

## APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and  
Mr. Justice Handley.

NANU (PLAINTIFF), APPELLANT,

v.

RAMAN AND OTHERS (DEFENDANTS NOS. 1 TO 11),  
RESPONDENTS.\*

1892.  
October 6.  
November 10.

*Mortgage-deed passing possession of certain parcels of land and hypothecating others—  
Remedy of mortgagees—Previous decrees for rent obtained against mortgagors—Res  
judicata.*

The obligee under an instrument, dated 1878, by which certain land was usufructuarily mortgaged and other land merely hypothecated to him, having obtained against the mortgagors decrees for rent due on part of the land under the terms of pattamchits executed by them on the date of the mortgage, now sued to recover the principal and interest due under that instrument :

*Held*, that he was not precluded from obtaining a decree by reason of his previous suits, and was entitled to a decree for the amount due, and in default of payment for the sale of the mortgage premises.

APPEAL against the decree of V. P. deRozario, Subordinate Judge of South Malabar at Palghat, in original suit No. 1 of 1890.

Suit to recover principal and interest due on an instrument of mortgage, dated 28th April 1878, and executed on behalf of the tarwad of the defendants in favour of the plaintiff.

The material part of the instrument, which was filed as exhibit A, was as follows :

“ The amount received by us from you by conveying to you on  
“ usufructuary mortgage Villen Kandam and fourteen other items  
“ of property at Kolaparth Padom which are our jenm and are  
“ mentioned in the subjoined schedule and by hypothecating the  
“ jenm right over items 16 to 20 after reserving Puvakkurisi  
“ Kunneeth Raman Menon’s kanom of 740 fanams over items 16 to  
“ 19 and Kalakkattil Kalaproth Kummini Amma’s kanom of 260  
“ fanams over land No. 20, for the purpose of paying off the  
“ Panayom claim of Palathal Nambudri and for paying off the  
“ encumbrances on other properties is 14,000 fanams equivalent to  
“ Rs. 4,000. For this sum of Rs. 4,000, you shall hold possession  
“ of properties Nos. 1 to 15 which have been made over to you and

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“ you shall appropriate annually the paddy fixed as rent for the  
 “ said properties, viz., 780 Vadippens of paddy (by the Vadipper-  
 “ of 40 nalties) made up of 630 Vadippens of paddy being the in-  
 “ terest on the 14,000 fanams borrowed from you at the rate of  
 “ 4½ Vadippens for 100 fanams and of 150 Vadippens of paddy  
 “ for 150 fanams, the Government revenue of the said properties,  
 “ you shall from this day take possession of and hold properties  
 “ Nos. 1 to 15 and appropriate interest after paying Government  
 “ revenue and surrender the properties, together with the title-  
 “ deeds on payment of your mortgage amount. It is further here-  
 “ by agreed that we all shall neither jointly nor any of us severally  
 “ raise any amount either by hypothecating the jenm right over  
 “ properties Nos. 1 to 15 which have been made over to your pos-  
 “ session or over and above the existing incumbrance on properties  
 “ Nos. 16 to 20 till your mortgage claim is paid off. If this stipu-  
 “ lation is violated, such amount will be paid by us personally. It  
 “ will not, on the other hand, be charged on the jenm right over  
 “ these properties, and it will be no hindrance to the realization of  
 “ your mortgage amount from these properties as well as other  
 “ properties of ours.”

The plaintiff had recovered certain sums on account of rent accrued due under pattamchits relating to part of the mortgage premises, and on this ground the Subordinate Judge held, with reference to *Gurusami v. Chinna Mannar*(1), that his remedies were exhausted and accordingly dismissed the suit.

The plaintiff preferred this appeal.

The further facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court.

*Sankaran Nayar* for appellant.

*Sankara Menon* for respondents Nos. 5, 6 and 8.

JUDGMENT.—In 1878 the then karnaven of defendants' tarwad and the anandravens, including defendants Nos. 1 to 5 and 8, borrowed Rs. 4,000 from plaintiff and executed a mortgage-deed (exhibit A), mortgaging with possession items 1 to 15 of the plaintiff 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 karnaven 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 properties. Present defendants Nos. 4, 5 and 8 presented a claim petition which was allowed and the attachment dissolved.

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*(1), 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 Nos. 308 of 1881 and 445 of 1883 has exhausted his remedy and cannot sue again for it as interest. Plaintiff appeals.

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.

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(1) I.L.R., 8 Mad., 488.

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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.

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* (1) 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 suits. Neither is the decision in *Ittiachan v. Velappan* (2) 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 karnaven 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

(1) I.L.R., 5 Mad., 37.

(2) I.L.R., 8 Mad., 488.

against the mortgagees and the mortgaged property. On the other hand, *Govinda v. Mana Vikraman*(1) 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 Nos. 1 to 5 and 7 and 8 personally and by sale of the mortgaged property.

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

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.*

AMUTHU (DEFENDANT), APPELLANT,

v.

MUTHAYYA (PLAINTIFF), RESPONDENT.\*

1892.  
November 15.  
December 23.

*Limitation—Account settled but not signed—Oral promise by debtor to pay balance—Commencement of limitation.*

The plaintiff and the defendant, who was his agent, examined the account between them on 13th July 1887 and a balance was found due by defendant, who orally promised to pay it in one month. The account was not signed. The plaintiff sued on 10th July 1890 to recover the amount, and it appeared that the last item in the account to the debit of the defendant was dated 28th May 1887:

*Held*, that the suit was barred by limitation.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 194 of 1891, confirming the decree of V. Narayana Rau, District Munsif of Negapatam, in original suit No. 219 of 1890.

Suit filed on 10th July 1890 for money due on a settlement of account between plaintiff and defendant. The plaintiff employed the defendant as captain of a vessel, and kept a running account with him. The account, in which the last entry to debit of the defendant was dated 28th May 1887, was examined on 13th July 1887, and it was ascertained that a balance of Rs. 642-5-6 was due thereon by the defendant to the plaintiff. The plaint alleged that the defendant orally promised to pay this amount in one month, and the date of the accrual of the cause of action was 13th July 1887. The defendant raised the plea of limitation.

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(1) I.L.R., 14 Mad., 284.

\* Second Appeal No. 1906 of 1891.