

(1939) 09 MAD CK 0037
In the Madras High Court

T.V. Duraiswami Pillai

APPELLANT

Vs

P. Venkata Reddy and Others

RESPONDENT

Date of Decision : 28-09-1939

Acts Referred:

Contract Act, 1872 — Section 69

Citation : AIR 1940 Mad 233 : (1939) 50 LW 889

Hon'ble Judges : Leach, C.J

Bench : Division Bench

Judgement

Leach, C.J.—In order to appreciate the questions which arise in this appeal it is necessary to set out the course of events preceding the suit. The appellant is a mittadar in the North Arcot District. On 27th February 1875 his predecessor-in-title mortgaged a village in the mitta to the respondent's predecessor-in-title to secure a loan of Rs. 9000. The mortgage was a usufructuary mortgage and the deed provided that the mortgagee should pay annually to Government Rs. 170-13-2, the amount of the peshkush. In the year 1914 the appellant filed a suit in the Court of the Subordinate Judge of Vellore for the redemption of the mortgage, and obtained a preliminary decree. The respondent was dissatisfied with the terms of the decree and appealed to this Court which modified it in certain respects which do not call for mention. It is sufficient to say that the preliminary decree was allowed to stand with further directions with regard to the taking of the account. 1st July 1924 was the date fixed for redemption. The appellant did not pay the amount due under the mortgage and on 1st July 1924 the respondent obtained a final decree for the sale of the property. The respondent and his predecessors-in-title have not fulfilled their obligation to pay the peshkush due to Government. Throughout, the appellant or his predecessors-in-title have been compelled to pay the peshkush in order to prevent the Government from selling the property.

2. On 16th January 1933 the suit out of which this appeal arises was filed by the appellant to recover the amounts which he had been compelled to pay to

Government as peshkush during the six years immediately preceding the suit. After the suit had been instituted the appellant paid the amount due to the respondent under the mortgage. The payment was effected by the adjustment of certain accounts in which the parties were interested. On 7th March 1933 satisfaction of the mortgage decree was entered and the appellant was given possession of the property. The adjustment between the parties which led to the discharge of the mortgage debt did not however take into account the amount due by the respondent to the appellant in respect of the peshkush which the appellant had been compelled to pay in order to safeguard the property, and in these circumstances the suit proceeded. The respondent denied all liability and various issues were framed, but the case really only involved the consideration of two questions. The first question was" whether the appellant was entitled to rely on the mortgage deed and claim damages on the basis of a breach of a contract in writing registered in which case he was entitled to recover the total amount paid by him as peshkush for the six years preceding the suit. The second question was whether the position was governed by Section 69, Contract Act, in which case, the appellant could only recover the amounts paid for three years. The District Munsif held that the appellant was only entitled to rely on Section 69, Contract Act, and granted him a decree in respect of the amount paid by him in respect of the three years immediately before suit. On appeal, the Subordinate Judge of Vellore concurred in the decision of the District Munsif. The appellant contends that he is entitled to recover the full amount, of his claim as damages for breach of a registered contract and has relied on the decision of the Privy Council in AIR 1931 226 (Privy Council) . For the respondent three contentions have been raised. In the first place it is said that AIR 1931 226 (Privy Council) is not an authority for the proposition that the appellant could file a separate suit for damages for breach of the respondent's covenant in the mortgage deed after the final decree had been passed in the redemption suit. In the second place it is said that even if that decision does apply the mortgage deed cannot be relied on in this case as the mortgage was redeemed on 7th March 1933 and in consequence the relationship of the mortgagor and the mortgagee ceased. The third contention is that a suit is not maintainable by reason of the provisions of Order 34, Rule 10, Civil P.C. It may here be mentioned that the second and the third contentions were not advanced in the Courts below.

3. An examination of the judgment in AIR 1931 226 (Privy Council) makes it manifest that the appellant is entitled to rely on the mortgage deed notwithstanding the passing of the final decree. In that case the plaintiff sued to enforce a mortgage. Defendant 7 was impleaded because he was entitled to a usufructuary mortgage of an earlier date and to certain simple mortgages which had been created after the plaintiff's mortgage. A final decree for sale was obtained by the plaintiff, but before the sale took place he brought a second suit to recover the amount of the revenue which he had been called upon to pay in respect of the mortgaged property. The mortgagor had by the mortgage deed covenanted to pay this revenue. The question was whether the mortgagee was

entitled to bring the second suit. It was argued that inasmuch as there had been a final decree the mortgage deed could not be looked at. The decree had, it was said, taken the place of the deed. In this connexion reliance was placed on the decisions in *Sunder Koer v. sham Krishan* (1907) 34 Cal. 150 and AIR 1927 1 (Privy Council) . The Board did not accept the argument and held that the appellant was entitled to institute the second suit and to have the amounts which he had paid in respect of the Government revenue made a first charge on the sale proceeds.

4. In dealing with the argument based on the decisions in *Sunder Koer v. sham Krishan* (1907) 34 Cal. 150 and AIR 1927 1 (Privy Council) , the Judicial Committee pointed out that in the earlier case (which was followed in the later case) all that was decided was that, under the Transfer of Property Act, the effect of a preliminary decree is to convert the mortgage claim into a judgment-debt, and the mortgagee into a judgment-creditor or decree-holder, and, consequently to deprive him of any right to further interest at the contract rate in respect of his mortgage claim covered by the decree. Their Lordships then proceeded to say:

As regards the present question, the only effect of the preliminary decree was to make the mortgaged property security for the judgment-debt pending realization by sale as provided in the decree, and, pending such realization, the plaintiff, as a secured decree-holder, was just as much interested in the preservation of the security as he had been under his mortgage while it subsisted and their Lordships see no reason why he should not be entitled, in accordance with the opinion of the Board in the case already cited, *Nugendechand Ghose v. Kamince Dossee* (1866) 111 M.I.A. 241, to a first charge in respect of the payments of revenue made after the passing of the final decree, which were really in the nature of salvage payments on behalf of all persons interested.

In the present case, the same result is reached as to subsequent encumbrances by reference to the mortgage deed itself. The authority conferred upon the mortgagee by that deed to pay the Government revenue in respect of which the mortgagors make default is not limited in point of time. It is necessarily intended to continue so long as the mortgagee remains interested under the mortgage in the mortgaged properties. When the payment is so made, it becomes, by the very terms of the deed, a further charge upon the properties which presumably is enforceable as such.

5. Their Lordships here clearly regarded the mortgage deed as still subsisting and that the plaintiff was entitled to enforce the covenant by which the mortgagor had undertaken to pay the Government revenue. The decree had decided what was to be paid under the mortgage and had settled the question of interest. To that extent the decree and not the mortgage deed had to be looked at. In the light of this decision, it is not possible for the respondent to contend that by virtue of the final decree the appellant is to lose all benefit of the covenant under which the respondent was bound to pay the peshkush. As the

mortgage deed subsisted at the date of the suit the appellant was entitled to rely on it. The respondent had broken a term of the contract embodied in the deed and he was guilty of a breach of a contract in writing registered which gives the appellant the right to recover by way of damages what he was compelled to pay during the six years preceding the suit. The decision of the lower Courts that the appellant was only entitled to rely on Section 69, Contract Act, is erroneous.

6. There is no substance in the respondent's second and third contentions. The amount which was paid by the appellant to redeem the property did not, as has been pointed out, take into consideration the amounts which the respondent ought to have paid by way of peshkush. The adjustment which led to the redemption of the property took no account of this suit which was already on the file. Therefore what happened in the redemption suit cannot be deemed to have put an end to what the appellant was entitled to as the result of the breach of the respondent's covenant to pay the peshkush. The position was that the appellant as mortgagor paid what was due by him under the mortgage, but the respondent did not pay what he was liable to pay under the covenant. Order 34, Rule 10 provides for the adding to the mortgage money the costs of the suit and other costs, charges and expenses, which have been incurred by the mortgagee since the date of the preliminary decree. This rule was added to the Code in 1930. The decree for sale in this case was in 1924 and therefore this rule can have no application. Nor can it affect rights which exist independently of the rights conferred by the preliminary decree. For the reasons indicated the appeal succeeds. The respondent has not objected to the decree passed by the trial Court which gave the appellant the amount claimed for the three years immediately preceding the suit with interest. The amount and interest awarded in respect of the peshkush paid for the three years immediately preceding the suit will therefore stand and the appellant will get in addition the amount claimed for the first three years of the six years with interest from the date of the suit to the date of the decree. There will be interest on the decretal amount at the Court rate from the date of the trial Court's decree to the date of payment or realization. The appellant is entitled to the costs awarded below and in addition he will get costs throughout based on the further amount awarded to him by the decree of this Court.