APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

1934, August 31.

PACHIPENTA LAKSHMI NAIDU (NINTH DEFENDANT), APPELLANT,

v.

SOMAHANTI GUNNAMMA *alias* CHINNAMMI AND THIRTY-TWO OTHERS (PLAINTIFFS 2 TO 5 AND DEFENDANTS 1 TO 8 AND 10 TO 31), RESPONDENTS.*

Indian Limitation Act (IX of 1908), sec. 20—Hindu Law—Joint family—Mortgage executed by all the members—Part payment by manager—No mention that it was made by him as such—Availability of part payment to save bar of limitation—If and when—Plurality of persons liable on a debt—One of them making part payment—Effect of, to save limitation as against others—Part payment of debt signed by person making same—No mention whether it is for principal or interest—Effect of.

C was the managing member of a joint Hindu family composed of himself and his brother B. A mortgage was executed by C and B. Later on, a part payment was made towards the mortgage by C alone and the endorsement relating thereto was signed only by him. A suit was filed by the mortgagee impleading C and B and several others. The question for determination, *inter alia*, was whether the part payment by C was available to save limitation as against B also.

Held, that it was so available on the principle of implied agency, since it could be inferred from the circumstances of the case that the part payment was made by him as the managing member on behalf of the other members also.

Held further, (1) that section 20 of the Limitation Act does not contemplate that, when there is a plurality of persons liable in respect of a debt, all of them should join in making a part payment, and as such a part payment by one of the persons liable can avail not merely against the person making the same or those deriving title under him subsequent to such

* Appeal No. 184 of 1929.

payment but also against other persons liable in respect of the debt, and

(2) that, when a part payment is evidenced by a writing which is signed by the person making the same, it makes no difference whether the payment is held to be for interest or for principal or for both.

APPEAL against the decree of the Court of the Agency Subordinate Judge of Vizagapatam in Original Suit No. 61 of 1926.

Advocate-General (*Sir A. Krishnaswami Ayyar*) and *Y. Suryanarayana* for appellant.

P. Somasundaram for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This is an appeal by the ninth defendant, a puisne mortgagee, against the decree for sale passed in a prior mortgagee's suit. The prior mortgagee had two mortgages in his favour, viz., Exhibit A, a usufructuary mortgage of 1st September 1891, and Exhibit B, a simple mortgage of 4th September 1897. In respect of Exhibit A the appellant contends that, on its true construction, the mortgagee is bound to account for all the income from the properties of which he was put in possession, subject to a deduction of interest at nine per cent per annum on the mortgage amount and one or two other items of charges mentioned in the document. He insists that, if accounts are taken on this footing, it would be found that the mortgagee has realized the whole amount due to him under the mortgages. With reference to Exhibit B the appellant raises a plea of limitation. Incidentally, his learned Counsel also suggested the possibility of a claim for subrogation in respect of a fraction of the amount included in the

LAKSHMI NAIDU v. GUNNAMMA. — VARADACHARIAR J.

mortgage in favour of the appellant, but he realized that in view of certain circumstances this claim could not be usefully pressed. It is therefore unnecessary to say anything further about this. The only other matter raised in the appeal relates to the direction of the lower Court for payment of costs by the ninth defendant and the other members of his family.

On the first point we are unable to accede to the contention of the appellant. Though incidentally there is a reference to interest at nine per cent per annum in Exhibit A, the scheme of Exhibit A is not to make the mortgagee accountable for the realizations from the mortgaged property except to a very limited extent. The mortgage was effected in the year *Khara*, but, as the parties were not sure as to the data then available for fixing the probable income from the mortgaged property, which would be available to the mortgagee in satisfaction of his claim for interest, they provided that the necessary *dowle* should be prepared in the course of the succeeding year, *Nandana*; and the document then goes on to provide as follows :—

"If the *dowle* amount for the year *Nandana* be found insufficient for the interest of Rs. 405 due for each year and the *kattubadi* of Rs. 12–8–0 payable to the Zamindar of Pachipenta, making up in all Rs. 417–8–0, we shall make good the said deficiency by means of other immovable properties belonging to us. If that *dowle* amount be in excess of the said amount of Rs. 417–8–0, you shall pay to us the excess amount every year within the end of the year . . . From *Vijaya* year you shall have control over the properties according to the above-mentioned conditions without having anything to do with us and *you yourself shall enjoy the profit and loss* (sic) *occurring thereby.*"

The last clause would become meaningless if the appellant's construction should be accepted. The document belongs to the class of cases in which the mortgagee is permitted to enjoy the income in lieu of interest; but, as the parties were not quite sure at the time of the execution of the document as to what the probable income might be, they made provision for its being definitely fixed with reference to the next year's *dowle*. It is only in respect of the difference between Rs. 417-8-0 and the figure to be fixed in the *dowle* for *Nandana* that the mortgagee would be accountable to the mortgagor.

That this is the true construction of the document is made clear by the subsequent conduct of the parties and by the recitals in Exhibit P, a document executed by the mortgagors themselves in 1900. Referring to this mortgage, they say in that document that the *dowle* fixed for *Nandana* as per stipulations contained in Exhibit A is Rs. 445-6-0 and that out of that amount, deducting Rs. 417-8-0, the balance has been accounted for to them by the mortgagee. After this statement by the mortgagors themselves, it is unnecessary to labour the point. This contention therefore fails.

With regard to the plea of limitation in regard to Exhibit B, the question depends upon the extent to which a part payment made on 25th April 1912 is available to save limitation. The mortgage bond had been executed by two brothers Chinnayyadora and Bhimandora, but this part payment was made by the former alone and the endorsement relating thereto is signed only by him. The appellant contends that, on a proper construction of sections 20 and 21 clause 2 of the Limitation

LAKSHMI NAIDU v. GUNNAMMA.

VARADACHARIAR J.

Act, this part payment can avail to save from the bar of limitation only the liability of Chinnayyadora's share and not that of Bhimandora's share. The argument was put on two grounds ; one, that section 20 contemplates that, where there is a plurality of persons liable in respect of a debt, *all* of them should join in making a part payment ; alternatively, it was contended that, where they are liable as joint promisors, a payment by one of them alone will not avail against the others because of the express provisions of section 21 (2). The first contention is scarcely sustainable ; see *Velayudam Pillai* v. *Vaithialingam Pillai*(1). In view of numerous cases decided in recent years in the various High Courts in India, the learned Advocate-General also admitted that, as held in the English decisions [Cf. *Bolding* v. *Lane*(2), *Chinnery* v. *Evans*(3) and *Lewin* v. *Wilson*(4)], there is a difference between the effect of an acknowledgment and that of a part payment, and that a part payment can avail not merely against the person making the payment or those deriving title under him *subsequent* to such payment but even against other persons liable in respect of the same debt. Even in respect of *acknowledgments*, this Court has recently held in *Muthu Chettiyar* v. *Muthuswami Ayyangar*(5) that an acknowledgment will also avail to save limitation as against a person to whom the mortgagor making the acknowledgment has transferred the mortgaged property *prior* to the date of the acknowledgment. The learned Advocate-General therefore pressed his contention

(1) (1912) 24 M.L.J. 66.
(2) (1863) 1 De G.J. & S. 122; 46 E.R. 47.
(3) (1864) 11 H.L.C. 115.
(4) (1886) 11 A.C. 639.
(5) (1932) I.L.R. 55 Mad. 758.

mainly with reference to section 21 (2). As to the effect of this provision, there is considerable conflict amongst the several High Courts in this country; what is the exact relation between the restrictive provision in this clause and the general provision in sections 19 and 20? The contention of the learned Advocate-General that, in the case of joint mortgagors, payment by one cannot save limitation as against the other co-mortgagors or their interest in the mortgaged property is supported by a dictum in *Velayudam Pillai* v. *Vaithialingam Pillai*(1) and by two decisions of this Court in *Muthu Chettiar* v. *Muhammad Hussain*(2) and *Thayammal* v. *Muthukumaraswami Chettiar*(3). But there are decisions of other Courts to the contrary. Reference may be made particularly to *Parmeshri Kunwar* v. *Dhuman Kunwar*(4), *Jagwanti* v. *Bachan Singh*(5) and *Ibrahim* v. *Jagdish Prasad*(6). A further point has sometimes been raised whether the restriction in clause 2 of section 21 applies only to the *personal* liability of the joint contractors or even to the liability of the mortgaged property. Difference of opinion is also traceable as to the effect of the word "only" in that provision; [Cf. *Rajtilak Narayan Sur* v. *Mufizuddi Topadar*(7), *Veeranna* v. *Veerabhadraswami*(8) and *Rangasami Aiyangar* v. *Somasundaram Chettiar*(9)]. If it were necessary to base our decision in the case on this point, we should be bound to follow the decisions

(1) (1912) 24 M.L.J. 66.
(2) (1919) 55 I.C. 763.
(3) (1929) 57 M.L.J. 588.
(4) (1929) 119 I.C. 434.
(5) (1926) 95 I.C. 774.
(6) (1926) 99 I.C. 424.
(7) (1926) 98 I.C. 381.
(8) (1918) I.L.R. 41 Mad. 427 (F.B.).
(9) (1927) 54 M.L.J. 150.

LAKSHMI NAIDU v. GUNNAMMA. — VARADACHARIAR J.

of this Court, namely, *Muthu Chettiar* v. *Muhammad Hussain*(1) and *Thayammal* v. *Muthukumaraswami Chettiar*(2), or refer the matter to a Full Bench. But, as the plea of limitation can be disposed of on another ground, it seems to us unnecessary to do so.

The plaintiffs relied upon this part payment as saving limitation against both the mortgagors, on the ground that in making that part payment Chinnayyadora acted as managing member of the family and as such was authorized to make the payment on behalf of Bhimandora as well. In the Court below reliance was placed for this purpose upon evidence showing that they were members of an undivided family of which Chinnayyadora was the manager; and reliance was also placed upon a letter, Exhibit N, which, it was contended, expressly authorized Chinnayyadora to make the said payment. The learned Subordinate Judge refused to accept Exhibit N as a genuine letter, but he however came to the conclusion that the two brothers were undivided and that Chinnayyadora was the manager of the joint Hindu family and that therefore the payment was sufficient to save limitation as against both. The learned Advocate-General however contends that, if Exhibit N is excluded, the mere fact that Chinnayyadora was managing member of the family will not suffice to save limitation against Bhimandora, because in the present case the contract was entered into not by Chinnayyadora alone as managing member of the family but by both the brothers and therefore the case is in terms governed by the provisions of section 21 (2). In support of this

(1) (1919) 55 I.C. 763. (2) (1929) 57 M.L.J. 588.

argument he relies upon certain observations of the Division Bench in *Narayana Ayyar* v. *Venkataramana Ayyar*(1). The facts of that case show that those observations were *obiter*, because the Court came to the conclusion that the payments relied on were not true and that the entries were merely collusive. These observations have been dissented from in *Bajrangi Prasad Singh* v. *Kesho Singh*(2) and the learned Judges suggest that, at any rate, they must be confined to the facts of that case. But, even in *Narayana Ayyar* v. *Venkataramana Ayyar*(1), the learned Judges recognize that it may be possible to *infer* from the circumstances that the payment was made by the managing member on behalf of the other members as well and that in that connection the very fact of his being a managing member would itself be a factor of importance. This view receives corroboration from the way in which section 21 (2) has been interpreted by the Full Bench in *Veeranna* v. *Veerabhadraswami*(3) and in *Rangasami Aiyangar* v. *Somasundaram Chettiar*(4). The extent to which this theory of *implied* agency could be carried under similar circumstances is illustrated by a recent judgment of the Privy Council; see *National Bank of Upper India* v. *Bansidhar*(5). Besides the fact that Chinnayyadora was the managing member, we have also an important document in this case, namely, Exhibit T1, dated 8th March 1912. Its genuineness is proved by the writer himself who was examined as plaintiff's fourth witness and he has not been cross-examined

(1) (1902) I.L.R. 25 Mad. 220 (F.B.). (2) (1927) I.L.R. 6 Pat. 811.
(3) (1918) I.L.R. 41 Mad. 427 (F.B.).
(4) (1927) 54 M.L.J. 150. (5) (1929) L.R. 57 I.A. 1.

LAKSHMI NAIDU v. GUNNAMMA.

VARADACHARIAR J.

about it. That letter clearly shows that the mortgagee was pressing both the debtors for payment, and Bhimandora says that Chinnayyadora was going about making collections for the purpose of making payment to the mortgagee. When, following upon this, after a short interval, we find Chinnayyadora actually making the payment, it seems reasonable to infer that Chinnayyadora, who was undoubtedly the family manager, must have been acting on behalf of both and that, therefore, this is clearly a case of implied agency within the meaning of the decisions.

A further point has been raised by the learned Advocate-General that, because the entry of payment on Exhibit B does not purport to say whether it is for interest or principal, it is not sufficient to save limitation. This question may be material if the matter rested on oral evidence as to payment of interest; but where the payment is evidenced by a writing which is signed by the person making the payment, it makes no difference whether the payment is held to be for interest or for principal or for both; see *Hem Chandra Biswas* v. *Purna Chandra Mukherji*(1) and *Soumia Narayana Iyengar* v. *Alagirisami Iyengar*(2). In these circumstances we agree with the lower Court that the suit is not, to any extent, barred by limitation.

As regards the direction for costs in the lower Court's decree, it is no doubt true that in mortgage suits the amount of costs is usually directed to form part of the mortgage money to be realized by sale of the mortgaged property; but, when one of the defendants disputes the right of the

(1) (1916) I.L.R. 44 Calc. 567. (2) 1912 M.W.N. 754.

mortgagee or raises other contentions calculated to negative his right to maintain the suit, this rule cannot be insisted on. In this case the ninth defendant pleaded that the suit must fail in whole or in part for various reasons; and when these pleas have failed, the lower Court was right in directing that he and those who sided with him must pay the costs of the plaintiffs.

The appeal fails and is dismissed with costs of the plaintiffs-respondents.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Pandrang Row.

MARUDAMUTHU PADAYACHI (ACCUSED), PETITIONER,

v.

C. S. RAGHAVA SASTRI (PROSECUTION WITNESS No. 1), RESPONDENT.*

1934, September 5.

Criminal Procedure Code (Act V of 1898), ss. 342 and 537— De novo trial—Omission to examine accused afresh under sec. 342 not an illegality vitiating trial.

Omission to examine the accused under section 342, Criminal Procedure Code (Act V of 1898), afresh at a *de novo* trial is not an illegality which vitiates the trial, but is at the most an irregularity to which section 537 applies. Where there had been no prejudice to the accused and no miscarriage of justice in consequence of such omission,

held, that there was no ground for interference in revision.

Varisai Rowther v. *King-Emperor*, (1922) I.L.R. 46 Mad. 449 (F.B.), referred to.

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*Criminal Revision Case No. 324 of 1934 (Criminal Revision Petition No. 302 of 1934).