
(1892) 03 MAD CK 0007
In the Madras High Court

Syneer Labatheen Routhan

APPELLANT

Vs

Thurai Raja alias Ayyarappa Mekkan Gopalar represented by
E. Gibson Esquire, Collector of Tanjore and Agent of the Court
of Wards

RESPONDENT

Date of Decision : 15-03-1892

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 43

Citation : (1892) 2 MLJ 190

Hon'ble Judges : Muthusami Aiyar, J; Best, J

Bench : Full Bench

Judgement

Best, J.—This is an appeal by the plaintiff against the decree of the Subordinate Judge dismissing the suit for Rs. 45,687-8-0 claimed by

plaintiff as profits (and interest thereon) for 6 years--Faslis 1291 to 1296--of 2 villages, Karuvloor and Marayakudi, to the possession of which

plaintiff claims to be entitled as assignee of a lease (Exh B) executed by defendant's father to one Annamalai Chetti. B is dated 18th February

1872, which is also the date of the hypothecation bond A executed by defendant's father to the same Annamalai Chetti. By A, defendant's father

hypothecated to Annamalai Chetti 10 villages, including Karuvloor and Marayakudi mentioned above, for a sum of Rs. 30,000 to be paid by the

mortgagee to one Arunachelam Chetti to whom the amount was [as stated in A] due under previous bonds; and by B six of the ten hypothecated

villages [Karuvloor and Marayakudi being two of the six] were leased to Annamalai Chetti for a period of 15 years, it being stipulated that the rent

of Rs. 4,400 per annum should be taken by the lessee during those fifteen years in full satisfaction of the debt of Rs. 30,000 with interest thereon.

Annamalai Chetti having died in the interval, his widow and brother assigned to plaintiff, on the 1st September 1874 both the hypothecation bond

A and the lease deed B for a consideration of Rs. 19,551, of which Rs. 8,050-3-9 is expressly stated to be the balance due under the

hypothecation bond A, to Arunachelam Chetti, after deducting the sum of Rs. 21,949-12-3 paid, out of the Rs. 30,000 which were payable

thereunder by Annamalai Chetti. Plaintiff was thus given an assignment of "all rights and liabilities of the said hypothecation bond and of the lease

deed" and a right of undisputed enjoyment of "the said villages until the expiration of the said lease according to the terms of the said lease deed

and hypothecation bond." After this, a suit [No. 76 of 1874 on the file of the Subordinate Court at Tanjore] was instituted by Arunachelam

Chetti's son against (1) the present defendant's father, (2) the present plaintiff, (3) Annamalai Chetti's widow and (4) (Sic) Chetti's brother, these

two last being the assignors of hypothecation bond and lease to the present plaintiff, for the very of Rs. 11,997-2-3 as balance of principal and

interest duo (Sic) one of the bonds mentioned in A--which is filed as Exh I (Sic) he present suit. This Exh I is a hypothecation bond for (Sic)

executed to Arunachelam Chetti by defendant's father on (Sic) 29th June 1865.

2. Defendant's father then pleaded that the amount sued for was part of the Rs. 30,000 for which ho had executed a bond and a lease (A and B)

to Annamalai Chetti and that, as the arrangement had been agreed to by the then plaintiff, he himself was not liable for the debt. The then 3rd and

4th defendants stated that they had transferred to the present plaintiff the interest which Annamalai Chetti had acquired from the then 1st defendant,

while this plaintiff (as 2nd defendant) pleaded that there was no cause of action against him and that the then plaintiff had been paid some Its.

10,000 and odd in excess of the amount for which he gave credit.

3. The first 3 issues recorded in that suit were (1) "whether the liability of the 1st defendant to the bond has been relieved by the transfer of the

payment through Annamalai Chetti, (2) whether the payment pleaded by defendants 2 to 4 are true, (3) whether the hypotheca and the defendants

are liable to plaint debt.

4. The first of these issues was decided in the negative, on the ground of failure of proof of Arunachelam Chetti's consent to the assignment to

Annamalai Chetti. The 2nd issue was also decided in the negative; and the 3rd in the affirmative so far as the hypothecated property and 1st

defendant were concerned; while, as to the other defendants, though it was held that they could not be held liable ""merely on the ground that they

derived an interest in the hypotheca from Annamalai Chetti,"" they were held to have been ""rightly made parties as they set up certain claims over

the hypotheca."" The result was a decree for the then plaintiff for the sum sued for with costs and further interest and that in default of payment

within 3 months the hypothecated property be sold in satisfaction of the decree--see Exhs. II and XI. It was in execution of this decree that the

two villages Karuvloor and Marayakudi were sold for a sum of Rs. 14,650, of which Rs. 14,611 were paid in satisfaction of that decree.

5. The present defendant then brought a suit (No. 24 of 1877 on the file of the same court) against this plaintiff and 2 brothers of his, and also

against Annamalai Chetti's son and brother, for the recovery of Rs. 21,132-3-9 as damages sustained by him in consequence of failure of the latter

to discharge the debts due to Arunachelam Chetti, which had led to his being sued and having to satisfy two decrees consequently passed against

him--the decrees being the one referred to above (in O. S. No. 76 of 1874) and another (in O. S. No. 75 of 1874) on a simple bond--the

judgment and decree in which are filed as Exhs, XII and X respectively. It was found in that suit that of the Rs. 30,000 payable by Annamalai

Chetti under Exh A, only Rs. 22,000 had been paid, and that consequently this defendant was entitled to recover ""damages from this plaintiff and

his assignors, but that the amount actually due to Arunachelam was Rs. 38,000 and not only Rs. 30,000 and that as this defendant's father was

liable for the excess amount of Rs. 8,000 the same, plus a sum of Rs. 422-1-11 found to be rents appropriated by the then plaintiff, should be

deducted from the Rs. 21,132-3-9 sued for; and a decree was passed in favour of the then plaintiff (now defendant) for the difference, Rs.

12,690-1-10. See Exh C.

6. On appeal, this decree was modified by deducting from the amount decreed a sum of Rs. 5,321 as ""counter interest"" on the excess sum of Rs.

8,000 which ""it was the plaintiff's duty to pay,"" as ""Annamalai Chetti undertook to pay only Rs. 30,000""; and further the amount thus reduced was

made payable by 1st and 2nd defendants (the representatives of Annamalai Chetti)--the decree of the lower court as against 3rd, 4th and 5th

defendants, viz., present plaintiff and his brothers, being reversed, it being declared however ""that the mortgage in their hands will be good only for

the sum of Rs. 22,000,"" (See Exh D.)

7. The judgment also reduced the time for redemption from 15 years to ""eleven years from the commencement of Fasli 1282"" (date of A and B);

but, on review of judgment, this part of the decree was cancelled and set aside. See Exhs. B and F.

8. The question is whether under the circumstances stated above plaintiff is entitled to recover from defendant damages on account of his loss of

possession of the two villages--they being included in the six of which, as assignee under Exh. VII, his possession was to continue till the

termination of a period of fifteen years from 18th February 1872, the date of Exhs. A and B.

9. I am of opinion that the question must be answered in the negative, because it is clear that the sale of the villages was the result of plaintiff's own

default in paying to Arunachelam Chetti the balance of the Rs. 30,000 in consideration of which both A and B were executed by defendant's

father to plaintiff's assignor's family. The mere fact of the amount duo to Arunachelam Chetti at the date of A and B being more than Rs. 30,000

(assuming such to have been the case) cannot affect the question. It is clear that the villages were sold in execution of a decree obtained on the

document I, which is one of those expressly mentioned in A, and of which decree plaintiff himself was well aware, as he was a party to the suit in

which it was passed.

10 .It is urged on behalf of the respondent (defendant) that the sum of Rs. 11,000 and odd for which the suit, O. S. No. 76 of 1874 (Exh. X), was

brought is almost equal to the balance of Rs. 8,000 and odd remaining unpaid out of the Rs. 30,000 payable under A plus the interest thereon to

date of suit. But even assuming that the balance that remained unpaid out of the Rs. 30,000 together with interest thereon falls short of the amount

decreed in XI, the circumstance cannot be allowed to weigh in favour of the plaintiff, for, the charge being one fastened on the property included in

A, plaintiff could safely have paid the excess also and added it to the amount

payable to himself on redemption. In any case the bulk of the debt on account of which the villages were sold was payable by plaintiff himself as holder of the assignment under VI, and he is neither legally nor equitably entitled to recover damages for the same from the defendant.

11. Exhs. N and O have been produced on behalf of plaintiff as showing that defendant himself was the purchaser of the two villages. They merely show that the villages were bought on account of defendant--part of the purchase money being provided by him and the rest (Rs. 8,300) being paid by the person in whose name the purchase was made, on the understanding that on payment of this amount by defendant a conveyance should be executed in his name : but even assuming that defendant himself was the purchaser, I do not see why that circumstance should be allowed to weigh against him. If, as is found to have been the case, it was plaintiff's default that led to the villages being sold in execution of a decree, the mere fact of the mortgagor himself having purchased the villages cannot make any difference when the question is whether the defaulting mortgagee is entitled to damages for non-possession of the villages thus sold.

12. The judgment K cannot, I think, be given any weight in favour of the plaintiff, for, it clearly proceeded on a misapprehension of facts, as is apparent from the statement therein ""that the equities of parties had been adjusted on the basis of the mortgage of Rs. 30,000 and of the lease as instruments to which full effect should be given""; whereas, as already noticed above, it was expressly declared in D that the mortgage in favour of the present plaintiff ""will be good only for the sum of Rs. 22,000""; (i.e.) Rs. 30,000 less the Rs. 8,000 which plaintiff ought to have paid but failed to pay, in consequence of which failure the two villages were sold. As the amount of the mortgage was thus reduced and the period over which the lease, was to extend restored to 15 years, (see Exhs. E and F), the presumption is that the two villages sold were excluded from those which plaintiff was entitled to hold under A. This circumstance, that the reduction (to 11 years) of the period for which the lease was to hold good was cancelled and the original period of 15 years restored by the judgment and order E and F, was also overlooked in the judgment K. Moreover, it was the plaintiff's default rather than that of the Zamindar which brought about

the sale of the villages and as pointed out in para 13 of the judgment under appeal, plaintiff has been already enormously over-paid.

13. Therefore neither legally nor equitably is he entitled to the amount now claimed or any portion of it. As the suit fails on the merits, I need not consider the objection that it is barred u/s 43 of the Code of Civil Procedure.

14. I would affirm the decree of the court below and dismiss this appeal with costs.

Muthusami Aiyar, J.

15. I concur. The respondent is the minor proprietor of Singavanam Palayapat in the District of Tanjore and the appellant is the assignee of a lease

granted by the late Palayagar on the 18th February 1872 for a term of 15 years in respect of six villages : two of these villages, viz., Karuvur and

Marayakudi, were sold in execution of the decree in O. S. No. 76 of 1874, dated the 3rd November 1875, and thereby taken out of appellant's

possession, and the present suit was brought to recover mesne profits due for these villages for six years, viz., from Faslis 1291 to 1296. The

ground of claim is his eviction in alleged violation of his right to continue in possession for a period of 15 years from 1872 under the lease, Exh. B.

The several questions arising for determination are indicated by the issues set forth in paragraph 3 of the original judgment. The late Subordinate

Judge of Tanjore dismissed the suit upon a consideration of the documentary evidence in the case and deemed it unnecessary to examine

witnesses. He held that the suit was barred by Section 43 of the CPC and determined against the appellant all the issues save the second which

was determined in his favour. Hence this appeal.

16. There is no doubt that under document B, the appellant was originally entitled to possession for 15 years, and document B purports to create a

lease for that period. It is also clear that it was executed in liquidation of the debt of Rs. 30,000 secured by the hypothecation bond A, which

provided for its repayment with interest at 12 per cent, per annum in 15 yearly instalments.

17. The main question for decision on the merits was whether the appellant's eviction was due to his own default. The Subordinate Judge decided

it in the affirmative, and I think his decision is correct. It is clear from document VI that appellant undertook to pay one Arunachelam Chetti Rs.

8,050, and it is not denied that he failed to pay it though it formed part of the consideration for the assignment in his favour. The result was the

institution of O. S. No. 76 of 1874 by Arunachelam Chetti the late Palayagar's creditor upon the hypothecation bond executed in his favour, for

Rs. 20,000 in June 1865 and the sale of the two villages in execution of the decree passed therein.

18. For the appellants it is contended that the sale was not imputable solely to his default, and our attention is drawn first to the amount claimed by

Arunachelam in his plaint, secondly to the fact that the Palayagar owed Arunachelam besides Rs. 20,000, Rs. 18,000 upon two simple bonds and

thirdly, to O. S. No. 75 of 1874 brought by Arunachelam's nephew upon one of those two simple bonds and to the decree obtained by him

therein. It is true that the amount which the appellant had to pay was only 8,050, but it must be remembered that, at the date of suit No. 76 of

1874, that sum together with interest due thereon from February 1872, the date of document A, amounted nearly to the amount sued for by

Arunachelam, and for which he obtained a decree against the hypo-theca (Exh. IX). Although Arunachelam's nephew obtained a decree in O. S.

No. 75 of 1874 upon one of the simple bonds, it was only for the sum of Rs. 4,574-5-7; the appellant was no party to it, and the sale of the two

villages was not ordered in its execution (Exh. X). On the other hand, it is clear that the sale took place in execution of the decree in O. S. No. 76

of 1874 and that the sale proceeds amounted to Rs. 14,650, of which Rs. 14,611 was applied in satisfaction of the decree XI. Nor does it appear

that the other simple bond had anything to do with the court-sale. It was never put in suit and the time that has elapsed since its execution raises a

presumption that the late Palayagar had satisfied it. There is thus no foundation for the contention that either of the simple bonds executed in

Arunachelam's favour partly led to the court-sale, or that the decree in O. S. No. 76 of 1874 was for an amount which is not traceable to Rs.

8,050 which the appellant failed to pay and the interest due thereon from February 1872. Moreover, the appellant not only made default to paying

what he was bound to pay under the deed of assignment VI; but also set up a defence in O. S. No. 76 of 1874, which was not true. He pleaded in

that suit that besides the amount for which credit was given by Arunachelam in his plaint, Rs. 10,638-10-7 had been paid to him and that certain

other monies paid on account of principal were credited to interest and cited evidence to prove his plea which was rejected as untrustworthy [Exh.

II]. It appears further that the late Palayagar since brought O. S. No. 24 of 1887 to recover compensation for the loss sustained by him by the sale

of two of his villages owing to the appellant's default, and obtained a decree in the court of first instance for Rs. 12,630-1-10, which sum was

reduced on appeal to Rs. 5,321, (Exhs. O and D). To this suit the appellant was also a party, and his contention that the sale was not due to his

default is inconsistent with the award of damages to the late Palayagar. Again, the appellant himself instituted O. S. No. 11 of 1878 against the late

Palayagar to establish his right inter alia to the enjoyment of the six villages mentioned in lease deed B during the term of his lease, and one of the

issues for determination was whether the auction purchase ought to prevail against the appellant. The decree established his right to the possession

of the villages mentioned in his plaint excepting the two villages sold at the public auction, (Exh. IX); and Exhs. H and J show that so far as the two

villages are concerned, the decree was not altered on appeal. The effect of that decree was to limit as against the auction-purchaser the appellant's

right of possession to four out of six villages mentioned in Exh. B and to negative it so far as it related to the villages of Karuvur and Marayakudi on

the ground that Arunachelam had a prior lien on these villages. It is true that the appellate court appears from Exh. H to have accepted the finding

of the Subordinate Judge that the late Palayagar collected grain from the villages leased out by him of the value of Rs. 4,615; but this did not justify

the appellant's default in paying Arunachelam Rs. 8,050 which he was bound to have paid as part consideration for the assignment. I am also of

opinion that the appellant's eviction was due solely to his own default.

19. I further think that the Subordinate Judge was right in holding that the suit is barred by Section 43 of the Code of Civil Procedure. Subsequent

to his eviction, the appellant instituted O. S. No. 85 of 1882 claiming, inter alia, mesne profits on account of these two villages for Faslis 1289 and

1290. Though the late Palayagar resisted the claim, a decree was passed in favour of the appellant, and it was confirmed on appeal. The present

suit is substantially one for damages for breach of implied covenant for quiet enjoyment during the term of lease B. This being so, the appellant was

bound, as remarked by the Subordinate Judge, to have claimed all the damages flowing from the breach, and he was not entitled to bring a fresh

suit for mesne profits as they accrued from year to year, his right of possession under the lease B being negatived by the decree in O. S. No. II of

1878 to the two villages for which mesne profits are now claimed. Having regard to the principle laid down by the Master of the Rolls in *Child v.*

Stenning, 11 Ch. D 82, I agree with the Subordinate Judge that the suit is barred by Section 43 of the Code of Civil Procedure, It is argued for the

appellant that his claim for mesne profits being allowed in O. S. No. 12 of 1878 and in A. S. No. 23 of 1884 for the two years subsequent to his

eviction, respondent is precluded from now denying his liability to pay mesne profits under the leases for the other years as they accrued each year.

I do not consider this contention tenable. It is true that in A. S. No. 23 of 1884, the court observed that the equities of the parties had been

adjusted on the basis of the mortgage of Rs. 30,000 and of the lease as instruments to which full effect should be given (Exh. K), but I find that the

decree in O. S. No. 11 of 1878 negatived the appellant's right of enjoyment of Karuvur and Marayakudi under the lease B, and that the mortgage

was held to be operative to the extent of Rs. 22,000. Though the decree in O. S. No. 85 of 1882 is conclusive as regards the mesne profits

awarded by it, I do not think that it estops the respondent from showing that the equities were not adjusted on the basis indicated therein.

20. Another contention for the appellant is that the purchase at the court-sale held in execution of the decree in O. S. No. 76 of 1874 was made

benami for the late Palayagar. The plaint contains no averment to that effect, nor was any issue taken, but our attention is drawn to Exhs. N and O.

Though the word benami is used in Exhs. N, yet the transaction as appears from those Exhibits was substantially a purchase by a stranger under an

agreement to reconvey to the late Palayagar on payment of so much of the purchase money as was advanced by the purchaser. Exh. O shows that

the purchaser has to reconvey on payment to him of Its. 32,000. In O. S. No. 11 of 1878, the question whether the purchase ought to prevail

against the appellant was raised and the purchaser was the 13th defendant. There was then no allegation that the purchase was benami and the

purchaser's right was established against the appellant and the present contention appears to be the result of an after-thought.

21. I am also of opinion that this appeal must be dismissed with costs.