As regards the two decisions referred to, it is not quite easy to say whether they should properly be regarded as laying down as a condition of liability that there should be direct evidence of express authority to give acknowledgments. But at least one sentence in *Shaik Mohideen Sahib* v. *The Official Assignee of Madras*(1) lends colour to that view. WHITE, C.J., referring to the former decision in *Valasubramania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar*(2), says:

"Following the principle we here *Valasubramania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar*(2) lay down, we have to see in this case if there is evidence that the person who made the acknowledgment had authority to do so on behalf of his firm."

Those words are capable of the construction that what is meant is direct evidence of specific authority, and they were obviously so regarded by the learned Judges who referred this question to us. If that be so we have no hesitation in saying that they were wrongly decided and should no longer be regarded as law. Such a view is completely at variance with that taken by the other Courts of India and by the English Courts in their construction of the corresponding sections of the English Acts and would obviously put a premium on commercial dishonesty.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

SINGA PILLAY (PLAINTIFF), APPELLANT,

v.

AYYANERI GOVINDA REDDY AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1917, July 16 and 27.

Mortgage—Transferee from benamidar—Right of suit.

A transferee-mortgagee can maintain a suit on the mortgage though the mortgagee named in the bond is only a benamidar and though the beneficial owner is not added as a party.

Kirtibas Das v. *Gopal Jiu* (1914) 19 C.L.J., 193, and *Parmeshwar Dat* v. *Anardan Dat* (1915) I.L.R., 37 All., 113, followed.

SECOND APPEAL against the decree of K. KRISHNAMACHARIYAR, the Subordinate Judge of North Arcot, in Appeal No. 113 of

(1) (1912) I.L.R., 35 Mad., 142 at p. 145. (2) (1909) I.L.R., 32 Mad., 421.

* Second Appeal No. 1887 of 1915.

SINGA PILLAY v. GOVINDA REDDY.

1914, preferred against the decree of M. A. KRISHNA RAO, the District Munsif of Sholingur, in Original Suit No. 203 of 1913.

The plaintiff brought this suit upon a registered mortgage deed executed by the first defendant in favour of one Rengasami Reddi and transferred by him to the plaintiff. The second defendant is a subsequent purchaser of the property. The second defendant contended that the original mortgagee Rengasami Reddi, was only a benamidar for the second defendant's judgment-debtors, the mother and sister of the first defendant, and that the assignment in favour of the plaintiff was a nominal and sham transaction. The Court of first instance upholding the above contentions dismissed the plaintiff's suit. The lower Appellate Court confirmed the above decision, observing that a benamidar in respect of a mortgage deed cannot sue and recover on the mortgage. The plaintiff preferred this second appeal.

C. V. Anantakrishna Ayyar for the appellant.

P. Venkataramana Rao for the respondents.

SPENCER, J.

SPENCER, J.—In the Calcutta and Allahabad High Courts it appears to have been settled by judicial decisions that a benami mortgagee may maintain a suit upon a mortgage: vide *Kirtibas Das* v. *Gopal Jiu*(1), *Sachitananda Mohapatro* v. *Baloram Gorain*(2), and *Parmeshwar Dat* v. *Anardan Dat*(3). In this Court there is no reported case on the point so far as I am aware; but in *Chidambara Mandarayan* v. *Singaram*(4), the same view was taken as in Calcutta and Allahabad and three more unreported cases were therein referred to as authorities that precluded arguments being raised to the contrary. In *Kuthaperumal Rajali* v. *The Secretary of State for India*(5), the decision in *Chidambara Mandarayan* v. *Singaram*(4) was quoted with approval and its principle was explained as being that a benamidar's suit is equivalent to a suit by an agent of an undisclosed principal. If a mortgagor can successfully resist a suit brought by the beneficial owner of the bond on the ground that he is not the person named in the bond as mortgagee, it is difficult to see on what grounds he could also be successful

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(1) (1914) 19 C.L.J., 193.
(2) (1897) I.L.R., 24 Calc., 644.
(3) (1915) I.L.R., 37 All., 113.
(4) Second Appeal No. 186 of 1903.
(5) (1907) I.L.R., 30 Mad., 245.

against the ostensible owner of the legal estate when the real owner holds back. In case of dispute the remedy would be to join the person alleged to be the real owner as a party, so that he might be bound by the decision. If the benamidar can sue upon the bond there is no reason why he should not assign his right of suit to another for proper consideration. In this case, however, there is a further difficulty. Both the lower Courts have found that the transfer to the plaintiff by Rangaswamy Mudali, the benamidar, was not a *bona fide* transaction.

The Subordinate Judge gives as one of his reasons for this finding that the transfer was made on the very date upon which the second defendant sued to recover the consideration of the pro-note from the real mortgagee. If he meant that the transaction was one in fraud of creditors, it must be set aside in a suit framed for that purpose. So far as the parties to this suit are concerned it is sufficient that Rangaswamy Mudali says he transferred his title to the plaintiff and received consideration for the transfer. His act must be taken as operating to pass whatsoever title he had to sue the mortgagor and I have held above on the point of law that he had a title to sue as mortgagee though he was a benamidar.

I agree therefore that the lower Court's decree must be reversed and a decree passed for the plaintiff.

SESHAGIRI AYYAR, J.—Both the Courts below have found that the plaintiff's assignor was only a benamidar in respect of the mortgage sued on. We see no reason to differ from this conclusion. The further question whether a benamidar can sue in his own name on the mortgage is not free from difficulty.

There is only a thin line of demarcation between a benamidar and an agent or trustee. The element of confidence in the ostensible owner exists in all the three cases. In the case of an agent, the law gives a qualified right of suit to him. See section 230 of the Contract Act. In the case of a trustee, the law recognizes him alone as entitled to deal with the outside world, because the legal estate vests in him; and until discharge he represents that estate: The case of a benamidar is slightly different. He is not the legal owner because although from the utset he is expected to screen the real owner from the public, e is to be only the alias of the latter, until he chooses to reveal

SINGA PILLAY v. GOVINDA REDDY.

SESHAGIRI AYYAR, J.

himself as the person entitled. Such an attitude is insufficient to create a relationship of principal and agent either.

In this view of his status, the question is whether he should be allowed to sue in his own name. The Judicial Committee of the Privy Council apparently held that he can sue to recover debts; *Gopeekrist Gosain* v. *Gungapersaud Gosain*(1). In regard to negotiable instruments, it was held in *Subba Narayana Vadhiyar* v. *Ramaswami Aiyar*(2) that he alone was competent to maintain a suit. An extension of this principle was made in *Sivasankaran Pillai* v. *Panchami Kesiyar*(3), where he was held entitled to sue for a debt due on a simple bond: A still further inroad upon the rights of the real owner was made in *Sree Raja Datla Venkata Suryanarayana Jagapathiraju* v. *Goluguri Bapiraju*(4). In that case it was held that a benamidar can sue to set aside a sale. It may here be mentioned that an attempt to bar his right in all cases of suits relating to immovable property in general did not meet with approval in Madras. See observations in *Kuthaperumal Rajali* v. *The Secretary of State for India*(5). None the less it was held that he is not entitled to sue for rent: *Kuppu Konan* v. *Thirugnana Sammandan Pillai*(6). Suits in ejectment have been regarded as outside his rights; *Kuthaperumal Rajali* v. *The Secretary of State for India*(5).

As regards the other High Courts, in Allahabad the benamidar is allowed to sue on the mortgage: *Parmeshwar Dat* v. *Anardan Lal*(7). A suit in ejectment is also allowed by that High Court: *Nand Kishore Lal* v. *Ahamad Ata*(8). In Calcutta, notwithstanding *Munshi Basiruddin Ahmed* v. *Mahomed Jalish Patwari*(9), the later decisions concede his right to sue on a mortgage: *Hara Gobinda Saha* v. *Purna Chendra Saha*(10) and *Kirtibas Das* v. *Gopal Jiu*(11) following *Sachitananda Mohapatra* v. *Baloram Gorain*(12). But he is not allowed to sue in ejectment: *Mohendra Nath Mookerjee* v. *Khali Proshad*

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(1) (1854) 6 M.I.A., 53 at pp. 72 and 73.
(2) (1907) I.L.R., 30 Mad., 58. (3) (1898) 8 M.L.J., 302.
(4) (1910) I.L.R., 34 Mad., 143. (5) (1907) I.L.R., 30 Mad., 245.
(6) (1908) I.L.R., 31 Mad., 431. (7) (1915) I.L.R., 37 All., 113.
(8) (1896) I.L.R., 18 All., 69. (9) (1908) 12 C.W.N., 409.
(10) (1910) 11 C.L.J., 47. (11) (1914) 19 C.L.J., 193.
(12) (1897) I.L.R., 24 Calc., 644.

Johuri(1). In Bombay also, the same view seems to prevail: see *Ravji* v. *Mahadev*(2).

Probably, it would be more logical to permit the benamidar to sue in all cases, leaving it to the real owner, to his remedies against him in a separate suit. The decisions which apply the rule of res judicata against the real owners and even permit him to execute a decree obtained by the benamidar are not inconsistent with this view. It may be that suits in ejectment stand on a different footing from other suits. In such suits the legal right of the plaintiff and his right to eject are directly in question. It may be said that the defendant can plead *jus tertii*. These considerations may not be altogether absent in other suits. However that may be, it is not necessary at present to canvass the correctness of his position in regard to suits for ejectment.

I think that prima facie a suit on a mortgage is one to recover a debt, although such a debt is charged on immovable property: consequently, the dictum of the Privy Council in *Gopeekrist Gosain* v. *Gungapersaud Gosain*(3) is applicable to such a suit. It was pointed out in *Chidambara Mandarayan* v. *Singaram*(4) that the practice in this Presidency is to permit the benamidar to sue on a mortgage; and that practice is in consonance with what obtains in the other High Courts. A further argument was addressed to us on the finding of the Subordinate Judge that the transfer to the plaintiff by the first benamidar Rengaswami was in fraud of the creditor, the second defendant. Even accepting this finding it is not open to the second defendant to resist the suit without first suing to set aside the transfer: Vide *Palaniandi Chetty* v. *Appavu Cheltiar*(5). Under these circumstances we must hold that the plaintiff must be allowed to sue in his own name. The decrees of the Courts below must be reversed and the usual mortgage decree should be passed for the amount sued for. Time for payment will be six months from this date. Each party will bear his own costs throughout.

S.V.

(1) (1903) I.L.R., 30 Calc., 265. (2) (1898) I.L.R., 22 Bom., 672.
(3) (1854) 6 M.I.A., 53. (4) Second Appeal No. 186 of 1903.
(5) (1917) 30 M.L.J., 565.