
(2000) 09 MAD CK 0072
In the Madras High Court
Case No : L.P.A. No. 167 of 1997

A. Gnanam

APPELLANT

Vs

Palaniappa and Co. and Others

RESPONDENT

Date of Decision : 07-09-2000

Acts Referred:

Transfer of Property Act, 1882 — Section 59A, 60

Citation : AIR 2001 Mad 14 : (2001) 1 LW 630 : (1998) 1 LW 724

Hon'ble Judges : V.S. Sirpurkar, J;V. Kanagarj, J

Bench : Division Bench

Advocate : V. Shanmugham, for the Appellant; S.V. Jayaraman, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Sirpurkar, J.—An interesting question of law falls for consideration in this Letters Patent Appeal and that is :

"Whether a mortgagor, who has been divested of his title to the mortgaged property by a stranger, still retains his right of redemption in respect of that property so as to be able to assert that right against the said stranger as also the mortgagee?"

2. Following factual panorama will help to understand the controversy in a better manner :

(i) The lis in this present appeal, started by way of an original suit, O.S. No, 57 of 1986, filed by the appellant/plaintiff, is that plaintiff alone was entitled to redeem the mortgage dated 16-2-1973 in respect of the property mentioned in the schedule. He also prayed for an injunction, restraining the 1st defendant--M/s. Palaniappa & Co. -- from interfering with the right, title and interest of the plaintiff to redeem the mortgage, which the plaintiff had made in favour of the 2nd defendant. He, in this, also sought the possession of the suit property. The plaintiff had also asked for the incidental relief of costs and such other reliefs

which the Court would deem fit and proper in the circumstances of the case.

(ii) The plaintiff had averred that he was the owner of the suit schedule property and the same was mortgaged to the 2nd defendant--Union Bank of India, Thiruthangal Branch (hereinafter referred to as "the bank") by deposit of title deeds and thus it was an equitable mortgage. It was also averred that in pursuance of this, a civil suit (O.S. No. 140 of 1978) was filed by the Bank and obtained a preliminary decree on 6-11-1978 and a final decree on 2-4-1980. It is also pointed out that long before the institution of this suit, the 1st defendant had filed O.S. No. 61 of 1975, seeking to recover money and this was a simple money suit. This suit was filed in Sub-Court, Ramanathapuram and even before the suit by the 2nd defendant was instituted, the 1st defendant had obtained a simple money decree. In execution of the said money decree, the 1st defendant filed execution proceedings (E.P, No. 45 of 1985) for the attachment and sale of the mortgaged property and thereafter, the 1st defendant itself purchased the said property in a Court auction on 26-4-1989. It is then pointed out that in pursuance of the decree passed in its favour, the bank also filed an execution petition for sale of the same property and that the 1st defendant was attempting in that execution to interfere with the right of redemption on the part of the plaintiff, It was also alleged that the bank was joining hands with the 1st defendant and it was for this purpose, the present declaration suit had been filed.

(iii) The suit was opposed by the 1st defendant by pointing out that the property was purchased by the 1st defendant and was sold in a Court auction which was held after the due notice to the plaintiff and the sale was sought to be set aside by the plaintiff by making an application under O. 21, Rule 90, C.P.C., but the said sale became confirmed as the said petition under Order 21, Rule 90, C.P.C. was itself dismissed In default and there was no challenge thereafter to that dismissal. It is pointed out that even the possession was taken through Court and on the possession receipt, both the plaintiff and her husband had put their signatures. It is pointed out that since the plaintiffs-husband requested time for vacating the suit property, six months" time was granted and in the meanwhile, the present suit was filed. It was specifically pleaded that whatever rights the plaintiff had were lost by the Court sale and that the 1st defendant had stepped into the shoes of the plaintiff having purchased all the rights in the Court sale and, therefore, there was no question of the right of redemption remaining with the plaintiff. Additionally it was pointed out that the said property was put to sale in the execution proceeding brought by the Bank through one Chockalingam and he was a necessary party to the suit and in his absence, the suit was liable to be dismissed.

(iv) The 2nd defendant also opposed the suit contending that the plaintiff was not entitled to redeem and that the suit itself was without any good faith.

(v) By way of a reply, the plaintiff pleaded that u/s 60 of the Transfer of Property Act, the right of redemption was not lost at all.

3. On the pleadings, parties went to trial and, after considering the evidence, both documentary as well as oral, the trial Court came to the conclusion that the suit was not maintainable and the plaintiff had no right of redemption and that she had the entire right, including the right of redemption, in favour of the 1st defendant. The trial Court also held that the suit was barred u/s 47, C.P.C.

4. An appeal came to be filed wherein, only two questions came to be tried. They being: (i) was the plaintiff entitled to redeem the mortgage and have the sale set aside by exercising her right of redemption; and (ii) was the suit barred u/s 47, C.P.C.? The appellate Court came to the conclusion that though the suit was not barred u/s 47, C.P.C., the plaintiff/appellant had lost her right of redemption of the property as the plaintiff was divested of the property because of the Court sale held in favour of the 1st defendant and which sale was ultimately confirmed and which confirmation ultimately undisturbed because of the dismissal of the application of the plaintiff under Order 21, Rule 90, C.P.C.

5. It is a common ground that the property originally was owned by the plaintiff and the plaintiff had created an equitable mortgage on 16-2-1973 in favour of the 2nd defendant-Bank and that the bank had filed a suit to recover the amount by sale of the mortgaged property and the preliminary decree was passed on 6-11-1978, while the final decree on 2-4-1980. It is also an admitted position that the 1st defendant had already obtained a decree for money against the plaintiff in an independent transaction. He also attached the property and brought the same for sale, which sale was conducted on 26-4-1983. Thus, the sale in favour of the 1st defendant was after the 2nd defendant-bank had obtained a decree in its favour and before the money due to it was paid. It is also an admitted position that after the sale in favour of the 1st defendant was over and finalised, the bank executed the decree and put the property for sale, which was purchased by Ohockalingam and the sale in whose favour is not yet finalised due to Court orders and that the said Chockalingam is not a party to the present suit.

6. The learned single Judge took the view firstly, that before a sale in pursuance of a mortgage decree becomes final, it could be set aside at any time. For this, the learned single Judge relied on various judgments of the Supreme Court and also the Privy Council and relied on the interpretation of Section 60 of the Transfer of Property Act made in those judgments. The learned single Judge held that it was possible on the part of the mortgagor to get a sale in pursuance of a decree in a mortgage suit set aside as the right of redemption could be extinguished only (i) by the act of parties or (ii) by a decree of the Court. The learned single Judge pointed out that there was no question of any act of parties involved nor was it the question of any decree having been passed by the Court extinguishing the right of redemption in this case. So far, the learned single Judge seems to have found in favour of the plaintiff. However, in paragraph 17 of his judgment, the learned Judge posed the question whether the plaintiff can exercise this right of redemption once it was an admitted position that the said right was sold in Court auction and purchased by the 1st defendant (who was a

stranger to the mortgage). Relying on the language of Section 59-A, the learned single Judge went on to hold that unless and otherwise expressly provided, references in Chapter IV to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively. It was further held that the 1st defendant, because of the confirmation of the sale of the mortgaged property in the first suit, had stepped into the shoes of the original mortgagor in that, he has not only purchased the property which was mortgaged, but also the right of redemption.

7. A question was then posed before the learned single Judge as to whether a transaction of Court sale in between the plaintiff and the 1st defendant was hit by the principle of "Us pendens" inasmuch as admittedly the Court sale had taken place during the pendency of the mortgage suit filed by the 2nd defendant-Bank. A reference was also made to Section 2(d) of the Transfer of Property Act and it was tried to point out on behalf of the plaintiff that the provisions of Chapter IV and Section 57 of the Act would be applicable even to the Court sale and thereby, the Court sale itself would be bad as hit by the doctrine of "lis pendens." The learned single Judge has answered these questions by firstly holding, on the basis of a few judgments by the Bombay High Court, Madras High Court, Patna High Court and Andhra Pradesh High Court and more particularly the decisions reported in Vasudeo Raghunath Oka Vs. Janardhan Sadashiv Apte, AIR 1958 Mad 245 (R. M. S. Benjamin v. Devadoss) Mahendra Mahto Vs. Suraj Prasad Ojha and Others, and Ollala Ambiah Vs. Avadhanula Mallanna, that the provisions of the Transfer of Property Act could not be applied to a transfer by Court sale as Court sale is not a transfer of title inter parties, but by operation of law. Ultimately, relying on the Supreme Court judgment reported in (1965) 1 SCWR 303 (Lakxmi Devi v. Mukund Kanwar), the learned single Judge held that if a Court sale is a transfer of property by operation of law and the same could give a valid title to the 1st defendant, it could not be said that the plaintiff had retained any right over the suit property. The learned Judge held that the plaintiff had no subsisting right over the mortgaged property and if the entire equitable mortgage rights were transferred, she could not exercise the right of redemption. The learned Judge also relied on the principle that once the mortgagor had assigned his rights even by transfer by operation of law, there would be no right to redeem the property since he has absolutely parted with the equity of redemption or the said equity of redemption had been sold in execution.

8. It is also tried to be argued before the learned single Judge that the transaction would be hit by Section 52 of the Transfer of Property Act. The learned single Judge has answered this question by suggesting that the transaction does not become void merely because the said sale is during the pendency of the earlier suit, but the transaction is then governed by the result of the earlier suit. For this, the learned Judge has relied on the law laid down in the decision reported in Samarendra Nath Sinha and Another Vs. Krishna Kumar Nag, . The learned Judge held that the purchaser pendente lite is bound by the result of the litigation on the principle that since the result must bind the party to

it so must it bind the person deriving his right, title and interest from or through him. However, considering that the property itself and thereby the right to redeem the property was parted with by the plaintiff in favour of a stranger like the 1st defendant, the plaintiff was left with no residuary right to redeem the property. In short, the learned single Judge seems to have held that once the property itself is sold, the right to redeem the property is a part and parcel thereof and does not remain with the mortgagor. The learned single judge, therefore, dismissed the appeal filed by the plaintiff and held that the 1st defendant was entitled to pay the amount and redeem the mortgagor or to have the sale set aside and whatever rights the plaintiff had were transferred in favour of the 1st defendant and consequently, the plaintiff was not entitled to the declaration which was sought in the suit.

9. We have already referred to the fact that the learned single Judge did not agree with the finding of the trial Court that the suit was not maintainable u/s 47, C.P.C. and the learned Judge held that the suit was maintainable. Before us, however, the parties have not addressed that question. We, therefore, will not go into that question and choose to go by the finding recorded by the learned single Judge that the suit was maintainable.

10. Mr. Shanmugham, learned counsel appearing on behalf of the plaintiff/appellant earnestly raised a contention that firstly by a mere Court sale it could not be said that the plaintiff had lost her title to the property and along with it the right of redemption. We are of the considered opinion that the contention lacks the necessary logic. A right of redemption does not remain independent of the property itself. A sale of the property, that too to a stranger like the 1st defendant, who had nothing to do with the mortgage and who was not a party to the same, would convey a complete title of the property to him and once the title to that property goes, the equity of redemption shall also accompany the property. In short, the 1st defendant would then be in a position to substitute himself in place of the plaintiff and to step in her shoes. In a reported decision in C.V. Raghavachar Vs. Lakshminarasamma and Others, , the Supreme Court has reiterated this principle and observed :

"The High Court has held rightly that the prior mortgagee when he himself purchased the mortgaged property, became entitled as assignee of the equity of redemption to redeem the subsequent mortgages."

In that decision, the facts show that the owner had created as many as four mortgages and the first mortgagee, C.K. Ramachandra Rao had instituted a suit against the mortgagor for recovery of the mortgage debt by the sale of the house, which suit was decreed and the property was brought to sale and the mortgagee himself had purchased that property and the sale was confirmed. The first mortgagee also proceeded to obtain the possession of the mortgaged property and sold this property to one Srinivasamoorthy. In a suit filed by the subsequent purchaser one C.V.Raghavachar, who had purchased the property subject to the rights of the first mortgagee, the trial Court rejected the plea

raised by Srinivasamoorthy that he was entitled to redeem the property being a purchaser from the first mortgagee who himself had purchased the right of redemption from the mortgagor as he had purchased the property was negated by the trial Court and the appellate Court and it was held that the subsequent purchaser, viz. C.V. Raghavachar was entitled to redeem the first mortgage. It is also seen from the facts that the legal representatives of Srinivasamoorthy had come up in second appeal before the High Court and had also filed a suit, O.S. No. 563 of 1964, against the original mortgagor and his son for possession of the property and for mesne profit. This suit was also dismissed by the trial Court and the appellate Court and another second appeal was filed against this decision also. The High Court, however, allowed both the appeals taking a view that since the predecessor in title of Srinivasamoorthy was a prior mortgagee and he himself had purchased the mortgaged property, he became entitled as an assignee of equity of redemption to redeem the subsequent mortgages. The High Court also held that if there was a conflict between the right of the prior mortgagee as assignee of equity of redemption to redeem the puisne mortgagee and the right of the puisne mortgagee to redeem the prior mortgage, the right of the, prior mortgagee takes priority. The Supreme Court in this behalf observed as follows :

There can be no dispute that while the puisne mortgagee had a right to redeem the prior mortgagee, the prior mortgagee after he himself auction purchased the property had the last right of redemption as the assignee of the equity of redemption."

In our opinion, this position recognises the fact that the right of redemption goes along with the property even if it is sold in the Court-auction.

11. Mr. Shanmgham, however, argues on the basis of the decision reported in Samarendra Nath Sinha and Another Vs. Krishna Kumar Nag, , to which a reference was already made by the learned single Judge, that even if it is held that the equity of redemption was transferred to the 1st defendant, since it was during the pendency of the mortgage-suit by the bank, the said transfer would be subject to the rights of the parties in the mortgagee-suit and the plaintiff would still retain his right of redemption. For this purpose, our attention is invited to the following observations in paragraph 16 :

"An execution purchaser therefore of the whole or part of the equity of redemption has the right to redeem the mortgaged property. Such a right is based on the principle that he steps In the shoes of his predecessor-in-title had before the purchase. u/s 59-A of the Act also all persons who derive title from the mortgagor are included in the term "mortgagor" and, therefore, entitled to redeem. But u/s 52 which incorporates the doctrine of lis pendens during the pendency of a suit in which any right to an immovable property is directly and specifically in question such a property cannot be transferred or otherwise dealt with by any part to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein except

under the authority of the Court and on such terms as it may impose." Under the Explanation to that section the pendency of such a suit commences from the date of its institution and continues until it is disposed of by a final decree or order and complete satisfaction or discharge of such a decree or order has been obtained. The purchaser pendente lite under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it bind the person deriving his right, title and interest from or through him.

Relying more particularly on the emphasised portion and the subsequent portions, the learned counsel says that since the sale took place during the pendency of the earlier mortgage suit between the bank and the plaintiff, those rights would remain unaffected and thereby, the plaintiff would still retain the right of redemption in the sense that the plaintiff is not divested of her right of redemption merely because of the sale of the property in favour of the 1st defendant. We are afraid the observations are being read by the learned counsel too widely. If we consider the emphasised portion, it would be seen that the Supreme Court spells out a caution that a party to a suit cannot transfer such a property so as to affect the rights of the "other party" thereto. In our case, the said "other party" would be the 2nd defendant-Bank. Therefore, when we read the emphasised portion, it would mean that the sale of this property in the Court-sale would not affect the rights of the 2nd defendant-Bank. That is all that can be read from these observations. The observations do not mean that a right of redemption as a part and parcel of the property belonging to the mortgagor is still retained though the property is sold out by the mortgagor, though in a Court-action sale. Reference to the words "other party" in the emphasised portion is extremely telling and excludes all the scope of confusion.

12. There are two other decisions in the field which though not cited before us, we ought to make a mention which are seemingly helpful to the appellant, but on a deep consideration would be of no consequence since the factual scenario in both the cases is completely different. In the decision reported in Panchanan Sharma Vs. Basudeo Prasad Jaganani and others, . It was a case where the mortgage was created which was a usufructuary mortgage. There, one of the terms of the mortgage was the mortgagee was to pay the land revenue. Since the mortgagee committed default in payment of land revenue, the property was brought to sale and was purchased by a stranger. There also the suit was brought by the mortgagor and though the trial Court had decreed the suit, the appellate Court and the High Court had held that the appellant had lost his title on account of the sale of the property in favour of the stranger and, therefore, he was left with no right of redemption. The Supreme Court came to the conclusion on the basis of the specific language of Section 76(c) of the Transfer of Property Act that the mortgagee was enjoined to pay the land revenue and for the default committed by the mortgagee when the property was sold, it could not be said that the mortgagor had lost his right of redemption because of the conduct and action on the part of the mortgagee of not paying the land revenue. Since this was an usufructuary mortgage and since the fault was found entirely with the

mortgagee, who had failed to pay the land revenue and in derogation of his specific duty in Section 76(c), this case would not apply and it cannot be said that the Apex Court has held that even after the sale of the property, the right of redemption remained with the mortgagor. It is specifically found by the Apex Court that it was because of the breach of duty on the part of the mortgagee enjoined by Section 76(c), the mortgagor should not be punished and it is in that light that the right of redemption was found to have survived with the mortgagor. This case, therefore, would be of no consequence.

13. The other case is also extremely relevant, but, again on facts, the observations become inapplicable. It is reported in *Parichhan Mistry (Dead) by Lrs. and another Vs. Acchiabar Mistry and others*, . Here also was a case of usufructuary mortgage. Here under the mortgage deed, the mortgagor was liable to pay the rent in respect of the holding and since the rent remained unpaid by the mortgagor in a suit instituted by the landlord for arrears of rent, a decree had been obtained and in execution thereof, the property was put to sale and the defendant-mortgagee paid the decretal amount in question and, therefore, claimed that the suit for redemption would not lie at the behest of the mortgagor. The trial Court had decreed the suit, but both the appellate Court and the High Court had accepted the contention of the mortgagee and dismissed the suit. When the matter came before the Supreme Court, the Supreme Court, however, allowed the plea by the mortgagor and held that the right of redemption can be extinguished only by the act of parties and by the decree of the Court and the High Court was not right in holding that in this case the right of redemption has got extinguished. The Supreme Court observed (para 2) :

"A usufructuary mortgagee cannot by mere assertion of his own or by a unilateral act on his part, convert his position on moiety of the property as mortgagee into that of an absolute owner. It is no doubt true that the mortgagee would be entitled to purchase the entire equity of redemption from the mortgagor. The mortgagee occupies a peculiar position and, therefore, the question as to what he purchases at a Court sale is a vexed question, but being in an advantageous position where the mortgagee availing himself of his position gains an advantage he holds, such advantage is for the benefit of the mortgagor. It has been so held by this Court in the case of *Sidhakamal Nayan Ramanuj Das Vs. Bira Naik and Others*, and *Mritunjoy Pani and Another Vs. Narmanda Bala Sasmal and Another*, . This being the position of law if for some default in payment of rent a rent decree is obtained and the mortgagee pays off the same even then the mortgage in question is liable to be redeemed at the option of the mortgagor."

The observations in this case are seemingly in conflict with the observations made in *C.V. Raghavachar Vs. Lakshminarasamma and Others*, where the Supreme Court had held that a purchase by the mortgagee of the property had put him in the boots of the mortgagor. However, on a deeper consideration, it will be seen that there is no conflict. In the earlier case, the mortgagee had

purchased the rights in a suit properly brought by him in the mortgage-suit itself and in that suit, after the decree was passed in the execution, he purchased the property in the Court-sale. That was a question of inter se rights between the first mortgagee and the subsequent mortgagees, whereas in the present case, the peculiar dominant position of the mortgagee has been considered by the Supreme Court and the Court has come to the conclusion that it is because of that dominant position of a mortgagee, again in a usufructuary mortgage, that the mortgagor does not lose his right of redemption because of the unilateral act on the part of the mortgagee of purchase of the moiety. Such is not the case in our case. In the first place, in the present case we are not dealing with the usufructuary mortgage. We are dealing with a simple mortgage that too, where the conflict is not between the mortgagee, and the mortgagor, but between the mortgagor and a stranger, who has brought the money-suit, earned a decree and in pursuance thereof, had purchased the property. This case also, therefore, would be of no consequence.

14. In short, the appeal has no merits and must be dismissed. However, in the circumstances, we do not propose to saddle any costs. Parties to bear their own costs.