

**Kumarappa Chettiar and ors. Vs. Suppan Chettiar**

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**SooperKanoon Citation :** [sooperkanoon.com/800605](http://sooperkanoon.com/800605)

**Court :** Chennai

**Decided On :** Mar-07-1933

**Reported in :** AIR1933Mad672; 145Ind.Cas.744

**Appellant :** Kumarappa Chettiar and ors.

**Respondent :** Suppan Chettiar

**Judgement :**

**Sundaram Chetty, J.**

1. This appeal arises out of a suit filed by the plaintiff for redemption of the plaintiff mentioned usufructuary mortgage which is evidenced by Ex. D' The plaintiff sued in his capacity as a later usufructuary mortgagee, defendants 2 to 5 being the mortgagees under Ex. D. One of the contentions raised by the mortgagees by way of attack against the plaintiff's claim is, that the suit is premature. This question depends upon the construction of the terms of the mortgage deed. That deed is dated 8th July 1908 and provides a period of 15 years for the enjoyment of the mortgaged properties by the mortgagees from the date of that document, and further recites that the mortgagor should pay the amount in the beginning of the sixteenth year. If the terms of the deed are literally understood, we must hold that the amount of the mortgage is payable at the end of the 15 years' term which should be calculated from the date of the mortgage deed. In this view the time for redemption would expire on 8th July 1923, and the present suit is sustainable. It is

however contended on behalf of defendants 2 to 5, that the mortgagees should have a period of 15 years for the enjoyment of the mortgaged properties, irrespective of the term 'from this year,' indicating the commencement of the period.

2. If the items of consideration set forth in the mortgage deed are taken into account, it is clear that the sums of Rs. 8,500 and Rs. 6,000, were not paid on the date of the mortgage deed, but were undertaken to be paid by the mortgagees in discharge of two prior othies. The only amount that was actually paid on the date of Ex. D was Rs. 1,000. We find that the terms fixed for the redemption of the two prior othies had still to run when Ex. D was executed. Those mortgages were redeemable in April 1911. That being so the mortgagees under Ex. D should be taken to be legitimately entitled to possession of the two villages covered by the previous othies, only from April 1911. They were at liberty to enjoy the third item of the mortgaged properties mentioned in Ex. D even from the date of the deed. Assuming that the period of 15 years' enjoyment with respect to those two villages should be reckoned from the date of the expiry of the term of the previous othies the time for redemption would be ripe by April 1926. Even from this stand-point, the present suit which was filed on 28th July 1926 is certainly not premature. This objection against the maintainability of the suit must therefore be overruled.

3. The second question for consideration is what is the proper amount payable to defendants 2 to 5 in redemption of the suit mortgage. That the principal amount of Rs. 15,500 is due is admitted on both sides and the only point in dispute is whether the mortgagees would be entitled to any interest by way of compensation for the period subsequent to 2nd April 1911 till the date of their actually taking possession in April 1913. The mortgage deed Ex. D provides for the enjoyment of the rents and profits in lieu of interest. There is no specific provision for the payment of interest at a certain rate. The question before us is whether the mortgagees are entitled to claim any reasonable rate of interest on their principal amount for the aforesaid period and can claim the payment of the same along with the principal money at the time of the redemption of this mortgage. The case set up by defendants 2 to 5 is, that prior to April 1911 they did make a deposit of the amount of the prior othies in Court and therefore they must be deemed to have

been wrongfully kept out of possession of the mortgaged properties on account of the plaintiff's conduct. 'What we find from the judgment in the previous suit (Ex. 2) is that there was no valid tender of the mortgage money, as the plaintiffs therein (the present defendants 2 to 5) failed to prove that they made an effective deposit into Court in proper time so as to enable the mortgagee to draw the money in accordance with the stipulations contained in the othi deeds.

4. This is the finding on issue 8. It is contended that finding would not operate as res judicata in the present suit. Granting that it is so we have to see whether any evidence has been adduced in the present suit on behalf of defendants 2 to 5, in order to show that they made the deposit in proper time in conformity with the stipulations contained in the prior mortgage deeds. Beyond the statement of D.W. 1, that a sum of Rs. 14,500 was deposited in Court which was lying there for two years, there is nothing to show that the deposit was made in proper time in conformity with the terms of the mortgage deed. We are not therefore in a position to say that it was a valid deposit. It is only when defendants 2 to 5 who were entitled to redeem the previous mortgage were kept wrongfully out of possession by the act of the prior mortgagee, that they could ask in the present suit that a reasonable amount should be awarded to them by way of interest, which should be tacked to the principal of the mortgage money payable by the plaintiff for redeeming the mortgage. If in a suit for the recovery of the mortgage money under Section 68, T.P. Act, coupled with Section 67, defendants 2 to 5 can properly claim interest in addition to the principal amount, then only can the plaintiff in the present suit be made liable for the same in order to redeem the mortgage. We are not satisfied that such a claim for interest has been made out and therefore we hold that the plaintiff was bound only to pay the principal amount of the mortgage money, namely, Rs. 15,500, by way of redeeming the suit mortgage. The decision of the lower Court, so far as these two questions are concerned, is correct. The appeal should therefore be dismissed with costs.

5. There is a memorandum of objections which the plaintiff-respondent has filed and the question to be considered is whether the plaintiff is entitled to any mesne profits for the period subsequent to the deposit of the principal sum into Court. In this case, it is shown that the amount was deposited by the plaintiff, but as the

defendants refused to accept that amount in satisfaction of the mortgage, the Court dismissed the plaintiff's application on 17th July 1926(vide Ex. K-1). By reason of the findings already given, the deposit of the principal sum alone by the plaintiff must be taken to be a valid deposit. Under Section 76(1), T.P. Act, the mortgagees would be bound to account for the gross receipts from the mortgaged property from the date when they could take such amount out of Court. This is not a case of a mere deposit of the amount into Court. The additional circumstance disclosed in the evidence is, that subsequent to the refusal by defendants 2 to 5 to accept that amount, the plaintiff withdrew that sum and utilised it for his own purposes. That being so, it is contended on behalf of the appellants, that the mortgagees should be allowed reasonable rate of interest and this should be set off against the mesne profits awardable to the plaintiff. In order to disentitle the mortgagees to interest, the plaintiff should prove that in spite of his having withdrawn the money from the Court and utilised it for his own purposes, he was ever ready and willing to pay the same towards the discharge of the mortgage.

6. He should satisfy the Court that he had sufficient funds available with him and that he was also ready to pay the same. Such proof is wanting in the present case, and as observed by the learned District Judge, even when a challenge was made in Court, the plaintiff did not choose to accept the challenge and deposit the money into Court in order to testify his ability to pay as also his readiness and willingness to do so. We therefore find that the plaintiff has not shown circumstances which would induce us to disallow interest to the mortgagees. In the circumstances of this case, we think fit to allow 9 per cent interest on the principal amount. In ascertaining mesne profits for the period between 17th July and 8th April 1927, the date of the order of the High Court on the petition for stay of further proceedings (vide C.M. Ps. 1339 and 1518 of 1927), interest on the principal amount at 9 per cent will have to be set off in favour of defendants 2 to 5. The amount of the profits subsequent to 8th April 1927 will have to be determined in accordance with the order on the aforesaid petitions. This enquiry will be made by the lower Court and the result of that enquiry will be incorporated in the final decree to be passed. There will be no order as to costs in the memorandum of objections. Three months' time is fixed for the payment of the entire mortgage money after the ascertainment of the same by the lower Court.

