

(1943) 09 MAD CK 0029
In the Madras High Court

Patinhatte Patillath Karnavan and Manager Krishnan
Namboodiri

APPELLANT

Vs

Narayanan Namboodiri

RESPONDENT

Date of Decision : 20-09-1943

Acts Referred:

Citation : AIR 1944 Mad 164 : (1943) 56 LW 748 : (1943) 2 MLJ 642

Hon'ble Judges : Wadsworth, J

Bench : Division Bench

Judgement

Wadsworth, J.—The appellant was indebted to the respondent under a mortgage, Ex. I, dated 16th November, 1932, for a sum of Rs. 4,500. This mortgage discharged a number of previous debts to the same creditor and it is clear that if the mortgagor is entitled to the benefits of Section 8 of Madras Act IV of 1938 with reference to this mortgage he would get a very considerable reduction of his debt. He applied under the rules framed under that Act for the determination of the amount due to the creditor. The trial Court held that he was entitled to the benefits of the Act with reference to the mortgage and scaled down the debt on the basis of the principal of the sums originally advanced. The lower appellate Court has taken a different view and has held that this mortgage is one by virtue of which the mortgagee is in possession of the property mortgaged and no rate of interest is stipulated as due to the mortgagee and has applied Section 10(2)(i) of the Act.

2. In second appeal reliance has been placed on a decision of ours in C.R.P. No. 2309 of 1941, though the appellant concedes that there is one observation in the judgment cited which if taken" literally might be used against him. In that case we had to deal with a mortgage of land and the trees standing thereon. The mortgagee was put in possession of the trees, the usufruct of which was to be appropriated in lieu of interest, but he was not put in possession of the land. We held that the words in Section 10 "is in possession of the property mortgaged" in ordinary English can only mean "is in possession of all" or at any rate of a

substantial portion of the property mortgaged and that we were not justified in inserting into the clause after the words "property mortgaged " such words as "or any portion thereof" merely in order to make the exception more effective, having regard to the presumed intention of the Legislature. Now if the words "is in possession of the property mortgaged "mean" is in possession of all the property mortgaged "clearly the appellant must succeed. If, however, they can be taken to mean" is in possession of the property mortgaged or a substantial portion thereof" then the view of the lower appellate Court would, on this point, be correct. It is to be pointed out that in the case quoted we did not consider the trees on the land sufficient to amount to a substantial portion of the property mortgaged; and the result of the case was that the mortgage was held not to be a possessory mortgage such as would bring into force Section 10(2)(i) of the Act. No doubt also this decision is authority for the view that the criterion for deciding whether or not the property mortgaged has been handed over to the possession of the mortgagee cannot be the fact that the usufruct of the property in possession is sufficient to cover the interest on the advance. The judgment quoted is not, therefore, a decision to the effect that when no more than a substantial portion of the property has been handed over to the possession of the mortgagee, the mortgage will be protected by Section 10(a)(i), though it contains an observation tending to support that view.

3. On the facts of the present case we find that the mortgage comprises 26 items of property. Of these, items Nos. 1 to 21 have been put in the possession of the mortgagee. Of six of those items there is an actual transfer of physical possession, one was in his physical possession already and the rest are held by tenants and he is given possession of the landlord's right to collect the rent, which was all the possession which could have been given to him. Items Nos. 22 to 26 seem to have been added as a sort of supplemental Security. The income from these items is about 1/14th of the total income of the mortgaged properties. Undoubtedly, the great majority of the mortgaged properties have been handed over to the possession of the mortgagee, but we are not able to hold that substantially all the properties have been handed over.

4. Very similar words to those of Section 10(2)(i) of Act IV are used in Section 58 of the Transfer of Property Act where a usufructuary mortgage is defined. It is very doubtful whether on facts like these the mortgage which we have to consider could be held to be an usufructuary mortgage. The fact that 5 out of 26 items have not been handed over to the possession of the mortgagee would, we think, make it necessary to hold that this mortgage is not an usufructuary mortgage as defined in the Transfer of Property Act but an anomalous mortgage. It is futile to speculate on the intention of the Legislature in drafting this section, with a view to giving it a meaning different from that conveyed by the plain text of the section. The words " the property mortgaged "must in their ordinary connotation mean all the property mortgaged and we are inclined to think that our observation in the previous judgment suggesting that they might also mean " a substantial portion of the property mortgaged " went too far. On the facts of

the present case we are unable to hold that the property mortgaged has been handed over to the possession of the mortgagee. It follows that the decision of the trial Court is correct and that the amount due on the mortgage will be as determined by the trial Court. The appellant is entitled to his costs here and in the lower appellate Court.