

\*Civil Procedure Code. This case was followed in *Sarat Chandra Bisu and others v. Tarini Prosad Pal Chowdry*(1). We agree with these decisions. We must set aside the decree of the lower Appellate Court and remand the case to that Court for disposal on the merits.

Costs will abide the event.

SARALA  
SUBBA HAU  
v.  
KAMSALA  
TIMMAYYA.

## APPELLATE CIVIL.

*Before Mr. Justice Wallis and Mr. Justice Miller.*

RANGASAMI NAIKEN (PLAINTIFF), APPELLANT,

v.

ANNAMALAI MUDALI AND OTHERS (DEFENDANTS Nos. 2, 1  
AND 3), RESPONDENTS.\*

1907  
September  
20, 30.

*Transfer of Property Act—Act IV of 1882, s. 78—Gross negligence - Failure to get possession of title-deed does not necessarily amount to gross negligence where system of registration exists—Delay, effect of, in registration of documents.*

A mortgaged property to B on 21st December 1896 and subsequently mortgaged the same property to C on 20th January 1897. A wilfully delayed the registration of the mortgage-deed to B, which was finally registered on the 21st April 1897. The title deeds of the property were not given to B, but were given to C when the property was mortgaged to him. The mortgage was executed outside Madras and was in respect of property in the mofussil. In a suit by C to recover the amount due on his mortgage deed, C claimed priority over B on the ground that B was guilty of gross negligence in not obtaining possession of the title deeds:

*Held*, that the failure on B's part to obtain the title-deeds from A did not, under the circumstances, amount to gross negligence within the meaning of section 78 of the Transfer of Property Act and did not postpone his mortgage to that of C.

*Held further*, that the delay in the registration being due to the default of A which B could not have anticipated, did not make B's failure in obtaining the title-deeds amount to gross negligence.

\* What amounts to gross negligence must be determined according to the circumstances of each case; and one of the circumstances to be taken into consideration in this country is that a universal system of registration is established by law. As registration puts subsequent incumbrancers in a position, with the exercise of reasonable care, to find out prior encum-

(1) 11 C.W.N., 487.

\* Second Appeal No. 1494 of 1904, presented against the decree of M.R.Ry. T. Sadasiva Ayyar, Subordinate Judge of Coimbatore, in Appeal Suit No. 102 of 1903, presented against the decree of M.R. Ry. K. Krishnamachariar, District Munsif of Udamalpet, in Original Suit No. 803 of 1902.

RANGASAMI  
NAIKEN  
v  
ANNAMALAI  
MUDALI.

branches, failure on the part of the prior mortgagee to get possession of the title-deeds must not be imputed to him as gross negligence.

The system of registration having caused mortgagees to attach little importance to the possession of title-deeds, the existence of a practice by which the title-deeds are left with the mortgagor must also be taken into consideration. Another fact to be considered is that the possession of title-deeds in the Presidency towns where mortgages may be created by depositing them is of greater importance than in the mofussil.

*Damodara v. Somasundara*, (I. L. R., 12 Mad., 423), considered and distinguished.

*Shan Maun Mull v. Madras Building Company*, (I. L. R., 15 Mad., 268), considered and distinguished.

*Monindra Chandra Nandy v. Truyluckho Nath Burat*, (2 C. W. N., 750), followed.

*The Agra Bank v. Barry*, (L. R., 7 H. L., 135), referred to.

SUIT to recover money due on mortgage. The facts are sufficiently stated in the judgment.

*T. R. Venkatrama Sastri* for the Hon. Mr. P. S. Sivaswami Ayyar for appellant.

*T. R. Ramachandra Ayyar* and *T. R. Krishnasami Ayyar* for first and third respondents.

JUDGMENT.—This is a suit by the plaintiff on a mortgage executed in his favour by the first defendant. The mortgage-deed was executed and registered on the 20th January 1897 and at the same time the plaintiff obtained possession from the first defendant of the title-deed of the property mortgaged. The first defendant had previously mortgaged the same property by deed, dated the 21st December 1896, to the third defendant, who did not obtain possession of the title-deed and did not get the deed registered until the 21st April 1897 some time after the execution of the plaintiff's mortgage. Under the Registration Act, the third defendant's mortgage having been registered within time would ordinarily take priority according to the date of execution, that is to say, before the plaintiff's mortgage.

The third defendant was not at first a party to the present suit, but the Subordinate Judge ordered him to be made a party on appeal, and framed and sent down four additional issues of which the second was as to the consideration for the third defendant's mortgage, while the fourth was in the following terms:—"Is the third defendant Muthusamy Mudali not entitled to priority by reason of his not obtaining possession of the title-deed of plant lands from the first defendant?" The District Munsif found that no consideration was proved, but the

Subordinate Judge reversed this finding on appeal, and proceeded to deal with the fourth additional issue, which raises the question whether the third defendant's mortgage though prior in time to the plaintiff's should be postponed to it under section 78, Transfer of Property Act, by reason of his gross negligence, the negligence imputed in the issue being his failure to obtain possession of the title-deeds.

RANGASAMI  
NAIKEN  
v.  
ANNAMALAI  
MUDALI.

The Subordinate Judge has found on a consideration of the facts and the authorities that gross negligence was not proved, and we are asked in second appeal to interfere with this finding on the ground that the admitted facts amount in law to gross negligence.

That the mortgagor was in possession of the title-deed at the time of the execution of the mortgage may be gathered from the fact that he handed it over so soon after to the plaintiff. There is no evidence that any thing was said about title-deeds when the third defendant's mortgage was executed, but, if he had insisted, he could apparently have obtained possession of them, and the fact of his not doing so under the circumstances of the case constitutes the alleged gross negligence. In support of the proposition that the third defendant's conduct amounts to gross negligence under section 78, we have been referred to the judgments of Kernan, J., in *Damodara v. Somasundara*(1), of Handley, J., in *The Madras Hindu Union Bank v. Venkatrangiah*(2), of Shephard, J., in *Madras Building Company v. Rowlandson*(3), and of the appellate judgment of Collins, G.J., and Handley, J., in the same case which is reported under the name of *Shan Maun Mull v. Madras Building Company*(4) and also to *Somasundara Tambiran v. Sakkarai Pattan*(5) which was decided in 1869 before the passing of the Transfer of Property Act. These decisions do undoubtedly go far to show that conduct such as that of the third defendant may amount to gross negligence, but it is to be observed with regard to them, first, that they were decisions on the facts of those particular cases; secondly, that the three cases under section 78 all related to transactions in the Presidency town where title-deeds are of much greater importance than in the distant mofussil owing to the

(1) I. L. R., 12 Mad., 429.

(3) I. L. R., 13 Mad., 363.

(2) I. L. R., 12 Mad., 424.

(4) I. L. R., 15 Mad., 268.

(5) 4 M. H. C. R., 369.

RANGASAMI  
 NAIKEN  
 v.  
 ANNAMALAI  
 MUDALI.

facility of creating mortgages by depositing them ; thirdly, that it has not been considered in any of these cases how far the question of a registered mortgagee's negligence in not getting or retaining possession of title-deeds is affected even in a Presidency town by the fact of his registering the mortgage under the Registration law in force in this country ; and fourthly, that it is not clear that these decisions do not apply a stricter rule than is laid down by the Court of Appeal in *Northern Counties of England Fire Insurance Company v. Whipp*(1), a point of some difficulty which it will not be necessary to consider. As observed by Mr. now (Chief) Justice Jenkins in *Monindra Chandra Nandy v. Troyluckho Nath Burat*(2), "the existence of gross negligence within the meaning of section 78, Transfer of Property Act, must be determined according to the circumstances of each case, and one of the circumstances to be taken into consideration is that in this country a universal system of registration exists." Although, according to the view taken in this Court, registration does not amount to notice to subsequent incumbrancers, it does put them in a position, with the exercise of reasonable care, to find out whether there is any registered prior incumbrance or not, and this consideration goes far to show that failure on the part of the prior mortgagee to get possession of the title-deed is not, in the absence of reasonable explanation, necessarily to be imputed to him as gross negligence. The observations of Lord Cairns in *Agra Bank v. The Barry*(3) on this question are entitled to very great weight. "Has it ever" he asks "been decided, with regard to a Register Act such as that which prevails in Ireland, that negligence in not asking for the title-deeds or not taking up the title-deeds shall postpone a registered security? I am not going to say a word with regard to the effect of negligence of that kind in a country like England, where there is no general registration of deeds and no Act of Parliament like the Irish Act. But I am unable to discover any principle upon which mere negligence and mere failure to take all the securities that might be taken, could, in any country subject to a law like the Irish Register Act, postpone a registered deed." With reference to certain English case, such as *Hewitt v. Loosemore*(4), which lay down that it is the duty of the mort-

(1) L. R., 26 Ch. D., 482.

(3) L. R., 7 H. L., 135.

(2) 2 C. W. N., 750.

(4) 9 Hare, 449.

gagées to obtain possession of the title-deeds or explain why he did not do so, and that if he fails to do so the Court will impute fraud or gross negligence to him, Lord Selborne following Lord Cairns in the case already cited observes that "what is a sufficient explanation on the part of the mortgagee must always be a question to be decided with reference to the nature and circumstances of each particular case, and among these the existence of a public registry in a country in which a registry is established by statute must necessarily be very material." In the cases decided in this Court the learned Judges appear to have relied mainly on the authority of such cases as *Hewitt v. Loosemore*(1); the case of *Agra Bank v. The Barry*(2) does not appear to have been cited, and the question how the duty of a mortgagee is affected by the existence of a registration system is not considered. This question, as already observed, is quite distinct from the question considered in these cases as to whether registration amounts to notice to subsequent transferees. That the existence of this system has caused mortgagees in general to attach less importance to the possession of title-deeds is undoubted. In *Balmakundas Atmaram v. Moti Narayan*(3) Fulton, J., speaks to the absence of settled practice in the mofussil of the Bombay Presidency as to the custody of title-deeds. In *Monindra Chandra Nandy v. Troyluckho Nath Burat*(4), it was stated that the practice in the Bengal mofussil was to have the title-deeds with the mortgagor, and in the present case the Subordinate Judge appears to accept this statement as accurate with regard to the mofussil in this Presidency. Such a practice is, we think, one of the matters to be considered in a case of this kind. On the whole we are unable to interfere with the finding of the Subordinate Judge, on the ground that gross negligence must necessarily be imputed to the third defendant by reason of his failure to obtain possession of the title-deeds. With regard to the delay in getting his mortgage registered which undoubtedly had the effect of enabling the first defendant to effect the second defendant's mortgage, he pleads that this delay was due to the first defendant, and has sworn that he had to threaten to take proceedings for compulsory registration before the first defendant attended to register the mortgage.

RANGASAMI  
NAIKEN  
v.  
ANNAMALAI  
MUDALI.

(1) 9 Hare., 449.

(2) L. R., 7 H. L., 135.

(3) I. L. R., 18 Bom., 444.

(4) 2 C. W. N., 750.

RANGASAMI  
NAIKEN  
v.  
ANNAMALAI  
MUDALI.

When the third defendant failed to get possession of title-deed at the execution of the mortgage, he could not, we think, have anticipated that registration would be delayed in this manner and the fact of its having been so delayed does not, in our opinion, make his failure to obtain possession of the title-deeds amount in law to gross negligence. This failure to get possession of the title-deeds is the only ground of postponement that has been pleaded or considered in the lower Courts, and as it fails the second appeal must be dismissed with costs.

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### APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Sankaran Nair.*

1907  
October 25.

VENKATESWARA AIYAR (PLAINTIFF), APPELLANT IN BOTH,  
v.  
THE SECRETARY OF STATE FOR INDIA IN COUNCIL  
(DEFENDANT), RESPONDENT IN BOTH.\*

*Pensions Act, Act 23 of 1871, s. 4—Act does not apply to endowments for pious or religious purposes.*

Endowments for religious or pious purposes do not fall within the purview of section 4 of the Pensions Act and Civil Courts have jurisdiction to entertain suits in respect of such grants made by Government.

*Subrahmania v. Secretary of State for India, (I. L. R., 6 Mad., 361), referred to.*

*Athavulla v. Gouse, (I.L.R., 11 Mad., 283), referred to.*

*Miya Vali Ulla v. Sugad Bava Santi Miya, (I. L. R., 22 Bom., 496), dissented from.*

SUIT for a declaration that Government was not entitled to levy the full assessment on the lands and chattram mentioned in the plaint. The Mansif decreed in favour of plaintiff, but his judgment was reversed on appeal. The facts are stated in the judgment of the lower Appellate Court, the material portions of which are as follows :—

“In the town of Dindigul there is a building called Barki Venkata Row’s chattram. Plaintiff is the hukdar of the building. He is also in possession of certain lands which were granted 200

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\* Second Appeals Nos. 1612 and 1613 of 1904, presented against the decrees of H. Moberly, Esq., District Judge of Madura, in Appeal Suit Nos. 76 and 92 of 1904, presented against the decree of M.R.Ry. T. S. Krishna Ayyar, District Munsif of Dindigul, in Original Suit No. 473 of 1902.