

(2003) 09 MAD CK 0023
In the Madras High Court
Case No : S.A. No. 938 of 1993

K. Ramachandra Thevar

APPELLANT

Vs

Murugesan, Ganesan, Paul Lingam and Balasubramaniam

RESPONDENT

Date of Decision : 30-09-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : AIR 2004 Mad 245 : (2004) 2 CivCC 584 : (2003) 4 LW 377 : (2004) 4 RCR(Civil) 183

Hon'ble Judges : M. Thanikachalam, J

Bench : Single Bench

Advocate : T.V. Sivakumar, for the Appellant; No appearance, for the Respondent

Final Decision : Allowed

Judgement

M. Thanikachalam, J.—In a suit for redemption, the defendant suffered a decree partially and questioning the same, he has filed the second appeal.

2. The suit property originally belonged to one Sheik Dawood Rowther. On 6.3.1964, he sold the same in favour of one Ramuammal.

Ramuammal's first husband is Sundararaj and her second husband is Kottaiya Thevar. After the death of Ramuammal, Veeranan S/o. Kottaiya

Devar became the absolute owner of the suit property, since other heirs of Ramuammal predeceased, thereby leaving no other legal heirs. From

the owner, Veeranan, the plaintiffs have purchased the property on 3.7.1983. The predecessor in interest of Veeranan usufructually mortgaged

(othi) the suit property in favour of the defendant. In pursuance of the sale, in favour of the plaintiffs by the owner of the suit property, the plaintiffs

are entitled to redeem the suit property, which right was given, even in the sale

deed. The plaintiffs are entitled to the benefits of Debt Relief Acts

viz. Acts 18/80 and 50/82. Therefore, the othi stand discharged and the plaintiffs, who got the right of equity of redemption, are entitled to recover

the possession of the suit property from the defendant. On the above said allegations, the suit was filed for possession after passing a final decree

for redemption, including the future profits also.

3. The defendant questioning the right of Veeranan to sell the suit property in favour of the plaintiffs, would contend that he had purchased the suit

property from its lawful owner, who inherited the same, after the demise of the predecessor in interest, and that the claim of the plaintiffs that Othi

is discharged, in pursuance of the Debt Relief Act is untenable, that he had prescribed title to the suit property by adverse possession, and that the

plaintiffs are not entitled to equity of redemption, since they have purchased the property from a person, who has no right of any kind in the suit

property. On the basis of the above contention, in addition to other defence also, the defendant opposed the claim of the plaintiffs.

4. The learned District Munsif, Paramakudi, after examining one witness on behalf of the plaintiffs and four witnesses on behalf of the defendant,

exhibiting Exs.A1 to A4, B1 to B.18, evaluated the above materials and scanned the evidence, to reach a just conclusion. The evaluation of the

above materials revealed that the plaintiffs have purchased the property from its rightful owner, including the equity of redemption and that the debt

is not wiped out, under the Debt Relief Act. Thus concluding, the learned trial Judge passed a preliminary decree for redemption directing the

plaintiffs, to pay the othi amount, within two months.

5. The aggrieved defendant, questioning the decision of the trial Court, preferred an appeal before the Additional District Judge, Ramnad at

Madurai in A.S. No. 73/88. The learned Additional District Judge, considering the relationship between the plaintiffs' predecessor in interest, as

well as the defendant's predecessor in interest, came to the conclusion that Veeranan would be entitled to only 1/2 share of the property and the

remaining extent owned by Azhagarsamy could not be inherited, since Veeranan is not the heir of Azhagarsamy. The learned first Additional

District Judge confirmed the finding of the trial Court, regarding the existence of the debt viz., the same was not wiped out under the Debt Relief

Act. Thus concluding, the first appellate Court came to the conclusion, that the plaintiffs, who have purchased the property, are entitled to have

only 1/2 share validly and in respect of the remaining 1/2 share, the plaintiffs cannot lay a claim. In this view of the matter, without considering the

settled proposition, that a mortgage is indivisible, modified the decree granted by the lower Court, concluding that the plaintiffs are entitled to

redeem 1/2 share of the property, on payment of 1/2 of the mortgage amount.

6. The decision rendered by the first appellate Court was also not to the satisfaction of the defendant and that is why, the second appeal is filed

questioning the decree and judgment of the courts below.

7. This Court while admitting the second appeal, formulated the following substantial questions of law, which reads:

1. Whether the Lower Appellate Court is legally justified in granting partial redemption and by that made the mortgage divisible?

2. Whether the Appellate Court decree can be sustained when it is not in conformity with the appellate judgment?

8. Heard the learned counsel for the appellant Mr. T.V. Sivakumar.

9. The suit property, admittedly, originally belonged to one Sheik Dawood Rowther. From Sheik Dawood Rowther, Ramuammal purchased the

property, under the original of Ex.A1. Ramuammal's first husband is one Sundararaj and their sons are Muthumari and Azhagarsamy. According

to the plaintiffs, Ramuammal married another man, by name Kottaiya Devar, as her second husband and through him, she gave birth to another

male child by name, Veeranan. One of the sons of Ramuammal and Sundararaj, by name Marimuthu died elsewhere in the year 1968 and another

son, by name Azhagarsamy died in the year 1980. As evidenced by Exs.A5 = B2, A6 = B2, and A7 = B3, Azhagarsamy usufructually mortgaged

(othi) the suit property in favour of the defendant, for a total consideration of Rs. 3,000/-. Ramuammal died in the year 1971 and Azhagarsamy

died in the year 1980. The only surviving member in that family according to the plaintiffs, is Veeranan. Therefore, it seems, Veeranan claiming as

the absolute owner of the suit property, sold the same in favour of the plaintiffs, under Ex.A13. Therefore, on the basis of Ex.A13, the plaintiffs

having purchased the property, including the right of redemption also, have filed the suit for redemption, that too claiming benefits under the Debt

Relief Act. The defendant also claimed title in respect of the suit property by purchase, from one Vellachiammal under Ex.B8. In addition, the defendant had also claimed adverse possession.

10. The learned District Munsif, upon the appreciation of the materials placed before him, came to the conclusion that, Veeranan alone was the absolute owner of the property, after the death of Azhagaramy and therefore, he was competent to execute the sale deed, which he did under

Ex.A13. It is the further finding of the learned District Munsif that Vellachiammal has no right over the suit property and therefore, the alleged purchase from Vellachiammal by the defendant under Ex.B.8 will not clothe him with any right. In this view, the trial Court granted a decree for redemption, on payment of full amount.

11. The first appellate Court on appreciation of the evidence, came to the conclusion that Veeranan is the son of Ramuammal, through her second husband. Concluding so, applying the provisions of Hindu law, the first appellate Court came to the conclusion, that Veeranan and Azhagarsamy

are entitled to equal share in the suit property, as the heirs of Ramuammal, who died in the year 1971. It is the further finding the first appellate

Court, that when Azhagarsamy died in the year 1980, his property will not devolve upon Veeranan, since he is not the heir of Azhagarsamy, and if

at all, Veeranan could succeed only to the property of Ramuammal. Therefore, according to the first appellate Court, the property of Azhagarsamy

will revert back to the agnates of Azhagarsamy. Thus concluding, the first appellate Court came to the conclusion, that Ex.A13 will confer only 1/2

share in the suit property, in favour of the plaintiffs and for the remaining 1/2 share, they cannot claim any right, because of the fact, the entire

property was not inherited or possessed by Veeranan. In this view, the first appellate Court modified the decree and judgment of the trial Court,

holding that the plaintiffs are entitled to redeem 1/2 share of the property conveyed under Exs.A1 and A3. It is the further finding of the first

appellate Court that it is sufficient, if the plaintiffs pay 1/2 of the mortgage amount.

12. The defendant, who is in possession of the property as mortgagee, unable to satisfy himself about the decree granted by both the courts below,

has filed this second appeal.

13. The learned counsel for the appellant submits, that the decree drafted by the first appellate Court is not in accordance with the operative

portion of the judgment and therefore, certainly, the decree has to be modified, even if the judgment of the first appellate Court is to be confirmed.

As seen from the records, the first appellate Court has drawn a decree, which reads:

The appeal be and the same is hereby dismissed with the observation that one half of the suit property belongs to Respondent/Plaintiff.

14. Since the suit is one for redemption, the preliminary decree should be drawn in the prescribed form, as given in appendix "D" of the Code of

Civil Procedure. The trial Court has drawn the decree properly, as per the prescribed form, but the first appellate Court has failed to do so.

Though the operative portion of the first appellate Court's judgment says, that the plaintiffs are entitled to redeem half of the property, on payment

of 1/2 of the mortgage amount, in the decree drawn by the first appellate Court, those things have not been incorporated. On the other hand, as

aforementioned, the decree drawn says, the appeal is to be dismissed with the observation that one half of the suit property belongs to

Respondent/plaintiff, which is incorrect. In this view as rightly contended by the learned counsel for the appellant, even if the second appeal is

dismissed, the decree drawn by the first appellate Court has to be modified, giving direction to draw the decree, as per the operative portion of the

judgment dated 15.7.1989 in A.S. No. 73/88 on the file of the Additional District Judge, Ramanathapuram.

15. The main substantial question of law raised in this case is, whether the first appellate Court is legally justified in granting a decree for partial

redemption and by that made the mortgage divisible. The finding of the first appellate Court that Veeranan is entitled to only 1/2 share, is not

disputed. It is not the case of the appellant also before me that he became the owner of the suit property, in pursuance of the purchase made by

him, from Vellachiammal. In fact, the learned counsel for the appellant submitted, that the finding of the first appellate Court, regarding the title and

interest, in respect of the suit property is perfectly correct and it does not require any disturbance. Therefore, as such the plaintiffs are entitled to

only half share in the suit property. By the finding, that the plaintiffs/respondents are entitled to half share, it seems, they are not aggrieved, since

they have not filed any separate appeal or cross objection in this appeal. In fact, though the respondents have been served, they have not entered appearance, either in person or through counsel to agitate their claim. In this view, the finding of the first appellate court, should be confirmed and according to that finding the plaintiffs are entitled to only half share. Having settled the share of the parties or the interest of the parties, in the other property, we have to see whether the plaintiffs, who are having only half share, are entitled to redeem that share alone, by paying proportionate amount as directed by the first appellate Court.

16. Section 60 of the Transfer of Property Act envisages the right of mortgagor or the person, who acquired the right of redemption, to redeem the mortgaged property. It says under the heading "redemption of portion of mortgaged property" - Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor. Under the above provisions, it is crystal clear and no authority is also needed that a sharer in the mortgaged property is not entitled to redeem his own share alone, by paying proportionate part of the amount remaining due on the mortgage. The learned Additional District Judge has failed to analyse, whether the sharer is entitled to redeem the mortgage, by paying 1/2 share alone, and he has not adverted to Section 60 of the Transfer of Property Act and thereby committed an error, against law, in granting a decree for redemption, regarding 1/2 share, on payment of proportionate amount. This decree granted by the first appellate Court is against the well established principle of indivisibility. There are certain circumstances, for partial redemption also, and that circumstances does not exist in our case. Under the above quoted provision, where a mortgagee or if there are more mortgagees, then one of such mortgagees had acquired in whole or in part, the share of the mortgagor, then only, the principle of indivisibility could be ignored and the property could be redeemed since right merged. Here the plaintiffs/respondents are not the mortgagees. Admittedly, the appellant/defendant alone is the mortgagee of the entire property. As per the findings

of the courts below, the sale in favour of the appellant/defendant is not valid and he has not acquired any right. Therefore, conversely also, the principle of indivisibility cannot be overruled on the ground that the defendant/mortgagee, had acquired in whole or in part, the share of the mortgagor. The integrity of a mortgage is not broken, except in the only case of acquiring by purchase or otherwise as proprietor, a portion of the mortgaged property. As aforementioned, the plaintiffs are not the mortgagees, and in this view, though they are entitled to half share, they would not come under the above said category, which should follow, the general rule should prevail. In this view, the general rule under this clause, that a mortgage is indivisible and the person, who purchased a share is not entitled to maintain a suit for partial redemption and the Court, in fact, has no power also, to order piecemeal redemption. If at all, one of the several mortgagors or the purchaser of the equity of redemption can redeem the entire mortgage, paying the entire money and then work out the remedy, regarding interest, by filing a suit for partition or taking any other steps legally, which are permissible.

17. In view of the above, I am of the considered opinion that the purchaser from the mortgagor or from a sharer, who is having some interest in the mortgaged property is not entitled to redeem his share of mortgaged property, on payment of proportionate mortgage amount, as directed by the first appellate Court, since it will act against the settled principle of indivisibility regarding the mortgage, I am of the view, that there is no bar for a sharer or to a purchaser of the equity of redemption to redeem the entire mortgage, by paying the entire mortgage amount. If the plaintiffs, being the mortgagee, had acquired a share of the mortgaged property, then they are entitled to redeem his portion, without redeeming the whole mortgage and that kind of situation, does not arise here. Therefore, I am of the considered opinion, on the basis of Section 60 of the Transfer of Property Act, that the plaintiffs/respondents are not entitled to redeem the mortgage being the half share on payment of proportionate amount, whereas I am of the view that they could redeem the mortgage by paying the full amount and if at all, they have to work out their remedy, for their share separately.

18. For the foregoing reasons, I conclude, that the learned Additional District

Judge, Ramnad at Madurai has committed an error, in ordering partial redemption and therefore, that order has to be set aside. There cannot be any bar for redemption, by the sharer, by paying the entire mortgage amount. Therefore, the plaintiffs should be directed to pay the entire amount, in order to redeem the suit property, and thereafter, they have to work out their remedy, for carving out their share, as per the finding of the first appellate Court viz., the plaintiffs are entitled to 1/2 share, which is confirmed in this appeal.

In the result, the appeal is allowed and the direction of the first appellate Court, ordering redemption of 1/2 share on payment of proportionate amount viz., 1/2 of the mortgage amount is set aside. The plaintiffs are entitled to a decree for redemption, being the owner of 1/2 share of the suit property, on payment of the entire mortgage amount.