

(1967) 07 MAD CK 0009
In the Madras High Court

Chidambaram Chetty and Another

APPELLANT

Vs

Sakku Bai alias Lakshmi Bai and Another

RESPONDENT

Date of Decision : 24-07-1967

Acts Referred:

Tamil Nadu Agriculturists Relief Act, 1938 — Section 9A

Citation : (1968) 81 LW 396 : (1969) 1 MLJ 543

Hon'ble Judges : T. Venkatadri, J

Bench : Division Bench

Judgement

T. Venkatadri, J.—Defendants are the appellants. The suit is for redemption of the properties belonging to one Santhanaramaswami Raja.

He had othied the properties to the first defendant on 25th April, 1927. The first defendant is thus the mortgagee represented by his mother, the

second defendant, since the first defendant was minor at the time of the mortgage. The sum secured was about Rs. 1,500 and the period fixed for

redemption was seven years. The mortgagee was directed to pay from and out of the sum of Rs. 1,500 Rs. 800 to one Pakirisami Naidu, who

was the prior othidar in respect of one item and Rs. 700 borrowed in cash for litigation expenses of the mortgagor. The defendants did not pay the

prior mortgagee i.e., Pakirisami Naidu, and they did not get possession of that item of the properties which Was in his possession. Therefore, the

mortgagors redeemed the property in O.S. No. 171 of 1956 on the file of the District Munsif's Court, Tanjore, from Pa`kkiriswami Naidu and

took possession. The mortgagees were in possession of items 2 and 3 as othidars for the amount of Rs. 700. Santhanaramaswami Raja executed a

registered will on 25th June, 1946, bequeathing the othied properties to the first plaintiff and the second plaintiff, his daughter and grand daughter

respectively. They filed the present suit to redeem the suit properties. While redeeming, they also claimed that the othied debt was liable to be

scaled down u/s 9-A of the Madras Agriculturists Relief Act, IV of 1938, and as admittedly the othidars Were in possession of the suit properties

for over thirty years, they were entitled to redeem the suit properties without payment of any money.

2. The first defendant remained ex parte and the second defendant contested the suit. Her case was that Section 9-A of the Act would not apply,

that the plaintiffs were not entitled to the benefits of that provision and that therefore the plaintiffs were bound to pay the whole othi amount. The

second defendant also claimed that she was a woman entitled to the exemption provided in Section 4 (h) of the Act.

3. The trial Court found that Section 9-A was not applicable to the suit othi and that the second defendant was not entitled to exemption u/s 4 (A)

of the Act. It further found that the defendants would be entitled to get the sum of Rs. 700 which they had advanced in cash. Accordingly a

preliminary decree for redemption was passed on the condition of the plaintiffs depositing into Court a sum of Rs. 700 and the balance of deficit

Court-fee. But on appeal, the lower appellate Court,, while confirming the finding of the trial Court that the second defendant was not entitled to

the exemption provided u/s 4 (h) of the Act, held that the plaintiffs were entitled to redeem the suit properties without payment of any money, as

they were entitled to get the benefits of Section 9-A of the Act. The lower appellate Court directed the defendants to surrender possession of

items 2 and 3 to the plaintiffs. Aggrieved by this order, the defendants have preferred this second appeal.

4. The question for consideration is whether the plaintiffs are entitled to redeem. the suit properties without payment of any money under the

provisions of Section 9-A of Act IV of 1938.

5. The appellants contend that the respondents-plaintiffs would not get the benefits of Section 9-A of the Act, since the appellants are entitled to

get the benefits of Sub-section (10) (ii) (a) of Section 9-A. That sub-section runs as follows;

Nothing contained in this section (section 9-A) except Sub-sections (1) and (2), shall apply to any mortgage....(a) where during the period after

30th September, 1937, and before 30th January, 1948, the equity of redemption in the property subject to the mortgage has devolved either

wholly or in part on a person, by or through a transfer inter vivos either from the original mortgagor or from a person deriving title from or through

such mortgagor otherwise than by a transfer inter vivos then to the whole of such part, as the case may be.

6. Learned Counsel for the appellants contend that during such period the original mortgagor Santhanaramaswami Raja executed a will

bequeathing the suit properties to the plaintiffs, and therefore, it was a transfer inter vivos from the original mortgagor who died on 30th January,

1947. If it is a transfer inter vivos Section 9-A of the Act would not apply to the plaintiffs and therefore they cannot ask the Court to scale down

the debt. The learned District Judge has observed that the expression ""transfer inter vivos"" used in the sub-section would mean transfer between

two living persons. It is true that Santhanaramaswami Raja executed a will during his life time bequeathing the equity of redemption in favour of the

respondents. It is not a transfer inter vivos for the reason that a will would come into effect only after the lifetime of Santhanaramaswami Raja. But

learned Counsel for the appellants contend before me that when Santhanaramaswami Raja during his lifetime executed a will bequeathing the equity

of redemption in favour of the respondent, it was a devolution of interest in the mortgaged properties on the respondents herein and that it was

immaterial when the will takes effect. Santhanaramaswami Raja. during his lifetime made a devolution of interest in the mortgaged properties to the

respondents herein and therefore Section 9-A will not apply to the respondents. In this connection he has invited my attention to a passage in the

Full Bench decision of our High Court in Kothalavalli Achi v. Ayyadurai Odayar (1961) 2 M.L.J. 427.

The Transfer of Property Act relates only to transfer by act of parties and not to those by operation of law; the term ""inter vivos"" means between

living persons; but the section does not merely refer to a transfer inter vivos thereby implying that the transaction should be made between the

persons named in a document as vendor and purchaser. It speaks of a devolution by transfer from the mortgagor and employs the passive voice

suggesting thereby that it would comprehend cases where there has been no act

of the mortgagor. It is implicit that "devolution by transfer, inter vivos is used in contradistinction with devolution under law and should therefore include all cases of transfer whether it be by the act of party or a forced one under the law.

7. Counsel for the appellants wants this Court to treat the execution of the will bequeathing the equity of redemption to the respondents as transfer

inter vivos as the Full Bench ruling will apply to all cases of transfer whether it be by act of parties or a forced one under the law. I am unable to

agree with this contention of learned Counsel for the appellants. The Full Bench was considering the question whether Section 9-A was confined to

usufructuary mortgages as defined in Section 58 (d) of the Transfer of Property Act and whether the sale of equity of redemption in Court auction

was covered by Sub-section (10) (ii) (a). The Full Bench held that Section 9-A was not restricted in its application to usufructuary mortgages as

defined in Section 58 (d) of the Transfer of property act but applied to all mortgages by virtue of which the mortgagee Was entitled to remain in

possession of the property mortgaged and that Sub-section (10) (ii) (a) of the Act would apply to all sales of equity of redemption whether by act

of parties or by operation of law. But we are concerned here with the words ""inter vivos"" and their interpretation on the facts of this case. It is a

fundamental principle that, when a will is executed bequeathing property to a person the will takes effect only after the death of the testator. The

meaning of inter vivos as given in Black's Law Dictionary 2nd edition page 645 is this:

Between the living; from one living person to another. Where property passed by conveyance, the transaction is said to be inter vivos to distinguish

it from a case of succession or devise. So an ordinary gift from one person to another is called a gift inter vivos to distinguish it from a donation

made in contemplation of death

(mortis causa)

8. Similarly, in Words and Phrases, the following interpretation is given:

Where a man, in the full possession of his faculties, executes and delivers the necessary instruments to convey his property to his brother, with the

intent that the gift shall take effect immediately unconditionally, such a gift is inter vivos and not causa mortis even though at that time he is in

extremis, since a gift causa mortis must be conditioned upon the death of the donor.

A gift "inter vivos " is distinguishable from a will in that such a gift may be made by parol and, upon the acceptance of the gift by the donee, the gift

is irrevocable by the donor. While ordinarily a will is required to be in writing, and usually is made in view of the fact of death, and is ineffective

until the death of the testator and the admission of the will to probate.

9. In the Indian Succession Act"" will "" is defined in Section 2 (h) as meaning the legal declaration of the intention of the testator with respect to his

property which desires to be carried into effect after his death. In Mahboob Sirfraz Vanth Sri Rajah Parthasarathy Appa Rao Savai Asva Rao

Bahadur Varu, Zamindar of Bhadrachalam and Palavancha Vs. Sri Rajah Venkatadri Appa Rao Bahadur Zemindar Garu and Others, Sri Raja

Venkataramayya Appa Rao Bahadur Zamindar Garu and Sri Rajah Sobhanadri Appa Rao Bahadur Zamindar Garu, , a Full Bench of this Court

has observed that the Transfer of Property Act applies only to alienations inter vivos and has no application to disposal of property by will. Now

inter vivos which means living persons will exclude transfer by will, for a will operates from the death of the testator. In Vannappan Servai Vs.

Sinnathayee Ammal and Others, , it is held that a will is merely a declaration of the intentions of the testator with respect to his property to take

effect after his death and is not a document securing money or other property within the meaning of Section 7 (IV-A) of the Court-fees Act. I am

therefore, unable to agree with the contention of learned Counsel for the defendants-appellants that ""inter vivos"" will also include transfer by

execution of will bequeathing properties to heirs and beneficiaries. Mere execution of will bequeathing properties will not and cannot amount to

transfer inter vivos. It cannot be said to be a transfer by operation of law or act of the party as contemplated in the section. No doubt, learned

Counsel for the appellants drew my attention to a passage in Jugalkishore Saraf Vs. Raw Cotton Co. Ltd., :

Thus when a person dies testate there is a devolution of his properties to his legal representatives by operation of the law of testamentary

succession which is now mainly statutory in this country.

10. But devolution of properties to his legal representatives will take effect only

after his death. Learned Counsel cannot, therefore, rely on this passage to support his argument that mere execution of the will is also a transfer by operation of law or by act of parties. The learned District Judge is right in his conclusion that the defendants cannot invoke the provisions of Sub-section (10) (ii) (a) of Section 9-A as a will does not amount to a transfer inter vivos. The defendants have been in possession from 25th April, 1927 and therefore the debt has been completely wiped out. The respondents, are therefore entitled to redeem the suit properties without payment of any money,

11. The second appeal is accordingly dismissed. There will be no order as to costs. No leave.