

KONDAMA  
NAICKER  
v.  
KANDASAMI  
GOUNDAR.

Sir  
LAWRENCE  
JENKINS.

equity or good conscience that would empower the Court to deprive them of that legal title or to impose any restriction in derogation of it.

Their Lordships therefore are unable to agree with the High Court's decision in the mortgagee's favour, and they will, accordingly, humbly advise His Majesty that the appeal be allowed, and that the decree of the High Court be varied so far as it dismissed the appeal as against the fourth defendant and ordered that the plaintiff should pay to the fourth defendant Rs. 621-12-6 for his costs, by directing in lieu thereof (a) that it be declared that the mortgage of the 2nd July 1910 and the decree thereon are inoperative against the plaintiffs beyond their mother's lifetime, and (b) that the fourth defendant pay to the plaintiffs their costs in the lower Courts so far as attributable to his claim against them, the amount of such costs to be assessed by the High Court. The fourth defendant must pay to the plaintiffs their costs of this appeal.

Solicitor for appellants : *Douglas Grant.*

Solicitor for respondent : *Edward Dalgado.*

A.M.T.

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PRIVY COUNCIL.\*

1923  
November 26

MALIREDDI AYYAREDDI (PLAINTIFF),  
APPELLANT

and

GOPALAKRISHNAYYA AND ANOTHER (DEFENDANTS),  
RESPONDENTS.

[On Appeal from the High Court at Madras.]

*Mortgage—Privity—Subrogation—Purchase of equity—Payment under mortgage decree—Mortgage including crops—Rights against later mortgagee—Transfer of Property Act (IV of 1882), s. 101.*

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\* Present :—Lord DUNEDIN, Lord PHILLIMORE, Sir JOHN EDGE, and Mr. AMEER ALI.

Land was subject to three simple mortgages, of which the second was on the crops as well as the land. A purchaser of the land subject to the three mortgages, and the respondents, who were assignees of his interest, paid to the second mortgagee money to save the crops from sales under a decree which he had obtained upon his mortgage.

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*Held* that there being no covenant by the mortgagor to pay the third mortgage, the payments made to the second mortgagee were to be regarded as purchases *pro tanto* of the second mortgage, not as a discharge of it, the fact that the third mortgage did not include the crops not being material; and that accordingly the respondents were entitled in respect of the payments to priority over the third mortgagee.

APPEAL (No. 101 of 1921) from an order of the High Court (January 26, 1920) affirming an order of the Temporary Subordinate Judge at Masulipatam.

The appeals related to three simple mortgages, dated August 21, 1905, March 5, 1909, and October 20, 1909, respectively, made by the owners of certain lands in the Kistna district to different mortgagees. The first and third mortgages were upon the lands merely; the second mortgage, after detailing the lands, provided "these *seri* dry and wet lands, with the different kinds of crops produced every year in the said lands, are mortgaged for your debt."

In 1912 one Pingala Venkataramayya purchased the properties subject to the three mortgages, and in June 1917 he sold his interest to the respondents.

In the circumstances stated in the judgment of their Lordships, the respondents and their assignor had paid considerable sums to the second mortgagee under a decree obtained by him in November 1913 upon his mortgage, and that decree had been finally discharged in December 1917 by a payment by the respondents. The third mortgagee (the appellant) obtained a decree on his mortgage on January 3, 1916. The properties

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were sold under that decree, and after discharging the first mortgage there was a balance of Rs. 1,327 which was deposited in Court.

The present appeal arose in proceedings in execution of the decree of January 3, 1916.

The High Court (OLDFIELD and SESHAGIRI AYYAR, JJ.) had dismissed an appeal by the present appellant from an order whereby the balance in Court had been ordered to be paid to the respondents. The learned Judges were of opinion that the respondents were entitled to be subrogated to the rights of the second mortgagee, and rejected a contention that that right did not include sums paid to save the crops from sale.

*Narasimham* for the appellant.

*Dube* for the respondents.

Reference was made to the cases mentioned in the judgment, also to *Satnarain Tewari v. Chowdhuri Sheobaran Singh*(1).

The JUDGMENT of their Lordships was delivered by

Lord  
PHILLIMORE.

Lord PHILLIMORE.—Certain Indian landowners within the Kistna district effected first, second and third mortgages on their property; the first and third being on the lands alone, the second on the crops also. They were afterwards sued to judgment by some creditors for ordinary debts, and their lands were sold in execution of the judgment but subject to the mortgages. The purchaser of the equity of redemption was one Pingala, who paid Rs. 1,000, and thereout the judgment debt was satisfied.

The second mortgagee then instituted his suit to enforce his mortgage, making the original mortgagors

the third mortgagee and Pingala, defendants; and having obtained judgment, he, from time to time, obtained orders for sale of the crops. In one case it would seem as if the crops were actually sold in execution; in others, Pingala, or the present respondents who bought Pingala's interests during the course of the proceedings, paid the second mortgagee sums of money and saved the crops from seizure. While this was going on, the third mortgagee, who is the present appellant, brought a suit, making the original mortgagors and Pingala parties; and in this suit the lands were sold out and out, freed and discharged from the mortgages. After payment of the amount due to the first mortgagee and the expenses of the sale and so forth, there remained in Court to the credit of the cause a sum of Rs. 1,327 with some annas and pies.

The respondents, the purchasers from Pingala, who had been added as supplemental defendants in the suit brought by the appellant, thereupon claimed to be subrogated to the second mortgagee, and in right of the latter, to receive this sum out of Court. They made this claim on July 22, 1918, for the following reasons: At the time of the decree in favour of the third mortgagee which was made on appeal by the High Court on February 13, 1917, there was still due to the second mortgagee the sum of Rs. 1,990. Now the decree of the High Court provided that Pingala or his assignees should be at liberty to pay the amount due under the decree obtained by the second mortgagee, and that by doing so, they would be relegated to the rights of that mortgagee. Accordingly the respondents paid Rs. 1,990 to the second mortgagee, and on December 20, 1917, full satisfaction by payment through the Court was recorded.

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The application of the respondents for the payment out of the money in Court was resisted by the appellant, who contended that when the owner of a property subject to several mortgages pays off a prior mortgage, he is not entitled to stand in the shoes of the prior mortgagee but is to be taken as clearing the property from prior incumbrances for the benefit of the later mortgagee.

Now quite apart from the general law on the subject, the decree of the High Court, from which there was no appeal, had provided that in respect of any payment made by the owner of the property to the second mortgagee, he should acquire the right of the second mortgagee. This would be sufficient for the determination of the question immediately in dispute, because the sum in Court, Rs. 1,327 odd, is less than the sum of Rs. 1,990 which the respondents paid to the second mortgagee when final satisfaction was entered. And accordingly the Subordinate Judge had no difficulty in deciding the immediate application in favour of the respondents.

From this decision the present appellant appealed to the High Court at Madras. This Court, in affirming the actual decision, went further and stated a principle in accordance with which the present respondents will not only be entitled to stand in the shoes of the second mortgagee in respect of Rs. 1,990, paid at the time of the final satisfaction, but also in respect of several payments that they or Pingala had made from time to time to save the crops from being seized. This question, as the Judges in the High Court rightly pointed out, was not determined by the previous decree of the High Court which only affected payments made subsequent to that decree.

It is therefore necessary to investigate matters a little more closely. It is now settled law that where in India there are several mortgages on a property, the

owner of the property, subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt, but in this case there was no such personal covenant. It is further to be presumed, and indeed the Transfer of Property Act, section 101, so enacts, that if there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit.

So far, therefore, as Pingala or the respondents can be supposed to have bought the rights of the second mortgagee at the various times when they paid sums to him, so far they are entitled to stand in his shoes and claim priority over the present appellant, who is the third mortgagee. This could hardly be disputed by counsel for the appellant, having regard to the decisions of this Board. (*Gokaldas Gopaldas v. Purnamal Preamsukhdas*, (1) *Dinubundhu Shaw Chowdhry v. Jogmaya Dasi* (2) and *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh* (3)). The point, however, on which he really relied arose under the peculiar conditions of the second mortgage, which was upon the crops as well as upon the land. He contended that sums paid to the second mortgagee to save the crops from seizure must be deemed to be sums paid in reduction of the second mortgage, and not purchases *pro tanto* of that mortgage.

Their Lordships fail to follow the contention. There was an incumbrance upon a composite security, land and crops. It became necessary for the owner subject to the

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(1) (1884) I.L.R., 10 Calc., 1035 (P.C.) ; 11 I.A., 126.

(2) (1902) I.L.R., 29 Calc., 154 (P.C.) ; 29 J.A., 9.

(3) (1912) I.L.R., 39 Calc., 527 (P.C.) ; 39 I.A., 88.

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incumbrance, to pay sums of money to the incumbrancer to prevent his enforcing his charge from time to time. The incumbrancer could sell his charge or portions of his charge to any one, and there is nothing in law or good sense to eliminate the owner of the property from the list of possible purchasers. It is to the benefit of the owner that the proceedings should be deemed to be a purchase and not a redemption, and no reason appears why it should not be assumed that he intended to act in the way most beneficial to himself.

If instead of the mortgage being on lands and crops it had been on three separate estates, and proceedings had been taken against one of them only, money paid to stave off such proceedings might certainly be considered to be purchase money and not redemption money. So in the case of these crops. Any sums paid by Pingala or the respondents to save the sale of crops should be deemed to be *pro tanto* purchases of the second mortgage. It is suggested by the appellant that the sum of Rs. 2,058 odd received in April, 1914, was not paid by Pingala but was the fruits of a sale in execution. If this should prove to be so, and there is nothing to qualify it, the present respondents would not in respect of that sum be entitled to stand in the shoes of the second mortgagee. But in all cases where they have paid the money, they are entitled to the benefit. *A fortiori* they are entitled to keep the order made in their favour by the Judge of the Subordinate Court and confirmed by the High Court, and to have the money in Court paid out to them.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: *Edward Dalgado*.

Solicitor for respondents: *H. S. L. Polak*.