

(1945) 02 MAD CK 0040
In the Madras High Court

Kangayam V.V.R. Bank

APPELLANT

Vs

Karuppa Goundan and Others

RESPONDENT

Date of Decision : 07-02-1945

Acts Referred:

Citation : (1946) ILR (Mad) 114 : (1945) 58 LW 203 : (1945) 2 MLJ 1

Judgement

1. This appeal is governed by the decision of this Court in C.S. Ananthanarayana Iyer Vs. Sivaramakrishna Iyer and Another, . The appellant is the

plaintiff in the suit. On the 4th July, 1912, one Pattai Goundan mortgaged his one-fourth share in the property in suit to the first defendant and on

the 26th September, 1912, he created a second mortgage in favour of the plaintiff. In O.S. No. 802 of 1924, on the file of the District Munsiff's

Court of Dharapuram the plaintiff sued to enforce his second mortgage. He did not, however, implead the first defendant as the mortgagee. He

obtained a decree and at (he Court sale held in execution on the 13th August, 1929, he bought the mortgagor's one-fourth share. His purchase

was, of course, subject to the first mortgage. On the 12th October, 1929, he, obtained symbolical possession.

2. In 1926, the first defendant filed a suit (O.S. No. 568 of 1926) to enforce his mortgage without impleading the plaintiff. He obtained a decree.

On the 11th November, 1930, he purchased the mortgagor's share of the property at the sale held in execution and on the 20th October, 1932,

he obtained symbolical possession. Sixteen years before, namely, on the 27th June, 1916, the defendant had purchased the one-fourth interest of

another co-sharer in the property. After the Court sale of the nth November, 1930, the first defendant obtained possession of an undivided half

share of the property. The present suit was instituted by the second mortgagee for partition. He made all the co-sharers defendants. The District

Munsiff decreed the suit, but on appeal his decision was overruled by the Subordinate Judge who dismissed the suit. The plaintiff has now

appealed to this Court.

3. The appellant says that the Subordinate Judge was wrong in not relying on the judgment of the Full Bench of this Court which decided M.N.

Nagendran Chettiar Vs. Lakshmi Ammal, , The Subordinate Judge refused to follow this judgment, as he considered it to be inapplicable. In that

case it was held that where there is a first and a second mortgage in favour of different persons and each mortgagee files a separate suit to realise

the amount due on his mortgage without impleading the other mortgagee and in execution each buys the mortgagor's interest, in a suit for

possession simpliciter the mortgagee who bought first is entitled to possession. This present suit is not a suit for possession simpliciter; it is a suit for

partition and therefore M.N. Nagendran Chettiar Vs. Lakshmi Ammal, does not apply. As we have indicated, the case falls entirely within C.S.

Ananthanarayana Iyer Vs. Sivaramakrishna Iyer and Another, .

4. In these circumstances, the suit should not be dismissed, but a decree for partition should be given to the plaintiff conditional on his redeeming

the first mortgage created on Pattai Goundan's share. The appellant and the respondent, having appreciated the position, are agreeable to such a

decree being passed by this Court. Accordingly we hold that the appellant is entitled to a decree for partition and the recovery of a one-fourth

share in the property in suit conditional on his paying into Court within six weeks of the date on which it is ascertained the sum due to the first

defendant as the first mortgagee of Pattai Goundan's one-fourth share. In other words, the plaintiff will be given an opportunity of redeeming the

first defendant within the stipulated period.

5. The suit will have to be remanded to the trial Court for the ascertainment of the amount due to the first mortgagee and the passing of a decree

for partition and delivery to the plaintiff of the one-fourth share, subject to his depositing the sum into Court within the time allowed. The amount

payable on redemption will, of course, include the interest on the mortgage money but the first defendant will have to give credit for the income of

the one-fourth share from the date on which he went into possession. If he fails to deposit the amount within the due date, the suit will stand dismissed.

6. We will make no order as to costs in this Court; but the costs already awarded to the first defendant below will stand. The costs of the further hearing before the District Munsiff will lie in his discretion.