(1953) 11 KL CK 0009

In the High Court Of Kerala

Case No : A.S. No. 165 of 1950

Govinda Pillai Easwara Pillai and Others APPELLANT

Vs

Ahmed Moosa and Others RESPONDENT

Date of Decision : 12-11-1953

Acts Referred:

Transfer of Property Act, 1882 — Section 76

Citation : AIR 1954 Ker 251

Hon'ble Judges : K. Sankaran, J;G. Kumara Pillai, J

Bench : Division Bench

Advocate : K.K. Narayana Pillai, for the Appellant; T.S. Krishnamoorthi Iyer, for the Respondent

Final Decision : Allowed

Judgement

1. This appeal is filed by Defendants 1 to 7 in a mortgage suit against the decree for redemption given to the Plaintiffs therein.

2. According to the Plaintiffs'' case, plaint items 1 to 6 belonged originally to the Purathanai tarwad and plaint item No. 7 belonged to one Kunjachi and was mortgaged by her to the Purathanai tarwad under Ext. III on 20-2-1089. By Ext A, partition deed executed by the members of the Purathanai tarwad in 1073, plaint items 1 to 6 and the mortgage right in item No. 7 were allotted to the Karadiparambu branch of the said tar- wad. After the partition, the Karadiparambu branch mortgaged plaint items 1 to 7 in 1074 to one Narayana Panicker of Mangayil house. Ext. B is the mortgage deed. It is a mortgage in respect of plaint items 1 to 6 and a sub-mortgage in respect of plaint item No. 7. Subsequent to the execution of Ext. B mortgage, the Karadiparambu branch also gave two puravaipas, Exts. C and D, in 1077. The rights under Exts. B, C and D are now vested in the first Defendant, and Defendants 2 to 15 are in possession of the plaint properties under him. The first Plaintiff who was the sole legal representative of Kunjachi who executed Ext. III mortgage, took a sale deed from the Karadiparambu branch for the equity of redemption in respect of Ext. B

mortgage and brought the suit, which has given rise to this appeal, for redemption of Exts. B, C and D (mortgage and puravaipas) and recovery of possession of the plaint properties. The mortgage amount under Ext. B is 7000 fanams and the puravaipa amounts under Exts. C and D are 41683/4 Fanams and 2793 Fanams respectively.

In the plaint the first Plaintiff offered to pay these amounts and sought to recover from the Defendants and the mortgage amount a sum of 35 Fanams as damages on account of earth removed from the north-eastern corner of plaint item No. 1. He also claimed future mesne profits at the rate of 500 paras of paddy from the date the mortgage amount was deposited in Court. On the death of the first Plaintiff, additional Plaintiffs 2 to 12 were impleaded as his legal representatives, and they prosecuted the suit in the lower Court.

3. Defendants 1 to 7 contested the suit. Since some alone of their contentions in the lower Court were pressed at the time of hearing in this Court, it is not necessary to refer here to all the contentions they had put forward in their written statement. The points that were pressed here are: (1) that the equity of redemption of plaint item No. 1 now vests in Defendants 1 to 7 and did not belong to the first Plaintiff, and so redemption of item 1 cannot be allowed; (2) that the michavaram for plaint item No. 7 was increased during the currency of the mortgage from 5 ? Edangazhies of paddy to 24 paras 7 ? Edangazhies of paddy and as the mortgagees were paying michavaram at this enhanced rate from 1074 Defendants 1 to 7 are entitled to get from the mortgagor the excess michavaram paid by them viz., 24 paras 2 Edangazhies of paddy per year and the same should be Included as an item in, the settlement of accounts between the mortgagor and the mortgagee; (3) that the Karadiparambu branch had received Rs. 290/- under an agreement to execute Anr. puravaipa, and, as they have not executed the puravaipa, Defendants 1 to 7 are entitled to get back that amount also at the time of the redemption of Ext. B; (4) that the value of improvements awarded to the Defendants is low; and (5) that the Plaintiffs are entitled to get mesne profits only for the date the full amount duo to the Defendants is deposited in Court.

4. Point No. 1: According to the Defendants, the equity of redemption of plaint item No. 1 was sold in execution of the decree in O.S. No. 535 of 1072 of the Moovattupuzha Munsiffs Court obtained by the Edappally Koikkariam, and the auction-purchaser''s rights were assigned by the Koikkariam to Mangayil Narayana Panicker. The Defendants contend that, by virtue of the assignment Mangayil Panicker has given, Defendants 1 to 7 have obtained the auction-purchaser''s rights and that the first Plaintiff did not therefore obtain the equity of redemption of item 1 by the sale deed taken by him from Karadiparambu branch. It is seen from Ext. Z, copy of the file book in the Moovattupuzha Munsiffs Court, that O.S. No. 535 of 1072 was filed by the Koikkariam against one Narayanan Sankaran of Purathanai on 13-10-1072 and that it was decreed ex parte on 27-11-1072. Ext. Y is the copy of the decree in that suit.

According to the Defendants, Narayanan Sankaran, the Defendant in O.S. No. 535 of 1072, was the karanavan of the Purathanai tarwad at the time of the institution of O.S. No. 535 and so Ext. Y decree must be deemed to be one obtained against that tarwad. From the records produced in the case, it is not possible to ascertain whether the suit was filed, and the decree obtained, against Narayanan Sankaran personally or against him in his representative capacity as karnavan of the tarwad. Without ascertaining that fact, it is not possible to say that the decree in O.S. No. 535 of 1072 was one passed against the Purathanai tarwad. Subsequent to the execution of Ext. A partition deed in 1073, the equity of redemption of plaint item No. 1 was attached and sold in execution of the decree in O.S. No. 535 of 1072. Ext. VI is copy of the sale certificate. The attachment was after the partition and no member of the Karadiparambu branch was impleaded in the execution proceedings.

Even if it is admitted for arguments'' sake that the decree in O.S. No. 535 of 1072 was obtained against Narayanan Sankaran in his representative capacity as karnavan of the Purathanai tarwad, it is not possible to hold that the attachment and sale of the equity of redemption of item No. 1 after the partition is binding on the Karadiparambu branch. The tarwad had ceased to exist with the partition in 1073, and after the partition the equity of redemption belonged to the Karadiparambu branch alone and no one else had any right in it. No doubt, if the decree was one binding on the tarwad, plaint item No. 1 would be liable for the decree amount as it originally belonged to the tarwad and the Karadiparambu which had obtained it in the partition. But, for the attachment effected after the partition and the subsequent proceedings in execution to be binding on the members of the Karadiparambu branch, it was necessary to have impleaded the Karnavan of that branch in the execution proceedings after the partition. As the attachment and sale were effected after the partition without impleading the Karadiparambu branch in the execution proceedings they are not binding on the said branch.

Even if the attachment and sale are binding on the Karadiparambu branch, Defendants 1 to 7 will not be entitled to resist redemption of Ext. B mortgage unless they can show that the equity of redemption of plaint item No. 1 is now vested in them by virtue of assignments obtained from the auction-purchaser and his assignees. Seven items of properties are comprised in Ext. B mortgage. Even if the Plaintiffs are entitled to the equity of redemption of one alone of those properties they would be entitled to redeem the whole mortgage, and the mortgagees can resist their claim for redemption of any item only if they (mortgagees) have acquired the equity of redemption of that item. No sale deed executed by the Koikkaraiam in favour of Mangayil Panicker has been produced in this case. The Appellants'' counsel contended that the sale in favour of Mangayil Panicker might have been only an oral sale. It is true that an oral sale could be made. But it is extremely unlikely that a mortgagee would have taken an oral sale of the equity of redemption from the auction-purchaser in a Court sale. Except the bald statement made by Mangayil Panicker in Ext. IV that he got an assignment of the equity of redemption of plaint item No. 1 for Rs. 95/-, there is absolutely no evidence to show that he had purchased the equity of redemption from the Koikkariam. As has been pointed out by the Court below, Mangayil Panicker''s assignees have dealt with plaint item No. 1 only on the basis that they had a mortgage right alone and not on the basis that they had the equity of redemption also. So, it is absolutely clear that Defendants 1 to 7 have not obtained the equity of redemption of plaint item No. 1. In the circumstances, Defendants 1 to 7 cannot resist the Plaintiffs'' claim for redemption and recovery of possession of plaint item No. 1.

5. Point No. 2: It was as a result of Ext. v. suit that the michavaram for plaint item No. 7 was raised from 54 Edangazhies of paddy to 24 paras 7 ? Edangazhies of paddy. That suit was filed on 4-10-1074. Ext. B mortgage, which is the mortgage now sought to be redeemed, was executed only on 8-12-1074. It was thus executed pending the suit filed by the jenmi for enhancing the michavaram, and the mortgagor and the mortgagee are both bound by the decree in that suit. The mortgagee took the mortgage fully knowing that the jenmi''s claim for enhancement of the michavaram was pending adjudication. Therefore, on the principle recognised in Section 76 T.P. Act the mortgagees are bound to pay the enhanced michavaram and cannot claim any compensation from the mortgagor oil account of the enhancement of the michavaram during the currency of the mortgage. So far as the plaint item No. 7 is concerned, Ext. B is only a sub-mortgage and Defendants 1 to 7 are also only sub-mortgagees. The property originally belonged to Kunjacni and she mortgaged it to the Purathanai tarwad in 1089 under Ext. III. The rights under Ext. III devolved on the Karadiparambu branch under Ext. A partition and after that partition the Karadiparambu branch executed Ext. B mortgage.

It was, therefore, contended by the Appellants counsel that the michavaram for plaint item No. 7 was enhanced during the currency of Ext. III mortgage and so Defendants 1 to 7 who claim under the Karadiparambu branch are entitled to get back from Kunjachi''s representatives-in-interest the enhanced michavaram paid by them. The Short answer to this contention is that the mortgage which the Plaintiffs seek to redeem is not Ext. III mortgage but Ext. B sub-mortgage. The sub-mortgage was executed at a time when the Jenmi''s suit for enhancement of the michavaram was pending and, therefore, the sub-mortgagee has taken the sub-mortgage subject to the result of the suit for enhancement of michavaram. Consequently the sub-mortgagee cannot claim any compensation for the payments made by him on account of the enhancement of the michavaram. So far as plaint item No. 7 is concerned, as against Defendants 1 to 7, Plaintiffs stand in the shoes of the sub-mortgagors.

Under Section 76(c), T.P. Act it is the duty of the mortgagee to pay all tax and rent during the currency of the mortgage; and the decisions in the Indian High Courts are also to the effect that he is bound to pay the enhanced tax and rent and cannot claim compensation in respect of the payment of the same unless there is a contract between the parties making him liable to pay only the tax and rent subsisting at the time of the execution of the mortgage. The decisions of the Travancore High Court on the subject are not uniform. But the last decision of that High Court on the subject reported in-Ouseph Kathanar v. Narayani Amma 1943 Trav LR 988 (A)is that, in the absence of express terms, it is the mortgagee who is to pay the tax. In the circumstances, we hold that the Defendants are not entitled to claim from the Plaintiffs the amount they have paid on account of enhanced michavaram in respect of plaint item No. 7.

6. Point No. 3: There is no documentary evidence to show that the Karadiparambu branch had received Rs. 290/- under an agreement to execute Anr. puravaipa. A statement in Ext. VII compromise petition to the effect that a sum of 1295 Fanams was paid under a puravaipa deed was relied upon by the Appellants'' counsel in sup-port of the contention that a payment had been made to the Karadiparambu branch. In the first place, 1295 fanams is not the same as Rs. 290/-. In the second place, what is stated in Ext. VII is that 1295 Fanams has already been paid under a puravaipa deed and not that it was paid under an agreement to execute a puravaipa. The Court below was, therefore, right in dismissing the claim for Rs. 290/- on the ground that there was no evidence in support of it.

7. Point No. 4: As regards the value of improvements the specific items claimed by the Appellants'' counsel in this Court were: cost of sinking a well, cost of lowering the level of the southern portion of item No. 1, and cost of building the masonry banks of two tanks. The Respondents have also filed a memorandum of objections contending that the value of improvements awarded by the Court below is excessive. Their main objection was to the value awarded to the Defendants for certain trees. From the commission report and the evidence of the witnesses, it is clear that the well in item No. 5 which, according to the commission report, is about 20 years old must have been sunk by the mortgagees. The cost of this well appears from the commission report to be Rs. 40/-. The mortgagees are entitled to get the same from the Plaintiffs. There is no substance in the Defendants'' claim in regard to the cost of levelling and the cost of masonry works to the two tanks. What is claimed as levelling done by the Defendants appears to be the sale or removal of some earth to a tile factory at Vazhakulam. From the commission report it also appears that the two tanks referred to by the Appellants'' counsel are lying in a very neglected condition.

According to the Plaintiffs, some of the trees for which value of improvements has been awarded are trees of spontaneous growth and no value of improvements should have been awarded in respect of them. The trees claimed to be of spontaneous growth are valuable for timber and for the fruits. They could not have grown up without proper attention and care. We are unable to accept the contention that they are trees of spontaneous growth. In the circumstances, the value of improvements awarded by the Court below calls for interference only in one respect, viz., as regards the cost of the well in item No.

5. The amount awarded by the Court below undervalue of improvements has, therefore, to be enhanced by Rs. 40/-.

8. Point No. 5: It was conceded by the Respondents'' counsel that the Plaintiffs would be entitled to get mesne profits only from the date they deposited in Court the full amount due to the Defendants and gave notice of the same.

9. In the result, the appeal is allowed to the extent indicated in paragraphs 7 and 8 above and dismissed in other respects. The value of improvements which the Plaintiffs have to pay to the Defendants is raised from Rs. 633-14-4 awarded by the Court below to Rs. 673-14 As. 4Ps; and the Plaintiffs are allowed to recover mesne profits only from the date they deposit in Court the full amount payable by them to the Defendants under the lower Court''s decree as modified by this Court in this appeal and give notice of the deposit to the Defendants. In all other respects the lower Court''s decree is confirmed. The memorandum of objections filed by the Respondents is dismissed. The Respondents will pay the costs of the memorandum of objections to the Appellants; and the Appellants will pay three-fourth of the costs of this appeal to the Respondents.

