

(1927) 09 MAD CK 0055
In the Madras High Court

A. Rangaswamy Pillay

APPELLANT

Vs

C.R.P. Kuppuswamy Dookshatar and Others

RESPONDENT

Date of Decision : 13-09-1927

Acts Referred:

Evidence Act, 1872 — Section 114

Citation : 107 Ind. Cas. 650

Hon'ble Judges : Wallace, J;Tiruvenkatachariar, J

Bench : Division Bench

Judgement

1. This appeal is preferred by the fourth defendant in a mortgage suit brought to enforce the mortgage security for the recovery of the amount due to the plaintiff as assignee of the mortgage from the mortgagees. The mortgage-bond is dated the 22nd January, 1908, and it was for the sum of Rs. 6,000. The material portion of the bond to which reference has to be made in connection with the questions arising in this appeal is as follows: "As the total sum of Rs. 6,000 has been received by us as per particulars mentioned above, we shall pay before the 22nd January of each year the interest arrived at on the said amount at the rate of 3/4 per cent. per mensem and pay the principal sum within a period of 5 years from this date. In default of payment of interest or principal on such due dates, we agree to your adding to the principal sum the interest due each year from the date of default and recovering the total amount with interest at the said rate, without regard to the due date for (payment of) principal whenever you require, by proceeding against us and the under-mentioned hypotheca."

2. The plaintiff's case as alleged in the plaint is that towards the suit mortgage-bond, the following payments were made Rs. 3,347-8-0 on the 15th June, 1909, towards the principal and interest, Rs. 800 on the 15th June, 1909, towards principal and interest and Rs. 250 on the 4th November, 1909, to wards interest but the balance of principal and interest was not paid. The mortgagee assigned the mortgage-bond in plaintiff's favour for Rs. 7,604, on the 25th November, 1922. The plaintiff says that a sum of Rs. 8,420-14-0 was due on the mortgage

at the date of the suit, and he prays for a decree for the sale of the mortgaged properties to recover the said amount with subsequent interest and costs. The cause of action for the suit is stated to have arisen on 22nd January, 1913, i.e., on the expiry of the period of 5 years provided in the mortgage-bond, and the plaint was presented on the 30th January, 1924. The plaintiff has impleaded as defendants the legal representatives of the mortgagor as well as subsequent alienees of different portions of the mortgaged properties.

3. The fourth defendant among other pleas raised the plea of limitation. In para. 4 of his written statement he says that as the mortgagors failed to pay interest due for the first year the mortgagee made a demand on the mortgagors to pay the entire amount of principal and interest according to the conditions stipulated in the bond and pressed for payment of the same, Thereupon payments towards the principal and interest were made to the mortgagee as admitted in the plaint itself, and the suit is, therefore, barred by limitation, as the cause of action, therefore, arose in 1909.

4. The sixth defendant also raised a similar plea in para. 4 of his written statement. It was he who paid to the mortgagee Rs. 3,347-8-0 on the 15th June, 1909, and endorsed payment of the same on the bond.

5. With reference to the above plea, the third issue, viz., is the plaintiff's suit barred by limitation? was framed, The suit after several adjournments came on for trial on the 4th March, 1925. But on that day neither the fourth defendant nor the sixth defendant appeared and the trial of the suit proceeded against them ex parte. The learned Subordinate Judge held that the suit was not barred by limitation. He also disposed of the other issue in the case and passed a decree for the plaintiff for the amount claimed.

6. The main point pressed before us in this appeal is that the lower Court erred in holding that the suit was not barred by limitation. On behalf of the appellant it is contended by his learned Vakil that upon the terms of the mortgage-bond already set out, the cause of action for purposes of limitation began to run as soon as there was default in the payment of interest for the first year and that the stipulation on the part of the mortgagors that they agreed to pay the entire amount of principal and interest without due regard to the due date whenever the mortgagee required the amount did not render a demand on the part of the mortgagee a condition precedent to his enforcing that right. The argument is that the words "whenever you require" has the same meaning as the expression "on demand" which is a term of art meaning immediately or forthwith. This contention which appears to have been the only one put forward before the Subordinate Judge was overruled by him. He observes as follows: "It will be seen by a reference to Ex. A that it is only a privilege given to the mortgagee to claim the mortgage amount if interest is not paid at the end of every year. He may exercise that privilege or not. That being so, it cannot be said that the mortgagee is bound to claim the amount before the period fixed." In our opinion the learned Subordinate Judge has taken the right view that the stipulation in question gives

only an option to the mortgagee to call in at once the principal amount and interest due on the mortgage-bond without reference to the period stipulated for payment, if there is default. There is, no doubt, some conflict of authority on the point between this Court and some other High Courts and it may also be observed that some of the earlier decisions of this Court may support the appellant's contentions but later decisions of this Court with which we agree and which the Subordinate Judge has followed support the view that a stipulation so worded only gives the mortgagee an option which is open to him to exercise or not as he chooses; and the time will not run against him unless he exercises the option [see *Narna, minor by father and guardian Vittappa Shanbhoga*, legal representative of the deceased plaintiff, *Bhagirathi Amma Vs. Ammani Amma, and Netta Karuppa Goundan v, Kumarasami Goundan* 22 M. 20 : 1926 8 M.L.J. 167 : 8 Ind. Dec. 15.] We may before leaving this point refer to a recent decision of the Privy Council in *Pancham v. Ansar Hussain* 99 Ind. Cas 650 : 53 I.A. 187 : AIR 1926 P.C. 85 : 24 A.L.J. 736 : (1926) M.W.N. 520 : 24 L.W. 241 : 48 A. 457 : 31 C.W.N. 324 which was an appeal from the Allahabad High Court. Their Lordships considered this question and their observations rather tend to show that they do not approve of the view taken by the Allahabad High Court in two Full Bench cases in *Gaya Din v. Jhuman Lal* 28 Ind. Cas. 910 : 37 A. 400 : 13 A.L.J. 510 and *Shib Dayal v. Meharban* 69 Ind. Cas. 981 : 45 A. 27 : 20 A.L.J. 819 : AIR 1923 AIL. 1 and they are inclined towards the view adopted by this Court in the later cases. These observations are, no doubt, obiter and the appeal was disposed of on some other point, but as stated in their Lordships judgment itself they were made in view of the conflict of authority which exists on the point between the several High Courts.

7. It is next urged on the appellant's behalf that there is satisfactory evidence in this case that the mortgagee did exercise the option in 1909 and that, therefore, the cause of action for the suit accrued when he did so. This question was separately not argued before the Subordinate Judge. It was probably due to the fourth defendant as well as the sixth defendant being absent at the final hearing. The facts on which reliance is placed in support of this contention are (1) the admitted payment of Rs. 773-12-0 for interest and Rs. 2,573-12-0 towards principal on the 15th June, 1909; (2) payment of Rs. 800 by adjustment of account on the same day; and (3) payment of Rs. 250 on the 4th November, 1909. The 2nd and 3rd payments are not endorsed on the bond. As regards the alleged payments not only there is no dispute but they are also referred to in the assignment of the mortgage in plaintiff's favour, Ex. B dated the 25th November, 1922.

8. Taking first payment made on 15th June, 1909, it will be seen that interest which was paid represents the interest due on the entire amount of the mortgage-bond up to the 15th June, 1909, interest being calculated on the basis of there having been a default at the end of the first year. In addition to all interest due up to that date Rs. 2,573-12-0 was also paid towards the principal. This seems to be a strong evidence of the mortgage amount being treated by the

mortgagee as having fallen due on the date of that payment. Otherwise it is difficult to understand why interest which would not be due till the end of the 2nd year, viz., till the 23rd January, 1910, was paid up to the 15th January, 1909. Besides the aforesaid payment there was also another payment of Rs. 800 to the mortgagee on adjustment of account on the same day. As that amount was not paid by the sixth defendant it is only reasonable to presume that the adjustment of the account was between the mortgagee and the mortgagors all of whom are now dead. This adjustment also by itself is good evidence of the mortgagee having elected to exercise the option conferred on him in case of default in payment of interest and the same observation also applies to the further payment of Rs. 250 which also may be presumed to have been made by the mortgagors themselves.

9. The plaintiff's (1st respondent's) Vakil has endeavoured to meet the appellant's contention based on the above payments. His argument is that on the construction of the default clause in the mortgage-bond, the mortgagee became at once entitled to payment of enhanced interest as provided in the bond. The operation is so to speak automatic and requires no exercise of option on his part. Article That option is confined only to the mortgagee calling in the principal amount together with interest due till the date of his exercising the option. In other words, that there are two independent covenants in the bond one of which relates to the payment of enhanced interest which operates automatically on the happening of the default and the other requires the exercise of the option given to the mortgagee. In support of this contention the learned Vakil for the respondent relies on the case in *Ramadh Bibi Ammal v. Kandasami Pillai* 51 Ind. Cas 724 : 9 L.W. 479 : (1919) M.W.N. 82 : 25 M.L.T. 154. But on a reference to the terms of the mortgage-bond in that case which is set out in that report clearly shows that in that case there was a separate covenant for interest and a separate covenant conferring on the mortgagee the option to call in the entire amount of principal and interest, and they have been so construed by the learned Judges who decided that case. This contention cannot, therefore, be accepted.

10. The respondent's Vakil next contends that payments relied on were voluntary payments and not payments made pursuant to any demand. He draws our attention to the evidence of P.W. No. 1 the agent of the mortgagee who says he was present when the sixth defendant made the payment on the 15th June, 1909. Plaintiff's witness No. 1 further says that the payment was voluntarily made by Subbiah Pillai (6th defendant). It is not quite clear what the witness meant thereby. He does not say that there was no previous demand at any time by the mortgagee and it was merely to oblige the mortgagors the mortgagee received payment before the time provided in the bond; nor does he speak to the other two payments. This is the only evidence in support of this contention. The mortgagors and mortgagee being dead no stress can be laid on the fact that there is no oral evidence on either side as to whether there was a demand or not by the mortgagee in 1909. We have, therefore, to see what is the reasonable

inference to be drawn from the conduct of the parties themselves as evidenced by the admitted payments. It seems to us hardly likely that the mortgagors (who were evidently in embarrassed circumstances) would have voluntarily without any demand or pressure on the part of the mortgagee paid, either interest at the enhanced rate, which provision comes into operation only when default has been made, or the sums paid by them towards the principal amount long before the due date fixed in the bond if there was no default. On the other hand, it seems to be a much more reasonable inference that when the default occurred the mortgagee elected to exercise the option and pressed for payment of the entire amount, viz., the principal and interest due on the bond and that the payments were made in consequence of such demand. The fact that all interest according to the enhanced rate up to the 15th June, 1909, when interest for the second year was not due, was paid and a further amount was paid towards the principal shows that the whole amount was treated as due immediately. The adjustment of Rs. 800 which was also made on the same day also points to the same conclusion. At any rate all the payments are good evidence from which the Court may well presume that the mortgagee in exercise of the option made a demand on the mortgagor for the payment of the mortgage-money. This view received support from the case of *Brown v. Rutherford* (1880) 14 Ch. D. 687 : 49 L.J. Ch. 654 : 43 L.T. 105 : 28 W.R. 802 cited by the appellant's Vakil. In that case it was held by the Court of Appeal reversing the decision of the Vice Chancellor that the endorsement of payment of interest on the promissory note which was all the evidence in the case, imported that a demand had been made for the payment of interest. The presumption, no doubt, is one of fact and not of law but on such a question it is only right that the Court should draw such inference as is probable having regard to the common course of human conduct as laid in Section 114 of the Evidence Act. For debtors will pay more by way of interest if they can avoid it and voluntarily accelerate the date of the payment of principal amount together with the enhanced interest except on demand by the creditor. If we find them doing so it is only reasonable to infer that there has been pressure put upon them by the creditor. We are, therefore, of opinion that there is sufficient evidence in the case to show that the creditor has exercised the option and that, therefore, the cause of action for the suit arose in 1909 and that under Article 132 this suit is barred by limitation.

11. On this finding it is unnecessary to go into the other questions which were argued before us which relate to the order in which the mortgaged properties should be sold. The suit must be dismissed on the ground that it is barred by limitation, but we do not think that this is a case in which the appellant should have his costs. He failed to appear at the trial for no sufficient reason. If he had appeared and the point had been argued before the learned Subordinate Judge it is quite probable his decision might have been the other way and the appeal would have been quite unnecessary.

12. Civil Miscellaneous Appeal No. 429 of 1925 is preferred by the fourth defendant against the order of the Subordinate Judge refusing to set aside the ex

parte decree against him. We see no sufficient ground for allowing this appeal and we dismiss and in the circumstance without costs.