(1950) 07 KL CK 0006

In the High Court Of Kerala

Case No : Appeal Suit No. 16 of 1124 (C)

Azheekkal Sree Varaha Devaswom and Another APPELLANT

Vs

Ummer Sait Abdulla Sait and Others RESPONDENT

Date of Decision : 25-07-1950

Acts Referred:

Cochin Agriculturists Relief Act, 1114 — Section 18, 8
Transfer of Property Act, 1882 — Section 1, 3, 60, 67

Citation : AIR 1950 Ker 17

Hon'ble Judges : Kunhiraman, C.J;K. Sankaran, J

Bench : Division Bench

Advocate : T.M. Mahalinga Iyer and K.V. Rajagopala Shenni, for the Appellant; C.S. Venkiteswara Iyer and Essa Ahamad sait, for the Respondent

Judgement

Sankaran, J.—This appeal arises from the decision of the Ahjikamal District Court in O. S. No. 122 of 1121. The Sree Varaha Dewaswom Azhtekkal, who is Defendant I in the case, is the Appellant. Defendants 10 to 15, to whom the plaint properties belonged originally, bad mortgaged them under Ex. IV dated 12-10-1100 in favour of Defendant I Devaswom for a consideration of Rs. 12,800 and directed the mortgagee to appropriate the income of the properties towards the interest due on the mortgage amount. All the same, the mortgagors retained possession of the properties by executing EX. V lease deed of even date in favour of the mortgagee. The lease amount payable under Ex. V was expressly made a charge on the equity of redemption of the properties. Subsequently on 4-4-1108, the properties were surrendered to the Devaswom under EX. III release deed, executed by the mortgagors lessees, wherein they undertook to pay off the arrears of pattom amounting to Rs. 6599-7-6 and interest thereon together with the mortgage amount and to close the transaction without any delay. Out of the plaint items, which thus came into the possession of the Devaswom, items 1 to 7,10, ll and 13 to 17 were again leased by the Devaswom on 14-2.1109 to one Thankamma, who is the wife of Defendant IS and the mother of Plaintiff S. It is stated that such a lease arrangement was brought into existence at the instance of Defendant 15. Item a was already outstanding on lease with one Thomman cheekku, whose legal representatives are Defendants 8 to 9. Items 9 and 12 were enjoyed by the Devaswom direcjly. In the meanwhile, the equity of redemption of the plaint items, except items 10 and 11, was sold in court auction in O. S. No. 288 of 1101 on the file of the Cochin District Munsiff''s Court and sale certificate was granted in favour of one Krishna Pillai and others. The rights over items 6, 7, 8, 12 and 13, which these persons acquired under this sale certificate, were again sold in court auction in O. S. No. 167/1107 and were purchased by one Kurien. The present Plaintiff 2 acquired the rights under these two sale certificates and has thus become the owner of the items already mentioned. From him Plaintiff l has obtained a mortgage in respect of items l to 11 and 18 to 17. These two Plaintiffs wanted to close the transaction under Ex. IV mortgage in favour of the Devaswom. But the parties could not come to an agreement as to the amount payable to the Devaswom in full satisfaction of its claims. The Devaswom accordingly instituted O. S. No. 126/1120 on the file of the Anjikaimal District Court for, recovery of the mortgage amount as well as the arrears of pattom due to it from the plaint items. Even though th c arrears due to the Devaswom amounted to Rs. 6599-7-6 together with future interest thereon, the whole of such amount could not be rocovered by the Devaswom because of the provisions? of the Cochin Agriculturists'' Relief Act (Act XVII [18] of 1114). By Section 8 of the said Act, the whole of the interest due from an agriculturist under an outstanding debt up to 1-1-1107, was wiped off. The Explanation to Section 9 of the Act is to the effect that interest referred to in S3. 8 and 9 includes pattom payable by the mortgagor to the mortgagee on a lease back of the mortgaged properties. Consistent with these provisions, the Devaswom could claim, out of the arrears of pattom mentioned in EX. III release deed, a sum of Rs. 968-8-6 only, representing the arrears for the period subsequent to 1-1-1107 together with 6 per cent, interest on the same, the total amount coming to Rs. 1264-9-8. The claim put forward in O. S. No. 126/1120 was for recovery of the mortgage amount of Rs. 12 800 and also of Rs. 1264-9-8 by way of arrears.of pattom. Plaintiffs 1 and 3 in the present suit were Defendants 14 and 13 in 0. S. No. 126/1120. They resisted the claim of the Devaswom in respect of the arrears of pattom and interest thereon, and contended that the right to enforce that claim had become barred by limitation and that therefore the Devaawom was entitled to a decree only for the mortgage amount less a sum of Rs. 186-4-4, which the Devaswom had already realised out of the compensation amount awarded in connection with the land acquisition proceedings relating to item 11 of the plaint. These contentions were upheld and a decree was passed in favour of the Devaswom for recovery, from the mortgagors personally and by the sale of the mortgaged properties. of a sum of Rs. 12,666 11-8 only. That decree was confirmed in appeal. Exhibit B is copy of the trial court judgment and EX. VI is copy of the appellate court judgment in that case. The Devaswom did not care to execute the decree in that case. It may also be mentioned in this connection that the present Plaintiff 1, who was Defendant 14 in EX. B case, had deposited in that case a sum of Rs. 14,914-0 0, but at the same time had contended that only the sura of Rs. 12,666-11-8 admitted to be due to the Devaswom, should be disbursed to it.

2. It was because the Devaswom was not prepare to accept the sum of Rs. 12,666.11-8 decreed in Ex. B case in full satisfaction of its claims in respect of the plaint items and to surrender possession of the properties, that the Plaintiffs instituted the present suit for redemption of Ex. IV mortgage and for recovery of possession of the properties with mesne profits from 27-11-11.20, the date on which the mortgage'' amount due to the Devaswom was deposited in Ex. B case. The Devaswom contended that the mortgagors are bound to pay off all the amounts in respect of which the Devaswom has a charge on the mortgaged properties before claiming surrender of possession of the properties. Besides the mortgage amount of Rs. 12,666-11-8, the arrears of pattom clue under Ex. V lease deed as also the arrears of pattom due from Thankamma, the mother of Plaintiff 2, and from Defendants 3 to 9, were also claimed by the Devaswom. All the claims under arrears of pattom have been negatived by the learned District Judge, who has held that the Plaintiffs are entitled to redeem the plaint properties on payment of Rs. 12,666-11-8 towards the mortgage amount. He has also male the Devaswom liable for the mesne profits due from 27-11 1120, the date on which a sum in excess of the mortgage amount, found to be due to the Dewaswom, was deposited by the present Plaintiff 1 in Ex. B suit. Costs have also been decreed in favour of the Plaintiffs.

3. The main point raised in this appeal, Referred by Defendant l Dewaswom, is that the Plaintiffs are bound to cay along with the mortgage amount the sum of Rs. 1324-7 9 also which represents the arrears of pattern as well as interest due thereon, due under Ex. V lease deed and which still subsists as a charge on the plaint properties, before redeeming the properties from the Devaswom. The other points raised in appeal are that the Devaswom should not have been made answerable to the Plaintiffs for any mesne profits until payment of the redemption price in full and that the Devaswom should not have been made liable for the costs of the Plaintiffs in the suit.

4. The question whether the properties sought to be redeemed by the Plaintiffs have been secured for the arrears of pattom claimed by 1st Defendant mortgagee, has an important bearing in.deciding whether the Plaintiffs are bound to pay off that debt also before seeking to recover possession of the plain t properties from the mortgagee. Exhibit V is the lease deed executed by the mortgagors in favour of the mortgagee, and there is an express stipulation in it that the mortgagee-lessor can recover the arrears of pattom as a charge on the properties. The pattom now claimed by the mortgagee is part of the amount of the accumulated arrears for the period during which the mortgagors were in possession and enjoyment of the properties on the strength of EX. V lease deed. All the same, the learned Judge has held that the charge created under that document in respect of such arrears of pattom, has ceased to exist when EX. III release deed was executed on 4-4.1108 by the lessees in favour of the lessor.

The learned Judge has viewed Ex. III as embodying a new undertaking in place of the stipulation contained in the original lease deed Ex. V, and has stated that there are no words in the release deed to indicate that the arrears of pattom mentioned therein continued to be a charge on the properties. This view of the lower Court is undoubtedly erroneous. In the first place, there is no warrant for supposing that Ex. III contains a new undertaking in place of the stipulation contained in the original lease deed. It is clear from a reading of the release deed, Ex. Ill, that it was intended to evidence the fact that the properties which the mortgagors had taken on lease from the mortgagee have been surrendered back to the mortgagee-lessor. No doubt the amounts due to the mortgagee by way of mortgage amount as well as arrears of pattom have also been recited and acknowledged in Ex.III release deed. After acknowledging those debts, the mortgagor have further undertaken to pay off those debts together as early as possible, This undertaking cannot be taken to have the effect of extinguishing the charges which had already been, created under Ex. IV morsaae deed and EX. V lease deed. No such inference can be drawn from the absence of reiteration in EX. HI release deed that such charges continued to subsist. On the other hand, the position is well established that the charge already Great, ed in favour of the creditor would continue to subsist so long as the same has not been extinguished or abandoned by express words to that effect. There are no such words or expressions in Ex. Hi release deed to suggest that the parties intended to extinguish the charges created under Exs. IV and V. The undertaking . in Ex. HI that the debts would be discharged as early as possible, can only mean that the debts would be paid off in accordance with the stipulations contained in the original documents themselves. It has to be remembered that the undertaking in Ex. III was in respect of the mortgage debt as well as in respect of the arrears of pattom. The Plaintiffs have no case that by such undertaking the mortgage debt had ceased to be a charge on the plaint properties. In fact, in EX. B case, a decree was given for recovery of that debt charged on the plaint properties. In the present suit also, the Plaintiffs have accepted the position that the mortgage debt subsists as a charge on the plaint properties and have accordingly sought to redeem the properties on payment of that debt. There is no reason for understanding the stipulation in Ex. III differently when it refers to the arrears of pattom specified therein. On a reading of Exs. III and V together, it is clear that the arrears of pattom due to the mortgagee Devasworn have not been extinguished, but that the same continued to be a charge on the plaint properties.

5. The next aspect to be considered is whether the mortgagee has the right to insist on the payment of such arrears of pattom also along with the mortgage amount due under Ex. IV before surrendering possession of the properties. These transactions came into existence long prior to the passing of the T. P. Act in Cochin, which came into force on 1-1-1112. Hence the rights and liabilities of the parties in this case to be determined in accordance with the principle''s of the common law which governed mortgage transactions in the State prior to the passing of the T. P. Act. There is no definite pronouncement in any of the judicial

decisions in Cochin laying down that a mortgagee, in whose favour several charges have been created in respect of same properties, cannot insist on a simultaneous redemption of all those charges. In Neelakanta Iyer v. Krishna Iyer 19 KER L. R. 941 an opinion was expressed doubting the propriety of recognising in the State the doctrine of consolidation of mortgages. Apart from the Expression of such an opinion by one of the Judges who decided that case, no definite decision was arrived at either in favour of or against the doctrine. In fact the other Judge, who took part in that decision, stated that he did not want to commit himself to a thorough rejection of the doctrine. The question of the mortgagee''s right to insist on simultaneous redemption again came up for consideration in Koru v. Krishna Menon 29 KER L. R. 218. There also, it was not definitely laid down whether the common law of cochin recognised a right in favour of a mortgagee to insist on a simultaneous redemption of all the mortgagee in his favour in respect of the same property. An agreement by the parties for such simultaneous redemption was held to be valid and enforceable. It was also held that the attempt should be to ascertain whether the intention of the parties as expressed in the documents executed by them was for or against simultaneous redemption of the several mortgages. In an earlier case in Uzhuthra Warrier v. Subramania Pattar 3 sel. Dec. (cochin) p. 34 it was definitely held that the Plaintiff, who sued for redemption of certain properties demised on Jcanom, was bound to pay also the debt dueunder a purakkadom charged on the same properties before he could get '' recovery of possession of the properties. That decision clearly indicates that the common law of Cochin was in favour of the mortgagee''s right to insist on simultaneous redemption of all the mortgages in his favour in respect of the same properties, The principle accepted in the above case is applicable to the present case also where there has been first a mortgage Ex. IV in favour of Defendant 1 Devaswom, followed by a subsequent charge created as per Ex. V lease deed in respect of the same properties, It is also clear from Ex. III release-deed executed by the mortgagors in favour of the Devaswomf that what was intended by the parties was that both the charges in favour of the Devaswom should be simultaneously redeemed. The mortgagors have expressly undertaken in Ex. III that the mortgage amount together with the arrears of pattom and interest thereon would be discharged as early as possible. The undertaking is as follows: [The passage given in Malayalam is omitted But its purport is given below in English*?Ed.] In view of such an undertaking made by the mortgagors to redeem simultaneously all the charges in favour of the

Will pay the Devaswom with interest as stipulated in the pattomchit, fas early as possible Sail the amounts due to the Devaswom by way of, pricipal amount, arrears of pattom Rs. 6,599-7-6, arrears ot Qaduvu interest Rs. 1,366-12-4 and Nedumchit duem 1 anna 8 pies.

mortgagee, the Plaintiffs are bound to pay off the arrears of pattom also due to Defendant 1 Devaswom along with the mortgage amount, before the Devaswom can be asked to surrender possession of the plaint properties.

6. Viewed, in yet another aspect also, the position taken up by the first Defendant-Appellant is seen to be tenable. When Ex. III release deed was executed by the mortgagors, the arrears of pattom due to the Devaswom had come to an aggregate amount of Rs. 6,699-7-6. When the Cochin Agriculturists'' Relief Act (Act XVIII [18] of 1114) came into force, a major portion of the aforesaid amount was wiped off u/s 8 of the Act. For this purpose, the arrears of pattom due to the. Devaswom was treated as interest on the mortgage amount as per the Explanation to Sesction 9 of the Act. The arrears of pattom thus having been treated as interest and cut down to a very Urge extant by virtue of Sections 8 and 9, Agriculturists'' Relief Act it would be highly inequitable to give a different legal character to the small balance of Rs. 969-8-6 left out of such pattom treated as interest. Under the provisions of the Agriculturists'' Relief Act, this balance also has to be treated as interest on the mortgage amount. So long as such amount par. takes of the nature of interest on the mortgage amount, it is clear that the same has to be paid along with the principal amount before redeeming the plaint properties.

7. It has next to be considered whether the fact IFH the mortgagee''s right to enforce the claim for recovery of arrears of pattom has become barred by limitation, disentitles such mortgagee from claiming such arrears along with the mortgage amount at the stage when the properties are sought to be redeemed by the mortgagors. A mortgagee has two courses open to him. One is to recover the debts by enforcing the elaim.against the mortgagor and the charged properties. For getting relief in that direction, the action has to be started within the period prescribed by the law of limitation. Failure to do so can only result in such a relief becoming unavailable to him and not in a total extinguishment of the debts really due to him from the mortgagor. The debts may still exist even though the remedy for enforcing the same may have become barred by lapse of time. The second remedy open to the mortgagee is to retain'' possession of the properties over which he has obtained a lien in respect of the debts due to him, for each time until the mortgagor chooses to redeem the properties on payment of such debts. Here an action has to be commenced by the mortgagor and the prescribed period of time will run against him and not against the mortgagee. By the time the mortgagor initiates proceedings for redeeming the properties, it is possible that the mortgagee''s remedy to enforce his claim by an action in a Court of law, may have become time barred. All the same he can put forth his possessory lien over the mortgaged properties as a defence against the claim for redemption and insist on payment of the debts legitimately due to him. Such defences are not controlled by any period of limitation. The statute of limitation prescribes only the periods within which legal actions have to be oommenced, and not any period for setting up claims by way of defences to such actions. These views gain considerable support from the following observations in the jud gment of Cave J., in In Re Hepburn, Ex parte Smith, (1885) 14 Q. B. D. 394 at pp. 399-400 : (5l. J. Q. B. 422):

In the case of a debt the ordinary and universal remedy is by action against the debtor. There may, however, and sometimes does exist another remedy, not by action against the debtor, but arising out of. the possession of property of the debtor which by law or contract may be detained by the creditor until the debt is paid. This latter remedy may exist, although the remedy by action is barred; and is that case the debt continues to exist so far as is necessary for the enforcement of this light of lien but not for enforaing the remedy by action.

Applying these principles to the facts of the present case, it is clear that the first Defendant, mortgagee, who is in possession of the mortgaged properties over which he has a lien for the arrears of pattom by him, is not precluded from claiming repayment of such arrears also along with the mortgage amount, before surrendering possession of the properties, merely because his remedy by way of action for recovery of such arrears of pattom has become time barred. We accordingly held that the Plaintiffs are bound to pay an amount of Rs. 1324-7-9, representing Rs. 968-8-6 by way of arrears of pattom together with interest on the same, along with the mortgage amount of Rs. 12,666-11-8, before, redeeming the plaint properties from Defendant l Devaswom.

8. The next point urged on behalf of the first Defendant-Appellant is that the mortgagee cannot be made liable for the mesne profits claimed by the Plaintiffs. From the finding already recorded above, it is clear that there has been no proper and valid tender on the part of the Plaintiffs of the redemption price due to the first Defendant-mortgagee. They have all along been repudiating the mortgagee''s claim to get the arrears of pattom also along with the mortgage amount proper. The claim for such arrears of pattom was resisted by these Plaintiffs as Defendants in Ex. B suit also. Even though a sum of its. 14,914 was deposited by them in that suit on 27-11-1120, it was only a conditional deposit and they were not agreeable to the full amount claimed by the mortgagee being drawn from Court towards satisfaction of the redemption price. Under such circumstances, Defendant 1 Davaswom cannot be Bu,v3 to have been wrongfully refusing to surrender possession of the properties to the Plaintiffs. It follows, therefore, that Defendant 1 Devaswom cannot be made liable for the mesne profits claimed by the Plaintiffs. The lower Court''s decree awarding such mesne profits, has therefore to be set aside.

9. Lastly there, is the question of costs. Under normal circumstances, the first Defendant-mortgagee could have claimed his costs from the Plaintiffs. But it is seen that Defendant 1 has been guilty of setting up several untenable contentions in this case. The arrears of pattom due to Defendant 1 from one Thankamma, the mother of Plaintiff 2, in respect of certain items leased to her by Defendant 1 was claimed as part of the redemption price payable by the Plaintiffs. A Similar claim was put forward in respect of the arrears of pattom due from Defendants 3 to 9 in respect of plaint item 8. These claims were found to be untenable and accordingly negatived by the trial Court. For such misconduct I the mortgagee must be made to suffer the costs incurred in the trial Court. All the same, the mortgagee has succeeded in the major contention raised in the

case and hence there is no justification for directing the mortgagee to pay the Plaintiffs'' costs of the trial Court.

10. In the result this appeal is allowed to the extent indicated above, and the lower Court''s decree is modified as follows:

11. Out of the amount of Rs. 14,914-0-0 deposited by the present Plaintiff 1 in O. S. NO. 126 of 1120 on the file of the Anjikaimal District Court a sum of Rs. 12,666-11-8 is directed to be drawn by the present first Defendant-mortgagee in satisfaction of the claim under Ex. IV mortgage deed. The first Defendant-mortgagee is directed to draw a further sum of Rs. 1324-7-9, as representing the arrears of pattom and interest, due to the first Defendant.mortgagee under Ex. V lease transaction. If such amount has already been withdrawn from Court by the plain-tiffs, they will deposit the same in this case in the lower Court within one month from this date, to enable Defendant 1 to draw the same also within the specified period. Such amounts will be drawn from Court within one month from this date. On the amounts being thus drawn by Defendant 1, the claims under the mortgage deed and the lease deed, will be deemed to have been satisfied and extinguished and the Plaintiffs will be deemed to have redeemed the plaint properties from Defendant 1. They will accordingly get possession of the plaint proper, ties. The lower Court''s decree making Defendant 1 liable for the mesne profits and costs, is set; aside and both sides are directed to Buffer their respective costs in the trial Court. The first Defendant-Appellant will get the costs in this Court from the Respondents-Plaintiffs. If Defendant 1 fails to draw the amounts specified, above, within the period fixed and to surrender possession of the properties to the Plaintiffs, then the Plaintiffs will get mesne profits at the rate decreed by the lower Court for the period commencing from the 30th day after this date and until the date of recovery of possession of the properties.