

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Immudipattam Thirugnana S. O. Kondama Naik and Another v. Periya Dorasami and Another, and of Immudipattam Thirugnana, S. O. Kondama Naik and another v. Periya Dorasami (Consolidated Appeals), from the High Court of Judicature at Madras; delivered 8th December 1900.

Present at the Hearing :

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The subject of this litigation is the impartible Zemindary of Ayakudi. In the year 1882 Ovala was its owner. Transactions then took place by virtue of which Thirugnana, his nephew, claims to be owner. He, along with his minor son, is the substantial Defendant below and now Appellant. Afterwards in the year 1883 Periya, the Plaintiff below and now Respondent, was born to Ovala by his wife Angammal. He also claims to be owner by inheritance from his father who died in the year 1890.

There are in fact two suits, Nos. 53 and 54 of 1895. But the only difference between them is that the bulk of the property which is comprised in one suit, is subject to a mortgage which the Plaintiff seeks to redeem: and that a small portion of it, consisting of the palace, the temple, and some endowments, comprised in the other suit, is not so subject. The question in both

suits is the same, viz.: What was the effect of the transactions in the year 1882? Other issues have been raised, but have not been urged at this Bar. The Subordinate Judge decided in favour of the Defendant. The High Court decided the other way; and the Defendant appeals from their decision.

Ovala came to the Zemindary in the year 1872 by transfer from his father, who declared himself to be old and unable to manage the affairs. He seems to have been no more capable than his father, and in his hands the debts of the estate, which were large before, became larger. In the year 1879 he executed an usufructuary mortgage by way of lease for 19 years to one Ramanathan Chettier in consideration of advances of money and of a sum of Rs. 3,000 per annum to be paid by the mortgagee for the maintenance of the family. Debts however went on increasing, and on the 4th November 1882 a new arrangement was made with Lakshamanan Chettier, who was the heir of Ramanathan and is the present mortgagee.

The deed of that date is a deed poll executed by (1) Ovala the Zemindar. (2) His brother Karutha. (3) The Defendant Thirugnana son of Karutha and (4) another son of Karutha: and addressed by them to the mortgagee Lakshamanan. It commences by stating the "particulars of our having usufructually mortgaged the Zemindari to him for " Rs. 2,47,000." It gives an account of the debts affecting the estate, of which much the largest is the debt already due to Lakshamanan. Other subsequent items amount to about Rs. 65,000, all of which the four parties to the deed declare to be due by them. Among them is specified " Rs. 10,000 borrowed from you on " this date in order that, after a settlement of " the differences existing between the members

“ of our family, the same might be paid as a re-
 “ compense to the said I. Ovala Kondama Naiker
 “ Aiyan Avergal, one of us, for his transferring
 “ even now the right to Ayakudi Zemin and
 “ Rettayambadi Mitta to I. Thirugnana Sam-
 “ manda Ovala Kondama Naiker Aiyan Avergal
 “ and his addressing an arzi to the Collector
 “ of Madura District stating the said fact.”

The parties then state that they had im-
 portuned the mortgagee to take an usufructuary
 mortgage on the estate in lieu of interest on his
 debt, that he had kindly agreed to do so, and
 that they had conveyed 28 villages with their
 incidents or appurtenances to him. They stipu-
 late that he shall pay the peshcush and road cess
 to Government, and also an allowance “ for our
 “ maintenance at the rate of Rs. 270 per mensem.”
 Clauses 24 and 25 are as follows :—

“ 24. We shall not only inform the Collector of the Madura
 “ District, the Sub-Collector of the Dindigul Division and the
 “ Tahsildar of the Palni Taluk by means of arzis and yadast
 “ that a conveyance on usufructuary mortgage has been made
 “ to you and that all the proceedings in revenue matters should
 “ be conducted in your name, but also cause the said fact to be
 “ published by means of proclamation in the villages.

“ 25. As soon as the above-mentioned mortgage amount, the
 “ amount spent by you on repairs and the amount of expenses
 “ incurred by you in suits, are paid in full at the end of any
 “ Fusli either by all of us jointly or by I. Thirugnana
 “ Sammanda Ovala Kondama Naiker Iyen Avergal, you should
 “ surrender the said Zemin and the Mitta to I. Thirugnana
 “ Sammanda Ovala Kondama Naiker, one of us.”

The arzis contemplated in the deed were
 presented by Ovala on the 7th November. One
 is addressed to the Deputy Collector of Madura
 as follows :—

“ As besides being too old and infirm to bear and manage
 “ our two Zemindaris of Ayakudi and Rettayambadi and all
 “ other immovable and movable properties appertaining thereto
 “ and the duties of Hukdar of Pachala Naickenpatti village
 “ attached to Sri Agobalesvara Perumal Devasthanam, we
 “ are also issueless, we have transferred the right to Immudi-
 “ pattam Thirugnana Sammanda Ovala Kondama Naiker, who
 “ is the eldest son of our brother Karutta Kondama Naiker and
 “ who is the next heir to get the said Zemin and all other
 “ possessions, and have at this very moment delivered the said

“ Zemin and all other possessions into the hands of the said
 “ Thirugnana Sammanda Ovala Kondama Naiker after entering
 “ into an arrangement with him that he should be paying us
 “ month by month at the rate of Rs. 250 per mensem for the
 “ maintenance of ourself and those attached to our family.
 “ Therefore, I request that the name of the said Thirugnana
 “ Sammanda Ovala Kondama Naiker may be entered in the
 “ register and that orders may in future be issued for con-
 “ ducting all the revenue proceedings through him as the
 “ Zemindar for the Zemins and as Hukdar for the Devasthanam
 “ in our place.”

The other is addressed to the Collector of Madura in similar terms.

On the 17th November Ovala made a statement before the Tahsildar of Palani Talook, which is in the following terms :—

“ The Arzi, dated the 7th instant, now read and shown is
 “ the one addressed by me to the Sub-Collector. I have also
 “ written to the Collector on the said date. As I have
 “ surrendered to my brother's son Thirugnana Sammaada
 “ Ovala Kondama Naiker, son Kondama Naiker, the villages
 “ and all other possessions attached to the Zemin, in consequence
 “ of my inability to look after all the affairs relating to the said
 “ Zemin and for other reasons as stated in the said Arzi, all
 “ proceedings relating to the Government should, in future,
 “ be conducted through him.”

After this was signed by Ovala and the Tahsildar, another question was put to Ovala, to which he answered “ I have no issue,” and this again is signed by him and the Tahsildar.

These are the transactions relied on by the Defendant to prove the transfer under which he claims. It is not disputed that according to the law established at this time such a transfer could not be effected except by a registered deed. The arzis and the statement made to the Collector clearly do not bear any such character. Mutation of names in the Collector's books seems to have been effected in the year 1888; though possession of the 28 villages has always been with the mortgagee, and it does not appear that Ovala was ever put out of possession of the other property. But even if a complete change had been effected in these respects, it would at the utmost do no more than give a starting point for

the law of limitation. It would not supply the conditions of the law of transfer.

The Subordinate Judge would not allow the Plaintiff the benefit of this law because he had not made it the subject of express pleading and issue. In this he was wrong, because the party who relies on a transfer must prove it, and the second issue, as the High Court point out, raises the question whether by the stated arrangements the property had passed to the Defendant.

The question then is whether the mortgage effects the alleged transfer. Directly, it does not. It contemplates such a transfer and an arzi stating the fact, and it requires that the mortgagee, if paid off either by all the family or by the Defendant, shall surrender to the Defendant. But both in form and in substance it is a transaction between the family and the mortgagee and not one between the several members of the family.

The Defendant's case is then put in a different way, and this is the point principally argued at the Bar. It is contended that though the mortgage may fall short of an actual transfer it shows a good contract for one and that the Defendant may now call upon Ovala's heir to implement that contract. Certainly if such a right exists it would be an answer to the Plaintiff's claim and the exact form in which it could be enforced need not be considered. The High Court held it to be fatal to the Defendant that his case was not put in that way in the Court below, and that no evidence was tendered upon it. Clearly it was for the Defendant to allege a contract between himself and Ovala, founded on valuable consideration, that Ovala should cease to be owner and that he should become owner. In the absence of such an allegation the circumstances which led Ovala to execute the mortgage and to present the arzis have not been examined.

If the documents in proof contained on their face clear evidence of a valuable consideration passing to Ovala, it would have to be considered whether it was open to the Defendant to make such a case on appeal. Mr. Mayne has argued the case very fully on the supposition that it is open. So treating it, their Lordships cannot find that the existence of a contract for valuable consideration between the Defendant and Ovala is proved by the mortgage deed. It is suggested that the transfer was part of a general family arrangement; but there is no proof of that. It is contended that the family were making themselves liable for payment to the mortgagee. But, as the High Court point out, the family was a joint family, and the estate a joint estate, though impartible; and the object was to strengthen the mortgagee's title, not to effect changes in the family. It did not signify to the mortgagee whether the estate when redeemed went back to Ovala or to the Defendant. All wished to save it from sale, and in the then position of Ovala it was likely that either his brother Karutha or his nephew the Defendant would be Zemindar on his death. No reason is given why a transfer of interest from the uncle to the nephew should form part of a joint effort by the family to keep the estate in the family. If there was any reason it should have been alleged and proved.

As to pecuniary benefits accruing directly to Ovala only two are mentioned. One is the pension of Rs. 250; which is only a continuance of a similar payment by Ramanathan, and which is for the maintenance of all the members of the family. The other is the sum of Rs. 6,000 said to be given to Ovala as a recompense for his transfer of the property. But there is no evidence that this recompense ever really reached Ovala's hands, and the documents give reason for doubting it. It was to be paid

“after a settlement of the differences existing between the members of our family.” No evidence has been given of any such settlement. To treat the intended payment as the consideration for Ovala’s transfer is inconsistent with his arzis presented three days later and with his statement to the Tahsildar made thirteen days later. In none of these documents does he allude to the receipt of money, except that he is to have Rs. 250 per mensem for maintenance of himself and family. The reasons he assigns for the transfer are that he is infirm, that he has no issue, and that Thirugnana is the next heir. If there had been any substance in the allegation that the mortgagee had paid Rs. 6,000 to Ovala as consideration for transferring the estate, it is inexplicable that it should not be mentioned in the arzis which were intended to effect the legal transfer.

With such imperfect evidence on the face of the documents it was imperative on the Defendant that in order to avail himself of an antecedent contract he should by his pleadings and evidence have put it in a proper course of trial. Not having done so, he has been rightly adjudged to have failed on that issue.

The case is not free from obscurity or difficulty. But their Lordships think that the High Court has arrived at the sound legal conclusion, viz., that though there may have been an intention to transfer the property it never was effected in the mode required by law; and that the intended transferee cannot now call for implement of the intention because he fails to show any contract founded on valuable consideration.

The mortgagee has been added as a Respondent in these Appeals. Mr. Mayne now asks that he may be relieved from paying that Respondent’s costs, because, as nobody

sought to attack his interests, he need not have appeared. The mortgagee is clearly interested to watch the litigation in the redemption suit; but he has judiciously kept himself from doing more; treating the controversy between the cousins as a matter indifferent to himself. It is quite possible that arrangements might have been made with him to dispense with his appearance. But none have been made; and he appears here, maintaining the same attitude of neutrality as before. The Appellants say that they were obliged to bring the mortgagee here as a matter of procedure. If so, it is one of the necessary incidents of the Appeal, and the costs of it must be taken as part of the costs of this Appeal.

In giving the foregoing reasons their Lordships have not distinguished between the more important suit for redemption, and the other for possession. The result in both is governed by substantially the same considerations, and the cases have been so treated by the High Court. Their Lordships will humbly advise Her Majesty to dismiss both Appeals as against both Respondents, whose costs the Appellants must pay.
