

(1940) 11 MAD CK 0027
In the Madras High Court

Cheriyath Manayil Paru Amma (dead) and Another	APPELLANT
Vs	
Kannamkot Kelu Kurup	RESPONDENT

Date of Decision : 12-11-1940

Acts Referred:

Citation : (1941) 53 LW 300 : (1941) 1 MLJ 484

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—This appeal arises out of a suit for the redemption of a usufructuary mortgage created on the 25th January, 1894 by the respondent's predecessor-in-title in favour of the appellant's predecessor-in-title. The respondent's predecessor-in-title was the lessee of certain agricultural lands situate in the District of North Malabar. The mortgage was of the lessee's interest in the land. The sum advanced by the mortgagee was Rs. 164, which was to be repaid at the end of three years. The deed provided that the mortgagee should remain in possession of the property and enjoy the profits in lieu of interest, but he was to pay the rent due to the lessor. At the end of the three years the mortgagor was to regain possession of the property merely on the repayment of the principal amount of Rs. 164. The lessor appears to have been a most complacent landlord because he allowed the rent to fall into arrears for 17 years, but then he filed a suit for the recovery of the possession of the property and the amount of the arrears, making both the mortgagor and the mortgagee parties. On the 18th April, 1910 a decree was passed in his favour, but he made no attempt to execute it, and as the result of his inaction he lost all right to the property and to the arrears of rent.

2. In 1933 the respondent as the representative in interest of the mortgagor, filed the present suit for redemption of the mortgage and he claimed to be entitled also to the amount which the mortgagee ought to have paid to the lessor by way of rent. He maintained that an account should be taken of the rents which had not been paid and that the amount found should be set-off against the

mortgage loan; any balance in his favour to be paid to him. ,.In other words he claimed that he was entitled to a decree for redemption with an order for a monetary payment in his favour. The District Munsif held that the appellant should give credit to the respondent for all the moneys he ought to have paid by way of rent during the 17 years but failed to pay, and granted a decree for redemption on this basis. The appellant appealed to the District Judge of North Malabar, who reversed the decision of the District Munsif. On appeal to this Court by the respondent, Patanjali Sastri, J., restored the decision of the District Munsif, but granted a certificate permitting of the present appeal under Clause 15 of the Letters Patent.

3. The learned Judge considered that the respondent was entitled to credit for the unpaid rents by virtue of the provisions of Section 76 (h) of the Transfer of Property Act, there being in his opinion no contract to the contrary within the meaning of Section 77. Section 76 states what shall happen when during the continuance of the mortgage the mortgagee takes possession of the mortgaged property. Clause (h) of the section provides that the mortgagee's receipts from the mortgaged property shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and other expenses mentioned in Clauses (c) and (d) and interest thereon, be debited against him in reduction of the amount, if any, from time to time, due to him on account of interest, the balance being applied in reduction or discharge of the mortgage money. If there is any surplus it is to be paid over to the mortgagor. Section 77 states that nothing in Section 76, Clauses (b) (d) (g) and (h) applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property be taken in lieu of interest on the principal money or in lieu of interest and defined portions of the principal.

4. We are unable to accept the opinion of the learned Judge that the contract does not deprive the mortgagor of the benefit of Clause (h) of Section 76. In our opinion the mortgage deed allowed the mortgagee to go into possession and make what he could out of the property, subject to meeting the landlord's demands for rent and the right of the mortgagor at the end of the period to redeem on payment of the bare amount of principal. We consider that the effect of the document is to take the mortgage entirely out of the purview of Section 76 (h) and as the lessor did not insist on the payment of the rent his inaction enured to the benefit of the mortgagee, not of the mortgagor.

5. The learned Judge placed great reliance on the decision of this Court, in *Immani Seshayya v. D. Lakshminarasimha Rao Pantulu*¹, but we can see nothing in common in the two cases. In *Immani Seshayya and Others Vs. Dronamraju Lakshminarasimha Rao Pantulu (dead) and Others*, , there was a usufructuary mortgage and it was calculated that the annual profits from the land would be Rs. 240. The deed provided that the mortgagee should pay annually Rs. 100 for revenue and village expenses, retain Rs. 80 on account of the mortgage debt and

pay the balance of Rs. 60 to the mortgagor. The deed also provided that if the lender failed to pay the Rs. 60 he was bound to relinquish a proportionate part of the land. The mortgagee failed to pay the Rs. 60 annually to the mortgagor and it was held that the mortgagor was entitled to be given credit for the total amount which he ought to have received. Clearly the mortgagor was entitled to be credited with the sums which the mortgagee ought to have paid him when it was being calculated what the mortgagor owed the mortgagee. In the course of the judgment the following observations were made:

Let us suppose that the revenue on this land had been remitted by the Zamindar and the sum representing that revenue had annually been left in the hands of the defendant. Can it be successfully maintained that it is not a part of the usufruct, which the mortgagee was bound to adjust against the mortgage debt? Clearly not. The same principle applies to the facts of the case.

6. The learned judge has expressed the opinion that this passage puts in substance the position in the present case, but again we are unable to agree. The passage just quoted would have application if there were not a contract to the contrary within the meaning of Section 77, but there is a contract to the contrary in this case and that makes all the difference.

7. For the reasons indicated we allow the appeal with costs throughout.