

Ummachakutti and ors. Vs. C. Ummerkutti Haji and ors.

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Court : Chennai

Decided On : Apr-16-1915

Reported in : AIR1916Mad649(2); 29Ind.Cas.583

Judge : Oldfield and ;Tyabji, JJ.

Appellant : Ummachakutti and ors.

Respondent : C. Ummerkutti Haji and ors.

Judgement :

1. This appeal is argued on the ground that in setting the assignment aside the lower Courts should have given the defendants Nos. 2 to 6 a charge for Rs. 500, the amount of Exhibit III. We think that appeal ground No. 10 in the lower Appellate Court was intended to raise this point, and we are not prepared to assume that it was abandoned there. Whether defendants made any payment for Exhibit III, and whether they are entitled to a charge in virtue of it, are questions on which the lower Appellate Court must now submit findings, as regards the latter with reference to Palamalai Mudaliyar v. South Indian Export Co. La. 5 Ind. Cas. 33 : (1910) M.W.N. 239. The findings are due in six weeks; seven days will be allowed for SUn g objections.

2. In compliance with the above order of this Court, the District Judge of South Malabar submitted the following.

3. Findings.--It is directed that findings. be returned on the questions

4. (1) Whether defendants made any payment for Exhibit III and

5. (2) whether they are entitled to a charge for it with reference to Palamalai Mudaliyar v. South Indian Export Co. Ltd. 5 Ind. Cas. 33 : 33 M.P 334 : 7 M.L.T. 167 : 20 M.L.J. 211 : (1910) M.W.N. 239.

6. On the first question the evidence of payment is that of the 4th and 5th witnesses for the defendants. The 4th witness who attested the document of sale by the first defendant (Exhibit II) says that Rs. 400 were paid to Ayissumma on the date of Exhibit II and that she gave a receipt. He did not actually witness the receipt being given but saw the payment being made.

7. The 5th witness who attested the mortgage in favour of Ayissumma (Exhibit III), also states that she saw the payment made and Ayissumma giving a receipt. Both witnesses agree as to the source from which the money came but differ in details. The receipt (Exhibit VII) for Rs. 400 by Ayissumma to the 1st defendant and others is registered. On the whole I think that the payment of Rs. 400 is proved and find on the first question that Rs. 400 were paid towards Exhibit III.

8. On the second question, in Palamalai Mudaliyar v. South Indian Export Co. Ltd. 5 Ind. Cas. 33 : 33 M.P 334 : 7 M.L.T. 167 : 20 M.L.J. 211 : (1910) M.W.N. 239 it was held that since the transferee had discharged a valid mortgage previously binding on the property, it would not be equitable to give the plaintiffs the relief for which they asked, except upon the terms of giving the defendant a charge for the Rs. 7,500 which he had expended in discharging a mortgage-decree against the suit property. In the present case, however, no complete but only a partial discharge of the mortgage evidenced by Exhibit III has been effected by the payment of Rs. 400, and it has been held that there can be no subrogation if any part of the debt remains unpaid. Ourdeo Singh v. Ghandrika Singh 1 Ind. Cas. 913 : 36 C.P 193 : 6 C.L.J. 611 (Ghose on the Law of Mortgage, 4th Edition, page 332). In this view I find on the second question that the defendants are not entitled to a charge for the payment of Rs. 400.

9. This second appeal coming on for final hearing on the 8th April 1915, after the return of the finding of the lower Appellate Court upon the issues referred by this

Court for trial and having stood over for consideration till this day, the Court delivered the following

10. Oldfield, J.--On the lower Appellate Court's finding of fact, which we accept, the case stands thus. The plaintiff sues for a declaration that the suit property is liable to attachment in execution of his money-decree against the 1st defendant. The defence is a prior conveyance of the property to defendants Nos. 2 to 6 by Exhibit II. That defence was rejected with reference to section 53 of the Transfer of Property Act. But we were then asked to hold that, as Rs. 400 out of the total consideration of Rs. 1,000 for Exhibit II is found by the lower Appellate Court to have been actually paid towards discharge of a mortgage, Exhibit III, 2nd to 6th defendants (of whom 2nd and 6th defendants are the appellants) are entitled to a charge on the suit property for the amount they paid, the equitable principle referred to in *Palamalai Mudaliyar v. South Indian Export Co. Ltd.* 5 Ind. Cas. 33 : (1910) M.W.N. 239 being relied on. That was the point dealt with in second issue stated in our order of remand.

11. On that issue and the question it raised directly, whether the existence of bad faith, which vitiated Exhibit II, also deprived defendants Nos. 2 to 6 of the right to a charge for what they actually paid, the lower Appellate Court has said very little. But we read its finding as being that defendants Nos. 2 to 6 would be entitled to such a charge, but for the further distinct defect in their position that their payment of Rs. 400 did not discharge Exhibit III, which was for Rs. 500, entirely. Argument here has proceeded on this interpretation of the finding, and we adopt it.

12. Dealing then with the contention that defendants Nos. 2 to 6 are not entitled to a charge, because they did not pay off the encumbrance, Exhibit III, entirely, we hold that it is irrelevant in these proceedings. It rests on *Hanumanthaiyan v. Meenatchi Naidu* 12 Ind. Cas. 412 : 35 M.P. 183 : (1912) M.W.N. 158 : 10 M.L.T. 380 : 22 M.L.J. 12. But the basis of that decision was the impossibility of working out the rights of the different persons, each of whom had contributed towards the discharge of the mortgage in question, when a distribution of the sale-proceeds between them had to be considered; and it was held that, as their rights could not be worked out, they could not participate. In this case, however,, at the stage it

has reached and as between the parties to it, among whom the mortgagee under Exhibit III is not included, no such conflict is in question; and for all that appears none ever need be, since defendants Nos. 2 to 6 may prevent it by agreeing with the mortgagee under Exhibit III as to the distribution of any amount realisable on it or by obtaining an assignment of her rights. In these circumstances, whatever considerations may arise when defendants Nos. 2 to 6 attempt to recover, the mere grant of a charge will not necessarily be within the mischief contemplated in *Hanumanthaiyan v. Meenatchi Naidu* 12 Ind. Cas. 412 : 35 M.P 183 : (1912) M.W.N. 158 : 10 M.L.T. 380 : 22 M.L.J. 12 and the lower Appellate Court's finding based thereon cannot be accepted.. This conclusion is consistent with that of Sandara Aiyar, J., in *Jaladanki Chinna Pitchia, In re* 11 Ind. Cas. 868 : (1911) 2 M.W.N. 152, though the case relied on by plaintiff was not referred to by him. We allow the second appeal to the extent that defendants Nos. 2 and 6 will be given a charge for Rs. 400 on the mortgage amount in virtue of their payment evidenced by Exhibit VII dated 12th November 1907, but dismiss it in other respects. In view of the extent to which defendants Nos. 2 and 6 have failed, we make no change in the orders of the lower Courts as to costs and direct the parties to bear their own in this Court.

13. Tyabji, J.--I agree.