

(1964) 09 KL CK 0026

In the High Court Of Kerala

Case No : Second Appeal No. 124 of 1960

Cherukutty Mattuvayil Chandukutty

APPELLANT

Vs

Thoyali Kurinholi Arjunan and Another

RESPONDENT

Date of Decision : 22-09-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35, Order 34 Rule 8
Kerala Agriculturists Debt Relief Act, 1958 — Section 11, 11(3), 5, 7

Citation : AIR 1965 Ker 128

Hon'ble Judges : M.S. Menon, C.J;P. Govindan Nair, J;M. Madhavan Nair, J

Bench : Full Bench

**Advocate : V.P. Gopalan Nambiar and K.P. Madhava Menon, for the Appellant;
V.R. Krishna Iyer and K. Raghavan Nair, for the Respondent**

Judgement

Govindan Nair, J.—This is an appeal by an usufructuary mortgage, A decree for redemption was passed against the appellant at the instance of the predecessor-in-interest of the respondents on 12-3-1950. Thereafter an application was made By the decree-holder purporting to be under: Order XXI, Rule 35 of the CPC read with Sections 5 and 11 of the Kerala Agriculturists Debt Relief Act, 1958, on 10-1-1959. This was opposed by the appellant on the ground that the application is not maintainable. The objections taken were that Section 11 of the Kerala Agriculturists Debt Relief Act, 1958 can have no application as the section envisages the existence of a mortgage and there was none at the time of the application as a decree on the mortgage had intervened. It was also urged that Section 11, in any event, cannot apply and that the correct Section, is Section 7. There was a further contention that the application which was apparently moved on the execution side is not maintainable. These contentions have been negatived by the first Court as well as by the appellate court.

2. In view of the decision of the Federal Court reported in Subba Rao v. Mattapalli Raju, AIR 1930 F. C. 1 it is not seriously disputed before us that the mortgage which formed the basis of the decree has not ceased to exist by virtue of the

decree. We have therefore to proceed on the basis that if there is not other impediment, Section 11 must be available to the respondents. The learned Advocate General who appears for the appellant however urges that the decree passed in this case is a decree for repayment of a debt and in regard to such decrees there is a specific provision In Section 7 of the Agriculturists Debt Relief Act, 1958, and that the only remedy available to the respondents is therefore to move for amendment of the decree under that section. Section 7 runs thus:-

"Amendment of certain decrees :- (1) Where, before the commencement of this Act, a Court has passed a decree for repayment of d debt, it shall, on the application of any judgment-debtor who is an agriculturist or on the application, of the decree-holder apply the pro visions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be.

2. The provisions of Sub-section (1) shall also apply to cases where, after the commencement of this Act, 3 Court has passed a decree for the repayment of any debt."

3. It was contended that the decree in this case is a decree for repayment of the debt, and our particular attention was Invited to Clause (c) (1) of Sub-rule (1) of Rule 7 of Ip. XXXIV of the CPC wherein provision is made that in a preliminary decree in a redemption suit, the plaintiff may be directed to pay a certain sum into court. Reference was also made to Form no. 7-B in Appendix D of CPC relating to preliminary decree for redemption where on default of payment by mortgagor a decree for foreclosure is passed. Reliance is also placed on the decision of the Madras High Court reported in Krishna Iyer v. Nallathambal Mudaliar, (1955) 1 Mad LJ 215 wherein the view has been taken that a decree of this nature can be considered to be a decree for repayment of a debt. This is what their Lordships said :

"Section 19 provides for an application for scaling down of the decree for repayment of a debt. So long as a decree is alive in the sense that it is capable of being enforced not necessarily by the mortgagee in this case but by the mortgagor, it continues to be a decree for repayment of a debt, since the liability under the mortgage is still outstanding, which liability Is Incorporated in the decree. In that view the preliminary decree for redemption passed in a suit on a usufructuary mortgage is one for the repayment of a debt, which can be scaled down under the provisions of Act IV of 1938."

4. We are unable to agree that a decree for redemption of a usufructuary mortgage passed at the Instance of the mortgagor is a decree for the repayment of a debt. The direction for the payment involved in such a decree, if it is passed in the form provided under the Code of Civil Procedure, is Incapable of enforcement at the instance of the mortgagee. There can be no, question of enforcement of the direction to pay as against the mortgagor who has been directed to pay, for it is left to him either to pay or not to pay. No element of

compulsion therefore arises. A decree of this nature is a composite one which really and substantially gives reliefs to the decree-holder-mortgagor of getting the mortgaged property re-conveyed or retransferred to him. We do not think that a decree of that type is one such regarding which provision is made under Sec. 7 of the Kerala Agriculturists Debt Relief Act, 1958.

5. The section that is applicable therefore is Section 11 of the Kerala Agriculturists Debt Relief Act, 1958. As we read the section, an application contemplated under that section for repayment of a usufructuary mortgage debt and for recovery of a mortgaged property in the case of a usufructuary mortgage is an application that should be moved on the trial side of the court and court fees as provided by Sub-section (3) of Section 11 should be paid.

6. In the light of the above discussion, we hold that the view taken in the decisions of this Court "reported In M. K. KuruViila v. M. S. Joseph, 1960 Kef TT 1207 and in Devassia Joseph v. Augusthi, 1963 Ker LT 100, that after a decree for redemption has been passed, the mortgage ceased to exist is incorrect. The correct position is as has been laid down by the federal Court in AIR 1950 FC 1.

7. In the result, we dismiss this appeal. We however, direct the respondents if they wish to avail themselves of the benefit of Section 11 to move a proper application within a month of this date, on the trial side of the Court, and pay court-fee thereon in accordance with the provision in sub-sec. 3 of Sec. 11. If such an application is moved, the amount said to have been deposited, a sum of Rs. 400/-, pursuant to the Execution Petition dated 10-1-1959 will be given credit to and the application moved by the respondents, dealt with on the merits in accordance with the provisions in Section 11 of the Kerala Agriculturists Debt Relief Act, 1958.

8. This appeal will stand disposed of on the above terms. We direct the parties to bear their costs throughout. Office will send back the records to the trial court Immediately.