

(1969) 02 KL CK 0015
In the High Court Of Kerala
Case No : A.S. No. 484 of 1963

C. Arunachalam Vanamoorthi Konar

APPELLANT

Vs

Kochummen Geevarghese and others

RESPONDENT

Date of Decision : 07-02-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 103, Order 21 Rule 98
Limitation Act, 1963 — Section 28

Citation : (1970) KLJ 10

Hon'ble Judges : P. Narayana Pillai, J;M.U. Isaac, J

Bench : Division Bench

Advocate : P.C. Chacko and P. Krishnamoorthy, for the Appellant; V. Rama Shenoil and R. Raya Shenoil, for the Respondent

Final Decision : Allowed

Judgement

Isaac, J.—This is an appeal by the legal representative of the first defendant from the judgment of a learned Judge of this Court in a Second

Appeal. The suit was for recovery of possession of an item of landed property from the first defendant on payment of an amount alleged to be due

to him as a charge on the suit property and also for incidental reliefs. The property belonged to the third defendant who had hypothecated it to the

State of Travancore in 1098 M.E. for a money loan. When the State took proceedings to recover the loan, the Travancore National Bank Ltd.,

who was a subsequent mortgagee of the said property, paid the debt to the State, and thereby became subrogated to the rights of the State of

Travancore under the hypothecation of 1098. In 1099, the second defendant obtained a money decree as O.S. 405 of 1099 against the third

defendant; and in execution of that decree, he attached certain properties of the judgment-debtor including the suit property and purchased them in

court sale. The suit property was taken delivery of by the second defendant as per two delivery receipts Exs. F(1) dated 15-3-1108 and Ex. F

dated 25-5-1108. The Travancore National Bank Ltd., instituted O. S. 145 of 1107 against the third defendant for the money due under the

hypothecation of 1098 to which it had become subrogated. It obtained a decree on 1-4-1107 and purchased the property in execution of that

decree. Ex. IV dated 19-11-1112 is the sale certificate. The Bank applied for delivery of possession of the property pursuant to Ex. IV, which

was obstructed by the second defendant. The obstruction was disallowed; and the property was delivered over from the second defendant's

possession to the Bank by the court on 29-12-1115. Ex. II is the delivery receipt. The Bank sold this property to one Karayalar, from whom the

first defendant purchased it as per Ex. V dated 10-7-1120. The second defendant sold his rights under the sale certificate in O.S. 405 of 1099 to

the plaintiff on 16-11-1122 as per Ex. E. The plaintiff then instituted the present suit for recovery of possession of the suit property on payment of

the debt due under the hypothecation of 1098 which the State of Travancore had on the property and to which the Travancore National Bank

Ltd., became subrogated, and for other reliefs as already stated.

2. The suit was resisted by the first defendant mainly on the ground that the sale certificate obtained by the second defendant and the delivery as

per Ex. F(1) and F were sham, that he did not actually get possession of the property under the said delivery receipts, and that the suit having been

instituted more than 12 years from the date of the court sale was time-barred. This contention was upheld by the trial court and the suit was

dismissed. In the appeal filed by the plaintiff, the Subordinate Judge held that the sale certificate was valid and the second defendant actually got

possession of the property as per Ex. F (1) and F. He accordingly found that the suit was not time-barred and allowed the appeal. The first

defendant came to this court in Second Appeal. The learned Judge who heard the appeal accepted the above finding of the Subordinate Judge and

held that the second defendant was actually in possession of the property till he was dispossessed on 29-12-1115 as per Ex. II. The contention

raised by the first defendant that the plaintiff's title to the property was lost u/s 28 of the Indian Limitation Act, 1908 was, therefore, overruled. The

first defendant however raised a new contention before the learned Judge that the suit was in substance one which falls under Order XXI Rule 103

of the CPC and that the suit having been instituted more than one year after the order on the application made under Rule 98, is barred under

Article 11-A of the Limitation Act. The learned Judge entertained this contention as it is a pure question of law arising on the admitted facts of the

case. He, however, rejected that contention and affirmed the decision of the Subordinate Judge.

3. The only question before us is whether the view taken by the learned Judge that the suit was not barred under Article II-A of the Limitation Act

is correct. He had referred to the decision of the High Court of Calcutta in *Gobardhan v. Sukhamuny* AIR 1951 Cal and held that the character of

a suit which falls under Order XXI Rule 103 C.P.C. is one to establish the right which the plaintiff claims to the possession of the property. The

learned Judge further held that the fact that an order has been made against the plaintiff under Order XXI Rule 98 C.P.C., and that he did not

institute a suit as contemplated by Order XXI Rule 103, does not debar him from instituting a suit for recovery of the property on any other cause

of action which may be available to him. These proposition were not disputed before us. The only ground urged by the learned counsel for the

appellant is that the present suit is one which falls in substance within the ambit of order XXI, Rule 103, and that, if it be not such a suit, the plaintiff

is not entitled to recover the property on redemption of the charge to which it is subjected thereunder. The plaintiffs stand is that the decree in O.S.

145 of 1107 for sale of the suit property for the amount due under the hypothecation of 1098 was obtained by the Travancore National Bank

Ltd., without impleading the second defendant, the plaintiff's predecessor, in whom the equity of redemption of the property had vested at the time

of institution of the said suit, that the said decree & sale in execution thereof are not binding on him and that he is entitled to recover the property

from the first defendant on redemption of the hypothecation, on the basis of which the Bank filed the above suit and obtained the decree. It was

not disputed by the learned counsel for the first respondent--plaintiff that, if the suit was for recovery of possession of the property, the suit would

fall under Order XXI Rule 103 in view of the order against the plaintiff under order XXI Rule 98, and that it would be time-barred under Article

11-A of the Indian Limitation Act, 1908. But the learned counsel for the first respondent contended that the existence of the mortgage on the property would make all the difference. We are unable to appreciate the distinction which he has attempted to make. Though recovery of the money due under the mortgage has become time-barred long before the institution of the present suit, technically it may be open for the first respondent to pay off that debt and redeem the property of the mortgage. But as the appellant or his predecessor-in-interest was not holding possession of the property under that mortgage, redemption of the mortgage by payment of the debt does not entitle the first respondent to recover the same.

4. The decision of the Privy Council in AIR 1929 288 (Privy Council) is an authority for the position that a simple mortgagee who is in possession of the property under an invalid sale cannot resist an action for recovery of the property by setting up the mortgage as a defence. The judicial Committee said that whatever rights the defendant had under the mortgage, he can enforce in proper proceedings taken for that purpose, but there was no principle or authority which enabled the defendant to set up his mortgage against the plaintiff's claim for possession; because the defendant was not in possession of the property under the mortgage. Converse is the case here. The appellant, not being in possession of the property under any mortgage, the first respondent cannot recover possession of the same on redemption of the mortgage. The decision of the Patna High Court in Baiju Lal Marwari and Others Vs. Thakur Prasad Marwari and Others, is exactly in point. The facts of the case were very similar to the case before us, and in that case their lordships stated:--

The mere fact that in the present suit the plaintiffs seek to recover possession upon redemption can be no ground for holding that they do not claim the right to the present possession of the disputed properties. In fact possession is the substantial relief claimed. In my opinion, the present suit is one under O. 21 R. 103 Civil P.C. and not having been brought within one year it is barred by limitation.

5. Our learned brother, in repelling the appellant's contention that the present suit actually fall within Order XXI Rule 103, C.P.C. stated as follows:

I do not think that the prayer for recovery of possession of the property is a relief which the plaintiff seeks because the 2nd defendant was dispossessed wrongfully, but because it is consequential to redemption of the property. The 1st defendant cannot put forward any right to remain in possession of the property as the plaintiff is the admitted owner and is not bound by the decree. Under which alone the 1st defendant obtained possession.

With great respect we venture to think that the learned judge did not take notice of the fact that, on redemption of the mortgage, the first respondent would not be entitled to get possession of the property, and that he can succeed only if he established not only his right to possession, but also that the suit is not barred by limitation.

In the result we allow that appeal and restore the decree of the trial court. The first respondent will pay the costs of the appellant (the 1st defendant and his legal representatives) in all the courts.