In the High Court of Travancore Cochin at Ernakulam.

Before the Honourable Shri P.K.Subramonia,Judge and

the Honourable Shri Joseph Vithayathil,Judge.

A.S.No.13 of 1951.
O.S.No.296 of 1124,Quilon District Court.

Appellant- Plaintiff.

Venkitasubramonia Iyer Narayana Iyer,of Chootnara Kudathil, Kattakkakathu Cheri, Quilon.

By Advocate General Shri T.K.Subramonia Iyer.

Respondents-Defendants:

1. Chidambaram Achari Kolappan Achari of Sulluvilakathu Veedu, Varkala Desom, Varkala Pakuthy now undergoing imprisonment as a convict in the Central Prison, Trivandrum.

2. Aythean Kunju Ebrahim Kutty of Padamilathu outhen Veedu, Kaikulangara cheri, Quilon.

By Advocate Shri T.K.Narayana Pillai for 2nd Respondent.

This appeal suit coming on for hearing on 11-3-1954 the court on 17th March 1954 delivered the following:

Judgment.

(Delivered by Subramonia Iyer J:)

The suit against the decree in which this appeal by the plaintiff is brought was for enforcement of a hypothecation bond executed in his favour by the 1st defendant on 25-7-1123 (Ext.A)for Rs.2500/- to carry interest at 12%. The 2nd defendant is a hypothecatee from the first of the identical property as per a document of even date i.e 25-7-1123(Ext.1)for Rs.2000/-. The plaintiff claimed priority for his mortgage over that in favour of the 2nd defendant. The 2nd defendant retorted making a similar claim for priority for his mortgage. The court below upheld this plea and granted the plaintiff a decree for sale of the hypotheca subject to the liability under the mortgage in favour of the 2nd defendant. The question in appeal is whether either of the 2 mortgages has priority over the other and if so which or whether the 2 are co-equal mortgages operating simultaneously and payable pari passu.

The maxim de minimis non curant lex - The law does not concern itself about trifles,may apply and enable courts of justice not to take notice of transactions fractions of a day but not in cases where there are conflicting rights for the determination

of which it is necessary that they should do so. (Brooms Legal maxims 10th edition page 88). In the words of Fry.J. as he then was:

> "I think the law stands in this way, that when two deeds are executed on the same day, the Court must inquire which was in fact first executed first, but that if there is anything in the deeds themselves to show an intention, either that they shall take effect pari passu or even that the later deed shall take effect in priority to the earlier, in that case the Court will presume that the deeds were executed in such order as to give effect to the manifest intention of the parties" (Gartside v. Silkstone 21 Chancery division 762 at 767-8)

This rule has been followed by the courts in India and is well established. See 6 C.L.J.74; 21 I.C.602; A.I.R. 1921 M.693; 34 T.L.R. 61. Section 47 of the Indian Registration Act provides that:

> " A registered ~~judgment~~ document shall operate from the time from which it would have commenced to operate if registration thereof had not been required or made, and not from the time of its registration".

Fisher states the rule regarding the operation of contemporaneous instruments thus:

> "Where several instruments have been executed on the same day, priority will follow the order of execution, subject to any contrary intention appearing on the deeds, and an enquiry may be directed to ascertain the times of execution if uncertain" (Fisher on Mortgages 5th Edition 1931 Page 435).

The Question of priority between simultaneous mortgages is dealt with by Jones as under:

> "Where several mortgages are executed and recorded at the same time, whether the parties intended that one of them should have priority is a matter of fact for the jury to determine from the evidence of such intention. For the purpose of carrying such intention into effect the law will presume that the mortgage which was intended to be preferred was first delivered. Where mortgages on the same property are executed and delivered simultaneously to parties having knowledge of each other's rights, to secure debts of equal standing, and there is no evidence of intention to prefer one mortgage to the other, they are considered equal and concurrent liens, although not recorded simultaneously." (Jones on Mortgages 7th edition Vol:1 Page 987 para 707a).

The facts are short. The 1st defendant was in need of money and both the 2nd defendant and the plaintiff helped him by loans. The 2nd defendant was the first to lend Rs.2000/- on 1-2-1122 on a promissory note (Ext 2). The plaintiff followed and he lent Rs.1500 on 12-11-1122 also under a promissory note (Ext.B). On 15-7-1123 the 1st defendant borrowed Rs.1000 from the plaintiff whereon he paid the interest up to date due both to plaintiff and the 2nd

defendant upon the respective promissory notes to them. On that day 2 deeds of hypothecation were executed to the 1st defendant (Ext.1) in favour of the 2nd defendant and Ext.A) in favour of the x plaintiff. xx Both the documents were registered on the same day as Nos.2619 and 2620 respectively. Both the documents were written at the dictation of the same person, who was a registered document writer. Both the documents agree in that they purport to deal with unencumbered property. Each document refers to the other and the executant covenants in each that the liability under the other will be discharged by him. xx Ext.A gives Ext.1 the epithet ([illegible]) (has been executed while Ext.1 refers to Ext.A as ([illegible]) (is being executed). The title deeds of the property were delivered to the plaintiff and that fact is mentioned in his document, while nothing is stated about them in the 2nd defendant's mortgage.

At the trial both the parties examined themselves as witnesses and each swore that his document was executed first. Neither the first defendant nor the scribe of the documents was called. The court below reached the conclusion that the 2nd defendant was entitled to priority based merely on the language of the instruments which in its view indicated the sequence the expression ([illegible]) being in the past and the expression ([illegible]) being in its view in the future xxxx tense. The expression in Ext.I no doubt connotes a completed act and the expression in Ext.A may indicate a present as well as future act, but which in the context it would be more appropriate to interpret as meaning a present rather than a future act. The indication of sequence in the 2 documents does not, however, necessarily disclose an intention that the transactions should operate one after the other, because even when 2 documents are to have simultaneous operation, at their execution that is signing and delivery cannot be scientifically simultaneously which could be achieved only by some mechanical process. When 2 instruments have to be signed and delivered by a person there must necessarily be an interval between them albeit of a split second. It is only the physical fact of

such a sequence that is indicated by the expressions regarding execution contained in the two documents. On the evidence and circumstances in the case there can be no doubt that each party was aware of what was being done to the other and that the intention of all the concerned parties was that the mortgages should rank pari passu. In other words, the result must be as though one document was executed in favour of both the plaintiff and the 2nd defendant for the respective amounts payable to them securing the property which must have been deemed sufficient for the entire liability. This is clear from the fact that each document purports to create a mortgage over unencumbered property. Had Ext.1 preceded Ext.A the mention in the latter that the property secured thereby is unencumbered, is inexplicable. If Ext.1 was meant to be a second mortgage to Ext.A, which was yet to come into existence the mention of Ext.A in Ext.1 is equally inexplicable. It is only on the hypothesis that the 2 mortgagees were co-tenants or tenants in common and the amount due to them are payable pari passu that the 2 documents would be even be intelligible and on that view the reference to each document in the other fits in and the two together make a homogeneous whole. In our judgment, therefore it is impossible to construe the 2 documents A and 1 otherwise than as constituting parts of a single and simultaneous transaction and we hold that neither the plaintiff nor the 2nd defendant is entitled the priority over the other.

The question then is what is the decree to be passed. Each of the contending parties claims priority over the other. The truth has been ascertained and it favours neither party. The court ought to decide according to truth if discoverable from the evidence, though it may not accord with the case set up by either party, if that could be done without occasion in surprise, embarrassment, or prejudice, to either party that is to say in cases falling out of the ordinary rule enunciated by the Privy Council in (1) Natabehari Das v. Kanailal Das (39 Bom.L.R.748 P.C.), (2) Kishan Chandar Mission v. Ramachandra [illegible] (11 M.I.A. 7 at p.23) and by the Supreme Court in Trojan and Co. v. Nagappa Chettiar (1953) [illegible] 436 at p.442. The claim to a larger or

exaggerated relief as in this case is no reason to deny a party the smaller relief that he is found entitled to. The mortgages Ext.A and 1 being co-equal and as the security can be sold but once there can be only one suit which must be to enforce the entire claim. One of the co-claimants is, however, entitled to institute the suit making the other a defendant. The suit in the present case may be regarded as one to enforce plaintiff's mortgage along with that of the 2nd defendant. The question of court fee then arises. Plaintiff paid court fee only for the amount due to him and no court fee has been paid by the 2nd defendant for his claim. In such a situation, which usually arises in cases where a foreman secures his property for his liabilities under a chitty the proper procedure would be to allow the suit to be filed with a court fee for the amount claimed by the plaintiff, directing the other co-claimants defendants to pay court fee upon the amounts due to them and thereupon to pass the decree in favour of all the respective amounts due to each, as otherwise unnecessary hardship to the plaintiff and insurmountable difficulties would result obstructing administration of justice besides providing chances for collusion to defeat just claims. (See Suppiah Chettiar v. Suppiah Chettiar - 13 Cochin 483). We accordingly order that on the 2nd defendant filing a statement of his claim and paying court fee thereon within 3 months from this date, there will be a decree in his favour for the said amount along with the plaintiff appellant who has been given a decree for his amount, both claims being payable pari passu from out of the proceeds of the sale of the hypotheca. The costs of each party including costs of execution will first be appropriated by the respective parties and the balance would be paid pro-rata and if the proceeds are sufficient, then both the ~~six~~ claims would be discharged in full; otherwise, the balance can be realised from the first ~~plaintiff~~ defendant personally. Should, however, the proceeds leave a surplus after satisfaction of the claims of both the parties such surplus will belong, and will be paid over, to the first defendant. As regards costs in the special ~~[illegible]~~ circum -

circumstances we direct that the costs of both the parties including costs hereafter to be incurred by 2nd defendant by way of court fee do form part of the decree recoverable from the said hypothica and from the first defendant in person. Neither the plaintiff nor the 2nd defendant is rendered liable for the costs of the other. The appeal is allowed to the extent above indicated, and instead of the decree of the court below there will be a ~~decre~~ decree in the ~~x~~ suit in favour both of plaintiff and of 2nd defendant on the lines mentioned in this judgment. If the 2nd defendant fails to submit the statement of the claim and pay court fee thereon within the time specified or within such further time as the court below may allow, in that behalf, his claim will not be adjudicated and the decree will be confined to granting the claim of the plaintiff with all costs.

~~Joseph Vithayathil, J: I agree.~~

17th March 1954

Sd/- P.K. Subramonia Iyer, Judge.

I agree Sd/- Joseph Vithayathil, Judge.

(True Copy)

Compared by
[signature]

[signature]
Asst. Registrar for Registrar.

A.S.13 of 1951.

Judgment.