

(1940) 12 MAD CK 0009
In the Madras High Court

Doraisami Naicken

APPELLANT

Vs

Peru Su Aru Periakaruppan Chettiar and Others

RESPONDENT

Date of Decision : 20-12-1940

Acts Referred:

Citation : AIR 1941 Mad 475 : (1941) ILR (Mad) 739 : (1941) 53 LW 348 :
(1941) 1 MLJ 388

Judgement

1. Two questions relating to the law of limitation have been argued in this appeal. On the 8th April, 1926 the appellant obtained in the Court of the Subordinate Judge of Coimbatore a preliminary mortgage decree for Rs. 4,772 with interest and costs, amounting altogether to Rs. 5,856--6--6, against one Muthu Goundan and his two sons, a period of six months being allowed for redemption. The respondent was impleaded as the fifth defendant in the suit. He had obtained a money decree against the mortgagors and had attached the equity of redemption of the mortgaged properties. The attachment was continuing at the time of the passing of the preliminary decree on the 8th April, 1926. In the month of July 1926 the mortgagors conveyed the mortgaged properties to the appellant in satisfaction of the mortgage debt. Thereupon the appellant went into possession of the properties and remained in possession until 1932 when he was dispossessed by the respondent, who had caused them to be sold in execution of his decree and had become the purchaser at the Court sale. The properties were sold subject to the appellant's mortgage and on the 27th October, 1933 the appellant filed an application in his suit for a final decree for sale. The respondent pleaded that the application was barred by the law of limitation, but the Subordinate Judge and the District Judge on appeal held that it had been filed within time. The respondent then

appealed to this Court and the appeal was heard by Patanjali Sastri, J., who allowed it. The present appeal is from the judgment of Patanjali Sastri, J.

2. The first of the two questions raised is whether Section 20 (2) applies here. If it does apply the appellant's application for a final decree is in

time. Patanjali Sastri, J., held that the section did not apply and relied on the decisions of this Court in Mohamad Yusuf and Others Vs. Narayana

Pillai (died) and Others, , and Fallesatha Banu v. Mahomed Rashiuddin Quraishi (1934) 40 L.W. 595. The appellant says that the first decision is

erroneous and the second decision has no application. He contends that the Calcutta High Court rightly decided the question in Ramcharan

Chakrabarti v. Nimai Mandal (1921) 35 C.L.J. 58. The second question is whether the purchase of the properties by the respondent at the Court

auction held in the execution proceedings instituted by him revived the appellant's right to have a final mortgage decree passed in his favour,

irrespective of Section 20.

3. Sub-section (2) of Section 20 states that where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of the

land shall be deemed to be a payment for the purpose of Sub-section (1), which deals with the effect of payment of interest as such or a part

payment of principal. The first case in which the effect of Sub-section (2) was considered was Ramcharan Chakrabarti v. Nimai Mandal (1921)

35 C.L.J. 58. The facts in that case were shortly these. A preliminary mortgage decree was passed on the 6th April, 1910 and the mortgagor was

allowed six months in which to redeem. In 1912 the mortgagor agreed to transfer the equity of redemption to the mortgagees in satisfaction of what

was due to them under the mortgage decree, and in pursuance of the agreement the mortgagees went into possession, but they never received a

valid conveyance. On the 1st April, 1917, the mortgagor transferred the property to the fifth defendant, who dispossessed the mortgagees. On the

2nd October, 1917, the mortgagees applied for a final decree for sale, but the objection was taken that the application was time-barred. The

Court which was composed of Asutosh Mukherjee and Panton, JJ., held that it was not time-barred. The Court said that Section 20 might well be

construed to apply whenever mortgaged property is in the possession of the

mortgagee. Where a mortgagee has obtained possession under an invalid agreement for sale he may be called upon to account for the rents and profits as if he were a mortgagee in possession. The Court also observed that a litigant cannot be permitted to take up inconsistent positions to the detriment of his opponent. If he does not regard the sale as being valid he must accept his opponent as the mortgagee, in which case Section 20 applies.

4. In *Mohamad Yusuf and Others Vs. Narayana Pillai (died) and Others*, the facts were also very similar. In 1903 Immovable property was

mortgaged to one Narayanaswami Iyer and in 1905 a second mortgage was created in favour of one Swaminatha Pillai. In 1906 Narayanaswami

Iyer instituted a suit to enforce his mortgage without impleading the second mortgagee and bought the property in execution proceedings in 1908.

In 1915 Narayanaswami Iyer sold the property to the plaintiff's father, and the plaintiff and the members of his family remained in possession up to

the year 1928. In 1910 Swaminatha Pillai assigned his second mortgage to the fourth defendant, who in 1920 brought a suit on his mortgage,

impleading Narayanaswami Iyer as the first mortgagee. The Court directed a sale and at the Court auction held in 1928 the fourth defendant

bought the property. He obtained possession from the plaintiff, who filed the suit out of which the appeal arose to recover the amount lent on the

mortgage of 1903. It was held that the suit was time-barred. Venkataramana Rao, J , said that as the plaintiff and his family had been in possession

as purchasers, not as mortgagees, they must be deemed to have received the rents and profits in the capacity of owners and not as standing in the

place of the first mortgagee. The learned Judge considered that there was a distinction between that case and the *Calcutta* case which has just been

quoted, but we are unable to see any distinction in the principle involved.

5. The facts in *Fallesatha Banu v. Mohamed Rashiuddin Quraishi* (1934) 40 L.W. 595, bear no analogy to the facts in *Ramcharan Chakrabarthy*

v. Nimai Mandal (1921) 35 C.L.J. 58, or in *Mohamad Yusuf and Others Vs. Narayana Pillai (died) and Others*, . In *Fallesatha Banu v. Mohamed*

Rashiuddin Quraishi (1934) 40 L.W. 595, the Court held that unless interest is received as such Section 20 of the Limitation Act cannot extend the

period of limitation in favour of the plaintiff, but the Court was not considering

the position of a mortgagee, who has gone into possession as owner under an invalid title, and we do not regard the case as having any real bearing here.

6. In the present case the plaintiff had a valid mortgage, but went into possession of the mortgaged properties under an invalid contract of sale. The fact that his sale proved to be invalid could not vitiate his title as mortgagee and the rents and profits which he received must in the circumstances

be deemed to have been received by him as the mortgagee. He may have thought that he was receiving them as the full owner of the property, but

as he did not in fact hold that position he could only have received them in the capacity actually held by him, namely that of mortgagee. Support for

this opinion is to be found in the decision of the Privy Council in *Ramcharan Lohia v. Bhagwan Das Magesbri* I.L.R.(1926)All 443. There a karta

of a joint Hindu family contracted to sell family property in order to discharge a debt due under a simple mortgage. The karta did not convey the

property and the purchasers were compelled to institute a suit for specific performance, as the result of which they obtained a conveyance and

went into possession a year later. Out of the price payable to the vendor the vendees discharged the mortgage debt. Subsequently, the karta's

sons challenged the validity of the transaction and it was held that it did not bind them, but the Privy Council said that the purchasers should for the

period in which they were in possession of the property be treated as usufructuary mortgagees. They had discharged the mortgage. They

purported to be in possession as purchasers, but as their title was defective they were to be regarded as usufructuary mortgagees. It follows that

we consider that in *Ramcharan Chakrabarti v. Nimai Mandal* (1921) 35 C.L.J. 58, the correct opinion was expressed and therefore the appellant

in this case was in possession of the property within the meaning of Section 20 of the Limitation Act.

7. This Court held in *Subbalakshmi Ammal v. Ramanujam Chetti* I.L.R.(1918)Mad 52 : 35 M.L.J. 552, that an application which amounts to an

acknowledgment within the terms of Section 19 of the Limitation Act gives a fresh starting point for computing limitation in an application for a final

decree in a mortgage suit. There is no difference in principle between Section 19 and Section 20 and the Allahabad High Court in *Baldeo Salmi v.*

Jafar Husain I.L.R.(1926) All. 147, expressly held that Section 20 operates to extend the time for the filing of an application for a final decree. It

has been suggested that the decision of this Court in Singa Raja v. Pethu Raja I.L.R.(1918) Mad. 61 : 35 M.L.J. 579, is in conflict but we do not

agree. The Court there was not considering the question which arises here.

8. We hold that in the circumstances of this case the appellant must be deemed to have been in possession of the properties in suit as the

mortgagee and therefore Section 20 (2) of the Limitation Act applies which means that his application for a final decree on the 27th October,

1937, was in time. In these circumstances it is not necessary to consider the appellant's second contention.

9. The appeal succeeds and will be allowed with costs in this Court and before Patanjali Sastri, J.