

(1945) 10 MAD CK 0019
In the Madras High Court

Muhammadhu Mamoon Labbai and Others

APPELLANT

Vs

C. Ramanatha Pillai and Others

RESPONDENT

Date of Decision : 24-10-1945

Acts Referred:

Citation : AIR 1946 Mad 312 : (1946) 59 LW 86 : (1946) 1 MLJ 90

Judgement

1. The only point pressed for the appellants in this second appeal is that on a proper construction of the othi deed, Ex. P-18, there is no personal covenant to pay the amount due under the deed to enable the plaintiff to bring a suit for sale. Mr. Swaminatha Aiyar for the appellants also raised another point that even if the deed did contain a personal covenant to pay, the suit for sale is not maintainable because after the amendments to Sections 67 and 98 of the Transfer of Property Act the mortgage in question should be treated as an anomalous mortgage and if the deed itself did not confer a right on the mortgagee to institute a suit for sale he will not have that right. This point was not raised in either of the Courts below. It assumes that the amendments referred to are retrospective and will affect rights under a mortgage of 1922. In the absence of authority I am not inclined to agree with the appellants' Counsel that these amendments are retrospective. But I shall not express any final opinion because I do not think I should permit the appellants to raise this point, not having raised it in the Courts below.

2. The relevant part of the document in question is as follows in the translation by this Court:

You shall, for this sum of rupees four thousand two hundred and fifty, take possession of the schedule property under othi for a period of six years from this day, pay the assessment due to the Government and enjoy the property. On the expiry of the stipulated period, I shall pay the amount and redeem the othii.

2. As Mr. Swaminatha Iyer for the appellants has taken objection to the correctness of this translation, I am also setting out the original Tamil which is as follows.

3. Both the lower Courts have held on a consideration of the actual language used and with the assistance of the decisions in which similar language had been used that there is a personal covenant to pay the othi amount.

4. It is contended that the relevant words which in the translation appear as " I shall pay the amount and redeem the othi " really ought to have run as " having paid the amount, I shall redeem the othi." The contention is that this provision is only for redemption on payment and does not import an obligation to pay. Great stress is also laid by Mr. Swaminatha Aiyar on the fact that according to him there is no date mentioned for payment. He sought to distinguish in particular the decision of the Full Bench in *Kangayya Gurukkal v. Kalimuthu Annavi* (1903) 14 M.L.J. 61 : ILR 27 Mad. 526 on the ground that in the document construed in that case a definite date had been mentioned. I do not agree however that there is no date mentioned in Ex. P-18 for payment. The sentence preceding does fix a period of six years " from this day " that is, the date of the document. In *Udayana Pillai v. Senthilvelu Pillai* (1896) 6 M.L.J. 210 : ILR 19 Mad. 411 a Bench of this Court construed almost identical language to imply a covenant to repay the mortgage amount on a certain date. In that case the contract between the parties contained in a deed dated the 8th October, 1867, provided as follows:

In lieu of interest on this sum of Rs. 200 you will, for three years from this year, raise any crops you like, including summer and season crops, pay Government assessment and enjoy the said lands. On the expiry of the term, I shall pay the said Rs. 200 and redeem the lands.

5. Their Lordships held that these words contained a covenant to repay the mortgage money on a certain date, that is the 8th October, 1870. This date, it may be remarked, is not to be found in the document. It is a date which has to be necessarily implied by the language used, namely, " on the expiry of the term". Likewise in the present document it can be implied that the date fixed for payment is the 16th September, 1938.

6. I entirely agree with the Courts below in holding that the construction of this document should follow the construction of documents containing very similar language in *Kangayya Gurukkal v. Kalimuthu Annavi* (1903) 14 M.L.J. 61 : ILR Mad. 526. and *Udayanan Pillai v. Senthilvelu Pillai* (1896) 6 M.L.J. 210 : ILR 19 Mad. 411.

7. Mr. Swaminatha Aiyar for the appellant relied strongly on the recent ruling of a Bench of this Court in *P.R.M.P.L.R.M. Palaniappa Chettiar Vs. K. Periaswami Konar and Another*, . The document construed in that case contained the following clause:

In any year, after the expiry of the stipulated period, I shall redeem by giving notice in Pangur/x and paying money in Chitrai.

8. Their Lordships held that there was no covenant to pay. Two features which distinguish the language used in the document construed in that case from the

language used in the document in the present case may be noted. The first is that there is an option to pay in any year and secondly the main idea of the clause is that the mortgagor is at liberty to redeem after the expiry of the stipulated period and as a condition of redemption the issue of notice in a particular month and payment in another month are specified. Krishnaswami Aiyangar, J., in delivering the judgment says at page 449:

There are no words in the deed casting an obligation on the mortgagor to pay and redeem, capable of being enforced at the instance of the mortgagee. The language employed only reserves an option to the mortgagor, but if he desires to exercise it, he can do so only by following the procedure indicated and not otherwise.

9. I do not think that the decision in that case helps us to construe Ex. P18. The language used in the document in the other decisions relied on by the appellants, namely, Rangayya Pillai v. Narasimha Aiyangar (1918) M.W.N. 672 Nagar Damodara Shanbhogue Vs. Chandappu Pujary and Others, and Mohamed Maina Thambi Marakqyar v. Sidhi Mohamad 1937 M.W.N. 81 is so different from the language used in the present case that I need not deal with them in detail. In this case the words clearly denote a covenant to pay and the lower Courts are correct in the view that they took of the document.

10. The second appeal is therefore dismissed with costs of the first respondent. No leave.