

(1939) 10 MAD CK 0023
In the Madras High Court

Kannomkot Kelu Kurup

APPELLANT

Vs

Cheriyath Manayil Paru Amma

RESPONDENT

Date of Decision : 17-10-1939

Acts Referred:

Citation : AIR 1940 Mad 686 : (1940) 51 LW 617 : (1940) 1 MLJ 693

Hon'ble Judges : Patanjali Sastri, J

Bench : Division Bench

Judgement

Patanjali Sastri, J.—The main question for decision in this appeal is a short one and it arises on a few undisputed facts. The appellant as the

successor in interest of the mortgagor sued the respondent in whom the mortgage right has become vested for redemption of an usufructuary

mortgage of Kuzhikhanam rights in the suit paramba. The mortgage, marked Ex. A in the case, was executed on 25th January, 1894 and it

provided that out of the rents and profits of the paramba, the purapad (rent) payable to the jenmi should be paid every year and the balance should

be appropriated in lieu of interest on the principal money. The mortgagee not having paid the rents due to the jenmi according to the stipulation in

the deed, the latter brought a suit in 1909 against the predecessors-in-interest both of the appellant and of the respondent herein and obtained a

decree for possession of the property with the rents due. This decree, however, was not duly executed and has now become unenforceable owing

to lapse of time.

2. The contention of the respondent is that the appellant is not entitled to claim an adjustment of these unpaid rents due to the jenmi against the

mortgage amount and compensation for improvements payable by the appellant

as a condition of redemption, as the benefit of the non-payment of these rents, which have now become irrecoverable should go to him, the appellant being only entitled to be kept indemnified against the claims of the jenmi. This contention was rejected by the trial Court, but was upheld by the learned District Judge on appeal and is urged again before me on behalf of the respondent.

3. It is not disputed that the question has to be decided with reference to the provisions of Sections 76 and 77 of the Transfer of Property Act.

Section 76 so far as it is material here provides:

When during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property...(h) his receipts from the mortgaged property shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and other expenses mentioned in Clauses (c) and (d) and interest thereon be debited against him in reduction of the amount, if any, from time to time, due to him on account of interest and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage money; the surplus if any, shall be paid to the mortgagor.

4. Section 77 says:

Nothing in Section 76, Clauses (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money or in lieu of such interest and defined portions of the principal.

5. It is perfectly clear that, by virtue of these provisions, the mortgagee is under a statutory obligation to apply the net receipts from the mortgaged property in reduction of the interest due to him and the surplus, if any, in reduction of the principal money and this obligation is excluded only if and in so far as, there is a contract between the parties that such receipts shall be taken in lieu of interest on the principal money or in lieu of interest and portions of the principal as the case may be. The principle underlying these provisions, is, of course, that the usufruct of the mortgaged property represents mortgagor's money in the hands of the mortgagee for which he is bound to account at the time of redemption, except to the extent to

which he is expressly authorized to appropriate such usufruct towards interest due to him or towards interest and principal, if any surplus is left

after meeting the interest. In the present case, s the contract between the mortgagee and the mortgagor provides that rent payable by the

mortgagor to the jenmi should be paid by the mortgagee out of the receipts from the mortgaged property and the balance should be taken in lieu of

interest on the principal money. To the extent, therefore, of the receipts not paid to the jenmi as rent according to the stipulation in the deed,

Section 77 cannot operate to exclude the statutory liability to account which Section 76(h) casts on the respondent as the mortgagee in possession.

This principle was recognised in *Immani Seshayya and Others Vs. Dronamraju Lakshminarasimha Rao Pantulu (dead) and Others*, . In that case

the annual profits from the mortgaged property was estimated to be Rs. 240 out of which the mortgagee was required annually to pay Rs. 100 for

revenue and village expenses, Rs. 60 to the mortgagor and appropriate the balance Rs. 80 towards the mortgage debt. The deed also provided

that after the debt was discharged in 55 years in the manner set forth, the creditor was to surrender possession of the land to the borrower. After a

certain period, the annual payment of Rs. 60 was never made to the representative in interest of the mortgagor. In a suit for redemption before the

expiry of 55 years, the question arose whether the unpaid sums of Rs. 60 should have been adjusted as they fell due against the mortgage debt in

which case, the mortgage debt would have been completely discharged by the time the suit was brought, or whether the mortgagor's only remedy

was to recover such unpaid amounts separately, that is, otherwise than in connection with the mortgage transaction, in which case the mortgage

would still remain outstanding. The learned Judges held that the unpaid sums of Rs. 60 as they fell due every year should be taken as adjusted

against the mortgage debt, and observed:

A portion (Rs. 60) was by agreement of parties excluded from the usufruct for a specific purpose. If the purpose failed or the term was not carried

out, what was the result? The part excluded reverted without any further act or agreement and became again profits. The mortgagee would then be

liable to apply it in reduction of the debt. Section 76(h) enacts that the mortgagee should apply the usufruct, first in reduction of the interest, then of

the principal. This, he is bound to do under the law; so that, if a part of the profits initially excluded was not applied as directed, it became usufruct

as a matter of course and without a special contract to that effect. The proper way then of viewing the question, is : has the part excluded, in the

events that have happened, regained its character of rents and profits? If so the mortgagee has no option but to appropriate it to the mortgage

debt.

6. They reinforced their conclusion by putting an illustration which, in substance, is the present case:

Let us suppose that the revenue on this land had been remitted by the Zamindar and the sum representing that revenue had annually been left in the

hands of the defendant. Can it be successfully maintained that it is not a part of the usufruct, which the mortgagee was bound to adjust, against the

mortgage debt? Clearly not. The same principle applies to the facts of the case.

7. The respondent's learned Counsel attempted to distinguish the decision on the ground that the mortgagee had agreed to pay the mortgagor Rs.

60 whereas all that the mortgagee in the present case undertook to do was to pay rent due to the jenmi out of the usufruct. I am unable to see how

this difference affects the principle on which that decision was clearly based. In fact, the illustration which the learned Judges used in support of

their conclusion clearly shows that the principle should apply a fortiori to a case like the present.

8. The learned Counsel for the respondent placed reliance in support of his contention on certain decisions, namely, *Izzat-unnessa Begum v. Pratab*

Singh (1909) 19 M.L.J. 682 : L.R. 26 IndAp 203 : ILR 31 All. 583 , *Fakir Muhammad Khan v. Ali Sher Khan* (1911) 10 I.C. 113, *Raghubar*

Narain Chowdhuri v. Mohit Narain Jha I.L.R.(1927) 7 Pat. 44 and *Pandit Bachchu Lal v. Chowdhri Syed Mohammad Mah* 37 C.W.N. 457 .

The facts of the first of these cases were entirely different and no question arose with reference to Sections 76(h) and 77. A mortgagee decree-

holder purchased the mortgaged property subject to earlier encumbrances thereon and it turned out subsequently that these encumbrances were

unenforceable. The mortgagor thereupon sued to recover from the purchaser the amount of those encumbrances as unpaid purchase money and it

was held by their Lordships of the Privy Council that he had no right to recover

those amounts as all that he was entitled to was an indemnity against the incumbrances affecting the land, I am clearly of opinion that this principle cannot apply to the facts of the present case which has to be decided with reference to the statutory provisions referred to above. Indeed, even in the case of vendor and vendee, it has been held by this Court, in Ragunatha Chariar Vs. Sadagopa Chariar, , that the principle of the above decision will not apply if the vendee agrees to pay a certain sum of money for the land sold to him and undertakes to pay a portion thereof to the encumbrancers on behalf of the vendor. In such a case, the purchaser is regarded as agreeing to pay to the encumbrancers moneys belonging to the vendor but left with him (the vendee) to make the payment as agent of the vendor. See also Gadde Venkatarayudu Vs. Anumolu China Ramakrishnayya and Others, .

9. Fakir Muhammad Khan v. Ali Sher Khan (1911) 10 I.C. 113 is the decision of a single Judge, Griffin, J., of the Allahabad High Court. The case, no doubt, resembles the present one on the facts and does support the contention of the respondent, but no reference is made to Sections 76 and 77 of the Transfer of Property Act and all that is referred to by way of authority for the view taken was a previous unreported decision of that Court. With all respect to the learned Judge, I think the decision is open to question and I am unable to follow it.

10. In Raghubar Narain Chowdhuri v. Mohit Narain Jha I.L.R.(1927) Pat. 44, there was a term in the usufructuary mortgage deed that all profits from increased income should go to the mortgagee and this was particularly stressed by James, J., who observed:

The mortgage bond specifies a sum of Rs. 91-15-0, as the annual income which the mortgagees may expect to derive from the property; but it is expressly provided that any income in excess of this shall go to the mortgagees in possession and that the mortgagors will have no concern with it.

Mr. Pugh contends on behalf of the appellants that the assignee of the equity of redemption is not concerned to know how the mortgagees applied their annual profits, provided that no additional liability was thereby cast upon the mortgagors.

11. The decision therefore appears to proceed on an express term in the mortgage bond there in question. Though Section 77 of the Transfer of

Property Act was referred to in the opening sentence of the judgment as reported, there is no discussion either of that section or of Section 76(h)

to show how the conclusion arrived at is in accord with those provisions; and the decision in *Fakir Muhammad Khan v. Ali Sher Khan* (1911) 10

I.C. 113, was merely followed.

12. In *Pandit Bachchu Lal v. Chowdhri Syed Mohammad Mah* 37 C.W.N. 457 , there was a provision in the mortgage deed that the mortgagee

shall appropriate the surplus profits towards interest:

The mortgagors having no claim for profits and the mortgagee having no claim for interest

and it was held that the case fell within Section 77 and the mortgagee was not liable to account for the rents and profits. This decision has clearly

no application to the present case.

13. Two subsidiary questions were also raised by the respondent's counsel; first, that the claim of the appellant for the back rents payable to the

jenmi should be treated as a claim to set-off and that only so much of it as is not barred by limitation should be allowed; secondly, in any case, no

interest should be allowed on these arrears.. Both these contentions are, however, answered by the decision in *Kanna Pisharodi v. Kombi Achan*

I.L.R.(1885) 8 Mad. 381, where it is pointed out that a claim of the kind put forward by the appellant cannot properly be described as a set-off

and that in taking accounts in such cases, interest on both sides should be allowed. It is a matter of adjustment in the taking of accounts in the

redemption action - vide the last paragraph of Section 76 of the Transfer of Property Act.

14. For the reasons indicated, the decree of the lower appellate Court is set aside and that of the Court of the District Munsif restored. Interest at

6 per cent, per annum on future unpaid rent will be allowed till delivery of possession. The appellant will have his costs here and in the lower

appellate Court. This will be subject to such orders as may be passed in C.M.P. No. 3694 of 1939 which will be sent to the trial Court for

disposal.