

(1937) 09 MAD CK 0035
In the Madras High Court

Majji Gurunaidu and Another

APPELLANT

Vs

Gottemukkala Venkatraju and Others

RESPONDENT

Date of Decision : 09-09-1937

Acts Referred:

Citation : AIR 1938 Mad 85 : (1937) 46 LW 742

Hon'ble Judges : Horwill, J

Bench : Division Bench

Judgement

Horwill, J.—The plaintiffs in these two suits mortgaged a certain property to defendants 1 and 2; and there is evidence that the latter

subsequently leased the property to defendants 4 and 5. The Appellate Court seems to have accepted this evidence; and it must therefore be

assumed for the purpose of this appeal that the lease by the mortgagees to defendants 4 and 5 has been proved. While defendants 4 and 5 were in

possession, there was a re-survey of the Vizianagaram estate in which these properties are situated; and defendants 4 and 5 were then registered

as pattadars. The plaintiffs now bring these suits for the recovery of this property after redemption. The trial Court dismissed the suits; but the

Appellate Court held that they were entitled to redeem. Defendants 4 and 5 have therefore filed these second appeals.

2. It has first been argued that there was no valid mortgage at all, because although the amount of the mortgage under these documents was less

than Rs. 100, no immediate delivery took place. Reliance is placed on the fact that the deed is described as a mortgage deed and on the recital that

by this document the land has been usufructuarily mortgaged to defendants 1 and 2. It has however to be remembered that although it is true that

Ex. A does contain this expression, yet when the document is read as a whole it seems clear that the parties did not intend that the mortgage should operate at once; for example, after the preamble and the recital of the necessity for borrowing money, the document begins ""was have mortgaged to you with possession from the ensuing year Durmukhi there under"". Whatever value for the appellants the use of the past tense in "we have mortgaged" might have, it is neutralized by the use of the words "from the ensuing year." ""We have mortgaged to you with possession from the ensuing year"" has no grammatical meaning. The nature of the transaction therefore seems to have been that on the date of Ex. A money was needed by the executants of Ex. A, that money was paid, and that the actual mortgage of the property was to take place the following year. Before the date on which the mortgage was to operate, Ex. A would presumably amount to an agreement to mortgage. Many cases have been quoted in which delivery was not given in pursuance of an agreement; and the Court was asked to consider the documents as agreements to sell or mortgage, as the case may be, the actual sale or mortgage being deferred until the time of delivery; and in which it was held that the documents could not be so construed. But in none of these cases did the documents themselves show that it was not the intention of the parties that possession should be given at once.

3. The only case that bears any resemblance to the present one is Suraj Baran Singh v. Pratab Bali Singh (1917) 4 AIR Oudh 203 where the transaction was apparently a simple mortgage with a stipulation that if the money was not repaid within a certain time, possession was to be given.

It is therefore possible to distinguish that case; but if it were there intended to lay down any general principle that delivery must take place at the time the document is drawn up, I would respectfully differ. Reliance has already been placed on the much discussed case, Kuppuswami Goundan

Vs. Chinnaswami Goundan and Others, in which the question of the proof of a mortgage for an amount less than Rs. 100 came up for

consideration. As the mortgage was for less than Rs. 100, the parties were not bound to draw up any document at all; and the learned Judges in

that case, as will be seen from the head-note, were of opinion that:

The moment the parties for some reason consider that it is not sufficient to effect

the transaction of sale by mere delivery of property, but require that as evidence of such transaction there should be a deed or document, the transaction and scarcely be correctly described as one effected by mere delivery of property, and again, but the moment the parties reduce the terms to writing, it is the writing that thereafter must be regarded as containing and setting out the terms of the contract and it would not be an apt or correct description of the transaction to call it a sale by delivery of property.

4. The exact effect of the drawing up of an unregistered document for a sum less than Rs. 100 has been much discussed in later "Cases; but it is

not necessary to refer to these cases because this case can be clearly distinguished in that the mortgage was not intended to operate at once and

that the delivery was an independent transaction that took place a year later. It cannot be said therefore that the parties did not here intend to effect

a mortgage by delivery. It has lastly been argued that even if the appellants were lessees, the fact that they attorned to the zamindar of

Vizianagaram in 1902 gives them an independent title and that they are no longer estopped from denying the title of the [Plaintiffs, It is conceded

that as lessees from the mortgagees, they are in no better position than the mortgagees and that just as the mortgagees were estopped from denying

the title of the mortgagors, so the defendants, had it not been for the re-survey in 1902, would have been estopped from denying the title of the

plaintiffs. It is argued that Ex. J(I), the patta issued by the zamindar to the defendants, shows that the zamindar did not admit that the tenants had

any occupancy rights. It is argued, on the authority in *Alaga Pilial v. Ramswami Thevan* (1926) 13 AIR Mad 187 that if the zamindar either evicted

the appellants or did some act signifying that he no longer admitted their right to remain in possession as lessees of the mortgages and the plaintiffs,

then the mere fact that the appellants continued in possession after attorning to the zamindar would not prevent them from setting up a title against

the mortgagors. That contention is no doubt correct; but there is no evidence on the record which serves as a basis for that argument. Presumably,

the settlement officer who issued the patta in the name of the defendants did so because the appellants were in possession and claimed the right to

remain in possession. There is no reason to believe that the estate authorities insisted on issuing a patta to the appellants in spite of the fact that they knew that the appellants only derived their title from the plaintiffs. One must therefore presumed in the absence of evidence to the contrary, that the appellants made no reference to the title that they derived from the plaintiffs and that they were willing to take the patta from the zamindar without making a reference to their derivative title from the plaintiffs. I do not consider therefore that 49 M.L.J. 7423 in any way helps the appellants.

There being no evidence that their possession was threatened by the zamindar in 1902, they are estopped from denying the right of the plaintiffs even after 1902; for there was no change in the nature of their possession. The appeals are therefore dismissed with costs one set of Rs. 35 in each case. Leave to appeal is refused.