(1965) 11 KL CK 0002

In the High Court Of Kerala

Case No : S.A. No. 517 of 1961

Joseph APPELLANT

Vs

Sukumara Panicker and another RESPONDENT

Date of Decision : 25-11-1965

Acts Referred:

Citation : (1966) KLJ 774

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J

Bench : Single Bench

Advocate : S. Boothalingam, for the Appellant; M. Prabhakaran, for the Respondent

Judgement

T.S. Krishnamoorthy Iyer, J.—The first defendant is the appellant. The appeal arises out of a suit filed by respondents 1 and 2 for redemption of Ext. A mortgage dated 7-6-1111 executed in favour of the appellant for Rs. 785/-. The properties comprised in Ex. A belonged to the tarwad of respondents 1 and 2. The members of the tarwad got divided under Ex. B partition deed dated 18-9-1111. The first respondent claimed to have purchased item I in Ex. A under Ex. C dated 28-4-1121 from the sharers in Ex. B to whom this item was allotted. The respondents admitted that the appellant purchased 1/3 right in the equity of redemption over item 2 in Ex. A.

2. The trial court granted a decree to respondents 1 and 2 for redemption and recovery of possession of the whole of item I in Ex. A and passed a preliminary decree for recovery of 2/3 share in item 2 in Ex. A after division by metes and bounds. On appeal by the appellant, the lower appellant court confirmed the decree of the trial court with a slight modification.

3. The facts found by the courts below and which are not disputed in this court are these. Item I in Ex. A mortgage is the plot RNHIUVWXYZ in Ex. XXI plan. The portion of item I in Ex. A comprised in Ex. Cis the plot GONH in Ex. XXI. The appellant is the owner of 1/3 of item 2 in Ex. A.

4. On the above facts, the learned advocate for the appellant raised two contentions. The first is that the respondents can recover only the plot GONH in Ext. XXI plan and the second contention is that even if it is found that respondents 1 and 2 are competent to recover the whole of item 1 and 2/3 of item 2 in Ex. A, the suit is not maintainable as all the persons representing the equity of redemption are not impleaded in the suit.

5. The first contention of the learned counsel for the appellant raises the question whether, when the integrity of a mortgage is broken up by the mortgagee acquiring a share in the equity of redemption, it is open to the plaintiff who owns only a share therein, to redeem more than his share. Mr. Justice T.K. Joseph in Kanian Govindan v. Bhagavathi Lekshmi 1968 K.I.T. 328 after a review of the case law on the subject took the view that the decision in Azimut Ali v. Jowahir Singh 13 M.I. Appeals 404 which held that when the integrity of a mortgage was broken by the mortgagee acquiring a share in the equity of redemption, the plaintiff who owned only a share was entitled to redeem only his share and no more, was not in any way affected by the decision of the Privy Council in AIR 1921 125 (Privy Council) . The decision in Pala Singh v. Attar Singh AIR 1964 Pun. 81 cited by the respondents which held to the contrary was not followed in Kunjan Govindan v. Bhagavathi Lakshmi 1968 K.I.T. 328. I am inclined to agree with Mr. Justice Joseph and hold that the dictum in Azimut Ali v. Jowahir Singh 13 M.I. App.404 has not in any way been affected by the decision in AIR 1921 125 (Privy Council) . I therefore accept the contention of the learned advocate for the appellant and hold that the plaintiffs are entitled to redeem only GONH plot in Ext. XXI plan. In view of my decision on this point it is not necessary to consider the second ground advanced on behalf of the appellant. In the result, I set aside the judgments and decrees of the courts below and pass a preliminary decree allowing respondents 1 and 2 to recover GONH in Ex. XXI plan. The trial court will pass a final decree fixing the price of redemption after ascertaining the proportionate mortgage amount chargeable on the plot GONH and the value of improvements therein. The parties will bear their costs till the date of this decree. The costs incurred hereafter will be provided for in the final decree to be passed.

The respondents have filed a memorandum of objections which raises the question of the liability of the appellant for mesne profits. In view of the preliminary decree passed, the question whether the appellant is liable for mesne profits will also be considered and decided in the final decree to be passed.

