

Nanu Vs. Raman and ors.

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Court : Chennai

Decided On : Nov-10-1892

Reported in : (1893)ILR16Mad335

Judge : Arthur J.H. Collins, Kt., C.J. and ;Handley, J.

Appellant : Nanu

Respondent : Raman and ors.

Judgement :

1. In 1878 the then karnavan of defendant's tarwad and the anandravens, including defendants No Section 1 to 5 and 8, borrowed R Section 4,000 from plaintiff and executed a mortgage-deed (Exhibit A), mortgaging with possession items 1 to 15 of the plaint lands and hypothecating items 16 to 20. As to the fifteen items the mortgage purports to be a usufructuary mortgage, the surplus income after payment of Government revenue to be taken by plaintiff as interest. Actual possession of items 1 to 15 was not, however, given to plaintiff, as they were under mortgage to a third party, but the karnavan and two of the anandravens executed a pattamchit on the date of the mortgage agreeing to rent the lands from plaintiff. Plaintiff sued the executants of the pattamchit in Original Suit No. 308 of 1881, Nedunganad District Munsif's Court, for the rent for the years 1054, 1055 and 1056 and obtained a decree. He again sued for the rent for the years 1057 and 1058 in Original Suit No. 445 of 1883 in the same Court, and also for possession of the lands demised, and obtained a decree in execution of which he

subsequently obtained possession of items 1 to 15. In execution of the decree in Original Suit No. 308 of 1881 plaintiff caused to be attached certain of the tarwad propertie Section Present defendants No Section 4, 5 and 8 presented a claim petition which was allowed and the attachment dissolved.

2. Plaintiff then filed Original Suit No. 146 of 1886 in the same Court for a declaration that the lands which had been attached were liable to be sold in execution of the decree in Original Suit No. 308 of 1881. That suit was dismissed on the ground that the defendants in Original Suit No. 308 of 1881 had not been impleaded as representing the tarwad, and, therefore, according to the decision of the Full Bench in *Ittiachan v. Velappan* I.L.R., 8 Mad., 488, the tarwad property could not be made liable for the decree. Plaintiff now sues for recovery of the principal and interest up to the time when he recovered possession of the lands, items 1 to 15, by sale of the mortgaged properties and from defendants personally. The lower Court has dismissed plaintiff's suit for the principal of the mortgage on the ground that the mortgage is a usufructuary mortgage, and therefore a suit for recovery of the mortgage debt or for sale of the mortgaged property will not lie, there being no covenant for payment of the debt. He also disallows the claim for interest on the ground that plaintiff having sued for it in the form of rent in Original Suits No Section 308 of 1881 and 445 of 1883 has exhausted his remedy and cannot sue again for it as interest.

3. Plaintiff appeal Section

4. The mortgage-deed was executed before the Transfer of Property Act came into force, and therefore by Section 2 (c) of that Act its provisions do not affect the rights or liabilities of the parties to the mortgage or the relief in respect of such rights or liabilities Section But it is argued for respondents that the law as to usufructuary mortgages was the same before the Transfer of Property Act as is laid down by that Act. This question has never been decided by this Court, and is by no means free from doubt. But we do not think it necessary to decide it in this case, as we are of opinion that the mortgage cannot be treated so far as the rights and liabilities of the mortgagors and mortgagee under it are concerned as a usufructuary mortgage. As to items 16 to 20 it is only a hypothecation, and as to

these items therefore there is nothing to prevent plaintiff from suing for the mortgage debt or for sale of the mortgaged property. But he cannot split the mortgage, and it follows, we think, that, in order that he may obtain his legal rights over the hypothecated items he must be allowed to bring the whole property to sale. He would at least be entitled under his hypothecation to a decree for the mortgage debt, and for the above reason, we think he is also entitled to a decree for enforcing the same by sale of the mortgaged property.

5. As to the reasons given by the lower Court for disallowing the interest claimed, we think they also are unsound. The suits 308 of 1881 and 443 of 1882 were suits against the executants of the pattamchit for recovery of rent and possession. The defendants in these suits were not sued as representing the tarwad and therefore, as decided in Original Suit No. 146 of 1886, the decrees in these suits could not be executed against the tarwad property. The present suit is against the tarwad on the mortgage. The cause of action is not the same as that in the former suits, and therefore the decision in *Gurusami v. Chinna Mannar* I.L.R. 5 Mad. 37 relied on by the Subordinate judge does not apply. The obligation sought to be enforced in this suit is not the same obligation as that which was the foundation of the former suit. Neither is the decision in *Ittiachan v. Velappan* I.L.R. 8 Mad. 488 quoted here in point. That case, which was the authority on which Original Suit No. 146 of 1886 was decided, only decides that a decree against a karnavan and some members of a tarwad in a suit in which they were not impleaded in a representative character cannot be executed against the tarwad property. There is no question in the present suit of executing a decree obtained against individual members of the tarwad against tarwad property, but of enforcing a mortgage against the mortgagees and the mortgaged property. On the other hand, *Govinda v. Mana Vikraman* I.L.R. 14 Mad. 294 is a direct authority for giving plaintiff the relief claimed in this suit. The decree of the lower Court is reversed, and there will be a decree for plaintiff for recovery of the amount claimed from defendants No. 1 to 5 and 7 and 8 personally and by sale of the mortgaged property.

6. Appellant is entitled to his costs in this and the lower Court.