(1933) 01 MAD CK 0015

In the Madras High Court

Bappu alias M.P. Kader Batcha Sahib APPELLANT

Vs

Dhurvas M. Venkatachalapathi Ayyar, Lakshmana Ayyar and Sons and Others RESPONDENT

Date of Decision : 23-01-1933

Acts Referred:

Citation : AIR 1934 Mad 227 : (1933) 37 LW 751 : (1933) 64 MLJ 606

Hon'ble Judges : Sundaram Chetty, J

Bench : Division Bench

Judgement

Sundaram Chetty, J.—The 3rd defendant has preferred this appeal against the mortgage decree passed by the Subordinate Judge of

Madura in a suit brought by plaintiffs 1 to 3 (now respondents 1 to 3). These plaintiffs are members of an undivided Hindu family carring on

money-lending business under the name and style of Dhurvas M. Venkatachalapathi Ayyar, Lakshmana Ayyar & Sons. Their ancestors were

carrying on the same business which is continued by the plaintiff''s guardians in the same way. The suit was originally instituted in the name of that

firm as represented by the present 1st plaintiff as one of its partners. Objection was taken by the 3rd defendant on the ground that the suit was not

maintainable in the name of the firm, but it should have been filed by all the three plaintiffs in whose favour the assignment of the suit mortgage was

effected under Ex. B. Later on, the present plaintiffs 2 and 3 were added as supplemental plaintiffs on 17th August, 1026. It was contended by the

3rd defendant in the Lower Court that the suit as framed originally was not maintainable and that after the addition of plaintiffs 2 and 3 the suit

should be deemed to be barred by limitation. The learned Subordinate Judge found that the suit as framed at first is maintainable, and therefore it was not necessary for him to consider at length the other question whether the suit is barred by limitation or not after the addition of plaintiffs 2 and

3. In our opinion, much of this controversy would be obviated, if regard be had to the terms of the suit mortgage deed, Ex. A, and the question of

limitation be considered in the light of the recent decision of the Privy Council reported in Lasa Din v. Musammat Gulab Kunzvar ILR (1932)

Luck. 442 : 63 M.L.T. 187 . The terms of Ex. A are exactly similar to the terms of the bond which was the subject of consideration in their

Lordships'' judgment. In the present case, Ex. A recites that the principal amount is payable within two years, while the interest is payable at the

end of each month and in case of default in the payment of interest, compound interest at a much higher rate and also the principal and interest will

become payable. As stated in the plaint, default was made in the payment of even the first instalment of interest. Cause of action is said to have

arisen for this suit on 22nd June, 1914, the date of default in payment of interest and also on 22nd May, 1916, the date of default in the payment of

principal and interest. The argument advanced on behalf of the appellant is, that the suit should have been filed within 12 years from the date of the

first'' default, namely, 22nd June, 1914. If this position is correct, then the suit should have been filed within 12 years from that date. In that case, if

the addition of plaintiffs 2 and 3 was also necessary, the suit must be deemed to have been filed by all the plaintiffs on 17th August, 1926. That

would be more than 12 years from the date of the , cause of action, namely, 22nd June, 1914. But the principle of the decision referred to above is

clear on this point, and in a case like this, the period of limitation for the suit should be computed only from the date of the expiry of the term of the

mortgage and the clause empowering the mortgagee to sue on default must be deemed to have been inserted exclusively for the benefit of the

mortgagee, and as such, it gives him an option to enforce the security at once or to stand by his investment for the full term of the mortgage. The

mortgagee has thus the option to sue within the period of limitation allowed by law computing it either from 22nd June, 1914 or from 22nd May,

1916. The question for consideration is, whether he has unequivocally elected to sue on the basis of the first default"" in the payment of interest and

therefore precluded himself from computing the period of limitation from the latter date, namely, 22nd May, 1916. We find in paragraph 9 of the plaint that both these dates are given as the dates on which the cause of action arose. The mere fact that in the plaint compound interest is

calculated even from the date of the first default in payment of interest does not necessarily indicate that the option given to him of suing within the

period of limitation calculated from the expiry of the term fixed for the payment of principal has been waived. In case of default in the payment of

interest, he had two courses open to him. The first is to claim compound interest and the second is to wait and sue on the basis of the default in

payment of the principal, within 12 years from that date. The conflict of decisions on this question has been set at rest by the decision of the Board

and that is a clear authority against the contention that the suit must be deemed to have been barred on 17th August, 1926, when plaintiffs 2 and 3

were added as supplemental plaintiffs. That being so,'' it is unnecessary to consider the other question, whether the suit as originally framed is

maintainable or not. We therefore do not propose to deal with that question, as it is clear that even in the amended form the suit is not barred by

limitation.

2. There remains another contention raised on behalf of the appellant, and that is, that by reason of Packiri Rowthen Father of 3rd defendant.--Ed.

having discharged a mortgage prior to the suit mortgage as undertaken at the time of the sale under Ex. VII, the 3rd defendant must be given

priority, by being subrogated to the position of the earlier mortgagee to the extent of the sum paid by him together with subsequent interest. He has

proved the discharge of the prior mortgage debt by proving the endorsement on the mortgage bond, Ex. VI. This payment was made on 13th

June, 1916. There is no doubt that it is a prior mortgage. What the learned Subordinate Judge has stated is, that the 3rd defendant would not be

entitled to priority by reason of this discharge, inasmuch as Packiri Rowthen had undertaken to discharge this mortgage as well as the suit mortgage

under the contract entered into with the mortgagor. Reliance was placed on the decision in Garudappa Peria Thiruvadi Ayyangar and Another Vs.

Pokutti Janaki and Others, . We are of opinion that that decision rested upon the particular circumstances of that case. The mortgagor with whom

that contract was made and who was also a party to the suit asked the Court to enforce that covenant and direct the purchaser to pay the amount of the later mortgage of the plaintiff, without claiming a prior lien. In this case, there was no such requisition made by the mortgagor. On the other

hand, the decision of the Privy Council in AIR 1924 36 (Privy Council) is clear on the point. The observation at page 196 of their Lordships is that

in cases like this it is to the benefit of the owner that the proceedings should be deemed to be a purchase and not a redemption and no reason

appears why it should not be assumed that he intended to act in the way most beneficial to himself. Adopting this principle we have to hold that in

the present case it is certainly to the benefit of the purchaser to keep alive the first mortgage which he discharged out of the purchase money. It

seems to us that this principle which has had recognition in a series of decisions should be applied to the present case and there are no special

circumstances which warrant a deviation from that principle. We therefore hold that the 3rd defendant who now stands in the shoes of the

purchaser is entitled to be subrogated to the position of the first mortgagee by reason of the payment of Rs. 200 in discharge of that mortgage. The

contention on behalf of the appellant that this sum should be allowed to him together with subsequent interest seems to us to be untenable. Even

since the purchase under Ex. VII the purchaser and his successors have been in possession and enjoyment of the properties covered by the sale

deed. That being so, the claim for subsequent interest is obviously untenable. The 3rd defendant would therefore be entitled to Rs. 24)0 alone and

nothing for subsequent interest.

3. One other point requires short notice. One of the items of the mortgaged properties is the right to recover a prize in a chit transaction. It appears

that that right was also hypothecated under Ex. A along with two items of immovable properties. Unless it is proved that the original mortgagee

(P.W. 3) actually recovered this sum, there is no force in the contention that there should be a proportionate abatement in the present claim,

inasmuch as it is enforced against the other two items alone. As found by the Lower Court, there is absolutely no proof that P.W. 3 ever collected

this sum. That being so, the contention put forward on behalf of the appellant is without substance.

4. The main contentions put forward by the appellant have failed. We are informed that during the pendency of this appeal, the mortgaged

properties referred to in the plaint schedule have been put up in Court auction and also purchased by the plaintiffs themselves. It is not therefore

possible to provide for the payment of Rs. 200 to the 3rd defendant by directing the payment of the same out of the sale proceeds. There should

be a direction now to the plaintiffs to pay this sum of Rs. 200 to the 3rd defendant which would operate as a decree in his favour.

5. In the result, the appeal fails in the main and the only direction we should give is that the plaintiffs should pay the aforesaid sum of Rs. 200 to the

3rd defendant with subsequent interest thereon from this date at 2| per cent. per mensem The appellant should pay the costs of respondents 1 to 3

in this appeal and bear his own.

