

(1937) 08 MAD CK 0037
In the Madras High Court

S.M. Chinnaswami Aiyangar

APPELLANT

Vs

Kanniah Naidu (deceased) his L.R. and Others

RESPONDENT

Date of Decision : 20-08-1937

Acts Referred:

Citation : AIR 1938 Mad 132 : (1937) 46 LW 728 : (1937) 2 MLJ 920

Hon'ble Judges : Varadachariar, J

Bench : Division Bench

Judgement

Varadachariar, J.—The order of the lower Court is obviously unsustainable. The plaintiff sued for money due on a hypothecation bond but he limited his claim to a money decree on the personal covenant, stating that as the mortgaged properties had been sold away hra revenue sale by reason of the mortgagors" default, he did not wish to take proceedings to enforce the SP ity and was content with a money decree. The lower Court found that only one of the items had been sold but not the other item; in this view it held that the proper course for the plaintiff was to file a suit to enforce the mortgage as against the other item. This view seems to me to have been proceeded on a misapprehension of the relevant provisions of the Transfer of Property Act.

2. If the case is viewed as one falling under Clause (c) of:Section 68 of the Transfer of Property Act, the plaintiff will have an unconditional right to sue for money but even taking it that the case falls either under Clause (a) or Clause (b) of Section 68, the second clause gives the power to the Court to stay a personal action only in the event of the mortgagee not abandoning his security. The Court has certainly no power to insist upon his filing a mortgage suit even when he does not wish to have a mortgage decree. The dismissal of the suit was therefore not warranted by law. I do not find that there is any other question remaining to be tried in the case as the lower Court -has held that the debt is binding on defendants 3 to 6 as a family debt.

3. The result will be that the decree of the lower Court is set aside and a decree passed in plaintiff"s favour personally against the second defendant (as the first

defendant is reported to have since died), also against the assets of the first defendant, if any, in the hands of the third defendant and against the interests, if any, of defendants 3 to 6 in the joint family properties belonging to themselves and- to defendants 1 and 2 for the plaint amount with interest on Rs. 100 at 6 per cent, per annum from the date of plaint up to date of payment. Plaintiff will be entitled to his costs both here and in the Court below.