

(1916) 08 MAD CK 0073
In the Madras High Court

Bhavani alias Rukmani Amma

APPELLANT

Vs

Anantha Kamthi and Others

RESPONDENT

Date of Decision : 11-08-1916

Acts Referred:

Citation : 35 Ind. Cas. 789 : (1916) 4 LW 357 : (1916) 31 MLJ 556

Hon'ble Judges : Sadasiva Aiyar, J; Oldfield, J

Bench : Full Bench

Judgement

Oldfield, J.—The necessary facts are as follows : Plaintiff's husband, now deceased, started a Kuri fund and in 1892 executed Ex. R. to the members, pledging property as security for the amounts, which would be payable to them. On his death plaintiff succeeded to his estate and her father, as her guardian, in 1893 took steps to transfer the management of the fund to 1st defendant by a Power of Attorney and obtained from him and his brothers an indemnity bond Ex. B. with the plaint property as security for an amount not exceeding Rs. 2,500 against any damage resulting to plaintiff and her property including that bound by Ex. R. Two members of the fund afterwards obtained decrees on Ex. R. against plaintiff, 1st defendant being a party; and (neither decreeholder being a party to the other's decree) both in succession brought the property to sale, the purchasers being different individuals. Plaintiff has now sued 1st defendant and others representing the other executants of Ex. B. to recover Rs. 2,500 by sale of the properties specified therein as security. The question is whether the Lower Courts were right in deciding that her suit was premature.

2. The Lower Appellate Court reached this decision on what, notwithstanding its tentative method of expression, may be accepted as findings of fact, that plaintiff had enjoyed the suit property since 1898 by mortgaging it with possession to P.W. 2, one of the two decreeholders above referred to; has continued to enjoy it until the date of suit by receiving from him the annual payment of grain, for which his mortgage provides ; and is accordingly in spite of the two court sales still in possession. It has referred also to other circumstances such as the

connection between the plaintiff and P.W. 2, as indicating that the two have combined to defeat the two auction purchasers' attempts to get possession. But that, if true, is not material at present. For the only issue is whether plaintiff's retention of possession however effected, is inconsistent with her having been damnified by the two Court sales, which have occurred. It is urged that the Lower Appellate Court's consideration of the case was defective because, though the grounds, on which damages are claimed, were in no way defined or limited in the plaint, it regarded the continuance of plaintiff's possession to the date of suit as decisive and did not deal with plaintiff's right to compensation on account of (1) the future determination of her possession, which the Court sales would entail in the ordinary course (2) their effect on her title to the property. These two claims are differently founded and call for separate discussion. Apart from that however, the cases, *Puthi Narayanamurthi v. Marimuthu Pillai* (1883) 11 Q.B.D. 695 and *Pundi Doraisami Tevar v. Lakshmana Chetty* (1811) 1 M. & S. 53, on which defendants mainly rely as showing that the suit is premature, are irrelevant. For they relate to the right of action on contracts to discharge a promisee's debts and there is no analogy between the event, in which the promisor in them would become liable, the discharge by the promisee under compulsion and the grounds alleged for defendant's liability in the present case.

3. First as to the cause of action alleged as arising in respect of the future determination of plaintiff's possession. There is, for all that appears, no doubt that the auction purchasers may still claim delivery through Court, oust P.W. 2 and determine that they have done so or taken any step in that direction. No Indian authority has been shown for the opinion that Judicial recognition of a stranger's right to possession or anything short of actual disturbance of it by him justifies a claim to damages ; and that opinion was negatived in *Howard v. Maitland* (1904) 14 M.L.J. 245, a decision which is in point, though the claim was made on a covenant for quiet enjoyment. Plaintiff's claim so far as it relates to the enjoyment, past or future, must be held premature.

4. There remains a claim in respect of damages to her title, defendants arguing that she has not yet sustained any loss and that, subject to her retaining possession, she will never do so. No Indian authority has been referred to. But the merits of the case are clear. For two court sales have been held and have not been set aside; and, though neither purchaser has yet obtained possession there is still time for one or other to do so. Plaintiff's title accordingly has been lost and she has suffered none the less because so far as she has sustained no practical inconvenience and because she has not had the occasion to sell the property and cannot yet estimate the damage sustained with reference to any actual diminution in the price obtainable. *Kingdom v. Wittle* ILR (1902) M. 322 is in point, though it was a case of breach of covenant for title ; and it is a clear authority, since in the particular circumstances proof of special damage was necessary. Such damage was held established on the ground that, the title being impaired, the plaintiff would not be able to dispose of the estate. Plaintiff's suit therefore, so far as it is founded on detriment to her title, cannot be held

premature.

5. The Lower Court's decisions are therefore set aside, the District Munsif is directed to readmit the suit and rehear it in the light of the foregoing with particular reference to plaintiff's right to damages on account of the loss of her title. Costs to date in this and the Lower Court will follow the result and will be provided for in the decree to be passed.

Sadasiva Aiyar, J.

6. I agree. There are, no doubt, several decisions which hold that before actual loss is incurred, a suit brought on a contract of indemnity for recovery of the damages which are likely to be incurred by the default of the guarantor would be premature. See *Pundi Duraisami Thevar v. Lakshmana Chetty* (1904) 14 M.L.J. 245. Especially in the case of an indemnity given by a principal debtor to a surety would this doctrine apply. See *Puthi Narayanamurthi v. Marimuthu Pillai*. ILR (1902) M. 322 But the doctrine, however, is qualified very appreciably by the rulings in several decisions which hold that an action for specific performance of a contract to indemnify can be sustained before actual loss is incurred by the promisee. (See *In re Law Guarantee Trust and Accident Society, Ltd.* 3) and that an action on the covenant by the defendant to do a particular thing, if it is an absolute promise, "at once gives rise to a cause of action in which substantial damages are recoverable and a plea of non-damnificatus is not maintainable." (See 24 I.C. 873). The distinction between a covenant containing an absolute promise to do an act and a covenant merely to indemnify for the loss which may be incurred on breach of the promise to do the Act is, no doubt, sometimes a fine distinction but such a distinction is in most cases not difficult to perceive.

7. Even if the covenant in question in the present case which is not the case of a principal debtor promising to indemnify a surety, is only one to indemnify the plaintiff against the loss caused by the neglect of the 1st defendant to fulfil his promise, the loss of the plaintiff's legal title to the lands caused through the defendant's said breach of his promise is a substantial present loss and the plaintiff's suit for recovery of the damages incurred on account of such loss of title cannot therefore be held premature. The sums necessary to be expended by the plaintiff in order to cure the defect in or the loss of title so caused would be the measure of damages and the lower Courts ought to have come to a finding on that question before deciding the suit. The decisions of the Lower Courts which dismissed the suit on a preliminary point, (namely, whether the suit was premature) ought to be set aside and the case remanded to the Court of First Instance for a fresh decision with reference to the above observations. Costs to be costs in the cause. Fresh evidence might be allowed on the question of the quantum of damages.