

Olakkat Moidunni Haji Vs Poothherri Illoth Madhavan Nair and Another**None**

Court: Madras High Court**Date of Decision:** Dec. 16, 1932**Acts Referred:**

Transfer of Property Act, 1882 " Section 65A, 66

Citation: AIR 1933 Mad 876 : (1933) 38 LW 921 : (1933) 65 MLJ 826**Hon'ble Judges:** Krishnan Pandalai, J**Bench:** Division Bench

Judgement

Krishnan Pandalai, J.

Both these appeals raise a common question and may be disposed of together.

2. The jenmi of certain properties which were held on kanom by different tenants under different demises mortgaged the equity of redemption to

the respondents by a simple mortgage for Rs. 6,000 by Ex. D, dated 9th December, 1915. The appellants are two of these tenants. The appellant

in S.A. No. 1658 of 1928 had been holding under a demise, Ex. VII, dated 29th September, 1904, for Rs. 400 and the appellant in S.A. No.

1714 of 1928 under a demise, Ex. A, dated 1909, for Rs. 500, the respective properties in those cases. Subsequent to the simple mortgage of

1915, the appellant in S.A. No. 1658 of 1928 took a renewed demise Ex. VIII in 1917 for Rs. 700 on payment of a further advance of Rs. 300

and the appellant in S.A. No. 1714 of 1928 took a renewed demise Ex. IV in 1920 for Rs. 800 on payment of a further advance of Rs. 300.

3. The respondents-simple-mortgagees brought a suit O.S. No. 28 of 1921 on their mortgage impleading the mortgagor (jenmi) and the various

kanomdars including the present appellants and obtained a decree for sale subject to the encumbrances prior to their own mortgage which were

mentioned in Schedule B. It may be noted that the mortgagees had mentioned in the plaint that there were several subsequent encumbrances

including the appellants' renewals, Exs. VIII and IV, and stated that being subsequent to their mortgage they could not prevail over their mortgage.

The appellant in S.A. No. 1658 of 1928 (55th defendant) set up in his written statement his renewal (Ex. VIII) and claimed that the sale on the

mortgage could only be held subject to those rights. But beyond putting in these written statements none of the defendants including the present

appellants pressed the right based on the renewals in that suit. No issue was raised about them and no mention is made of them in the judgment

and decree which simply directed that the sale will be held subject to the prior encumbrances only. Nothing was also said about the right of

redemption which the subsequent encumbrancers undoubtedly had if they cared to exercise it. It is fair to infer that the subsequent encumbrancers

including the appellants did not for obvious reasons care to redeem the respondents' mortgage and did nothing beyond putting in written

statements asserting their superior rights to hold the property, till the end of their 12-year terms. In due course the respondents-mortgagees brought

the properties to sale and in 1923 purchased them themselves for about Rs. 5,000 out of a total decree amount of about Rs. 18,000. The balance

of the decree amount which I am informed amounts now to Rs. 11,000 has not been realised.

4. The present appeals arise from suits brought by the mortgagees-purchasers (respondents) to redeem the kanoms. The dispute is that the

respondents contend that they are only bound to redeem the kanoms prior to their mortgage subject to which alone they became the purchasers.

The appellants contend that though the additional amounts charged on the properties by the subsequent renewals Exs. VIII and IV (Rs. 300 in

each case) may not be binding on the respondents as prior mortgagees yet the renewed kanoms are not mortgages but leases by the mortgagor

which are valid against the prior mortgagees as they are the usual and accustomed mode of enjoyment of property in Malabar and that as these

leases subsist for a period of 12 years in each case from the date of renewal which had not expired on the date of the suit, they are not liable to be

evicted. Both the Lower Courts rejected the appellants' contentions and ordered redemption. Hence these appeals.

5. On the main question which was elaborately argued whether and to what extent a mortgagor's leases are binding on a prior mortgagee, there

appears to be no Madras decision. Section 66 of the Transfer of Property Act and the decisions of other Courts were referred to. Before I come

to that I might mention two other points in view of which that question would seem not so important in the present appeals as it was supposed to

be during the argument.

6. In the first place whether the mortgagor's power of leasing the property in his possession be referred to Section 66 of the Transfer of Property

Act or to the principles which have been referred to in the decisions, the most important of which is Madan Mohan Singh v. Raj Kishori Kumari

(1912) 21 C.W.N. 88 and are now enacted in the new Section 65A (which does not apply to these cases) introduced by Act XX of 1929, the

power is limited by the rule that the mortgagor must not by his act render the security insufficient or do anything that is not necessary for prudent

management and enjoyment of the income while he is entitled to it; and the burden of proving that the security is unimpaired by the lease is on the

lessee : Madan Mohan Singh v. Raj Kishori Kumari (1912) 21 C.W.N. 88, Beni Prasad v. Gangoo Singh ILR (1928) 7 Pat. 349 and Anand Ram

Marwari v. Dhanpat Singh and Anandram Marwari v. Lakhan Singh (1916) 1 Pat. L.J. 563. The mortgaged property concerned in these cases

was the equity of redemption subject to prior encumbrances. Seeing that only a fraction of the mortgage money then due was realised by sale in

1923, it seems fairly clear that the security was already hardly sufficient at the time of the renewals in 1917 and 1920 and that the effect of the

renewals Exs. VIII and IV which expired in 1929 and 1932 must have been to materially diminish what was already hardly sufficient. If for no

other reason, these renewals cannot be held to be binding on the mortgagees.

7. Secondly the renewals, as they are now put forward, were not merely renewals but purported to charge the properties with fresh substantial

advances. It was in consideration of these advances that the mortgagor granted fresh terms for 12 years from 1917 and 1920. It is admitted that

these fresh advances which are nothing less than subsequent mortgages cannot avail against the prior mortgagees-respondents. The contracts

contained in Exs. VIII and IV being entire, the appellants when they ask that the new terms must be upheld against the mortgagees, though the

fresh advances for which they were given cannot be upheld, are asking that new contracts should be made for them. This is clearly untenable. If

Exs. VIII and IV cannot be upheld as to the consideration as against the respondents it is impossible to uphold the extension of terms granted for

that consideration and which are an integral part of the contract.

8. On the general question of the power of a mortgagor in possession to lease the mortgaged property so as to bind the mortgagee there is a

considerable body of judicial authority in favour of it before the enactment of Section 65A. Some decisions had tried to modify the English law to

suit Indian conditions. According to English law a lessee from the mortgagor in possession after an English mortgagee has but a precarious

possession and is liable to be evicted by the mortgagee. In their search for an Indian standard, other decisions applied Section 66 of the Transfer

of Property Act as the right measure of that power. Others adopted the standard of what is necessary for the prudent management of the property

without impairing the security. The result of these various lines of thought was not always uniform. While in some cases leases for short terms were

set aside as improper, in other cases, permanent leases were upheld. It was in these circumstances that Section 65A has been enacted which

provides statutory tests whereby such leases may be judged. It has no application to this case as the mortgage and kanoms here are of an earlier

date.

9. Coming to the cases themselves:

In *Madan Mohan Singh v. Raj Kishori Kumari* (1912) 21 C.W.N. 88 Mr. Justice Mukerjee said:

It cannot, however, be maintained as was pointed out by Lord Justice Romer in *Reynolds v. Ashby* (1909) 1 K.B. 87 that the mortgagor has

anything like a general authority to deal with or affect the mortgaged property during his possession thereof. The true position thus is that the

mortgagor in possession may make a lease conformable to usage in the ordinary course of management; for instance, he may create a tenancy from

year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease

on unusual terms, or to alter the character of the land or to authorise its use in a manner or for a purpose different from the mode in which he

himself had used it before he granted the mortgage.

10. He added:

If there are any defendants who have obtained settlement from the mortgagor after the mortgage but before the commencement of the mortgage

suit, they can resist the claim of the plaintiff only if they establish that the leases in their favour were granted on the usual terms in the ordinary

course of management; such a plea if established - and, it must not be overlooked that the burden of proof in this matter is upon them - will furnish

a complete answer to the plaintiff's claim.

11. This opinion has been since followed in *Anand Ram Marwari v. Dhanpat Singh* and *Anandram Marwari v. Lakhan Singh* (1916) 1 Pat. L.J.

563, *Beni Prasad v. Gangoo Singh* ILR (1928) 7 Pat. 349, *M.P.M.S. Firm v. Ko Pyu* ILR (1932) 10 Rang. 210 and would appear to have been

the basis of the limitations found in Section 65A. On the other hand in *Tana Peena Chuna v. Mammakkantakath* (1916) 34 I.C. 24, a case of an

English mortgage, where a lease for three years was upheld and *Natho Singh v. Lachu Singh* (1927) 107 I.C. 156, where a permanent lease was

upheld on the ground that the whole mortgage debt was satisfied by the sale and in *Dasain Sahu v. Musammat Ramdulari Kuer* ILR (1930) 10

Pat. 332, where a permanent lease was upheld, the test applied was Section 66 of the Transfer of Property Act. The case in *Kiran Chandra Bose*

v. Dutt & Co. (1924) 40 Cal. L.J. 500 was a lease pendente lite which is obviously invalid against the mortgagee's right under the decree; and in

the cases in *Macleod v. Kissan* ILR (1904) 30 Bom. 250 and *Mangtural Bagaria v. Upendra Mohan Pal Chaudhuri* ILR (1929) 57 Cal. 82 the

mortgages were English mortgages.

12. From the above it is seen that (1) the mortgagor must be in possession to exercise the right in question, and (2) the lease must be the usual

mode of management of the property.

13. There are difficulties in the appellants' way on each of these points. The mortgagor, was not even on the date of the mortgage in physical

possession or enjoyment of the land; because the properties were already subject to prior kanoms. In fact the mortgage was and could only be of,

the equity of redemption subject to these kanoms and the only thing which the mortgagor could be in possession or enjoyment of was the rests due

to the owner of the equity of redemption. The mortgagor was not even entitled to possession of the lands till the prior kanoms expired and when

the expired he did not acquire possession as he never redeemed the prior kanoms by payment of the of the kanom amounts and improvements

then due. What he did do was, while he did do was, while the property was still in the possession of his prior kanom tenants whom he could have

redeemed but did not as it would involve expense, to grant them further terms of 12 years' enjoyment on receipt of further advances. I doubt very

much whether the power's of a mortgagor in possession to lease would include transactions of this class. There may of course be a mortgage of

rents and afterwards a lease of these rents by the mortgagor in possession of them. But that is not this case which is a mortgage of the properties

themselves, i.e., of the whole interest of the mortgagor subject to prior interest.

14. Another difficulty is that the appellants ought to have proved that giving renewals is the accustomed mode of management of lands in Malabar.

No such evidence has been given. Kanoms are no doubt common, but by no means the most common or popular mode of management of

property. In fact people who want merely to manage their property would give it out on yearly leases (Verumpattam). At any rate in modern times

kanoms have acquired many of the incidents of mortgages and are recognised as anomalous mortgages : Kanna Kurup v. Sankara Varma Rajah

ILR (1920) 44 Mad. 344 : 40 M.L.J. 282. The difficulties in recovering possession of property once it is given in kanom have progressively

increased to such an extent that it is doubtful whether any one would willingly now give his property on kanom as a prudent act of management or

would renew it except in cases where he was unable to pay the amounts of kanom and compensation for improvements. Without wishing to

generalise on this aspect of the case too strongly, I think it is sufficient to say that the appellants have not proved that the renewals, Exs. VIII and

IV, were, even if they can be considered as leases and not anomalous mortgages, acts of prudent management by an owner who had already

mortgaged his property to the hilt.

15. I have already given grounds for my opinion that these documents materially diminished the security which was already insufficient and that they

are mortgage transactions from which the terms of years cannot be separated or divided off in order to carve out valid leases out of invalid

mortgages.

16. The respondents' advocate raised a contention that the question of the validity of Exs. VIII and IV is res judicata by the fact that in the

mortgage suit the appellants did not whereas they might and ought to have raised it. In my opinion that is not a valid contention. The question in

these appeals is whether Exs. VIII and IV can be upheld as leases and, if so, whether they would bind the purchasers-respondents. The question

in the mortgage suit was whether there was any answer to the plaintiffs' (respondents') mortgage. The question what rights the purchasers in the

mortgage suit would get and whether they would be able to claim vacant possession as against Exs. VIII and IV did not arise in that suit. I reject

this contention.

17. The appeals are dismissed with costs.

18. Time for redemption extended to 16th March, 1933.