

## APPELLATE CIVIL.

*Before Mr. Justice Spencer and Mr. Justice Napier.*

T. VENKATA SUBBA REDDI (PLAINTIFF), APPELLANT,

*v.*

BAGIAMMAL (DEFENDANT), RESPONDENT.\*

1914,  
December,  
10 and 11  
and 1915,  
January 12

29/1/15  
1915

*Mortgage by two persons of two properties for a single debt—Payment by one of his portion—Suit against other for the balance—Transfer of Property Act (IV of 1882), sec. 67.*

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 on the mortgaged properties.

*Krishna Ayyar v. Muthukumarasamiya Pillai* (1906) I.L.R., 29 Mad., 217, followed.

Where, therefore, the plaintiff sued the defendant—one of the mortgagors, for the recovery of the balance of mortgage money due under a deed of mortgage, without joining the other mortgagor,

*Held*, that the plaintiff was entitled to a decree for a sale of the plaintiff mentioned properties for the whole of the balance due on the mortgage.

SECOND APPEAL against the decree of L. G. MOORE, the District Judge of North Arcot, in Appeal No. 414 of 1911 preferred against the decree of J. SUNDARANANA RAO PANTULU, the District Munsif of Sholinghur, in Original Suit No. 547 of 1910.

The facts appear from the judgment of SPENCER, J.

The Honourable Mr. L. A. Govindaraghava Ayyar for the appellant.

V. V. Srinivasa Ayyangar for the respondent.

SPENCER, J.—In this case the separate properties of two owners were mortgaged to secure a single debt of Rs. 1,800. One of the mortgagors, Arunachala Mudali, paid up Rs. 1,631-14-0 and the mortgagee sought in this suit to recover the whole of the balance from the mortgaged properties in the possession of the other mortgagor. The lower Courts refused to allow the plaintiff to recover more than what the property he proceeded against was rateably liable for.

The questions for our decision are: (1) whether there was in law an extinguishment of the mortgagee's lien over Arunachala

\* Second Appeal No. 2404 of 1912.

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Mudali's property, so as to preclude the plaintiff from recovering the whole of the balance due under the mortgage in this suit and the defendant from obtaining a contribution from Arunachala Mudali in a separate suit in proportion to the value his property bears to the whole debt secured by the mortgagee after deducting the amount already paid to the mortgagee; and (2) whether assuming that it was understood by the parties that plaintiff released his right to proceed against Arunachala Mudali's property, this will prevent him from recovering the whole debt from the defendant.

The statement in paragraph 6 of the plaint that Arunachala Mudali cleared off a portion of the interest and principal due upon the mortgage and that accordingly his properties had been *excluded from the suit* as arranged does not in my opinion amount to an extinguishment of the mortgage lien over Arunachala Mudali's property.

No doubt there are words in Exhibit B showing that plaintiff at one time had an idea of relinquishing his lien over Arunachala Mudali's property, but as it was not a completed transaction and the document contains an admittedly false recital as to the payment of Rs. 1,621 in cash, it cannot affect the equities existing between the parties. Exhibit 1: therefore does not help defendant as containing an admission of plaintiff that he had given up Arunachala Mudali's property. I consider the alleged extinguishment not proved, but as this is partly a question of fact upon which one of the lower Courts has pronounced in defendant's favour, I proceed to the second question.

Now, as stated in *Mir Eusuf Ali Haji v. Panchanan Chatterjee*(1) it is a firmly settled doctrine that, as between the original parties the release of a part of premises does not affect the lien of the mortgagee upon the residue, which is bound for the whole debt. There are no words in section 67 of the Transfer of Property Act to limit the mortgagee's right in this respect. Section 82 declares "where several properties whether of one or 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, after

deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage." The effect of this and other sections relating to mortgages has been fully considered in *Krishna Ayyar v. Muthukumaraswamiya Pillai*(1) where it was held that there was 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. Reliance is placed by respondent's vakil upon the *obiter dictum* at page 224: "It remains only to observe that, if the action of the mortgagee 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." The learned Judges were here dealing with an argument advanced on behalf of subsequent purchasers. The decision in *Ponnusami Mudaliar v. Srinivasa Naickan*(2) is also one relating to the rights of assignees of the equity of redemption. As observed by the Calcutta High Court in *Mir Busuff Ali Haji v. Panchanan Chatterjee*(3), the principle "has no application as between the mortgagor and the mortgagee when the rights of no other persons intervene and require protection." The decision in *Sanwal Singh v. Ganeshi Lal*(4) is to the same effect. I express no opinion as to the rights of subsequent transferees with or without notice.

It was not necessary to join Arunachala Mudali as a party to this suit and there has been no application to have him made a party. He is not a person interested in the property which is the subject of this suit; *vide Krishna Ayyar v. Muthukumaraswamiya Pillai*(1) and *Ponnusami Mudaliar v. Srinivasa Naickan*(2).

I consider for these reasons that the appeal should be allowed and that the appellant should be given a decree for a sale of the plaint mentioned properties for the whole of the balance due upon this mortgage with interest up to the date fixed for payment and that he should recover his costs from respondent throughout.

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(1) (1906) I.L.R., 29 Mad., 217.

(2) (1908) I.L.R., 31 Mad., 333.

(3) (1910) 11 C.L.J., 639; s.c. 6 I.C., 842.

(4) (1913) I.L.R., 35 All., 441.

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Time six months from this date.

NAPIER, J.—Two questions are raised in this appeal: First whether the plaintiff has in fact extinguished the liability on the property of Arunachalam Mudali under his mortgage; and secondly whether if he has in fact done so, he is only entitled to recover a rateable proportion of the mortgage amount from the mortgaged properties in the possession of the defendant. The original liability arose on a single mortgage executed on the 9th March 1898 by Arunachalam Mudali and Sanjeevi Mudali, the father-in-law of the defendant, the mortgage amount being Rs. 1,800 with interest at twelve annas per cent per mensem. Both executants mortgaged distinct items of property, belonging to each of them, to cover the joint debt and it is admitted that Arunachalam Mudali, one of the original mortgagors, paid a sum of Rs. 1,681-14-0 in August 1910 which amount represented half the then existing liability. The plaintiff then brought a suit to recover the balance against the defendant and not making the co-mortgagor a party, defendant alleging that in consequence of his having paid a sum of Rs. 1,681-14-0, to the plaintiff, he and his property out of the hypotheca were excluded from the suit as was arranged with him.

The defendant set up in paragraph 10 of the written statement that she was not liable for this balance of Rs. 1,600 as the plaintiff was bound to apportion the mortgage amount rateably on the value of all the mortgaged properties, and, as Arunachalam Mudali's properties were worth Rs. 5,550 and her property only Rs. 1,020, she was only liable for an amount of Rs. 450 as her share. The issue framed on this plea is, whether the plaintiff's properties are liable to be sold only for a rateable amount due as the plaintiff has exonerated the other mortgagor and his properties." The District Munsif held in favour of the defendant on this issue.

On appeal to the District Court two points were taken, first, that the lower Court had erred in holding that the non-inclusion of Arunachalam Mudali, the co-mortgagor, and his properties operated as an extinguishment of the mortgage to that extent; and secondly, that the plaintiff was entitled to recover his debt on any portion of the mortgaged properties. Before the District Court the first point seems hardly to have been pressed: for, the learned Judge states that the only question argued in this appeal

related to the second point : it having been assumed that the plaintiff had exonerated the other mortgagor and his properties.

A long and careful argument has been addressed to us by Mr. Govindaraghava Ayyar urging that the plaintiff did not intend, by the language used in his plaint, to allege that he had exonerated the other mortgagor and his properties. I am unable to accept this contention. It is clear to me from the language of the plaint that the parties went to trial on this footing and, seeing that there can be an oral release, I accept the finding of both Courts that there had been such a release and that the endorsement on Exhibit A of the payment is evidence of that release.

Assuming, therefore, that the plaintiff had discharged one of the mortgagors from liability under the mortgage by receipt of half the amount due, the question remains, whether he is thereby debarred from seeking to recover more than a rateable proportion of the balance from the co-mortgagor. Both Courts have held that he is so debarred, relying on the language of *Krishna Ayyar v. Muthukumaraswamiya Pillai*(1), and also on the dictum of MOOKERJEE, J., in *Mir Eusuff Ali Haji v. Panchanan Chatterjee*(2). The language used by the learned Judges on page 224 is as follows: "It remains only to observe, etc. . . ." It is to be noted that in the view of the learned Judges the limitation of the mortgagee's right arises where his action has had the effect of relieving the discharged property from its liability to bear its proportion of the debt; and the argument addressed to us is based on the assumption that section 82 of the Transfer of Property Act which creates the right to contribution does not apply where one of the mortgaged properties has, at the time of the suit, been discharged from liability. The words are "where several properties are mortgaged to secure one debt, such properties are liable to contribute rateably to the debt." It is argued that the words "are mortgaged" mean "are at the date of suit, liable on an existing mortgage" and that they cannot be read as meaning "where several properties have been mortgaged to secure one debt the right to contribution arises" and that therefore, the mortgagee having put it out of the power of one mortgagor to get contribution, an equity arises in favour of the

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(1) (1906) I.L.R., 29 Mad., 217 at p. 224. (2) (1910) 11 C.L.J., 639 at p. 648.

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remaining mortgagor which limits the mortgagee's right to rateable contribution. It is, to my mind, a little difficult to see how a mortgage can be extinguished so as to prevent contribution but be kept alive for the purpose of ascertaining rateable proportion. But I do not think it necessary to decide here whether the right of contribution has, in fact, been lost; that question may arise in another suit: I am unable however to accept the view that even if it is lost this right of equitable limitation exists. It seems to me that we should be very slow in introducing equities into the statutory mortgage law of this country based on equitable doctrines applied to English mortgages. The right of contribution is itself an equity, and an equity specially introduced by statutes. If under the English Law of mortgages there is an equitable limitation to the mortgagee's right, it was perfectly open to the framers of the Act to introduce that equity by suitable provision. They have not chosen to do so and in my humble opinion, it is not the function of the courts to do so for them. The learned Judges in *Krishna Ayyar v. Muthukumaraswamiya Pillai*(1), examine the provisions of the Transfer of Property Act with great minuteness. They point out that there are only four or five sections which need be considered, namely, sections 56, 81, 82, 95 and 60 and conclude as follows: "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 with." Section 81 deals with marshalling; section 82 is the contribution section; section 95 creates a charge by a co-mortgagor who has redeemed the whole debt on the share of the other co-mortgagors in the property for their due proportion; section 60 states that the rights of a mortgagor to redeem; section 66 gives a right to a purchaser of one of two properties subject to a common charge as against the seller to have the charge satisfied out of the other property as far as such property will extend. It is to be noted that sections 56, 81, 82 and 95 are statutory

(1) (1906) I.L.R., 29 Mad., 217.

equities in favour of persons owning properties liable to a charge against other persons and other properties equally liable on that charge. It has not been argued, and it cannot be argued, that any of these provisions raises the equity sought for here. The first difficulty in the way of this equity seems to me to be this: if the equity can be used as a defence to a mortgage suit, it obviously should be available to a mortgagor in a redemption suit, for, it is illogical to say that the mortgagee cannot claim more than a rateable proportion, but that the mortgagor in a suit to redeem would have to pay the whole amount. Therefore the right must be exercisable in redemption. Unfortunately, however, the Transfer of Property Act is definite in negating this right. Section 60 gives a right to the mortgagor to redeem *on payment of the mortgage money* and specifically provides that nothing in the section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of the proportionate amount of the amount remaining due on the mortgage, except where a mortgagee has acquired another such share. Here is to be found the only statutory limitation to the liability of the mortgagor to pay the whole amount due on the mortgage if he seeks to redeem. Section 67 states the rights of the mortgagee. It gives a right to foreclosure or an order for sale to the mortgagee as long as the mortgage money has not been paid. Among all the following sections from 69 to 84 there is not a single provision limiting the right of the mortgagee to recover the amount of his mortgage from any property made liable thereto by the mortgage document, except where he has lost his priority by fraud, misrepresentation or gross neglect, and except as to the right of a second mortgagee without notice of the mortgage to have the securities marshalled so as to protect himself as far as possible. It is clear, therefore, that this equitable limitation of the mortgagee's right is one which is directly opposed to the language of the various sections, introduces a right in the mortgagor impliedly negated by section 60, and is, of course, in direct conflict with the rights and liabilities arising from the language of the document. When I am asked to read this equity into the statute and am pressed with the language used by learned Judges of this Court and of other Courts, I can only refer to the language of Lord MACNAGHTEN in *Norendra Nath Sircar v. Kamalbasini Dasi*(1),

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(1) (1896) I.L.R., 23 Calc., 563.

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adopting the language of Lord HERSCHELL in *The Bank of England v. Vagliano*(1), which is, in effect, as follows, that the proper course is to examine the language of the statute uninfluenced by any considerations derived from the previous state of the law. If the statute is intended to embody in a code a particular branch of the law, the purpose of such statute surely was that the law should be ascertained by interpreting the language used and not by enquiring how the law previously stood. Bearing in mind that the chapter relating to mortgages in the Transfer of Property Act is as distinctly a "Code as any enactment could be, in that it begins by defining a mortgage and seeing that its provisions contain several equities known to English Law,—I must, with the greatest deference to the views taken by other Judges, decline to introduce provisions which the legislature has not thought fit to incorporate in the Act.

I now proceed to consider the question from another point of view. The mortgage is a simple mortgage under which each of the mortgagors bound himself personally to pay the mortgage money. Under section 68 of the Transfer of Property Act the mortgagee has a right to sue the mortgagor *for the mortgage money* where the mortgagor has bound himself to repay the same. There is no equitable limitation here and a reference to the Contract Act shows that no such limitation can be introduced. Section 43 of the Indian Contract Act provides that any one of joint promisors may be compelled to perform the *whole of the promise* and section 44 specifically enacts that where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor. This is the very point under consideration in this case, and it is to be noted that these two sections 43 and 44 give the right of contribution to joint promisors and also specifically provide that the release of a joint promisor by the promisee does not free such promisor from responsibility to the other joint promisor. I fail to see how it can be argued that a mortgagee in a mortgage suit can only ask for sale of the mortgaged property for a rateable proportion of the mortgage debt, when in his claim on the covenant to pay he is entitled to judgment for the whole amount with, as a necessary corollary, a right to levy execution against the land. If there is an equity here it operates strangely, for, its only result will be, not to



protect the mortgagor, but to give some advantage to a subsequent mortgagee if there be one.

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Reliance is placed on the view embodied in *Ponnuswami Mudaliar v. Srinivasa Naickan* (1). There the learned Judges accept the statement of the law contained in Mr. Ghose's Law of Mortgages, dated 1875, prior to the Transfer of Property Act. With the very greatest deference I cannot follow the Court in disposing of this case without reference to the provisions of the Act, but this case does not help the respondent as the proposition stated is covered by sections 56 and 81 of the Act. The learned Judges in *Krishna Ayyar v. Muthukumarasaamiya Pillai*(2), the case containing the *obiter dictum* relied on by the lower Court quote with approval two cases *Lala Dilawar Sahai v. Dewan Bolakiram*(3) and *Royhu Nath Pershad v. Harlal Sahu*(4) which lay down that the mortgagee is entitled to realise the whole debt upon the whole property, the right to contribution being only as between the defendants, though they limit it in a manner expressly provided by section 81. The decision in *Krishna Ayyar v. Muthukumarasaamiya Pillai*(2) was considered by the High Court of Allahabad in a later case reported in *Sanwal Singh v. Ganeshi Lal* (5) and the Court adopted as correct the broad proposition, without any reservation, that where two properties are jointly mortgaged for the same debt, each of those properties is liable for the whole debt and it is open to the mortgagee to proceed either against the whole of the mortgaged property or against a part only of such property; and the proposition is stated equally broadly by a Full Bench of the same Court in an earlier case—*Sheo Tahal Ojha v. Sheodan Rai*(6). It is true that a different view appears to have been taken by the High Court of Calcutta in *Imam Ali v. Baij Nath Ram Sahu*(7). But there the learned Judges were considering the case of an assignee of the equity of redemption—a case which is covered by section 56 of the Act,—and no authority on the construction of any section of the Act is quoted for the proposition stated in page 622, that “a mortgagee, who has a security upon two or more properties, which he knows belong to different persons, cannot release his lien upon the one so as to

(1) (1905) I.L.R., 31 Mad., 233.

(2) (1906) I.L.R., 29 Mad., 217.

(3) (1885) I.L.R., 11 Cal., 258.

(4) (1891) I.L.R., 18 Cal., 320.

(5) (1913) I.L.R., 35 All., 411.

(6) (1906) I.L.R., 28 All., 174 (F.B.).

(7) (1906) I.L.R., 33 Cal., 613.

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increase the burden upon the others without the privity and consent of the persons affected." With the greatest deference I know of nothing in the Act to support this limitation and it is to be noted that in a later case—*Mir Eusuff Ali Haji v. Panchana chatterjee*(1)—Justice MOOKERJEE, who was a party to the prior case, limits it specifically to cases where the release took place after the purchase of an interest in the mortgage premises and considers it inapplicable to the case where the mortgagors alone were the persons affected by the release. Nothing could be more definite than the following language used by that learned Judge in this last case. "It is a firmly settled doctrine that as between the original parties the release of a part of the premises does not affect the lien of the mortgagee upon the residue which is bound for the whole debt (*vide* page 647)." In this view I entirely concur, for the simple reason that, both by the language of the mortgage and the language of the sections of the Transfer of Property Act no equity arises as between mortgagors and mortgagee which limits the mortgagee's rights and I would refer to the language used by Lord DAVEY in *Webb v. Macpherson*(2) with reference to an endeavour to apply English equities to the Transfer of Property Act. The question arose as to a vendor's charge under the Act and the Board's view is stated on page 72. The English vendor's lien "was a creation of the Court of Equity and could be modified to the circumstances of the case by the Court of Equity. But in the present case there is a statutory charge. Such a charge stands in quite a different position from a vendor's lien. You have to find something, either express contract, or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the statute." What was sought to do in that case was certainly different to what is sought here. But it appears to me that the Privy Council were insisting in that case, too, on the construction of the statute, apart from equitable principles introduced by Courts of Chancery in England.

For the above reasons I would reverse the decision of the lower Courts and make a preliminary order for sale as prayed for in the plaint.

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(1) (1910) 11 C.L.J., 639.

(2) (1904) I.L.R., 31 Cal., 57 (P.C.).