

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

P. K. KRISHNAMURTHY CHETTIAR (THIRD DEFENDANT),
APPELLANT, 1932,
December 1.

2.

K. S. A. S. SATHAPPA CHETTIAR AND TWO OTHERS
(PLAINTIFF AND FIRST AND SECOND DEFENDANTS),
RESPONDENTS.*

Mortgage—Puisne mortgagee paying off earlier mortgage without knowledge of subsequent mortgage—Presumption.

When a puisne mortgagee pays off an earlier mortgage he must be presumed to intend to keep that mortgage alive against all subsequent mortgages, even though he had no knowledge at the time of payment of the existence of subsequent mortgages.

APPEAL against the decree of the Court of the Subordinate Judge of Kumbakonam in Original Suit No. 25 of 1924.

K. Rajah Ayyar and *V. Ramaswami Ayyar* for appellant.

K. Bhashyam Ayyangar for first respondent.

Second and third respondents were unrepresented.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The third defendant is the appellant. The question for decision in this appeal is whether he is entitled to the right of subrogation to the extent of Rs. 1,181-12-7, the balance of consideration on the first mortgage, which he has paid off.

MADHAVAN
NAIR J.

The facts are these:—The suit property was subject to four mortgages. The first mortgage is dated 20th November 1918. The third defendant has paid off the balance of the mortgage debt, namely, Rs. 1,181-12-7.

* Appeal No. 182 of 1926.

KRISHNA-
MURTHY
CHETTIAR
v.
SATHAPPA
CHETTIAR.
—
MADHAVAN
NAIR J.

The second mortgage is dated 22nd April 1921 and the mortgagee under it is the present plaintiff. The third mortgage with which we are not concerned is dated 30th November 1921, and the fourth mortgage dated 18th January 1922 is in favour of the third defendant, the appellant. Under this mortgage he had to pay from out of the consideration the balance of the first mortgage. He paid it on 19th January 1922. At that time he did not know of the existence of the plaintiff's mortgage and when he came to know of it he prosecuted the first defendant for "cheating". In the circumstances the appellant claims that he is entitled to the right of subrogation as against the plaintiff to the extent of the mortgage-debt which he has paid off. The lower Court disallowed the contention. The question has been dealt with in paragraph 11 of its judgment. The learned Subordinate Judge says :

"I do not think that an encumbrancer who in pursuance of the agreement between the mortgagor and the mortgagee pays a portion of the mortgage-money towards a prior mortgage is entitled to priority or subrogation of the prior mortgage rights."

Apparently the learned Judge treated the third defendant as an agent of the mortgagor in paying off the balance of the mortgage-debt and therefore he thought that the payment was on behalf of the mortgagor and not on behalf of himself. This ground of his decision is not tenable at all. In fact Mr. Bhashyam Ayyangar for the first respondent did not base his argument on this principle. His argument is this: that at the time when the payment was made the third defendant did not know of the existence of the plaintiff's mortgage and therefore it cannot be presumed that he intended to keep the first mortgage as a shield against the second mortgage of the plaintiff. It appears to us that the question is a very simple one and

has been decided once for all by the Privy Council in *Gokaldas Gopaldas v. Puranmal Premasukhdas*(1). In that case, their Lordships pointed out that a man having a right to act in either of the two ways, that is, either to extinguish or keep alive a mortgage, shall be presumed to have acted according to his interest. In this case the presumption should be that when the appellant paid off the prior mortgage he intended to keep that mortgage alive against all subsequent mortgages. But Mr. Bhashyam Ayyangar contends that the presumption should be held not to arise because he did not know at that time that the second mortgage existed. But the knowledge of the existence of the second mortgage is not a material consideration in pleading "the presumption", as has been held in *Gangadhara v. Sivarama*(2). In that case the learned Judges referred to the case, *Gokaldas Gopaldas v. Puranmal Premasukhdas*(1), and treated the presumption as a general one, the operation of which is not restricted by the question whether the man who makes the payment knew of the existence of the subsequent mortgage or not. The same conclusion was arrived at in *Andi Thevan v. Nagayasami Chettiar*(3). In *Chidambaram Nadan v. Muni Nagendrayyan*(4) it was held that a payment made by the subsequent mortgagee in discharge of a prior mortgage-debt cannot be considered to be a payment made on behalf of the mortgagor. These three decisions dispose of the ground on which the lower Court's judgment is based, and also the contention urged before us by Mr. Bhashyam Ayyangar. We therefore set aside the decree of the lower Court and declare that the appellant is entitled to get priority over the plaintiff's mortgage to the extent of the balance of the consideration which he has paid off with

KRISHNA-
MURTHY
CHETTIAR
v.
SATHAPPA
CHETTIAR.
MADHAVAN
NAIB J.

(1) (1884) I.L.R. 10 Calc. 1035 (P.C.).

(2) (1884) I.L.R. 8 Mad. 246.

(3) (1927) 55 M.L.J. 369.

(4) (1920) 39 M.L.J. 445.

KRISHNA-
MURTHY
CHETTIAR
v.
SATHAPPA
CHETTIAR.

reference to the first mortgage, that is, the sum of Rs. 1,181-12-7 together with interest.

The case will be remanded to the lower Court for passing a final decree giving the appellant priority in the manner indicated above. The appellant is entitled to costs here and in the Court below with respect to the amount on which he has succeeded.

The court-fee will be refunded.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

1932,
November 8.

JUGISTI MAHAPATRO (TRANSFEREE DECREE-HOLDER
AND PETITIONER), APPELLANT,

v.

KORADA MAGATA PATRO AND EIGHTEEN OTHERS

(ORIGINAL DECREE-HOLDER AND RESPONDENTS AND DEFENDANTS
TWO TO FIVE, SEVEN AND SIXTEEN, EIGHTEEN AND
TWENTY TO TWENTY-TWO), RESPONDENTS.*

Mortgage suit—Preliminary decree—Appeal from—Withdrawal of—Dismissal with costs—Final decree—Application for—Starting point of limitation for—Indian Limitation Act (IX of 1908), art. 181.

In a case where an appeal against a preliminary decree in a mortgage suit was filed but was withdrawn and dismissed with costs, an application for a final decree made within three years from the date of the order dismissing the appeal is not barred by limitation.

Abdul Majid v. Jawahir Lal, (1914) I.L.R. 36 All. 350 (P.C.), and *Batuk Nath v. Munni Dei*, (1914) I.L.R. 36 All. 284 (P.C.), distinguished.

APPEAL against the orders of the District Court of Ganjam, dated the 9th day of March 1928, in Interlocutory

* Appeal No. 286 of 1930.