
(1906) 03 MAD CK 0016
In the Madras High Court

Abbakke Heggadthi

APPELLANT

Vs

Kinhiamma Shetty and Others

RESPONDENT

Date of Decision : 30-03-1906

Acts Referred:

Contract Act, 1872 — Section 74

Citation : (1906) ILR (Mad) 491

Hon'ble Judges : Arnold White, C.J;Benson, J

Bench : Division Bench

Judgement

1. The plaintiff sues on a mortgage of 31st August 1891 executed by one Manjanna Shetty, now deceased, the then ejaman of the defendant's

family and his two brothers The first defendant is one of the brothers. The other defendants are members of the family and the second defendant is

also the present ejaman of the family. The mortgage comprises certain items of property and the mortgagor's mortgage interest in some other

items.

2. As regards the latter the plaintiff's allegation, which apparently is not denied, is that the mortgage money has been collected by the second

defendant and is now in his hands. The deed provides for payment of interest at the rate of 7 per cent, per annum, with a further provision that, on

default, interest at 12 per cent, shall be payable on the arrears of interest. The deed also provides for the payment of the principal on 31st August

in any year after five years from the date of the deed with a further provision that, on default, interest at 12 per cent, shall be payable. It appears to

have been assumed by all parties, though this is not clear from the translation of the deed, that the deed should be construed as providing for

payment of interest at 12 per cent on the principal if the principal was not paid on 31st August 1896.

3. The District Judge disallowed the plaintiff's claim for interest at 12 per cent, as regards both principal and interest and gave the plaintiff a decree

for the amount advanced with interest at 7 per cent.

4. He gave a decree against the defendants as members of the family, but declined to give a personal decree against the first or second defendant.

5. We think the plaintiff is entitled to a personal decree against the first defendant as one of the parties who executed the mortgage deed.

6. It seems to us that, on the true construction of the deed, the deed contains a personal covenant to repay notwithstanding the introduction of the

words "'on the responsibility of the mortgaged property'" in the provisions for payment of enhanced interest on default. At any rate the deed cannot

be construed as excluding the personal liability of the mortgagor which exists, in the case of a simple mortgage, unless there is a specific contract to

the contrary see *Wahid-un-Nissa v. Gobardhan Das* ILR 22 All. 453.

7. The plaintiff is not precluded from claiming under this covenant by reason of the fact that there is no specific prayer in the plaint with reference

thereto. The plaint asks for a decree against the defendants as members of the family and such other relief as the Court may think fit. This is enough

to enable us to give the plaintiff the appropriate relief if he is otherwise entitled to it (see the judgment of the Privy Council in *Cockerell v. Dickens*

2 M.I.A. 353, and *Gopi Narain Khauna v. Bansidhar* ILR 27 All. 325.

8. The suit is on a mortgage to which the second defendant is not a party and the plaintiff is not entitled in this suit to a personal decree against him

in respect of the money alleged to be in his (the second defendant's) hands.

9. We are unable to adopt the view taken by the learned Judge that the plaintiff has disentitled herself by her conduct to interest at the enhanced

rate provided for in the bond. The fact that she delayed in instituting her suit is, in our opinion, no ground for holding that there had never been any

intention to enforce the enhanced rate. As regards the contention that the agreement to pay enhanced interest on default was a stipulation by way

of penalty and could not be enforced u/s 74 of the Contract Act as amended by Act, VI of 1899, it is for the Court to decide whether the contract

contains a stipulation by way of penalty. If the Court is of opinion that it does,

the Court may award reasonable compensation not exceeding the penalty stipulated for. The explanation to the section provides that a stipulation for increased interest from the date of default may be a stipulation by way of penalty.

10. This explanation, as pointed out in *Sankaranarayana Vadhiar v. Sankarayana Ayyar* ILR 25 Mad. 343, appears to have been introduced to

meet the decisions to the effect that when the higher rate of interest is payable as from the date of default and not as from the date of the contract

the contract rate is enforceable, The explanation read by the light of the illustrations shows that it is for the Court to decide on the facts of the

particular case whether the stipulation is or is not a stipulation by way of penalty. We are of opinion that the stipulation in the present case is not a

stipulation by way of penalty within the meaning of the section and that it is enforceable. There is nothing unconscionable or unreasonable about the

agreement and the enhanced rate of interest which becomes payable on default is quite moderate.

11. It was urged on behalf of the respondents that the stipulations were by way of penalty since they provided both for an increased rate of interest

and for compound interest, and *Dip Narain Rai v. Dipan Rai* ILR 8 All. 185 a decision which this Court in *Appa Rau v. Suryanarayma* ILR 10

Mad. 203 declined to follow, was relied upon. It is not necessary to discuss the authorities on this point since in the present case, although the

plaintiff claims interest at 12 per cent, on interest in arrear she does not claim compound interest on such interest. Even in the view that the

stipulations are by way of penalty and that the section applies, it is open to us under the section to award to the plaintiff the penalty stipulated for so

long as it is not in excess of the reasonable compensation to which she is entitled, and we are not prepared to say that, in this case, the penalty is in

excess of the reasonable compensation to which she is entitled.

12. The only other point with which it is necessary to deal is the contention put forward on behalf of the respondents that the members of the family

are not bound by the contract. We are of opinion that it was within the scope of the authority of the ejaman of the family to make the contract and

that the family are bound by it. There will be a personal decree against the first defendant for principal and interest up to date at the contract rate,

subsequent interest at 6 (six) per cent, and there will be a decree against all the defendants quoad the family assets. The plaintiff is entitled to her costs throughout.