
(1929) 10 MAD CK 0016
In the Madras High Court

Pichai Konar

APPELLANT

Vs

Narasimha Rama Iyer

RESPONDENT

Date of Decision : 18-10-1929

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Citation : AIR 1930 Mad 471 : (1930) 31 LW 832 : (1930) 58 MLJ 343

Hon'ble Judges : Anantakrishna Aiyar, J

Bench : Division Bench

Judgement

Anantakrishna Aiyar, J.—The first defendant is the appellant before me in this Second Appeal. The plaintiff filed a suit, as originally framed,

for a declaration of the invalidity of a mortgage decree obtained by the first defendant in O.S. No. 53 of 1918 on the file of the Sub-Court,

Kumbakonam. The plaint underwent three processes of amendment and, finally, the plaint, as amended, contained a prayer for subrogation

inasmuch as the plaintiff on 29th March, 1919, discharged in good faith a prior mortgage in favour of one Doraisami Padayachi by Veerabhadra

Padayachi in respect of the properties which the plaintiff alleged he had purchased in Court auction. At the trial of the suit before the first Court this

question of the plaintiff's right to subrogation was a material question discussed. The Trial. Court decided (vide paragraph 7 of its judgment) that

the plaintiff was entitled to be subrogated to the rights of the prior mortgagee and, consequently, it gave the plaintiff a decree for the amount prayed

for with interest. The plaintiff was also given costs in respect of the said relief granted to him. Appeals were preferred to the Lower Appellate

Court by the plaintiff and the 1st defendant. The plaintiff's appeal was dismissed and I have no further concern with the same for the purpose of

this second appeal. On the 1st defendant's appeal, the learned Subordinate Judge, after noticing that the plaint was amended thrice and that the materials before the Court were not as satisfactory as one would wish, proceeded to discuss the question whether the plaintiff was entitled to interest and costs decreed to him by the first Court. There was discussion before the Lower Appellate Court whether the 1st defendant was entitled to raise the further question whether the plaintiff was entitled to subrogation-or not. The learned Subordinate Judge pointed out that, though the grounds of appeal raised the question, the subject-matter of the appeal was confined to interest and costs allowed to the plaintiff. The 1st defendant's pleader then took refuge under the power of the Court under Order 41, Rule 33, Civil Procedure Code, to do justice in the matter. The Lower Appellate Court accordingly proceeded on the footing that the appeal before it was confined to the question of interest and costs, it followed the decision of this Court in *Malireddi Ayyareddi v. Adusumalli Gopalakrishnayya* (1920) 58 I.C. 493 and held that the plaintiff was entitled to the interest that was awarded to him and that the 1st defendant was not right in saying that the plaintiff should not have been awarded interest for the period during which he was in possession of the properties as purchaser of the equity of redemption. The 1st defendant has preferred this second appeal.

2. The learned Advocate for the appellant raised the question at the beginning of this second appeal, namely, that the Lower Appellate Court was wrong in not going into the question whether the plaintiff was in the circumstances entitled to be subrogated to the rights of the prior mortgagee, *Doraisami Padayachi*. He argued that in the grounds of appeal to the Lower Appellate Court his client specifically raised the question whether the plaintiff was entitled to any subrogation at all, and, consequently, if there had been any deficit of Court-fee payable on the appeal memorandum, it was clearly the duty of the Court to direct the deficit Court-fee to be paid and not to decline to allow the pleader for the 1st defendant-appellant to argue the question of subrogation. On the other hand, the learned Advocate for the respondent drew my attention to the discussion of this question in paragraph 6 of the judgment of the Lower Appellate Court. Reading that paragraph, it appears to me, that, for reasons best known to him, the

1st defendant's pleader confined the subject-matter of the appeal to the Lower Appellate Court only to the amount of interest and costs. In fact,

the appeal memorandum to the Lower Appellate Court printed at pages 14 to 16 clearly supports this position. . The valuation of the appeal is Rs.

595-5-10, made up of interest payable on Rs. 800 from the date of Court sale to date of delivery through Court, namely, Rs. 377-5-0 and costs

Rs. 212-13-0. No doubt, during the discussion of the appeal in the Lower Appellate Court it was open to the pleader for the 1st defendant to

explain to the Court the mistake, if any, committed in regard to the valuation of the appeal and the Court-fee paid thereon. If he had offered to

amend the valuation of the appeal and if he had offered to pay any Court-fee that might have to be paid in consequence of the amendment, the

Lower Appellate Court would probably have in the circumstances directed the amendment to be made. But, as the pleader for the 1st defendant

did not consider it proper to take up that attitude, he relied on the power of the Court to pass orders under Order 41, Rule 33, Civil Procedure

Code. The learned Advocate for the appellant before me did not support the attitude taken by the pleader for the 1st defendant in the Lower

Appellate Court, (and I think properly) because Order 41, Rule 33, Civil Procedure Code, is not applicable to the circumstances of the present

case. If I were satisfied that a mistake had been committed in the Lower Appellate Court, quite a different course would be adopted by me; but, in

the absence of an affidavit showing that there was a mistake, and having regard to the discussion in paragraph 6 of the judgment of the Lower

Appellate Court, I think I must proceed to deal with this case on the footing that the appeal to the Lower Appellate Court was only in respect of

interest and costs allowed to the plaintiff.

3. The second point argued by the learned Advocate for the appellant was with respect to the interest decreed to the plaintiff for the period during

which he was in possession. The learned Subordinate Judge relied on a decision of this Court in Malireddi Ayyareddi v. Adusumalli

Gopalakrishnayya (1920) 58 I.C. 493 and held that, the plaintiff was entitled to interest on the amount of the prior mortgage. He, in fact, decreed it

with interest thereon. The accidental circumstance, that the plaintiff became the purchaser in Court auction by payment of money, and as

compensation therefor he happened to be in possession, does not in any way prejudice his right as a person entitled to the rights of the prior

mortgagee whom he paid up. The learned Advocate for the appellant also argued that the decision in *Syed Ibrahim Sahib v. Arumugathayee* I.L.R.

(1912) M. 18 supported his position. To certain extent it does; but, as was pointed out by the learned Advocate for the respondent, that decision

was dissented from in *Muthammal v. Rasu Pillai* ILR (1917) M. 513 the decision in *Malireddi Ayyareddi v. Adusumalli Gopalakrishnayya* (1920)

58 I.C. 493 following the decision in *Mulhamntal v. Razu Pillai* I.L.R.(1917) M. 513. Finally, it was brought to my notice that the decision in

Malireddi Ayyareddi v. Adusumalli Gopalakrishnayya (1920) 58 I.C. 493 has been confirmed by the Privy Council in AIR 1924 36 (Privy

Council) . In these circumstances, it is clear that the Lower Appellate Court was entitled to act on the authority of the decision in *Malireddi*

Ayyareddi v. Adusumalli Gopalakrislinayya (1920) 58 I.C. 493. It therefore follows that the second point raised by the appellant also fails.

4. The last point raised is as regards costs. It stands on the same footing as the question of interest and should along with it, be held to be equally

unsustainable. It was, however, sought to be argued by the learned Advocate for the appellant, that though in my view of the scope of the appeal

memorandum to the Lower Appellate Court the question of the plaintiff's right to be subrogated was not raised before the Lower Appellate Court,

yet it was open to him to impugn the correctness of the 1st Court's decree relating to subrogation in so far as he claimed relief with reference to

interest and costs. In other words, the learned Counsel argued that, though that portion of the decree relating to subrogation became final, the

finality did not attach to the portion of the relief which he claimed in second appeal relating to interest and costs. It seems to me that, it is not open

to the learned Counsel in the circumstances to avoid the effect of the finality attaching to the plaintiff's right of subrogation. When it is said that the

portion of the decree relating to subrogation has become final, it means that the plaintiff was properly held to have the right to subrogation. If that is

so, how could that portion of the decree relating to subrogation be called in question in the later stage of the very same proceeding in respect of the

question of interest and costs? Either the plaintiff has got the right of subrogation or he has not. If he has, not only is he entitled to the relief on the

footing of subrogation in respect of the principal amount he has paid but he is also entitled to the incidence relating to subrogation, viz., interest on

the money paid by him. If, on the other hand, he is not entitled to subrogation, he could not claim any relief either with respect to principal or

interest. To say that the plaintiff is entitled to subrogation in respect of the principal and to say that he is not entitled to subrogation with respect to

interest, is, I think, an inconsistent position to take. A similar point was sought to be argued in the case reported in *Kandasamy Chetty v.*

Annamalai Chetty I.L.R.(1904) M. 67 : 15 M.L.J. 402. The plaintiff was given a decree for money in spite of the defendant's plea that the claim

was barred by limitation. The defendant did not appeal with respect to the whole of the claim decreed. He preferred an appeal only with respect to

a portion of the claim decreed. On the footing that there was no basis for any distinction between the portion appealed against and the portion not

appealed against so far as the question of limitation was concerned, the defendant-appellant was met by the objection that, if the plea of limitation

was good, the whole claim was barred, and in the face of the fact : that a portion of the plaintiff's claim was held to be not barred and that portion

of the decree had become final, it was not open to the defendant in appeal against only a portion of such a decree to argue the question of

limitation. The learned Judges relied upon two earlier cases in support of the view that they took, namely, *Rughu Nath Singh Manku v. Pareshraim*

Mahata I.L.R.(1882) C 635 and *Alimunnissa Khatoon v. Syed Hossein Ali (1880) Cri.L.R. 267* The question will be different in case the plea of

limitation raised with reference to the appealed portion was different from the aspect of the question of limitation applicable to the unappealed

portion. The principle involved in the decision of this Court in *Kandasamy Chetty v. Annamalai Chetty I.L.R.(1904) M. 67 : 1904 15 M.L.J. 402*

that it is not open to the defendant in such circumstances to raise the plea of limitation with reference to the portion of the decree appealed against

only, would, apply to the present case also. That principle, as I understand it, is this. If a portion of a decree has become *res judicata*, then, the rest

of the decree based on same reasoning would also become *res judicata* even with reference to the other portion of the decree which alone is

brought for review before the Appellate Court. Applying the principle of that decision to the present case, as it was decided that the plaintiff was

entitled to subrogation and as there was no appeal to the Lower Appellate Court from that portion of the decree of the 1st Court, it is not open to

the defendant-appellant to appeal against some portion only of the decree of the 1st Court relating to subrogation and not appeal against the other

portion of the decree in so far as subrogation was allowed and thus call in question the decision of the 1st Court. On this reasoning, it seems to me

that it is not open to the learned Advocate for the appellant to raise this question of subrogation before me in whole or in part.

5. For all the above reasons, I think the learned Subordinate Judge was right in his decision and I dismiss this Second Appeal with costs.