(1944) 03 MAD CK 0023

Madras High Court

Case No: None

Manicka Nadar	APPELLANT
Vs	
Arumuga Sundara Sathia Gnana Pandara Sannadhi Avergal	RESPONDENT

Date of Decision: March 5, 1944

Acts Referred:

- Transfer of Property Act, 1882 - Section 62(a)

Citation: (1945) 2 MLJ 7

Hon'ble Judges: Chandrasekhara Ayyar, J; Chandrasekhara Aiyar, J

Bench: Division Bench

Judgement

Chandrasekhara Ayyar, J.
The plaintiff, the head of a math, created a usufructuary mortgage over certain immovable properties on 5th

May, 1938, under Ex. I for a sum of Rs. 625 in favour of the defendant, appellant in this second appeal. It is provided in the mortgage that the

mortgagee should enjoy the mortgaged property for a period of eleven years from the date of mortgage, himself paying the Government kist. Then

comes the relevant clause:

After the expiry of the period I shall pay the amount and have the schedule property redeemed.

2. The consideration of Rs. 625 was made up of three items, a sum of Rs. 214-14-11 due to one Mayakootha Pillai, a sum of Rs. 310-1-1 due to

one Saminatha Desikar, and a sum of Rs. 100 paid in cash. The mortgagee was directed to pay the sums due to Mayakootha Pillai and Saminatha

Desikar but he did not pay the amounts, and the mortgagor discharged the debts in April and May, 1939, owing to pressure from the creditors.

The plaintiff brought this suit for redemption on 23rd November, 1939, setting out these facts alleging that the properties would yield an annual

income of Rs. 75 and that as against the sum of Rs. 100 which alone was advanced by the mortgagee under the deed of mortgage what would be

due and payable to him after debiting with the income of Rs. 75 was Rs. 31 only, Rs. 6 being taken as the rate of interest agreed upon between the

parties. This suit was resisted by the mortgagee as premature because it was brought before the expiry of the eleven years" period fixed in the

deed. He raised the contention that though he was always ready and willing to pay the creditors, they demanded higher amounts and that

consequently he had to go before the Debt Conciliation Board with unsuccessful results, as the plaintiff would not co-operate with him. These pleas

have been overruled by both the lower courts. On the question whether the suit was premature, they came to a conclusion in favour of the plaintiff

and allowed redemption even before the period fixed in the deed of mortgage following an equitable rule enunciated in Chhotku Rai v. Baldeo

Sukul ILR (1912) All. 659 and adopted in Narasimha Rao Pantulu v. Seshayya (1924) 48 M L J. 363. This conclusion is challenged in this

second appeal by the defendant.

3. Chhotku Rai v. Baldeo Sukul ILR (1912) All. 659 is no doubt a case exactly like the present one and redemption was allowed before the

period fixed on the ground that it was equitable to do so as the defendants did not perform what was a most essential part of the contract so far as

they were concerned. But in the same volume in Rashik Lal v. Ramnarain ILR (1912) All. 273 is a decision of another Bench where the distinction

between a contract and a conveyance is pointed out and it is laid down that the mere fact that part of the mortgage money has not been paid does

not render the mortgage invalid nor does it entitle the mortgagor to rescind it at his option. They dissent from a Full Bench decision of the Lahore

High Court where it was held that failure to pay a prior encumbrancer avoids the mortgage and destroys the mortgagee''s lien and right to

possession even on a subsequent tender of the unpaid consideration it being immaterial whether the non-payment has or has not caused

inconvenience or loss to the mortgagor. Chamier, J., points out that there is no distinction in principle between the case of a sale and that of a

mortgage and that interest in the mortgaged property is transferred even where the mortgagee refuses to advance part of the money agreed to be

advanced. He was however inclined to hold that the Court was not bound in every case to enforce the mortgage according to the letter where the

whole of the mortgage money has not been advanced and he observed:

where the mortgagee sues for possession, he may, I think, be required to pay the balance of the mortgage money before he takes out execution of

his decree, and there may be other cases in which he may properly be put upon terms.

4. The decision in Chhotku Rai v. Baldeo Sukul ILR (1912) All. 659 was dissented from in Kandasami Pillai v. Ramasami Mannadi (1918) 36

M.L.J. 313: ILR 42. This was a case of a lease where the lessees sued for possession of a demised property without discharging a mortgage debt

on the property which they agreed to discharge and in consequence of which failure on their part it became necessary for the lessor to execute a

usufructuary mortgage to third parties. Wallis, C.J., and Kumaraswami Sastri, J., differed, the former holding that the lessees were entitled to

recover possession and the latter taking the view that as they failed to discharge the debts '' which they had undertaken to discharge, they were not

entitled to sue for possession. As the suit was for possession the learned Chief Justice imposed a condition on the plaintiffs that they will not get

possession until they repaid to the subsequent mortgagees what they had advanced to the lessor for payment to the prior mortgagees. Speaking of

the subsequent mortgagees, he says that:

they are entitled to be sub-mortgaged to the rights of the prior mortgagees whom they had paid off and to retain possession until they have been

repaid what, but for their intervention, would have become payable to the original mortgagees.

5. Owing to this difference of opinion, the case came up before a Bench of three Judges and they upheld the view of Wall is, C.J., Chhotku Rai v.

Baldeo Sukul ILR (1912) All. 659 and Subba Rao v. Devu Shetti ILR (1894) Mad. 126, which was referred to with disapproval in the earlier

Allahabad case were considered by the Bench and dissented from. With reference to the former case, Abdur Rahim, J., says:

They cite no authority and do not enunciate any general and well-recognised principle of equity by which the case could be said to be governed.

With all respect to the learned Judges, it is not open to us to proceed on some sort of vague equitable grounds, especially in a case like, this, where

the plaintiffs are seeking a remedy in law.

6. As regards Subbarao v. Devu Shetti ILR (1894) Mad. 126 the decision was put aside as obscure in the absence of the necessary facts. Courts-

Trotter, J., observed as follows:

All I can say is that I do not understand it as reported, nor do I gather upon what principle the learned Judges proceeded. With regard to the case

in Subbarao v. Devu Shetti ILR (1894) Mad. 126. I have no hesitation in saying that unless it can be explained by an omission hi the report as to

the existence of an express power of cancellation, it must be regarded as contrary to the trend of authority.

7. If the correct principle has been laid down in Tatia v. Babaji ILR 22 Bom. 176, Rashik Lai v. Ramnarain ILR (1912) All. 273, and Kandasami

Pillai v. Ramasami Mannadi ILR (1918) Mad. 203: 36 M.L.T. 313, we must consider Subba Rao v. Devu Shetti ILR (1894) Mad. 126, and

Chhotku Rai v. Baldeo Sukul ILR (1912) All. 659 as wrong decisions, not binding on us.

8. The lower Courts have however followed Narasimharao Pantulu v. Seshayya (1924) 48 M.L J. 363 as a decision later in date to Kandasami

Pillai v. Ramasami Mannadi ILR (1918) Mad. 203 : 1918 M.L.J. 313, and it has to be presently examined. Mr. A. Swaminatha Aiyar, the learned

Advocate for The respondent, pointed out that the view taken by Devadoss, J., in that case was upheld in Letters Patent Appeal by Venkatasubba

Rao and Reilly, JJ., in Immani Seshayya and Others Vs. Dronamraju Lakshminarasimha Rao Pantulu (dead) and Others, and he contended on

these authorities that a suit for redemption instituted before the expiry of the period fixed for redemption in a deed of usufructuary mortgage will lie

when the mortgagee does not advance the full amount of consideration but pays only less and the amount lent can be said to have become

discharged from his enjoyment of the usufruct of the property. He argued that it would be very oppressive to the mortgagor if in a case like the

present where the sum advanced was only Rs. 100, the mortgagee could still take advantage of the term in the deed that he should remain in

possession for the full period of eleven years, when long before that date, the debt would become discharged. I agree that there is hardship but the

question is whether considerations of hardship entitle us to invent or create equitable rules or principles to circumvent or overcome such hardship.

In this connection, attention may be drawn to Yella Krishnamma v. Kotipatti Mali ILR (1920) Mad. 712: 38 M.L.T. 467 where referring to

Velayudhan Chetty v. Govindastvami Naicker ILR (1912) All. 273, the learned Judges say:

Can courts give equitable relief to mitigate or suspend the consequences laid down by a statute; and they came to the conclusion that such a

proposition as that the plain words of the statute could be whittled away by the application of the so-called equitable doctrines, was an absolutely

untenable one and they expressed their dissent from the contrary decision in Baijanath Singh v. Paltu ILR (1908) All. 125.

9. In Narasimha Rao Pantulu v. Seshayya (1924) 48 M.L.J. 363, though the suit was for redemption by the mortgagor against the usufructuary

mortgagee and was brought before the period of 55 years stipulated in the mortgage, the question of possession became academic inasmuch as the

period expired after the decree in the District Munsif''s Court and before the appeal was filed in the District Court and possession was actually

handed over by the mortgagee to the plaintiff. Moreover, the mortgage deed in that case was apparently unlike the mortgage deed in the present

case. On Letters Patent Appeal, Venkatasubba Rao, J., observed that the case was covered by Clauses (a) of Section 62 of the Transfer of

Property Act which is in these terms;

In the case of a usufructuary mortgage, the mortgagor, has a right to recover possession of the property (a) where the mortgagee is authorised to

pay himself the mortgage money from the rents and profits of the property--when such money is paid.

10. The question that they had to consider was whether the sum of Rs. 60 which the mortgagee undertook to pay to the mortgagor as a personal

allowance was to be treated as rents and profits of the property for which he was bound to account to the mortgagor in the redemption suit. It was

held that as the sum was set apart from the rents and profits of the property for this purpose, its non-utilisation for the object stated in the deed

rendered it a part and parcel of the rents and profits for which the mortgagee was accountable on redemption. Though reference is made by

Devadoss, J., to Chhotku Rai v. Baldeo Sukul ILR (1912) All. 659 it is really strange that no mention is made of the later decision in Kandasami

Pillai v. Ramaswami Mannadv ILR (1918)Mad. 203 : 36 M. L. J. 313, dissenting from the Allahabad decision. Citing Chhotku Rai v. Baldeo

Sukul ILR (1912) All. 659 in his support the learned Judge says,

I think it is equitable that he should not be allowed to insist upon one of the terms of the mortgage deed being given effect to when he himself gives

a go-by to the other terms of the deed.

11. It is exactly the existence of any such supposed rule of equity that was negatived in Kandasami Filial v. Ramasami Mannadi ILR (1918) Mad

203 : 36 M. L. J. 313 : Venkatasubba Rao and Reilly, JJ. do not go into the question of possession as it became unnecessary and they rest their

decision on the simple ground that the mortgagee was to be debited with a sum of Rs. 60 which he undertook to pay as a personal allowance to

the mortgagor and which by reason of the non-payment had become part and parcel of the rents and profits of the property from which it was

carved out. It was in this manner that they met the argument raised for the mortgagee that the sum of Rs. 60 was to be treated as an independent

amount in his hands for which the mortgagor should file a separate suit.

12. The present is not a case where the mortgagee sues for possession when probably we can impose on him the term that he should pay to the

mortgagor the two amounts which he undertook to pay to the creditors and which the mortgagor had to pay by reason of his default. This is a case

where the mortgagor comes to Court and says that he is entitled to redeem before the period fixed for redemption because what was advanced

was much less than the amount of the consideration specified in the mortgage. It should be noted also that this suit was not filed after the sum of Rs.

100 was discharged, for he himself admits according to his calculation that there was still a sum of Rs. 31 due and that he was prepared to pay it to

the mortgagee. According to the findings of the lower court, the income from the property is only Rs. 25 and on the date when the suit was filed

only 11/2 years had elapsed from the date of the mortgage. It is a case therefore where the suit for redemption even assuming the contentions of

the plaintiff to be correct was really premature. The mortgage deed does not provide for any particular rate of interest nor does it give any estimate

of the rents and profits. Mr. Swaminatha Aiyar contended that as Rs. 100 only had been advanced, we must cut down the period pro rata and

also work out the interest at the rate of Rs. 25 on a principal of Rs. 625. All this is speculation and to say anything of the kind would be to make a

new contact for the parties. We are beyond the stage of a contract and in the stage of a conveyance of property, and the period fixed for

redemption must govern the rights and relations of the parties in the absence of a contract to the contrary. If one of the parties does not conform to

or fulfil the requirements or the obligations imposed on him the other party may have a remedy in damages against him. But to say that because he

has failed to advance the full amount the mortgagor has got a right to come before the Court seeking possession even though he has definitely

undertaken that the mortgagee should remain in possession for a period of eleven years is to hold what the law will not allow on the authorities

cited and discussed above.

13. The second appeal is allowed. Each party will bear his own costs in the lower courts, but the respondent will pay the appellant''s costs here.