

Rangappa Vs. Thammayappa and ors.

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Court : Chennai

Decided On : Mar-05-1914

Reported in : 24Ind.Cas.372

Judge : Sadasiva Aiyar and;Seshagiri Aiyar, JJ.

Appellant : Rangappa

Respondent : Thammayappa and ors.

Judgement :

Sadasiva Aiyar, J.

1. The plaintiff is the appellant in this case. He brought the suit out of which this second appeal has arisen for the recovery of the amount due under a document dated the 30th of June 1900 executed by defendants Nos. 1 and 2. The lower Appellate Court dismissed the plaintiff's suit on the finding that in accordance with the terms of the above document, the plaintiff was put in possession of one of the three lands mentioned in the document as security for the amount mentioned in the same, and that according to the terms of the bond and the law applicable to the case, the plaintiff was not entitled either to bring a suit for sale of the properties charged for the amount due under the plaint bond, or to obtain a personal decree against the executants. It is often very difficult in some of these cases to decide what the nature of the document sued on is.

2. So far as the plaint document affects that property which was intended to be and was put in the possession of the plaintiff, it seems to me reasonably clear, that the document is a document of usufructuary mortgage. As regards the other two lands mentioned in the document the question is whether the document is a document creating a simple mortgage over those two lands or whether the document merely creates a charge upon the two lands. In *Balasubramania Nadar v. Sivaguru Asari* 11 Ind. Cas. 629 : 21 M.L.J. 562, Justice Krishnaswami Aiyar says as follows on pages 568, 569 : I have been in considerable doubt during the course of the argument as to whether we have succeeded in getting hold of any principle by means of which we could distinguish a mortgage from a charge. But having heard the matter fully discussed by Srinivasa Aiyangar, I have been able to make up my mind and I wish to express the conclusion at which I have arrived. I think a covenant to pay is an essential element of a simple mortgage.' In this case I do not think that I could gather from any of the words used in the plaint document that the defendants Nos. 1 and 2 covenanted to pay the amount mentioned in the bond executed in favour of the plaintiff. The language of the document to be construed in this case seems to me even less favourable to the plaintiff than it was in the case of *Gopalasami v. Arunachella* 15 M. 304 : 2 M.L.J. 122. where it was held that there was no covenant to pay the mortgage money by the mortgagor. If there is no such covenant in the plaint document, then the document, so far as the other properties are concerned, created only a charge on those properties and did not give a simple mortgagee's right to plaintiff over those properties. If there is only a charge, then Section 100 of the Transfer of Property Act applies. That section says that all the provisions as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having a charge.' Some of those provisions governing the questions relating to the institution of a suit by a mortgagee are contained in Section 68 of the Transfer of Property Act. That section says that 'the mortgagee has a right to sue the mortgagor for the mortgage money in the following cases only', and then there follow three clauses (a), (b) and (c), Clause (c) consisting of two paragraphs. In this case, the plaintiff has not proved any facts bringing his case within any of these three clauses and he was, therefore, not entitled on the date of the suit to sue for the recovery of the mortgage money from defendants Nos. 1 and 2 personally or by the sale of the

property charged. I, therefore, confirm the decree of the lower Appellate Court and dismiss the second appeal with costs.

Seshagiri Aiyar, J.

3. I am not prepared to differ. Speaking for myself I am inclined to think that there is a covenant to pay when the mortgagors say : whenever we pay the same to you, you shall receive it and give back the deed.' I am prepared to hold that there was an understanding on the part of the mortgagors to pay the amount. The non-fixing of a period for payment does not make it the less a covenant to pay. But this Court in *Gopalasami v. Arunachella* 15 M. 304 : 2 M.L.J. 122. held that such an undertaking does not amount to a covenant to pay. With the greatest deference to the learned Judges I think the question requires re-consideration. I must also differ with considerable hesitation from the opinion at which my learned colleague has arrived, that there is only a charge created in respect of the other two items. The document itself says that a mortgage is being executed and there is nothing in the body of the document which indicates that the parties had in mind only a charge, especially having regard to the fact that on four previous occasions there was undoubtedly a simple mortgage with respect to these properties. But the plaintiff came into Court with a false case. He said that he was deprived of possession by the defendants and it is found that he is still in possession. That was the cause of action and I am not prepared to stretch a point in his favour and to allow him to base his suit upon the language of the document which, in my opinion, does contain a covenant to pay. That may necessitate a reference to a Full Bench whether *Gopalsami v. Arunachella* 15 M. 304 : 2 M.L.J. 122. was rightly decided. I, therefore, do not differ from the conclusion at which my learned colleague has arrived, and the second appeal will be dismissed with costs.

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