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SooperKanoon Citation : sooperkanoon.com/779818

Court : Chennai

Decided On : Nov-05-1890

Reported in : (1891)ILR14Mad232

Judge : Handley and ;Weir, JJ.

Appellant : Ramayya

Respondent : Guruva and ors.

Judgement :

1. The question to be determined in this second appeal is whether the plaintiff is entitled to a decree for recovery of the amount due to him under his mortgage by sale of the mortgaged property. The Court of First Instance held he was so entitled and gave him a decree, but the Lower Appellate Court held he was not, and dismissed his suit. The mortgage was executed after the Transfer of Property Act came into force, and, therefore, the rights of the mortgagee are those declared by that Act. Section 67 gives the mortgagee the right to obtain from the Court a decree for sale 'in the absence of a contract to the contrary,' but with the proviso that nothing in that section shall be deemed (a) (inter alia) to authorize a usufructuary mortgagee as such to institute a suit for foreclosure or sale. The term usufructuary mortgage is defined by Section 58 (d) to be 'when the mortgagor delivers possession of the mortgaged property to the morgagee and authorizes him to retain such possession until payment of the mortgage money and to receive the rents and profits accruing from the property and to appropriate them in lieu of

interest or in payment of the mortgage money, or partly in lieu of interest and partly in payment of the mortgage money.' No doubt the incidents here enumerated occur in the present case and the mortgage would therefore be a usufructuary mortgage within this definition, but for the fact that the mortgage deed contains a covenant for payment of the principal by a certain date Chathu v. Kunjam I.L.R. 12 Mad. 109 is an authority for the position that a mortgage is not a usufructuary mortgage within the meaning of the Transfer of Property Act if there is a covenant to pay the mortgage debt.

2. The Subordinate Judge holds that the mortgage is of the kind defined as 'anomalous' by the Transfer of Property Act and therefore to be governed by the contract of the parties and that by the contract in this case the mortgagee is precluded from suing for sale of the mortgaged property by the provision in the mortgage-dead that, in default of payment within the prescribed time, the mortgagee shall continue to enjoy the mortgaged property for interest as before. This provision is one in favour of the mortgagee, extending his security beyond the prescribed period, and does not, in our opinion, take away his right, arising out of the covenant to pay, to sue for sale the mortgaged property.

3. We reverse the decree of the lower Appellate Court and restore that of the Munsif. The plaintiff is entitled to his costs in this and the lower Appellate Court.