GNANASAM-MANDA PANDARAM v. PALANIYANDI PILLAI.

Plaintiff preferred this petition.

Krishnasawmi Ayyar for petitioner.

Parthasaradhi Ayyangar and *Srirangachariar* for respondent.

JUDGMENT.—The question is whether the claim is barred by limitation. If there had been thirty days in Masi of the year Tharana, the suit would not be barred; but in the year Tharana there happened to have been only twenty-nine days in Masi. Following the decision in *Almas Banee* v. *Mahomed Ruja*(1), we hold that the suit brought on the 12th March 1891 is not barred. The decision in *Migotti* v. *Colvill*(2), referred to by the District Munsif, relates to computation of a sentence on a prisoner and is not in point.

We set aside the decree of the District Munsif and remand the suit for disposal on merits.

The costs hitherto will abide and follow the result.

APPELLATE CIVIL.

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

1893. April 17. September 13.

NARAYANASAMI NAIDU (DEFENDANT NO. 3), APPELLANT,

v.

NARAYANA RAU (PLAINTIFF), RESPONDENT.*

Mortgage—Extinguishment of incumbrances—Suit by puisne incumbrancer—Decree for sale—Contract Act—Act IX of 1872, *s.* 74—*Penal sum.*

In March 1881 A purchased certain land and, in the same month, mortgaged it to B. In June the land was attached in execution of a decree. In August A discharged the judgment-debt with money borrowed from C, and he hypothecated the land to him to secure repayment of the loan.

In 1882 B brought a suit on his mortgage and obtained a decree, in execution of which the land was brought to sale and purchased by him: C was not a party to this suit. In 1886 B sold the land to D under an instrument, which recited that out of the purchase-money Rs. 760 were retained by the purchaser for payment of prior encumbrances, and the finding was that the purchaser undertook to pay the debt owing to C. C now sued A and D to enforce his hypothecation:

Held, that C was entitled to a decree for sale.

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(1) I.L.R., 6 Calc., 239. (2) L.R., 4 C.P.D., 233.

*. Second Appeal No. 338 of 1892.

A stipulation in a bond that if the sum secured is not repaid with interest at 12 per cent. on a certain date, the interest shall be at 18 per cent. from the date of the bond is not unenforceable.

NARAYANASAMI NAIDU v. NARAYANA RAU.

SECOND APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in appeal suit No. 69 of 1891, modifying the decree of T. Ramasami Ayyar, District Munsif of Tiruttarapundi, in original suit No. 219 of 1889.

Suit to recover principal and interest due on a hypothecation bond. The instrument sued on was dated 29th August 1881 and it provided for the repayment of the amount secured "with "interest at Re. 1 per cent. per mensem within 30th August 1883 "and in default with interest at Rs. 1-8-0 per cent. per mensem "from the date of the bond."

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

The District Munsif passed a personal decree only. The Subordinate Judge on appeal passed a decree for sale of the property hypothecated.

Defendant No. 3 preferred this second appeal.

Bhashyam Ayyangar, *Desika Chariar* and *Tiruvenkata Chariar* for appellant.

Subramaniya Ayyar for respondent.

MUTTUSAMI AYYAR, J.—The parties to this appeal are prior and subsequent mortgagees of the land in dispute, which is 17 maws and odd in extent. The land in question originally belonged to Saminatha Bosalai and his co-parceners. On the 10th March 1881 they sold it, together with other property, to first defendant for Rs. 1,500 (exhibit J). The purchaser mortgaged it and other property to one Vengusami for Rs. 3,000 under exhibit I, dated the 19th March 1881. The mortgagee instituted original suit No. 84 of 1882 and obtained a mortgage decree, in execution of which he purchased the seven velies mortgaged to him (including the land in dispute) and other land and obtained possession of the same on the 2nd October 1885. On the 20th January 1886 the purchaser at the execution sale sold the lands to appellant's father for Rs. 3,750 by exhibit H. This document recites that out of the purchase-money, viz., Rs. 3,750, Rs. 760 were retained by the purchaser for payment of prior encumbrances. Thus appellant's claim as the purchaser at the Court-sale in original suit No. 84 of 1882 has to be traced to the mortgage executed to

NARAYANA-SAMI NAIDU v. NARAYANA RAU.

Vengusami on the 19th March 1881. The plaintiff-respondent's hypothecation bond A was executed by the first defendant in plaintiff's favour on the 29th August 1881 about five months subsequently to the mortgage in favour of Vengusami. This hypothecation was executed to pay off the debt under the decree in original suit No. 185 of 1872 on the file of the Additional Munsif of Tanjore, in execution of which the land now in dispute and other lands were under attachment since the 7th June 1881. Thus, respondent's claim is derived from the mortgage of the 29th August 1881. To original suit No. 84 of 1882 the plaintiff-respondent was not made a party, and he is not, therefore, debarred from enforcing his charge. Upon these facts the Lower Appellate Court held that respondent had a right to redeem the prior mortgage or to bring the mortgaged property to sale, and decreed, *inter alia*, that unless appellant paid the sum due to respondent and redeemed the mortgage in six months, the mortgaged property be sold in satisfaction of respondent's claim. For appellant it is contended that there ought to be no decree for sale, and that a puisne encumbrancer's remedy as against a prior encumbrancer is limited to a right to redeem and does not include a right to bring the property to sale. I do not consider this contention to be tenable. That a second mortgagee has a right to redeem a prior mortgage is not disputed, the real question being whether he can also claim a direction that the property be sold so as to throw the burden of redemption on the prior instead of the subsequent mortgagee. He is certainly entitled to say that the mortgage property is sufficient for payment of both debts, that if sold on account of them there will be a surplus after satisfying the prior mortgage, and that that surplus should be appropriated in payment of the second mortgage. The only ground on which the prior mortgagee could resist such demand is that the property in question was not sufficient to satisfy both mortgages, and that it was exhausted in satisfying the first mortgage, which has a priority of claim to payment. Upon the finding that Rs. 760 was reserved out of the purchase-money for payment of prior encumbrances, this defence is not available to the appellant. In *Perumal* v. *Kaveri*(1) no portion of the purchase-money was reserved for paying off the prior encumbrances, and there was no

(1) I.L.R., 16 Mad., 121.

undertaking to pay the second mortgage as in this case. Moreover, the second transaction in this case was a hypothecation which created a charge on the property, and there is no reason why the charge should not be satisfied when a portion of the purchase-money was retained for meeting prior encumbrances. As regards interest, the Subordinate Judge's decree is in accordance with the decision in *Basavayya* v. *Subbarazu*(1).

I would dismiss this appeal with costs.

BEST, J.—The finding of the Subordinate Judge is that the third and fourth defendants (it should be third defendant's father and fourth defendant) undertook to pay plaintiff's debt, "and "retained money for that purpose." On this finding there can be no question as to the propriety of the decree, which makes the debt a charge on the property mortgaged of which third defendant is now the sole owner.

The case is distinguishable from *Gokuldoss Gopaldoss* v. *Rambux Seochand*(2), because, according to the Subordinate Judge's finding, the appellant's father when purchasing from Vengusami bound himself to pay off the plaint debt and retained Rs. 760 of the purchase-money for the purpose of paying off the debt. For the same reason this case is also distinguishable from *Perumal* v. *Kaveri*(3) to which our attention was called by the appellant's vakil.

As to the contention that exhibit M has been misconstrued by the Subordinate Judge, it appears from M that third defendant's father and fourth defendant then ignored Subbammal's debt and expressly denied the liability of the plaint property for that debt, whereas their present plea is that the Rs. 760 were retained for the payment of that very debt.

The only other objection urged on behalf of appellant is as to the interest awarded at 18 per cent. It is objected that this is a penal rate and therefore not enforceable. The bond, which is dated 29th August 1881, stipulates for payment of the principal amount on the 30th August 1883 with interest at 12 per cent. per annum, and provides that in default of payment on the above date, the interest shall be at the enhanced rate of 18 per cent. *from the date of the bond.* The question has recently been considered by a Full Bench of the Allahabad High Court in *Banke*

(1) I.L.R., 11 Mad., 294. (2) L.R., 11 I.A., 126. (3) I.L.R., 16 Mad., 121.

NARAYANA-SAMI NAIDU v. NARAYANA RAU.

Behari v. *Sundar Lal*(1) and the conclusion arrived at is that such stipulations in contracts substituting in a given state of circumstances a higher for a lower rate of interest cannot be treated as penalties, but must be interpreted—as other parts of a written contract should be interpreted—according to the expressed intention of the parties. To the same effect also is the decision of this Court in *Appa Rau* v. *Suryanarayana*(2), where the true principle of decision is stated to be that a Court "should not "interfere to protect persons who, with their eyes open, choose "knowingly to enter into even somewhat extortionate bargains, "but that it is only when a person has entered into such a bargain "in ignorance of the unfair nature of the transaction, advan-"tage having been taken of youth, ignorance or credulity, that a "Court of Equity is justified in interfering." See also *Basavayya* v. *Subbarazu*(3) and the decision of the Privy Council in *Balkishen Das* v. *Run Bahadur Singh*(4).

As observed by the Privy Council in *Dimech* v. *Corlett*(5) "the hinge on which the decision in every particular case turns "is the intention of the parties collected from the language they "have used." In the present case the language is clear enough, and there is no reason for supposing that the executant of the bond when he expressly stated that in default of paying the principal with interest at 12 per cent. on the date agreed upon for the payment, the interest should be payable "from the date of "the bond" at the higher rate of 18 per cent. did not understand or intend what he said.

I would, therefore, uphold the Subordinate Judge's decree in its entirety and dismiss this appeal with costs.

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(1) I.L.R., 15 All., 232. (2) I.L.R., 10 Mad., 203. (3) I.L.R., 11 Mad., 294.
(4) I.L.R., 10 Calc., 305. (5) 12 Moo. P. C. Cases, 229.