

APPELLATE CIVIL:

Before Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

SAMINATHA PILLAI (THIRD DEFENDANT), APPELLANT,

v.

KRISHNA AYAR AND TWO OTHERS (PLAINTIFF AND DEFENDANT'S
NOS. 1 AND 2), RESPONDENTS.*

Mortgage—Subrogation—Third mortgagee advancing money for discharge of first mortgage—Application of part only towards discharge—Priority over mesne mortgagee to that extent.

A mortgagee who advances money towards the discharge of a first mortgage on a property is entitled to priority over an intermediate mortgagee to the extent to which the money advanced by him went towards discharging the first mortgage.

Rupabai v. Audimulam (1888) I.L.R., 11 Mad., 345, followed.

Hanumanthaiyan v. Meenatchi Naidu (1912) I.L.R., 35 Mad., 183, referred to.

SECOND APPEAL against the decree of D. VENKOBÄ RAO, the Subordinate Judge of Tanjore, in appeal No. 614 of 1910, preferred against the decree of P. G. RAMA AYYAR, the District Munsif of Tiruvadi, in Original Suit No. 65 of 1910.

The facts of the case appear from the Judgment.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellant.

T. Rangachariyar and *M. K. Ramaswami Ayyar* for the first respondent.

JUDGMENT.—The plaintiff sues to recover the money due under a mortgage instrument executed by the first defendant in 1905. The amount was advanced to discharge a mortgage debt of Rs. 400 due to one Sivasami Sivan under a mortgage dated November 1901. The finding is that the mortgagor discharged that mortgage by paying the creditor Rs. 300 out of the amount received from the plaintiff and by the execution of a promissory note for Rs. 50 the balance Rs. 50 having been given up by the mortgagee.

The appellant claims under a mortgage dated October 1903, and contends that the plaintiff is not entitled to any priority on account of his discharge of the prior mortgage. His contention has been disallowed by the Lower Courts.

1913.
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23 and 24.

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JJ.

It is argued before us in Second Appeal that though the entire mortgage debt has been discharged, as only Rs. 300 a portion of the mortgage debt was paid out of the money advanced by the plaintiff, and the balance Rs. 50 was paid by the mortgagor himself, he cannot claim a first charge to that extent. It is contended that it is only when the person claiming subrogation discharges the entire debt that he is so entitled. Reliance is placed in support of this contention on *Hanumanthaiyan v. Meenatchi Naidu*(1) *Gurdeo Singh v. Chandrikah Singh*(2).

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It appears to us that this contention cannot be supported and the question is concluded by authority. In *Rupabhai v. Audimulam*(3), the debt due to one Minakshi Naik the first mortgagee under a hypothecation deed (Exhibit XII) was discharged to the extent of Rs. 27,713 by the fourth defendant in that suit and the balance which came to over a lakh of rupees by the mortgagor himself, and it was argued that the fourth defendant had not therefore acquired any priority over an intermediate mortgagee. The learned Judges pointed out that if the whole amount lent by the fourth defendant has been applied to pay off the entire debt due under Exhibit XII he would have priority of that charge to the full amount. Then they said "but only Rs. 27,713 was so applied, and the question is does that fact prevent the application of the rule above stated," and they replied "we do not think it does." They pointed out that the hypothecation under Exhibit XII, *i.e.*, the whole charge was released and the mortgagee after that had no hypothecation on the villages. The case according to them was therefore governed by the Privy Council judgment in *Gokal Dass v. Purnanmal*(4) and the defendant No. 4 in that case who had paid a part of the amount of the first charge ranked to that extent and interest in the priority of that first charge.

The decision is thus directly in point and is not overruled by *Hanumanthaiyan v. Meenatchi Naidu*(1).

We see no reason to doubt its soundness.

We accordingly dismiss the Second Appeal with costs.

(1) (1912) I.L.R., 35 Mad., 183.

(2) (1909) I.L.R., 36 Cal., 193.

(3) (1888) I.L.R., 11 Mad., 345.

(4) (1884) L.R., 11 I.A., 126.