

Narayanan Chetti and ors. Vs. Nallammal and ors.

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Court : Chennai

Decided On : Jul-21-1942

Reported in : AIR1942Mad635; (1942)2MLJ525

Appellant : Narayanan Chetti and ors.

Respondent : Nallammal and ors.

Judgement :

1. This second appeal has been placed before a Full Bench for decision, as King, J., before whom the appeal came in the first instance, considered that the judgment of this. Court in Sesha Aiyar v. Krishna Aiyangar : (1900)10MLJ383 . , on which the Courts below had relied required reconsideration. In order to appreciate the application of Sesha Aiyar v. Krishna Aiyangar : (1900)10MLJ383 . , it is necessary to state the facts in the present case.

2. On the 28th June, 1927, one Swaminatha Aiyar mortgaged immovable property to the grandfather of the plaintiffs to secure the sum of Rs. 3,000. On the 14th December, 1928, the mortgagor conveyed to his daughter the eastern portion of the property. She took it, of course, subject to the mortgage of the 28th June, 1927. On the 4th November, 1929, the mortgagor borrowed Rs. 700 from the plaintiffs' grandfather on the security of a second mortgage of the western portion. On the 24th April, 1934, the 2nd defendant bought the western portion in a Court auction, subject to the two mortgages which Swaminatha Aiyar had created. On the 30th May, 1934, Swaminatha Aiyar's daughter conveyed her interest in the

eastern portion to the 1st defendant. On the 6th September, 1934, the plaintiffs' father, the grandfather being dead, assigned the mortgage of the 28th June, 1927, to one Chidambaram Chettiar, who filed O.S. No. 227 of 1934 in the Court of the Subordinate Judge of Devakottai to enforce payment. On the 2nd April, 1935, a preliminary decree was passed in favour of Chidambaram Chettiar and a final decree followed on the 19th September, 1935. On the 27th October, 1935, the plaintiffs and their father separated and the second mortgage which Swaminatha Aiyar had created on the western portion of the property in suit fell to the plaintiffs' share of the family properties. On the 24th August, 1936, in execution of the mortgage decree obtained by Chidambaram Chettiar, the western portion was sold for Rs. 8,883-6-0 and bought by the 1st defendant. The price realized was sufficient to discharge the first mortgage, but only Rs. 155-13-2 remained and this was not sufficient to discharge the second mortgage. On the date on which the preliminary mortgage decree was passed in favour of Chidambaram Chettiar there was due on the second mortgage the sum of Rs. 1,294-8-0. On the 26th March, 1938, the present suit was filed to recover Rs. 1,600 from the 1st defendant as the owner of the eastern portion. The plaintiffs' case was that as the first mortgagee had not brought the whole of his security to sale she was liable under Section 82' of the Transfer of Property Act to make contribution.

3. Section 82 of the Transfer of Property Act was amended in 1929. Before the amendment the first paragraph of the section read as follows:

Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any, other incumbrance to which it is subject at the date of the mortgage.

This paragraph now reads as follows:

Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for

the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.

In deciding *Sesha Aiyar v. Krishna Aiyangar* : (1900)10MLJ383 , the Court was concerned with Section 82 as it stood before the amendment, but the amendment makes no material change so far as this case is concerned : Now the section expressly refers to a case where the mortgaged property is subsequently divided into shares held separately and not merely to a case where several properties are mortgaged, and it is placed beyond question that the valuation for purposes of contribution shall be that at the date of the mortgage. Both before the amendment and now the liability to contribute is a liability which is imposed upon the land and therefore is not a personal liability.

4. At this stage it will be convenient to state the facts in *Sesha Aiyar v. Krishna Aiyangar* : (1900)10MLJ383 , Certain immovable properties were mortgaged to one Rangayya Goundan. Later some of the lands comprised in the mortgage were, with other lands, mortgaged to the plaintiffs. After the second mortgage had been created Rangayya Goundan obtained a decree on his mortgage and in execution the portion of his security which was subject to the second mortgage in favour of the plaintiffs was sold. As in the present case the amount realised was sufficient to satisfy the full claim of the first mortgagee, and consequently the execution proceedings were carried no further. The mortgagors subsequently sold the surplus security to certain of the defendants. The plaintiffs then instituted the suit which gave rise to the appeal. They based their claim in the first place on the mortgage, and in the second place they claimed contribution from the holders of the properties which were not sold in execution. Shephard and Davies, JJ., who heard the appeal, held that Section 82 did not apply and therefore the plaintiffs were not entitled to any contribution. The basis of their decision is to be gathered from the following passage in their judgment which is to be found at page 107 of the report:

The first paragraph' (of Section 82) 'does not provide for the keeping alive of the lien after the mortgage debt has been paid, for it merely declares the manner in which the debt shall be borne by the several properties. It would come into effect when the administration of the estate of the mortgagor was under consideration and may be taken to recognise a lien possessed by the person who, being interested in one of the mortgaged properties, pays off the debt and so acquires a right of contribution; but we do not think that the section gives any further right. In the present case the plaintiffs who certainly cannot be in a better position than they would be if they had simply bought part of the mortgaged property subsequently sold under Bangayya Goundan's decree, had their opportunity, and they might, by paying off the debt and saving the property from sale, have acquired a right of contribution secured by a lien on the other property.

In other words, persons in the position of the present plaintiffs do not come within Section 82 unless they pay off the first mortgagee. The section certainly does not say this, but before taking the matter further we will examine some of the authorities quoted to us in the course of the arguments.

5. The first of these cases is the Bench decision of this Court in *Ramabhadrachar v. Srinivasa Aiyangar* I.L.R. (1900) Mad. 85. , where Section 82 was correctly applied. There a joint family consisted of a father and three sons. The father mortgaged certain lands and subsequently the family became divided. By the terms of the partition the father and his sons each took a fourth share in the family estate and each became liable for a fourth of the mortgage debt. One of the sons sold the greater portion of his share in the mortgaged property to the plaintiff, to whom he gave a bond and mortgaged other lands to secure the plaintiff from loss should the original mortgagee bring the property subject to the mortgage to sale. The mortgagee sued to enforce his mortgage and obtained a decree, whereupon a portion of the hypotheca was sold, and the portion sold included the property which the plaintiff had bought. The proceeds of sale proved sufficient to discharge the mortgagee's decree, whereupon the plaintiff sued upon his security bond, and the land hypothecated to him was sold. As the result of this the plaintiff received the amount secured by the bond. It was not sufficient to discharge the debt due to him and he brought a suit under Section 82 of the Transfer of Property Act in

which he claimed rateable contribution from the portions of the mortgaged property which had not been sold to satisfy the mortgagee's decree. The Court held that he was entitled to recover and that his right to rateable contribution was in no way affected by the security bond or the payment which he had received thereunder. It was contended that the arrangement between the father and the sons under which each son took a fourth share of the family estate, each being liable for a fourth of the mortgage debt created by the father, precluded the application of Section 82, but the Court held that the words 'in the absence of a contract to the contrary' in that section apply to contracts between a mortgagor and a mortgagee and that an agreement binding only as between the mortgagors is not a contract to the contrary within the meaning of the section. The facts in that case are different from the facts in the present case and those in *Sesha Aiyar v. Krishna Aiyangar* : (1900)10MLJ383 . , but Madhavan Nair, J., in *Raghavachari v. Venkatamarayana Reddi* (1934) 41 L.W. 416. , criticized *Sesha Aiyar v. Krishna Aiyangar* : (1900)10MLJ383 . on the basis of the judgment in *Ramabhadrachar v. Srinivasa Aiyangar* I.L.R. (1900) Mad. 85.

6. The Allahabad High Court has indicated its dissent from the judgment in *Sesha Aiyar v. Krishna Aiyangar* : (1900)10MLJ383 , in more than one case. In *Ibn Hasan v. Bribhukan Saran* I.L.R. (1904) All. 407. Banerji, J., said that he could see no distinction in principle between a case where the payment in respect of which contribution is claimed is made to avert a legal process and a case in which payment has been enforced by sale of the property of the claimant for contribution. In both cases his claim is based upon the ground that his property has contributed more than what it is liable for, and that the defendant is benefited thereby. These remarks were prefaced by the statement that he was unable to agree with the view of the learned Judges who had decided *Sesha Aiyar v. Krishna Aiyangar* : (1900)10MLJ383 . Stanley, C.J., in *Muhammad Yahiya v. Rashid-ud-din* I.L.R. (1908) All. 65. , pointed out that the right to contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that other property alone. The decision in that case certainly runs counter to that in *Sesha Aiyar v. Krishna Aiyangar* : (1900)10MLJ383 .

7. The governing factor here is what Section 82 of the Transfer of Property Act says, and the learned Judges who decided *Sesha Aiyar v. Krishna Aiyangar* : (1900)10MLJ383 . had not sufficient regard to its wording. That decision if allowed to stand would mean that persons in the position of the plaintiffs would lose everything unless they were sufficiently well off to discharge the prior mortgage. It would not only be most unjust, but it would mean inserting into the section a provision which is not there and a provision which runs, counter to its tenor. In order to avoid this conclusion Mr. Rajah Aiyar, who represents the respondents, has suggested that a second mortgagee is in the position of a mortgagor and a mortgagor cannot claim contribution. A second mortgagee does not stand in the shoes of a mortgagor. Where there is a second mortgage, the second mortgagee holds a mortgagee's interest in the property and the fact that some other person has previously received a mortgagee's interest does not detract from the nature of his interest. When a person agrees to lend money on the security of a second mortgage of a portion of the property he knows that the first mortgagee has the benefit of the whole of the property, and that the first mortgagee, if he calls in the mortgage loan, will have the right to cause the whole of the hypotheca to be sold. If the first mortgagee does not cause the whole of the hypotheca to be sold, the second mortgagee has the right, as the section stands, to call upon the holder of the unsold portion to contribute his share of the principal debt. All that persons in the position of the present plaintiffs ask is that the holder of the unsold portion of the hypotheca shall bring into Court the proportion of the amount of the first mortgagee's debt which is allottable to the portion held by him. In our opinion the plaintiffs as the second mortgagees of the western portion have an interest in the portion sold and come within the principle stated by Stanley, C.J., in *Muhammad Yahya v. Rashid-ud-din* I.L.R. (1908) All. 65.

8. For the reasons given we consider that *Sesha Aiyar v. Krishna Aiyangar* : (1900)10MLJ383 . was wrongly decided. The appeal will be allowed, which means that the case will be sent back to the trial Court to ascertain the amount which the plaintiffs are entitled to recover by way of contribution from the 1st defendant.

9. The plaintiffs are entitled to their costs here and below.

