

(1944) 01 MAD CK 0011
In the Madras High Court

Chandrakaladhara Row

APPELLANT

Vs

Nagapotharow

RESPONDENT

Date of Decision : 20-01-1944

Acts Referred:

Citation : AIR 1944 Mad 369(1) : (1944) 57 LW 283

Hon'ble Judges : Wadsworth, J

Bench : Division Bench

Judgement

Wadsworth, J.—The appellant is the legal representative of a mortgagor who applied under the rules framed u/s 28, Madras Act 4 of 1938,

for the determination of the amount due under the mortgage. The mortgage was peculiar in that it provided that the amount advanced, which

included a sum of Rupees 1592-3-6 due on accounts and certain other advances, should be secured on property already in the possession of the

mortgagee under previous transactions, and it provided that the usufruct of the property should go, first in discharge of the account debt, secondly

in discharge of an earlier mortgage incurred by the mortgagor in favour of the mortgagee's mother, thirdly in discharge of an earlier mortgage in

favour of the mortgagee's father, and lastly in discharge of the present mortgage. The petition filed under the rules asserted that the recital in the

mortgage about the debt due on the account was fictitious and that the two earlier mortgages in favour of the mother and the father of the

mortgagee were not actually subsisting at the time Of the present mortgage; so that the whole of the usufruct would necessarily have to go in

liquidation of the , present mortgage; and he claimed that by crediting this usufruct and by applying Act 4 to the balance of the debt, the debt would

be entirely discharged. The learned District Judge in dealing with this application held that an inquiry into the plea of partial failure of consideration and an inquiry into the subsistence of the two connected mortgages was outside the scope of proceedings under the rules and the learned Judge confined himself to making a hypothetical declaration -of the amount that would be due on the debt on the assumption that the recitals in the mortgage document were true, and no payments adjusted towards the two earlier mortgages had to be re-adjusted towards the present debt. We have held in *Subbaro v. Seshayya* A.I.R 1943 Mad. 7 I that the Court acting under the rules framed u/s 28 of Madras Act 4 of 1938 cannot be required to go into the question of the amount of the debt when the 1 petitioner who seeks the aid of the Court denies the existence of any enforceable debt. The position is somewhat different where the petitioner admits the I subsistence of the debt, but says that there is a partial 1 failure of consideration and that payments which ought to have been appropriated to this debt have wrongly been appropriated to some other debt. It is difficult to see how the Court can refuse to adjudicate on such contentions and to give a positive determination of the amount due after applying the provisions of the Act to the debt having regard to the findings on pleas of this nature. But whatever be the correct view under the rules subsisting when the learned District Judge made his inquiry, the position has been substantially changed by the passing of Madras Act 15 of 1943. u/s 2 of that Act it is provided that no Court shall entertain a suit by a creditor for the recovery of a debt if the Court having jurisdiction has passed an order under Clause (a) of Sub-section (4) in respect of such debt. Clause (a) of Sub-section (4) deals with an order declaring the amount due or declaring that the debt has been discharged. No doubt the order of the learned District Judge was not passed under this amending Act; but now that this Court is seized of the matter in appeal, the result will be an order under Act 4 as amended in 1943; and seeing that the creditor is not allowed to file any suit after the amount due under the debt has been declared, it seems to follow that any declaration now made must deal comprehensively with all matters necessary to be decided before a decree for the debt can be passed, for the new Act contemplates the decree being passed on payment of court-fee in terms of the declaration given as a result of the application. Having regard to these considerations it seems

to us eminently desirable that in these proceedings a complete adjudication should be made of the amount of the debt due from the appellant to the respondent not merely by applying the provisions of the Act, "to hypothetical figures, but by applying those provisions to the actual figures reached after taking into account any plea of failure of consideration or misapplication of payments. The appeal is therefore allowed and the application is remitted for fresh disposal to the lower Court in the light of these remarks. The parties will be at liberty to adduce further evidence. Costs in the appeal will abide the result.