
(1948) 02 MAD CK 0017
In the Madras High Court

V. Vr. Bank

APPELLANT

Vs

L.M. Bank, Cusba Kangayam by Managing Partner Muthayya
Chettiar by Agent Srinivasa Raghava Ayyangar

RESPONDENT

Date of Decision : 04-02-1948

Acts Referred:

Citation : (1948) 61 LW 382 : (1948) 1 MLJ 458

Hon'ble Judges : Horwill, J

Bench : Division Bench

Judgement

Horwill, J.—The appellant purchased from the Official Receiver the insolvent's right in two mortgages, one of which was a simple mortgage and the other a usufructuary mortgage. About two years after the sale, the appellant entered into an agreement (Ex. P-10) with the predecessors-in-title of the respondent, who were simple creditors of the insolvent, whereby the appellant was to have a $\frac{1}{4}$ share and the respondent's predecessors-in-title a $\frac{1}{4}$ share in the rights to the amounts of the said deeds and to the property. Relying on this agreement, the respondent filed the present suit for partition and separate possession of the property which was the subject-matter of the agreement and for an account of the mesne profits. Faced with the difficulty arising out of the circumstance that Ex. P-10 was not registered, he put forward an oral agreement prior to Ex. P-10, of which Ex. P-10 was said to be merely a record. The trial Court found that there was no evidence of any prior agreement; and since Ex. P-10, which purported to convey the interest in the amounts, was not registered, he dismissed the suit. In appeal, the respondent drew a distinction between his rights to the security and his rights to the debts. By that time, the amounts due under the mortgages had been realised. Thereupon, the plaintiff filed a petition for the amendment of his plaint, claiming a share of the sum realised. Since at first the appellant denied having received any money, he also prayed for permission to sue for an assignment in his favour of this $\frac{1}{4}$ share in the mortgage deed. The learned Subordinate Judge in appeal referred to Lakshmana Naicker v. Jayaram Naicker (1933) 66 M.L.J. 380, in which the learned Judges drew a distinction

between a security and a debt and said that although no rights to the security could be conferred by an unregistered document, a right to the debts could. He therefore allowed the amendment and remanded the suit for fresh disposal on the amended plaint.

2. The learned advocate for the appellant sought to distinguish *Lakshmana Naicker v. Jayaram Naicker* (1933) 66 M.L.J. 380 on the ground that it relates to a simple mortgage and not, as in the present case, to a usufructuary mortgage. He contends that in a usufructuary mortgage, apart from the security, there is no debt at all to be transferred. For that purpose, he relied on the decision of the Federal Court in *Mt. Parkash Kuar v. Mt. Udham Kuar* (1946) F.L.J. 110 : (1947) 1 M.L.J. 127 (F.C). The learned Judges there did not, however, draw a broad distinction between a usufructuary mortgage and a simple mortgage. They merely distinguished the cases of simple mortgages such as were dealt with in *Lakshmana Naicker v. Jayaram Naicker* (1927) M.W.N. 743, from the particular mortgage with which they were dealing, which was of a form common to agricultural land in the Punjab, where the mortgagee has merely a right to receive the rents and profits from the property till the mortgage money has been repaid. In such cases, he has no right to recover the amount of the mortgage money and so there can be no debt. At the time of his death, which was the point of time with which the learned Judges were concerned, the interest he had as the owner of the land was only that of a mortgagee in possession entitled to receive the rents and profits from the property, which was a right in or over agricultural land comprised within Entry 21 of List II and not therefore regulated by the Hindu Women's Rights to Property Act-; so that the plaintiff could not claim a share in it.

3. As the mortgage deed is not now before us, we have no idea of the terms of the deed and so cannot say that there exists no debt independent of the security. There might have been for aught we know a covenant to pay. Moreover, the terms of Ex. P-10 are wide enough to include the money realised by the appellant in the future; and so even if the plaintiff had no right to a transfer of the debt, he would still be entitled to a share of the money realised by the appellant.

4. The lower Court was therefore justified in allowing the amendment.

5. It has been pointed out that the learned Subordinate Judge has not said in so many words that the defendant can file a fresh written statement and raise objections to the grant of a decree on the amended plaint. It is fairly clear from the order made by the learned Subordinate Judge that he did not intend to preclude the filing of an additional written statement; but to avoid doubt it is expressly stated here that the appellant has such a right. The amended plaint, as already stated, purports to deal with a situation in which it was not quite clear whether the money had been realised or not; and so the plaintiff prayed to be allowed to ask for specific performance. That is now unnecessary in view of the appellant's admission that he has realised the money. The plaintiff will therefore

be permitted to amend his plaint so as to pray for his 1/4th share in the money realised on the usufructuary mortgage, with consequential reliefs.

6. In other respects, the appeal is dismissed with costs.