The second defendant herself could have, therefore, maintained the suit and the plaintiff is not the less entitled to do so. In this view it is unnecessary to enter into the question raised by Mr. Desika Chariar that the endorsement on the note was, with reference to section 56 of the Negotiable Instruments Act, such as not to confer on the plaintiff a good title to the note under the law merchant.

The decree of the Subordinate Judge is reversed and the plaintiff's claim allowed with interest on the principal Rs. 5,000 at six per cent. per annum till payment. The plaintiff did not in the lower Court rely on the contention with reference to Exhibit IX on which he succeeds here. We direct that in the lower Court each party will bear his costs. The first defendant will pay the plaintiff's costs of this appeal.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

KRISHNA AYYAR AND OTHERS (DEFENDANTS NOS. 2 TO 5), APPELLANTS,

v.

MUTHUKUMARASAWMIYA PILLAI AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1, 6, 7, 8 AND 9), RESPONDENTS.*

1905. November 1, 2, 21.

Transfer of Property Act IV of 1882, *s.* 85—*Does not authorise Court to introduce unnecessary complications—Mortgagee not compellable to distribute liability among mortgaged properties—Contribution, right of against properties not included in suit—Marshalling not compellable so as to prejudice mortgagee—Power of Court executing mortgage decree.*

There is nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption the mortgagee is bound to distribute his debt rateably upon the mortgaged properties.

Timmappa v. *Lakshmamma*, (I.L.R., 5 Mad., 385), referred to.

He may, however, be compelled to do so when by his act he has prejudicially affected the rights of the holders of the properties to contribution among

* Appeal No. 24 of 1903, presented against the decree of M.R.Ry. S. Duraiswamy Ayyangar, Subordinate Judge of Tinnevelly, in Original Suit No. 10 of 1902.

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themselves. Where some only have been compelled to pay the whole debt, they are entitled to contribution from the other parties who are liable, though the properties in their hands have not been included in the suit.

Jagat Narain v. *Qutab Husain*, (I.L.R., 2 All., 807), followed.

Chagandas v. *Gansing*, (I.L.R., 20 Bom., 615), followed.

Semble: Where, however, the mortgagor sells not merely the equity of redemption but conveys a portion of the property itself free from any liability to contribute to the mortgage debt, the purchaser may insist upon the mortgagee proceeding, in the first instance, against the property in the hands of the mortgagor. Marshalling cannot be enforced so as to compel a mortgagee to proceed against a security which may be insufficient or may involve him in litigation to realise.

Flint v *Howard*, [(1893), 2 Ch.D., 54], distinguished.

Ram Dhun Dhur v. *Mohesh Chunder Chowdhry*, (I.L.R., 9 Calc., 406), distinguished.

Obiter: It is competent to the Court in executing a mortgage decree to exercise its control in bringing the different items of property comprised in the decree to sale in a particular order to adjust the equities of the parties before it who are interested.

SUIT for the recovery of Rs. 9,000, being the amount of principal and interest due on a registered hypothecation bond, dated the 21st June 1896, for Rs. 5,000 executed by the first defendant in favour of the plaintiff's father Ramalingam Pillai deceased. Under the bond four schedules of property were hypothecated, but the plaintiff did not ask for a decree against item C in the fourth schedule, because the plaintiff's father had granted a release in respect of this item of property in favour of a subsequent mortgagee from the first defendant, or against the one-third share of the first defendant's brother's sons, because in other suits brought by the first defendant's mortgagees the shares of the brother's sons were exonerated, and in the razinamah entered into between the first defendant and his brother's sons in the partition suit (Original Suit No. 54 of 1896), it was provided that the first defendant should pay the debts contracted by him. The defendants Nos. 2 to 7 were impleaded as they were subsequent purchasers of portions of the hypothecated property and the defendants Nos. 8 and 9, as they were prior mortgagees of some portions of the property.

The defendants Nos. 1 and 6 were *ex parte*, and the seventh defendant disclaimed any interest in item B in the fourth schedule, the defendants Nos. 8 and 9 asserted their prior mortgage claim; which was not denied by the plaintiff. The defendants Nos. 2 to 5 were the really contesting defendants and they pleaded that the

plaintiff had fraudulently omitted to claim relief against the one-third share of the first defendant's brother's sons and item C in schedule IV, that the suit was bad for non-joinder of the first defendant's brother's sons as defendants, that a deduction must be made in the plaint amount proportionate to the value of the properties not included in the suit and that the plaint bond was a fraudulent transaction for which no consideration passed.

The issues were—

(*a*) Whether the plaintiff had fraudulently omitted to join the first defendant's brother's sons in the suit.

(*b*) Whether the suit was bad for non-joinder of these persons as defendants.

The Subordinate Judge decided this issue in favour of the plaintiff and passed the usual mortgage decree. Defendants Nos. 2 to 5 preferred this appeal.

V. Krishnaswami Ayyar and *R. Sivarama Ayyar* for appellants.

Sir V. Bhashyam Ayyangar and *M. R. Ramakrishna Ayyar* for first respondent.

K. Srinivasa Ayyangar for second and fifth respondents.

V. Krishnaswami Ayyangar for sixth respondent.

JUDGMENT.—Ramalingam Pillai, the deceased father of the plaintiff, a minor, obtained from the first defendant on the 21st June 1896, a bond for Rs. 5,000 on the hypothecation of certain lands, to which the first defendant and the two sons of his deceased brother, members of a joint family, were entitled, the debt being recited to be one binding on all the members subsequent to the mortgage, the first defendant became by purchase from one of his nephews entitled to a two-thirds share in the joint property instead of to one-half as originally. Of the other defendants, the second to the seventh inclusive, are impleaded as persons entitled to the equity of redemption in some or other of the properties hypothecated to the plaintiff they having acquired such interests in Court sales held in execution of decrees against the first defendant, and the eighth and the ninth defendants are holders of prior mortgages on the properties comprised in the plaintiff's mortgage. In the present suit the plaintiff prayed for a decree against the first defendant and only against his two-thirds share of the mortgaged property, excluding the third share belonging to first nephew who had not parted with his interest, it being stated in the plaint

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that the plaintiff apprehended there were difficulties in establishing that the debt was binding on that nephew's share.

The Subordinate Judge overruled the objection raised by the appellants (defendants Nos. 2 to 5) to the frame of the suit in so far as the nephew's third share was excluded, and granted a decree to the plaintiff as prayed for.

It was said on behalf of the appellants that Ramalingam Pillai being the maternal uncle of the nephew, the object of the exclusion of his share from the suit was to throw the entire debt upon the share purchased by the appellants and save that of the nephew from liability to the debt to which it was justly subject. The evidence which the nephew may produce against the contention that his one-third share is bound by the debt not having been taken, no final conclusion on this point can be arrived at, and though the evidence on which the appellants rely tends to support their contention that the nephew's share also is bound yet the matter cannot be said to be free from doubt. Consequently, it is not to be taken that the next friend of the plaintiff in refraining from impleading the nephew and from litigating the matter with him was acting otherwise than in the interests of the plaintiff.

The question is whether in the circumstances of the case it is open to the plaintiff to proceed against the two-thirds share which had vested in the mortgagor and which has since passed to defendants Nos. 2 to 7 to the exclusion of the one-third share of the nephew.

The answer to the question must, we think, be in the affirmative. The only sections of the Transfer of Property Act that can be thought of as having any sort of bearing on the present question are as pointed out by Sir V. Bhashyam Ayyangar, but four or five.

Now section 56, as its very position, as part of chapter III, shows, lays down a rule governing the rights and obligations as between the buyer and the seller with reference to the instance provided for in the section. Section 81 deals with marshalling of securities where the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage. Section 82 provides that, where several properties, whether of one or of several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute

rateably to the debt secured by the mortgage, according to the net value of the properties at the time, this provision being inapplicable to a property liable under section 81 to the claim of a second mortgagee. Section 95 gives to one of several mortgagors who redeems the mortgaged property a charge on the share of each of the other co-mortgagors for his proportion of the expenses, properly incurred in redeeming and obtaining possession. Section 60 of the Act confines the right of a person interested in but a share of the mortgaged property to redeem his share only to cases where the mortgagee has acquired in whole, or in part, the share of a mortgagor. It is scarcely necessary to say that there is nothing in any of these sections suggesting the view that as between a mortgagee in the position of the plaintiff and holders of the equity of redemption such as the appellants are, the law compels the former to distribute his debt, upon the mortgaged property rateably so as to entitle the latter to insist upon their interest not being proceeded with until after the nephew's one-third share has been proceeded against.

Passing to the decided cases cited by Sir V. Bhashyam Ayyangar they more than support the conclusion in favour of the plaintiff. In *Timmappa* v. *Lakshmamma*(1) the mortgagee had obtained a decree for the sale of the mortgaged properties on account of the mortgage debt. After the decree was passed the equity of redemption in one of the properties was purchased at a Court sale in execution of a money decree against the mortgagor. Subsequent to this Court sale, the property, thus sold, was sold in execution of the mortgage decree and purchased by the mortgagee himself. It was held that the purchaser under the money decree was not entitled to insist on the mortgagee recovering what was due to him from the other mortgaged properties and that the purchaser at the money decree sale was bound, if he wished to redeem, to pay the whole mortgage debt. In the other case, the Court laid down that a mortgagee's right to realise his debt by sale of any portion of the land mortgaged to him cannot be curtailed by the fact that the portion of the land he elects to sell has been sold by the mortgagor subsequent to the date of the mortgage. *Lala Dilawar Sahai* v. *Dewan Bolakiram*(2) is to the same effect; and it was there held that where the owner of certain property mortgages it to A and afterwards sells a portion of the mortgaged property to B, it

(1) I.L.R., 5 Mad., 385. (2) I.L.R., 11 Calc., 258.

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is not incumbent on A in suing to enforce his mortgage to proceed first against that portion of the mortgaged property which has not been sold by the mortgagor. *Roghu Nath Pershad* v. *Harlal Sadhu*(1) proceeds on the same principle, and the contention of the purchasers of the equity of redemption from the mortgagors that the debt should be apportioned upon the portions held by each of them, was disallowed, it being pointed out that the mortgagee was entitled to realise the whole debt upon the whole property, the right to contribution being only as between the defendants. *Bhikhari Das* v. *Dulip Singh*(2) is a similar decision. Dr. Rash Behari Ghose apparently considers that *Lala Dilawar Sahai* v. *Dewan Bolakiram*(3) and *Rama Raju* v. *Subbarayudu*(4) and the cases following them go too far. We should be disposed not to rely on the authority of the said decisions when the mortgagee refrains from proceeding against the portion of the mortgaged property which the mortgagor has not parted with, and when he seeks to realise the entire debt from those portions only of the mortgaged property which have been conveyed by the mortgagor, subsequent to the mortgage to a purchaser without any contract affecting the purchaser's right to have the charge satisfied out of the portion retained by the mortgagor, in other words where the mortgagor conveys not merely the equity of redemption but the property itself free from any liability to contribute to the mortgage debt. That, in such a case, the purchaser may insist upon the mortgagee proceeding in the first instance against the mortgaged property which is in the mortgagor's hands would seem to be consonant alike with sound principle and the weight of authority (Ghose on 'Mortgage,' 3rd edition, p. 436). The present, of course, is altogether a different case: not only are the appellants not purchasers of the property free from the mortgage, but the one-third not proceeded against does not belong to and is not in the hands of the mortgagor, but is the property of a third party who is sought to be affected by a transaction entered into, so far as he is concerned, by another, purporting to act under the power incident to the position of the mortgagor of a joint family under the Hindu Law. The doctrine of marshalling on the principle of which the appellant's contention

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(1) I.L.R., 18 Calc., 320.
(2) I.L.R., 17 All., 434.
(3) I.L.R., 11 Calc., 258.
(4) I.L.R., 5 Mad., 387.

virtually rests is not applicable to such a case. Even in the cases to which that doctrine in all its strictness is applicable Dr. Ghose points out "but there can be no doubt that, as a rule, marshalling cannot be enforced against the prior mortgagee where there is any doubt of the sufficiency of the fund upon which the junior creditor has no claim; or where the prior creditor is not willing to run the risk of obtaining satisfaction out of that fund, or where that fund is of a dubious character or is one which may involve him in litigation to realise, Jones section 1628" (Ghose on 'Mortgage' at p. 874).

Even if the facts of the present case were such as otherwise to admit of the application of the doctrine of marshalling, the existence of the dispute as to the liability of the nephew's share would take the case out of it. *Flint* v. *Howard*(1) on which Mr. Krishnaswami Aiyar laid stress has no real bearing upon the present question. The decision was with reference to the special terms of the contract between the parties. In *Ram Dhun Dhur* v. *Mohesh Chunder Chowdhry*(2), no doubt, the mortgagee was compelled to resort in the first instance to properties not parted with by the mortgagor. There, however, the question was in execution of a decree and it was quite competent to the Court to exercise the control, which it did so as to bring the different items of property comprised in the decree to sale in a particular order with a view properly to adjust the equities possessed by the parties who were before it and who were all the parties interested in the different items constituting the security. It was urged by Mr. Krishnaswami Aiyar that the frame of the present suit was in contravention of the rule in section 85 of the Transfer of Property Act and that, with reference to that section, the Subordinate Judge should have ordered the plaintiff's nephew entitled to the third share not comprised in the suit to be made a party, and allowed the appellants to raise the issue as to whether the mortgage was not binding upon that one-third share also, and, in the event of the finding being in their favour, given directions in the decree which would have the effect of distributing the mortgage debt proportionately. The literal construction of section 85 pressed by Mr. Krishnaswami Aiyar cannot but lead to startling results. Suppose, for instance, some part of the property comprised in a mortgage is

(1) (1893) 2 Ch. D, 54. (2) I.L.R., 9 Calc., 406.

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made the subject of litigation between, on the one hand, a party denying the mortgagor's title thereto and on the other the mortgagor and the mortgagee and the mortgagor's title is finally negatived, it would be necessary to make such third person a party to the suit brought by the mortgagee against the mortgagor, if the words of section 85 are to be taken literally, inasmuch as the previous adjudication would *not render the property* adjudicated upon any the less "property comprised in the mortgage." Section 85, as has been pointed out more than once but reproduces a rule as to parties which had of course been even previous to the Transfer of Property Act held applicable to mortgage suits, viz., that all persons interested in the actual subject of the suit should be before the Court in order that as far as possible as between them complete justice might be done. That rule was never understood as authorizing the Court to complicate a suit by a mortgagee by introducing into it controversy in which the mortgagee upon the frame of his plaint in itself unobjectionable, is really uninterested. Now the consequence of allowing Mr. Krishnaswami Aiyar's contention under consideration would, at least, be to oblige the plaintiff to await the result of this controversy in all its stages between the appellants on the one hand and the nephew interested in the one-third on the other for the realisation of his debt from so much of the property as is unquestionably liable for it and against which alone he wishes to proceed and as shown above is entitled to proceed. In these circumstances to make the recovery of the plaintiff's debt to any extent dependent upon the settlement of the dispute between the appellants and the nephew would be to give the mortgagee's suit a turn to which he has a right to object.

It remains only to observe that, if the action of the mortgagee had had the effect of extinguishing the mortgage lien upon any portion of the mortgaged property so as to relieve it from the liability to bear its proportion of the debt, he cannot recover more than what the property he proceeds against would be rateably liable for. Such is not the case, for the omission of the plaintiff to include the nephew's share did not affect the liability thereof to bear its proportion of the debt. In the event of the appellants being obliged to pay the whole debt and being able to show that the nephew's share was also liable, they would be entitled to contribution from him notwithstanding the non-inclusion of his

third share in the present suit [*Jagat Narain* v. *Qutub Husain*(1) and *Chagandas* v. *Gansing*(2)]. And, so long as the equities in the matter of contribution as between these parties are thus unaffected by the act of the plaintiff, the latter's right to be paid the whole of his debt from whatever portion of the mortgaged properties he wishes to comprise in his suit cannot be questioned.

The decision of the Subordinate Judge is therefore right and the appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

KOYYANA CHITTEMMA AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

DOOSY GAVARAMMA AND OTHERS (PLAINTIFFS NOS. 1 AND 2, FOURTH DEFENDANT, LEGAL REPRESENTATIVES OF THE DECEASED, FIRST RESPONDENT), RESPONDENTS.*

1905. October 26, 30. December 5.

Civil Procedure Code Act XIV of 1882, *ss.* 13, 283—*Order 'in investigation' under Section* 283, *what is—Payment of decree amount more than one year after order, effect of—Decision on question of mixed law and fact* res judicata—*Voluntary payments not recoverable.*

A claim to attached property by A was dismissed by the following order:—"The sale seems collusive. Claim rejected." The order was apparently made on a consideration of the sale deed alone and there was nothing to show that any evidence was gone into. More than a year after the order B, claiming the properties under a sale by A subsequent to the order, paid the decree amount and the attachment was raised. In a suit by A to redeem the lands on the strength of his title under the sale dealt with by the order:

Held, that as the order on the claim by A, purported to be made on the merits, it was valid as one made after an 'investigation' of the claim within the meaning of the word as used in the Code.

Held further, that the order was conclusive between A and the defendants and that the payment of the decree debt by B, having been made more than a

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(1) I.L.R., 2 All., 807. (2) I.L.R., 20 Bom., 615.

* Second Appeal No. 1008 of 1903, presented against the decree of E. B. Elwin, Esq., District Judge of Ganjam, in Appeal Suit No. 199 of 1902, presented against the decree of M R.Ry. P. Lakshmenarusu, District Munsif of Chicacole, in Original Suit No. 45 of 1901.