

(1925) 09 MAD CK 0068
In the Madras High Court

Mathilda Sice and Another

APPELLANT

Vs

Fritz Gaebele and Others

RESPONDENT

Date of Decision : 28-09-1925

Acts Referred:

Transfer of Property Act, 1882 — Section 76, 76(g)

Citation : AIR 1926 Mad 955 : (1926) 23 LW 272

Hon'ble Judges : Odgers, J;Madhavan Nair, J

Bench : Full Bench

Judgement

Odgers, J.—This is an appeal against the final decree of the Subordinate Judge of Salem in a mortgage suit. By Ex. A, dated 24th August 1886, one Jules Sice, who was a coffee planter in the Shevaroy Hills mortgaged certain property, namely, 1/2 of the Tanny Pandal Estate and the whole of the St. Josephs Estate, to one Lob Levyt. In 1892 Jules Sice, the mortgagor, died. His widow, sons and daughters are the defendants in this case. On the 31st July 1908, Madame Sice, the widow of Jules Sice entered into a contract, Ex. B, with one Mr. Fritz Gaebele, by which the latter undertook to work the coffee estate and to furnish the necessary money for it, which latter should bear interest at 8 per cent. Mr. Fritz Gaebele was to be treated as the first mortgagee of the estate for Rs. 24,000 and was to work the plantation without any interference from the defendants. The agreement provided that an account and inventory should be taken on the 1st March every year and that after providing for certain charges the profits should be divided by allotting 60 per cent. to the hypothecation debt 25 per cent. to Madame Sice, and her heirs and 15 per cent. for management. The contract was to last for ten years i.e., up to 1918. In 1909 Fritz Gaebele paid off Levyt and took an assignment of the latter's mortgage rights by Ex. C, and on the 22nd June 1910, an English mortgage was entered into by Madame Sice in , favour of Gaebele. This deed recited that Gaebele had advanced Rs. 15,200 making with the sum Rs. 13,200 paid to Levyt Rs. 28,400. It is, however, conceded that the sum of Rs. 15,200 was never in fact paid. Now it is admitted by both sides that Fritz Gaebele is in the position of a mortgagee in possession

and the suit was brought for a sum of Rs. 49,877 on the footing of Ex. D. The plaintiff prayed that there might be a decree for foreclosure and that the defendants be directed to put the plaintiff in possession of the properties, the defendants having, according to the plaintiff, taken possession of the properties after the agreed period which expired on 30th October 1918 the suit having been filed on 14th December 1918.

2. In the preliminary judgment the Subordinate Judge held that Ex. D was not supported by consideration to a larger" extent than Rs. 13,200, that the plaintiff under Ex. D, was in the position of a mortgagee in possession and that he was bound to account for the income of the properties ; further that the defendants are entitled to re-open the settlement of accounts of the plaintiff's management. There was a decree for foreclosure and an account to be taken of what was due to the plaintiff for principal and interest on the mortgage. In giving directions for the account the learned Subordinate Judge directed that the principal due on the mortgage would be taken at Rs. 13,200 and accounts taken and usual adjustments made out of the profits according to Ex. K till the date of Ex. D, i.e., 22nd June 1910, and thereafter under the terms of Ex. D with due regard to Section 76 of the Transfer of Property Act. The accounts were referred to a commissioner from whose report it is seen that the plaintiff produced certain books of account; that he summoned two witnesses who were not examined ; that books, Exs. P and Q were written from subsidiary books not produced ; that the entries in Exs. P and Q could not, therefore, be verified ; and the entries gradually dwindled into one or two entries a month and practically became a monthly extract. The produce-accounts, Exs. N and O, did not contain any explicable abstracts as to the disposals and balance in stock at the end of each year. It was, therefore, not possible to arrive at the balance of coffee in stock at the end of each year. Ex. M, the cash account, up to 1915 does not help in this respect and there is no cash account from 1915 to 1918. Again management is entered in the ledger at 20 per cent. instead of 15 per cent. as per Ex. K. The advances made by Fritz Gaebele and the amount of interest due to him do not agree with the statements forwarded to Madame Sice. There is no proper stock book maintained and the result the commissioner had arrived at is with reference to the figures available in the accounts produced.

3. To this report the defendants took certain objections set out in pages 56 to 58 of the printed papers. The Judge on the defendants' contention, that the accounts which the commissioner has examined were not reliable and were not kept in the regular course of business, and that no vouchers have been produced in support of the items of expenditure, says that the plaintiff was a resident of Pondicherry ; that the management of the estate was entrusted to one Bosen and to one Ramdhoni and was of opinion that these facts are not sufficient to condemn the whole account as unreliable though he admits that the facts seemed to be that the plaintiff being an absentee landlord had not sufficient control over the managers. In the result he says the defendants have not called evidence as to the annual average yield either prior to the plaintiff's possession

or after they got possession in 1918. All he does is to disallow all interest on the advances to the plaintiff, namely, Rs. 3,155, and to find without reasons that the plaintiff had recouped himself the actual amounts advanced for expenses. He, therefore, decreed for Rs. 13,200, the principal, and Rs. 803, the balance of interest. Against this the defendants appeal and state that if accounts were properly taken a very large sum would be found due to them.

4. A number of letters have been exhibited which show that Fritz Gaebele knew that his managers were behaving improperly. He complains that it is very hard to get particulars from them. The allowance to Madame Sice was paid irregularly and according to the plaintiff's own admission the manager does not properly look after the estate. In fact as he says " he has become madder every day." In spite of letter and wires he gets no reply. That is in February 1918. The question is: What to do with this account ? It is perfectly clear to my mind that the plaintiff's books are of very little real value in arriving at a figure. Mr. O.S. Venkatachariar for the respondents admits the accounts are improper but wants to throw the responsibility for proving what the mortgagee ought to have received on to the mortgagors. There is no doubt that merely putting forward accounts is of no use whatever. They must be supported by some other evidence which the Court believes. All that the plaintiff says as P.W. 1 is that Ex. M is the cash account from 1908 to 1915 kept by his agent Bosan. Ex. N is the crop account from 1908 to 1917 kept by Bosen and continued by Ramdhoni. Ex. O is the continuation of Exs. M and N. Exs. P and Q are the accounts maintained in his (plaintiff's) office at Pondicherry, under the control of his accountant. That statement to my mind is totally insufficient to afford the slightest corroboration of the accounts Which the plaintiff literally threw at the head of the Court.

5. As said in *Kundanmal v. Kashibai* [1902] 26 Bom. 363 it is for the party who puts forward the accounts to explain them and support them in such a way as to convince the Judge that there is such a probability of their accuracy as to make it reasonable for a prudent man to accept them. It has been laid down over and over again that a mere account book without more does not prove anything : see *Yasuvadiyam v. Subba Naicker* [1919] 52 I.C. 704 (Abdur Bahim and Oldfield, JJ). There mere proof of the existence of certain entries in books of account kept in the ordinary course of business was held not sufficient. As laid down in *Imambandi v. Motasuddi* [1912] 15 C.L.J. 621 mere assertion that particular pages of volumes were written by this or that writer is not sufficient compliance with the provisions of law. It appears to me therefore that the books cannot be said to have been proved item by item for the purpose of charging the defendants. Their general character has no doubt been proved by plaintiff.

6. There are, however, certain admissions in them which all go to the debit of the plaintiff. I take it that the law requires proof not only of account books generally but of each item that is, in the interest of the person producing the books, but with regard to admissions, i.e., entries against the producer's own pecuniary interest, the law dispenses with all proof save that the book has been kept by or

under the authority of the producer. We must, then, it seems to me, set aside the evidence as far as the plaintiff seeks to fasten the liability on the defendants by the entries in these books of account. The mortgagee is, therefore, in the position of having neglected to keep proper accounts as required by Section 76(g) of the Transfer of Property Act. The question is what ought to be done under these circumstances. The plaintiff has had an opportunity of producing his evidence. He only produced these books that are now in question. He brought two witnesses with him who it is stated without contradiction were Bosen and Ramdhoni and they were not examined. The defendants stated that they had no evidence to put before the Court. They of course were out of possession for ten years as it will be remembered that under Ex. K they were to have nothing to do with the management of the estate during that time. But for the fact that the defendants, beyond disputing the legal value of these accounts, should have in my opinion, shown or attempted to show that the figures (for instance with regard to the yield) were prima facie wrong, I should have sent these accounts back with a direction that the plaintiff "was to be disallowed all items of expenditure in his accounts and debited with all items of receipt."

7. I think, however, the defendants were under the circumstances wrongly advised. It may be that having been in possession up to 1909 and since 1918, they could have afforded the Court some assistance in the taking of these accounts. Under the circumstances I do not see how I can direct a fresh account without giving both parties an opportunity of adducing fresh evidence, it being borne in mind that on the admissions of the plaintiff any entries in the books already produced will be debited against Mm. Mr. Aiyangar for the appellant pressed us to decide on a figure for ourselves, to take the accounts ourselves on the basis of disallowing the plaintiff everything and making every presumption against him which the learned Counsel said would result in a balance in his favour of about Rs. 38,000, This we cannot do for obvious reasons. But I do not see why, if on re-taking all these accounts it turns out that a balance is due to the defendants a decree should not be given in their favour on their paying the requisite Court-fee. As Ghose says at p. 598 of his book it is the essence of foreclosure and redemption suits, that each party is entitled in such suits to enforce his rights against the other. If the balance is, therefore, against any party he must pay it. The appeal therefore is allowed. The appellants must have their costs of the appeal. The cost of the final decree will abide the result of the decree, if any, after taking the accounts afresh. The final decree is set aside. The matter will go back to the lower Court for the purpose of having the accounts re-opened, each side being at liberty to adduce evidence.

Madhavan Nair, J.

8. I agree and have nothing to add.