

Thimmakkal Vs N. Kamakshi Ammal and Another

Court: Madras High Court

Date of Decision: Nov. 11, 1960

Acts Referred: Transfer of Property Act, 1882 " Section 32, 56, 67, 68, 81

Citation: (1961) ILR (Mad) 794

Hon'ble Judges: Jagadisan, J

Bench: Single Bench

Advocate: T.V. Balakrishnan, for the Appellant; V.C. Viraraghavan, for the Respondent

Final Decision: Allowed

Judgement

Jagadisan, J.

Rangan Chetti, the owner of two items of properties mortgaged them under a mortgage deed, exhibit A-1, dated 27th

December 1950, to secure a debt of Rs. 500 in favour of his sister Thimmakkal. On 4th April 1951, he sold one of the items mortgaged to

Kamakshi under a registered sale deed, exhibit B-4. Rangan Chetti died sometime in 1951 or 1952 leaving behind him as his heirs his two sisters

Thimmakkal, the mortgagee, under exhibit A-1, and another Lakshmi Ammal. Thimmakkal filed Original Suit No. 264 of 1955, on the file of the

District Munsif's Court, Kallakuriehi, seeking to enforce the mortgage in her favour, exhibit A-1, by bringing to sale the hypotheca. The first

Defendant in the suit is her sister Lakshmi Ammal who is jointly entitled along with her to succeed to the estate of Rangan Chetti. The second

Defendant in the suit was impleaded on the footing that he was a purchaser under the registered sale deed, exhibit B-3, dated 19th February 1951,

of another item of hypotheca from Rangan Chetti. The third Defendant was the purchaser under Exhibit B-4, Kamakshi, referred to above. The

first Defendant remained ex parte and Defendants 2 and 3 contested the suit. The Plaintiff subsequently gave up the second Defendant and the

third Defendant therefore became the only contestant. She contended that the mortgage sued upon was not supported by consideration, and that in

any event the Plaintiff was disentitled to sue, as her rights as a mortgagee became merged with the rights of the mortgagor inherited by her along

with her sister, the first Defendant.

2. The learned District Munsiff of Kallakurichi who tried the suit found that the mortgage was fully supported by consideration and that the Plaintiff

was entitled to sue upon the mortgage, and accordingly granted a preliminary mortgage decree in of the Plaintiff as prayed for.

3. The third Defendant preferred an appeal, Appeal Suit No. 92 of 1956, on the file of the Court of the Subordinate Judge of Cuddalore against

the said judgment and decree of the learned District Munsiff, and the learned Subordinate Judge reversed the decree and judgment of the trial

Court, and non-suited the Plaintiff. He found that the suit mortgage was supported by consideration only to the extent of Rs. 250, and that the

Plaintiff was disentitled to sue by reason of the merger of the rights of mortgagee and mortgagor in herself.

4. This second appeal has been preferred by the Plaintiff. When the second appeal was heard by me in the first instance, I called for a finding from

the trial Court on the following two questions: (i) Whether item 1 of the suit mortgage was sold by Rangan Chetti to the second Defendant in the

suit under exhibit B-3 and if not who was in possession of that item on the date of the suit and (ii) What was the market value of items 1 and 2 of

the suit properties on the date of the suit and on the date of the mortgage. Parties were given liberty to adduce fresh evidence.

5. The learned District Munsiff of Kallakurichi has now given a finding that item 1 of the suit mortgage was not sold by Rangan Chetti to the second

Defendant and that it was in the possession of the Plaintiff. He has further found the market value of the items 1 and 2 of the suit properties on the

date of the suit was Rs. 400 and Rs. 150 and on the date of the mortgage Rs. 350 and Rs. 250 respectively. This finding has not been challenged

before me by the parties to the appeal. The learned Counsel on both sides were heard after the return of the finding.

6. On behalf of the Appellant it was conceded that the finding of the learned Subordinate Judge holding that the suit mortgage was supported by

consideration only to the extent of Rs. 250 was correct. The only question that arises for consideration is whether the Appellant is entitled to any

relief in this suit and if so to what extent. The learned Counsel for the Respondent frankly submitted that he could not support the dismissal of the

suit by the lower Appellate Court. He submitted that he was entitled to the statutory right of marshalling as embodied in Section 56 of the Transfer

of Property Act. Section 56 of the Transfer of Property Act is as follows:

If the owner of two or more properties mortgages thorn to one person and then sells one or more of the properties to another person, the buyer is,

in the absence of a contract to the contrary, entitled to have the mortgage debt satisfied out of the property or properties not sold to him, so far as

the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for

consideration acquired an interest in any of the properties.

7. This Section in its present form was substituted for the original Section by the amending Act of 1929. Before the amendment the Section reads

as follows:

Where two properties are subject to a common charge and one of the properties is sold the buyer is as against the seller in the absence of a

contract to the contrary entitled to have the charge satisfied out of the other property so far as such property will extend.

8. The words "as against the seller" which occurred in the original Section have been omitted by reason of the amendment. This Section provides

for the right of marshalling the subsequent purchaser. Section 81 of the Transfer of Property Act provides for the right of marshalling by a

subsequent mortgagee. Where the owner of two or more properties having mortgaged them to one person, subsequently sells one or more of such

items to another person, the purchaser has the statutory right u/s 56 of the Transfer of Property Act, called marshalling to insist upon the mortgage

debt being satisfied out of the property or properties not sold to him. But the exercise of this right is subject to the condition that it must not

prejudice the rights of the mortgagee or of persons claiming under him, and that there should be no contract to the contrary.

9. The principle of the doctrine of marshalling is thus explained by Lord Hardwicke, in *Lanoy v. The Duke and Duchess of Athol* (1742) 2

Atkyns's Reports 444, 446:

It is the constant equity of this Court that if a creditor has two funds he shall take his satisfaction out of that fund upon which another creditor has

no lien.

10. The third Defendant in the present case being the purchaser of one of the items of the hypotheca, item 2 of the plaint schedule, is certainly a

person entitled to claim the right of marshalling u/s 56 of the Transfer of Property Act in view of the finding that the other item of the hypotheca,

namely, item 1 was not sold by Rangan Chetti to the second Defendant. If Rangan Chetti had been alive and had been impleaded in this suit as the

mortgagor there cannot be any defence to the right claimed by the third Defendant that the mortgage should be satisfied out of the properties not

sold to him as far as possible.

11. It must, however, be borne in mind that a mortgagee has undoubted right to recover the entire mortgage debt due and payable from every item

of the mortgaged property and he can choose the particular item of the hypotheca from which he can recover the mortgage amount. The

mortgagee has an absolute right to give up or release any portion of the mortgaged property from the mortgage and can enforce his claim against

the other properties.

12. In *Perumal Pillai v. Ravum Chettiar* ILR (1916) Mad. 968 a Full Bench of this Court held that a mortgagee voluntarily releasing from the suit a

portion of the mortgage property is not bound to abate a proportionate part of the debt and is entitled to recover the whole of the mortgage

amount from any portion of the mortgaged property.

13. In *Appayya v. Rangayya* ILR (1907) Mad. 419 it was held that a bona fide purchaser who purchased for value a portion of the mortgaged

property without notice of such mortgage had no right in a suit by the mortgagee to enforce his mortgage, to insist that the portion not sold to him

must be proceeded against first and that the portion purchased by him must be sold only for the balance if any due. It was pointed out in that

decision that under Sections 67 and 68 of the Transfer of Property Act the mortgagee is entitled to an order that the mortgaged property or a

sufficient part thereof should be sold on default of payment of the mortgage amount. This decision was given before the amendment of Section 56

of the Transfer of Property Act by the 1929 Amendment Act. The Division Bench pointed out that a purchaser cannot claim a right u/s 81 or

Section 56 of the Transfer of Property Act as the former applied only to a second mortgagee and the latter conferred such rights only "as against

the seller".

14. The question for consideration is whether Section 56 of the Transfer of Property Act, as it now stands, can prevent the mortgagee from

releasing the items of hypotheca not sold away by the mortgagor and stand in the way of his enforcing the mortgage as against the item sold by the

mortgagor. I am of opinion that Section 56 of the Transfer of Property Act does not operate to curtail and restrict the rights of the mortgagee to

recover the mortgage amount from all or any of the items mortgaged in any manner he likes. Section 56 of the Act can come into play only where

there are items of properties not sold away by the mortgagor available to the mortgagee to be proceeded against and not where the mortgagee has

given up his rights with regard to all the items of property except the properties sold away or where the mortgagee for other reasons is unable to

proceed against any item other than the property sold away by the mortgagor.

15. Reference may be made to the decision of this Court in *In re Muthammal* AIR 1938 Mad. 503 in which Pandrang Row, J., observed as

follows:

Marshalling implies the existence of two sets of properties one of which is subject to both the mortgages and the other is subject only to the earlier

mortgage. At the time when the doctrine was sought to be invoked in the present suit there were no two items of properties liable to be sold but

only one item, that is to say, Schedule I property. It is impossible for the Plaintiff in the present suit to risk for sale of Schedule II properties and it

follows therefore that it is not open to the Appellants to ask that they should be sold before Schedule I properties are sold.

16. In the present case the mortgagee, namely, the Plaintiff and the first defendant have jointly inherited the equity of redemption in respect of item

1 of the plaintiff schedule. The Plaintiff and the first Defendant are therefore co-owners in respect of this equity of redemption. The Plaintiff is clearly

disentitled to the extent of half the property comprised in item 1 to recover her mortgage money. She cannot sue herself and her own property to

recover what is due to her under the mortgage. By reason of this circumstance the third Defendant cannot put forward his rights of marshalling u/s

56 of the Transfer of Property Act so as to compel the Plaintiff to sell her half share in item 1 of the hypotheca. Under the very terms of that

Section the right of marshalling cannot be availed of if the exercise of that right will prejudice the rights of the mortgagee. The utmost that the third

Defendant will be entitled to by virtue of Section 56 of the Act is to claim a right of marshalling so as to oblige the Plaintiff to proceed against half

of item 1 in the first instance to recover the mortgage amount due to her leaving her to recover the balance, if any, after such proceeding from and

out of item 2 of the property purchased by her.

17. The learned Counsel for the Respondent relied upon the decision in *Visivanatha Iyer v. Vengama Naidu* (1928) 19 L.W. 561, 575 as authority

for his contention that Section 56 of the Transfer of Property Act will bar the Plaintiff from proceeding against item 2 of the hypotheca. In that case

it was held that where an assignment of part of the mortgage security is made free from encumbrance, the assignee is not liable to contribute as

against the assignor to the payment of the mortgage debt. Venkatasubba Rao, J., referred to the following passage in the judgment of Christian L.

J., in *Ker v. Ker* (1869) Irish 4 Eq. 15:

The conclusions which I gather from *Herbert's case* (1584) 3 Rep. 11b. are the following : First, that the original principle of the common law was

equality, that is to say, contribution in the ratio of value, wholly irrespective of priority of dates of purchase; Second, that the case of the debtor

himself and his heir-at-law, in respect of retained lands, was an exception to that principle by reason solely of his personal liability and, that to such

exception it mattered not whether the purchasers were such with consideration or without it;

18. Venkatasubba Rao, J., then observed as follows:

The Transfer of Property Act enacts the rule in Section 32 and the exception in Section 56.

19. I am unable to see how this decision can help the Respondents to sustain his contention.

20. The second appeal is allowed and the judgment and decree of the lower Appellate Court is set aside. There will be a preliminary mortgage

decree in favour of the Plaintiff for the sum of Rs. 250 with interest thereon at 5 per cent throughout. The Plaintiff is directed to proceed against the

half of item 1 of the plaint schedule in the first instance to recover the decree amount. She will be entitled to proceed against the third Defendant

and item 2 purchased by him only for the balance that may remain due to her after proceeding against half of item 1 as aforesaid. The third

Defendant will be entitled to contribution in the event of item 2 being ultimately made to bear more than the proportionate share of the mortgage

liability. This will have to be worked out in a separate suit. The parties will bear their respective costs throughout. No leave. Time for redemption

six months.