
(1959) 03 KL CK 0027

In the High Court Of Kerala

Case No : Appeal Suit No. 175 of 1955 (T)

Kesava Pillai Ramakrishna Pillai

APPELLANT

Vs

Dakshyani Amma Thankamma

RESPONDENT

Date of Decision : 09-03-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 1, Order 7 Rule 11, Order 7 Rule 6
Evidence Act, 1872 — Section 101, 102, 103, 104
Limitation Act, 1908 — Article 148, 3

Citation : AIR 1959 Ker 377

Hon'ble Judges : Sankaran, C.J;Anna Chandy, J

Bench : Division Bench

**Advocate : P. Govindan Nayar and G. Balagangadharan Nayar, for the Appellant;
M. Madhavan Nair, for the Respondent**

Final Decision : Dismissed

Judgement

Anna Chandy, J.—The plaintiff is the appellant. The appeal is against the judgment of this Court in S. A. No. 262 of 1954. The suit, filed on 15-3-1119, is for the redemption of an alleged mortgage of unspecified date. According to the plaintiff the property belonged to one Kurichimattom. It was demised on Kanappatom to Kundarathala tarwad and the defendants are in possession under a mortgage executed by the Karna- van of the Kundarathala tarwad in favour of the Karanavan of the defendant's tarwad.

Those members of the Kundarathala tarwad who obtained in partition the equity of redemption of these properties, sold the same to the plaintiff on 27-12-1117 with a direction to redeem the mortgage. The cause of action is stated to have arisen on 21-4-1075, 4-1-1099 the date of partition in Kunda-rathala tarwad, and on 27-12-1117 when the equity of redemption was purchased by the plaintiff. The significance of the first date, i.e., 21-4-1075 is not indicated in the plaint.

2. The third defendant who alone contested the suit denied the mortgage and

alleged that the property belonged to the defendant's tarwad from ancient times, that she has purchased it from those members who got it in the partition deeds of 1090 and 1104 of the defendant's tarwad, that the suit was barred by limitation, and that the plaintiff's vendors or their tarwad had no title to the equity of redemption.

3. The plaintiff filed a rejoinder stating that he was not aware of the date of the mortgage, and he was not in a position to produce a copy of the mortgage deed. But he alleged that the defendants' tarwad had all along been admitting that they had only a mortgage right in the property. It is also seen from the rejoinder that 21-4-1075, the first of the three dates shown in the plaint as those when the cause of action arose, is the date of Ext. D decree in O. S. 742 of 1075. That was a suit filed by the jenmi for recovery of arrears of michavarom from the members of the Kundarathala tarwad.

Ayyappan Kumaran, the Karnavan of the defendant's tarwad had to be impleaded as the defendants were in possession of the property and a charge was sought to be enforced against the property. Ayyappan Kumaran remained ex parte and the second defendant who was the then senior Anantharavan of the Kundarathala tarwad filed Ext. E written statement to the effect that as the property was mortgaged to the defendant's tarwad, they were liable to pay the arrears claimed. However, there is no acknowledgment of the subsisting mortgage in Ext. E and that fact is admitted by the learned counsel for the appellant.

4. On these pleadings the learned Munsiff raised a solitary issue "Is the plaintiff competent to redeem". It was found on the strength of Exts. C to G that the defendants and members of their tarwad were in possession as mortgagees under Kundarathala tarwad. Though the plaintiff had not pleaded or proved the year of the mortgage and had not established a subsisting right to redeem, the learned Munsiff held that the plaintiff was entitled to a decree for redemption as he has shown that the defendants held the properties as mortgagees.

For this position of law reliance was placed on the observation made in Umamaheswara Iyer Subramonia Iyer v. Meeravu Ummini 9 TLJ 228, that "where the plaintiff does not tie himself down to any specific mortgage made in a particular year, and the defendant in possession denies the mortgage, the real question is whether the defendant is mortgagee of the property in suit, and in such circumstances the plaintiff is entitled to succeed if he proves that the land is held by the defendant as mortgagee". The appeal by the 3rd defendant in the District Court was dismissed, and the decree for redemption was confirmed substantially on the same ground as was given by the learned Munsiff. It was further stated in the appellate judgment that no question of limitation arises as the plea that was raised was not one of limitation but adverse possession, and that plea was not made out.

5. The 3rd defendant brought the matter in Second Appeal to this Court in S. A.

No. 262/4, and that appeal was allowed and the redemption decree vacated for the reason "the plaintiff's evidence does not show that the defendants or their predecessors admitted a subsisting mortgage in respect of the suit property, at any time within 50 years preceding the commencement of the suit". The decision of the Travancore High Court reported in *Umamaheswara Iyer v. Meeravu Ummini* 9 Trav LJ 228, on the strength of which the decree for redemption was given by the lower Court as well as the cases viz., *Ganeshi Lal v. Basanti Lal*, 20 Ind Gas 29 (All), *Ramlal v. Sri Makurji Kishori Rawan Maharaj* 22 Ind Cas 574: AIR 1914 AH 43 *Bala v. Shiva* ILR 27 Bom 271, as also the subsequent decisions of the Travancore High Court *Kanakku Neelacantan Ayyappan v. Bakuvan Subramoniam*, 4 Trav LT 48, *Raman Raman v. Varki Skaria* 4 Trav LT 780 and *Punnan Masilamoney v. Esakkimadan Velavu-dhan* 5 Trav LT 875, which adopted the principle that when a plaintiff does not "tie himself down to a particular mortgage he is entitled to succeed if he proves that the land is held by the defendant as mortgagee, and if the plaintiff gives prima facie evidence that the defendant is holding the property as mortgagee, the burden of proving that the plaintiff has lost the right of redemption will be shifted to the defendant", were considered and it was found that such an interpretation was not warranted by the decision of the Privy Council in *Raja Kishen Dutt Ram Pandev v. Narendar Bahadoor Singh* 3 Ind App 85, which was the authority relied on for the proposition laid down in those cases."

The scope and effect of the above Privy Council decision as enunciated in a Full Bench decision of the Allahabad High Court, *Parmanand Misr v. Sahib Ali*, ILR All 438, was accepted by T. K. Joseph J. and it was held that "if the plaintiff in a redemption suit is unable to specify the mortgage, he must give prima facie evidence that the mortgage was subsisting on the date of the suit, or admitted to have been subsisting within the period of limitation". As the plaintiff had admitted that he was unable to give the date of the mortgage, and had not succeeded in proving that the defendant acknowledged the mortgage as a subsisting one at any time within 50 years preceding the filing of the suit, it was held that the plaintiff has not proved his title to redeem, and the decrees of the Courts below be set aside as they were passed on a wrong view of the law.

6. In this appeal, the plaintiff has not questioned the correctness of the finding "that the plaintiff has not proved that the defendant acknowledged the mortgage as a subsisting one within 50 years of suit". The only ground urged by Shri Govindan Nair, learned counsel for the appellant, is that the plaintiff has no onus to prove that he has a subsisting title, but it is for the defendant to prove that there is no subsisting title in the plaintiff and even if the plaintiff has the onus, the onus is light and there need be only a prima facie proof of subsisting title, and this has been shown by him.

7. As the scope and effect of the Privy Council decision in 3 Ind App 85, as well as the decisions of the Travancore High. Court in 9 Trav LJ 228 : 4 Trav LT 48 : 4 Trav LT 780 : 5 Trav LT 875 as also the decisions of the Allahabad and Bombay

High Courts referred to in 9 Trav LJ 228 have been considered in detail by T.K. Joseph J. it is not necessary for us to cover the ground over again. Suffice it to note that in the cases reported in Thakur Dharam Singh Vs. Ram Dial Singh Fuller, it was found on evidence that the defendant has within the period of limitation admitted that the mortgage was a subsisting one. Similarly, in the case reported in 4 Trav LT 48 and 4 Trav LT 780, it was seen from the evidence that the mortgagees acknowledged the subsistence of the mortgage within the period of limitation.

8. In none of these decisions the provisions of Rules 1, 6, and 11 of Order 7 of Civil Procedure Code, or Section 3 of the Limitation Act appear to have been considered. Section 3 of the Limitation Act states,

"subject to the provisions contained in Sections 4 - 25 inclusive, every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefore by Schedule 1 shall be dismissed although limitation has not been set up as a defence".

Rule 1 of Order 7, CPC requires the plaintiff to contain the facts constituting the cause of action, and when it arose. Rule 6 requires that where the suit is instituted after the expiration of the period prescribed by the law of limitation the plaintiff must show the ground upon which exemption from such law is claimed. Rule 11 enacts that the plaintiff shall be rejected if the suit appears from the statement in the plaintiff to be barred by any law: These provisions give clear indication that the burden to plead and prove that the suit is within time is on the plaintiff. In other words, in a suit for redemption the onus is primarily on the plaintiff to prove that at the commencement of the suit he had a subsisting title to redeem.

9. We are fortified in this view by the decision of the Privy Council in AIR 1948 36 (Privy Council) That was a suit for redemption of a mortgage. The suit was filed on 27-8-1936. The mortgage deed was not produced, but the plaintiff had proved by certain records that the mortgage was in existence in the year 1885. An issue was raised "is the plaintiff's suit within time", and the trial Court held that the burden of proving that the suit was within time was on the plaintiff, and he had failed to prove that the mortgage was effected on or after 27-8-1876.

The suit was dismissed as it was barred by limitation. That decree was upheld by the District Judge and the Court of Judicial Commissioners and the plaintiff appealed to the Privy Council. Their Lordships dismissing the appeal held that in suits for redemption the "burden rests in the first instance upon the plaintiff to show that the suit was not instituted after the period of limitation prescribed therefor."

10. There may be cases in which the plaintiff's evidence may reach such a point that the onus of proving a suit to be barred by limitation rests upon the defendant, and the question as to which party has the knowledge of the relevant fact; has always to be considered. But, in the present case it cannot be said that

the defendants are withholding the relevant information. The Travancore Registration Act was enacted in 1042 and it is not shown why the plaintiff could not get a copy of the mortgage deed if it was executed after that. If it was before 1042 the suit is clearly barred by limitation. We find that the plaintiff has failed to prove that the mortgage on which the title to redeem is based was executed within the period of limitation.

11. In the result, the decree of this Court in S. A. 262/54 is confirmed, and this appeal is dismissed, In the nature of the case the parties will suffer their costs throughout.