

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1901.
August, 21,
23.

BHIMARAJU CHETTI (PLAINTIFF), APPELLANT,

v.

SRI KUNJA BEHARI GAJENDRA DEVU AND OTHERS
(DEFENDANTS), RESPONDENTS.*

Mortgage—Construction of deed—Mortgage quā zamindār—Right of mortgagor in village not held quā zamindār—Absence of express provision in deed charging such right—Not comprised in mortgage.

By a deed of mortgage, dated 22nd October 1892, a zamindar mortgaged to plaintiff his entire zamindari, which was recited as yielding a certain annual income, together with the zamindar's "entire right and income and the kattubadis on enfranchised inams." The schedule specified by name the villages constituting the zamindari, one of these being the village of Sabuliya. The only right, title and interest possessed by the zamindar in this village, (which was an inam village of certain Payaks), was to the annual payment by the inamdars of a fixed kattubadi, and the amount of this kattubadi was all that was included in the approximate annual income specified in the schedule. At the date of the mortgage to plaintiff, the zamindar also possessed a mortgage right over this village, he being the assignee of a mortgage which had been executed by the Payaks, (the inamdars), in 1874, the assignment having been made to him in 1889. In a suit brought against the zamindar in 1888 by plaintiff, on his mortgage, plaintiff contended that the deed operated to assign to him, by way of mortgage, not only the zamindar's right to kattubadi in respect of the village of Sabuliya, but also the mortgage right possessed by the zamindar over that village :

Held, that the zamindar's mortgage right over the village Sabuliya was not comprised in the mortgage.

Rooke v. Lord Kensington, (25 L.J., (Ch.), 795), referred to.

Sure for money due on a mortgage. Plaintiff alleged that the father of first defendant, acting for himself and as guardian of first defendant, had executed in plaintiff's favour a mortgage over the zamindari of Palur for Rs. 90,000, which sum had been duly advanced ; that first defendant's father had died two years prior to the suit without discharging the debt or any portion of it ; and that first defendant, who had succeeded to the zamindari, was liable for the debt, and that defendants Nos. 2 to 8 were also mortgagees of portions of the zamindari, some of them holding prior and some subsequent mortgages. He alleged that a village of the name of

* Appeal No. 62 of 1900 against the decree of F. Murray, District Judge of Ganjām, in Original Suit No. 9 of 1899.

Sabuliya, being one of those mortgaged to plaintiff, had been sold at a date subsequent to plaintiff's mortgage at a Court auction at the instance of ninth defendant, in execution of a decree obtained in Original Suit No. 44 of 1894, by first defendant's father against certain Payaks, who claimed to be the owners of the village, and that it had been purchased by ninth defendant, who was accordingly impleaded in this suit. Plaintiff claimed that whatever interest first defendant's father might have had in the said village had become mortgaged to plaintiff, under his mortgage deed, and that the interest which ninth defendant had acquired in the village must be subject to plaintiff's interest. He asked for a decree directing payment of the mortgage amount together with interest, and in default of payment, that the mortgaged property should be sold subject to certain mortgages which plaintiff admitted were prior to his own. First defendant put plaintiff to proof of his allegations. Defendants Nos. 2, 5, 6 and 7 filed statements which are not material to the point decided. Ninth defendant claimed the village of Sabuliya by virtue of his purchase at the Court sale. He alleged that the Payaks, as the original owners of that village had mortgaged it with possession to one Brindavana Doss for thirty years; that Brindavana Doss had died ten years after the date of that mortgage; whereupon, in 1889, his son and widow had assigned the mortgage to the zamindar of Palur, who, being out of possession, brought Original Suit No. 44 of 1894 on the mortgage bond, and obtained a decree in 1895. This decree had been assigned by the zamindar in 1896 to ninth defendant, who executed it in 1897, brought the village to sale, and purchased it in 1898 in a Court auction. He contended that the zamindar had no right to mortgage this village to plaintiff, and, in fact, had not done so, and that the mortgage deed executed in plaintiff's favour did not purport to mortgage or assign to plaintiff the zamindar's limited interest, as mortgagee, in the village. He asked that it should be exempted from liability under plaintiff's mortgage.

The mortgage deed which bore date the 22nd October 1892 commenced with the words "Deed of mortgage in respect of a zamindari," and after reciting the objects for which the loan was raised, and giving various undertakings, continued as follows:—
"In respect of the principal, interest, &c., of this document are mortgaged the following:—The entire zamindari of Palur, which

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is situate in Chattrapur Sub-Registry of Ganjam district, which has passed to our possession from our ancestors, which is in our possession and enjoyment, which yields an annual income of about Rs. 9,975, which is described in detail in schedule No. 1 herein, on which is payable annually a peishkush of Rs. 22 and a land-cess of Rs. 463, and which bears zamindari patta No. 364, together with the hills, jungles, cultivated and uncultivated lands, gardens, sources of irrigation, &c., as well as with our entire right and income and the kattubadis on enfranchised inams,—these are mortgaged to you subject to the mortgages mentioned in schedule No. 2, but they are retained in our possession.”

The second schedule specified twenty-nine villages by name, the fourteenth being that of Sabuliya. Further facts relating to this village and the rights possessed by the zamindar in respect of it, are to be found in the judgment of the High Court.

The fifth issue was:—“ Whether plaintiff possesses the rights of a sub-mortgagee over the village of Sabuliya and whether the same is not entitled to priority over the ninth defendant’s subsequent purchase at the Court sale in Original Suit No. 44 of 1894 on the file of this Court? ” On this issue the District Judge found as follows:—“ The plaint bond purports to and does assign to plaintiff all the zamindar’s right, title and interest of whatever nature in the whole of his zamindari and every part of it ; it must therefore be concluded to embrace what those rights are in Sabuliya village. Even ninth defendant by his vakil admits that this village is an inam village over which, however, (*vide* exhibits I and IA), the zamindar has the right of collecting kattubadi. Defendant No. 9 objects that it was mortgaged in the plaint bond (exhibit A) as a jirayati village and this may have been done so under a mistake for it is not a jirayati one, and plaintiff himself in the box admitted he knew nothing about this village, as it was his clerk who made inquiries. The zamindar having original kattubadi right which he has never been divested of, afterwards acquired the inam right in 1889 and by decree in Original Suit No. 44 of 1894 got a decree for the village and transferred it to ninth defendant, but this transfer would not do away with the zamindar’s right to collect kattubadi, and as the zamindar mortgaged all his rights to the plaintiff, it follows that plaintiff has a mortgage lien on this right also. Thus, no doubt, so far, plaintiff would be in the position of a sub-mortgagee—*vide Muthu Vijaya*

Raghunatha Ramachandra Vacha Mahali Thurai v. Venkatachallam Chetti(1). It is quite clear, therefore, the Sabuliya village cannot go free from plaintiff's claim. The suit deed was drawn up in 1892, long before the ninth defendant came on the ground with his transfer decree and obtained what rights he did obtain in the village. I, therefore, pass to my finding on the fifth issue, which is that plaintiff possesses the rights of a sub-mortgagee in Sabuliya village to the extent that he may collect the kattubadi therefrom and that in so doing he is entitled to priority over the ninth defendant's subsequent purchase at the Court sale in Original Suit No. 44 of 1894 on the file of this Court, so far as that right to collect kattubadi extends."

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He decreed in plaintiff's favour for payment of the amount claimed, and in default of payment within six months that the mortgage property be sold subject to the prior mortgages admitted by plaintiff.

Against this decree plaintiff preferred this appeal.

Sundura Ayyar for appellant.—At the time of the mortgage to plaintiff the zamindar held a mortgage of the village of Sabuliya. This village is included in the schedule of properties appended to the mortgage deed. It was described as a jirayati village. The question, therefore, is whether the zamindar's right as mortgagee of the village was also mortgaged to plaintiff or, in other words, whether plaintiff is a sub-mortgagee under the zamindar of the village of Sabuliya, besides being the mortgagee of the kattubadi payable to the zamindar in respect of it. The plaintiff contends that both rights have passed to him, under the deed, as mortgagee. The words "entire right and income" show that not only rights *quâ* zamindar, which were sufficiently described by the preceding words, but also all rights possessed by the zamindar at the time, whether they were *quâ* zamindar or not, within the limits or ambit of the zamindari, passed to the plaintiff. What was meant by the document read as a whole was that all the rights of the mortgagor within the geographical limits were thereby mortgaged. The fact that the title-deeds of the zamindar's mortgage right were not handed over to plaintiff cannot affect him. If, on a construction of the document, the plaintiff was entitled to the full rights in the village, they cannot be cut down by this

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circumstance only. [He cited *Early v. Rathbone*(1); *Land Mortgage Bank of India v. Abul Kasim Khan*(2); *Mohunt Kishen Geer v. Busgeet Roy*(3).]

V. Krishnasami Ayyar and *V. Ramesam* for respondent (ninth defendant).—The schedule to the mortgage deed shows that the income of the village of Sabuliya and thirteen other villages is Rs. 3,000. It is therefore clear that the right to take kattubadi alone was meant and the description in another column referring to Sabuliya as jirayati is erroneous. The mortgage instrument was headed “zamindari mortgage.” This clearly shows that rights of the zamindar alone, *quâ* zamindar were mortgaged. Again it is clear that as the mortgage debts owed by the zamindar were specifically mentioned in another schedule to the instrument, those owing to him would have been mentioned if they had been intended to be affected by the instrument. The reference to the number of the patta, the peishkush and the permanent settlement shows also that rights *quâ* zamindar (excluding inams) were mortgaged. The special reference to “kattubadi on enfranchised inams” made in the instrument, is superfluous if the geographical limits were meant by the preceding description. [Reference was made to *Rooke v. Lord Kensington*(4); *Chapman v. Gatcombe*(5); *Francis v. Minton*(6).]

JUDGMENT.—The instrument of simple mortgage, dated 22nd October 1892, on which the suit is brought by the plaintiff, the mortgagee, for the recovery of the mortgage debt by sale of the mortgaged property, purports to be a zamindari mortgage, the property mortgaged being the zamindari of the mortgagor, described in schedule No. 2 annexed to the mortgage instrument. The operative part of the instrument of mortgage runs as follows:—

“In respect of the principal, interest, &c., of this document are (mortgaged) the following:—The entire zamindari of Palur, which is situate in Chattrapur Sub-Registry of Ganjâm district, which has passed to our possession from our ancestors, which is in our possession and enjoyment, which yields an annual income of about Rs. 9,975, which is described in detail in schedule No. 2 herein, on which is payable annually a peishkush of Rs. 22 and a land cess of Rs. 463, and which bears zamindari patta No. 364,

(1) 58 L.T., 517.

(3) 14 W.R., (C.R.), 379.

(5) 5 L.J., (C.P.), 93.

(2) I.L.R., 26 Cal., 395.

(4) 25 L.J., (Ch.), 795.

(6) L.R., 2 C.P., 543.

together with the hills, jungles, cultivated and uncultivated lands, gardens, sources of irrigation, &c., therein, as well as with our entire right and income and the kattubadis on enfranchised inams, —these are mortgaged to you subject to the mortgages mentioned in schedule No. 2, but they are retained in our possession.”

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Schedule No. 2 specifies the twenty-nine villages constituting the zamindari, with the approximate extent and yearly income thereof; one of such villages (No. 14) being Sabuliya. That village is an inam village of certain Payaks, in which the only right, title and interest which the mortgagor, as zamindar of Palur, possesses, is to the annual payment, by the inamdars, of a fixed kattubadi of Rs. 70, and apparently this is all that is included in the approximate annual income specified in the above schedule. At the date of the mortgage, the zamindar also possessed a mortgage right in the said village, being the assignee, apparently, of a simple mortgage, made in 1874, by the Payaks, the inamdars, to one Brindavana Doss, who in 1889 assigned the mortgage to the zamindar.

The only question raised and argued in the appeal is whether, so far as the village of Sabuliya is concerned, the only interest therein, which was assigned by way of mortgage, to the plaintiff, is the zamindar's right to kattubadi, or also the mortgage right possessed by the mortgagor, as assignee of the mortgage granted by the inamdars. It is contended on behalf of the appellant that he is a sub-mortgagee, under the zamindar, of the village of Sabuliya, besides being the mortgagee of the kattubadi payable to the zamindar in respect of it. The question we have to decide is, whether the property mortgaged is the zamindari estate of Palur, or the properties of the mortgagor, situate within the territorial limits of the zamindari. The plaintiff in his evidence admits that he was neither informed, nor otherwise aware of the mortgage interest, which the zamindar had in the above village of Sabuliya; but that whatever rights were possessed by him in the said village were mortgaged to him. He also says in his evidence that he cannot say whether the zamindar handed to him the mortgage deed executed by the inamdars and the deed assigning that mortgage to him. There is little doubt that those documents were not handed to the plaintiff, but retained by the zamindar himself. The zamindar, as assignee of that mortgage, brought a suit against the Payaks, the inamdars, in Original Suit No. 44 of 1894, and obtained a decree on the footing of that mortgage. The ninth

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respondent obtained an assignment of that decree and, in execution thereof, became the purchaser, in 1898, of the village of Sabuliya. The plaintiff was not a party to the said suit, and unless the zamindar acted fraudulently in bringing the said suit to enforce the mortgage granted by the inamdars, it is clear that the zamindar did not consider that he had sub-mortgaged the village to the plaintiff. Though the zamindar did not intend to assign his mortgage right in the village by way of sub-mortgage to the plaintiff and he did not consider that he had done so when he brought Original Suit No. 44 of 1894, and though the plaintiff himself was not aware of the mortgage right which the zamindar had in the said village and did not obtain possession of the original mortgage deed, yet, if it appeared clearly, from the instrument of mortgage, that all the interests possessed in fact and law by the mortgagor, in the village of Sabuliya, were assigned to the plaintiff by way of mortgage, it is immaterial that the zamindar did not really so intend and that the plaintiff was not aware of the exact interest which the zamindar had in that village. The determination of the question therefore depends mainly upon the right construction of the instrument of mortgage. The transaction purports to be a simple mortgage of the zamindari of Palur, which bears zamindari patta No. 364, and which has passed to the possession of the zamindar from his ancestors, yielding an annual income of about Rs. 9,975 (the particulars of which are given in schedule 2 appended to the mortgage instrument), subject to a fixed peishkush of Rs. 22, together with the hills, jungles, cultivated and uncultivated lands, gardens, sources of irrigation, &c., therein, as well as with the zamindar's entire right and income and the kattubadi on enfranchised inams. It is clear that the entire zamindari of Palur, bearing patta No. 364 and subject to a peishkush of Rs. 22, which was mortgaged, is the estate of Palur, which was permanently settled on zamindari tenure under Regulation XXV of 1802. The village of Sabuliya was at the time of the permanent settlement, a jaghir or inam held by the Payaks, subject to the payment of a kattubadi to the zamindar. Under the said Regulation, the permanent settlement was exclusive of the inam (*vide* section 4), and included only the kattubadi, which alone was taken as part of the assets of the zamindar.

The interests which the mortgagor possessed in the village at the time of the mortgage, were two-fold—one, the right to the

payment of the kattubadi, and the other, his right as a simple mortgagee under the Payaks, the inamdars of the village. The former right alone, belonged to him *quâ* zamindar, and was an incident of the zamindari tenure and would be comprised in the expression—"with our entire right and income"—occurring in the mortgage instrument. The latter right, as mortgagee, he did not possess, *quâ* zamindar, and it was not an incident of the zamindari tenure, *i.e.*, of the estate as permanently settled under the Regulation. It is evident that the zamindari of Palur is referred to in the mortgage deed, as an estate permanently settled, subject to the payment of a fixed peishkush and not in a geographical sense, as comprising every kind of right, title and interest, which the mortgagor may have possessed, within the local limits of the zamindari. This is placed beyond all reasonable doubt, by the express inclusion in the mortgage of kattubadis or quit-rents payable on enfranchised inams, situate within the zamindari limits. Such quit-rents, which were imposed when the inams were enfranchised in this Presidency, are payable to Government, but the right to collect the same appears to have been assigned by Government for administrative reasons to the zamindar himself, in consideration of his undertaking to pay to Government an amount equal to 90 per cent. of such quit-rents, the remaining 10 per cent. being intended as compensation for the trouble and risk involved in the collection of the quit-rent. If the expression "with our entire right and income" had reference to the zamindari in its geographical sense, and not merely to the estate held on zamindari tenure, the express inclusion of quit-rents on enfranchised inams would be superfluous. But, as the right he had to such quit-rents was not possessed by him, *quâ* zamindar, and it did not form an appurtenance of the zamindari, it had to be expressly included, to give effect to the intention of the parties, that the mortgage should comprise also the right to such quit-rents. The parties, therefore, would also have expressly included the zamindar's simple mortgage right in the village of Sabuliya, if their intention was to include that right also in the mortgage. This construction of the instrument of mortgage receives support from the conduct of the parties, in that the plaintiff did not obtain possession of the original mortgage deed, and in that the zamindar himself subsequently brought a suit upon the mortgage deed against the Payaks in Original Suit No. 44 of 1894. If the instrument in question had

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been an outright sale of the zamindari and not a mere mortgage, it could hardly be seriously contended that the zamindar's mortgage interest in the village would pass under such conveyance.

The case of *Rooke v. Lord Kensington*(1), which was cited on behalf of the respondent, is a strong authority in support of his contention. In that case, Lord Kensington, the mortgagor, after specifying certain properties, which were mortgaged, also conveyed by way of mortgage, "all other, the lands, tenements and hereditaments (if any), in the County of Middlesex." At the date of the mortgage, the mortgagor was seized in fee of a manor at Killahan in the County of Middlesex; and the question arose whether the mortgage instrument conveyed to the mortgagee that manor also. It was held that it did not, Vice-Chancellor Wood observing as follows:—"I think the clear intent and purport must be held to be simply a sweeping in of other property *ejusdem generis* with the property which had been so conveyed, if any there should be; certainly not to include a copyhold property, and manorial rights in property of a totally different character from anything attempted to be conveyed or specified throughout the deed."

The appeal fails and is dismissed with costs.

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Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

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 March 20.

KOTAPPA (PLAINTIFF), APPELLANT,

v.

VALLUR ZAMINDAR (DEFENDANT), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, art. 116—"Contract in writing registered" signed by one party thereto—Plaint—Sufficient disclosure of cause of action.

During the course of certain litigation in which B was suing A on a promissory note a compromise was arrived at under which A undertook to execute

(1) 25 L.J., (Ch.), 705.

* Second Appeal No. 1454 of 1899, against the decree of P. S. Gurnamurthi Ayya, Subordinate Judge of Kistna, in Appeal Suit No. 543 of 1898, reversing the decree of A. Ramaswami Sastri, District Munsif of Masulipatam, in Original Suit No. 336 of 1896.