

(1916) 10 MAD CK 0006
In the Madras High Court

Kandula Pbda Linga Reddi and Others	APPELLANT
Vs	
Kakumanu Hanumayta	RESPONDENT

Date of Decision : 03-10-1916

Acts Referred:

Citation : 37 Ind. Cas. 764

Hon'ble Judges : Oldfield, J;Krishnan, J

Bench : Division Bench

Judgement

Krishnan, J.—This appeal arises in the execution of a compromise decree of 1903, passed in a suit brought by plaintiff-respondent for

money due on two promissory notes. The decree directed the defendants to pay the plaintiff Rs. 705, made up of the amount sued for, costs and

interest in nine yearly instalments on specified dates and default of payment of any one instalment on due date, to pay the whole amount due with

interest at one per cent, per mensem calculated from the date of the decree; it further directed that till the debt was discharged the schedule

mentioned Immovable property be mortgaged and that plaintiff do recover the above debt from defendants Nos, 1 and 2, from the family

properties of defendants, and by auction of the mortgaged property aforesaid." Defendants did not pay any of the instalments except the first on

due date; the second and third instalments were paid and received long after due dates; the other instalments were not paid at all. In 1911, plaintiff

applied under Order XXXIV, Rule 5 (2), for a decree absolute" and an order was passed in his favour after notice to defendants who did not,

however, appear. No formal decree was drawn up in pursuance of the order. Plaintiff then applied for execution of the decree by sale of the

mortgaged property and his application was granted by both the lower Courts and the appeal is against it.

2. Defendants-appellants have raised before us several legal objections to the execution which I shall consider one by one. The first objection is

that the compromise decree merely created a mortgage on the property but was not in itself an executable decree against it and that a separate suit

should have been brought if plaintiff wanted to enforce the mortgage by sale. This question depends on the construction of the decree. Though the

decree in question is an unusual one, it appears to me to be clearly a decree for sale of the mortgaged property. It sets out the amount due and

provides that on failure to pay on due date the plaintiff do recover his money by sale of the property prescribed in the schedule. It was suggested

that the sale by auction mentioned in the decree was not a Court sale but a private sale; but I am unable to accept that suggestion. No such

objection was taken by the defendants when application was made under Order XXXIV, Rule 5, of the CPC on the footing that the decree was

one, under Rule 4 clause 1. The appellants' Vakil has relied on *Rameshar Upadhy v. Subbkaran Upadhy* (1) and *Ghundra Nath Sep v. Burroda*

Shoondnry Ghose 22 C.S 813. and *Aubhoyessury Dabee v. Gouri Sunkur Panday* 11 Ind. Dec. 568. they were all cases where mere charges had

been created without any provision for sale of property to realise the debt.

3. The next contention is that the decree if viewed as a mortgage decree is an illegal decree because, it is alleged, that a mortgage decree for sale

can be passed only in a suit on a mortgage and not otherwise; and because no decree on a compromise could have been passed except in "so far

as it related to the suit" u/s 375 of the old Code which was in force and this decree went beyond it. For the first part of the argument, appellants'

Vakil relied on some observations of Richards, J., in *Rameshar Upadhy v. Subbkaran Upadhy* 10 Ind. Cas. 481. already cited. They are obiter

dicta, as the question for decision before the learned Judges was the construction of a decree and with all respect I am unable to follow them.

There is no reason shown why an agreement between parties that a decree amount should be realised by sale of properties should be treated as

anything but a lawful agreement and if it is lawful why a decree should not be passed in its terms. Section 99 of the Transfer of Property Act has no

application and no question of public policy seems involved. The objection, therefore, fails.

4. The second part of the argument is that in so far as the decree directed the sale of property in the schedule it went beyond the scope of Section

375 and was without jurisdiction, as it did not relate to the suit which was one for money due. It is conceded that the ruling in *Joti Kuruvetappa v*

Izari Sirusappa 30 M.S 478. is directly against this contention but it is argued that the rulings in *Venkatappa Nayanam v. Thimnia Nayanam* 18 M. S

410. and *Muthu Vijaya Raghunatha Tjdayana Tevar v. Thandavaraya Thambiran* 22 M.D 214. are not in consonance with it and the former has

been accepted in Calcutta and we should, therefore, refer the question of the meaning of the expression so far as it relates to the suit"" to a Full

Bench. The two Madras cases cited were referred to in *Joti Kuruvetappa v. Izari Sirusappa* (4) and reason given why it was unnecessary that they

should be strictly followed. The view expressed in *Joti Kuruvetappa v. Izari Sirusappa* (4) has been ever since followed by this Court. See

Natesan Ghetty v. Vengu Nachiar 3 Ind. Cas. 701. and *Sabapathi Pillay v. Vanmahalinga Pillai* 23 Ind. Cas. 581. As I entirely agree with the

ruling in *Joti Kuruvettappa v. Izari Sirusappa* (4) on the point, I see no need for any reference as suggested, I follow it and disallow the objection.

5. It was urged that such a question could not be raised in execution proceedings by a person bound by the decree even if it went beyond the

scope of the Section and reliance was placed on *Sabapathi Pillay v. Vanmahalinga Pillai* (8). It is not, however, necessary to decide this point as

appellants' objection fails for the reason already stated.

5. The next point raised was that the decree required registration before it could validly affect Immovable property. This objection is entirely

unfounded as we are dealing here with a decree which u/s 17, exception clause Vf of the Indian Registration Act, need not be registered.

6. It was next urged that as default had been waived by plaintiff by acceptance of instalments due, his right to execute the decree by sale of

property had not accrued. Plaintiff has only accepted two instalments which were overdue, viz., the 2nd and 3rd and the defaults so far as they

related to them, were no doubt waived, as payments were accepted without any reservation. See *Easin Khan v. Abdul Wahab Sikdar* 6 Ind. Cas.

138. But there are several subsequent defaults which plaintiff is entitled to rely on : and this objection also fails.

7. The last point urged is that the clause in the decree which gives interest at 12 per cent, on the amount due not from the date of default but from

the date of decree itself, no interest being provided for originally, is a penal clause which should be relieved against. This contention is well-

founded. It has always been held that an agreement to pay an enhanced rate of interest not from the date of default but from that of the original

obligation is in the nature of a penalty and is unenforceable. See Nanjappa v. Nanjappa (10) and Baid Nath Das v. Shamanand Das (11). It is

conceded that the fact that a compromise decree has been passed in terms of the agreement does not affect the right of the defendants to be

relieved against any term in it if it is of a penal nature. Plaintiff will, therefore, be entitled to the interest of 12 per cent, only from the date of the first

default which he is entitled to rely on, viz., 31st August 1906.

8. Defendants' appeal is dismissed subject to the above modification as to interest, parties will pay and receive proportionate costs here and in the

lower Appellate Court.

Oldfield, J.

9. I agree.