
(1924) 11 MAD CK 0078
In the Madras High Court

Kakaraparti Punneyya

APPELLANT

Vs

Chilakalapudi Venkatappa Rao

RESPONDENT

Date of Decision : 07-11-1924

Acts Referred:

Transfer of Property Act, 1882 — Section 66

Citation : 91 Ind. Cas. 754

Hon'ble Judges : Devadoss, J

Bench : Single Bench

Judgement

Devadoss, J.—The plaintiffs suit is on a hypothecation bond executed by the 1st defendant on the 16th May 1908. The 2nd defendant is impleaded on the ground that he purchased the hypothecated house after the date of the hypothecation bond. Both the lower Courts have given a mortgage decree in favour of the plaintiff against both the defendants. The 2nd defendant pleaded in his written statement that the 1st defendant sold only the house to his father and not the site for a debt due by the 1st defendant to his father. It is unnecessary for the purposes of this case to consider whether the purchase of the house was by the 2nd defendant or by his father.

2. The contention of Mf. Krishna Mohan, for the appellant is that the suit is barred by limitation inasmuch as it is brought more than three years from the date of the sale to the 2nd defendant's father. His argument is that the 2nd defendant's father purchased only the materials of the house and that Article 36 of the First Schedule of the Limitation Act is the proper Article applicable to the case. Before considering the contention it is necessary to make it clear what was it that was actually sold by the 1st defendant to the 2nd defendant's father. Exhibit 1 is the document under which the sale was effected. It is dated 12th January 1910. It is headed sale deed of moveable property for a sum of Rs. 500. What was conveyed under the document was the site and "all the wood materials, brick, walls, foundation etc., belonging to the house of 14 full gadees built of brick--walls herein and the different kinds of materials belonging to the

said house." In the body of the document the recital is: Therefore, hence forward you, your heirs and representatives may enjoy the said property as you please and we, our heirs and representatives will never raise any disputes in respect of the same". Reading the document as a whole it is quite clear that which was conveyed under it was the house and not the materials of the house after it was pulled down. It is admitted that when the sale deed was executed, the house was standing on the site. The 2nd defendant's contention is that it was pulled down after the purchase and the materials were sold or utilised by him. When the house was sold, granting that under the document the superstructure alone was sold, the sale was a sale of Immovable property, for the house was built on foundations laid in the earth, and the house, therefore, is Immovable property even though it was conveyed apart from the site on which it stood. The expression Immovable "property" is defined in the General Clauses Act thus: "immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." According to the Indian Registration Act XVI of 1908 Immovable property includes land, buildings...and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, grooving crops nor grass." In the Transfer of Property Act Immovable property does not include standing timber, growing crops or grass. It is clear from the definition of the expression "immovable property" in the three Acts that a house which is built on a site with foundations laid in it is Immovable property. A house which is sold for the purpose of enjoyment as a house with an option to pull it down if the vendee, likes, is Immovable property for the purposes of the Transfer of Property Act.

3. Mr. Krishna Mohan's argument is that the object of the sale was for the purpose of allowing the vendee to remove the materials of the house by pulling it down and, therefore, the sale is of moveable property. I am not satisfied that that was the intention of the parties to Ex-1. Granting for argument's sake that the intention of the parties was that the house should be pulled down and the materials should be removed by the vendee even then, what was sold was the house and not the materials and, therefore, the property that was sold was Immovable property at the time of the sale. In the case of a sale or any other contract we must see in what state the property sold or dealt with under a contract was at the time of the sale or contract. What the parties intended should be done with the property after the sale or contract should not be taken into consideration in deciding whether the sale or contract is of moveable property or of Immovable property. Mr. Krishna Mohan relies upon the decision in *Surapudi Muniappa v. Nookala Seshayya* 32 Ind. Cas. 901, as supporting his contention. The facts in that case were 1st defendant mortgaged certain Immovable property with casuarina plantation on it. After some time the casuarina trees became fit for cutting and they were cut and sold. Defendants Nos. 12 and 13 were impleaded on the ground that they purchased the casuarina plantation. It was held in that case by *Coutts-Trotter and Srinivasa Ayangar, JJ.*,

that so far as defendants Nos. 12 and 13 were concerned the suit was barred after 3 years from the date on which the casuarina trees were cut. This case has no application to the present case. In that case it was found that the casuarina trees were grown for the purpose of being cut, and Srinivasa Ayangar, J., held that the mortgagor had a right to fell the casuarina trees for they were planted and grown only for the purpose of being cut for fuel. The finding was that the land was mortgaged and not the trees. Though in the case of a mortgage of land trees also are included, yet it was held there was no separate mortgage of the trees. The provisions of the Transfer of Property Act do not apply to a sale of casuarina trees for, according to the definition of the expression "immovable property" in the Act standing timber, growing crops or grass are not Immovable property. It was also held in that case that defendants Nos. 12 and 13 were in no sense alienees of the security or a portion of it and the learned Judges were of opinion that what the defendants Nos. 12 and 13 did, only amounted to a tort and the proper period, of limitation was the one applicable to the case of a tort. Srinivasa Ayangar, J., was of opinion that Article 36 was the more appropriate Article applicable to the facts of the case. The principle of the decision is that, if trees which are not the subject of a mortgage are sold and the vendee cuts them down, the mortgagee cannot proceed against him on the ground that he is the alienee of the mortgage property. The case is distinguishable from the present. In the first place, the trees were not mortgaged and in the second place defendants Nos. 12, and 13 were not the alienees. In this case the 2nd defendant's father was the alienee of the property and the property which was sold was Immovable property at the time of the sale.

4. If the 2nd defendant or his father pulled down the house and utilised the materials for other building or otherwise dealt with them, they cannot escape their liability as vendees of the mortgaged property! The mere fact that the mortgaged property exists in a different shape from that in which it was at the time of the mortgage would not extinguish the mortgagee's right against the property in its converted state, and if the person who has converted it has appropriated it to his own use either in the shape of money or in the shape of materials he would still be liable as a mortgagor. Supposing a person mortgages his house without mortgaging the site on which it stands, if he pulls it down and sells the materials, can he reasonably contend that the mortgagee should only sue the mortgagor as a tortfeasor? Section 66 of the Transfer of Property Act. prohibits a mortgagor from committing waste or from injuring the mortgaged property. But the period of limitation available to the mortgagee to proceed against fine mortgaged property is not reduced to 3 years by reason Of the mortgagor pulling down the house, and selling the materials. The mortgager would be liable for the mortgage debt if he destroys the mortgaged property, and the period of limitation is cot in any way curtailed by the mere fact that the mortgagor wilfully destroys the mortgaged property. If the vendee from a mortgagor destroys or pulls down the mortgaged properly, the liability will still attach to him, and the period of limitation in such cases is the usual period of

limitation applicable to the case of a mortgage.

5. I have held in a recent case, *Krishnaswami Bhagavathar v. Thirumalai Iyer* 90 Ind. Cas. 410, that a person who attached and realized in execution of a money-decree the surplus sale proceeds in Court was liable to pay back the amount in order to satisfy the claim of the subsequent mortgagee who was not a party to the mortgage decree in execution of which the sale proceeds were realized. As observed by Sir John Edge in delivering the judgment of their Lordships of the Privy Council in *Barhamdeo Prasad v. Tarachand* 21 Ind. Cas. 961 : 118 C.W.N. 345 : 19 C.L.J. 132 : 26 M.L.J. 243 "The surplus moneys of that sale represented the security which the plaintiffs had under their mortgage of the 19th September 1887 and did not cease to represent that security owing to the fact that Ram Barhamdeo Prasad and Rama Sumran Prasad had wrongfully and in fraud of the plaintiffs drawn them out of the Court in which they had been deposited." In this case the mere fact that the 2nd defendant or his father pulled down the house, sold the materials or used the materials for building another house would not take away the right of the plaintiff to proceed against the 2nd defendant as being in possession of the mortgaged property. The proper Article of Limitation Act applicable to such a case is Article 142.

6. The direction in the decree that the sale-proceeds of the hypothecation in the hands of the 1st defendant should be applied in discharge of the mortgage-debt and the balance, if any, should be recovered by the plaintiff from the 2nd defendant's property, is a proper direction.

7. In the result the second appeal fails and is dismissed with costs.