

(1936) 12 MAD CK 0036
In the Madras High Court

Nagayya Naidu and Another

APPELLANT

Vs

R. Duraiswami Naidu

RESPONDENT

Date of Decision : 02-12-1936

Acts Referred:

Limitation Act, 1963 — Section 2(12)

Citation : AIR 1938 Mad 111 : (1937) 46 LW 688

Hon'ble Judges : Burn, J

Bench : Division Bench

Judgement

Burn, J.—The only question for decision in this appeal is whether the payment of the suit mortgage on 16th November 1926 by defendant 13 saved limitation as against defendant 12. The learned District Munsif held that it did not and the learned Subordinate Judge, disagreeing with him, held that it furnished the start of a fresh period of limitation and that therefore the suit was not barred. Defendants 13 and 12 are purchasers from the original mortgagors. Defendant 11 had purchased a portion of the hypotheca before and defendants 12 and 13 purchased one-half of the rest. Defendant 11 was exonerated during the trial and with regard to defendant 13, it was found by the learned District Munsif and the learned Subordinate Judge agreed that the payment made by him on 16th November 1926 was accepted by the mortgagee in full satisfaction of the mortgagee's claim against defendant 13. The learned Subordinate Judge says:

Was the amount received by plaintiff from defendant 13 in full satisfaction of the claim so far as he is concerned or no? I find that plaintiff received it in full quit in view of the language of Ex. A-1 (which is the endorsement of payment), I agree with the District Munsif on the point. It would therefore,

the learned Subordinate Judge goes on to say,

be inequitable to allow plaintiff to proceed against defendant 13 again from whom the full amount which he had agreed to pay by his sale deed with interest has been received.

2. Now, it has been held by two Benches of this Court, *Muthu Chettiar v. Muhammad Husaain* (1920) 7 AIR Mad 418 and *Thayammal v. Muthukumaraswami Chettiar* AIR (1929) Mad 881 that the expression "joint contractors" in Section 21(2), Lim. Act, includes co-mortgagors. Defendants 12 and 13 in this suit are, as I have already said, purchasers of approximately one-half of the hypotheca from the original mortgagors, each purchased the share bringing to one of the original mortgagors? In view of this fact and also in view of the finding that the mortgagee definitely accepted the payment made by defendant 13 in full quit of what was due by him, it is peculiarly appropriate in my opinion to say in this case that defendants 12 and 13 are joint contractors within the meaning of Section 21(2). This is a case in which not only by construction or implication but in actual fact the purchasers have taken over the contract made by the original mortgagors with the mortgagee. My attention has been drawn to the case in *Narasimha Rama Iyer v. Ibrahim* AIR (1929) Mad 419 which was referred to in the case in *Lokandha Naiko and Others Vs. Lokhono Naiko and Others*, . In the first case *Thiruvenkatachariar J.* held that co-heirs of a single debtor are not "joint contractors" within the meaning of Section 21(2), Lim. Act, and in the latter case *Curgenven J.* held that the descendants of a deceased mortgagee are not joint contractors. The facts of the present case are however quite different. It is quite intelligible that co-heirs of a single debtor should not be held to be joint contractors with the original creditor, and in the case decided by *Curgenven J.* there is nothing to indicate that the purchasers with the concurrence of the mortgagee had taken over definite shares of the liability under the original mortgage. It appears to me quite clear that Section 21(2), Lim. Act, applies to this case and therefore the decision of the learned Subordinate Judge is wrong. I set aside the decree passed in appeal and restore the decree of the learned District Munsif, holding that the suit as against defendant 12 was barred by limitation. The appellants will recover their costs from the respondent in this Court and in the lower Appellate Court.