

(1936) 09 MAD CK 0024
In the Madras High Court

Kizhakkepati Thavazhi Tarwad Karnavan and Manager,
Narayanan Nair

APPELLANT

Vs

Thavalapara Komli's son Chekunhi and Others

RESPONDENT

Date of Decision : 18-09-1936

Acts Referred:

Citation : AIR 1937 Mad 520 : (1937) 45 LW 648

Hon'ble Judges : Horwill, J

Bench : Division Bench

Judgement

Horwill, J.—The appellant and one Karthiyayini Amma, a lady of his tarwad, executed a kanom kychit in favour of defendants 9 and 10;

and the appellant, as the karnavan of the tarwad, brought this suit for the redemption of the prior mortgages. The suit was decreed by the District

Munsif of Walluvanad but in appeal the Subordinate Judge of Ottapalam has given three reasons why the suit should not be decreed. The first is

that the suit was premature, in that it was brought before the expiration of the period of the mortgage. The second is that the suit is not maintainable

without Karthiyayani Amma's heirs being made parties to the suit, as the kychit was executed by her and the plaintiff jointly and not by the tarwad

as represented by them. The third objection to the plaintiff's suit is that he has not asked to be allowed to redeem the whole of the property

mortgaged. In appeal all these points have been argued, except that the finding of the learned Subordinate Judge that the kanom kychit was

executed by the plaintiff and Karthiyayini Amma in their personal capacities and not on behalf of the tarwad has been accepted. It therefore follows

that Karthiyayini Amma must be added as a party; but it is contended that the plaintiff should be given an opportunity of doing so. It has also been

conceded that the plaintiff is bound to pay for the improvements of all the lands covered by the mortgage, and therefore to redeem all of them.

2. The trial Court found that the suit was not premature. The question arose because the mortgage document, Ex. A, was executed seven years

after the execution of a similar deed, Ex. 3, for which type of mortgage the normal term is 12 years. The existence of a mortgage for 12 years does

not prevent the parties from renewing the mortgage and cancelling the old one before the 12 years have expired; and to see whether that has been

done one has to examine the document itself. The learned District Munsif pointed out that there is nothing in Ex. A, to indicate-that it was not to

operate until the expiration of the 12 years under Ex. 3, and I agree. Not only is there nothing in Ex. A to suggest that it is not intended to operate

for a number of years; but there are-recitals definitely proving that it is to operate at once. For example, we find: ""These items are demised to me

today;"" later on, ""out of this michavaram the paddy shall be paid from 1089 onwards"" (the year of Ex. A being 1088); then, lower down: ""The oil

shall be measured according to the oil measure before the 30th Makaram of each year from 1089 onwards"". The next sentence is:

The Government assessment with fund on the scheduled properties from 1089 onwards shall be paid yearly.

3. Lastly, and still more important, we find the sentence:

I would also forfeit the right to hold the properties for the rest of the period for which the properties have been demised in kanom.

4. So that the natural presumption that a mortgage deed would not be executed five years before it was intended to operate is reinforced by

definite terms in the document itself proving that it is intended to operate at once. The lower appellate Court was wrong in holding that the suit was

premature. Most of the contest in this Court has been centred round the question whether the suit must fail because Karthiyayini Amma's heirs

have not been added as parties. Order 1, Rule 9, Civil P.C., lays down the principle that a suit shall not be dismissed merely because of the non-

joinder of some person necessary to the suit; but admittedly an exception has been made by the Courts to those cases in which the plaintiff has

persisted in two or more Courts in not adding the necessary party, even when he was given an opportunity to do so. This principle is enunciated in

AIR 1931 229 (Privy Council) , a Privy Council case. Their Lordships found it necessary to dismiss the suit because the plaintiffs had violated the terms of Order 2, Rule 2, in that in a previous litigation they did not ask for the relief that could then have been granted. At the very end of the arguments the counsel for the plaintiff appellant asked for permission to add the co-mortgagors. It appears that the reason why the plaintiff had not added the co-mortgagors at the outset was that the defendant claimed accounts against these co-mortgagors and the plaintiff wished to avoid this issue.

5. Their Lordships also found that a remand would have necessitated a commencement of the proceedings de novo; for the contest between the defendants and the co-mortgagors would then have had to be opened. The claim in *Faqir Chand v. Aziz Ahmad* was of an intricate nature and the plaintiff was eventually unsuccessful. He then asked in appeal for permission to change his suit into one for contribution. Had he been allowed to do that it would have changed the whole nature of the suit, which was a complicated one. All the evidence that had been let in would have been of no avail and fresh evidence of an entirely different kind would have been necessary. The Court therefore refused to allow the amendment. Their Lordships however held that had there been a mere non-joinder of parties they would have remanded the suit for fresh disposal. *Pasumarthi Subbaraya Sastri Vs. Mukkamala Seetha Ramaswami*, was a case in which the plaintiff was particularly remiss in not adding a necessary party. There had been disputes between the plaintiff and the Bezwada Municipality. The plaintiff, in order to avoid a direct contest with the Municipality and to try to assert his right by a tortuous method, brought a suit to eject a person from a strip of land that he was claiming. The trial Court found it necessary, although the Municipality was not a party, to consider the relative claims of the plaintiff and the Municipality. Naturally, the defendant was not able to put forward fully the claims of the Municipality and it was held in this Court that the suit should not have been decreed; but should have been dismissed on account of the refusal of the plaintiff to add the Municipality as a party. In each of these cases the Court found that the plaintiff had disentitled himself to an equitable remedy under Order 1, Rule 9, by way of amendment of plaint because of his conduct throughout

the suit. In none of these cases was the plaintiff's suit dismissed on the purely technical ground that he had failed to amend his plaint in the lower

Courts. The conduct of the plaintiff, the persistency with which he prosecuted his wrong claim, his refusal to adopt the remedy open to him when

the opportunity arose, or an injustice to the defendants, was the reason for the refusal of the appellate Courts to allow an amendment. In

Mohanavelu Mudaliar Vs. Annamalai Mudaliar and Another, a Bench of this Court refused to allow an amendment where the plaintiff had wrongly

refused to add certain executors as parties to a suit on a will; but there the change in the position of the defendants on account of the conduct of

the plaintiff was the reason for the order. From a perusal of these cases quoted on behalf of the defendants it cannot be said that there is any rule of

thumb by which a Court can say whether the plaintiff shall be allowed to add a party at a late stage or not. Order 1, Rule 9, is still the rule to be

applied at any stage of a proceeding; and the plaintiff should only be refused that equitable relief when his conduct has been such as to disentitle

him to it.

6. Although the cases quoted by the learned advocate for the appellant, e. g., S.R.M.A.R. Ramanathan Chettiar Vs. Annamalai Chettiar and

Others, and Kherodamoyi Dasi Vs. Habib Shaha, , are not very much to the point, yet they do at least show that Courts will not lightly dismiss a

plaintiff's suit unless his conduct has been such that he does not deserve the consideration of the Court. If he has behaved in a fair and

straightforward manner and the adding of a party would not unduly prejudice the defendants, his suit should not be dismissed because of some

technicality. Applying these principles to this case we have to see whether the conduct of the plaintiff has been such that he does not deserve to be

allowed the privilege that Order 1, Rule 9 gives him. It was of no importance to the defendants at all whether the mortgage was in favour of the

defendant or in favour of the plaintiff and Karthiyayini Amma personally. The contest in the trial Court seems not to have turned on this point at all,

the evidence being led on the questions whether or not the suit was premature and on the value of the improvements. That being so, it would be

most inequitable if the plaintiff were not granted the relief to which he is in equity entitled merely because he stated that he had taken the mortgage

on behalf of the tarwad and not for themselves. It is pointed out that even in the lower Appellate Court the plaintiff did not ask that in the event of the learned Subordinate Judge's coming to the conclusion that the mortgage was not for the benefit of the tarwad, he should permit the plaintiff to add the sons of Karthiyayini Amma as parties; but the plaintiff could hardly do so there because the Subordinate Judge having found incorrectly on issue 1, intended dismissing the suit in any event. Mr. Govinda Menon says that he holds a vakalat from Karthiyayini Amma's heirs; but even ignoring that, there seems to be no reason why Karthiyayini Amma's heirs should object to being added as parties; because the plaintiff, even without their consent, has a right to redeem.

7. A number of cases have been cited before me to show that a Court will not interfere in second appeal in a question of this kind. I need not discuss these cases; for I am quite satisfied that this Court will always interfere in second appeal when a lower Court has wrongly refused to grant an equitable relief. The learned advocate for the appellant denies that the suit of the plaintiff was for partial redemption. He states that the plaintiff was willing to pay the whole of the amount due on the mortgage bond; but did not wish to take possession of certain properties because of the high value of the improvements to the property. I think nevertheless that he is asking for partial redemption; because the amount to be paid upon redemption is not merely the mortgage amount, but the cost of the improvements. Mr. Govinda Menon however admits that the plaintiff must pay for all these improvements and states that he is willing to do so. As the suit is to be remanded in any case I need not now go into the question whether a Court in second appeal would ordinarily allow this, remedy to the plaintiff if that were the sole dispute between the parties. Defendant 8 has also appeared by an advocate in this Court and has asked that whatever orders may be passed in this appeal, his rights as a sub-mortgagee should be preserved. If the plaintiff is successful this defendant will be entitled to the value of the improvements he has made upon the land; and the plaintiff does not deny that this defendant possesses that right. The quantum of compensation will of course be determined by the trial Court.

8. In the result the appeal is allowed and the suit remanded to the trial Court with the following directions; The plaintiff will be permitted to add the

heirs of Karthiyayini Amma as parties. If they raise no objection to a decree being passed no further evidence on any issues raised in the suit except that of the value of the improvements will be necessary. In the unlikely event of their resisting the plaintiff's suit, some further issues and evidence may be necessary. The learned District Munsif has already given findings with regard to the value of the improvements on the property covered by the plaint. He will now permit the plaintiff to amend his plaint and ask for the redemption of all the items mortgaged. Evidence may, of course, be adduced with respect to the items not covered by the original plaint. The District Munsif will then pass a decree in accordance with his findings. As the plaintiff has had to appeal not only because of his negligence in failing to add Karthiyayini Amma as a party in the lower Courts, but also because the learned Subordinate Judge gave a wrong decision against him on the question of the interpretation of Ex. A, I order all parties to bear their own costs in the two appellate Courts. Refund of court-fee in both appellate Courts is allowed. Leave to appeal refused.