

Mosur Subramania Sastri - - - - - *Appellant*

v.

Seshama Raju and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 18TH FEBRUARY, 1948

Present at the Hearing :

LORD NORMAND
LORD MORTON OF HENRYTON
SIR MADHAVAN NAIR

[*Delivered by* LORD MORTON OF HENRYTON]

This is an appeal from a judgment and decree of the High Court of Judicature at Madras dated the 31st March, 1944, which reversed a judgment and decree of the Court of the Subordinate Judge of Chittoor dated the 7th July, 1943.

The only question arising on the appeal is whether the appellant can properly claim, in the execution petition mentioned hereafter, an order for the sale of a village named Mylaravada. The Subordinate Judge has decided that he can, the High Court has decided that he cannot.

The facts of the case are not in dispute and are as follows: The village of Mylaravada belonged to the Raja of Karvetnagar. On 2nd February, 1882, he effected a mortgage covering this village and another village in favour of D. Krishna Reddi and D. Venkatarami Reddi for about Rs.33,000. On the 21st February, 1885, he created a second mortgage over the said villages in favour of the same persons for Rs.6,500. On the 6th March, 1891, he mortgaged for the third time the same properties to one Seshama Raju, who is the predecessor in title of the respondents, for Rs.7,500. On the 9th June, 1894, he created a fourth mortgage on the village of Mylaravada and many other villages in favour of Saravana Pillai and Gurusami Ayya for about Rs.54,000. Subsequently Saravana Pillai acquired the interest of Gurusami Ayya and became the sole mortgagee. Saravana Pillai in his turn effected sub-mortgages of the properties comprised in his fourth mortgage. One of these sub-mortgages was dated the 21st February, 1902, and was in favour of one Pedda Subbaraya Chetti. In 1921 the appellant acquired the sub-mortgage rights of Pedda Subbaraya Chetti.

On the 16th February, 1903, the third mortgagee Seshama Raju filed O.S. No. 7 of 1903 on the file of the District Court of North Arcot on his mortgage dated the 6th March, 1891. The prior mortgagees of 1882, and 1885, and also the fourth mortgagee Saravana Pillai were made defendants to this suit, but Saravana Pillai's sub-mortgagee Pedda Subbaraya Chetti was not made a defendant.

On the 28th March, 1904, the District Judge delivered judgment and passed a preliminary decree in favour of Seshama Raju. He held that the fourth mortgagee had "no rights or interests superior to those of the plaintiff" Seshama Raju. He ordered the village of Mylaravada to be sold, subject to a lien on the sale proceeds in favour of the 1st and 2nd mortgagees for Rs.15,382. On the 6th February, 1907, the decree was made final. On the 22nd December, 1916, the said village was sold in execution and the sale was confirmed on the 23rd February, 1917. The village was purchased by Narasaraju the son of Seshama Raju, the decree holder, for Rs.35,768. Of this amount a sum of Rs.15,382 was deposited in court to the credit of the 1st and 2nd mortgagees and the balance of Rs.20,385 was applied in payment of the decree debt of the 3rd mortgagee. Satisfaction of the decree in O.S.7 of 1903 was duly entered.

In 1917 the said Narasaraju sold the village in question to Papi Reddi and Venkata Subba Reddi, who created a charge for Rs.20,000 in favour of Narasaraju the vendor for the balance of the purchase money. This charge is still subsisting, and Venkata Subba Reddi has acquired the interest of Papi Reddi in the village. Thus, apart from the other proceedings about to be described, the title to the village in question would appear to be perfectly clear, Venkata Subba Reddi being the owner subject to the charge for Rs.20,000 just mentioned.

On 7th December, 1906, after Seshama Raju had obtained the preliminary decree already mentioned, the representatives of Saravana Pillai, the fourth mortgagee, brought Suit No. 33 of 1906 on their fourth mortgage. The suit was transferred to the subordinate Judge of Chittoor and was ultimately numbered as O.S. No. 18 of 1911. It is hereafter referred to as "the suit of 1911". In this suit Narasaraju, Ramaswami Raju and Appala Raju the then successors in title of Seshama Raju, the third mortgagee, were brought on the record as defendants 78-80. The reason for their being made parties was that these defendants had prior charges on certain villages, other than Mylaravada, which were included in Saravana Pillai's fourth mortgage. Schedule C to the Plaint purported to set forth the prior mortgages on the properties comprised in the fourth mortgage. The village of Mylaravada was mentioned in this schedule and reference was made to the second mortgage of 21st February, 1885, but curiously enough there was no reference to the first mortgage, or to the third mortgage of 6th March, 1891, in favour of Seshama Raju. Nor was there any mention in the Plaint of O.S. No. 7 of 1903. Pedda Subbaraya Chetti, the predecessor in title of the appellant as sub-mortgagee of the fourth mortgage, was made a defendant to this suit.

On the view which their Lordships take of this appeal, it is unnecessary to trace the somewhat complicated course of the suit of 1911. A final decree was passed in that suit on the 1st December, 1920. The effect of that decree, stated shortly, was that in default of payment of certain sums to the plaintiffs certain villages, including the village of Mylaravada, should be sold subject to certain prior mortgages expressly mentioned, which did not include the third mortgage on that village. It does not appear that the existence of the third mortgage was brought to the attention of the court at any stage of the proceedings, either by the plaintiffs or by the defendants 78 to 80 or by Pedda Subbaraya Chetti. It will be noted that, prior to the passing of the decree of 1920, the village of Mylaravada had been sold under the order of the court in O.S. No. 7 of 1903.

On the 6th June, 1921 Pedda Subbaraya Chetti the sub-mortgagee of the fourth mortgage assigned his sub-mortgage to the present appellant.

In 1926, the appellant filed a suit on his sub-mortgage, O.S. No. 1 of 1926, impleading only his mortgagors and in 1928 he obtained a decree for the sale of certain other properties sub-mortgaged to his assignor by Saravana Pillai. There was a direction in the decree that the appellant should give credit for any amount that he might recover in execution of the decree in the suit of 1911.

On the 1st December, 1932, the appellant instituted the execution petition giving rise to the present appeal in the Court of the Subordinate Judge of Chittoor, asking for sale, *inter alia*, of Mylaravada village in execution of the mortgage decree obtained in the suit of 1911.

He impleaded as defendants 157 people including the present respondents, who were then the successors in title of Seshama Raju, the third mortgagee.

In his Petition the appellant claimed, *inter alia*:—

(1) That the Petitioner's right to execute the decree in the suit of 1911 be recognised.

(2) That the villages mentioned in Schedule A of the decree (which included Mylaravada) might be sold subject to the prior rights expressly mentioned in the said decree.

(3) That the sale proceeds might be paid to the Petitioner, subject to the conditions mentioned in the decree in O.S. No. 1 of 1926.

21. By their Counter Petition dated the 30th June, 1939, the respondents stated, *inter alia*, the facts in regard to the orders made in O.S. No. 7 of 1903, the sale to Narasaraju under the decree of the Court and the subsequent devolution of title to Venkata Subba Reddi. They prayed that the village of Mylaravada should not be sold. The views taken by the Subordinate Judge and by the High Court respectively have already been stated.

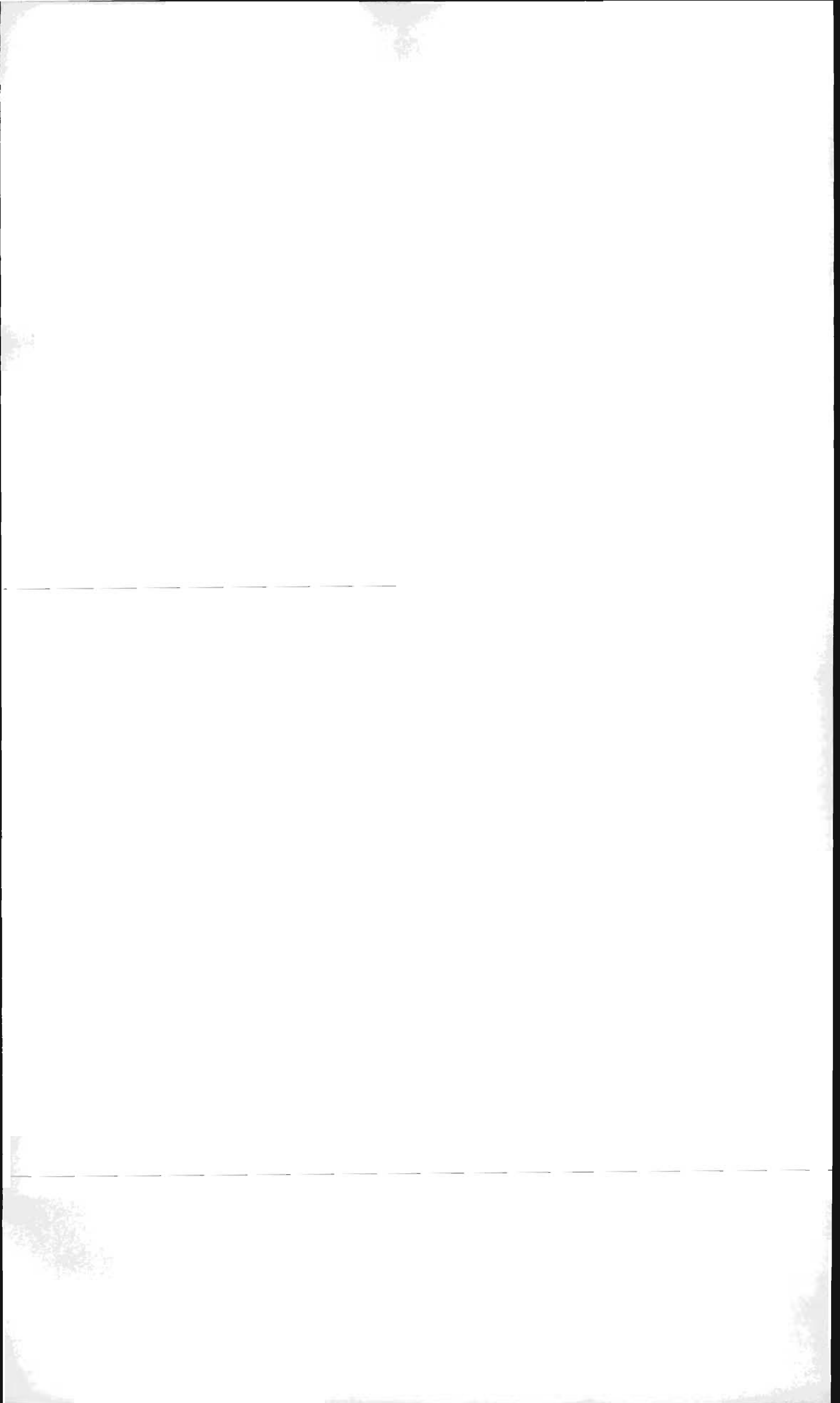
Their Lordships entertain no doubt that the claim of the appellant to have the village in question sold was wholly unfounded. That village was sold in 1916, pursuant to orders of the Court made in O.S. No. 7 of 1903. The purchase price of Rs.35,768 was duly paid and was applied in discharge of incumbrances ranking in priority to the fourth mortgage. The fourth mortgagee, Saravana Pillai, through whom the appellant claims, was a party to that suit, and the effect of the orders and the sale was to extinguish his charge on the village. These orders have never been rescinded or varied, and the validity of that sale has apparently never been challenged. Their Lordships are far indeed from suggesting that any application should be made for any of these purposes. In these circumstances, no order should have been made in respect of this village in O.S. No. 18 of 1911, which began after the preliminary decree of 28th March, 1904, had been passed. Their Lordships entertain no doubt that if, in the suit of 1911, the attention of the Court had been called to the orders made in the 1903 suit, the village of Mylaravada would have been excluded from the scope of the orders made in the suit of 1911.

Counsel for the appellant sought to rely upon the fact that in the suit of 1911 the predecessors in title of the respondents put forward no claim in respect of their third mortgage, or in respect of the orders made in O.S. No. 7 of 1903. He submitted that by reason of this fact, they were precluded, in the appellant's execution petition, from relying upon the third mortgage, or upon the orders made in the suit of 1903. A somewhat similar argument succeeded before the Subordinate Judge, but in their Lordships' view the argument has no substance. It is not necessary for the respondents to put forward any claim, as prior mortgagees or otherwise, in the present execution proceedings. They need only draw the attention of the Court to the orders made in the suit of 1903, and to the sale carried out pursuant to these orders. These orders, followed by that sale, constitute a complete bar to the sale now claimed by the appellant. The circumstances just stated distinguish the present case from all the cases relied upon by the Subordinate Judge and cited by counsel in support of this appeal.

Counsel further relied upon the fact that the appellant's predecessor in title as sub-mortgagee of the fourth mortgage, Pedda Subbaraya Chetti, was not made a party to O.S. No. 7 of 1903, although the sub-mortgage to him was dated 21st February, 1902. He contended that the sub-mortgagee ought to have been made a party, in accordance with the terms of Section 85 of the Transfer of Property Act, 1882, and that, as this was not done, the proceedings in O.S. No. 7 of 1903 are not binding on

the appellant as successor in title of the sub-mortgagee. Counsel for the respondents conceded that under the Statute of 1882 the sub-mortgagee ought to have been made a party, and it is necessary to consider the result of this omission. The fourth mortgagee, who was a party to the suit, could have preserved his rights as mortgagee only by redeeming the prior mortgages. This he failed to do, and his sub-mortgagee was not given any opportunity of redeeming, as he was not before the Court. For this reason, the Subordinate Judge in the present proceedings offered to give the appellant an opportunity to "redeem the prior mortgage" even at this late stage, but that offer was refused by the appellant. Their Lordships are prepared to assume, without so deciding, that the offer was rightly made; as it was made and refused, the omission to make the sub-mortgagee a party to the suit of 1903 in no way assists the present appeal. If the sub-mortgagee had been made a party to that suit, his rights could have been no higher than those of the fourth mortgagee, through whom he derived his title, and the rights of the fourth mortgagee ceased when he failed to redeem and the property was sold.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.



In the Privy Council

MOSUR SUBRAMANIA SASTRI

2.

SESHAMA RAJU AND OTHERS

DELIVERED BY LORD MORTON OF HENRYTON

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