

(1923) 09 MAD CK 0021
In the Madras High Court

V.A. Subba Rao

APPELLANT

Vs

Ponnammai Nadathi alias Pakkiammal Nadathi (dead) and
Others

RESPONDENT

Date of Decision : 13-09-1923

Acts Referred:

Transfer of Property Act, 1882 — Section 83

Citation : (1924) 46 MLJ 74

Judgement

1. This second appeal arises out of a suit by appellant to redeem a mortgage executed by him in favour of the husband of the 1st defendant who died leaving the 1st defendant, his widow, and defendants 2 and 3, his minor daughters. The 1st defendant in 1909 and after her husband's death sub-mortgaged the property and the 4th defendant claims to be entitled to the amount due on the sub-mortgage. The contention of defendants 1 to 3 is that the sub-mortgage originally created by the 1st defendant was a nominal transaction. The District Munsif found that the sub-mortgage was a genuine transaction supported by consideration but the Subordinate Judge on appeal reversed the decree on this point. In 1917, the appellant filed O. P. No. 33 of 1917 and deposited in Court the amount due on the mortgage. It is not disputed that the amount deposited was the amount legally payable on the mortgage. He seems to have stated that there was a sub-mortgage and that the 4th defendant claimed under it. Notice was issued to defendants 1 to 3 and to the 4th defendant. Owing to the contention raised by 1st defendant that the sub-mortgage was nominal and that the 4th defendant was not entitled to any portion of the money deposited in Court, the money was not paid to anybody but remained in Court. It was after decree in the suit (O.S. No. 515 of 1917) ordered to be paid out by the

District Munsif to the 4th defendant who drew this sum.

2. The first question is whether the deposit made under the provisions of Section 83 of the Transfer of Property Act in O. P. No. 33 of 1917 was

a proper one. Section 83 of the Act enacts that a mortgagor may, at any time before a suit for redemption is barred, deposit in a Court having

jurisdiction to the account of the mortgagee the amount remaining due on the mortgage. There can be little doubt that the word "mortgagee"

includes the legal representatives and assigns of the mortgagee. It is argued that a sub-mortgagee is not an assign and that a deposit of the money

as payable both to the legal representative and the sub-mortgagee is not a proper deposit.

3. We are unable to uphold this contention. Fisher in his Law on Mortgage observes "" Mortgages are frequently transferred by way of sub-

mortgage. In that case the sub-mortgage is a compound mortgage consisting of a mortgage of a chose in action, (viz., the original mortgage debt)

and of the property which is security for the original mortgage debt. "" In cases of suits where there is a sub-mortgage, the decree has to direct an

account of what is due on the original mortgage and of what is due on the sub-mortgage and payment of what is due on the sub-mortgage not

exceeding the sum due on the original mortgage and the residue, if any, to the original mortgagee. Form No. 9, Appendix D to the CPC refers to

suits by a sub-mortgagee against the original mortgagor and mortgagee and shows that an account has to be taken on the above footing. Ghose in

his work on the Law of. Mortgages in India observes, "" Debts secured by mortgage are also frequently assigned by way of security. Such

transactions are known as sub-mortgages and may be evidenced merely by a deposit of title deeds. The sub-mortgagee by virtue of the assignment

is not only entitled to the usual remedies against his own mortgagor but also against the original mortgagor. "" It is clear that a claim by a sub-

mortgagee against the original mortgagor cannot be met by a plea of want of privity as the sub-mortgage is only an assignment of the original

mortgagee's rights. Where the sub-mortgage is for an amount equal to or in excess of the original mortgage debt it will operate as a complete

assignment, and if for any lesser sum, as an assignment pro tanto.

4. We have not been referred to any case where a deposit in Court u/s 83 of the

Transfer of Property Act has been held to be bad owing to the assignee of the mortgage being stated as the person entitled to the money. Where a person having notice of an assignment pays the money into Court and names only the original mortgagee who has parted with his rights as the person entitled to receive the sum deposited we do not see how he can if the money is taken away resist a suit by the assignee of the mortgage before such deposit. [See Narayana Mudali Vs. Raghavammal and Another, . A sub-mortgagee will be a necessary party to a suit for redemption and we think that a deposit will not be bad merely because the petition states the persons entitled on the original and sub-mortgages and the Court issues notice to them. The case will of course be different if the mortgagor alleges claims of persons not the legal representatives or assigns of the mortgagee for the purpose of seeing that the money is not drawn out or of supporting the case of persons with no title.

5. We do not think that Madhavi Ammal v. Kunhi Pathumma ILR (1899) M 510 and Debendra Mohan Roy v. Sona Kunwar ILR(1904) A 291

referred to by the respondent apply to the case of sub-mortgages. They were cases where strangers having no right in the mortgage were mentioned as persons entitled to the money deposited.

6. The fact that the mortgagee and sub-mortgagee have disputes inter se either as to the validity of the sub-mortgage or the amount due thereunder

will not affect the mortgagor. Where the fact of a sub-mortgage is not disputed it is no part of the business of the mortgagor to decide whether the

sub-mortgage is real or nominal. In the case of legal representatives it has been held in Nagathal and Others Vs. V. Arumugham Pillai and Others,

that any dispute that may arise between the heirs as to their shares will not affect the mortgagor making the deposit and we can see no reason why

a similar rule should not apply where disputes arise as to the right to the money between the mortgagee and the sub-mortgagee from him. A person

executing a sub-mortgage and giving an apparent title should not cast on the mortgagor, a stranger, the duty of deciding who is entitled. To hold

otherwise would in effect deprive the mortgagor of the rights given to him by Section 83 where a mortgagee disputes the effect of his own act in

executing a document which on the face of it creates rights in another to the mortgage money.

7. We are of opinion, that a sub-mortgage is an assignment of the mortgage and that having regard to the remedies of the sub-mortgagee a deposit

in Court does not contravene the provisions of Section 83 of the Transfer of Property Act merely by reason of the fact that the mortgagor recites

the sub-mortgage in his petition and the Court directs notice to issue and the money is owing to disputes between the mortgagee and his sub-mortgagee, not paid out.

8. The next question is as to the liability of the defendants for mesne profits. The 2nd and 3rd defendants are minor daughters and they cannot be

liable for mesne profits owing to any wrongful act of their mother. So far as the 1st and 4th defendants are concerned it is immaterial to the plaintiff

whether the 1st defendant continued in possession or parted with it to somebody else. 1st defendant died pending second appeal and her legal

representatives are brought on record. if she created a sub-mortgage it was her duty to get back possession and hand it over to the mortgagor.

The 1st defendant is found by the Subordinate Judge to be in possession. So far as the rate of mesne profits is concerned there is no dispute. We

think that defendants 2 and 3 as legal representatives of the 1st defendant and out of her assets and 4 are jointly liable to pay the amount decreed

for mesne profits.

9. As regards the amount deposited in Court in O. P. No. 33 of 1917 which has been drawn by 4th defendant we think that on the finding of the

Subordinate Judge the 4th defendant is liable to pay the sum to the 1st defendant. As we hold that the deposit was valid there is no reason why the

plaintiff should pay the sum over again. There will be a decree in favour of the 1st defendant against the 4th defendant for recovery of , the amount

drawn by him.

10. The decree of the Subordinate Judge will be modified as decided above. As the appellant has succeeded in all the grounds urged, respondents

1 and 4 will pay his costs of the appeal and in the Courts below.