(1955) 09 KAR CK 0003

In the Karnataka High Court

Case No : Appeal No. 208 of 1950-51

C. Krishnamurthy Setty APPELLANT

Vs

Abdul Khsdar and Others RESPONDENT

Date of Decision : 30-09-1955

Acts Referred:

Citation : (1955) 09 KAR CK 0003

Hon'ble Judges : Venkata Ramaiya, C.J;Padmanabhiah, J

Bench : Division Bench

Advocate : M.P. Somasekhara Rau, for the Appellant; A.R. Somanatha Iyer, for Respondents Nos. 2 to 4, for the Respondent

Final Decision : Dismissed

Judgement

Venkata Ramiya, C.J.—Appellant was Defendant 1 in a suit for redemption of a sumptuary mortgage of two, items of immovable property situated to Bangalore. Exhibit v. is the deed of more gage dated 10-40-1929 consideration for which was Rs. 12,500/-. It was executed by Plaintiff 1 on his behalf and as guardian of his minor sons Plaintiffs 3 and 4 as well as by his adult sons Plaintiff 2 and Defendant 2.

Of these the 1st Plaintiff and 2nd Defendant died after the institution of the suit. Defendant 1 is the assignee of the mortgage from Malleshiah the original mortgagee under a registered deed Ex. XII dated 14-6-1937 and is in possession of the properties. He claims to be the full owner of both the properties as result of certain proceedings and transactions which are:

2. One Syed Mahamad filed a suit against the first Plaintiff for recovery of money due under a pronote and in execution of the decree passed therein purchased item I. Exhibit XXIV is the copy of the entry in the register of civil suits and Ex. XXV is the copy of the application for execution and orders thereon and Ex. XV copy of the sale certificate. Exhibit XXVIII shows that the purchaser could not obtain delivery of item I owing to obstruction of the 1st Defendant as noted on

the warrant by Syed Mohammad on 31-7-1937. The 1st Defendant purchased item 1 from Syed Mohammad on 28-8-1937 under Ex. XIII and item No. II on 18-10-1937 under Ex. I from Defendant 2.

3. According to first Defendant item 1 belonged solely to the 1st Plaintiff, his lights were acquired under the court-sale by Syed Mohammad and as purchaser of the property from him Defendant 1 has become absolute owner of the same. Likewise Defendant 2 is said to have been the exclusive owner of item 2 and his full rights over it are alleged to have been conveyed under Ex. I.

The lower Court has held that both the items wore the Joint property of Plaintiffs and Defendant 2 and that Defendant 1 assignee of the mortgage effected by them cannot resist the claim of Plaintiffs 2 to 4 to redeem the mortgage though he has become owner of the shares of Defendant 2 nd Plaintiff 1 in the properties. A decree has been made for delivery of the shares of others on payment of the proportionate part of the mortgage debt.

4. Sri Somasekhara Rao learned Counsel for the Appellant contended that the theory of joint ness is inapplicable to the case as the Plaintiffs are Muhammadans, that only Plaintiff 1 and Defendant 2 must be regarded as having been the sole owners of items 1 and 2 respectively and since their rights are vested in Defendant 1 the suit has to be dismissed.

The evidence in the case no doubt shows that 1st Plaintiff purchased the site of item 1, title deed was granted to him by the Municipality after the building was put up, he made the payments due to the Municipality towards the value of the site and kandayam, that there is a sale deed Ex. XXXV with respect to item 2 only in favour of Defendant 2, that he alone sold a part of it under Ex. XXXVII to one Ramaswamy Iyengar and he also borrowed money from Chikkananjundappa under Ex. XXXVI by hypothecating the property.

These are all facts in favour of the Appellant strengthened by the consideration that the principles and presumptions of Hindu Law cannot be applied & the fact of the parties living together or one of them being the manager of the family is not sufficient to render the property acquired by a member, the property of all or others. This is however subject to the qualification stated in Mulla''s Mohamadan Law that:

If during the continuance of the family, properties are acquired in the name of the) and member of the family and it is proved that they are possessed by all the members jointly the presumption is that they are the properties of the family and not the separate properties of the member in whose name they stand.

It is hence necessary to examine in the light of the recognized rules as to how the parties acted in regard to the properties.

5. The evidence in the case proves beyond doubt that Plaintiffs and Defendant 2 lived together and were all attending to the business in a cloth shop. P. W. 1 a house-broker further says that out of the profits of the cloth shop sites were

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purchased and plaint schedule buildings were Constructed. P. W. 2 was a former employee working in the shop and attester of Ex. A, a hypothecation deed executed by Plaintiffs and Defendant 2 with respect to the suit properties. He states that the 2nd Plaintiff and 2nd Defendant looked after construction of the buildings.

P. W. 3 who was a tailor and tenant in part of the shop premises also says that the earnings In the cloth business were utilized for the construction of the buildings. The 2nd Plaintiff has sworn that moneys of the busy as went spent for the structure. None of the witnesses examined on the side of the 1st Defendant had said anything to the contrary or the source the money used for putting up the building.... The accounts of the shop are of available to find out if these bear out the oral evidence but there are documents recitals in which lend support to the Plaintiff''s version.

Exhibit VIII is a partition deed dated 16-13-3927 to which 1st Plaintiff, his sister, a son of his brother are parties. These are referred to in the deed as a joint family and item 2 purchased in tile name of the 2nd Defendant we allotted to the share of the 1st Plaintiff. The would not have been possible if 2nd Defendant was sole owner of the property or deemed to be so. In Ex. XIV dated 15-5-1923 a release deed, In favour of 1st Plaintiff executed by-his. brother''s widow it is stated that she and his brother, with the aid of ancestral property traded in cloth and acquired immovable properties. If item 1 was absolutely his, there was no need for him to secure relinquishment of rights by any one.

Under Ex. II of 4-10-1921 the first Plaintiff and his brother borrowed Rs. 8,000/- hypothecating item 1 and other properties agreeing to the realization of the debt in case of daunt by means of sale of item 1 and their other properties. The amount is stated to be wanted for both of them completing construction of the building in item 1. Exhibit III is another hypothecation deed executed by them on 15-9-1923 to meet the "urgent need of money for "their'' clot, trade".

At the end of the document there is a statement that it will be attested by the 2nd Plaintiff and the son of the 1st Plaintiff''s brother. All these are indicative of not merely Plaintiff 1 and Defendant 2 but also of others who .had dealings with them having considered the suit Items as properties of the family.

6. As against these, attention is drawn to Ex. IV the mortgage deed in favour of Co-operative Bank dated 5-9-1927 and Ex. VI dated 30-9-1929 the agreement to execute the suit mortgage de as to both these only Plaintiff 1 and Defendant a are parties and they state in bit IV that no one excepting them has any interest in the property. Item 1 is described 111 Ex. IV as belonging to both the executants which is not the case of the Appellant and attestation of 1st Plaintiff''s brother is obtained, so as to imply that the creditor was not satisfied with the mere assurance of the borrower about title.

As regards item II it is significant that when the document Ex. v. was actually drawn up in pursuance of the agreement the mortgagee was not content with the

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execution of the deed by Plaintiff 1 and Defendant 2 and required concurrence of Plaintiff'' 2 and of Plaintiff 1 on behalf of Plaintiffs 3 and 4. The 2nd Plaintiff says that the deed was drawn up on the advice of the mortgagee''s advocate Sri Vamana Mutiny, who is since dead. D. W. 1 the son of the mortgagee says that Sri Vamana Murthy was his father''s advocate, that he has signed Ex. v. and that Ex. v. was written after referring to the title deeds. The 1st Defendant too admit, that he obtained assignment of the mortgage with the approval of this advocate.

It is therefore difficult to assume, when the-scribe of Ex. v. or any attester or any one present at the time of the transaction is not examined, that execution of the document by Plaintiff 2 and Plaintiff 1 on behalf of Plaintiffs 3 and 4 was inconsequential and superfluous, There is a stipulation that properties other than items need 2 of the parties may be proceeded against for powdery of the debt it is not realised .from the mortgaged property.

It would be therefore illogical and inequitable to deny Plaintiffs 2 to the right and opportunity to discharge it by voluntary payment and avoid the contingency of their properties being proceeded against irrespective of the!'''' interests in items 1 and 2. A notice Ex. F was asked by an advocate on behalf of all the Plaintiff on 17-2-HM7 to the 1st Defendant asking him !,o receive the mortgage debt. No reply was sent to this. The conduct of parties and the manner in which the properties were dealt with and enjoy-.K! considered as a whole, justify the conclusion that, these were joint property of the parties.

7. From the passage in Mulla''s book on Mohamadan Law already referred to, it Is evident that such a finding is not in any way repugnant to or inconsistent with the principles of Moha-.madan Law.

8. The question whether the properties belonged solely to Plaintiff 1 and Defendant 2 or to the family does not depend only on the sale deeds standing in their names or on the parties concerned being Mohamadans. it is not, as stated in - ''Abdul Rahim v. Abdul Hakim'' AIR 1931 Mad. 553 at p. 556 (A):

a problem of law, nor does the decision depend on the ideas which the parties have put into their pleadings but have to be decided on the facts.

The observation in that case that:

It is not an uncommon thing...where members of the Mahomadan community live surrounded by Hindus that they absorb Hindu social ideas and tend to look upon their own social customs from a Hindu point of view. This tendency has been recognised in various rulings", can well be applied to this case. Aminaddin Munshi Vs. Tajaddin and Others, , is also instructive for assessing the effect of the evidence. The mode in which it has to be appreciated was, put thus:

The question is however different when it is shown as is disclosed by the evidence that all the members now surviving of the family were possessing the disputed properties jointly. It Is not a question merely of the messing together of certain members of the family.

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They were possessing these properties in common and in joint ness and the question arises whether the rule can apply to the present case where as has been shown by clear evidence on which. the Sub-Judge relied and which we have be reason for discrediting that Defendant 1 (Plaintiff l in this case) was the managing member, of , such a family.

Under these circumstances it seems to us that the Burden of proof would lie on Defendant 1 for establishing that the properties which were during the joint ness of the family and Tyrk''h:fare shown to stand in the name of defendant 1 do not really belong to the joint family." Gaya Pande Vs. Amar Deo Pande, , was cited in .support of the Appellant''s contention that Plaintiffs 2 to 4 are not entitled co redeem the mortgage though the mortgage red was executed by one of them and on behalf of the rest. That was a case in which right of Plaintiff to contribution on the ground that .he Had discharged a mortgage effected by him jointly with Defendant was disputed. While rejecting the claim the Court found that the Plaintiff was the real mortgagor and Defendant had no interest in the mortgaged property. The Plaintiffs in tills case do not seek any payment but want to pay the debt contracted by them or on their behalf.

The case is distinguishable as being one between co-mortgagors and not between mortgagor and mortgagee in which apart from other factors the point of importance is whether it is permissible to a mortgagee or a transferee of his rights to impeach the title of the mortgagors to the mortgaged properties and in the case of a usufructuary mortgage when possession of the properties has been obtained from them. The law in England is according to Coots in nisi book on the Law of Mortgages Vol. 2 p. 1417 9th Edition; "The mortgagee is bound to recovery the estate to the mortgagor or those deriving title under him and Is estopped from denying the mortgagor'';'', title. This rule is thus stated (in - ''Tasker v. Small'' (1837) 40 JGR 848 (D)), by Lord Cottenham:

A mortgagee can never refuse to restore to his mortgagor or those who claim under him upon repayment of what is due upon the mortgage the estate which become vested In him as mortgagee. To him it is immaterial upon repayment of the money whether the mortgagor''s title was good or bad. He is not at liberty to disrv-.ter it any more than a tenant is at liberty pole the landlord''s title.

Swinfeneady M.R. in - ''Graham v. Seal'' (1918) 88 LJ Ch 31 (E), said:

The obligation of a mortgagee is, as against payment of what is due to him, to recovery and deliver up the deeds of the mortgaged premises. It is like the obligation of a vendor to convey and handover the title deeds and conveyance as against payment of the purchase money. It contemplates that -the handing over of the conveyance and payment of the purchase money ''shall be a simultaneous transaction so that neither party is at risk for any time without either the money or the estate.

In Fisher''s Law of Mortgages at p. 712 (6th Edn.) it is stated:

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As the mortgagor is never allowed to impeach the mortgage which he has made so the mortgagee may not allege that the title of the mortgagor under whom he claims is defective.

9. On behalf of the Appellant Sri Soma-sekhara Rao urged that this cannot be applied to the case as it would amount to enlarging the scope of the doctrine of estoppel provided for in the Evidence Act and for this relied on the decision of the Sind Judicial Commissioner''s Court in -''Nur Mahomed v. Kesumal'' 20 Ind Cas 523 (Sind) (F), where the question for determination was whether the person who applied for redemption .was the real mortgagor or benami-daiv The opinion of other Courts Is however different and in; keeping "with the .rule ;of English Law.

In - ''Abhuram Sil v. Hara Chahd Das'' AIR 1915 Cal 362 (G), and -- Surendro Nath Mitra Vs. Kshitindra Mohun Mitra and Others, , to the decision in both, of which Asutosh Mookerjeo j, was a party it is definitely laid down that, a mortgagee cannot resist a claim for redemption on the ground that mortgagor has no title to the property and that a person named in the mortgage deed as mortgagor can maintain a suit for redemption. See also - ''Muhammad Sheriff Sahib v. Kasim (Sahib AIR 1933 Mad 635 (I); ''Jai Nandan v. Umrao Koari'' AIR 1929 AH 301) do; - ''bombhal aaesingn v. Jagjlvan Daya-, ram'' AIR 1928 Bom 380 (K). The, principle of estoppel was extended against a second mort in - ''Tota Ram v. Har Govind'' 21 Ind Cas 721 (All) (L), by the Allahabad High Court where the facts were in a joint family consisting of father and son the latter mortgaged his undivided share and on the death of the father mortgaged the same property to another person.

It was held that the second mortgagee is slopped from challenging the first mortgage on the ground that the son had no power to mortgage his share at that time. In Tagore Law Lectures on Estoppels, 4th Edition, at p. 894 it Ls stated that a mortgagee let into possession be the mortgagor cannot set up a title adverse is or inconsistent with the relation existing between them.

10. Sri Somasekhara Rao learned Counsel for Appellant argued that there can be no estoppel, when the facts bearing on the question of. title are known to the parties and cited several cause some of which are - Lachman Singh Vs. Collector of Moradabad and Another . Mrs. N. Johnstone v. Copal Singh'' AIR 1931 Lah 419 (N) and - ''Tuisiram v. Tukaram'' AIR 19 4 Nag 363 (O). Considerations peculiar to miners were emphasised. I do not think that these can avail the Appellant and be of help to him as Plaintiff 2 was a major even at the time of the mortgage and it has been found that the mortgaged items were the joint property of Plaintiffs and Defendant 2.

On this footing the transaction was entered Into and the Appellant cannot now contend that (t is incorrect or untrue to their knowledge. Law has provided safeguards against attempts or possibilities of mortgagees taking advantage of the mortgage to deprive the mortgagors of their properties and intends as far as

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possible to relieve them of the clogs on redemption even though they are agreed to.

11. Leaving aside instances in which the in Seaton Is alleged to be banal mortgagee can have no ground of complaint or cause for hesitation to receive the money from the person mentioned in the deed is the debtor and when the mortgage is usufructuary restore the property to him as It is only a security for the debt.

The mortgagor on the other hand is exposed to the risk of losing the property if lie has to make good his title t& the property and for any reason the proof is Inadequate. The amount advanced on a mortgage being generally less than the market'' value of the property subject to it and borrowing small amounts by mortgaging: highly valuable properties being conceivable the mortgagee with the advantages of often having the title deeds with him may easily thwart redemption by demanding proof of title and exploit the mortgagor''s difficulties in establishing it to aggrandize the property.

Ordinarily a mortgagee is presumed to satisfy himself about the security being acceptable from the person who offers it when the money is lent, "in the special circumstances he cannot of this. That would these the scope of a suit for reddest be and raise needless complications.

12. The objection raised by the Appellant Alaim of Plaintiff to 4 for redemption therefore untenable.

13. The amount payable to the Appellant Intention is that the kanclayain annually due to the Municipality and expenditure incurred for repair or improvement of the property should be added to the same mentioned, in nix. v. the mortgage deed. The stipulation in the document is that the mortgagors had to pay the kanaayam and the lower Court has ordered that the amount due by Plaintiffs 2 to 4 towards this should be determined allied by them. No amount has been allowed towards improvement and it is difficult lo up no d the claim in this behalf. Fisher in his book on "the of Mortgages says at p. 897:

The improvements must; always be reasonable, having regard to the nature and value of the estate; for if .it were not so, a weapon would be put in the mortgagee''s hands with winch he might greatly clog the right of redemption which he has no right to make more expensive this necessary to keep the estate in good repair and working order and to protect the title. And! the mortgagee should inform the mortgagor as soon as possible of the necessity or the intention to incur extraordinary expenses.

and in the preceding page

the mortgagee in possession need not re-build ruinous premises or increase his debt by laying out largo sums beyond the rent...for the property when restored ought to be of the same nature as when the mortgagee received It; and if it be wholly or in part converted from its original purpose the money expended will hot

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be allowed to be charged upon it.

In the written statement, it is alleged that ho has spent more than ten thousand rupees for making alterations in the buildings to enable five families to live, raised upstairs in item 1 at a cost of Rs. 15,000/- and spent large sums for repairs. There is no indication of necessity for these. The mortgagors were not called upon to get anything done and not apprised of the expenditure. The Appellant did not intimate it when he was served with the notice Ex. P. Although permission of the Municipality is said to have been obtained and a plan showing the alleged alterations was submitted to it, these are not produced in Court.

The Appellant if- a merchant having considerable monetary dealings, admits having kept accounts of money spent for the improvements taut has not produced them. In view of this'', it has to be held that the claim on the score of improvements is unreasonable, and cannot be countenanced. . Plaintiffs 2 to 4 are entitled to mesne'' profits from the date on which the amount due by them was deposited.

14. This appeal is dismissed with costs In other respects.

Padmanabhiah, J.

15. I agree.

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