

(1922) 08 MAD CK 0001
In the Madras High Court

Bysani Madhava Chettiar, Charity Fund	APPELLANT
Vs	
G.R. Krishnaswamy Chetty	RESPONDENT

Date of Decision : 02-08-1922

Acts Referred:

Transfer of Property Act, 1882 — Section 72

Citation : AIR 1923 Mad 71 : 72 Ind. Cas. 987 : (1922) 16 LW 743

Hon'ble Judges : Walter Schwabe, C.J;Wallace, J

Bench : Division Bench

Judgement

Wallace, J.—The chief point in this appeal is whether the terms of the suit mortgage document imply and impose a charge on the mortgaged

property. The mortgage is not one which will come under the definition of any of the ordinary kinds of mortgage. It is not a simple mortgage

because possession of the mortgaged property is given; hence the usual principle that in a simple mortgage interest as well as principal is secured

on the property will not prima facie apply. It is not a usufructury mortgage because the rents and profits are not given in lieu of interest; but there is

a separate provision fixing the rate of interest and the method by which it is to be recovered, namely, that the rents and profits are to be set off, as

far as available, towards the payment of interest. The contingency of an excess of rents and profits over interest or vice versa is specifically

contemplated and for the case of deficit, where the whole of the interest is not met from rents and profits, it is provided that the mortgagee may

recover ""from us"" (that is the mortgagors) ""month after month."" This, to my mind, means that the remedy which the parties secured by the mortgage

for any interest not discharged by the rents and profits was a personal remedy, and that such deficiency was not to be added to the principal

mortgage sum. This view is strengthened by a further sentence in the mortgage-deed: ""we shall pay the aforesaid principal of Rs. 10,000 to you or your order, redeem this mortgaged property and take back the document,"" which seems to me to indicate further that the sum to be re-paid, prior to the redemption, and for the purpose of redemption was merely the original principal, sum, I therefore hold that this document means that interest was not to be a charge on the mortgaged property, but was left to be recovered under the personal covenant of the mortgagors.

2. Several reported cases have been put before us. With regard to these it is essential to say, first, that the meaning and the legal effect of a

document is to be determined on its own terms alone. The two cases most akin to the present one are *Phul Kuar v. Murli Dhar* 2 A. 527 : 1 Ind.

Dec. 905 and *Chintaman v. Dulari* 8 Ind. Cas. 570 : 33 A. 107 : 7 A.L.J. 1087. In the former case the chief point for decision was whether there

was a mortgage at all, but it was incidental decided that where there was a recital in the document that interest should be paid by the mortgagor

from his own pocket"" there was not a charge created on the property for interest. Such a recital is similar to the recital now before us that interest

shall be recoverable ""from us month after month"". In *Chintaman v. Dulari* 8 Ind. Cas. 570 : 33 AA. 107 : 7 A.L.J. 1087 it was held that, where the

document provided that the rents and profits were to be appropriated by the mortgagee ""on account of interest"" and that for any deficiency to

recover the whole amount due for interest, the mortgagor would meet that deficiency with interest at 2 per cent, per mensem this deficiency was

realisable from the mortgaged property. With reference to this case I would point out that the exact terms of the document are not given in the

judgment, and that the exact terms are obviously of peculiar importance, since, although the resume of the document given in the judgment seems

to show that the stipulation regarding the payment of interest en the deficiency of interest itself, the learned Judges held that while there was a

charge on the property for the latter there was no charge on it for the former. Therefore, in the absence of the exact terms of the documents in that

case I am not prepared to adopt the ruling to the present case. In *Ali Ahmad v. Kalka Prasad* 37 Ind. Cas 95. 14 A.L.J. 986 the mortgagee took

the-annual profits in lieu of interest and therefore there was a usufructuary mortgage under which no question, of a charge on the property for

interest can arise, and the covenant was to pay ""from my own pocket"" the deficiency not of interest, but of profits--obviously a personal covenant.

The other cases quoted before us do not seem to have any useful bearing on the present case.

3. I would, therefore, hold that there is no sufficient reason for disturbing the finding of the lower Court that there was no provision in this mortgage charging the property with payments of the interest.

4. As to the other point argued it is sufficient to say that I agree with the original Court that there is no evidence that there was any refusal by the mortgagors to pay the assessment, quit rent, etc., which compelled the mortgagee to find money for these charges in order to preserve the property from sale, and that, therefore, Section 72 of the Transfer of Property Act cannot be called in aid to charge the property with these payments. The document clearly says that if the mortgagors do not pay the charges the mortgagee shall recover ""from us"" that is, the covenant is a personal one.

5. I would, therefore, dismiss the appeal with, costs.

Walter Schwabe, C.J.

6. I agree and have nothing to add. The appeal will be ""dismissed with costs.