
(1921) 02 MAD CK 0030
In the Madras High Court

Ramasami Iyengar

APPELLANT

Vs

M.V. Kuppusami Iyer and Others

RESPONDENT

Date of Decision : 14-02-1921

Acts Referred:

Citation : AIR 1921 Mad 514 : 66 Ind. Cas. 554 : (1921) 14 LW 99

Hon'ble Judges : John Wallis, C.J;Oldfield, J

Bench : Division Bench

Judgement

1. These appeals have to some extent been argued on identical grounds, The appellants---11th and 16th defendants---are purchasers of certain items of property covered by what may be described as a security-bond, Exhibit C. The District Munsif dismissed the suit brought by the holder of Exhibit C. to enforce its terms against the executants and against the property bound by it. The lower Appellate Court gave the decree asked for, which is now under appeal.

2. The first contention with which we have to deal is, that Exhibit C. has not been properly proved. The lower Courts dealt with the question on the assumption that Exhibit C is a mortgage with reference to Section 59 of the Transfer of Property Act and Sections 68 and 71 of the Evidence Act, Here we might not be able to follow the lower Appellate Court in its application of Section 71. But it is unnecessary for us to go further into this portion of the case, because we accept the respondents' contention that the document is not a mortgage, but a charge, to which Section 100 of the Transfer of Property Act is applicable. It is urged that the provisions of Section 58 (59?) of the Transfer of Property Act and of the Evidence Act apply also to charges; but we cannot find any warrant for that even in the wording of Section 100 of the Transfer of Property Act, still less in Order XXXIV, Civil Procedure Code, by which the procedure portion of the Transfer of Property Act has been superseded, and from which the material portion of Section 100 has been omitted. Rule 15 of Order XXXIV, which relates directly to charges, is in different terms from Section 100 and those terms go no way towards supporting the appellants' argument. A reference to Exhibit C shows

that it does not transfer any interest in the property, but simply makes it liable for the satisfaction of the plaintiffs' claim. We have no hesitation in holding that it constitutes a charge and not a mortgage, and that the special provisions of the Transfer of Property Act, relating to the attestation of mortgages, and of the Evidence Act, relating, to the method of proof of mortgager, are not applicable. It has been suggested that we should remand the case in order that the lower Appellate Court might find whether Exhibit C has been proved on the evidence in accordance with the general law. It is sufficient that the lower Appellate Court has already recorded a finding that the document has been proved with reference to Section 71 of the Evidence Act. We, therefore, hold that Exhibit C has been properly proved.

3. The next question is, whether the plaintiffs have shown that any thing has happened which entitles them to recover under Exhibit C. The appellants argue that, in respect of two items at least, on a part of which the plaintiffs' claim had been allowed, nothing has been established.

4. First, it is urged, in respect of Exhibit J, that, although Exhibit J is a decree given in a suit brought subsequently to Exhibit C, the liability represented by that decree had arisen before Exhibit C, and that it is inconceivable that the parties to the document could have contemplated the application of the security towards their liability, when they could have made explicit reference to it and did not do so. This argument has been further complicated by the fact that the plaintiffs, who were parties to the proceedings in which Exhibit J was obtained, did not join in the appeal which other persons liable under Exhibit J preferred to the High Court and which ended in their exoneration. We may say at once that it has not been suggested that it was owing to any fraud or collusion or gross negligence that the plaintiffs did not carry the case to the High Court and participate in the benefit of its decision. In the absence of those such considerations, we cannot see how they were not justified in making a payment in satisfaction of the decree, which might have been executed against the property in their hands.

5. Returning to the general considerations arising in respect of Exhibit J, we observe that the liability on which it was based, was no doubt in existence before Exhibit C was executed. The terms, however, of Exhibit C are very general. The material portion is as follows:--- Whether we defaulted in discharging the said prior encumbrances or whether through the said prior encumbrances or other means, disputes arose in respect of the lands, and in consequence, any part of the said property fails to belong to you, or whether you suffered loss in any other manner, we have in consideration therefor furnished to you as security the properties mentioned below, "We cannot accept the appellants' suggestion that as some encumbrances have been specified, the mere debt, which might or might not be ultimately recovered from the property, must, at the date of the execution of Exhibit C, be held to have been outside the contemplation of the parties. There is reference to the disputes arising not only in respect of the "said prior encumbrances or other means" but also to the loss suffered "in any other

manner." We think that this language is quite comprehensive enough to cover the contingency in which the plaintiffs were constrained to make a payment towards Exhibit J, A somewhat similar argument I as been bored on Exhibit D and tan be similarly answered,

6. The appeals are next argued with reference to limitation. The appllants contended that the suit was out of time, because either Article No, 83 or, Article No. 116 is applicable to it. Article No. 83 provides for suits open contracts to indemnify, and no doubt Exhibit C is a contract to indemnify, and no doubt also, with reference to Article No. 116, is a contract in writing registered. But those facts will not deprive it of the further character which it possesses by vtute of the provision which it contains for a charge on Immovable property. The wording of Exhibit C that these lands specified in it are given as security and that the executants under it and their heirs should be bound to pay the money on the liability of the said security is, in our opinion, sufficient to constitute a charge. We, therefore, hold that the suit is a suit to enforce payment of the money charged on the Immovable property and that it is within time with reference to Article 182, Schedule T, of the Limitation Act. We might add that there is no question of personal liability raised in these appeals.

7. The remaining matter common to the two appeals is the claim of the appellants---11th and 16th defendants---to subrogation in respect of mortgages which the 11th defendant's vendor and the 16th defendant had discharged. No doubt, a claim was made in respect of these mortgages at the beginning of the trial. The issue framed, however, was very genera), and the District Munsif made no reference to the mortgages relied on by these two appellants, although he dealt with the other claims under that issue. As he dismissed the suit, it was unnecessary for him to refer to any such claims or to any decision on them in his decree. In the lower Appellate Court, the plaintiffs obtained a decree, a different view being taken regarding Exhibit C and other matters. But it does not appear that any contention was put forward regarding subrogation or that the 11th and 16th defendants insisted on their claims to it. We do not think that they can revive their claims in second appeal.

8. The appellant in Second Appeal No. 1398 has also claimed compensation for improvements, apparently u/s 51 of the Transfer of Property Act, in case he is evicted from the property. That claim was mentioned in the written statement but was not pat in issue, and, so far as appears, was never referred to again in either of the lower Courts. In respect of this, again, we decline to interfere at this stage in second appeal,

9. Lastly, the 16th defendant advanced a claim which is dealt with in paragraph 41 of the District Munsif's judgment. The District Munsif apparently would have allowed it, if he had given plaintiffs a decree at all. The lower Appellate Court in giving plaintiffs a decree lost sight of this contention of the 16th defendant and did not consider it or make any reference to it. We think that the lower Appellate Court must consider it now.

10. The result is that the Second Appeal No. 1393 by the 11th defendant is dismissed with costs of the plaintiffs,

11. In Second Appeal No. 1372 the lower Appellate Court will submit a finding on the evidence on record on the issue whether any portion, and if to, how much, of the 16th defendant's items is liable for sale?