
(1915) 12 MAD CK 0007
In the Madras High Court

Surapudi Muniappa and Another

APPELLANT

Vs

Nookala Seshayya Gari Subbiah and Others

RESPONDENT

Date of Decision : 15-12-1915

Acts Referred:

Limitation Act, 1963 — Article 132, 36

Citation : 32 Ind. Cas. 901 : (1916) 3 LW 341

Hon'ble Judges : Srinivasa Aiyangar, J; Coutts Trotter, J

Bench : Division Bench

Judgement

Coutts Trotter, J.—This is an action by a mortgages against the mortgagor and various other persons to enforce a mortgage, dated the 26th

October 1900. The only question that arises in this appeal relates to the liability of the appellants, the 12th and 13th defendants. The facts are

briefly these. The mortgaged property contained a plantation of casuarina trees, said to be twenty thousand in number. The allegation against the

12th and 13th defendants is that they in concert with the mortgagor cut and removed the trees and thereby depreciated the value of the plaintiff's

mortgage security by a thousand rupees. It is abundantly clear that such an act on their part might very well give rise to an action of tort. But that

will not avail the plaintiff, for such cause of action is admittedly barred by limitation, and he can only succeed if he can establish that they are

properly sued in an action brought to enforce the mortgage, which would fall under the longer period of limitation prescribed by Article 132 of the

Limitation Act.

2. The learned Judge has held that the suit falls within Article 132 on the ground that the appellants appropriated a part of the plaintiff's security

and converted it into money, which in their hands he is entitled to treat in equity as part of the security, or as security substituted for the original

one. This is a well recognized principle and has been frequently applied in India. See for example *Berhamdeo Pershad v. Tara Chand* 9 C.W.N.

989. In my opinion to apply this principle to the present case would be wholly fallacious. The mortgage was a mortgage of Immovable property

and not of any chattel interest, whether existing at the date of the mortgage or capable of being created subsequently. The mortgagor was entitled

to the standing timber and turned it into chattels; and the only remedy against him would be an action for damages for the depreciation of the

mortgage security if it can be shown that he has, in fact, by his action lowered the value of the mortgage security below the statutory minimum. See

Section 66 of the Transfer of Property Act.) It may well be that if the defendants Nos. 12 and 13 had aided and abetted the mortgagor in so

depreciating the security, they would be equally liable with him. No such cause of action is alleged or could be alleged in the present case. In my

opinion as soon as the trees were cut and converted into timber, they ceased to be part of the mortgage security; and nonetheless so because their

removal had pro tanto detracted from the value of the security.

3. Mr. Venkataramier put forward another argument which I have very great difficulty in following. It appears that the mortgage specifically

included the casuarina trees eo nomine as part of the security, which, of course, is immaterial to his other contention as the Transfer of Property

Act, Section 8, includes all things attached to the earth as passing on a transfer of Immovable property. But he says the specific mention of the

casuarina trees in the mortgage has this further effect: it imports by implication a covenant by the mortgagor not to cut or sever the trees without the

consent of the mortgagee. This in itself seems to me to be a very questionable proposition. But I will assume it to be correct for the purposes of the

argument. He then contends that such a covenant would run with the land and attach to the land in the hands of any alienee; the land for this

purpose is the trees and the covenant runs with them in the hands of the person who acquires them as timber. I am quite unable to follow this

reasoning. The land is not the trees, but the land with the trees on it; and when the trees were severed, they ceased to be part of the land and

became chattels, and so far as they were concerned there was no land for the covenant to run with. I confess that my imagination boggles at the conception of a covenant running with a tree trunk. I am of opinion that the only cause of action, if any, that the plaintiff ever had against the appellants was an action in tort to which the Act of Limitation would be a complete answer, and that his attempt to make them liable in an action to enforce the security is wholly misconceived. The appeal must be allowed with the plaintiff's suit dismissed as against the appellants with costs here and below.

Srinivasa Aiyangar, J.

4. This is an appeal by the 12th and 13th defendants. They contend that the suit as against them (if there was a cause of action) was barred by limitation. The facts which give rise to this contention are shortly these: On the 26th of October 1900, the 1st defendant, the manager of the undivided family consisting of defendants Nos. 1 to 9, mortgaged certain Immovable properties to the plaintiff to secure a loan of Rs. 5,000. Among the properties so mortgaged was a casuarina plantation. At the time of the mortgage, the plants were young and were not fit to be cut. In October 1905, when they were fit to be cut, the 12th and 13th defendants cut and carried away the wood then standing on the land. The action was brought on the 26th July 1909 against the mortgagors Nos. 1 to 9 to enforce the security. The claim against defendants Nos. 12 and 13 is stated in paragraph 11 of the plaint and is in the following terms: "'The defendants Nos. 12 and 13 are alienees from defendants Nos. 1 to 9 of a casuarina plantation.... These defendants have in concert with defendants Nos. 1 to 9 cut and removed all the trees and have appropriated them to their own use. These defendants were aware of the mortgage in favour of the plaintiff at the time of their sale and have by their acts impaired the value of the mortgage security available to plaintiff in a sum of Rs. 1,000.'" Defendants Nos. 12 and 13 contend that the action in so far as they are concerned is not an action to enforce the security governed by Article 132 of the Limitation Act, but is one for damages for a tort governed by Article 36 or at the best by Article 49, in which case the suit would obviously be barred by limitation.

5. The Judge finds that the 12th and 13th defendants in collusion with the 1st

defendant depreciated the value of the security by Rs. 1,000.

Whether the 12th and 13th defendants were purchasers, of the wood from the 1st defendant or whether they were merely assisting him in the

disposal of the timber cut without themselves appropriating any portion of it, is not quite clear from his findings in paragraph 22 of the judgment; in

paragraph 25 he says clearly that the timber was appropriated by the 12th and 13th defendants. If the defendants Nos. 12 and 13 merely assisted

the 1st defendant in cutting and disposing of the timber without themselves appropriating any of it, the suit as against them could not, in any sense,

be said to fall within Article 132 of the Limitation Act. In the argument it was assumed that defendants Nos. 12 and 13 had appropriated the wood

standing on the land to the value of Rs. 1,000, and it is on this basis that I proceed to decide the question of limitation.

6. In determining which Article of the Limitation Act applies to this suit it is necessary to ascertain precisely what, if any, are the rights which the

plaintiff has against the 12th and 13th defendants. In India a mortgage transaction is merely a security for the re-payment of the debt and in the

case of a simple mortgage the mortgagor, both before and after default of payment of mortgage-money, is and continues to be the owner of the

property entitled to possession and to the use and enjoyment of the property as an absolute owner. He is at liberty to sell the property subject, of

course, to the charge of the mortgagee, and a suit by a mortgagee to realise the debt due by sale of the security in the hands of the alienee would

be a suit to enforce payment of money charged upon Immovable property governed by Article 132 of the Limitation Act: it has also been held in

this Court that that remedy is available even when the property is in the hands of a trespasser who had acquired a title to the property by adverse

possession against the mortgagor. Again the mortgaged property after the date of the mortgage may assume a new form and in that new form may

be in the hands of the mortgagor or of a third party. Even in such cases a suit by the mortgagee to enforce payment of his debt may be governed

by Article 132. As for example *Heera Lall Chowdry v. Janokeenath Mookerjee*, 16 W.R. 222; *Umatara Gupta v. Uma Charan Sen*, 3 C.L.J. 52;

Kamala Kant Sen v. Abul Barkat, 27 C.K 180; *Jogeshur Bhagat v. Ghanasham Dass*, 5 G.W.N. 356. the mortgaged property may have been

sold for arrears of Government revenue payable by the mortgagor, *Gosto Behary Pyne v. Shib Nath Dut*, 20 C.K 241; *Shyam Chand Kundu v.*

Land Mortgage Bank, 12 C.L.R. 440 by a landlord for arrears of rent, *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan*, 6 I.A. 145; *Rafique &*

Jackson's P.C. No. 58; 3 Ind. Jur. 426 ; *Barhamdeo Prasad v. Tarachand*, 21 Ind. Cas 961, referred to by a first mortgagee under a power of

sale or *Ram Kant Chowdhry v. Brindabun Chunder Doss*, 16 W.R. 246; *Padmanath Bomhshenvi v. Khemu Komar Naik*, 18 B.A 684 through

Court in execution of a decree for sale to which mesne encumbrancers are parties. It might have been acquired in the exercise of the right of

eminent domain. *Venkata Viraragavayyengar v. Krishnasami Ayyangar*, 7 Ind. Jur. 358; *Armugam v. Sivagnana*, 13 M. S 321 For other examples

see *Ashburner on Mortgages*, page 230, and *Joala v. Hurbuns* (1853) S.D.N.W.P. 669. In all these cases the original security in the hands of the

purchaser is freed of all encumbrances subsequent to the charge for realising which the property was sold. In fact the charge is transferred to the

surplus sale-proceeds (see Section 73 and 97 of the Transfer of Property Act); and a suit by an encumbrancer who is entitled to be paid out of it,

to follow It in the hands of a person holding it, is a suit to enforce payment of money charged on Immovable property, though at the time of the

institution of the suit the Immovable property has assumed the shape of money. In equity the money is still considered to be land. Again, instead of

the original security, there may be a substituted security, as for instance in cases where the original mortgage was of an undivided share of

Immovable property for which by a subsequent partition a particular portion is allotted. [*Byjnath Lall v. Ramoodeen Chowdry* 1 I.A. 106 In all the

above cases the person in whose hands the substitute for the original security is, holds it subject to the right of the encumbrancers as if they were

alienees of the security. *Berhamdeo Pershad v. Tara Chand* 9 C.W.N. 989, confirmed by the Privy Council [*Barhamdeo Prasad v. Tarachand* 21

Ind. Cas 90 which has been followed by the lower Court, is a case of this sort. Defendants Nos. 12 and 13 are in no sense alienees of the security

or any portion of it. The suit mortgage is not a chattel mortgage of the casuarina plants. It is doubtful whether a person who is both the owner of

the land and of the trees growing thereon can make a chattel mortgage of the trees alone before they are severed. However, that question need not

be considered in this case, as the suit mortgage was a mortgage of Immovable property. It is said that the mortgage specifically refers to the

casuarina plants then growing on the land as being subject to the mortgage. Even without a specific mention they would pass under a mortgage of

land: see Section 8 of the Transfer of Property Act; *Faqueer Soonar v. Khuderun* 2 N.W.P.H.C.R. 251; *Jones Off Mortgages*, Section 145;

Hutchins v. King 17 U.S. Law. 544, and I do not think for the determination of the question of limitation, that is material. If the question were,

whether the mortgagor in the usual course of enjoyment was entitled to cut and utilise it without any liability to the mortgagee, the fact that the

standing timber was specifically mortgaged may possibly give rise to an inference of a covenant not to cut and appropriate them without the

consent of the mortgagee.

7. Now coming to the question in dispute in this case, as I have already observed, the mortgagor is entitled to use and enjoy the mortgaged

property in any way he likes. He is at liberty to cultivate the lands and take the crops grown on them. He is also entitled to cut and appropriate for

his own use underwood, on the same footing as yearly crops. He is also entitled to cut and sell the timber and appropriate the proceeds. All these

are merely acts of enjoyment of the property by the owner and are in no sense alienations or conversions of the security: in fact so far as the use or

enjoyment of the properties is concerned, the mortgagor is entitled to its unrestricted enjoyment as if no mortgage existed on the property subject

only to this qualification that he, by his acts, does not render the security insufficient. This was laid down in England in a series of cases from the

earliest times, *Usborne v. Usborne* 1 Dickens 76; *Hampton v. Hodges* 8 Vesey 105; *Humphreys v. Harrison* 21 R.R. 238. In the last two cases

the mortgage was also specifically of the trees. In *Ex parte National Mercantile Bank*; *In re Phillips* (1880) 10 Ch. D. 104, the Master of the Rolls

said: If a mortgage includes timber trees the mortgagor, while he remains in possession, is entitled to cut them down and sell them"". Section 66 of

the Transfer of Property Act is based on the same principle. A different view appears to have been taken in a case decided by the Supreme Court

of the United States. [*Hutchins v. King* 17 U.S. S 544.] In America there seems to be a difference of opinion on this matter; see *Jones* on

Mortgages, Sections 144, 453, and 688, the difference depending on the view entertained as to the nature of a mortgage security in particular

jurisdictions. But whatever that may be, we are bound by Section 66 of the Transfer of Property Act. The only cause of action, therefore, which

the plaintiff can have against defendants Nos. 12 and 13 is for damages for the depreciation of the security, the measure of damages being the

amount by which the security is rendered insufficient and the plaintiff in such an action must prove that the security as a matter of fact was rendered

insufficient. (Chose on Mortgages, page 319.) Such an action is not one to enforce payment of money charged, for if that were the nature of the

action, the plaintiff mortgagee would be entitled to claim payment out of the portion of the security or its value in the hands of the third party

irrespective of the sufficiency or insufficiency of the remainder of the security in the hands of the mortgagor. *Gosto Behary Pyne v. Shib Nath Dut*

20 C.S 241, *Kristodass Kundoo v. Ramkant Roy Chowdhry* 7 C.L. 11. 396. I think, therefore, Article 132 of the Limitation Act does not apply.

This is the view taken in *Ramakrushnama Chetty v. Vuvvati Chengu Aiyar* 25 Ind. Cas. 643 and *Aiyappa Reddi v. Kuppusami Reddi* 28 M.K

208. In the former case trees were cut and appropriated by the alienee from the mortgagor of the mortgaged lands. This was held to be waste and

not an alienation of part of the security. In the latter case, which is indistinguishable in principle from this case, there was a mortgage by a tenant-in-

common of his interest in certain lands. There were trees on the common lands, the whole of which was cut by the other tenant and appropriated

to his own use. The security was rendered insufficient and the mortgagee sued the other tenant for damages. This Court after considering the nature

of the action held that the proper Article of limitation applicable to the case was Article 49. It may be a question whether Article 36 is not the more

appropriate, Article as the action of the mortgagee is one on the case of damages for injuring the interests of the mortgagee in the mortgaged

properties. This is the nature of the action whether the suit is against the mortgagor, or his assignee or against a stranger: *Sedgwick on Damages*,

Section 73. But whether Article 49 or Article 36 applies the suit is equally barred by limitation as the action was not commenced till nearly 4 years

after the date of the cutting and appropriation of the wood by defendants Nos. 12 and 13. The appeal must, therefore, be allowed and the suit

dismissed against 12th and 13th defendants and with costs here and the Court below.