

(1942) 08 MAD CK 0029
In the Madras High Court

Moorayil Achutha Kurup

APPELLANT

Vs

Kandath Veluthedeth Govindan Nayar and Others

RESPONDENT

Date of Decision : 21-08-1942

Acts Referred:

Citation : AIR 1943 Mad 220 : (1943) 56 LW 35 : (1942) 2 MLJ 775

Hon'ble Judges : Wadsworth, J

Bench : Division Bench

Judgement

Wadsworth, J.—The plaintiff who is the appellant filed a suit for possession and rent on the basis of a lease deed which is contemporaneous

with a contract of possessory mortgage in favour of the plaintiff. The lease was to the mortgagor and it is common ground that the terms of the

mortgage were such that the rent due on it was secured by the contract of mortgage. The lease provided for rent at Rs. 24 per annum and it was

executed on 2nd February, 1896. The claim was for arrears of rent for 19 years and though the contract provides for interest on arrears at 24 per

cent., the amount of interest claimed in the plaint works out to a little over 12 per cent. The suit was decreed in full by the trial Court. There was an

appeal by the fourth defendant who claims under a subsequent demise from the original lessee-mortgagor and in that appeal no ground was taken

regarding the rate of interest for arrears of rent, though the fourth defendant had pleaded in his written statement that the rate of interest was penal

but had not pressed the plea to the extent of getting an issue framed on the subject. The lower appellate Court held that the suit was barred by

limitation and S.A. No. 880 of 1937 was filed by the plaintiff. It was heard by Venkataramana Rao, J., who found that the suit was not barred by

limitation and that the mortgage in favour of the plaintiff was binding on the family of the mortgagor only to the extent of Rs. 50, though the nominal amount of the mortgage was Rs. 200. The learned Judge remanded the appeal for a decision as to the amount of arrears of rent having regard to a contention that the plaintiff is not entitled to claim the full rent stipulated in the lease in view of the finding that only Rs. 50 was advanced. There was also a contention that the fourth defendant was entitled to relief u/s 15 of the Madras Agriculturists' Relief Act, which was referred to the lower appellate Court. In the remand enquiry the lower appellate Court has found that no relief could be given u/s 15 of Act IV of 1938 because the tenant had not deposited the rent for faslis 1346 and 1347 within the dates stipulated in Section 15. The correctness of that finding is not attacked now.

2. The lower appellate Court also found that because the lease must be regarded as part of the contract of mortgage the rent under the lease must be proportionately reduced in accordance with the finding as to the extent to which the mortgage was binding. He therefore allowed a rent of only one-fourth the amount stipulated in the contract. At the same time without giving any reason, he reduced the interest on arrears of rent. The learned Subordinate Judge observes,

On the basis of the recital in Exhibit A, interest at 24 per cent. has been claimed on such arrears. It is doubtful whether such rate can be decreed now.

As already indicated, although the contract provides for interest at 24 per cent., the plaintiff has limited his claim in such a way that the actual interest claimed in the plaint works out to a little more than interest at 12 per cent.

3. The reasoning of the learned Subordinate Judge on the basis of which he has reduced the rent payable is that the lease and the mortgage form one transaction, the lease being only in the nature of a machinery for the purpose of realising interest due on the mortgage and that the mortgagor is entitled to a reduction of interest because of the partial failure of consideration and that it does not matter whether this is worked out in a suit for redemption or in a suit on the lease. I am informed that a suit for redemption is now pending and if the mortgagor is entitled to claim as a

consequence of failure of consideration that the mortgagee should account to him for a proportionate share of the usufruct--a matter on which I express no opinion--that is a question which can properly be gone into in the mortgage suit and which, in my opinion, does not properly appertain to the suit on the lease. No doubt for some purposes it is necessary to read the lease and the mortgage as parts of a single transaction but as we had occasion to point out in *Abdul Khadir and Others Vs. V. Subramanya Pattar*, , that does not mean that the possessory mortgage and the lease back are to be construed as a simple mortgage providing for interest at a certain rate. The mortgage and the lease back do form part of the same transaction, but effect must be given to each transaction according to its terms and the Court cannot by reading the two together spell out a transaction totally different in its character and incidents. The argument for the contesting respondents is, in the present case, that because this lease is in the nature of a machinery for the collection of the interest, the rent is interest and the amount fixed for rent must be regarded as nothing more than so much per cent. on the principal of the mortgage. Consequently when the principal of the mortgage is shown to be less than the amount expressed in the document of mortgage, there will be a proportionate reduction in the interest and consequently in that which is described as rent. No doubt it has often been said that when there is a possessory mortgage and a contemporaneous lease back to the mortgagor, the lease back is by way of a machinery for the collection of interest on the mortgage. But that does not mean that the rent stipulated in the lease can be varied as if there had been no such stipulation and as if the contract merely provided for the payment of a certain percentage on the principal secured. This contract of lease expressly stipulated for the payment of a certain sum as rent. The amount of that rent is fixed with reference to the usufruct of the property and not as a percentage of the amount of the mortgage. It seems to me to follow that in a suit on the lease full effect must be given to the terms of the contract of lease and it is not open to the Court to vary the terms of this contract on grounds not even stipulated in the contract of mortgage. I am of opinion, therefore, that the plaintiff was entitled to recover rent under the lease-deed at the contract rate notwithstanding the finding that the mortgage is binding on the family of the mortgagors only to the extent of one-fourth its nominal amount.

4. The decision of the lower Court on the question of interest on arrears of rent cannot be supported. There was no contention in the memorandum

of appeal to the lower appellate Court that the interest decreed was penal nor was there any issue in the trial. The learned Subordinate Judge is in

error in stating that the plaintiff claimed interest on arrears of rent at 24 per cent., though the contract does provide for interest at this rate. There is

no evidence that the interest claimed is more than the customary rate for such contracts in the district concerned and the fact that Section 17 of the

Malabar Tenancy Act recognised 12 per cent. as the customary rate of interest for kanom transactions in South Malabar makes it most unlikely

that the rate which the plaintiff has claimed is in excess of the customary rate. it seems to me that there is no legal basis for the reduction of ""interest

which the lower Court has directed.

5. The appeal is, therefore allowed with costs, the decree of the lower appellate Court set aside and that of the trial Court restored with costs here

and in the lower appellate Court. (Leave refused.)