(1985) 01 KL CK 0014

In the High Court Of Kerala

Case No : C.R.P. No. 2977 of 1981

Habeebu Sulaikha Kanju	APPELLANT
Vs	
Krishna Pillai and Others	RESPONDENT

Date of Decision : 04-01-1985

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 148

Citation : (1985) KLJ 98

Hon'ble Judges : V. Bhaskaran Nambiar, J;P.C. Balakrishna Menon, J

Bench : Division Bench

Advocate : P.K. Shamsuddin, for the Appellant; P. Sukumaran Nair, for the Respondent

Final Decision : Dismissed

Judgement

Balakrishna Menon, J.—The only question raised in this revision petition is as to whether the Court has jurisdiction to extend the time for payment of the price of redemption fixed as per a decree for redemption of a usufructuary mortgage. The suit for redemption was decreed on 3-8-1976 directing the plaintiff mortgagor to deposit the redemption price fixed at Rs. 4097.38 within six months from the date of the decree. On such deposit together with subsequent interest and costs the defendant is directed to put the plaintiff in possession of the property mortgaged. The decree contained a default clause that on failure of deposit as aforesaid the plaintiff will be debarred from redeeming the property. The period of six months for deposit fixed under the decree expired on 3-2-1977. The plaintiff mortgagor deposited the redemption price on 14-2-1977 and as per E. P. No. 29 of 1977 applied for execution of the decree. He filed another application E. A. No. 95 of 1977 for extension of time, till 14-2-1977 for deposit of the amount fixed under the decree. The execution court dismissed the application for extension of time and also the execution petition on the ground that it has no jurisdiction to go behind the decree. C. R. P. No. 786 of 1978 filed by the plaintiff-mortgagor against these others of the execution court was dismissed on 18-7-1980, on the ground that the plaintiff bad in the meanwhile filed I. A. No. 939 of 1978 in the suit on the original side for extension of time for deposit of the amount. He had also filed I. A. No. 1169 of 1978 for drafting a proper decree in accordance with Form No. 7D appended to the Code of Civil procedure. Both these petitions were allowed by the lower court and the legal representative of the mortgagee-defendant has come up in revision.

Sub rule (2) of Rule 7 of Order XXXIV, reads as follows:

2). The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing for a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub rule (1) or of the amount adjudged due in respect of subsequent costs, charges expenses and interest.

The corresponding provision of the C P C as amended in Kerala is contained in Rule 5 of Order XXXIV extracted below;

The court may, upon good cause shown and upon such terms, if any, as it thinks fit, postpone the date fixed for payment under this order from time to time.

The relevant portion of Rule 4 of Order XXXIV, applicable to Kerala corresponding to sub rule (1) of Rule 7, C. P. C. is extracted below:

4. Decree in a suit for redemption.--In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree.

(a) xx xx xx

(b) directing - (i) that, if the plaintiff pays into court the amount so declared due with subsequent interest and costs as are mentioned in Rule 7 on a day within six months of the decree to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall if so required, retransfer the property to the plaintiff at his cost, free from the mortgage and from all encumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property.

2. In Het Singh & Others v. Tika Ram (I. L. R. (34) Allah. 388) a division Bench of the Allahabad High Court held that notwithstanding a default clause in the decree, the Court has jurisdiction to extend the time for deposit under the corresponding provision of Rule 8 of Order XXXIV, as it then stood. It is stated at page 390:-

In the decree in a redemption suit "the court may under Order XXXIV, Rule 8, upon good cause shown and upon such terms, if any, as it thinks fit from time to time postpone the day fixed for payment". The learned Vakil for the appellants concedes this, but urges that time can be extended when the decree in a redemption suit is drawn up in the form prescribed by law, but that if it provides that in case of failure to pay within the period fixed by the decree, the suit shall stand dismissed, no execution can be granted in contravention of the provision in the decree. We are unable to accept the contention. The decree in the case before us was a decree in a redemption suit, and the provision therein that in case of failure to pay the plaintiff''s suit shall stand dismissed was carelessly put in for the provision that the plaintiff shall be debarred from all right to redeem the mortgaged property, in as much as the suit was for redemption and the dismissal of such a suit had the effect of debarring the plaintiff from all right to redeem the mortgaged property, in a much as the suit was for redemption and the dismissal of such a suit had the effect of debarring the plaintiff from all right to redeem.

We are satisfied that Tika Ramin calculating the interest from November, 1890, made a bona fide mistake which constituted a good cause for the extension of the time for the payment of the prior mortgage of the 19th of November, 1889.

In the aforesaid decision it is also held that in view of the specific provision in Order, XXXIV it is not Section 148 of the C. P. C. that would apply for extension of time to make the deposit.

3. A Division Bench of the Madras High Court in the decision in Gurusami Naidu v. Govindappa Naidu & Others (A. I. R. 1933 Mad. 762) stated at page 763:-

If the decree passed can be reasonably treated as a decree directing the redemption of a mortgage, and if for that purpose it fixes a period of time for payment of the money, there is, in my opinion no bar to the exercise of the discretionary power for extending such time, as provided in sub R. (2), R.7, 0.34, Civil P. C.

A Division Bench of the Patna High Court in Md. Azim & Others v. Md. Sultan & Others (AIR. (33) 1946 Pat.99) stated at page 100:

The mortgagor''s right to redeem the mortgaged property subsists until a final decree debars the mortgagor from all right to redeem, and that in the case of a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale. In the case of a final decree that provides for sale of the mortgaged property, or a sufficient portion thereof, to satisfy the mortgage-debt, the mortgagor is entitled to redeem the mortgaged property even after sale has taken place but before confirmation of the sale.

It is in the case of a mortgage decree by conditional sale, or anomalous mortgage the terms of which provide for foreclosure only, where the final decree declares the plaintiff debarred from all right to redeem the mortgaged property, or, where in pursuance of the final decree the mortgaged property has been sold and the sale is confirmed, that the right to redeem is extinguished. In other cases the right to redeem the mortgaged property subsists, and so long the right is there, it is always open to a mortgagor to avail himself of that right on payment of the amount declared due under the preliminary decree.

. This decision of the Patna High Court was followed in Paltan Mahto and Another Vs. Jagaru Mahto and Another, . The same view is expressed by a Division Bench of the Calcutta High Court in Sambhunath Auddy v. Tarak Nath Auddy and others (A. I. R. 1965 Calc. 450) It is stated at page 453:

O.34, R. 7 deals with preliminary decrees passed in a redemption suit. It is provided that in a suit for redemption, if the plaintiff succeeds, the court shall pass a preliminary decree, ordering an account to be taken, declaring the amount so due, and directing that if the plaintiff paid into court the amount so found or declared due on or before such date as the court may fix within six months from the date on which the court confirms and countersigns the account, or from the date on which such amount is declared in Court, then the defendant shall deliver up to the plaintiff or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from all in cumbrances created by him and if necessary, put the plaintiff into possession of the property. Sub rule (2) provides that the court may, on good cause shown and upon terms to be fixed by the court, from time to time, at any time, before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due, or adjudged due in respect of subsequent costs, charges, expenses and interest. R. 8 deals with a final decree in a redemption suit. It provides that where, before a final decree debarring the plaintiff frame all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree, the plaintiff makes payment into court of all amounts due from him, the court shall on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order ordering the defendant to deliver up the documents referred to in the preliminary decree and, if necessary, order him to re-transfer at the costs of the plaintiff, the mortgaged property and also, if necessary order him to put the plaintiff in possession. Coming now to the decree passed on the 20th May, 1957, it appears that it is a composite one. It has all the elements of a preliminary decree providing for accounting and payment of the money which must be done within two weeks or such time as may be extended by the court. This is on lines of R. 7 of 0.34. It must be remembered, however that a sale had already taken place in the mortgage suit. So, it was ordered that if the payment was not made then the mortgages would be entitled to proceed with the confirmation of sale in the mortgage suit. It will be observed that although under R. 7 of 0.34 the time is fixed by the court for payment, which time may be extended by the court still under R. 8 the mortgagor can make payment into court right upto the time of confirmation of sale, and if he does so then the court is compelled to direct that the property be re-conveyed etc. In the present case, it is true that the time for payment fixed under the decree dated 20th May, 1957 had expired, but the mortgagor had still the right to put in the money into court before the sale was confirmed. If he did so, the court was bound to make an order in his favour and direct the mortgagee to make over the documents etc. If the mortgagor still had that right, the court should have taken that factor into consideration while deciding whether the time for payment should be extended or not.

4. It is clear from the authorities cited above, that the Court has jurisdiction under Order XXXIV, Rule 5 of the CPC as amended in Kerala for extension of time fixed for deposit under Order XXXIV Rule 4, until such time as the mortgage is itself extinguished by resort to the provisions of foreclosure or sale that may be applicable to mortgages other than usufructuary mortgages as provided for in Order XXXIV, Rule 4 (b) (ii) of the CPC as amended in Kerala.

5. Counsel for the revision-petitioner relies on the decisions of Moidu J. in Kallyani Amma v. Kunhikrishnan (1971 K. L. T. 309) and of Janaki Amma J. in Christeena v. Kolappan (1977 K. L. T. 215), in support of the proposition that in cases where the Court fixes a time ''for the doing of any act prescribed or by C. P. C. and on failure of compliance to which certain consequences are to follow, the Court will not have jurisdiction to extend time u/s 148, C. P. C. These cases however do not appear to have been correctly decided, in view of the decisions of the Supreme Court in Chinnamarkathian alias Muthu Gounder and Others Vs. Ayyavoo alias Periana Gounder and others, , and in Smt. Periyakkal and Others Vs. Smt. Dakshyani, . Since however, we find that the jurisdiction for extension of time for deposit of the price of redemption is specifically provided for in Order XXXIV, Rule 5 CPC. and it is not the general provision of Section. 148, C. P. C. that would apply to such cases, it is unnecessary for us to pronounce upon the correctness of the decisions in 1971 K. L. T. 309 and 1977 K. L. T. 215.

We see no merit in this Civil Revision Petition and it is accordingly dismissed. There will be no order as to costs.

