

RAMARAYA
SHANBOGUR
v.
SERRHOT
VENKATA-
RAMANAYYA.
—
SESHAGIRI
AYYAR, J.

further interest. I think this conclusion is right. No doubt, as pointed out by the learned vakil for the appellant, the analogy of the Transfer of Property Act is not very helpful as the legislature has provided specially for the cessation of interest only after the service of notice. I think there is a closer analogy in Order XXIV of the Code of Civil Procedure. Rule 3 says that interest on the deposit would cease to run from the date of the notice to the defendant. That is to say, the deposit being taken to have been made up correctly to the date of the deposit, the liability for interest on the sum which by the fact of the payment the defendant acknowledges to be due to the plaintiff ceases when the latter has notice of it and is put in the way of receiving the money from Court. True, that the order in question in terms only governs payment in the course of the hearing of a suit. I do not see why the same principle should not be applied to payments in the course of execution proceedings, especially as Order XXI, rule (1) (a), does not say that by the payment satisfaction of the claim of the decree-holder is *ipso facto* to be entered. The provision for notice rather indicates that the decree-holder's rights should be affected only after he is informed that the decree amount is available for him and that he can draw it out of Court. For these reasons I agree that the appeal should be dismissed.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919,
January, 31.

KUPPIER (PLAINTIFF), APPELLANT,

v.

PERIAKARUPPA KAVUNDAN (FIRST DEFENDANT),
RESPONDENT.*

Transfer of Property Act (IV of 1882), Sec. 68—Usufructuary mortgage, invalid for want of attestation—Deprivation of possession not by mortgagor but by title paramount—Suit for mortgage money, whether maintainable.

Section 68 of the Transfer of Property Act does not entitle a person, who takes a usufructuary mortgage which is invalid for want of attestation and who is deprived of his possession by title paramount and not by any act of his mortgagor, to sue for the mortgage money. The default referred to

* Second Appeal No. 1270 of 1918.

in section 68 (b) as entitling the mortgagee to sue for the mortgage money is one anterior to the deprivation of possession, and failure of the mortgagor to establish the possession when called upon as against the strangers dispossessing the mortgagee is no default within section 68 (b).

Ram Narayan Singh v. Abhindra Nath Mukherji, (1918) I.L.R., 44 Calc., 388, (P.C.), distinguished.

SECOND APPEAL against the decree of A. FOTHERINGHAM, District Judge of Madura, in Appeal Suit No. 226 of 1917, against the decree of K. W. RAMA RAO, District Munsif of Madura, in Original Suit No. 26 of 1917.

The plaintiff in this suit lent to the first defendant Rupees 450 and obtained from him a usufructuary mortgage of certain lands for a period of five years ending June 1917. He was put in possession and was enjoying the land till 1915 when he was dispossessed by defendants Nos. 2 to 4 who claimed paramount title. Plaintiff brought this suit in 1916 for possession against all the defendants and in the alternative for Rs. 450 and damages against the first defendant. All the defendants contended inter alia that the mortgage deed was invalid for want of a second attester and the first defendant contended in addition that the suit for money brought before the expiry of the mortgage period was premature, that he was in no way liable for the dispossession of the plaintiff and that he was not therefore liable to repay the mortgage money. Finding that the mortgage was invalid for want of a second attester, the plaintiff, in the course of hearing in the first Court, confined his prayer to the recovery of Rs. 450 and damages as against the first defendant only. Upholding the pleas of the first defendant on this point, both the lower courts dismissed the suit. The plaintiff preferred this appeal.

C. S. Venkata Achariyar for appellant.

The respondent did not appear.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.—The undisputed facts are that the first defendant executed a deed of mortgage to the plaintiff which was not in proper form owing to want of attestation. After the mortgage, the plaintiff was in possession for some time and then he was dispossessed by defendants Nos. 2 to 4 who claimed the property by title paramount. There is no allegation that the first defendant aided or abetted these other defendants in depriving the plaintiff of his possession. Under these circumstances plaintiff would not be entitled to sue for the mortgage money as

KUPPIER
v.
PERIA-
KARUPPA
KAVUNDAN.

SESHAGIRI
AYYAR, J.

KUPPIER
 v.
 PERIA-
 KARUPPA
 KAVUNDAN.
 ———
 SESHAGIRI
 AYYAR, J.

such even if the mortgage was in proper form. Reliance was placed upon *Ram Narayan Singh v. Abhindra Nath Mukkerji*(1) for the proposition that even though plaintiff may not be able assert his claim as mortgagee, he can claim the money advanced by him on the footing that the mortgagor should refund it. In the case before the Judicial Committee the mortgagor had taken active steps to deprive the mortgagee of his possession. To such a state of circumstances clause (b) of section 68 of the Transfer of Property Act would in terms apply, provided the mortgage was otherwise enforceable; but the Judicial Committee held that even though the mortgage *qua* mortgage was not valid, the mortgage money was recoverable. We are not prepared to extend the reasoning of that decision to a case where the mortgagor has done no act to deprive the mortgagee of possession.

Then it was contended that the case fell under clause (e) of section 68, inasmuch as the mortgagee was deprived of his security by a stranger. If that is taken to be the finding, then, before suing the mortgagor for the money, the mortgagee ought to have called upon the mortgagor to furnish some other security equivalent to the one which he was dispossessed of.

The last argument related to clause (b) and it was contended that as the mortgagor did not when called upon defend his title against defendants Nos. 2 to 4, he must be deemed to have been guilty of default which resulted in depriving the mortgagee of his possession. But the default referred to in clause (b) must be anterior to the deprivation. The failure to get back lost possession is not within the clause. In *Bhola Nath v. Hara Mohan*(2), the default was at the date of the mortgage. We are not however to be understood as deciding that the failure to observe the conditions mentioned in section 68 would amount to default on the part of the mortgagor.

We, therefore, agree with the lower Courts' conclusion, though not with the reasons given by either of them. In the circumstances of the case, we permit the plaintiff to withdraw the suit with liberty to bring a fresh suit for the money, if he is otherwise entitled to it, on his paying all the costs of the first defendant incurred up to date within two months from now.

N.B.

(1) (1918) I.L.R., 44 Cal., 888.

(2) (1910) 7 I.C., 251.