(1920) 08 MAD CK 0036

In the Madras High Court

Kunhimai Kutty Beari and Another APPELLANT

Vs

Halekote Alsabi and Others RESPONDENT

Date of Decision : 03-08-1920

Acts Referred:

Citation : AIR 1921 Mad 636 : 62 Ind. Cas. 723 : (1921) 13 LW 434

Hon'ble Judges : Oldfield, J;Abdur Rahim, J

Bench : Division Bench

Judgement

1. The question of limitation relates to the construction of a clause in Exhibit A, the deed of usufructuary mortgage. That clause is in these words:

Till the above stated vaida (time), you shall take possession, make improvements and enjoy and also pay the thirva due, in respect of this

property, Wang No. 81."" It is argued that we must hold that the passage contains a covenant to pay and that, therefore, the mortgagee was entitled

to rely on that covenant and that this suit is in time, as it was filed within 12 years of the breach of the covenant. But we must cay that it is difficult

to find any covenant to pay in this Clause What the mortgagor says is that the mortgagee is to be in possession and enjoyment of the land for 15

years, and, after the expiry of the 15 years, if he wishes to get back his land, he will pay the amount due to the mortgagee. There is no unqualified

promise to pay. It is an option given to the mortgagor, in case he wanted to do so, to re-pay the mortgage amount and get back his properties. We

have been referred to a number of oases in which a similar question arose, as to whether certain words in particular deeds of mortgage contained a

covenant to pay. But we do not think that much assistance can be derived from those decisions in construing the particular document before us.

We might, however, mention that the case of Ranga Pillai v. Narasimma Ayyangar 47 Ind. Cas. 852 bears a close resemblance to the facts of this

case, and there the learned Judges held that there was no covenant to pay. If there was no covenant to pay on the part of the mortgagor, then

according to the Full Bench decision in Marturu Subbamma v. Gadde Narayya 43 Ind. Cas. 4 , the right of the mortgagee to sue u/s 68(c) of the

Transfer of Property Act arose when the mortgagor failed to deliver possession of the property to the plaintiff. Reckoning time from that date, the

suit is clearly barred under Article 132 of the Limitation Act, which undoubtedly applies. We are, therefore, of opinion that the learned Judge''s

decision on the question of limitation, so far as the suit relates to Exhibit A, is wrong.

2. As regards Exhibit B, the case really cannot be distinguished from that in Exhibit A, for all that it says is that, if the mortgagor fails to pay even in

December 1899, he will pay the principal and interest in arrears, with the kanam amount due, under the under-mentioned Ildarwar document,

meaning Exhibit A. That does not necessarily refer to the period after the expiry of 15 years. The claim under Exhibit B must also be held to be

barred.

3. The language of Exhibit C, the other further document, is, however, different. It says: ""If I failed to pay even then, I shall pay the amount of this

document along with the amount of the kanam under the above-mentioned usufructuary mortgage after the vaida (time) of the said usufructuary

mortgage document."" Here, there is an express covenant, on the part of the mortgagor, to pay the amount covered by Exhibit C, after the term of

15 years mentioned in Exhibit A, and reckoning time from that date, the suit, so far as it is based on Exhibit C, is not barred. The plaintiff,

therefore, will have a decree for the mortgage amount of Exhibit C, Rs. 290, at Rs. 12 1/2 per cent. from the date of the document, until six

months from this date, and thereafter at six per sent, until realization. Time for redemption six months. The plaintiff''s suit is otherwise dismissed.

Costs in proportion here and in the Courts below.