

*Anni v. Lakshmi Anni*(1), *Bindosri Naik v. Ganga Saran Sahu*(2), which were cited in the argument before us.

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We may add that though the Civil Rules of Practice in force in the Courts subordinate to this Court are silent on the subject, yet the practice of the Courts is to register such bonds, and Rule 117 of the High Court Rules, Appellate Side (relating to appeals to the Privy Council) provides that "When the security offered consists of immoveable property, the appellant shall file a mortgage bond duly registered together with a specification of the surety's title."

Lastly, we would observe that registration appears to be necessary for the protection of third parties who otherwise might deal with property which had been given as security in ignorance of the incumbrances on it, thus frustrating one of the main objects of the Registration Act.

As the security bond in the case before us was not registered as required by law, it does not affect the mortgaged property, and the plaintiff's suit must be dismissed with costs throughout the decrees of the Courts below being set aside.

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## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Miller.*

PONNUSAMI MUDALIAR AND OTHERS (PLAINTIFFS), APPELLANTS,  
v.  
SRINIVASA NAICKAN AND OTHERS (DEFENDANTS Nos. 1 to 5, 9,  
12 AND 14 TO 16), RESPONDENTS.\*

1908.  
February 27,  
28.

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*Transfer of Property Act - Act IV of 1882, s. 85--Mortgagee releasing part of mortgaged property cannot enforce entire claim against the other portions--Section 85 of the Transfer of Property Act does not necessitate the dismissal of a suit where no relief claimed against persons not joined as parties.*

A mortgagee cannot release a part of the mortgaged land and then seek to enforce his entire claim upon another portion in which third parties have become interested as assignees of the equity of redemption.

(1) I. L. R., 22 Mad., 508.

(2) I. L. R., 20 All., 171.

\* Appeal No. 39 of 1905, presented against the decree of M. R. Ry. T. T. Ranga Chariar, Subordinate Judge of Kumbakonam, in Original Suit No. 72 of 1903 (*vide* Civil Miscellaneous petition No. 245 of 1903).

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A suit is not liable to be dismissed under section 85 of the transfer of Property Act for non-joinder of persons interested in portions of mortgaged property when no relief is claimed against them.

The plaintiffs ought, in such cases, to be allowed to recover what is due to them not exceeding the amount rateably due on the property they proceed against.

SUIT to recover money under a registered hypothecation bond. The plaintiffs' case is thus stated in the judgment of the lower Court :—

“The suit is to recover Rs. 8,250 due under a registered hypothecation bond for Rs. 4,000 executed by the first defendant to the late Muthukrishna Mudali on 6th July 1894. Plaintiffs, as Muthukrishna Mudali's joint coparceners, claim the debt exclusively, on his death, by right of survivorship. The second defendant, as a prior mortgagee of item No. 1, is impleaded, while the third to seventeenth defendants are made parties on the allegation that they claim individually, distinct portions of items Nos. 1 and 2 under rights derived from the first defendant subsequent to the date of the suit mortgage. The hypotheca consists of the plaint items and other properties. In their plaint; plaintiffs state that the latter items have since been sold by the first defendant for the discharge of certain prior encumbrances on the hypotheca and for other purposes; that they admit those sales and have given up the said items in the plaint; and that they will be content with a decree against the plaint mentioned properties alone.

Subsequent to the mortgage some items of the mortgaged property were sold and the mortgagee (predecessor in title of the plaintiffs) had executed release deeds in respect of such items. These items have not been included in the plaint and the parties who purchased these items were not made parties to the suit.

The second defendant contended that such items ought to have been included in the suit and that the non-inclusion of the purchasers as parties was fatal to the suit.”

On these points the Subordinate Judge decided as follows in paragraphs 18—20 of his judgment.

“Mr. Rashbehary Ghose in his Law of Mortgage in India (Tagore Law Lectures, 1875-1876, 3rd edn., p. 380) states, “The general rule deducible from the cases is that rights of persons who have acquired an interest in the mortgaged estate, since the mortgage cannot be defeated or impaired by any subsequent arrangement to which they are not parties. If, therefore, a

“mortgagee with notice that the equity of redemption in a part of  
 “the mortgaged property has been conveyed releases any part of  
 “the mortgaged estate, he must abate a proportionate part of the  
 “mortgage debt as against such purchaser.”

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“In other words a mortgagee cannot release a part of the  
 “mortgaged land, and then seek to enforce his-entire claim upon  
 “another portion in which third parties have become interested  
 “as assignees of the equity of redemption.”

Therefore, the principle applicable to such cases seems to be that, while the mortgagee does not voluntarily release any portion of the mortgage property from the liability to satisfy his debt, any subsequent assignee from the mortgagor of the equity of redemption on a portion of the said property or any purchaser in a Court sale of such equity of redemption, cannot compel the mortgagee to proceed against the other portion of the mortgaged property or restrict the mortgagee's right to realize the mortgage debt by sale of the portion of the property which is in his possession, and that where the mortgagee voluntarily releases a portion of the mortgaged property from the liability to satisfy the mortgage debt, he can recover from the other portion of such property subsequently mortgaged or sold to a third person only a rateable share of the mortgage debt.

But the further question arises whether a mortgagee who has relinquished his rights over certain lands mortgaged to him can obtain a decree for recovering from the other mortgaged lands that share of the mortgaged debt which can be rateably apportioned thereon without bringing into the record, under section 85 of the Transfer of Property Act the persons in whose favour he had released his rights as above described. This question can be answered in the affirmative if the rule of law laid down in *Subban v. Arunachalam* (I. L. R., 15 Mad., 487) and *Hari Kissen Bhagat v. Valixt Hussein* (I. L. R., 30 Cal., 755) can be followed. But I doubt whether in reality, any question of law was discussed, and decided in the latter case. In the former case, it does not appear whether any subsequent encumbrancer whose interest was affected by the mortgagee's relinquishment of a portion of the mortgaged property was a party. On the other hand, the various other decisions of the Madras High Court reported and unreported, and that of the Allahabad High Court appear to lay down that section 85 of the Transfer of Property Act is imperative and that

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non-joinder of a necessary party is fatal to the suit. It may be also stated that the non-joinder in the present suit of the persons in whose favour Muthukrishna Mudali, plaintiff's predecessor in title, had executed release deeds as evidenced by the four documents filed herein as exhibits IV series, and of Veeramuthu Padayachi in whose favour exhibit V was executed by the first defendant, that the non-inclusion in the plaint of the properties alienated to them prevents a proper and effectual decision of the mortgage amount which can be apportioned on the properties subsequently mortgaged to second defendant.

The Subordinate Judge dismissed the suit with reference to these findings.

The plaintiffs appealed to the High Court.

*S. Muthia Mudaliar* for appellants.

*T. Subrahmania Ayyar* for first and third respondents

*K. Ramachandra Ayyar* for second respondent.

JUDGMENT.—The law is, we think, correctly stated by the Subordinate Judge in paragraphs 18 and 19 of his judgment, *vide* (*Krishna Ayyar v. Muthukumarasamiya Pillai* (1), but we think that he was wrong in holding that he was bound to dismiss the suit with reference to section 85, 'Transfer of Property Act. In the state of facts existing in this case that course was not necessary, since no relief is claimed against the persons interested in the portions of the property not included in the suit (*Subban v. Arunachalam* (2), *Sheo Tahal Ojha v. Sheodan Rai* (3), *Hari Kissen Bhagat v. Valiat Hussein* (4). There is no reason why the plaintiffs should not in the suit, as brought, be allowed to recover what is due to them, not exceeding the amount rateably due on the property they proceed against.

We reserve the decree of the Subordinate Judge and remand the suit for disposal according to law. Cos'ts will abide the result. The plaintiffs and defendants Nos. 1 and 2 have put in a compromise of the suit as between them and the Subordinate Judge will give effect to it in disposing of the suit.

(1) I. L. R., 29 Mad., 217 at p. 224. (2) I. L. R., 15 Mad., 487.

(3) I. L. R., 23 All., 174.

(4) I. L. R., 30 Cal., 755.