

Court. The plaint ought to have been returned. We must modify the decree accordingly. The appellant must pay the costs of appeal.

RANGANAMI
NAICKAN
v.
VARADAPPA
NAICKAN.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

LINGA REDDI (DEFENDANT NO. 4), APPELLANT,

v.

SAMA RAU AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 3),
RESPONDENTS.*

1893.
December
12, 14,
1894.
January 18.

Transfer of Property Act—Act IV of 1882, s. 68 (c)—Mortgagee's right to sue for the mortgage money where he is kept out of possession by mortgagor's indirect conduct.

Where a usufructuary mortgagee is unable to obtain possession of the mortgaged property owing to his mortgagor having executed a subsequent mortgage and placed the second mortgagee in possession, the first mortgagee may elect to sue at once for the money under section 68 of the Transfer of Property Act, instead of for possession of the land.

APPEAL against the decree of R. S. Benson, District Judge of South Arcot, in original suit No. 19 of 1890.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

The District Judge passed a decree in favour of the plaintiff, and the fourth defendant preferred this appeal.

Bhashyam Ayyangar and Krishnasami Ayyar for appellant.

Pattabhirama Ayyar for respondents.

BEST, J.—The suit, out of which this appeal has arisen, was instituted by one P. Sama Rau (now first respondent) against Ranga Rao, his son Janakirama* (a minor) and brother Ragava Rao (defendants 1, 2 and 3 respectively) as executants of the mortgage bond A (dated 10th July 1890), the other defendants in the suit being Linga Reddi (the present appellant) and three others holding prior mortgages over portions of the property mortgaged to plaintiff under the mortgage bond A.

Plaintiff's case was that of the Rs. 4,500 for which the mortgage bond A was executed, Rs. 3,000 were left with him

* Appeal No. 115 of 1891.

LINGA REDDI
SAMA RAU.

for redemption of the prior mortgages, and for payment to other creditors of defendants 1 to 3, but that his attempts to discharge the prior mortgage debts were frustrated by the machinations of the fourth defendant (now appellant), who induced defendants 1 to 3 to execute to himself on the 16th September 1890 a usufructuary mortgage of the property for Rs. 2,750, and to put him in possession of the property. Hence plaintiff's suit to recover from defendants 1 to 3, and on the responsibility of the property mortgaged to plaintiff under A, a sum of Rs. 2,256 paid by him to those defendants and certain creditors of theirs, up to 10th October 1890, with Rs. 450 as damages. Defendants 4 to 7 were included as defendants in consequence of their being in possession of portions of the properties.

First defendant's plea was that it was owing to plaintiff's failure to pay off the other mortgages that he was obliged to make other arrangements. Second and third defendants also pleaded adversely to the plaintiff, but it is unnecessary to consider their pleas for the purpose of this appeal.

Fourth defendant pleaded that plaintiff had no right to recover the money from the plaint property, as exhibit A contained no pledge of the property. He also denied tender to him as alleged by the plaintiff. He further denied all knowledge of the payments alleged to have been made by plaintiff to, and on behalf of, defendants 1 to 3. He also denied the alleged collusion between himself and those defendants, and insisted on his right as prior mortgagee for a sum of Rs. 1,250 and also under the usufructuary mortgage bond of September 1890 for the further sum of Rs. 2,750.

It is unnecessary to state the pleas to the other defendants as the present appeal is by fourth defendant alone.

The District Judge has found that a sum of Rs. 2,181 was advanced by plaintiff to defendants 1 to 3 and is a valid mortgage debt, but that of the property mortgaged under A a portion had previously been sold to sixth defendant under exhibit XI, and that the land so sold must be excluded from liability for the debt due to plaintiff. As for the damages claimed, the District Judge held interest at 10 per cent. per annum on the amount found to have been paid by plaintiff to be a sufficient award. He, therefore, passed a decree against first and third defendants personally and against their shares of the mortgaged property for Rs. 2,181

with interest thereon as above, second defendant's share being held liable only for a portion of the debt, and that only in case it is not satisfied out of the first and third defendants' shares; fourth defendant has been held jointly liable with first and third defendants for plaintiff's costs on the amount decreed to plaintiff, because the Judge found the litigation to be due to the intervention of fourth defendant who "induced first and third defendants to abandon their mortgage to plaintiff and give him one instead."

LINGA REDDI
SAMA RAO.

The present appeal is, as already observed, by fourth defendant, the respondents being plaintiff and defendants 1 to 3.

The points urged at the hearing are—

- (1) That as a usufructuary mortgagee, plaintiff is not entitled to sue for sale of the property.
- (2) That the suit is premature, as under the mortgage bond A the money is not repayable till after the expiration of three years.
- (3) That plaintiff is entitled to sue only for possession of the property and redemption of prior mortgages.
- (4) That section 68 of the Transfer of Property Act is not applicable.
- (5) That the amount claimed is excessive.
- (6) That the damages cannot be made a charge on the property.

It is true that exhibit A allows three years for payment of the money, but the finding is that owing to appellant's machinations the plaintiff was unable to get possession of the property. Section 68 of the Transfer of Property Act provides that the mortgagee has a right to sue for the money (*inter alia*) where the mortgagee being entitled to possession of the property, the mortgagor fails to deliver possession to him or to secure the possession of it to him. No doubt in the present case the money for redemptions was left with the plaintiff, and the mortgagor had to take no active part in placing him in possession of the property, and consequently the case is not one coming within the letter of the section, but there can be no doubt it is within the spirit of the rule contained therein; and as it was owing to the combined action of the mortgagors and appellant, that the respondent (plaintiff) was unable to get possession of the property, the latter must be allowed to elect to sue at once for the money instead of for possession of

LINGA REDDI the land, though no doubt a suit for possession was also open to
SAMA RAU, him. I would, therefore, disallow the objections Nos. 1 to 4.

As to the fifth objection the Judge's finding is supported by exhibit L and the receipts referred to in paragraph 13 of the judgment.

As to the last objection, under the mortgage A, plaintiff was entitled to the usufruct of the land in lieu of interest at 10 per cent. per annum. It is this same interest that is awarded as damages. I think it has been rightly made a charge upon the property. As remarked by Romer, J., in the recent case of *Oradock v. The Scottish Provident Institution*(1), to constitute a charge in equity by deed or writing, it is not necessary that any general words of charge should be used. It is sufficient if the Court can fairly gather from the instrument an intention by the parties that the property therein referred to should constitute a security.

I would dismiss this appeal with costs.

Objection has been taken on behalf of first respondent (plaintiff), under section 561 of the Code of Civil Procedure, to the part of the decree which directs the property to be sold subject to the mortgages evidenced by exhibits IV, V, and VI. As these mortgages are of date prior to that under which this suit has been brought, the Judge's decree is correct. The mere fact of the amounts due under these mortgages being included in the mortgage bond VII executed to fourth defendant by defendants 1 and 3 subsequently to the execution of A is no reason for holding that A is unaffected by them.

I would, therefore, dismiss first respondent's objections also with costs.

MUTTUSAMI AYYAR, J.—I agree.

(1) 69 L.T.J. (N.S.), 380, 382.