

## APPELLATE CIVIL.

*Before Mr. Justice Ramesam and Mr. Justice Jackson.*

UNNAMALAI AMMAL (PLAINTIFF), APPELLANT,

v.

GOPALASWAMI CHETTI AND OTHERS (DEFENDANTS  
1 TO 3), RESPONDENTS.\*

1930,  
April 28.

*Transfer of Property Act (IV of 1882), sec. 81—Marshalling—Contribution—Purchaser in execution of money-decree against mortgagor of plot not mortgaged to puisne mortgagee—Payment by him of the decree amount of first mortgagee—Purchaser of plot mortgaged to both mortgagees in execution of decree on the second mortgage—Right of former purchaser to contribution from the latter—Right of latter to marshall as against the former.*

Where two plots of land (A and B) were mortgaged to one person, and plot A alone was subsequently mortgaged to another, a purchaser of plot B in execution of a money-decree against the mortgagor, who paid off the full amount of the decree obtained by the first mortgagee on his mortgage, is entitled to contribution rateably from plot A in the hands of the puisne mortgagee who had also purchased it in execution of his decree on his mortgage; and the latter is not entitled to enforce his right of marshalling on plot B as against the former, under section 81 of the Transfer of Property Act.

SECOND APPEAL against the District Court of West Tanjore in A.S. No. 68 of 1925, preferred against the decree of the Court of the District Munsif of Mannar-gudi in O.S. No. 511 of 1923.

*B. Kuppuswami Ayyar* for appellant.

*A. V. Viswanatha Sastri* for first respondent.

*N. S. Rangaswami Ayyangar* for third respondent.

The JUDGMENT of the Court was delivered by

RAMESAM J.—The facts of the Second Appeal may be stated as follows:—The first defendant was the original

RAMESAM J.

\* Second Appeal No. 404 of 1927.

UNNAMALAI  
 AMMAL  
 v.  
 GOPALA-  
 SWAMI  
 CHETTI.  
 ———  
 RAMESAM J.

owner of the suit properties which are described in schedules A and B of the plaint. Both these sets of properties were mortgaged to Kuppuswami Pillai on the 20th June 1910, under Exhibit I. Afterwards the first defendant effected a second mortgage of the properties in schedule A only, and some other properties not in the suit, in favour of third defendant's father in 1914, by Exhibit E. The plaintiff obtained a money-decree in Small Cause Suit No. 8 of 1916 against the first defendant and in execution of the decree purchased the properties in schedule B by a sale certificate Exhibit IV, dated 6th August 1917. Afterwards, the second defendant in execution of a decree in Small Cause Suit No. 1238 of 1904 purchased in Court auction the properties in schedule A. In 1917 a suit was filed by the first mortgagee to enforce his mortgage impleading the first defendant, the plaintiff, the second defendant and the third defendant and a decree obtained on the 8th February 1919: Exhibit C. He applied for execution of the decree in July 1923. The plaintiff paid off the decree amount. The plaintiff now brings the suit for contribution against "A" schedule properties in the hands of the third defendant. It may be mentioned that the third defendant himself in 1922 filed a suit on his mortgage and obtained a decree and purchased the properties in execution of his own decree (Exhibit II). This was on the 8th February 1924. Both the lower Courts, holding that the third defendant has got the right of marshalling under section 81 of the Transfer of Property Act, denied the right of contribution and dismissed the plaintiff's suit. The District Munsif in his judgment referred to *Rajkeshwar Prasad Narain Singh v. Mohammad Khabil-ul-Rahman*(1). It is also relied on by the Advocates for the respondents before us. That

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(1) (1924) I.L.R. 3 Pat. 522.

decision and the decision in *Inderdawan Pershad v. Gobind Lall Chowdhry*(1), merely decide that the right of marshalling which a second mortgagee has got is not lost by the fact that he afterwards purchased in execution of his own decree. But the point with which we are concerned now is not whether the respondent is not entitled to the right of marshalling by reason of the fact that he has purchased in execution of his own decree but whether he has got the right of marshalling against a person in the position of the plaintiff. Section 81 of the Transfer of Property Act says that the right of marshalling exists against a mortgagor but not

UNNAMALAI  
AMMAL  
v.  
GOPALA-  
SWAMI  
CHETTI.  
RAMESAM J.

“so as to prejudice the rights of the first mortgagee or any other person who has acquired for consideration an interest in either property.”

As the section refers to the right of the second mortgagee to have the first mortgagee satisfied out of the property not mortgaged to the second mortgagee, it is clear that the time with reference to which the section is speaking is the time when the prior mortgagee seeks to realize his mortgage amount. If, at that time, there is already a person who has acquired for valuable consideration an interest in the property not mortgaged to the second mortgagee, then the right of marshalling does not exist. The section is, therefore, clearly in favour of the appellant. Primarily the right of marshalling is a right given against the mortgagor. Any further extension of the equity must be made very clear by the language of the statute. Halsbury's Laws of England, Vol. XXI, section 544, relied on by the respondent, is against him. It does not exempt the right of marshalling in express terms against purchasers. It allows it against mere judgment-creditors. This obviously refers to

(1) (1896) I.L.R. 23 Calc. 790.

UNNAMALAI  
 AMMAL  
 v.  
 GOPALA-  
 SWAMI  
 CHETTI.  
 ———  
 RAMESAM J.

judgment-creditors who had not become purchasers. The case cited in the foot-note "c", *Gray v. Stone*, refers to a case of judgment-creditors, who had not yet purchased before the question arose. The dictum of KAY L.J. in *Flint v. Howard*(1), viz., "It is not enforced against a mortgagee or purchaser of the other estate" supports the appellants. The right of the appellant not to be marshalled does not depend upon whether he had notice of the second mortgage. See Ghose on Mortgages, Vol. II, page 812. We think therefore that the Courts below have erred in dismissing the plaintiff's suit. The plaintiff is entitled to contribution. No finding has been given as to the amount to which the plaintiff is entitled. The Court will have to find the amount which can be rateably charged upon the properties in "A" schedule with reference to the value of the properties at the time of the first mortgage. The Court will submit its finding upon the fifth issue with reference to the above remarks with such incidental consideration of the third issue as may be necessary. Time one month after the re-opening of the High Court. Time for objections seven days.

K.R.

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(1) [1883] 2 Ch. 54 at 73.

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