KARUTHA-SWAMI SERVAI, *In re.*

PAKENHAM WALSH, J.

before any of the prosecution witnesses are examined, the absolute right of recall cannot arise for the first purpose, but the qualified right for the second purpose does exist. It may be noted that Chapter VIII seems to be somewhat defective as it does not expressly provide for an examination of witnesses called for the defence, and the only form of summons given in the appendix, schedule V, is with regard to giving security for keeping the peace.

The balance of authority is certainly against a right of recall and cross-examination of the prosecution witnesses under section 256 (1). The remarks relied on in 43 Mad., 511, are *obiter*. Although the reference to us does not mention section 257, I agree that we should answer the question in the manner proposed by my learned brothers.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

1929 August, 2.

LAKSHMI ACHI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

NARAYANASAMI NAIKER AND FIFTEEN OTHERS (DEFENDENTS), RESPONDENTS.*

Mortgage, priority of—Purchaser undertaking to pay two mortgages—Failure of purchaser to pay—Purchaser from purchaser paying only one—Effect of—A selling his share of joint family properties to his brother for discharging his debts—Effect of sale on their joint status—Third party's right to sue on contract.

If in consideration of a sale of certain lands the purchaser agrees to pay certain specific mortgages thereon, he cannot by

* Appeal No. 89 of 1924.

paying only one of them claim priority in respect of that mortgage over others later in date; for the expressed intention was to pay and extinguish all of them; *Govindasami Tevan* v. *Dorasami Pillai*, (1910) I.L.R., 34 Mad., 119, followed. The same will be the result if, instead of the purchaser paying, an alienee from him paid.

If of *A* and *B*, members of a joint Hindu family, *A* sells his share in some of the family properties, not to a stranger, but to *B*, *A* thereafter becomes divided from *B* in respect of the said properties, without any right of survivorship thereto. *Balakrishna Trimbak Jendulkar* v. *Savitribai*, (1878) I.L.R., 3 Bom., 54, followed.

If by a sale by *A* of certain properties to *B*, *B* undertakes to pay *A*'s debts thereon, not only out of those properties, but also personally, *A*'s creditors not being parties to this contract, cannot compel *B* to pay *A*'s debts personally.

APPEAL against the decree of the Court of the Subordinate Judge of Dindigul in O.S. No. 16 of 1922.

The first defendant in this suit executed on 5th March 1914 the mortgage in suit in favour of one Subrahmanyam Chettiyar, the deceased son of the first plaintiff and the husband of the second plaintiff. At that time the first defendant (Narayanaswami Naiker) had a brother, by name, Natarajulu and both formed an undivided Hindu family owning immovable properties. Each of the brothers had before the suit mortgage, incurred simple and mortgage debts, some jointly and others individually. One such joint debt was a mortgage executed in 1909 (Exhibit V) while other mortgages, Exhibits XVI, XVI (*a*) and XIV, were executed by Narayanaswami alone. Soon after the suit mortgage, Narayanaswami agreed in 1914 to sell his share in all the family properties to his brother Natarajulu, the consideration for the sale being the undertaking by Natarajulu to discharge all the debts binding upon Narayanaswami (16 in number), including debts under Exhibits V, XVI, XVI (*a*), XIV and the suit mortgage

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(Exhibit A). Natarajulu brought a suit to enforce this agreement to sell and obtained in 1916 a sale-deed through Court in accordance with a compromise decree, comprising the vendor's share in all the family properties except two which were settled on Narayanaswami's wife for her life, the consideration for the sale being the undertaking by Natarajulu to discharge all the debts of Narayanaswami not only out of the properties sold to him but also out of his own properties. Natarajulu himself did not pay the debts but sold some of the properties mortgaged to the plaintiffs (suit items 1, 2 and 16) to the fourth defendant who undertook to discharge the mortgage debt under Exhibit V. Similarly he sold item 15 in this suit to one Guruvappa who undertook to discharge the mortgage debts under Exhibits XVI and XVI (*a*). Guruvappa, in his turn, sold item 15 to defendants 5 and 6. After Natarajulu died unmarried about the year 1920, his mother, the 2nd defendant, claiming that he was divided from Narayanaswami and that she was Natarajulu's heir got possession of his properties and sold in 1921, suit items 8 and 14 to the 15th defendant to discharge a mortgage decree thereon obtained on Exhibit XIV. In the present suit for Rs. 13,000 brought by the plaintiffs to enforce their mortgage, which was not paid by Natarajulu, defendants 4, 5, 6 and 15 having discharged the mortgages under Exhibits V, XVI, XVI (*a*) and XIV claimed priority over the suit mortgage. Plaintiff also claimed that all the properties of Natarajulu were liable to discharge the suit mortgage on account of his undertaking, which claim was resisted by the mother and other defendants on the ground that the plaintiffs were strangers to that undertaking. Though the Subordinate Judge found that Natarajulu died undivided and that therefore Narayanaswami was entitled to all the family

properties by survivorship, he held that the sale by the second defendant (the mother) to the fifteenth defendant was good as there was no objection to it by Narayanaswami. The Subordinate Judge allowed the claims to priority made by defendants 4, 5, 6 and 15 and in other respects allowed the suit, decreeing interest at the contract rate, only up to the date of decree and not up to the date fixed for payment. Plaintiffs preferred this appeal.

S. Varadachariyar and *C. A. Seshagiri Sastri* for appellants.—Though one of two members of a joint Hindu family sells his share in most of the family properties to the other member, he does not thereby become separate from the other; and the right of survivorship as between the two is not thereby lost; *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(1), and *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*(2). Even if they became divided by that sale, the purchaser by undertaking to pay the vendor's debts as consideration for the sale, becomes liable to pay the debts not only out of the properties sold to him but also out of his own properties; for he is in the position of a universal donee. If the vendor had to pay certain mortgage debts which the purchaser undertook to pay out of the consideration, then the purchaser by paying those mortgages, cannot claim priority by subrogation as against later mortgagees; *a fortiori* if he pays only some of them, as in this case; *Narayanasami Naidu* v. *Narayana Rau*(3), *Srinivasa Chari* v. *Gnanaprakasa Mudaliar*(4), *Govindasami Tevan* v. *Doraisami Pillai*(5), and *Muhammad Sadiq* v. *Ghaus Muhammad*(6). If the purchaser is not entitled in such a case to any priority, an alienee from him who is directed by the purchaser to pay the mortgages will be in no better position, by paying only the earlier mortgages; *Bisseswar Prosad* v. *Lala Sarnam Singh*(7). Interest at the contract rate should be awarded not only up to the date of decree but also up to the date fixed for payment.

L. A. Govindaraghava Ayyar and *P. N. Appuswami Ayyar* for the mother (second defendant).—The sale by one member

(1) (1902) I.L.R., 25 Mad., 690 at 717. (2) (1914) I.L.R., 39 Mad., 265.
(3) (1893) I.L.R., 17 Mad., 62. (4) (1906) I.L.R., 30 Mad., 67.
(5) (1910) I.L.R., 34 Mad., 119. (6) (1910) I.L.R., 33 All., 101.
(7) (1907) 6 C.L.J., 134.

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to the other effects a division in status; *Sivagnana Thevar* v. *Periasami*(1), *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru*(2), *Balakrishna Trimbak Jendulkar* v. *Savitribai*(3) and *Peddayya* v. *Ramalingam*(4). A purchaser of the equity of redemption is not personally liable to pay the balance due on a mortgage; *Nanku Prasad Singh* v. *Kamta Prasad Singh*(5) and *Jumna Dass* v. *Ram Autar Pande*(6). He explained and distinguished the cases quoted by the appellant.

K. Rajah Ayyar and *V. Ramaswami Ayyar* for fourth respondent (alienee from the purchaser).—A third party to an undertaking cannot take advantage of it. Payment of the earlier mortgage gives a right of subrogation and therefore a right to priority as against later mortgages; *Thorne* v. *Cann*(7). It is a question of intention of the person paying a prior mortgage, whether he means to keep alive that mortgage; the presumption being that he does so intend as it is for his benefit, though the payment is out of the consideration for the sale; *Dinobundhu Shaw Chowdhry* v. *Jagmaya Dasi*(8); *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*(9), and *Satnarain Jewari* v. *Chowdhuri Sheobaran Singh*(10). As there is no covenant running with the land, an assignee from the person covenanting, but not fulfilling his obligation in full is in a better position than the person who covenanted; *Thorne* v. *Cann*(7). The reason is that the covenant is only personal; *Ayyareddi* v. *Gopalakrishnayya*(11), *Kasim Moideen Rowther* v. *Annamalai Thevan*(12). Intention at the time of the covenant may be different from the one at the time of payment and the latter was given effect to in *Har Shyam Chowdhuri* v. *Shyam Lal Sahu*(13).

JUDGMENT.

RAMESAM, J.

RAMESAM, J.—The suit out of which this appeal arises was filed on the basis of a mortgage bond, dated the 5th March 1914, executed by the first defendant in favour of one Subrahmanyam Chettiyar, who was the son of the

(1) (1878) I.L.R., 1 Mad., 312 at 325.
(2) (1881) I.L.R., 4 Mad., 250.
(3) (1878) I.L.R., 3 Bom., 54.
(4) (1888) I.L.R., 11 Mad., 406.
(5) (1923) A.I.R., 54 (P.C.).
(6) (1911) I.L.R., 34 All., 63 (P.C.).
(7) [1895] A.C., 11.
(8) (1901) I.L.R., 29 Calc., 154 (P.C.).
(9) (1911) I.L.R., 39 Calc., 527 (P.C.).
(10) (1911) 14 O.L.J., 500.
(11) (1923) I.L.R., 47 Mad., 190 (P.C.).
(12) (1909) 3 I.C., 936.
(13) (1915) I.L.R., 43 Calc., 69.

first plaintiff and the husband of the second plaintiff. At the time of the mortgage, the first defendant had a brother Natarajulu and they were undivided. The plaintiffs claim that the first defendant Narayanaswami was the manager of the family and the mortgage deed was executed for purposes binding on the family. The defendants denied these allegations and contended that the debt is not binding on Natarajulu's share. This point was found by the Subordinate Judge against the plaintiffs, and the plaintiffs who are the appellants before us do not attack this finding so far as the state of things existing at the date of the mortgage is concerned. A few months after the execution of Exhibit A (the suit mortgage), a suit was filed by Natarajulu for specific performance of an agreement to sell Narayanaswami's share of the family properties with certain other reliefs which it is unnecessary to mention. Exhibit C (1), dated the 2nd November 1914, is the plaint, and Exhibit C is the compromise decree passed in that suit, dated the 23rd November 1915. According to the said compromise decree, two of the items included in that suit were settled upon the first defendant's wife for life and all the other properties were to be sold to Natarajulu. In execution of this decree, a sale deed was obtained by Natarajulu through the Court. This is Exhibit C (2), dated the 30th November 1916. The consideration for the sale deed was Rs. 35,000 and the consideration was to be paid by the vendee undertaking to discharge various debts of the vendor. Sixteen debts were enumerated in the sale deed. It is necessary to make particular mention of some of these items. The first item is Narayanaswami's half share of the debt due on a mortgage bond, dated the 11th August 1909, executed by both the brothers (Exhibit V). The fourth item is a sum of Rs. 356-4-0 due wholly by Narayanaswami on a

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mortgage bond, dated the 10th March 1913 (Exhibit XVI). The fifth item is a sum of Rs. 821-4-0 due wholly by Narayanaswami on a mortgage bond executed by him on the 18th November 1913 (Exhibit XVI-*a*). The sixth item is a sum of Rs. 1,100 due wholly by Narayanaswami on a mortgage bond executed by him on 1st November 1913 (Exhibit XIV). The tenth item is a sum of Rs. 2,675 due wholly by Narayanaswami in respect of Exhibit A. It is unnecessary to refer to the other items. The plaintiffs now claim that Natarajulu's share of the properties also is liable to their debt, first, on the ground that after the death of Natarajulu in 1919, these properties survived to Narayanaswami and the mortgage, Exhibit A, is at least now binding on the whole of the properties and secondly on the ground that Natarajulu having undertaken to pay off Narayanaswami's debts by the sale deed, Exhibit C (2), it has become a personal obligation and he is liable to pay off the debt due to the plaintiffs out of the properties of the family and not merely Narayanaswami's properties. This is the first point argued in appeal, the point having been decided by the Subordinate Judge against the plaintiffs. The second point argued by the appellants is that certain alienees from Natarajulu or his mother, the second defendant, are not entitled to priority over the plaintiffs' mortgage on account of their having paid off certain mortgages of the first defendant earlier in date than the plaintiffs' mortgage. The last point argued in appeal relates to the rate of interest. The second defendant, the mother of the two brothers, claims to be interested in Natarajulu's half share of the properties not sold to the alienees.

Taking up the first point, one subordinate question that arises is whether after the sale deed, Exhibit C (2), the two brothers should be considered as divided or

still undivided. Mr. Varadachariyar, the learned Advocate for the appellants, relied on certain observations of BHASHYAM AYYANGAR, J., in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(1). The alienation in that case was by a member of a joint family in favour of a stranger and the point referred to the Full Bench was what fraction of the family property passed to the alienee by the sale deed. The observation relied on is at page 717. I do not think this observation helps the appellants. If a member of an undivided family sells the whole of his share in some of the family properties or part of his share in such properties but not in other properties, it may be that he continues undivided with the other members in respect of the properties other than those in which the whole or part of his share has been transferred and this is all that the observation at page 717 amounts to. It almost implies that so far as the properties in which the whole or part of the members' share is sold are concerned, he must be regarded as divided from the other members. But where the sale is not to a stranger but to the remaining members of the family the matter becomes much stronger. The observations at page 268 of *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*(2) do not go beyond what I have stated above and even if there are any observations in those two cases in favour of the appellants, their value must be discounted on the ground that these observations were made long before the decision of the Privy Council in *Girja Bai* v. *Sadashiv Dhundiraj*(3). In the present case, a careful examination of the terms of the compromise and the provision therein that certain items should go to the heirs of Narayanaswami, and the terms of the sale deed,

(1) (1902) I.L.R., 25 Mad., 690. (2) (1914) I.L.R., 39 Mad., 265.
(3) (1916) I.L.R., 43 Calc., 1031.

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Exhibit C-2, showing that some debts were taken as binding on both the brothers and others on Narayanaswami alone—all show the unmistakable intention that the brothers should thereafter be separate. So early as *Balakrishna Trimbak Jendulkar* v. *Savitribai*(1), such a conclusion was reached. We are of opinion that the finding of the Subordinate Judge on the second issue is unsustainable. On the facts of this case, the presumption of jointness is overwhelmingly rebutted. Therefore, there is no survivorship of the properties of Natarajulu to the first defendant.

It is next suggested that the effect of Exhibit C-2 is to make Natarajulu liable to pay the plaintiffs' debt out of the whole of the properties. In the first place, the sale deed is only of Narayanaswami's share of the properties. They are transferred to Natarajulu in consideration of his paying off Narayanaswami's debts. The only effect of the covenants in the sale deed is that Natarajulu is liable *as between himself and the vendor* to pay off all the debts of the vendor out of all the properties which were the subject of the sale, that is, Narayanaswami's share of the properties, and personally out of other properties of his own; but such a covenant cannot be taken advantage of by the creditors who are no parties to the sale deed and so far as creditors like the plaintiffs are concerned, their remedies are confined to the rights under their documents. The plaintiffs' rights are to sell the mortgaged properties under Exhibit A. It may be that if, by non-payment of plaintiffs' debt by Natarajulu, Narayanaswami was put to trouble of some kind, he can sue Natarajulu for damages by reason of the breach of the covenant; but apart from this, we cannot see how creditors like the plaintiffs can take

(1) (1878) I.L.R., 3 Bom., 54.

advantage of the covenant. Nor can we read anything in the terms of the sale deed to show an undertaking by Natarajulu that he will pay off all the vendor's debts out of the whole of the family properties. On the other hand, portions of the sale deed imply that some of the debts are not binding on Natarajulu at all and he is in no way liable for them and, in the case of other debts, he is liable only to the extent of his half share. It is impossible to spell out of these terms an undertaking of Natarajulu in respect of his own share of the properties for Narayanaswami's share of the debts enuring to the benefit of creditors. The analogy of universal donee is invoked by the learned Advocate for the appellants, but we are not able to say that this analogy helps him. We are, therefore, of opinion that the plaintiffs can recover their debts only out of the half share of Narayanaswami in the mortgaged properties.

The next question that arises is whether certain of the alienees are entitled to priority over the plaintiffs' mortgage. The following table shows the parties claiming such priority over the plaintiffs, the items in the plaintiffs' mortgage in respect of which the priority is claimed, the debts by reason of the payment of which such priority is claimed and the last column shows the amount to the extent to which the priority is claimed:—

Persons claiming priority. (1)	Items in respect of which priority is claimed. (2)	Prior debts paid. (3)	Amount to the extent to which priority is claimed. (4)
			Rs. A. P.
Fourth defendant ..	Numbers 1 and 2.	Exhibit V ...	4,500 0 0
Fifth and sixth defendants.	Number 15 ..	Exhibits XVI and XVI (a).	3,900 0 0
Fifteenth defendant ..	Numbers 8 and 14.	Exhibit XIV ...	5,500 0 0

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Mr. Varadachariyar, the learned Advocate for the appellant, argued first that as Exhibit C-2 provides for the payment of Narayanaswami's debts by Natarajulu, he can himself claim no priority if he pays some of these debts and does not pay others, and that being so, persons claiming through him can claim no such priority; and secondly, that in the sale deeds of Natarajulu in favour of the various alienees, they were asked to pay the prior mortgages and therefore they cannot claim any priority. Now it is clear that where a mortgagor sells his property to a vendee requiring the vendee to pay off two or three prior debts of the mortgagor and if the vendee pays off only one of them, he cannot claim priority in respect of it over the others, though he may claim such priority in respect of some other debts the payment of which by him was not contemplated. This proposition was decided in *Govindasami Tevan* v. *Doraisami Pillai*(1) and both branches of the above statement are illustrated by the decision in *Har Shyam Chowdhuri* v. *Shyam Lal Sahu*(2). In the latter case, it was held that the vendee could claim priority in respect of the debt X and not in respect of the debts Y or Z. This proposition is conceded by the respondents. The question, however, arises how far this disability of the vendee applies to transferees from him. In *Bisseswar Prosad* v. *Lala Sarnam Singh*(3), it was held that the transferee also cannot claim such priority—vide the observations at page 139 of 6 C.L.J., 134, beginning with

"In our opinion, they do not, because they had constructive, if not, actual notice of the debt due to Muniram and of the circumstance that Prayag Lall had assumed payment of it . . . They are, consequently, not entitled to be subrogated to the

(1) (1910) I.L.R., 34 Mad., 119. (2) (1915) I.L.R., 43 Calc., 69.
(3) (1907) 6 C.L.J., 134.

rights of the mortgagee of the 28th May 1889, whose debt they satisfied."

In the present case, a perusal of Exhibit C (2) shows the position undertaken by Natarajulu, and all his vendees must be taken to have actual or constructive notice of Exhibit C (2); that is the title deed of their vendor and they cannot pretend ignorance of its contents. No case has been cited to support the contention of the respondents that the transferees stand in a better position than the transferor. There is no analogy between the relative positions of such transferor and transferee and the relative position of the mortgagor and his first transferee who would be transferor as against a second transferee. The relative rights between the two sets of parties are entirely different. The effect of the sale deed, Exhibit C (2), is to calculate all the debts of Narayanaswami up to a particular date and to make them stand on the same footing as on that date. The description of the various items of consideration show that all the debts were calculated up to the 5th October 1914 and the total amount of consideration, Rs. 35,000, was made up as on that date, and neither in the hands of Natarajulu nor in the hands of transferees from him can there be any priority between these various debts, whatever their original dates might have been. It is unnecessary to deal with the larger contention of Mr. Varadachari that wherever there is a covenant by the vendee to pay off a prior debt of the mortgagor, there can be no priority in respect of it. The authorities relied on by Mr. Rajah Ayyar, for example, *Satnarain Jewari* v. *Chowdhuri Sheobaran Singh*(1) and *Chidambara Nadan* v. *Muni Nagendrayyan*(2), show that no such broad proposition can be insisted on and it is safer to rest the decision in each particular case on the

(1) (1911) 14 C.L.J., 500. (2) (1920) 12 L.W., 393.

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particular intention in that case derived from the facts and not upon any general formula of that kind. But so far as transferees from the first transferee are concerned, there can be no question of their intention, for they stand in no better position than their transferor and it is unnecessary to examine their intention. After all, the rights conferred upon transferees who pay off prior mortgages for using such prior mortgages as a shield are the result of an equitable doctrine in spite of the fact that the mortgages are extinguished, and where a transferor by reason of his covenants and the transferee by reason of a notice of the transferor's covenants show a different intention, there is no scope for the application of such an equitable doctrine. The decisions in *Kasim Moideen Rowther* v. *Annamalai Thevan*(1), and in *Thorne* v. *Cann*(2), do not help the respondents. I therefore hold that the respondents mentioned in the above table cannot claim priority over the plaintiffs' debt in respect of the half share of Narayanaswami's debt under Exhibit V and the other debts of Narayanaswami and the other bonds mentioned in the table.

The other point which arises in the case is the question of interest. There is no dispute about this. The plaintiffs are entitled to the contract rate up to the date mentioned in the decree for payment, namely, the 10th April 1924. The Subordinate Judge allowed it up to the date of the decree and thereafter at 3 per cent per annum. The appellants will be allowed interest at the contract rate up to 10th April 1924, and on the consolidated amount from that date at 6 per cent up to date of payment.

The decree will be modified according to the second and third of the above findings.

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(1) (1909) 3 I.C., 936. (2) [1895] A.C., 11.

The appellants will pay the costs of the second defendant, Govindammal. The appellants will be entitled to proportionate costs on the amounts in respect of which there is a dispute as to priority from the fifth and sixth (in whose place the fourth defendant has stepped in pending appeal) and from the fifteenth defendant respectively but as to 4th defendant and Exhibit V, the appellants will be entitled to half the costs.

JACKSON, J.—I agree.

The question of the alienees' priority appears to me to be simply one of fact.

They knew that their vendor had undertaken to pay off the mortgages, and they knew that their own sales were effected in pursuance of that undertaking. There is no ground for presuming that with that knowledge they ever intended to keep alive the mortgages which they paid up; and I should find, as a matter of fact, that the idea never crossed their minds. No doubt, as observed in *Gokaldas Gopaldas* v. *Puran Mal Prem Sukhdas* (1), it may ordinarily be presumed that a man having a right to act in either of two ways has acted according to his interest. But that presumption of fact is rebuttable as shown in *Govindasami Tevan* v. *Doraisami Pillai*(2). If the party who pays off the mortgage suffers by the presumption not being in his favour, he has only himself to thank for not committing his intention to paper. Although the intention to keep a mortgage alive need not be formally expressed in India, nevertheless such formal expression by way of deed would save parties considerable confusion, litigation and expense.

N.R.

(1) (1884) I.L.R., 10 Calc., 1035. (2) (1910) I.L.R., 34 Mad., 119.