
(1996) 02 MAD CK 0101
In the Madras High Court

D. Chellayyan Nadar and Another

APPELLANT

Vs

Sulochana Thankachi and Others

RESPONDENT

Date of Decision : 06-02-1996

Acts Referred:

Citation : (1996) 2 LW 213 : (1996) 1 MLJ 570

Hon'ble Judges : Raju, J

Bench : Division Bench

Judgement

Raju, J.—The above second appeal has been filed against the judgment and decree of the learned Subordinate Judge, Kuzhithurai dated 29.9.1982 in A.S. No. 48 of 1981, allowing the appeal and granting the relief of redemption of the "B" schedule property in its entirety as prayed for as against the preliminary decree for redemption of 57.46 cents only granted by the trial court.

2. The controversy among the parties to this proceedings is in a narrow compass. The plaintiff's mother executed a mortgage for plaintiff "A" schedule property in favour of the defendant's wife. The mortgage was in possession till her death and after her death, her husband, the first defendant and her children defendants 2 to 5 continued to be in possession. There was a partition in the plaintiffs family and during the time of partition it was noticed that the total extent of the landed property as well as the survey number has been wrongly mentioned in the mortgage deed and necessary follow up action was taken. In the family partition among the plaintiff's family Plot 1 measuring 55 cents was allotted to the plaintiff and her children in F Schedule and the plaintiff purchased thereafter adjacent plots 2 and 3 each with an area of 20 1/2 cents from A and C schedule allottees in the partition and therefore she is entitled to 96 cents comprised in plots 1 to 3 as shown and appended to the partition deed. It is to redeem this property the plaintiff has filed O.S. No. 105 of 1980.

3. The case of the defendants was that the mortgage is only for 82 cents in Survey No. 3725 and therefore the plaintiff is entitled to redeem her legitimate share from the mortgaged area of 82 cents.

4. The trial court by judgment and decree dated 8.4.1981 accepted the plea of the defendants and passed a preliminary decree as noticed earlier for the redemption of 57.46 cents only. Not satisfied with the decree passed by the trial court the plaintiff pursued the matter on appeal in A.S. No. 48 of 1981 and defendants 1 and 2 viz., respondents 1 and 2 in the appeal before the first appellate court filed also cross-objection questioning the correctness of the findings of the trial court giving the benefits of Act 40 of 1979 to the plaintiff. The lower appellate court while allowing the appeal, sustained the claim of the plaintiff for the redemption of the entire extent of property as prayed for and also confirmed the findings of the trial court that the plaintiff is entitled to the benefit of Act 40 of 1979 and therefore entitled to redeem the mortgaged property without paying the amount but on payment of only the cost for improvements affected and to be determined, which was relegated to the final decree proceedings. Aggrieved the defendants 1 and 2 have filed the above second appeal.

5. Miss O.K. Sridevi the learned Counsel for the appellants vehemently contended that the lower appellate court committed an error in permitting redemption of the mortgage in respect of area over and above 82 cents which alone has been mortgaged, that the first defendant was a lessee of the adjoining Karayancode purayidom and certain extent which was lying idle was made cultivable and annexed to the mortgaged portion and therefore the excess extent found to be available in the property mortgaged cannot be claimed by the plaintiff.

6. Per contra, the learned Counsel for the respondents relied upon the decision of a learned Single Judge of this Court reported in Damodara Nair v. Jyothi Murthi 1981 T.L.N.J. 151. That was also a case where the right of the mortgagor to redeem the property with the extent found to be in excess than the extent actually mortgaged came up for consideration. On the basis of the report of the Commissioner appointed in that case, it was found that the area of the property was really of measurement found to be more than the actual extent specified in the document and after adverting to the relevant case law on the subject, the learned Judge held that the mortgagee cannot take away the actual property that is found even in excess of measurement taken of the property mortgaged and he has to surrender possession of the entire property as it is found at the time of redemption and the right of the mortgagor is not only to get restoration of the possession of the property as specified in the mortgage deed but also land which, accrued to the possession of the mortgagee as such mortgagee.

7. The learned Counsel for the appellants would contend while distinguishing the above ruling that so far as the case on hand is concerned the excess land found was attributable to the lease of the adjacent property taken by the mortgagee and not as part of the mortgaged property. Of course, if this claim of the appellants has been substantiated by proper and sufficient supporting material and evidence and properly proved, the general principle recognised in equity as

laid down in the above decision of the learned single Judge will have no application. But on going through the judgments of both the courts below, I am of the view that the defendants 1 and 2 have not substantiated such a claim and even the trial court which has passed the preliminary decree for the limited extent sustaining the claim of the defendants, has chosen to do so only on the ground that since what was mortgaged was only 82 cents, the plaintiff is not entitled to anything more than that extent. Such a view taken by the trial court on a hyper-technical and superficial view of the matter cannot be accepted by civil courts which not only discharge duties as mere courts of law but also function as courts of equity at times. The judgment reported in *Damodara Nair v. Jyothi Murthi* 1981 T.L.N.J. 151, sufficiently indicates that the principles of equity will come to the rescue of the mortgagor to redeem the property mortgaged with any excess extent found also at the time of redemption so long as such excess extent was found to be part of the mortgaged property and the position and status of the mortgagee as such mortgagee. In the light of the fact that the defendants 1 and 2 were not able to justify their claim or prove their claim that the excess extent in their possession was really attributable to any leasehold of the adjacent property as claimed, the principle laid down in the decision referred to above are squarely applicable to this case also and consequently, no exception could be taken to the well-merited conclusion of the lower appellate court in modifying the decree of the trial court allowing the relief of redemption in respect of the entire extent as prayed for.

8. The second appeal consequently fails and shall stand dismissed. No costs.