

Madras High Court

Bikkina Ramayya vs Adabala Seshayya And Ors. on 9 February, 1916

Equivalent citations: 34 Ind Cas 475

Bench: C Trotter, S Aiyar

JUDGMENT

1. The first point for consideration in this case is whether Exhibit A is a mortgage by conditional sale or a simple mortgage. If we are to apply the tests contained in Section 58, Clause (c), of the Transfer of Property Act, the document cannot be treated as evidencing a mortgage by conditional sale, because it does not purport to sell the mortgaged property. The only condition which provides for passing an absolute right is in these terms: Therefore in default of payment of any instalment in the aforesaid manner, the said entire mortgaged property shall be relinquished as if I had sold it to you." It is clear that there was no ostensible sale to the mortgagee which was intended to convey an absolute estate after the expiration of the prescribed period. See *Srinivasa Aiyangar v. Radhakrishna Pillai* 22 Ind. Cas. 54 : 38 M. 667 : 14 M.L.T. 547 : (1914) M.W.N. 81 : 26 M.L.J. 47 and *Hakeem Patte Muhammad v. Sheikh Davood* 30 Ind. Cas. 569 : 18 M.L.T. 209 : 29 M.L.J. 525 : (1915) M.W.N. 852. But it was contended for the respondents and we think rightly, that this document, should be construed with reference to the law as it stood before the Transfer of Property Act, It was held by the Judicial Committee in *Pattabhiramier v. Vencatarow Naicken* 13 M.I.A. 560 : 15 W.R. 35 (P.C.) : 7 B.L.R. 136 : 2 Suth. P.C.J. 410 : 2 Sar. P.C.J. 623 : 20 E.R. 660 that a document which was not ex facie a sale but only contained a covenant to give up all rights in the property as if it had been sold should be regarded as a mortgage by conditional sale. This view was re-affirmed by their Lordships in *Thumbusawmy Moodelly v. Hossain Rowthen* 2 I.A. 241 : 1 M. 1 : 3 Suth. P.C.J. 198 : 3 Sar. P.C.J. 531. At page 248 the definition of a mortgage by conditional sale by Mr. Justice Macpherson in his book is quoted with approval. According to that definition all that was required was that the borrower should not have made himself personally liable for the payment of the loan, and have covenanted that on default of payment of principal and interest on a certain date, the land pledged shall pass to the mortgagee. Applying these tests to the document in question we have come to the conclusion that Exhibit A is a mortgage by conditional sale.

2. The next question is whether the remedy given by the Transfer of property Act in Section 67 can be availed of by the parties to the document. It was contended that if the document is to be construed according to the canons of construction which prevailed before the Transfer of Property Act was enacted, the relief sought must be the one which was available before the Act came into force. We cannot agree with this contention. The right to a relief arising from a certain relation existing between parties is a matter of adjective law, and consequently the parties are entitled, when a new remedy has been provided by a new Act at the time when the relation subsists, to take advantage of that remedy in a Court of Law. This was the view taken by Mitter and Field, JJ., in *Pergash Koer v. Mahabir Pershud Narain Singh* 11 C. 582 and that has been approved by a Full Bench in *Bhobo Sundari Debi v. Rakhal Chander Bose* 12 C. 583, Wilson, J., says: It is a general rule in construing statutes that in matters of substantive right they are not to be so read as to take away vested rights, but that in matters of procedure they are general in their operation. I do not think we ought to conclude that the Legislature in the Transfer of Property Act meant to depart from the settled principle of legislation, unless that intention is shown beyond reasonable doubt." The other

learned Judges expressed the same view. *Kaveri v. Ananthayya* 10 M. 129 : 11 Ind. Jur. 138H and *Mata Din Kasodhan v. Kazim, Husain* 13 A. 432 accept this principle as sound. See also *Ganga Sahai v. Kishan Sahai* 6 A. 262 : A.W.N. (1884) 79. Our attention was drawn to the decision of the Judicial Committee in *Srinath Das v. Khetter Mohan Singh* 16 I.A. 85 : 16 C. 693 : 13 Ind. Jur. 132 : 5 Sar. P.C.J. 315. That was the case of a mortgage by conditional sale executed in the year 1865. Their Lordships of the Judicial Committee point out that the cause of action under the old law arose in February 1866 when the mortgagor's right to possession was determined, and that when the Act of 1882 came into force that right had become extinguished; and they consequently held that there was nothing in the Transfer of Property Act, Section 2, to revive a right which had become extinct. Reference may also be made to *Khunni Lal v. Gobind Krishna Narain* 10 Ind. Cas. 477 : 38 I.A. 87 : 15 C.W.N. 545 : 8 A.L.J. 552 : 13 Bom. L.R. 427 : 13 C.L.J. 575 : 10 M.L.T. 25 : 21 M.L.J. 645 : 33 A. 356 : (1911) 1 M.W.N. 432 and *Mahomed Mehdi Faya Tharia Topan v. Sakinahai* 17 Ind. Cas. 629 : 37 B. 393 : 14 Bom. L.R. 908. *Srinath Das v. Khetter Mohan Singh* 16 I.A. 85 : 16 C. 693 : 13 Ind. Jur. 132 : 5 Sar. P.C.J. 315 is only authority for the position that if when the new Act comes into force the right is not subsisting, the parties cannot avail themselves of the remedy given by the new Act. On the other hand, we have a catena of decisions under the Limitation Act and Section 6 of the General Clauses Act, which hold that if the right to sue is subsisting on the date of the new or amending Act, the remedy provided by it is available to the parties. See *Chidambaram Chetty v. Karuppan Chetty* 8 Ind. Cas. 543 : (1910) M.W.N. 711 : 9 M.L.T. 75 : 35 M. 678 and *Lala Sorri Ram, v. Kanhaiya Lal* 19 Ind. Cas. 291 : 40 I.A. 74 : 25 M.L.J. 131 : 17 C.W.N. 605 : 11 A.L.J. 389 : 13 M.L.T. 437 : (1913) W.W.N. 470 : 17 C.L.J. 488 : 15 Bom. L.R. 489 : 35 A. 227 (P.C.). It is true that the new Act cannot be applied to take away any vested rights to relief existing under the repealed Act. [See *Gopeshwar Pal v. Jiban Chandra Chandra* 24 Ind. Cas. 37 : 41 C. 1125 : 18 C.W.N. 804 : 19 C.L.J. 549.] But that will not be the effect of this case. In the present case although the document is of 1879, the cause of action accrued only in 1881. In very similar circumstances the Madras High Court in *Ammana v. Gurumurthi* 16 M. 64 : 2 M.L.J. 155 came to the conclusion that the remedy given by the Transfer of Property Act could be availed of. Apart from these decisions, we see nothing in Section 2, Clause (c), of the Transfer of Property Act to disentitle the parties from seeking the relief given by the Transfer of Property Act. It is a provision intended to preserve existing rights and not a disabling provision. That section appears to us to have been intended to preserve the earlier remedies if the parties chose to avail themselves of them, and not to take away the remedy given under the Act. In the view we have taken, the Article of the Limitation Act applicable to this suit is not Article 135, but Article 132 read with Section 31 of the Limitation Act and consequently the suit is not barred by limitation. The decision of the Courts below must be reversed and the suit remanded for disposal according to law. The costs will abide the result.