

THE
INDIAN LAW REPORTS,
Madras Series.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

VISVALINGA PILLAI (PLAINTIFF), APPELLANT,

v.

ALANIAPPA CHETTI AND OTHERS (DEFENDANTS NOS. 1 TO 3),
RESPONDENTS.*

1897.
September
9, 10.

Transfer of Property Act—Act IV of 1882, ss. 68, 98—Anomalous mortgage—Right to possession.

Two out of three co-parceners executed in favour of a creditor in respect of belonging to the co-parcenary an instrument which contained the following clause: "As we have received Rs. 500, you will, in lieu of the said amount and interest, enjoy the said property for three years by virtue of Arakattu otti the condition that, on the expiry of the said three years, we should redeem the land without paying either principal or interest. You will, on the expiry of the said period, deliver possession of the said immovable property without raising any objection." The creditor obtained possession of only part of the land:

Held, that the instrument was an anomalous mortgage and that the mortgagee was liable to ejection after the expiry of the three years.

SECOND APPEAL against the decree of T. M. Horsfall, District Judge of Tanjore, in Appeal Suit No. 481 of 1895, affirming the decree of S. Dorasami Ayyar, District Munsif of Tanjore, in original Suit No. 521 of 1894.

Suit to recover possession of certain land with arrears of rent. The land in question previously belonged to the family of defendant No. 1, and it was comprised in an instrument therein described as an Arakattu otti deed, dated 27th January 1895, and

* Second Appeal No. 47 of 1897.

VISVALINGA
PILLAI
v.
PALANIAPPA
CHETTI.

executed by the father and brother since deceased of defend
No. 1 in favour of defendant No. 2. This instrument was filed
the suit as exhibit I and was in the following terms :—

“ We have mortgaged to you the undermentioned immov
“ properties as described herein below belonging to us and in
“ enjoyment and borrowed thereon Company’s current Rs. 500,
“ particulars of the receipt whereof by us are as follows: for
“ purpose of paying off Rs. 500 the decree amount due from one
“ us, the said Kuppusami Chetpiar, the second defendant in Ori
“ nal Suit No. 156 of 1883 on the file of Kumbakonam Distr
“ Munsif’s Court to Muruga Pillai, son of Kuppaya Pillai, t
“ plaintiff in the said suit residing in Panjukara street, Patt
“ Kumbakonam, we have already received from you Rs. 325 a
“ paid the same to the said Muruga Pillai; we have received fr
“ you on this date Rs. 175 for discharging the said decree. As
“ have received Rs. 500 the total amount of the two items as ab
“ you will, in lieu of the said amount and its interest, enjoy the
“ properties for three years in virtue of Arakattu otti from
“ current fashi 1294 to fashi 1296, yourself paying the Sircar
“ &c. As extensive properties are hereby mortgaged to you w
“ could yield an income by which you can completely recover
“ said principal money and its interest within the said period,
“ as we have executed this Arakattu otti deed on the condition t
“ on the expiry of the said three years’ term, we should red
“ the land without paying you either the said principal mo
“ or interest, you will, on the expiry of the said period, del
“ possession of the said immovable properties without raising a
“ objection. We have herewith given the copy of the decree i
“ the said suit No. 156. We shall get the plaintiff in the sai
“ suit Muruga Pillai to present a petition in the said Kumbakon
“ Munsif’s Court to the effect that the decree in the said s
“ had been discharged.”

The plaintiff subsequently purchased the two-thirds share
the executants of that instrument at a Court-sale held in executi
of the decree in Original Suit No. 214 of 1888 on the file
the District Munsif of Tanjore.

Defendant No. 1 had refused on demand to divide the proper
Defendant No. 2 stated that he was in possession of part of t
land mortgaged under the above instrument and further that
had no objection to give up possession on being redeemed.

Defendant No. 3 was the widow of the brother of defendant
I.

VISVAJINGA
PILLAI
v.
PALANIAPPA
CHETTI.

The District Munsif held that the plaintiff's purchase was
I. subject to the rights of defendant No. 2 under exhibit I, and
dismissed the suit on the ground that the plaintiff was not entitled
to recover without redeeming which he had not offered to do.

The District Judge on appeal affirmed this decision.

Plaintiff preferred this second appeal.

Sivasami Ayyar for appellant.

Venkatasubbaramayya for respondent No. 2.

JUDGMENT.—On the whole, though not without hesitation, we
think that the instrument may be considered to be a mortgage, but
we are of opinion that it falls within section 98 of the Transfer of
Property Act, and that the rights and liabilities of the parties must
be determined by the contract itself. The contract does not provide
for the contingency which has occurred. No special usage appli-
cable to the present circumstances is set up. It is, however,
intended that, under section 68 of the Transfer of Property Act,
it is open to the mortgagee to sue for the mortgage money as
soon as a portion of the mortgaged property had not been delivered
to him or to acquire a charge on the part which had been delivered
to him until he was repaid the mortgage money. It appears to us,
however, that section 68 does not apply to a case like this. That
"intention" contemplates cases where the mortgagee is entitled to claim
"reimbursement" of the mortgage money before redemption. In the
"present" case, however, the contract gives no right to claim repay-
ment, but in terms denies it. The only right the mortgagee had
was to remain in possession for the stipulated period and to recover
damages for the breach of contract by the mortgagor in not
surrendering possession of the whole of the land to him. We think,
therefore, that the Lower Courts were wrong in holding that exhibit
I was an usufructuary mortgage and gave the second defendant
the right to remain in possession of the part he had after the expiry
of the three years agreed upon.

Therefore, we must, therefore, reverse the decrees in both the Courts below
and set aside the decree of possession of the property sued for to the plaintiff with
damages for past mesne profits and with future mesne profit also.
The defendants must pay the plaintiff's costs throughout.