(1997) 06 KL CK 0039

In the High Court Of Kerala

Case No : C.R.P. No. 188 of 1993 and 2340 of 1995

K. Rajendra Prasad and Others APPELLANT

Vs

South Indian Bank and Another RESPONDENT

Date of Decision : 02-06-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 5, 122
Transfer of Property Act, 1882 — Section 60

Citation : AIR 1998 Ker 215 : (2001) 103 CompCas 605 : (1997) 3 ILR (Ker) 782

Hon'ble Judges : P.K. Balasubramanyan, J;K.A. Abdul Gafoor, J

Bench : Division Bench

Advocate : M.P. Ashok Kumar, for the Appellant; S. Narayanan Poti and A.K. Basheer, for the Respondent

Final Decision : Dismissed

Judgement

Balasubramanyan, J.—C.R.P. 188 of 1993 is by the judgment debtors in O. S. 51 of 1983 on the file of the subordinate Judge''s Court of Tellicherry. C.R.P. 2340 of 1995 is by one of the judgment-debtors in O. S. 170 of 1988 on the file of the Subordinate Judge''s Court of Cochin Both the suits were filed by banks for recovery of amounts due to them from the respective judgment debtors. Both the suit were for recovery of the amounts due by sale of the mortgaged properties. Composite decrees were passed in terms of Order XXXIV of the Civil P.C. as adopted in Kerala. The properties were brought to sale on failure of the mortgagors to deposit the amounts due to the mortgagee in time or within the extended time granted by the court in that behalf. After the properties were sold but before the sales were confirmed, the judgment debtors purported to file applications seeking redemption of the respective mortgages on the assertion that they are entitled to redeem the mortgages at any time before confirmation of the sale. These applications were opposed by the decree holders as well as by the auction purchaser. They contended that on the scheme of Order XXXIV of the Civil P.C. as adopted in Kerala, there was no right in the mortgagors to deposit or pay the amounts due to the mortgagee including the poundage and that these applications were liable to be dismissed. The executing court in both the cases accepted that plea and dismissed the applications made by the judgment debtors-mortgagors. These orders are questioned in these revision Petitions. When C.R.P. 2340 of 1995 came up before the learned single Judge, it was contended that notwithstanding the scheme of Order XXXIV of the Civil P.C. as adopted in Kerala, the mortgagors had the right under Order XXXIV, Rule 5 of the Civil P.C. as it continues to exist in the CPC enacted by the parliament, the right tender the mortgage money and the other sums at any time before confirmation of the sale in exercise of their right of redemption and the said right is not taken away by anything contained in the Order as adopted in Kerala. The learned single Judge having felt that the question raised is of sufficient importance referred the revision for being heard by a Division Bench. Since identical question was sought to be raised in C.R.P. 188 of 1993 also, that revision was also posted along with C.R.P. 2340 of 1995 and both the revisions were heard.

2. As far as Kerala State is concerned, by exercise of power u/s 122 of the Civil P.C. Order XXXIV of the Central Code (called so far convenience) was amended in the year 1974. Serious departure was made in that amendment by dispensing with the need for passing a preliminary decree and thereafter a final decree for sale and giving power to the court to pass a composite decree with right in the court to grant time to the mortgagor to pay off the mortgage money and to extend the time for making the payment before holding the sale. When in the year 1976 Amendment Act 104 of 1976 was passed by the Parliament, controversy arose whether the amendment adopted in 1974 in Kerala will continue to be available or whether the Civil P.C. as amended by Amendment Act 104 of 1976 would prevail. A learned single Judge held in S.B.T. v. Balakrishnan 1990 (1) KLT 391 that a composite decree for sale of the property after the enactment of Order XXXIV by Amendment Act 104 of 1976 could not be passed under Order XXXIV of the Code as adopted by the High Court in the year 1974. The learned Judge in fact held that Order XXXIV as amended by the High Court stood repealed. Considerable controversy was generated on this aspect. Apparently to settle that controversy, what was done was that Order XXXIV of the Code was again re-adopted in terms of Section 122 of the Civil P.C. with effect from 20-11-1990. In other words Order XXXIV of the Code as is now available in Kerala was re-adopted with effect from 20-11-1990, subsequent to the coming into force of Amendment Act 104 of 1976.

3. Whereas in O.S. 170 of 1988 giving rise to C.R.P. 2430 of 1995 the application made by the judgment debtors was dismissed on the ground that the deposit was made out of time, in O. S. 1 of 1983 giving rise to C.R.P. 188 of 1993 the application was dismissed on the ground that the application was made after the confirmation of the safe. If the position adopted by the executing court in O. S. 1 of 1983 were to be correct, C.R.P. 188 of 1993 may have to be dismissed whatever may be our conclusion on the question of the entitlement of the mortgagor-judgment debtor to seek redemption at any time before confirmation of the sale.

4. Order XXXIV Rule 4 of the Central Code contemplates the passing of a preliminary decree in a suit for sale. That Rule in addition to providing that the plaintiff would be entitled to apply for a final decree directing that the mortgaged property be sold in case of default on the part of the defendant in paying the amount due to the mortgagee, also conferred on the court power to extend the time fixed for the payment of the amount found or declared due under Sub-rule (1) of that Rule. It is on failure of the mortgagor to make the deposit that the court was called upon to pass a final decree for sale in terms of Order XXXIV Rule 5 of the Civil P.C. That rule provided that where on or before the day fixed or any time before the confirmation of a sale made in pursuance of a final decree passed under Sub-rule (3) of this rule, the defendant makes payment into court of all amounts due from him under Sub-rule (1) of Rule 4 the Court shall on application made by the defendant pass a final decree or an order directing the plaintiff to deliver up the documents referred to in the preliminary decree and if necessary ordering him to transfer the mortgaged property as directed in the decree and further if necessary ordering the plaintiff to put the defendant in possession of the property. The sale contemplated is a sale held in pursuance of a final decree passed under Sub-rule (3) of that Rule which provided that where payment in accordance with Sub-rule (1) had not been made, the court shall, on application made by the plaintiff in that behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold. Therefore in a case where a sale was held pursuant to a final decree under Order XXXIV Rule 5 (3) of the Code, the mortgagor-judgment debtor had the right to pay off the amounts due to the mortgagee and seek redemption of the property. This scheme of the Central Code was replaced by a different scheme under Order XXXIV as substituted in Kerala (for convenience called the Kerala Code). Order XXXIV Rule 3 of the Kerala Code provided for a combined decree in terms of Order XXXIV Rule 2 and also directing that in default of the defendant paying as mentioned in Order XXXIV Rule 2, the mortgaged property be sold and that the proceeds of the sale be applied in payment of what is declared due to the plaintiff. Rule 5 of Order XXXIV gave power to the court upon good cause being shown and upon such terms as it thought fit to postpone the day fixed for payment under Order XXXIV. A Division Bench of this court in Sulaikha Kunju v. Krishna Pillai 1985 KLT 81 after referring to the earlier authorities on the question held :--

"Under Order 34 Rule 5 of the Civil P.C. as amended in Kerala court has jurisdiction for extension of the time fixed for deposit under Order 34 Rule 4 of the Code, even 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 34 Rule 4(b)(ii) of the Kerala Code."

The Division Bench also observed that the jurisdiction for extension of time for deposit of the price of redemption is specifically provided for in Order XXXIV Rule 5 of the Kerala Code. The Kerala Code thus dispenses with the need for the passing of a preliminary decree for sale followed by the passing of a final decree for sale. It contemplates filing a suit for sale, a combined decree for sale and a direction to the mortgagor to pay off the amounts due under the mortgage within a time fixed or within the extended time which may be provided by the Court under Order XXXIV Rule 5 of the Code. On this scheme, it is before the sale that the court is empowered to give the mortgagor, defendant in the suit for sale Opportunity, to pay off the amounts due to the mortgagor and to get the redemption of his mortgage. Since Rule 5 of Order XXXIV of the Central Code gives the right to the mortgagor to make the deposit before the confirmation of the sale held in pursuance of a final decree passed under Order XXXIV Rule 5(iii) of that Code, it cannot be said that that right is a right that automatically becomes available to the mortgagor even in a case where no final decree was passed in terms of Order XXXIV Rule 5 (iii) of the Central Code. It is therefore difficult to accept the argument that the right to deposit the mortgage money and seek redemption of the property continues to vest in the mortgagor until the moment of confirmation of sale.

5. u/s 60 of the Transfer of Property Act right to redemption continues to inhere in a mortgagor until it is extinguished by the act of parties or by decree of a Court. It can therefore be said that the right to redemption recognised by Section 60 of the Transfer of Property Act comes to an end by a decree of Court. In Sheo Narain Sah and Others Vs. Mt. Deolochan Kuer and Others, , the Patna High Court has held that the right of redemption conferred by Section 60 of the Transfer of Property Act comes to an end by the passing of the final decree for sale and the right given under Order XXXIV, Rule 5 of the CPC is a special right and is different from the right given by Section 60 of the Transfer of Property Act. Their Lordships observed :--

"Order 34, Rule 5 must be read together with Section 60, Transfer of Property Act, if possible, and, if it cannot, then Order 34, Rule 5, the latter statutory enactment, which takes effect as if enacted in the CPC itself, will prevail. Not only can these two provisions be read together, but when Section 60, Transfer of Property Act, 1882, is given what I understand as abovementioned to be its ordinary meaning, it in no way conflicts with the provisions of Order 34, Rule 5. It follows from these considerations that not only is the mortgage debt merged in the decretal debt, but also firstly, that as between the mortgagee and the mortgagors parties to the suit for sale, the mortgage security merges in the decree and is replaced by the security of the order for sale which merger is also in accordance with the ordinary principles of res judicata, the lower mortgage security which the mortgagee necessarily relies upon in his suit for sale, merging in the higher security of the resulting decree; and secondly, that the right to redeem conferred by Section 60, Transfer of Property Act, 1882, including the corresponding right of partial redemption thereby conferred, is extinguished by the final decree passed under Order 34, Rule 5(3) and that the mortgagor and so each co-mortgagor receives in exchange the right to redeem granted by Order 34, Rule 5(1), namely, right to redeem the whole property by payment of the full decretal debt, the relationship between the parties as the use in Order 34, Rule

5, Civil P.C., of the words ''plaintiff'' and ''defendant'' themselves also indicates being no longer that of mortgagor and mortgagee but that of judgment-debtor and judgment-creditor governed by the decree and the terms of Order 34, Rule 5, Civil P.C."

This view was adopted by the Division Bench of the Punjab and Haryana High Court in Karam Chand Moola Ram and Others Vs. Telu Ram and Others, The Madras High Court has also suggested in Ponnu Dorai Pandian v. State Bank (1984) 97 Mad LW 646 : AIR 1985 NOC 194, that Order XXXIV is a complete Code in itself as far as the mortgage decrees are concerned and even if the attempt of the judgment-debtor to get rid of the sale under the other provisions of the Code are unsuccessful, he would still be entitled to relief under Order XXXIV, Rule 5 of the Code and so far as no confirmation of the sale took place, redemption as of right should be allowed. This view is supported by the observation of the Supreme Court in S. Sivaprakasam v. B. V. Muniraj 1997 (4) JT 689. The Madras High Court in M. Sevugan Chettiar and Another Vs. V.A. Narayana Raja and Others, has also suggested that it was not proper to give a narrow and literal meaning to the expression "before the confirmation of sale" occurring in Order XXXIV, Rule 5 of the Code as meaning not the order confirming the sale by the Court of first instance. These decisions suggest that it is not the right available to a mortgagor u/s 60 of the Transfer of Property Act that is being enforced by the mortgagor when he seeks to act under Order XXXIV, Rule 5 of the Civil P.C. but only the right conferred on him by Order XXXIV of the Code itself. It is therefore clear that the right to relief under Order XXXIV of the Code must be looked for in terms of Order XXXIV of the Code and not outside it. So looked at, though such a right was available under the Central Code, after the substitution of Order XXXIV in the Kerala Code there is no such corresponding right available to the mortgagor. The argument of learned Counsel for the judgment-debtors that the right to make the deposit at any time before confirmation of the sale is a right available to the mortgagor in general or in terms of Section 60 of the Transfer of Property Act and notwithstanding the absence of a provision in the Kerala Code enabling the deposit at any time before confirmation of the sale the mortgagor would be entitled to exercise his right of redemption cannot therefore be accepted.

6. We also find from the scheme of Order XXXIV of the Kerala Code that under that scheme though a composite decree is passed sale is held only if the mortgagor fails to pay off the amounts due to the mortgagee within the period of six months time fixed by the Code itself or within such extended time as may be granted by the Court in exercise of power under Order XXXIV, Rule 5 of that Code. In other words the right to deposit and avert the sale is conferred on a mortgagor-judgment-debtor under the Kerala Code only prior to the sale itself and not subsequent to the sale. It cannot be said that in terms of Section 122 of the Civil P. C., the scheme envisaged by the Kerala Code could not be adopted in the State (See Mathuw v. Bank of India, 1982 KLT 591. If that be so, the rights and obligations of the mortgagor and the mortgagee flowing outof Order XXXIV

of the Kerala Code should be traced to that order itself. So traced, obviously there is no provision in the Kerala Code corresponding to Order XXXIV, Rule 5 of the Central Code conferring a right on the mortgagor to deposit the amounts due to the mortgagee after the sale is held or at any time before the confirmation of the sale. Since the right conferred by Order XXXIV, Rule 5 is not part of the general right available to a mortgagor or the right in terms of Section 60 of the Transfer of Property Act, it cannot be said that even outside Order XXXIV of the Civil P.C., the mortgagor will have a right to pay off the mortgage amount even after a final decree for sale is passed and a sale is held.

7. In the light of this conclusion, we have to hold that the executing Courts in both these cases were right in dismissing the applications filed under Order XXXIV, Rule 5 of the Civil P.C. whether it be Central or the State Code. Under Order XXXIV, Rule 5 of the State Code what is contemplated is only extension of time before the sale since what Rule 5 contemplates is only postponing the date fixed for payment and the sale takes place only when the amount is not deposited on the day fixed for payment. If the application be treated as one under Order XXXIV, Rule 5 of the Central Code, obviously those applications would not be maintainable in view of the substitution of Order XXXIV of the Kerala Code and in view of our conclusion that the right available under Order XXXIV, Rule 5 of the Central Code is not a general right but is a right derived from the scheme of Order XXXIV itself.

We therefore find no reason to interfere with the orders of the executing Court in these cases. We dismiss these revisions. We make no order as to costs.