

(1910) 04 MAD CK 0056
In the Madras High Court

K.V. Kunhiraman Menon and Others

APPELLANT

Vs

Aruthalatkutti and Others

RESPONDENT

Date of Decision : 27-04-1910

Acts Referred:

Transfer of Property Act, 1882 — Section 68, 68(c)

Citation : 7 Ind. Cas. 173

Hon'ble Judges : Ralph Benson, J; Krishnaswamy Aiyar, J

Bench : Division Bench

Judgement

1. The plaintiffs are mortgagees under a usufructuary mortgage-deed dated the 1st December 1899. The suit is to recover the mortgage money with interest. There is no covenant to pay. The plaintiffs claim to recover the money u/s 68 of the Transfer of Property Act, Clauses (b) and (c). The question is whether the mortgagees have been deprived of the whole or part of their security in consequence of the default of the mortgagors or whether the mortgagee being entitled to possession, the mortgagors have failed to deliver the same to them or to secure possession to them without disturbance by the mortgagor or any other person. We think we must answer the first part of the question in plaintiffs' favour. The facts necessary for the understanding of the question are as follows:-- Amina Umma was the original owner of the property. There was a panayam and puran-kolam executed by her in favour of one Kammali. He had a daughter and sons, one of whom was the deceased Mohamed. Mohamed purchased the property from Amina subject to the prior incumbrance on the 6th of October 1891. The mortgage sued on was executed by Mohamed as owner entitled to the whole suit property and by the other heirs of Kammali as entitled to the panayam and puran-kolam executed to Kammali. One Achyutha Wariar obtained a money decree against Amina Umma and in a subsequent suit O.S. No. 157 of 1892 he also got a declaration that the sale to Mohamed was invalid as against him and he was entitled to sell the property as that of his judgment-debtor subject only to the prior incumbrances. Subsequent to obtaining this declaration, Achyutha Wariar purchased the property in private sale in 1896 and

instituted a suit, O.S. No. 511 of 1898, for redemption of the panayam and purankodam. His suit was dismissed by the Munsif. He preferred an appeal and it was during the pendency of the appeal that Mohamed and the other children of Kammali executed the suit mortgage. Achyuta Wariar succeeded in appeal in getting a decree for redemption but in second appeal his suit was ultimately dismissed. In pursuance of the appellate decree, he got possession in execution in July 1903. But having regard to the risk he ran of the second appeal going against him, he brought the property to sale in execution of his original money decree and became the purchaser on the 17th October 1901. Achyutha Wariar is now in possession.

2. As regards the suit for redemption, Mohamed, the plaintiffs' mortgagor, did all he could to resist it and he ultimately succeeded in getting Achyutha Menon's suit dismissed. We cannot say that there was any default on his part within Clause (6) of Section 68 or that he failed to secure possession to the mortgagees under Clause (c) of that section. The fact that Achyuta Wariar took possession under the redemption decree of the appellate Court and that there was a temporary suspension of the mortgagees' possession does not, in our opinion, bring the case within Clause (c) of that section.

3. But we think the matter stands on a different footing with reference to the default of the mortgagor under Clause (6) of Section 68. Mohamed's ownership of the property was in consequence of the decree in O.S. No. 157 of 1892 subject to the risk of its being sold in execution of Achyutha Wariar's money decree. The mortgage instrument fully recognises it. He was, therefore, under obligation to discharge the decree by payment. In the first instance, the liability was, by express stipulation, cast upon the mortgagees and money was reserved in their hands for payment to Achyutha Wariar. But Mohamed, who was the sole purchaser under the sale of 1891 and who is treated as the sole owner of the property in the mortgage instrument, by a registered notice, dated the 22nd December 1899, countermanded payment. We think the notice, though it required the mortgagees to pay the amount to Mohamed himself, absolved them from the obligation of paying Achyutha Wariar. But as Achyutha Wariar was not paid he brought the property to sale and became the purchaser. The property has been lost to the mortgagee clearly by the default of the mortgagor, Mohamed, in not discharging the decree of Achyutha Wariar. The plaintiffs are, therefore, entitled to recover their money with interest. The question remains who is liable? Mohamed's heirs are undoubtedly liable to the extent of his assets which they have received. But we think the other defendants are not liable. They were parties to the mortgage only by reason of their interest in the panyarn and puran-kodam and that interest remains unaffected by the execution sale of Achyutha Wariar. In modification of the decrees of the Courts below, the plaintiffs will have a decree for the amount sued for, namely Rs. 1,254-10-0 as against the heirs of Mohamed with interest at six per cent, from the date of the mortgage to the date of this decree with costs throughout, and future interest till payment.

4. The second appeal is dismissed with costs against the other respondents.