

(1940) 08 MAD CK 0013
In the Madras High Court

K.G. Govindarajulu Naidu

APPELLANT

Vs

M.S. Gopalaswamy Chetty and Another

RESPONDENT

Date of Decision : 13-08-1940

Acts Referred:

Citation : AIR 1941 Mad 401 : (1941) 53 LW 153 : (1941) 1 MLJ 225

Hon'ble Judges : King, J

Bench : Division Bench

Judgement

King, J.—These petitions arise out of Small Cause suits filed by a landlord for rent or jodi due to him for faslis 1343, 1344 and 1345. He

has however not sued his original lessee but has sued the petitioner who is a usufructuary mortgagee, from that lessee. The District Munsif has

given him a decree on the ground that the provisions of Section 76(c) of the Transfer of Property Act lay it down that a usufructuary mortgagee in

possession of the mortgaged property is bound to pay the land revenue or similar public charges due on that property. This decree has been

challenged in revision. It is argued that Section 76 of the Transfer of Property Act deals only with the relative rights and duties of the mortgagor

and mortgagee and cannot possibly confer upon a third party to the mortgage the right of proceeding directly against the mortgagee for the

recovery of rent. This objection seems to me unanswerable and is supported by the authority of Sachindra Mohan Ghose v. Commissioner for the

Port of Calcutta (1937) 66 C.L.J. 10.

2. The respondent, however, although he does not seriously attempt to support the argument adopted by the learned District Munsif contends

before me that he is entitled to proceed against the petitioner on the ground that

he has recognised the transfer of the lease by way of the mortgage and has accepted rent from the petitioner for five faslis before the faslis with which these suits deal. I have analysed such evidence as is available and I find that it is true as a matter of fact that the defendant has paid the rent for faslis 1338 to 1342. There is nothing however in the documents filed in the case to prove that he paid this rent as the assignee of the mortgagor or in substitution for the mortgagor's liability to pay and that he did not pay it as agent of the mortgagor. On the evidence put forward in the case therefore there is no material for any positive finding as to the capacity in which the petitioner paid. So far as the plaint is concerned it is quite clear that the claim was not made upon this principle of law at all.

The only ground upon which the claim was made was that the defendant as mortgagor was in actual use and occupation of the land. In his written statement the defendant pleaded that there was no , contract between him and the plaintiff and further asserted that his mortgagor had actually sold the equity of redemption to one Venkatasami Naidu and that it was Venkatasami Naidu from whom the plaintiff should seek payment of the rent. I understand that the plaintiff thereupon attempted to implead Venkatasami Naidu but that the Court refused to allow the application which was belated. This state of the pleadings will amply show that there was no obligation at all upon the defendant to explain the capacity in which he actually paid the rent. It is now argued finally on behalf of the respondent that I should call for a finding on this question, namely, whether the defendant paid the rent during the preceding five faslis as agent for the mortgagor or in substitution for him. In view of the fact that the plaintiff did not base his claim upon the previous payment and did not even refer in his plaint to the fact of the previous payment by the defendant, I see no reason why I should order a remand to establish a matter which was clearly outside the scope of the suits as laid and as defended.

3. The result is that the decrees of the learned District Munsif cannot be upheld and must be set aside. These petitions are accordingly allowed and the plaintiff's suits dismissed with costs throughout.