

(1911) 02 MAD CK 0032
In the Madras High Court

Meenakshi Ayee

APPELLANT

Vs

Andi Nadan and Others

RESPONDENT

Date of Decision : 10-02-1911

Acts Referred:

Citation : 9 Ind. Cas. 996

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

Bench : Division Bench

Judgement

1. The respondents having put in a memorandum of objections in which they object to the finding of the Subordinate Judge that the whole of the consideration of Exhibits, A1 and A2 was not paid in cash on the dates of these documents but we have no hesitation in confirming the finding. The plaintiff's story of the point is utterly improbable. The executant of the bonds had admittedly no other property than what was mortgaged under Exhibits A1 and A2. We cannot believe the evidence of the witnesses who say that Vellia Nadan, who was risking his money by lending it to the first defendant for recovering her property by litigation, was content to pay the whole amount into her hands without any security for the money being expended for the purpose for which it was intended. The Subordinate Judge has fully dealt with the evidence relating to the question and we agree with the reasons he has given for his finding. On the finding the appellant contends that the suit should have been dismissed. We do not think so, Exhibits A1 and A2 were executed, according to the first defendant, for money to be advanced from time to time and we cannot see any reason for holding that the plaintiffs cannot in this suit recover the amount actually advanced. As the plaintiffs were bound to prove what amount was actually advanced on account of the bonds and to render an account of them, the proper course to be pursued in the case was to direct them to put in a statement showing the amounts, to call upon the first defendant, if so advised, to surcharge and falsify the plaintiff's account and then proceed to determine amount that the plaintiffs would be entitled to recover. The Subordinate Judge did not follow this course. He observes,--"The plaintiffs have not chosen to explain in detail the dates which

they made the several payments and the amounts paid on each occasion." He went on to find out the amounts actually advanced by the plaintiffs from the evidence on record, which was not directed to prove the particular point he had to decide. Before us, the parties have expressed their willingness to have the amount due to the plaintiffs decided on the materials available on the record.

2. The Subordinate Judge has taken much pains to arrive at the proper figure as approximately as possible and we accept his conclusion with one slight modification. He has taken the fee paid to the Pleader Rangasami Iyengar at Rs. 900. The Pleader as defence 5th witness said that what he received might be Rs. 800 or 1,000. We think that the plaintiff is not entitled to more than Rs. 800, on this evidence. We shall make the deduction of Rs. 100, in the amount found by the lower Court in paragraph 21 of its judgment to have been paid in 1898 and substitute in the said paragraph Rs. 750 for Rs. 850.

3. The appellant contends that the recital of cash payment made in the bonds being found to be untrue the plaintiffs are not entitled to recover the higher rate of interest of 2 per cent, provided therein in case of default of payment of the principal and interest of the bond in one year. We think that the contention must be upheld. This term of the bond cannot be given effect to on the finding that the amount of the bond was not paid to Vellia Nadan in cash nor within the year fixed for payment by the debtor. The Subordinate Judge has fixed certain dates of his own form from which interest at 2 per cent, should run on in different ways portions of the money. This, in our opinion, he was not at liberty to do. The stipulation in the bond being unenforceable the plaintiffs are not entitled to the higher rate on account of the risky character of the loan. We must further modify the decree by directing that the plaintiffs be entitled only to simple interest at 1 1/2 per cent, from the dates fixed by the Subordinate Judge in paragraph 24 of his judgment. With these two modifications decrees of the lower Courts are confirmed. The parties will pay and receive proportionate costs. The whole difficulty in the case has been caused by the plaintiff setting up an untrue case of cash payment of the entire consideration, failing to produce proper evidence of the sums of money advanced by them. Their conduct would justify every presumption being made against them. The time for redemption is extended to the end of April. 1911.