

ORE
v.
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JUDGMENT.—Admittedly the relation of landholder and tenant subsisted between the parties to the suit and even in these proceedings it is not the defendant's case that such relation has terminated. They tender a patta which implies the continuance of that relation. It is difficult to understand how they can insert in the patta words implying that any land or lands comprised therein belong not to the tenant but to another person, viz., Pattadar No. 57. To compel the plaintiff to accept such a patta would be to compel her to accept a document denying her right to the property. No doubt where there has been a transfer of a tenant's interest to a third party and the transfer is admitted by the parties concerned, it is competent to, and may be the duty of, the landholder to treat the transferee as the tenant; but where there is a dispute as to the transfer of the rights it is not competent to the landholder to determine the question for himself and refuse to grant patta to the party who was the tenant prior to the dispute. He is to proceed on the footing that the tenancy continues until the third party setting up the cessation of the tenancy establishes it in a way binding upon the original tenant. The appeal therefore fails, and is dismissed with costs.

APPELLATE CIVIL.

*Before Sir S. Subrahmanya Ayyar, Officiating Chief Justice,
and Mr. Justice Benson.*

SRINIVASA RAO SAHEB AND OTHERS (DEFENDANTS
NOS. 1 TO 7), APPELLANTS,

v.

YAMUNABHAI AMMALL AND OTHERS (PLAINTIFFS AND
DEFENDANTS NOS. 8 AND 9), RESPONDENTS.*

1905.
April 28,
September 8.

Transfer of Property Act IV of 1882, ss. 85, 96—Mortgage decree need not reserve rights admitted by all parties—Decree must be construed with reference to pleadings.

There is nothing in the provisions of the Transfer of Property Act, which requires that a decree in a mortgage suit should in terms reserve rights admitted

*Civil Miscellaneous Appeal No. 289 of 1904, presented against the order of K. C. Manavedan Raja, Esq., District Judge of North Arcot, in Civil Miscellaneous Petition No. 269 of 1904 in Execution Petition No. 16 of 1903 connected with Original Suit No. 11 of 1900.

by all the parties and order the sale to be subject to them, and section 96 of the Act does not militate against this view.

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Quære, whether section 85 of the Act requires such persons whose rights are admitted to be made parties.

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Where the decree omits to reserve such rights, it ought to be construed with reference to the admissions contained in the pleadings or made in the course of the case and ought not to be so construed as to grant a larger measure of relief than is prayed for or to negative rights admitted by all parties.

THIS appeal arose out of proceedings in execution of the decree in Original Suit No. 11 of 1900 in the District Court of North Arcot.

That suit was brought by respondents Nos. 3 and 4 on a mortgage bond executed by the first appellant and others. The eighth and ninth defendants (first and second respondents) were joined as they had a prior mortgage on the same properties. Their mortgage was admitted in the plaint and the defendants admitted the same in their written statements. The plaintiff prayed for a sale subject to the eighth and ninth defendants' mortgage. The lower Court in its decree for sale, did not however expressly state that the sale was to be subject to the eighth and ninth defendants' mortgage. The first and second respondents applied to the lower Court under section 295 of the Code of Civil Procedure that the property might be sold free of their mortgage, they being given a first charge on the sale-proceeds. The Court passed the order prayed for.

Against that order defendants Nos. 1 to 7 preferred this appeal.

The Hon. Mr. *L.A. Govindaragava Ayyar* for *V. Krishnaswami Ayyar*, and *S. Srinivasa Ayyar* for appellants.

T. V. Seshagiri Ayyar for *Sir V. Bhashyam Ayyangar*, *K. Varadachari* for *C. R. Tiruvenkatachariar* and *A. K. Madhava Rao* for respondents.

JUDGMENT.—The first and second respondents hereinafter referred to as the respondents, were prior mortgagees of the property ordered to be sold by the lower Court. In the plaint in the case, the plaintiffs stated that they were subsequent mortgagees, that the respondents were impleaded as they held a prior mortgage and expressly prayed *inter alia* that in default of payment of the money due to them under their mortgage, the mortgaged property should be sold subject to the prior mortgage. The appellants who were the other defendants in the case being mortgagors or persons claiming through them also admitted in their written statement the prior mortgage in favour of the respondents. There was thus

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no matter in dispute either between the plaintiffs in the suit and the respondents or between the latter and their co-defendants. In this state of things the Court in giving the decree for sale in favour of the plaintiffs made no reservation therein in respect of the respondents' prior mortgage.

It was argued that in the absence of any such reservation in the decree, it is imperative on the Court to sell the property on the footing that the respondents' mortgage was non-existent and to apply the proceeds in payment of the plaintiffs' mortgage and pay the remainder to the mortgagors themselves.

Now section 85 of the Transfer of Property Act, no doubt requires all parties having an interest in the property comprised in the mortgage being included in any suit on the mortgage. It is open to doubt however whether a suit in which all the parties admit the existence of and intend to raise no question about a prior incumbrance in favour of a person not impleaded in the suit is liable to be dismissed as one framed in contravention of the section. Assuming that, even in such circumstances, section 85 requires the prior incumbrance to be brought before the Court in the suit, we do not think that there is anything in the provisions of the Transfer of Property Act which requires that the decree in the suit should in terms reserve his rights and order the sale to be subject to them. Section 96 of the Act does not militate against this view. In laying down that, property subject to a prior mortgage may be sold by Court free from the same with the consent of the prior mortgagee the section does not necessarily imply that when the property is not to be sold free from such incumbrance the decree should under all circumstances expressly reserve the prior mortgagee's rights. No doubt where any contest arises between a puisne mortgagee-plaintiff and a prior mortgagee-defendant or a contest between a mortgagor and a prior mortgagee who are co-defendants which it is necessary to decide in order to give relief to the plaintiff, such contest should be adjudicated upon and the decree framed with reference to the adjudication. But where the right of parties to the suit such as the respondents is admitted on all hands and further the person claiming relief asks for relief subject to such admitted right, the court would of course be going out of the way in granting larger relief than he prayed for; and indeed there is no necessity to construe the decree in the present case as granting what the plaintiffs themselves did not

ask. No doubt to avoid misconceptions the decree might have been in the terms of the prayer of the plaintiffs themselves, that is to say, the mortgaged property be sold subject to the prior mortgage in favour of the respondents. The proper course to be observed in drawing up a decree is certainly that pointed out in *Lachmi Narain v. Jwala Nath* (1) still, in construing a decree, admissions in the pleadings or in the course of the case should not be ignored and the decree taken as negating any right which was conceded by all parties, with reference to which the Court was not called upon to make any adjudication and in respect of which there was no necessity for the Court to make reference in terms in the decree, provided such a construction does not infringe any statutory provision. It was in consonance with this view that the plaintiffs, the subsequent mortgagees, consented to the sale taking place as applied for by the respondents and the sale-proceeds being applied, in the first instance, towards the discharge of the prior mortgage. The contention of the mortgagors is therefore on the face of it unsustainable.

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We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Boddam.

RAMAKRISHNA RAJU AND OTHERS (PLAINTIFFS), PETITIONERS,

v.

KATTA VENKATASWAMY AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1905.
July 27.

Trustee--Person not entitled obtaining renewal of a promissory note, trustee for rightful owner—Misjoinder of parties.

Where on the death of the payee of a promissory note executed by D, C becomes entitled to the amount, but A obtains a renewal from D in favour of B, a suit will lie by C against D, A and B as defendants to recover on the renewed note, as A and B in obtaining the renewal must be held in law to have become

(1) I. L. R., 18 All., 344 at p. 347.

* Civil Revision Petition No. 594 of 1904, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of M.R.Ry. T. A. Narasimha Chariar, District Munsif of Bhimavaram, in Small Cause Suit No. 370 of 1904,