

(2001) 02 MAD CK 0156
In the Madras High Court
Case No : A.S. No. 1131 of 1989

TKT. Alagappan and 5 others

APPELLANT

Vs

Vimala Balasubramanian rep. by Power Agent B.
Swaminathan No. 2/54 East Raja St Pudukottai-1

RESPONDENT

Date of Decision : 16-02-2001

Acts Referred:

Evidence Act, 1872 — Section 34

Limitation Act, 1963 — Section 18, 19, 20, 20(2), 21

Citation : (2001) 02 MAD CK 0156

Hon'ble Judges : E. Padmanabhan, J

Bench : Single Bench

Advocate : Mr. V. Sundar for Mr. S. Viswanathan, for the Appellant; Ms. Sindhuja for Mr. T.R. Rajaram, for the Respondent

Final Decision : Allowed

Judgement

1. The defendants in O.S.No.155 of 1986 on the file of the Subordinate Judge, Pudukottai, are the appellants in this appeal. Heard Mr. V. Sundar for the appellants and Ms. Sindhuja for M/s.T.R. Rajaraman for the respondents. For convenience, the parties to this appeal will be referred as arrayed before the trial court.

2. The respondent herein instituted the suit in the recovery of a sum of Rs.73,274.51, being the amount due on the mortgage dated 22.9.61 with subsequent interest, and the present suit has been instituted to enforce the suit mortgage and recover the amount due inclusive of interest.

3. According to the plaintiff, on 22.9.61 defendants 2,3 and Sigapi Achi borrowed Rs.8,500 and to secure the said sum they executed a deed of mortgage. The said Sigapi Achi had executed the mortgage for herself and on behalf of defendants 1 and 4 as their agent and as guardian of the 5th defendant. As per the stipulations contained in the deed of mortgage the defendants are liable to pay the entire suit claim. The suit amount was borrowed to discharge certain earlier

pending decree debts as well. Sigapi Achi passed away. Defendants 2 and 3 on 21.9.71 remitted Rs.50 and made an enforcement on the mortgage deed. Once again on 21.9.82 the 2nd defendant paid Rs.25 towards the mortgage debt and made an endorsement. In view of the said two acknowledgments, the suit claim is not barred by limitation. Despite the repeated demands and notices, the defendants have failed to discharge the mortgage debt and hence the present suit.

4. The 2nd defendant filed a written statement denying the two acknowledgments. The 2nd defendant in other respects adopted the written statement filed by the 5th defendant. Defendants 1,3,4 and 6 adopted the written statement filed by the 5th defendant. The defendants admitted the execution of the mortgage deed. The alleged two repayments and acknowledgments are denied and these acknowledgments will not bind the defendants and the suit claim is barred by limitation. The defendants are entitled to claim benefit under the Tamil Nadu Agriculturist Debt Relief Act, as they are agriculturists. The claim of interest is usurious and that the plaintiff is not entitled to compound rate of interest. It is further pleaded that the plaintiff's husband, a member of the Bar was the defendants' advocate and he had appeared in number of cases. According to the defendants, no amount had been advanced towards the discharge of various debts, the plaintiff's husband secured a mortgage debt taking advantage of the relationship between the plaintiff's husband and the defendants. The defendants have been maintaining accounts as is being done in the family of Nattukottai Chettiar and as per their books of account maintained in the regular course, the entire mortgage loan had already been discharged. After receipt of notice, when the defendants approached the plaintiff's husband to return the mortgage deed, the plaintiff's husband assured them to look into the the accounts and return the mortgage deed. However in the meanwhile, the present suit has been filed. According to the defendants they have remitted Rs.18,350 from time to time and it is double the principal amount advanced under the mortgage deed. When the defendants insisted for an endorsement being made on the mortgage debt, the plaintiff's husband assured that he had noted down the remittances and on a later date after looking into accounts, he will return the mortgage deed after discharge. The plaintiff's husband, after going through the accounts assured that he will return the mortgage deed. The plaintiff's husband passed away and thereafter the present suit has been filed. The defendants are not liable to pay any amount as the entire mortgage debt has already been discharged.

5. On the said pleadings the Court below framed the following six issues for consideration:-

- (a) Whether the suit claim is barred by limitation?
- (b) Whether the plaintiff is entitled to charge compound rate of interest?
- (c) Whether the suit mortgage is supported by consideration?

(d) Whether the plaintiffs are entitled to the benefit of the Tamil Nadu Agriculturist Debt Relief Act?

(e) Whether the defendants have paid Rs. 18,350?

(f) Whether the endorsements of remittances made on the mortgage deed are true and binding on the defendants?

(g) To what relief the plaintiff is entitled?

6. The plaintiff examined three witnesses while the 3rd defendant was examined as D.W.1 and the 1st defendant was examined as D.W.2. The plaintiff marked Exs.A-1 to A-12 while the defendants marked Exs.B-1 to B-51. Apart from the said exhibits, Exs.C-1, a Court exhibit was also marked.

7. On the said pleadings and on a consideration of oral and documentary evidence, the trial court on the first issue held that the suit claim is not barred by limitation and on the second issue held that the plaintiff is entitled to claim compound interest. On the third issue the trial court held that the suit mortgage is supported by consideration. On the fourth issue the trial court held that the defendants are not entitled to the benefits of Tamil Nadu Agriculturist Debt Relief Act. On the fifth issue, the trial court disbelieved the defendants' plea of discharge by disbelieving the accounts produced by the defendants. The trial court rejected the plea of the defendants that they have remitted Rs.18,350 towards the suit mortgage.

8. On the sixth issue, the Court held that the two endorsements of payment of Rs.50 and Rs.25 respectively made on 21.9.71 and 21.9.82, Exs.A-2 and A-3, are true and they are binding on the defendants. Ultimately the Court below granted a preliminary decree as prayed for. Being aggrieved the present appeal has been preferred by the defendants.

9. In this appeal the learned counsel for the appellants raised the following points for consideration:-

(1) Whether the suit claim is barred by limitation?

(2) Whether the acknowledgment under Exs.A-2 and A-3 is binding on all the defendants?

(3) Whether the said acknowledgment and part payments save limitation?

(4) Whether the defendants have discharged the suit mortgage debt?

(5) Whether the defendants are liable to pay compound interest as claimed by the plaintiff?

10. Taking up the last two points, the learned counsel for the appellants took the Court through the pleadings as well as the oral and documentary evidence and contended that the defendants who belong to Nattukottai Chettiar Community maintained books of accounts, namely, Exs.B-10 to B-22 in the regular course of

maintaining accounts and therefore the entries therein should be accepted and the payments should be given credit. Hence it is claimed on that basis that payments have been made to the plaintiffs deceased husband who was a member of the Bar. It is also admitted that the plaintiff's husband was a member of the Bar and he had also appeared for the in certain proceedings before Court on behalf of the defendants. The Court below on a consideration of the oral and documentary evidence as seen in paras 8 to 10 after discussions disbelieved the said account books as well as the evidence of D.Ws.1 and 2 as regards the alleged plea of discharge.

11. The account books Exs.B-10 to B-22 produced by the defendants were challenged and for valid reasons the Court below disbelieved the account books and rejected the entries, which entries were relied upon by the defendants to substantiate their plea of discharge. The learned counsel for the appellants is unable to point out any factual error or mis-reading of the evidence in this respect. This Court also finds that the books of accounts produced by the defendants cannot be believed at all as there are inherent defects and vary many pages have been removed or inserted and they are not regular books of accounts, which may deserve certain amount of credence. The evidence of D.W. 1 also had been rightly disbelieved by the Court below. On a consideration of the said evidence of D.Ws. 1 and 2, this court also concur with the findings of the trial court and it is unnecessary to set out the details of the said evidence or deposition once again as this Court affirms the findings of the trial court in this respect.

12. As regards the rate of interest claimed, Ex. A-1 the mortgage deed itself stipulate the payment of Interest at 9% compound rate. The account statement filed by the plaintiff along with the plaint disclosed the claim that the defendants have agreed to pay compound rate of interest. The present plea that they are not liable to pay compound rate of interest cannot be sustained at all in the light of the defendants* agreement to pay compound interest. The learned counsel for the appellants is unable to point out any pronouncements to the Courts and in fact he has to fairly admit that the appellants/defendants will not be justified in persisting in these two contentions. Therefore, it is clear that the plea of discharge had been rightly disbelieved and no interference is called for in respect of these two points.

13. What remains to be considered is the plea of limitation and binding nature of the alleged endorsements of acknowledgments. The acknowledgments, Exs.A-2 and A-3 had been established by the plaintiff and it is unnecessary to examine the same in this appeal. However the evidence let in by the plaintiff establish the endorsements, namely, Exs.A-2 and A-3 and the endorsements are true and they have been made by two of the defendants as well as defendants 2 and 3. The evidence of P.W.2 would show that the said defendants made partial payment of Rs.50 and Rs.25 respectively under Exs.A-2 and A-3 and they have made endorsement to payment on the mortgage deed, Ex.A-1 acknowledging the said

two remittances. P.W.s 1 and 4 examined in this respect have spoken about the same. As deposed it is clear that defendants 2 and 3 made remittances under Exs.A-2 and A-3 and affixed their signatures. The second defendant had not come forward to examine himself. The admitted signature of the 2nd defendant was compared with Exs.A-2 and A-3 signature. On a comparison, the trial court had rightly held that they are identical and it is not necessary to refer the signatures for an expert's opinion. This Court also finds that the two signatures are identical. Thus it is clear that Exs.A-2 and A-3 are true endorsements of acknowledgments and the payments under Exs.A-2 and A-3 are true payments. Hence this point is answered against the appellants and in favour of the respondents. While accepting Exs.A-2 and A-3 as true, only further question that survives for consideration is whether the same would save limitation.

14. The suit mortgage, Ex.A-1 is dated 22.9.61. The plaintiff claimed that the suit claim is not barred by limitation in the light of Exs.A-2 and A-3 remittances of Rs.50 and Rs.25 respectively and the respective endorsement made on Ex.A-1. According to the plaintiff Exs.A-2 and A-3 are acknowledgments which would save limitation. But for Exs.A-2 and A-3, it is admitted that the suit claim will be barred by limitation.

15. Ex.A-1 is dated 22.9.61 and the present suit has been filed into Court only on 22.12.86. Hence it is clear, but for Exs.A-2 and A-3 acknowledgments which according to the plaintiff save limitation, the suit claim will be barred by limitation.

16. In this respect the learned Counsel for the appellants heavily relied upon the decision of this Court in *E. Ratnamma Pillai Thankachi v. P. Kamalam Mudaliar and others*, 1977 (91) LW 295 in support of his contention that an acknowledgment by one of the mortgagees will not give a fresh starting point of limitation. Per contra, the learned counsel for the plaintiff contended that the reliance placed upon *E. Ratnamma Pillai Thankachi v. P. Kamalam Mudaliar and others*, 1977 (91) LW 295 is a misconception and the said judgment will have no application to the facts of the present case. The learned counsel for the plaintiff relied upon the Division Bench Judgment of this Court reported in *T.A. Sankaralingam Vs. T.N. Mani and Others*, as well as the pronouncement of the Privy Counsel reported in *Nagarnal and others v. Bajranglal and others*, AIR 1950 P.C.215.

17. In *Ratnamma Pillai Thanakchi v. P. Kamalam Mudaliar and others* (V. Ramaswamy, J. as he then was) while following the earlier decision of this Court in *Vaikunta Bhakta v. Kunni Pakki*, 19 MLJ 288, held that an endorsement or acknowledgment made by one of the mortgagees will not give a fresh starting point of limitation in a suit for redemption. In *Ratnamma Pillai Thankachi v. P. Kamalan Mudaliar and others*, the plaintiff instituted a suit for redemption of the mortgage of the year 1865 while claiming that the suit claim is not barred by limitation on the ground that there was an assignment of the mortgage to the predecessor in interest of the contesting respondents under Ex.A-8 dated

2.6.1898 and a later Purakkadam (subsequent charge) of the same year and also a subsequent acknowledgment by one of the mortgagees on 14.10.1912. The learned Judge considered the contention whether the acknowledgment by one of the mortgagees made on 14.10.1912 will save the suit from the bar of limitation filed by the mortgagor for redemption. In the said case it has been held that an acknowledgment by one of the mortgagees will not give a fresh clearing point of limitation.

18. The said decision will not advance the case of the plaintiff in this case. In this case not only the facts are different, but also the case is converse in a suit for redemption filed after the period of limitation, the defendants therein set out the plea of bar on limitation while the plaintiff relied upon an acknowledgment by one of the mortgagees to have limitation. In that context, Ramaswamy, J. held that acknowledgment by one of the mortgagees will not save the limitation and the suit claim is barred by limitation. This is not the case here.

19. In the present case, the suit has been instituted by the mortgagee to recover the amount due on the mortgagor and money advanced with interest and to save limitation the plaintiff relied upon part payment and endorsements under Exs.A-2 and A-3. Already Exs.A-2 and A-3 have been held to be true but the court below and this Court also confirm the said finding.

20. Therefore the only question that survives is whether Exs.A-2 and A-3 would save limitation in the present suit instituted by the plaintiff for recovery of the amount due under the mortgage. The two authorities relied upon by the learned counsel for the plaintiff/respondent also will be of no avail as in these two cases the plea that was considered was whether the manager of a joint family could acknowledge the debts and whether such acknowledgment could save limitation; that is not the point that arises for consideration in this appeal.

21. Admittedly A-1 had been executed by the defendants and as well as by the late Sigapi Achi as power of attorney for two of the defendants and as guardian for the 5th defendant. Therefore it is clear that the mortgage debt had been executed by all the defendants and they are co-mortgagors. Mortgage debt, Ex.A-1 is dated 22.9.61; Ex.A-2, endorsement on payment had been made by defendants 2 and 3, while Ex.A-3 dated 21.8.82 had been made by the 2nd defendant alone. The 2nd and 3rd defendants are co-mortgagors along with the other defendants and they have no authority or power to sign on behalf of the other defendants. Though the endorsement proceeds as if the acknowledgment was made in the capacity of the manager of the joint family, the same had neither been established. On facts it could not be held that the acknowledgment had been made by the manager of the joint family. It is also pointed out that the mortgage debt was not incurred by the joint family manager nor he had acknowledged such a debt on a later date so that it can be binding on all the members of the joint family coparcenary. Factually on the other hand, the defendants are co-mortgagors and it may be that they own the property jointly. The interim relationship between the defendants in respect of the suit mortgage

debt, Ex.A-1 is as pure and simple co-mortgagors. Therefore, it has to be examined whether the acknowledgment by one or more of the co-mortgagors would save limitation in this appeal. Section 18 of the Limitation Act reads as follows:

" Where before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed."

Explanation to Section 18 further provides as to when an acknowledgment would be sufficient for the purpose of Section 18. Such acknowledgment could be signed either personally or by an agent duly authorised in this behalf by the party against whom such property or right is claimed.

22. But acknowledgment by a mortgagor on a mortgage deed would be effective as against the mortgagee or an assignee of the equity of redemption, provided the assignee had derived title from the mortgagor or an acknowledgment had been made by him. If a mortgagor by a subsequent document acknowledges not merely the mortgage debt due under the mortgage but also the real relationship as the mortgagor and mortgagee the same will save limitation if the mortgagee's suit is to recover possession of the mortgaged property of which he had been dispossessed.

23. The acknowledgment to be valid and binding should be made or be signed by the party against whom such property or right is claimed or by some person through whom he derives liability. Such an acknowledgment is required to be signed by the mortgagor or a person authorised in this behalf and such authorisation could be either express or implied by surrounding circumstances.

24. It is not the case of the plaintiff that the mortgagors, namely, defendants 2 and 3, or either the 2nd defendant is the agent of the remaining mortgagors or such agency had been proved so that it could be held that they have been validly authorised by the other defendants to acknowledge or to make an endorsements viz. ExsA-2 and A-3.

25. Therefore the further question that arises incidentally is whether defendants 2 and 3 who are only co-mortgagors who have no authorisation or authority to acknowledge the liability, could validly acknowledge the liability under Exs.A-2 and A-3 and whether such acknowledgments are binding on other co-mortgagors. An acknowledgment in favour of a prior mortgagee by the mortgagors will not operate against the subsequent mortgagee. This position is also well settled.

26. Section 20 of the Limitation Act deals with the persons by whom an acknowledgments or payment can be made. Sub- section (2) of Section 20 reads

as follows: -

"(2) Nothing in the said Section renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed by, or of a payment made by, or by the agent of, any other of others of them."

In terms of Sub-Section (2) of Section 20, an acknowledgment should be by the party against whom such property or right is claimed. The use of the expression by the party against whom such an authority or right is claimed shows that where more persons than one are jointly liable under acknowledgment by one will not operate against the others unless he has been authorised to acknowledge on behalf of the others also. On a consideration of Section 20 read with Section 18 and 19 of the Limitation Act, it follows that a payment by one of several co-mortgagors could not save limitation as against others. Further in Ex.A-1 mortgage deed no such stipulation or authorisation finds a place nor there is anything to show that one of the co-mortgagor is the agent of the other co-mortgagors.

27. In the following case it has been held that an acknowledgment of liability by one co-mortgagor cannot save limitation against other co-mortgagors:-

"(a) Janardhanan Embaranthiri v. Mariam & others, AIR 1957 T. C.18; (b) Dashrath Motiram Shet Wani Vs. Gajanan Keshav Phadnis, ; (c) Govindaswami Naicker and Others Vs. K.N. Srinivasa Rao and Others, ."

A full bench of this court in Narayana Iyer v. Venkatramana Iyer, ILR (1902) Mad. 220 has also laid down that an acknowledgment of liability by one mortgagor will not save limitation against the other two mortgagors. The decision of the full bench in ILR 25 Mad. 220 still holds the field and therefore it follows that the acknowledgment of liability by one or two of the co-mortgagors will not save the limitation against the other co-mortgagors.

28. The said full bench in Narayana Iyer v. Venkatramana Iyer, ILR (1902) Mad. 220 held thus:-

"For the purposes of Section 19 of the Limitation Act, the acknowledgment relied upon must on the fact of it purport to be that of an existing liability. But the same of the creditor to whom the debt acknowledged is owing as also the identity of the debt acknowledged in writing may be proved by parol evidence (Daia Chand vs. Sartraz (1), Uppi Haji v. Mammavan (2), Woornesh ChunderMookerjee v. Eliza Sageman (3), Padmanabhan Wambudri v. Kunni Kolendan (4), Hartley v. Wharton (5), Shortrede v. Cheek (6))."

But we are clearly of opinion that the first defendant's acknowledgment cannot affect his co-mortgagor the third defendant and save the suit from being barred by limitation as against him. Apart from the first defendant's position as co-mortgagor with the third defendant there is nothing to warrant the inference that the former acted as an agent duly authorised by the latter in making the

acknowledgment (explanation 2 to section 19 of the Limitation Act). u/s 21, one of several joint contractors cannot be chargeable by a written acknowledgment made u/s 19, by reason only that such acknowledgment is made by another joint contractor. An agency within the meaning of explanation 2 of section 19 cannot be inferred from the mere fact that the person making the acknowledgment is a joint contractor."

"When a creditor deals, not with the managing member only of an undivided family, but with all the members of family, as co-obligors, and on that footing enters into a transaction thereby avoiding any question as to whether the transaction was really for the benefit of the family, he cannot rely upon an acknowledgment of the liability, made by one of them, as an acknowledgment duty made on behalf of all the co-obligors, by reason only that the person acknowledging is in fact the managing member of the family consisting of the co-obligors. There may, however, be cases in which that circumstance, coupled with the conduct of the joint contractors, may warrant the conclusion that, as a matter of fact, the managing member was only authorised to make the acknowledgment on behalf of all."

In *Maragadhammal v. Yasodhammal*, AIR 1941 Mad. 110 as well as *Pachipenta Lakshmi Naidu v. Somahanti Gunwamma & another*, AIR 1935 Mad. 101, Division Bench of this court laid down that where more persons than one are jointly liable and acknowledgment by one of them will not bind the others. In *Muthiah Bhagavathar and others v. Venkatrama and others* AIR 1936 Mad. 114 a Division Bench of this court held that where, a person making acknowledgment or payment has the authority of the other members of the group to which he belongs, to make the acknowledgment of payment, such acknowledgment or payment alone will bind the other members also. A full bench of Allahabad Court in *Kallomal v. Ganeshi Lal & another*, AIR 1936 All. 120 held that an acknowledgment by one co-mortgagor will be effective only against him and cannot have limitation as against other co-mortgagors.

29. In *SA. Subramania Ayyar & others v. M. Natesa Sastrigal & others*, AIR 1936 Mad. 111 this court also held that the payment by one of the co-mortgagors will not save limitation against the other co-mortgagors and such a view is opposed on the ground that co-mortgagors are joint contractors. In *Thayammal & others v. A.T. Muthukumaraswami Chettiar*, AIR 1929 Mad. 881 a Division Bench of this court held thus:

In the said decision it has been held by the Division Bench that a payment by one co-mortgagor does not save limitation as against others not only as regards their personal liability but also as regards their liability in respect of their share in the mortgage property.

30. Thus on a conceptuous reading of the above said pronouncements, it is clear that the claim of the plaintiff against the defendants is not saved by Exs.A-2 and A-3 acknowledgments and the suit claim is barred by limitation. However the

mortgage being one and indivisible, it has to be held that the acknowledgment by the 2nd defendant in Ex.A-3 also will not save the limitation as mortgage is indivisible and a part of the mortgage cannot be held to be binding and at the same time the remaining held to be unenforceable or barred by limitation.

31. In the circumstances on the plea of limitation this court holds that the judgment of the court below cannot be sustained. The court below had proceeded on the assumption that acknowledgment or endorsement by one or two of the defendant/co- mortgagors will be sufficient to save limitation. Such a view cannot be sustained. Hence it follows that the suit claim is barred by limitation.

32. Consequently, the judgment and decree of the court below are liable to be set aside and accordingly they are set aside. The appeal is allowed and the judgment and decree of the court below are set aside. The suit in O.S.No.155 of 1986 will stand dismissed and the parties shall bear their respective costs throughout.