(1990) 02 KL CK 0020

In the High Court Of Kerala

Case No : S.A. No. 108 of 1984-D

K. Kunjamma and Others — APPELLANT

Vs

Bhageerathy Amma Gomathy Amma and Others — RESPONDENT

Date of Decision : 19-02-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 7, Order 34 Rule 8
Limitation Act, 1963 — Article 137, 61, 30

Citation : AIR 1991 Ker 111 : (1990) 2 ILR (Ker) 525

Hon'ble Judges : K.P. Balanarayana Marar, J

Bench : Single Bench

Advocate : B. Krishnamani, for the Appellant; L.G. Poti, for the Respondent

Final Decision : Dismissed

Judgement

1. This second appeal arises from a final decree for redemption of a mortgage. The preliminary decree passed on 19-1-1970 directed the plaintiff-mortgagor to deposit the mortgage amount of Rs. 154.40 and an amount of Rs. 200/- towards value of improvements within a period of two months from that date or any later date up to which the payment may be extended by the Court. It was further directed that on such payment the defendant-mortgagee shall deliver up all the documents in his possession and re-convey the property free from all encumbrances. Plaintiff did not deposit the amount within the prescribed time, nor did he seek extension of time to make the deposit. In the meantime he died. The 1st defendant also died since the date of the decree. An application was filed by the legal representatives of deceased plaintiff on 2-2-1977 as LA. No. 388/1977 for passing a final decree after recording them as the legal representatives and permitting them to make the necessary deposit. Request was also made for recording defendants 2 to 6 as the legal representatives of deceased 1st defendant and for impleading defendants 8 to 12. During the pendency of that petition another application was filed as I.A. 67/1980 for execusing the delay in filing the petition for final decree. The delay was condoned

and final decree was passed on 30-6-1981. On appeal the First Additional District Judge, Trivandrum set aside the order of the trial Court and dismissed the petition holding that the petition was barred by limitation. Hence the second appeal.

2. It is urged on behalf of the appellants that Rule 8 of Order 34, C.P.C. enables them to make the payment at any time before a final decree debarring them from all right to redeem the mortgaged property has been passed. The application for final decree is within time, according to the counsel, since such a decree has not been passed in this case. On the other hand, counsel for respondents has taken a plea that the petition is barred by limitation having been filed long after the expiry of 3 yeacs from the date fixed for payment and it was contended that Article 137 of the Limitation Act would apply to such a case. The Court below took the view that Article 137 applies;-

3. The question that arises for determination in this second appeal is whether there is period of limitation for making the deposit by the mortgagor-plaintiff in a redemption suit and to file an application to pass a final decree and whether Article 137 of the Limitation Act applies to such a deposit or application.

4. In order to appreciate the rival contentions we can appropriately refer to the provisions contained in Rules 7 and 8 of Order 34. Rule 7 provides that--

"Preliminary decree in redemption suit.--

(1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree--

(a) ordering that an account be taken of what was due to the defendant at the date of

such decree for--

(i) principal and interest on the mortgage,

(ii) the costs of suits, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon; or

(b) declaring the amount so due at that date; and

(c) directing--

(i) that, if the plaintiff pays 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 taken under Clause (a), or from the date on which such amount is declared in Court under Clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and and expenses as provided in Rule 10, together with subsequent interest on such sums respectively as provided in Rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances 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 also, if necessary, put the plaintiff in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree--

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(b) in the case of mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(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 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 under Sub-rule (I) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest."

Rule 8 reads thus :

"Final decree in redemption suit.-- (1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under Sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under Sub-rule (1) of Rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree, or, if such decree has been pasesd, an order--

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree, and, if necessary--

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree, and also, if necessary,--

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under Sub-rule (3) of this rule, the Court shall not pass an order under Sub-rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in Sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase-money

paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five percent thereof.

(3) Where payment in accordance with Sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,--

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in Rule 7, pass a final Decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property, and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same."

5. If payment of the amount found or declared due by the preliminary decree is not made on or before the date fixed by the Court, then the mortgagee-defendant shall be entitled to apply for a final decree under Clause (c)(ii) of rule 7. In the case of a mortgage other than a usufructuary mortgage by conditional sale or an anomalous mortgage, the terms of which provide for foreclosure only and not for sale, the mortgagee will be entitled to a final decree directing sale of the mortgaged property. In the case of a mortgage by conditional sale or such an anomalous mortgage, the mortgagee can claim a final decree debarring the plaintiff from all right to redeem the property. It follows that in the case of a usufructuary mortgage, a mortgagee is not entitled to apply for a final decree. The procedure to be followed by the mortgagee is provided in Sub-Clause (3) of rule 8. He has to make an application for a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the property in the case of a mortgage by conditional sale or of an anomalous mortgage the terms of which provide for foreclosure only and not for sale. The plaintiff can also be ordered to put the defendant in possession of the mortgaged property if necessary. In the case of any other mortgage, not being a usufructuary mortgage, the mortgagee can file an application to pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same. Sub-rule (1) of Rule 8 confers a right on the mortgagor-plaintiff to make deposit of all amounts due from him under Sub-rule (1) of Rule 7 and to make an application for a final decree at any time before a final decree debarring plaintiff from all right to redeem the mortgaged

property has been passed or before the confirmation of the sale held in pursuance of a final decree passed under Sub-rule (3) of rule 8. Here again it is seen that a usufructuary mortgagee is not entitled to file an application. In other words, only a mortgagor can apply to the court to pass a final decree on payment of the amount found or declared due under the preliminary decree. On making such deposit and on filing the application as contemplated in Sub-rule (1) of rule 8 the mortgagor-plaintiff can request the Court to order the mortgagee to put him in possession of the mortgaged properties.

6. The question whether Rule 8(1) is applicable to redemption suit of usufructuary mortgage arose for consideration in Angammal Vs. V.K.M. Muhammad Sulaiman Lebbai and Another, A preliminary decree in that case was passed on 15th October 1935 and the time fixed for payment was 15th January 1936. The plaintiff did not deposit the amount on or before that date. The application for a final decree was filed in 1943 and the amount was deposited towards the end of 1942. The trial court and the first appellate court dismissed the petition. In second appeal the High Court held that in a suit for redemption of a usufructuary mortgage, the mortgagor can, even after the time fixed for payment by the preliminary decree has expired, take advantage of Order 34, Rule 8(1) C.P.C. by exercising the right of making the payment of the amount due from him as fixed under Rule 7(1) at any time before a final decree debarring him from all right to redeem the mortgaged property has been passed. It is observed AIR 1946 Mad 39.

"Prima facie, even in the case of a usufructuary mortgage, the mortgagor would seem to have a right of paying under Rule 8(1) the amount fixed under Rule 7(1) and ask for consequential reliefs."

Somayya, J. did not agree with the contention that in the case of a usufructuary mortgage, plaintiff has no right of payment under Rule 8(1) for the reason that a usufructuary mortgagee-defendant has no right to apply for a final decree debarring the plaintiff from all right to redeem the mortgaged property or of bringing the property to sale. After referring to Rule 7(2) of Order 34 it is stated that this rule also fixes as the outer limit the passing of a final decree for foreclosure or sale. It is observed that the result must be that no extension of time is possible in cases of usufructuary mortgages since neither is possible in the case of such a mortgage. In that case the contention was that the only right that the plaintiff-mortgagor may have after the time fixed for payment has expired, is the remedy provided under Sub-rule (2) of Rule 7 and that he cannot exercise the right given under Rule 8(1). It is stated :

"If it is conceded that Rule 7(2) applies and that the mortgagor may have the time extended under that rule even in a case of a preliminary decree for redemption of a usufructuary mortgage, I fail to see how a different construction is possible in the case of Rule 8(1)."

It is further stated that the only reasonable construction is that in the case of a usufructuary mortgage, there is no outer limit before which action must be sought. On the question whether an application is necessary under Rule 7(2) it was held that an application is not necessary and that the mortgagor has to apply for a final decree after payment under Rule 8(1). For this application the starting point is the payment by the mortgagor. In the result it was held that the court should, if it is possible to suits for redemption of usufructuary mortgages as well.

7. A Division Bench of the Patna High Court had considered the same question in Md. Azim and Others Vs. Md. Sultan and Others, That also was a case where the deposit was made several years after the date fixed in the preliminary decree. It was held : at page Patna 100; AIR 1946.

"In the case of a usufructuary mortgage the mortgagor need not ask for extension of the time fixed for payment by the preliminary decree under the provision of Sub-rule (2) of Rule 7. The provisions of that Sub-rule apply to the case of mortgage for foreclosure or sale only. The effect of extension of time under the said Sub-rule is postponement of the time for passing the final decree for foreclosure or sale, as the case may be, which is not allowed in the case of a usufructuary mortgage."

It is further stated :

"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."

The petitioners in that case were found entitled to redeem the mortgaged property even though they deposited the amount nearly 7 years after the preliminary decree was finally confirmed on dismissal of the appeal by the High Court. A contention was raised that the plaintiff-mortgager should bring a fresh suit for redemption. That was answered by the Division Bench by saying that it is not necessary to compel the mortgagor to bring a fresh suit for redemption if the appropriate remedy can be granted in that litigation.

8. Can a mortgagor after getting a preliminary decree sleep over the matter for years and deposit the mortgage money at his will and pleasure and thereafter seek a final decree for redemption by filing the application contemplated in Rule 8(1) of Order 34, C.P.C. The Madras High Court in the decision referred above has taken the view that the mortgagor will have the right of paying the amount at any time. Mention is also made about the view of the Privy Council that in the case of a preliminary decree for partition the suit cannot afterwards be dismissed for non-prosecution and must be kept pending. Accordingly it was held that the

same result may follow in the case of redemption suits where after a preliminary decree no action is taken by the parties. With respect I disagree. Varghese Kalliath J. observed in Laxmi and others v. Sankappa Alva and others ILR 1990 Ker 217 thus:

"If a plaintiff does not take any steps after a preliminary decree is passed, the court should adjourn the proceedings sine die with liberty to the parties concerned to end the torpor and suspended animation of the suit by activising it by taking appropriate proceedings."

In the case of a preliminary decree for partition the position is that the suit is adjourned sine die without fixing any time within which a petition for a final decree has to be filed and, as held in Thomas v. Bhavani Amma 1969 KLT 729 it is the duty of the Court to pass a final decree and what is called an application for a final decree is but a reminder to the court of its duties. The position in the case of a final decree in a redemption suit is entirely different. The reliefs granted by the preliminary decree are to be worked out in accordance with Rr. 7 and 8 of Order 34, C.P.C.

9. On a reading of Rr. 7 and 8 it is apparent that the deposit of the amount has to be made before the right of redemption is lost. Even if the mortgagee is entitled to get a final decree debarring the plaintiff-mortgagor from all right to redeem the mortgaged property, such a claim has to be made within the period of limitation. Article 61 of the Limitation Act prescribes a period of 30 years to redeem or recover possession of immovable property mortgaged and time begins to run when the right to redeem or recover possession accrues. The period of limitation for foreclosure by a mortgagee is also 30 years and the starting point of limitation is the same. The deposit can be made by the mortgagor so long as the relationship of mortgagor and mortgagee subsists. It cannot be said that the relationship subsists even after the expiry of the period of limitation prescribed under Article 61 of the Limitation Act. The period of limitation is not in any way extended by the passing of the preliminary decree. The right of the mortgagee to get a final decree debarring the plaintiff from all right to redeem the property will also come to an end on the expiry of 30 years from the date on which the mortgage money has become due. The mortgagor cannot, therefore, wait for years and years and then make a deposit and file an application for a final decree. In other words, the deposit of the amount found due in before the date fixed in the preliminary decree or within the period of limitation prescribed in Article 61 of the Limitation Act viz. within 30 years from the date on which the mortgage money has become due.

10. Support for this view can be had in the decision in the Karnataka High Court in Ramaiah v. Veeraiah ILR 1983 Kar 114 where it is observed that it is a well-established principle of law that an application for final decree can be made so long as the relationship of mortgagor and mortgagee subsists. On the question as to when the right of the mortgagor to redeem the mortgaged property comes to an end, the Patna High Court in the Division Bench decision referred above

has held that the mortgagor''s right subsists until a final decree debars the mortgagor from all right to redeem. The right to redeem is extinguished only when the final decree declaring the plaintiff debarred from all right to redeem the mortgaged property has been passed or where in pursuance of the final decree the property has been sold and the sale is confirmed. It was held that in other cases the right to redeem the mortgaged property subsists and, so long as the right is there, it is always open to the mortgagor to avail himself of that right on payment of the amount declared under the preliminary decree. The right mentioned must be a right available under law and should have been subsisting on the date of deposit meaning thereby that it should not have been lost as barred by limitation. In that case a plea of bar of limitation was raised and a contention was taken that the plaintiff should bring a fresh suit for redemption. This plea was turned down by observing that the plaintiff had still the right to redeem the property and as such it was not necessary to compel the plaintiff to bring a fresh suit for redemption if the appropriate remedy can be granted in that litigation. That until the final decree is made under Sub-rule (2) of Rule 8 of Order 34 the relationship of mortgagor and mortgagee could not be extinguished, and so long as that relationship subsists, it may be open to the mortgagor to file a second redemption suit cannot be disputed. Instead of directing the plaintiff to file a second suit for redemption, the relief can be given in the petition itself provided the relationship of mortgagor and mortgagee subsists.

11. It is contended that in the case of usufructuary mortgage, the mortgagor need not ask for extension of time. On a reading of Rule 7(2) it is clear that the legislature intended that this Sub-rule should not apply to usufructuary mortgages. That the legislature was not unaware of this position is clear from the amendment introduced in 1929 by which rules 7 and 8 were amended whereby the right conferred earlier on a usufructuary mortgage to bring the property to sale in case of the mortgagor not making the payment within the time fixed in the decree was taken away. The provision in Rule 7(2) is applicable only in the case of mortgages other than usufructuary mortgages and as such a usufructuary mortgagor is not conferred with a right to seek extension of time. It is, therefore, unnecessary to consider whether an application at all is required to seek extension of time under Rule 7(2) in the case of a mortgagor of a usufructuary mortgage.

12. A deposit of the amount by itself is not sufficient. That has to be followed by an application for final decree as contemplated under Rule 8(1) of Order 34. Though the mortgagor is entitled to deposit the amount at any time before the right to redeem is extinguished, he has to file the application within three years of such deposit. The Madras High Court had occasion to consider this aspect in Subramaniam Chettiar and Another Vs. Muthiah Pillai, where it was held that the cause of action for an application arises on payment and the period of limitation prescribed for such application must be governed by Article 181 of the Limitation Act (corresponding to the present Article 137) which will be three years from the

date of deposit. The application in that case was filed long after the date of deposit and as such was found to be barred by limitation. There is no reason to differ from that view The position is that Article 137 is applicable only in the case of an application filed under Rule 8(1) of Order 34 and not in the case of deposit of amount.

13. I am, therefore, in complete agreement with the view expressed in Md. Azim and Others Vs. Md. Sultan and Others, and hold that without seeking extension of time fixed in the preliminary decree, the mortgagor in the case of a usufructuary mortgage is entitled to deposit the amount at any time after the period fixed in the preliminary decree and make an application for final decree under Rule 8(1) of Order 34 provided the right to redeem the mortgage has not been extinguished by that time. I further hold that Article 137 of the Limitation Act is not applicable for such deposit whereas it is applicable only in the case of an application presented under Rule 8(1) for passing a final decree in which case the application has to be filed within three years of such deposit.

14. The counsel for appellants has raised a contention that appellants, having deposited the amount, are entitled to recover possession of the property. He seeks support from the decision in Prithi Nath Singh and Others Vs. Suraj Ahir and Others, . That does not relate to a redemption decree whereas the amount had been paid off to the mortgagee. It was held that if the mortgage money has been received by the mortgagee and thereafter he refused to perform the acts he is bound to do, the mortgagor can enforce his right to get back the mortgage document, possession of the mortgaged property and the re-conveyance of the property through court. It is also stated that if the mortgagor goes to court to enforce his demands, that would not be to enforce his right of redemption which was really his right to make those demands on payment of the mortgage money. It was also held that the right to demand the mortgagee to do certain things on payment of the mortgage money is different from enforcing the demands subsequent to the payment of money. Since the mortgagor has desired to redeem the mortgage by filing a suit for redemption in this case the question of recovery of possession by resorting to the procedure contemplated in Section 62 of the Transfer of Property Act does not arise. The relief of recovery of possession cannot, therefore, be claimed by the appellants.

15. Applying the above stated principles to the facts of the present case, it is seen that the petition for final decree is barred by limitation. The mortgage deed was executed on 27th Karkadakam 1111 and the period fixed is three years. The amount was due oni 27th Karkadakam 1114, corresponding to 12-8-1939. The period of limitation for redemption is 30 years under the new Limitation Act (Act 36/1963) and the starting point of limitation is the date on which the amount becomes due. The new Limitation Act came into force on 1-4-1964. Under the earlier Act the period of limitation was 60 years. The period of limitation under the new Act is shorter than the period of limitation prescribed by the earlier Act. In such a case Section 30 of Act 36/1963 stipulates that a suit may be instituted

within a period of 7 years after the commencement of the new Act or within the period prescribed for such suit by the Limitation Act 1908, whichever period expires earlier. The period of 60 years will expire only in 1999. Seven years from the date of the Act will take us to 1-1-1971. The right to redeem has therefore been extinguished by 1-1-1971. The deposit is seen to have been made only on 9-12-1977, at a time when the mortgagor-mortgagee relationship was not subsisting. The deposit has been made beyond the outer limit and the petition for final decree is therefore not maintainable as barred by limitation. The dismissal of the final decree petition by the lower appellate Court has therefore to be sustained, though for different reasons.

In the result, the second appeal is dismissed, but in the circumstances without costs.