
(1923) 08 MAD CK 0051
In the Madras High Court

Nadapena Appanna and Others

APPELLANT

Vs

Saripilli Venkatasami and Others

RESPONDENT

Date of Decision : 21-08-1923

Acts Referred:

Citation : (1924) ILR (Mad) 203 : (1924) 19 LW 37

Hon'ble Judges : Ramesam, J

Bench : Single Bench

Judgement

Ramesam, J.—The facts are stated by my learned brothers. It is sufficient to add that defendants 1 to 4 represent the original mortgagee who is dead and defendants 5 to 8 are their relations and friends who got into possession of the suit property within 12 years prior to suit.

2. It is true that the unregistered deed of mortgage mentioned in the plaint is inadmissible in evidence to prove the mortgage. It is also true that a mortgage of immovable property to secure a sum of Rs. 100 or upwards cannot be created otherwise than by a registered deed. There is therefore no mortgage of 1902 to redeem.

3. But it does not follow that there was not, at the date of plaint, the relation of mortgagor and mortgagee between the plaintiff and defendants 1 to 4. It is a too narrow reading of the plaint which is a bare narration of the facts, to construe it as seeking to redeem only a mortgage of 1902 and no other. The decision in Krishna Pillai v. Rangasami Pillai ILR (1895) Mad. 462 does not apply. If the defendants who remained in possession for 15 years prescribed for and acquired the interest of a mortgagee by adverse possession, the relation between the plaintiff and the defendants is that of a mortgagor and mortgagee. The limited interest of a mortgagee may be acquired by adverse possession Madhava v. Narayana ILR (1886) Mad. 244. To prove the extent of interest acquired by the defendants by adverse possession, the terms of the mortgage asserted by them have to be and may be proved. Such proof cannot be regarded as an attempt to prove the mortgage of 1902 or to adduce secondary evidence of the terms of the

unregistered deed of mortgage; for the asserted mortgage need not necessarily be (though very often it will be) identical with the mortgage attempted to be created by means of the unregistered deed of mortgage.

4. The case has not been tried. One cannot now know what evidence the plaintiffs are going to adduce to prove the mortgage acquired by the defendants by adverse possession. The unregistered deed of mortgage (which ought to be in the defendants' possession), if forthcoming, can be admitted in evidence to show the character of the defendants' possession. *Varada Pillai v. Jeevarathnammal* (1920) ILR 43 Mad. 244 (P.C.). It cannot be assumed at this stage that no other evidence will be forthcoming.

5. Even if the defendants acquired no mortgage or other limited interest by adverse possession, the plaintiffs can succeed if they are able to prove their title. It cannot be said that the character of the suit is changed. In the first place, even as the suit is framed, it is a suit for possession based on title, as against defendants 5 to 8 and the suit, is not a suit for mere redemption. But apart, from this, I agree with the decision in *Annada Hait v. Khudiram Hait* (1914) 19 C.L.J. 532, where it was held that a suit to redeem a usufructuary mortgage is substantially a suit for possession. [See also *Sesha Naidu v. Periasami Odayar* ILR (1921) Mad. 951.]

6. I agree with Venkatasubba Rao, J., that the appeal must be dismissed. Costs of the High Court to abide the result.