

(1892) 07 MAD CK 0006
In the Madras High Court

Chinnagandham Ammanna and Others	APPELLANT
Vs	
Tota Gurumurti and Others	RESPONDENT

Date of Decision : 19-07-1892

Acts Referred:

Limitation Act, 1963 — Article 144 Schedule II

Citation : (1892) 2 MLJ 155

Hon'ble Judges : Muthusami Aiyar, J

Bench : Division Bench

Judgement

Muthusami Aiyar, J.—On the 28th March 1891, appellants' father executed a mortgage in favor of respondents' father. The instrument of mortgage Exh. A. purported to place the mortgaged property in the mortgagee's possession and provided for the usufruct being applied first in liquidation of the stipulated interest and then in reduction of the principal debt. It contained also a covenant to repay the balance within four years and then proceeded to state that in default of payment on the due date the mortgagor was to give up the mortgaged property to the mortgagee as if it was sold to him. The plaintiff stated that though the mortgagor placed the mortgagee in possession yet the former unlawfully resumed possession in 1874 without repaying the mortgage debt and prayed for a decree either for sale or foreclosure. It was contended on appellants' behalf that the mortgage-debt was discharged and that the suit was barred by limitation. On appeal the Subordinate Judge of Cocanada found that the debt was not paid off and passed a decree for foreclosure observing that the suit was not barred by limitation. Hence this appeal. It is first urged that the suit is governed by Article 144 of Schedule II of the Limitation Act. The transaction evidenced by Exh. A. is a mortgage by way of conditional sale as

defined in Section 58, Clause (c) of Act IV of 1882, and the plaintiff prays also for a decree for foreclosure. The suit is governed by Article 147 and not barred by limitation. The plaintiff alleges that the mortgagee was dispossessed in 1874, while the suit was instituted in 1888. But it must be remembered that the suit was brought to recover possession not on the footing of the usufructuary mortgage but by reason of the foreclosure decree which it claimed u/s 67 of Act IV of 1882. It is not necessary that plaintiff should be in possession of the mortgaged property while he claims a decree for foreclosure. Though a mortgage by conditional sale is generally accompanied by transfer of possession, yet it is not always the case. It is also clear from Section 87 that a decree for foreclosure may contain a direction for delivery of possession when necessary. The contention therefore that respondents lost their right to claim foreclosure by not recovering back possession on the footing of the usufructuary mortgage within twelve years from the date of dispossession cannot be supported.

2. It is next contended that the respondents are not entitled to obtain a decree without producing a certificate as required by Act VII of 1889. I am unable to accede to this contention either, as the suit was instituted before Act VII of 1889 came into force. The general rule as stated in *Wright v. Hales* 6 H. & N 227, and in *Kimbray v. Draper* L. R 3 Q. B. 160 is that when an enactment takes away a vested right, it does not apply to existing rights, but when it deals with procedure only, it applies to an action pending as well as future. In *C. M. A. No. 29 of 1890 Suria Row v. Chellayamma*, 1 M.L.J 602, it was held that the Act did not apply to an application to execute a decree which was pending at the date of the passing of the Act. In the case before us the plaintiffs had a vested right to a decision in the suit already instituted by them in accordance with the law as it existed when the suit was instituted, and that right would be curtailed if the Act subsequently passed were applied to it. I may also observe that the decree appealed against is for foreclosure of the mortgage and not for payment of a debt. The suit would be barred if it were regarded as a debt and the direction to pay in six months contained in the decree is given not to fix a personal liability for the debt but to enable defendants to save their right of redemption or to prevent its extinction by foreclosure.

3. This second appeal cannot be supported and I would dismiss it with costs.