

## APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Wallis and  
Mr. Justice Sankaran-Nair.

KOMMINERI APPAYYA (THIRD DEFENDANT), APPELLANT,

v.

MANGALA RANGAYYA AND OTHERS (PLAINTIFFS, AND SECOND  
AND FOURTH DEFENDANTS), RESPONDENTS.\*

1907.  
September .  
10.

1908.  
February 3  
17.

April 16.

*Transfer of Property Act, Act IV of 1882, ss. 56, 67, 81, 88—Marshalling—  
Purchaser of portion of mortgaged property has no right to marshal.*

A *bona fide* purchaser, who purchases for value a portion of a mortgaged property without notice of such mortgage, has no right, in a suit by the mortgagee to enforce his mortgage, to insist that the portion not sold to him must be proceeded against first and the portion purchased by him must be sold only for the balance, if any, due.

Under sections 67 and 68 of the Transfer of Property Act, the mortgagee is entitled to an order that the mortgaged property or a sufficient part thereof should be sold on default of payment.

The purchaser cannot claim such a right under section 81 or 56 of the Transfer of Property Act, as the former applies only to second mortgagees, and the latter confers such right only "as against the seller."

*Krishna Ayyar v. Muthukumarasawmiya Pillai*, (I.L.R., 29 Mad., 217), referred to and explained.

It is competent to the Court under section 88 of the Transfer of Property Act to order a *sufficient portion* of the mortgaged property to be sold; and if the portion not sold by the mortgagor is sufficient, and if the mortgagee will not be prejudiced, the Court may by its decree direct such unsold portion to be sold first; and if the decree directs the sale of the whole property, the Court, in execution, may first bring to sale the portion unsold and if the sale-proceeds be sufficient stop the sale of the portion sold by the mortgagor.

THE facts necessary for this report are sufficiently set out by (Benson and Miller, J.J.), in the order of reference to the Full Bench which was as follows:—

ORDER OF REFERENCE TO A FULL BENCH.—The facts found are as follows: The first and second defendants being the owners of two parcels of land mortgaged them to the plaintiff.

\* Second Appeal No. 1603 of 1904, presented against the decree of M. D. Bell, Esq., District Judge of Kistna at Masulipatam, in Appeal Suit No. 290 of 1904, presented against the decree of M. R. Ry. N. Lakshmana Rao, District Munsif of Tenali, in Original Suit No. 263 of 1902.

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They subsequently sold and delivered possession of parcel No. 1 of the land to the third defendant, who is a *bona fide* purchaser for value, without notice of the prior mortgage. The plaintiff now sues to recover the mortgage money by sale of the mortgaged property. The third defendant contends that he is entitled to require that the plaintiff shall proceed against parcel No. 2 of the mortgaged land in the first instance, and that recourse should be had to parcel No. 1 only if parcel No. 2 is found to be insufficient to satisfy the debt due to the plaintiff. The District Munsif found that the third defendant was entitled to have the assets marshalled in the manner claimed by him, and gave a decree in accordance with that finding, but the District Judge modified this by directing that parcel "No. 1 alone be sold if the decree amount is not paid within" the time limited.

The question is whether, upon the above findings, the third defendant is entitled to have the property marshalled, and to require that parcel No. 2 shall be first sold before recourse is had to parcel No. 1.

The principle involved has been fully discussed in a number of decided cases. The case of *Rama Raju v. Subbarayudu*(1) is opposed to the third defendant's claim, and the same view is supported by the decisions in *Lala Diluwar Sahai v. Dewan Bolakiram*(2), *Bhikhari Das v. Dalip Singh*(3), and *Manjiram v. Mehdi Hossein Khan*(4).

On the other hand, in the recent case of *Krishna Ayyar v. Muthukumarasawmīya Pillai*(5), this Court held that, in a case like the present, the Court would not be disposed to rely on the authority of the above decisions, and added "that, in such a case, the purchaser (of a part of the property) 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,' third edition, page 436)."

We think that this view is correct, and we are supported by the authority of the cases (*Rodh Mal v. Ram Harakh*(6) and *Lakhmidas v. Jammadas*(7)).

(1) I.L.R., 5 Mad., 387.

(3) I.L.R., 17 All., 435.

(5) I.L.R., 29 Mad., 217.

(7) I.L.R., 22 Bom., 304.

(2) I.L.R., 11 Calc., 258.

(4) I.L.R., 31 Calc., 96 at p. 101.

(6) I.L.R., 7 All., 711.

In this conflict of authority, and having regard to the general importance of the principle involved, we resolve to refer for the decision of the Full Bench the question stated by us above.

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The case came on for hearing in due course before the Full Bench constituted as above.

*P. Nagabhushanam* for appellant.

*C. P. Ramaswami Ayyar* for first respondent.

The Court expressed the following

OPINION.—The plaintiff, a mortgagee, sues to recover his money by sale of the properties mortgaged, which consist of two parcels of land, of which item No. 1 is in the possession of the third defendant, a *bonâ fide* purchaser for value without notice of the plaintiff's prior mortgage. The third defendant, appellant, contends that the plaintiff is bound to proceed first against the property, item No. 2, not sold to him and his property No. 1 should be sold only for the balance, if any.

Under section 67 of the Transfer of Property Act the plaintiff is entitled to an order that the properties, mortgaged, be sold, and section 88 of the same Act provides that the Court shall pass a decree that in default of the defendant paying the mortgage amount, the mortgaged property or a sufficient part be sold and the proceeds applied in discharge of the plaintiff's claim.

A second mortgagee of one of the properties mortgaged without notice of the first mortgage is entitled under section 81 of the Transfer of Property Act to have the first mortgage debt paid, so far as it is possible out of the other properties. but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property. It thus appears that the first mortgage is the dominant right to be enforced. The third defendant is not a second mortgagee. It is not therefore a case for marshalling securities and does not fall within this section.

The right of a purchaser is defined by section 56 of the Transfer of Property Act, which gives him a right to have the first mortgage satisfied out of the other property. But this right is given only "as against the seller" and it makes no difference whether or not he had any notice of the mortgage.

If the third defendant is right in his contention, then the words "as against the seller" in the above section, have no effect.

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On reading the two sections 56 and 81 of the 'Transfer of Property Act we are of opinion that a purchaser in the position of the third defendant has not the right claimed on his behalf.

Of the authorities cited, there are only two cases bearing on the question which are governed by the Transfer of Property Act. Of these the decision in *Bhikhari Das v. Dalip Singh*(1) supports the view indicated by us. In *Krishna Ayyar v. Muthukumarasawmiya Pillai*(2) it, no doubt, is broadly stated, quoting from Dr. Ghose on 'Mortgage' "that, in such a case, the purchaser (of a part of the property) 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." We are not prepared to accept this statement without some qualification. According to English authorities the right cannot be exercised so as to prejudice the first mortgagee in any way whatever and we are not aware of any Indian case in which it has been held that it can be so exercised.

According to Story's 'Equity Jurisprudence,' vol. I, section 633, the right is given to the second mortgagee only, "whenever it will not trench upon the rights, or operate to the prejudice, of the party entitled to the double fund" . . . . "If A has a mortgage upon two different estates for the same debt, and B has a mortgage upon one only of the estates for another debt, B has the right to throw A, in the first instance, for satisfaction upon the security, which he, B, cannot touch; at least, where it will not prejudice A's rights, or improperly control his remedies." . . . . "No injustice is done to him in point of security or payment."

In White and Tudor's 'Leading Cases,' vol. I, notes to *Aldrige v. Cooper*(3), it is stated "But the right of a second mortgagee of one of the estates mortgaged to marshall—that is, to throw the prior charge which exists on both estates, upon that which is not mortgaged to him—is an equity which is *not enforced* against third parties, that is *against any one except the mortgagor* and his legal representatives claiming as volunteers under him."

It is to be observed that the learned Judges in *Krishna Ayyar v. Muthukumarasawmiya Pillai*(2) quote with approval, Jones on

(1) I.L.R., 17 All., 435.

(2) I.L.R., 29 Mad., 217.

(3) W. & T. Leading cases, Vol. I (notes).

'Mortgages,' 6th edition, section 1628, that as a rule "Marshalling cannot be enforced against a 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 realize." The third defendant can scarcely be said to possess the right claimed when it cannot be exercised against the will of the plaintiff; and considering the difficulties of a judgment-creditor to realise his debt the delay must ordinarily prejudice him. The conclusion of the learned Judges in *Krishna Ayyar v. Mathukumarasawmiya Pillai*(1) is that as long as the right of contribution as between the mortgagor and the purchaser is unaffected by any act of the mortgagee "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." With this we entirely agree.

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Read as a whole, the judgment in *Krishna Ayyar v. Mathukumarasawmiya Pillai*(1) is not an authority in favour of the third defendant.

We are therefore of opinion that the third defendant is not entitled to have the property marshalled and to insist that parcel No. 2 should be first sold before recourse is had to parcel No. 1.

We may however point out that, under section 88 of the Transfer of Property Act, the Court may order that a *portion* sufficient to discharge the plaintiff's debt be sold, and if parcel No. 2 is sufficient and if the plaintiff cannot possibly be prejudiced by such sale, it may be open to the Court to direct in the decree itself its sale before the other property.

Further in execution of a decree for the sale of both parcels, parcel No. 1 may be sold first and if the sale-proceeds are sufficient to discharge the plaintiff's debt, the sale of No. 2 may be stopped.

Whether the third defendant's claim under section 56 of the Transfer of Property Act may not be enforced in this suit by passing a decree which will enable the third defendant to sell item No. 2 and have the sale-proceeds appropriated by the Court in discharge of the plaintiff's claim before the expiry of the period for the payment of the plaintiff's debt, after which alone the

(1) I.L.R., 29 Mad, 217.

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Our answer to the question referred is in the negative.

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The case came on for final hearing before (Benson and Miller, JJ.) when the Court delivered the following

JUDGMENT.—As a result of the decision of the Full Bench, the appellant's claim to have item 2 sold, must be disallowed. He however contends that as the plaintiff has himself purchased item 2 of the mortgaged property, he cannot be allowed thereby to throw the whole burden of satisfying the mortgage on item 1 which is in the hands of the third defendant, thus depriving the third defendant of his right to contribution rateably in proportion to the value of the two items. We think that this contention is sound (*Krishna Ayyar v. Muthukumarasawmiya Pillai*(1)).

The plaintiff can only recover so much of the mortgage debt as bears the same proportion to the whole mortgage, as the value of item 1 bears to the value of the whole property. The value of item 1 is Rs. 24-10-0 and of item 2 is Rs. 145. So the plaintiff can recover from item 1  $1\frac{26}{170}$ ths of Rs. 161 plus interest on Rs. 7-8-0 at 12 per cent. per annum from the 19th September 1902 to the 23rd June 1904, and further interest at 6 per cent. until payment. Three months from this date will be allowed for redemption. Each party will pay and receive proportionate costs.

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(1) I.L.R., 29 Mad., 217.