(1963) 10 MAD CK 0057

In the Madras High Court

Ananchaperumal Yogeeswarar APPELLANT

Vs

Sivagurunatha Pillai and Others RESPONDENT

Date of Decision : 04-10-1963

Acts Referred:

Citation : (1964) 1 MLJ 86

Hon'ble Judges : G.R. Jagadisan, J

Bench : Division Bench

Judgement

G.R. Jagadisan, J.—This is a Second Appeal from the preliminary decree passed by learned District Judge of Kanyakumari in a mortgage action. The suit was instituted by the respondents herein for redemption of the mortgage. The Courts below granted a decree for redemption and this appeal has been preferred by the defendants.

2. I do not propose to set out the facts and circumstances of the case at any great length ; nor do I wish to refer to the contentions urged before me now, as in my opinion, a revised finding has to be called for from the lower appellate Court in regard to one of the crucial questions upon which the learned District Judge has failed to record a satisfactory finding.

3. The plaintiffs alleged that the suit properties were mortgaged under an other deed dated 13-12-1107 M.E. for 20,500 fanams executed by one Sooriyanarayana Pillai, their predecessor-in-interest. The other document was in favour of one Bhagavathi Annachu. On his death, the defendant in the suit (appellant) has become entitled to the othi right. The claim of the plaintiffs to obtain redemption of that othi was resisted by the defendant on the ground that the document of othireally operated as a sale. There is a clause in the othi document that if the mortgage were not to be redeemed for a period of five years, the mortgagees should become the full owner of the property. A clause of that description is a clog on the equity of redumption and cannot certainly be upheld. But the further contention of the defendant was that title to the property had been acquired by long adverse possession for over the statutory period. In

order to establish adverse possession the defendant relied upon certain documents, the genuiness of which was, however questioned by the plaintiffs.

4. Exhibit D-I dated 20-4-1113 is described as an yadast executed by Sooriyanarayana Pillai in favour of Bhagavathi Annachu. Exhibit D-15 is the Pokkuvaravu form of Thazhakudy Pakuthy relating to S. Nos. 2178, 2182 and 2184 of that Pakuthy. Exhibi. D-16 is alleged to be a notice issued to Sooriyanarayana Pillai from Thazhakuda Pakuthy Cutchery containing an endorsement of personal service upon him. The case of the defendant was that after the expiry of the period of redemption fixed under the othi deed the mortgagor Sooriyanarayana Pillai himself agreed to have the patta transferred in favour of the mortgagee Bhagavathi Annachu, that there were mutation proceedings that the defendant came to be recognised as an absolute owner of the properties as a result of such proceedings, and, that possession after the proceedings should be treated as that of a full owner and not that of a mortgagee.

5. I do not wish to deal with the grounds adverted to by the learned District Judge in considering the question of the genuineness of these documents, but, I must however observe that the halting finding of the learned District Judge in regard to the genuineness of these documents is based purely on suspicion and not as the result of inference from the facts and probabilities of the case. In paragraphed 13 of his judgment the learned District Judge observed as follows:

We find that a form is prepared and patta transfer recommended by the Proverthicar, the Accountant, and, also by the Tahsildar on 23-4-1113. This is just on the day after the expiry of the three days fixed in Exhibit D-16. I wonder how this was possible. I also wonder whether the Revenue Department could move so swiftly. They have to wart till 22-4-1113. Only on 23-4-1113 could the proverthicar make the recommendation. We find that on 23-4-1113, there is the recommendation of the proverthicar and of the Accountant and the order of the Tahsildar. This appears to be rather very suspicious. So I am not inclined to act on Exhibit D-16.

In paragraph 14 he has observed as follows:

D.W. 3, the defendant admits that he got this document into his custody soon after the death of Bhagavathi Ananchu. The non-production of this document along with the written statement and the non-mention of the same in the written statement also creates a lot of suspicion. So on mere similarity alone I am not inclined to uphold the genuineness of Exhibit E-1 either.

Though the learned District Judge has discussed the evidence he has not recorded a clear finding on the question of the genuineness of these documents, and, as pointed out already by me, he appears to have been disinclined to uphold the genuineness of the impugned documents not because the evidence warrants that conclusion but because there were circumstance to excite his suspicion. I am unable to uphold this as a proper judicial finding.

6. The learned District Judge of Kanyakumari is hereby directed to submit a fresh finding on the evidence already on record on the question whether Exhibit D-I, Exhibit D-15 and Exhibit D-16 are genuine documents containing the signature of Mathevan Pillai Suryanarayana Pillai the mortgagor. Time for submitting the finding two months from to-day, parties are at liberty to file objections in this Court within ten days after the receipt of the finding.

7. In pursuance of the said order, the District Court of Kanyakumari at Nagercoil submitted the following finding;[* * * *]

Under such circumstance I find that Exhibits D-1 and D-16 are genuine documents containing the signature pf Mathevan Pillai Suryanarayana Pillai the mortgagor. Findings submitted as above.

8. After receipt of the finding the Court delivered the following

9. This Second Appeal is from the concurrent decrees of the Court below granting redemption of mortgage. The respondents--plaintiffs in the mortgage action sued to redeem an usufructuary mortgage and obtained a decree in their favour. The appellant--defendant in the suit, contended that the right of redemption was extinguished and that the hypotheca had become his property in full ownership by reason of adverse possession. The defendant failed and hence, this appeal.

10. The facts, as admitted by the parties and as found by the Courts below, arc as follows : The mortgaged properties comprised in the suit originally belonged to a certain Suryanarayana Pillai. He executed a usufructuary mortgage (othi) on 13-12-1107 (M.E.) for a sum of 20,500 Fanams in favour of Ananju son of Bhagavathi Pillai. Suryanarayana Pillai is now dead and it is now claimed that the plaintiffs are his successors in interest. The right of the plaintiffs to stand in the shoes of Suryanarayana Pillai is not now in dispute. The defendant claims to be in possession of the suit properties as a legatee under the last will and testament executed by Ananju, the original mortgagee. Therefore he represents the interests of the mortgagee. If the mortgage is capable of being redeemed and if the defendant cannot put forward any right of absolute ownership in the properties, derogatory to the original mortgage, the plaintiffs arc obviously entitled to succeed. Now, the difficulty in the case is that the original mortgage, Exhibit D-13, contains a clause that if the mortgage is not redeemed within a period of five years from the date of the transaction the mortgagee could enjoy the hypotheca as full and absolute owner. It is now common ground that the mortgagor committed default and allowed the mortgagee to continue in possession as owner after consenting to the transfer of patta in his name. It is this circumstance which has given a handle to the defendant, to resist the claim of the plaintiffs for redemption.

11. The relevant clause in the mortgage deed Exhibit D-13, which is alleged to be bar to the right of redemption of the mortgagor, reads as follows:

If from the date of this deed within five years I do not at the cost of both of the parties pay and redeem the lands, the said person '' mortgagee '' shall after said due date enjoy the said property as purchaser and obtain change of name in the revenue account and pay the kist.

It appears that in the former Travancore State, of which Kanyakumari District formed part prior to its merger in the Madras State, it was for a long time settled law that a clause of this description in a mortgage document would enable the mortgagee to be the owner of the mortgaged properties on the default of payment of the mortgage amount within the stipulated time. But, by reason of a Full Bench decision of the Travancore High Court in the year 1948, it was, however, held that such a clause would operate as a clog on the equity of redemption and despite such a clause mortgagor could yet redeem the mortgage. Following the law as it obtained in that territory in 1937, Ananju, the mortgagee, appears to have filed an application to the Revenue Department for transfer of patta in his name on the strength of the said clause in the mortgage document. Exhibit D-4 dated 3rd December, 1937, is the notice issued to Suryanarayana Pillai from the Pravarthikar of the Pakuthi Office of Thazhakudi. The notice reads as follow:

The application submitted by Ananju, son of Bhagavathi of Veeranarayanamangalam before the Taluk Office for effecting " pokkuvaravu " (transfer of patta) as per the stipulations in the othi deed executed by you on 13th Adi, 1107 M.E. (28th July, 1932) and given registered in the Office of the Sub-Registrar of Thevala, has been received and filed as No. 230 of this year. In case of there being any objection with regard to the effecting of Pokkuvaravu in respect of the same, you shall personally produce the same together with the written records within three days of the receipt of this notice. In default thereof, it is hereby informed that recommendation will be made for effecling pokkuvaravu by deeming that there is no objection whatever.

This was served upon Suryanarayana Pillai whose signature is found in Exhibit D-4. Exhibit D-5 is a copy of the pokkuvaravu account, and, as against column 8, which has the heading " Nature of transfer or succession right " the following entry is found:

Sale obtained by way of expiry of the period as per the terms of the othi deed executed by the Thandaper holder.

It is therefore clear that there was a transfor in the pokkuvaravu account from the mortgagor to the mortgagee on the strength of the clause in the mortgage document providing that the mortgagee would become the absolute owner on the failure of the mortgagor to redeem within the stipulated time of five years.

12. I must howover mention at this stage that there is an yadast, Exhibit D-1, executed by Suryanarayana Pillai in favour of Ananju on 20th Karthigai, 1113, M.E. (5th December, 1937). Considerable reliance has been placed upon this document by learned Counsel for the appellant to substantiate his contention that there has been an arrangement between the mortgagor and mortgagee by

which independent of the mortgage transaction the mortgagor agreed that the mortgagee should become the full owner of the property. The relevant portion of Exhibit D-1 may now be extracted:

Whereas you have obtained the jenman right in respect of the inlays of an extent of... in accordance with the terms of the othi deed executed by me in your favour on 13th Adi, 1107, M.E. (18th July, 1932) and you are in enjoyment of the said properties at present and whereas in the efforts taken by me to sell the said properties to some one else nobody offered to purchase the same for higher consideration than this, I have hereby fully consented that I have no manner of objection to your enjoyment of the said properties in sole right for the aforesaid othi amount as per the stipulation in the above mentioned document, by effecting the pokkuvaravu and obtaining the patta transferred to your name.

13. The genuineness of this document was somewhat in doubt and I therefore called for a finding on this question. The learned District Judge has now returned a finding that Exhibit D-I is a genuine document and that there is ample proof in support thereof. It is a finding of fact and I have no hesitation in accepting it.

14. The question therefore is whether Exhibit D-I can be construed as a subsequent bargain between the parties by which the mortgagor agreed to convey the hypotheca to the mortgagee for the debt due and payable under the mortgage and whether, therefore the possession of the mortgagee of the suit properties on and from the date of Exhibit D-I was really adverse to the mortgagor and his representatives in interest.

15. Redemption is of the very nature and essence of a mortgage. A fetter on the equity of redemption is void, as the principle, is " once a mortgage always a mortgage, and nothing but a mortgage ". A right of redemption is inherent in every mortgage and any agreement between the parties, express or implied, cannot defeat that right. The law does not of course permit the mortgagee to stipulate with the mortgagor at the time of the mortgage and as part of the mortgage transaction that the mortgage property shall become the absolute property of the mortgagee upon certain contingencies. See Vaddiparthi Narayanamurthy Vs. Cadimsetti Appalanarasimhulu and Another, and Mehrban Khan v. Mekhana (1930) 58 M.L.J. 714 : ILR 11 Lah. 251 : L.R. 57 IndAp 168 (P.C.). A contract at the time of the loan that the mortgagee would become the owner of the property, on the default of the mortgagor to redeem, has always been held to be a clog. A creditor is the dominating party in a loan transaction and has the advantage of driving a hard bargain against his debtor. The debtor is willing to sign any document, agree to any terms and to satisfy the lender in all his requirements. The situation is aptly described by Northington, L.C., in Vernon v. Bethell 2 Eden. 110 in these words:

This Court as a Court of conscience is very jealous of persons taking securities for a loan and converting such securities into purchases. And, therefore, I take it to be an established rule that a mortgagee can never provide, at the time of making the loan, for any event or shall be discharged and the conveyance made absolute. And there is great reason and justice in this rule, for necessitous men are not truly speaking, free men, but to answer a present exigency, will submit to any terms that the crafty may impose upon them.

16. But nothing can prevent the mortgagor and the mortgagee from entering into fresh contract subsequent to the mortgage, releasing or extinguishing the right of redemption. A sale by the mortgagor of his right in favour in his creditor, without fraud or oppression, for a price which is not nominal or shockingly low, cannot be defeated or invalidated as a mere fetter on the right of redemption.

17. Fischer in his book " On Mortgages " observes thus at page 586:

Although a mortgagee cannot at the time or as part of the mortgage transaction stipulate in advance for the extinguishment of the equity of redemption if the debt is not paid by a certain time, yet the equity of redemption may be released under a subsequent separate bargain.

In Lisle v. Reeve L.R. (1902) 1 Ch. 53 Vaughan Williams, L.J., stated the rule thus:

I did not understand the defendant''s counsel to dispute that it is competent for a mortgagee to enter into an agreement to purchase from the mortgagor his equity of redemption. The only objection to such an agreement is, that it must not be part and parcel of the original loan or mortgage bargain. The mortgagee cannot, at the moment when he is lending his money and taking his security, enter into an agreement the effect of which would be that the mortgagor should have no equity of redemption. But there is nothing to prevent that being done by an agreement which in substance and in fact is subsequent to and independent of the original bargain.

This decision has been affirmed by the House of Lords in Reeve v. Lisle L.R. (1902) A.C. 461.

18. The question has been dealt with by the Supreme Court in its recent decision in Padma Vithoba Chakkayya Vs. Mohd. Multani, . Venkatarama Aiyar J., sets out the rule thus:

It is not disputed that when a person gets into possession of properties as mortgagees he cannot by any unilateral act or declaration of his prescribe for a title by adverse possession against the mortgagor, because in law his possession is that of the mortgagor. But what is contended is that if the mortgagor and mortgagee subsequently enter into a transaction under which the mortgagee is to hold the properties thereafter not as a mortgagee but as owner that would be sufficient to start adverse possession against the mortgagor if the transaction is for any reason inoperative under the law. This contention, in our opinion, is well founded. Though there was at one time a body of judicial opinion that when a person enters into possession as a mortgagee he cannot under any circumstances acquire a title by prescription against the owner, the law is now fairly well settled that he can do so where there is a change in the character of his possession under an agreement with the owner. Vide Karnim Kanda Sami v. Chinnabha (1920) 40 M.L.J. 105 : ILR 44 Mad. 253 : AIR 1921 Mad. 82. Now the question is was there such an arrangement ?

19. The decision in Sukhdeo v. Lekha ILR 36 Pat. 753 relied upon by learned Counsel for the appellant does not advance the position further. In that case it was held that where both the mortgagor and the mortgagee agree by a transaction, to which they are parties, that the character of possession as mortgagee should change into that of possession as absolute owner in spite of the invalidity of the transaction to convey title at once, the possession so given can operate on the expiry of the statutory period to create title by adverse possession. This decision only recognises the principle that the parties to the mortgage transaction can always enter into a subsequent arrangement de hors the original mortgage transaction by which their rights and liabilities can be altered.

20. To sum up : any term in a mortgage calculated to extinguish the right of redemption would be unenforceable, being a clog ; to permit the mortgagee to acquire rights in forfeiture of the mortgagor''s rights, would derogate from the true nature of the transaction ; but the mortgagor is under no disability to part with his rights to whomsoever he likes, including his own creditor, the mortgagee ; when however, the hypotheca is sold to the mortgagee, it must be truly independent transaction, free from the environments of the previous relationship between the parties ; a mere affirmance of a term amounting to clog in the mortgage transaction in the form of a separate transaction would not validate the clog and confer better and further rights on the parties than under the mortgage instrument.

21. What then is the true interpretation of Exhibit D-I ? Does it amount to an independent dealing between the parties by which property is conveyed in full ownership to the mortgagee ? It must be noted that Exhibit D-I is only an "yadast " and an unregistered document. It cannot operate as a valid conveyance. It must also be noted that having regard to the language of Exhibit D-I it would not be possible to hold that the transaction embodied therein was something apart from the original covenant in the mortgage document which operated as a clog. Suryanarayana Pillai only states therein that he has no objection to the mortgagee giving effect to the clause in the mortgage document which provides for the mortgagee to become the owner on failure of redemption by the mortgagor. I am unable to construe it as a transaction wholly dissociated from the original mortgage transaction whereby it can be said that the mortgagor dealt with his rights and parted with them in the same manner as he would have done if the transaction had been in favour of third party. I am unable to hold that the defendant has acquired title to the property by adverse possession. The conclusion reached by the Courts below that the plaintiffs were entitled to redeem is in accordance with law.

22. In the result the Second Appeal fails and is dismissed with costs. No leave.

