

(1926) 02 MAD CK 0002
In the Madras High Court

Kasi Vasi Chokkalinga Tambiran

APPELLANT

Vs

Ramanadan and Others

RESPONDENT

Date of Decision : 23-02-1926

Acts Referred:

Citation : AIR 1926 Mad 1031 : (1926) 24 LW 257

Judgement

1. This is an appeal by an alienee of mortgaged property against an order declaring in what order the mortgaged properties are to be sold. The

Subordinate Judge has directed that the property alienated to the appellant should be sold first, and the property in the hands of Defendants 4 to 6

which was sold to them free from all encumbrances, should be sold next and that the property in the possession of the mortgagor should be sold

last. Under the sale-deed by the mortgagor to the appellant a sum of Rs. 1,1500 was directed to be paid towards the balance due on the

mortgage. Admittedly no portion of this amount was paid until after the mortgage suit was filed and, consequently, it is only fair to hold as the

Subordinate Judge has held that the appellant was most largely in default in the payment of the mortgage-debt. It is now contended in appeal that

the "appellant's alienees having paid Rs. 11,500 into Court appellant is not liable to pay any further amount towards interest or costs on the ground

that he was not bound to pay this amount of Rs. 11,500, until the mortgagor had tendered the balance of the mortgage amount to the mortgagee

He relies on a decision of the Privy Council in Muhammad Siddiq Khan v. Nasir Ullah Khan [1899] 21 All. 223 but that case can be distinguished

on the facts. There it was held by the Allahabad High Court that when the sale was effected by the mortgagor there was an agreement that a

portion of the consideration which was to be applied in discharge of the mortgager-debt was to be retained by the vendee as security for the

balance of the payment by the vendor-mortgagor. It was also found that a tender had been made by the vendee of the amount due by him, but that

the vendor decline 1 to offer. In appeal to the Privy Council their Lordships remarked that:

they are of opinion that there is no ground for the appeal.

2. And they go on to state,

The Rs, 17,000 were not left with the vendees simply as a deposit of the money of the vendor. They were to retain it as a security that the property

sold should be freed from encumbrances upon it and that they should have a good title They were entitled to retain it until the vendor provided the

rest of the money necessary for this purpose.

3. Then they proceed:

From the nature of the transaction it was not a deposit upon which the vendees would be liable to pay interest unless they refused or omitted to

pay the money when they were informed by the vendor that he was prepared to pay the balance necessary to satisfy what was due. Without that

balance they were not bound to pay or tender to him the Rs. 17,000.

4. Ordinarily the purchase money must be treated as deposit in the hands of the vendee which is payable to the vendor, but in the circumstances of

that case their Lordships held that it was not a simple case of purchase money, but that there was according to the terms of the sale an agreement

that this money should be treated as security, that the property sold should be free from in-cumbrances. In the present case the facts are very

different. There is one passage relied upon by the appellant in the sale-deed which is as follows:

If there should be any excess or deficit in the amounts directed to be paid towards the aforesaid hypothecations we shall ourselves be personally

present and discharge the same in full.

5. From this recital it is contended that we must assume that it was a sale free of incumbrances and that the money to be paid was to be held

merely as security for the discharge of the incumbrances. As against this contention we have first of all the statement of the appellant himself that the

amount of Rs. 11,500 was not the full amount due under the mortgage-deed and that there was a balance still due by the mortgagor. If this is so

the clause as to excess or deficit cannot refer to the question of Rs. 11,500, being the exact amount due under the mortgage, for both the parties

were aware that this was not the "whole of the amount due. No doubt the vendor would be liable to make good any loss to the vendee provided

that the vendee had paid the amount due by him. The sale deed expressly states that there are no incumbrances of any kind "" except the two

mortgages above-mentioned."" It was clearly understood between the parties that these mortgages were subsisting and that the payment by the

vendee would not fully discharge the liability. In such circumstances it is impossible to hold that there was any agreement such as is referred to in

Muhammad Siddiq Khan v. Nasir Ullah Khan [1899] 21 All. 223, and, therefore, the ordinary rule of vendor and purchaser must be applied an 1

the purchaser is liable for interest on the amount not paid by him. This was not disputed in the lower Court and we must accept that fact as further

evidence of the agreement between the parties.

6. A further point is raised that the executing Court is not competent to marshal the order in which the mortgaged property shall be sold when, the

question has been decided in the trial of the suit. The point was raised in the written statement in the suit but there has been no reference in the

judgment. The only part of the judgment relating to this question refers to an agreement between the mortgagee and the mortgagor and to this

agreement the alienees were apparently not parties, there having been no adjudication on this point. It was, therefore, open to the executing Court

to declare the order of sale. The appeal consequently fails and is dismissed with costs.