

(1942) 02 MAD CK 0011
In the Madras High Court

A. Rajagopala Aiyar and Others

APPELLANT

Vs

S. Ramachandra Aiyar

RESPONDENT

Date of Decision : 04-02-1942

Acts Referred:

Contract Act, 1872 — Section 126

Citation : AIR 1942 Mad 628 : (1942) ILR (Mad) 851 : (1942) 55 LW 417 :
(1942) 2 MLJ 406

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—This appeal arises out of a suit filed on. the original side of this Court by the respondent for the

redemption of a mortgage. The case presents some unusual features and it is necessary in order to appreciate the questions involved in the appeal

to state in detail the history of the case. The respondent's father, S. Subramania Aiyar, was indebted to the appellants' father, Ayyaswami Aiyar,

on two promissory notes. Ayyaswami Aiyar, died on the 14th September, 1919 and Subramania Aiyar on the 15th October, 1919. In 1920 the

appellants instituted a suit against the widow of Subramania Aiyar and D. Venkatarama Aiyar and M. Gopala Aiyar, who had been nominated by

him as the executrix and the executors of his will. On the 4th March, 1921, a decree was passed in favour of the appellants for Rs. 2,939-11-0. In

execution of that decree the appellants attached the property now in suit and bought it at the sale held in pursuance of an order of the Court passed

in the execution proceedings. The sale certificate was issued to them on the 22nd January, 1925 and the appellants obtained possession on the

14th May, 1925. The present suit was instituted by the respondent on the 14th

April, 1937.

2. The respondent's father had insured his life with the Gresham Life Assurance Society, Limited, and with the Oriental Government Security Life

Assurance Company, Limited." The assured assigned to his wife and the respondent, who is his eldest son, the policy issued by the former

company and the policy issued by the latter company to them and to his three other sons. In the Court below it was taken that the assignment of

the second policy was only to the sons of the assured, but we have allowed the appellants to put in an extract of the Assignment Register and this

establishes that the widow was also one of the assignees. Subramania Aiyar was indebted to a person named Johnstone and to a Mrs. Booth. To

Johnstone he owed Rs. 5,145-13-4 and to Mrs. Booth Rs. 7,000. To secure the debt to Mrs. Booth he mortgaged" to her the property now in

suit. On the 25th October, 1920, when the debt due to Mrs. Booth was discharged, there was owing Rs. 7,204-2-8. It is the respondent's case

that the debt was repaid to the extent of Rs. 4,000 out of the moneys received from the Gresham Life Assurance Society, Limited and the balance

of Rs. 3,204-2-8 out of the moneys received from the Oriental Government Security Life Assurance Company, Limited. The moneys obtained

from the two Insurance Companies did not form part of the deceased's estate. The policies having been assigned by the testator during his lifetime,

on his death the assignees became entitled to receive payment by reason of the assignments, not by reason of his will. On the ground that the

mortgage in favour of Mrs. Booth was discharged out of the moneys received from these insurance companies in which he had an interest, the

respondent claims that he is entitled to the benefit of the security held by her and to consequential relief.

3. Somayya, J., who tried the suit held that of the Rs. 4,000, which was paid out of the money received from the Gresham Life Assurance Society,

Limited, Rs. 2,000 came from the respondent. Of the Rs. 3,204-2-8, which was paid out of the money received from the Oriental Government

Security Life Assurance Company, Limited, the learned Judge held that one-fourth, namely Rs. 801-0-8 was the respondent's money. As the

respondent had only a one-fifth share, the figure should have been Rs. 640-12-11. Having found that the respondent had paid Rs. 2,801-0-8

towards the discharge of Mrs. Booth's mortgage, Somayya, J., gave him a decree for this sum with interest at seven per cent. per annum, and

directed that the property be sold in default of payment. The sale was however avoided as the appellants paid the money into Court.

4. The appellants challenge the validity of the decree passed by the learned Judge on several grounds. They say that (i) the evidence does not

establish that the respondent contributed towards the discharge of the mortgage in favour of Mrs. Booth; (ii) the respondent is not in law entitled to

the benefit of the security, even if he did contribute to the repayment of Mrs. Booth's mortgage, and (iii) the suit is barred by the law of limitation.

5. We agree with the finding of the learned Judge that the mortgage in favour of Mrs. Booth was discharged out of the moneys received from the

Insurance Companies, to the extent of Us. 4,000, out of the moneys received from the Gresham Life Assurance Society, Limited, and to the extent

of Rs. 3,204-2-8 out of the moneys received from the Oriental Government Security Life Assurance Company, Limited. We also agree with the

learned Judge that the respondent was entitled to a half of the moneys received from the Gresham Life Assurance Society, Limited, but as already

pointed out, he was not entitled to a fourth, but only to a fifth, of the money received from the other company.

6. The main question in this appeal is whether the respondent is entitled to the benefit of the security held by Mrs. Booth. The learned Judge

considered that the respondent could not be regarded as a surety within the meaning of Section 126 of the Indian Contract Act, but that his case

fell within the third category of the cases referred to in the judgment of Lord Selborne in *Duncan, Fox & Co. v. The North and South Wales Bank*

(1880) L.R. 6 A.C. 1. Lord Selborne said that there were three classes of cases in which a surety or a person in an analogous position is entitled

to the benefit of security held by the creditor, namely: (X) those in which there is an agreement to constitute, for a particular purpose, the relation of

principal and surety, to which agreement the creditor thereby secured, is a party; (2) those in which there is a similar agreement between the

principal and surety only, to which the creditor is a stranger; and (3) those in which, without any such contract of suretyship, there is a primary and

a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not

equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid.

7. The respondent was made a party to the mortgage deed executed by his father in favour of Mrs. Booth and he made himself liable for the repayment of the debt, although not as a mortgagor. There was only one mortgagor, the father. The respondent was referred to "as the party of the second part", and the deed recites that he had agreed to join in at the request of the mortgagee. The document does not describe him as a surety and his liability is not expressly stated to be limited to default on the part of the mortgagor; but reading the document as a whole, it is quite clear that he was brought in in case of need and. that his position was in reality that of a surety. We agree with the learned Judge that this case falls within the third category of cases referred to in *Duncan, Fox & Co. v. The North and South Wales Bank* (1880) L.R. 6 A.C. 1.

8. The Court in granting relief to a person in the position of a surety is not confined to contracts of guarantee within the meaning of Section 126 of the Indian Contract Act and the Court is free to apply the principles of equity unless the position is governed by some positive provisions of Indian

Law and therefore the Court is entitled in a suitable case to apply any of the principles stated in *Duncan, Fox & Co. v. The North and South*

Wales Bank (1880) L.R. 6 A.C. 1. This was recognised by this Court in *R.M.M.S.T. Vyravan Chettiar Vs. The Official Assignee of Madras*,

although it was held in that case that *Duncan, Fox & Co. v. The North and South Wales Bank* (1880) L.R. 6 A.C. 1 was not in point. There two

Nattukottai Chettiars borrowed Rs. 1,00,000 from a bank on a promissory note which they both signed as makers. The bank having paid over the

money, each took Rs. 50,000 for his own purposes. One of them became insolvent and the other being jointly and severally liable was called upon

to repay the Rs. 1,00,000 due to the bank. The question was whether the solvent borrower who had repaid the bank was entitled to the benefit of

securities which the insolvent borrower had deposited with it. The Official Assignee "contended that he was not and the Court upheld the Official

Assignee. The judgment in *Duncan, Fox & Co. v. North and South Wales Bank* (1880) L.R. 6 A.C. 1 was discussed and it was held that the case

did not fall within the third category as stated by Lord Selborne because the debt was not wholly of one, but equally of both the Chettiars. In the

present case the debt was wholly that of the mortgagor. It is common ground that the property mortgaged was the separate property of the father

and that the father had the benefit of the whole of the mortgage loan.

9. Turning now to the question of limitation, unless the mortgage is in the English form the suit will be governed by article 132 of the Limitation Act

and therefore will be out of time. The learned Judge held, however, that the mortgage was in the English form and that the appropriate article was

article 147 which provides for a period of limitation of sixty years. Suits for foreclosure or sale of a mortgage in the English form fall within this

article. This was decided by the Privy Council in *Vasudeva Mudaliar v. Srinivasa Pillai* (1907) 17 M.L.J. 444 : L.R. 34 IndAp 186 : ILR 30 Mad.

426 (P.C.) Section 58 of the Transfer of Property Act sets out the requirements of an English mortgage. The mortgagor must bind himself to repay

the mortgage money on a certain date and transfer the mortgaged property absolutely to the mortgagee, subject to a proviso that the mortgagee

will retransfer it to the mortgagor upon payment of the mortgage money as agreed. The learned advocate for the appellants admits that these

conditions are fulfilled, but he says there are other conditions which are not usually found in a mortgage of the English form and therefore this

mortgage must be regarded as an anomalous mortgage in which case it will not fall within article 147 of the Limitation Act. The additional

provisions in the deed which the learned Counsel for the appellants relies on here, are these: (i) if the mortgage debt should not be repaid on the

due date, interest shall be charged at seven per cent. per annum, and if the interest is paid regularly every month the date for payment shall be

extended from the 8th October, 1916 to the 8th April, 1919; and (ii) the mortgagor shall pay the fire insurance premiums, quit-rent, assessment

rates, taxes and other outgoings for the time being payable in respect of or charged upon the property. He also says that although there is a

provision for the extension of the time for the payment of the mortgage debt it is not accompanied by a stipulation that the mortgagee should

recover and that this changes the character of the mortgage.

10. Unless these provisions can be read as altering the obligation of the

mortgagor to pay the mortgage debt on a specified date or detract from the absolute nature of the transfer, the mortgage must be regarded as being in the English form. The fact that in a certain event the date of payment is changed from the 8th October, 1916 to the 8th April, 1919 does not mean that the mortgagor has not contracted to pay the debt on a certain date within the meaning of Section 58 (3) of the Transfer of Property Act, and the fact that the mortgagor has agreed to pay the cost of insurance and other charges does not detract from the absolute transfer to the mortgagee. In *Raja Janki Nath Ray v. Syed Asad Reza* ILR (1935) Pat. 560, the Patna High Court held that a stipulation which gave the mortgagor options with regard to part payment and extension of time for repayment of the principal sum did not affect a clause $\frac{1}{2}$ in the mortgage bond under which the mortgagor bound himself to pay the mortgage money on a certain date.

11. Nor did a provision in the bond requiring the mortgagor to pay in addition to the mortgage debt and interest, further advances and sums paid by the mortgagee for the protection and preservation of the mortgaged property and Government revenue, rents and all other costs, charges and expenses incurred in connection with the property make the mortgage any the less an English mortgage within the definition given in Section 58 of the Transfer of Property Act.

12. For the appellants reliance has been placed upon the decision of the Calcutta High Court in *Satya Charan Srimani v. Ramkinkar Banerjee* (1935) 62 C.L.J. 28, where it does appear that the view was taken that a provision in a mortgage deed requiring the mortgagor to pay "rent, royalty, cesses, taxes, rates, assessments and impositions which now are or hereafter may be payable in respect of the said premises" did change the character of the mortgage. But dissent from this view is indicated by the decision of the same Court in *Cohen v. Baidya Nath Mukherji* ILR (1937) 1 Cal. 359. It may be mentioned that *Satya Charan Srimani v. Ramkinkar Banerjee* (1935) 62 C.L.J. 28 was carried to the Privy Council but there it was held that it was not necessary to decide whether the mortgage in that case was in the English form (*Ram Kinkar v. Satya Charan* (1939) 1 M.L.J. 544 : L.R. 66 IndAp 50 : ILR (1939) 1 Cal. 283 (P.C.)). We are not prepared to accept *Satya Charan Srimani v. Ramkinkar*

Banerjee (1935) 62 C.L.J. 28 as embodying a correct indication of the answer to be given here.

13. There is no substance in the third contention of the appellants. The mortgage deed contains a stipulation that the mortgagee shall reconvey on

payment being made on the 8th October, 1916 and this stipulation must be read as applying also in the event of the time being extended to the 8th

April, 1919.

14. For the reasons given we hold that the additional provisions in the mortgage deed in suit do not alter the character of the mortgage.

Consequently we concur in the finding of Somayya, J., that the mortgage is in the English form, which means that the suit was filed in time.

15. The appeal fails except as regards the decretal amount. As already indicated the respondent is only entitled to Rs. 2,640-12-11, but this sum

will carry interest at the rate fixed by Somayya, J. The decree of the trial Court will be varied to this extent. The parties will pay and receive

proportionate costs. Out of the money in deposit in Court, so much of it as is due to the respondent under the decree passed by this Court will be

paid out to him on his complying with the other requirements of the decree.