

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar
and Mr. Justice Russell.*

1903.
November
17.

KANGAYA GURUKAI AND OTHERS (DEFENDANTS),
APPELLANTS,

v.

KALIMUTHU ANNAVI (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—IV of 1882, ss. 58 (b), 67, 68, 98—Combination of simple and usufructuary mortgage—Personal covenant to pay—Right of mortgagee to decree for mortgage money and for sale.

A mortgage deed, after acknowledging receipt of the consideration and mortgaging the land with possession (the usufruct, apparently, being taken in lieu of interest), contained the following proviso as to redemption:—"Thereafter, on [naming a date] on paying [the amount advanced] we shall redeem our land. If on the date so fixed the amount be not paid and the land recovered back, in whatever year we may pay [the amount advanced] on [naming the date] of any year, then you shall deliver back our lands to us:"

Held, that this contained a promise by the mortgagor to pay on the date named, and that the mortgagee was entitled to a decree for the mortgage money, under clause (a) of section 68 of the Transfer of Property Act, and to a decree for sale under section 67, the right to cause the mortgaged property to be sold in default of payment being implied within the meaning of section 68 (b).

Suit to recover money due on a mortgage. Plaintiff was a usufructuary mortgagee and brought the present suit to recover the amount due under the mortgage both personally from the mortgagor and by sale of the mortgaged property. Both of the lower Courts passed a decree as claimed. Defendants preferred this second appeal. The material portion of the deed is set out by the learned Judges (Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Bhashyam Ayyangar, J.), who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The respondent, who is a usufructuary mortgagee, sues to recover the mortgage money both personally from the mortgagor and by sale of the mortgaged property. Both the Courts below have given a decree

* Second Appeal No. 288 of 1902, presented against the decree of T. M. Rangachari, Subordinate Judge of Madurai (West), in Appeal Suit No. 261 of 1901, presented against the decree of V. K. Desikachariar, District Munsif of Periyakulam, in Original Suit No. 209 of 1900.

as prayed for. The principal question raised in this second appeal preferred by the mortgagor is that there is no covenant to pay the mortgage money and the respondent being merely a usufructuary mortgagee cannot as such sue for the recovery of the money personally or by sale of the mortgaged property. The mortgage deed after acknowledging the receipt of the consideration of Rs. 200 for the mortgage and mortgaging the land with possession, the usufruct apparently going in lieu of interest, contains the following provision as to redemption:—

“Thereafter on the 30th Panguni Bhava year causing the aforesaid Rs. 200 to be paid (on paying the aforesaid Rs. 200) we shall (redeem) or [recover back] our land. If on the date so fixed the amount be not paid and the land recovered back, in whatever year we may pay the Rs. 200 in full on the 30th Panguni of any year then you shall deliver back our lands to us. The Tamil of which the above is a literal rendering, runs as follows.” [Their Lordships caused it to be set out.]

Before disposing of this appeal we refer the following question for the opinion of the Full Bench:—“Whether the mortgagee is entitled under the mortgage deed on which the suit is brought to sue for the mortgage money personally and by the sale of the mortgaged property.”

The case came on for hearing before the Full Bench constituted as above.

K. N. Ayya for appellants.

P. S. Sivaswami Ayyar for respondent.

The Court expressed the following

OPINION.—Our answer to the reference is in the affirmative. The first sentence of the extract from the mortgage instrument quoted in the order of reference does, in our opinion, contain a promise by the mortgagor to pay on the date named, in which case there shall be a right in the mortgagor to get back his lands.

The second sentence of the extract provides that in the event of the mortgagor not paying on the due date, but subsequently, he may pay only on the corresponding day of a future year, and there shall then be an obligation on the part of the mortgagee to give up the land.

The mortgage is therefore a combination of a simple and an usufructuary mortgage, within the meaning of section 98, Transfer

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of Property Act, and the mortgagee is entitled to a decree for the mortgage money under clause (a) of section 68, and to a decree for sale under section 67, the right to cause the mortgaged property to be sold in default of payment being implied within the meaning of section 58 (b) of the Transfer of Property Act.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Subrahmania Ayyar, Mr. Justice Davies and
Mr. Justice Benson.*

MAHALINGA NADAR (PLAINTIFF), PETITIONER IN BOTH,

v.

GANAPATHI SUBBIEN (DEFENDANT), RESPONDENT IN C.R.P.

No. 188 OF 1902,*

KAVERI (DEFENDANT), RESPONDENT IN C.R.P. No. 189 OF 1902.*

*Contract Act—IX of 1872, s. 176—Suit for sale of property pledged—Pledger's
right to sue for sale—Limitation Act—XV of 1877, sched. II, arts. 57, 120.*

Plaintiff lent money on the pledge of jewels, and sued more than three years and less than six years from the date of the pledge, to recover the amount lent, by sale of the jewels and from defendant personally :

Held (per SUBRAHMANIA AYYAR and BENSON, JJ.) that plaintiff was entitled to sue for the sale of the property pledged to him notwithstanding that he was also entitled, under section 176 of the Contract Act, to sell the property without reference to the Court.

Held also, that the claim to proceed against the property pledged was governed by article 120, and the claim to proceed against the debtor personally was governed by article 57 of schedule II of the Limitation Act.

Per DAVIES, J.—That the claim to proceed against the debtor personally was governed by article 57 and was barred, but that in so far as the suit was for a sale of the pledged property that was merely an incident in the nature of an accessory to the right to recover the debt, which became barred with the right of suit for that debt. The right of sale, however, remained. *Vita Kamti v. Kalekara*, (I.L.R., 11 Mad., 153), commented on.

Suits to recover Rs. 109-3-6 due as money advanced to the defendants respectively on pledges of jewels in 1896. The suits

* Civil Revision Petitions Nos. 188 and 189 of 1902, presented under section 25 of Act IX of 1887, praying the High Court to revise the decrees of P. S. Gurusurti, Subordinate Judge of Kumbakonam, in Small Cause Suits Nos. 2928 and 2927 of 1901.