

(1933) 03 MAD CK 0038
In the Madras High Court

(Baghvatham) Mahadeva Sastrigal

APPELLANT

Vs

Kariyakara Marulai Reddiar and Others

RESPONDENT

Date of Decision : 22-03-1933

Acts Referred:

Citation : AIR 1933 Mad 874

Hon'ble Judges : Walsh, J

Bench : Division Bench

Judgement

Walsh, J.—Defendant 6 is the appellant in this second appeal. The suit was for recovery of a sum of Rs. 614 alleged to be due on a mortgage, Ex. A, dated 18th February 1910, executed by defendant 1, in favour of plaintiff 1, plaintiff 2's father and defendant 7. Defendants 2 to 5 are the sons of defendant 1. Defendant 6 is a subsequent mortgagee under the mortgage, Ex. 2, dated 4th January 1918. He was the only contesting defendant. He had brought a suit on his mortgage. In that suit in execution he purchased the mortgaged property in Court-auction. His defence in the present suit is that the mortgage Ex. A had been discharged by the mortgage, Ex. 1, dated 28th August 1913, which he had himself paid off when he took his own mortgage, Ex. 2, and that the plaintiff and defendant 1 are colluding in this suit. A question as regards non-joinder of parties was also raised. The suit bond being dated 18th February 1910, and the suit having been brought on 27th August 1925, the claim was prima facie barred by time. Three payments were mentioned in the plaint, not specifically as saving limitation but which, if true, would evidently do so. They were on 10th April 1913, 29th August 1916 and 22nd November 1920. The trial Court found that these alleged payments were untrue and hence limitation was not saved. The suit was therefore dismissed. The lower appellate Court agreed with the trial Court that the alleged payments endorsed in Ex. A were untrue, but it held that limitation was saved by a document, Ex. 1, filed by defendant 6. Agreeing with the trial Court that there was no non-joinder it decreed the plaintiffs' suit and against this defendant 6 has appealed. Three grounds in second appeal are taken. The first is that when the learned Subordinate Judge says

there is absolutely not even a scintilla of evidence to prove the plea of discharge (that is, discharge of Ex. A),

he is overlooking the very important evidence afforded by Exs. 1 and 2 which have been expressly relied on in the trial Court's judgment to prove discharge of Ex. A. The second ground is that the Courts below are incorrect in saying that all the necessary parties to the suit have been added. The third ground is as regards the matter of limitation. With regard to the first point I think it is perfectly clear that the learned Subordinate Judge has overlooked in the most extraordinary way evidence which weighed so strongly with the lower Court. He has not even said that he disagrees with its view of that evidence. He simply says that there is not a scintilla of evidence to prove the plea of discharge. Now Ex. 1 narrates that the mortgage is being taken to discharge the mortgage bond, Ex. A, and what is even more important is that in Ex. 2, defendant 1 has added the following as a separate clause:

I declare that there is no encumbrance whatever other than the one mentioned above.

2. The encumbrance mentioned above is Ex. 1. Therefore this is a categorical statement that Ex. A has ceased to exist. That Ex. A should have ceased to exist is strongly borne out by Ex. 1. The matter was put to defendant 1 whom the plaintiffs called as their own witness, P.W. and he could only say:

Exhibit 2 was not read out to me. They wanted me to affix my signature and I did so. I do not know the reason for my signing in two places in Ex. 2.

3. It is extraordinary that in the face of the evidence of Exs. 1 and 2 and of the inability of defendant 1 to give any better explanation of what he himself stated in Ex. 11 than this, the learned Subordinate Judge should say that there is not even a scintilla of evidence to prove the plea of discharge. In my opinion this entirely vitiates his judgment because it is the chief piece of evidence to prove discharge and has not even been considered. I shall take next the question of limitation. Both the trial Court and the lower appellate Court have found that the alleged repayments on Ex. A which would save limitation are untrue. That being so, the suit would be barred. But in appeal for the first time, Ex. 1, a document filed by defendant 6 for another purpose has been allowed to be relied on to save limitation without any amendment of the plaint. As to how far this could be done, there are no doubt conflicting authorities. But the decisions in this Court appear to be clear that a ground to save limitation which has not been taken in the plaint cannot be taken unless the plaint is amended. *Benode Behary v. Raj Narain* (1903)30Cal699, which was confirmed in appeal in *Jogeshwar Roy v. Raj Narain* (1904)31Cal195, lays down this principle and the case was followed in this Court in *Jagannadha Row v. Seshayya* (1907) 17 ML J281 and *M. Muthiriyar v. Chinnakannu Muthiriyar* AIR 1919 Mad.332. In a recent case reported in *Palani Chetty Vs. A.R.S.V. Sevugan Chetty*, , Cornish, J., reviewed all the decisions of the other Courts and followed the two Madras cases referred to above and the

Calcutta case, dissenting from the view in Yakub Ebrahim Sayani Vs. Bat Rahimatbai, , Hingu Miah v. Heramba Chandra (1911) 8 IC 81 and Parameshri Das v. Fakiria AIR 1922 Lah 230. In Yakub Ebrahim Sayani Vs. Bat Rahimatbai, , it was held that a ground not taken in the plaint to save limitation, if it is not inconsistent with the plaint, could be taken later. Parameshri Das v. Fakiria AIR 1922 Lah 230, went further than that and held that an inconsistent ground might be taken. A later case, in Uttam Chand v. Mt. Thakur Devi AIR 1922 Lah 39, while it holds that Parameshri Das v. Fakiria AIR 1922 Lah 230 is distinguishable because no ground of limitation at all was stated in the plaint, is in its tenor more in conformity with the view of the High Court.

4. It is there held that a plaintiff could not be allowed to set up a new acknowledgment in appeal. It is argued for the appellant in this case that if an amendment of the plaint had been allowed it would have been open to him to show that Ex. 1 did not necessarily exclude the possibility of money having been paid for Ex. A before the date of Ex. 1 or of Ex. 1 having been actually signed after the date it professes to bear. However that may be, I see no reason to differ from the view consistently taken by this Court so far, that without an amendment of the plaint the plaintiff cannot be allowed to take a ground which would save limitation not taken in the plaint. It may be pointed out that in the present case the plaintiffs would have had the greatest difficulty in reconciling the ground they now take as saving limitation with the plaint because prima facie the effect of Ex. 1 would be to show that Ex. A was entirely paid off at least then and it may be noted that neither defendant 1 nor the plaintiffs took any steps, when defendant 6 proceeded to execute his mortgage Ex. 2 against the property and to buy the land in Court-auction, although according to the plaintiff's case their mortgage on the property still remained undischarged.

5. As regards the third ground, nonjoinder, both the Courts have found as a fact that a custom prevails and has been proved, by which only the eldest member in each family manages the trust and that if there are any minors in one of the families they do not manage the trust and that only the eldest of them manages after he attains majority. That is a finding of fact which I must accept and I therefore consider that both the lower Courts are correct that there is no non-joinder of parties in this case. In the result this second appeal is allowed, the decree of the lower appellate Court is set aside and that of the first Court restored with costs throughout.