
(1977) 07 AP CK 0019
In the Andhra Pradesh High Court
Case No : S.A. No's. 400 and 466/76

Killada Potharaju alias Pentayya and others	APPELLANT
Vs	
Budasakurti Venkata Suryanarayana and others	RESPONDENT

Date of Decision : 27-07-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Criminal Procedure Code, 1973 (CrPC) — Section 144, 145
Registration Act, 1908 — Section 17
Specific Relief Act, 1963 — Section 8
Transfer of Property Act, 1882 — Section 91, 92

Citation : (1977) 07 AP CK 0019

Hon'ble Judges : S.H. Sheth, J

Bench : Single Bench

Advocate : M.S.R. Subrahmanyam, for the Appellant; P.V.R. Sarma, for the Respondent

Final Decision : Dismissed

Judgement

S.H. Sheth

1. Second appeal No. 400 for 1975 arises out of O.S. 232 of 1970. The facts of the case briefly stated are as under O.S. 232:-- Plaintiff filed O.S. 232 of 1970 for evicting defendants 1 to 11 from the suit land which is an agricultural land bearing survey No. 79/6 admeasuring Ac. 5. 08 cents. Admittedly the suit land belonged to defendants 1 to 5. Defendants 1 and 3 died during the pendency of the suit and defendants 12 and 13 are the legal representatives of defendant 3. First defendant is the father of defendants 2 to 5. They constituted a joint family, Defendants 1 to 5 and one more son of the first defendant, who was at the time of the transaction was alive and who died subsequently mortgaged the suit land to defendants 6 and 7 on 27-3-1957 for a sum of Rs. 1,000/- under the document Ex. A-2. It was a usufructuary mortgage. Defendants 6 and 7 were put in possession of the suit land.

In 1965 the first defendant approached the plaintiff for a loan in order to discharge his debts including the mortgage debts. Plaintiff lent to him a sum of Rs. 4,000/- on 27-3-1965 under agreement Ex. At which provided that defendants 1 to 5 would execute a usufructuary mortgage of the suit land in favour of the plaintiff. Out of the said sum of Rs. 4,000/- the plaintiff directly paid Rs. 1,000/- to defendants 6 and 7 under endorsement Ex. A-8 and discharged the mortgage debt of defendants 1 to 5. Thereupon plaintiff obtained possession of the suit land from defendants 6 and 7. 2. In April 1965 defendants 6 to 11 obtained a usufructuary mortgage of the suit land from defendants 1 to 5 for a sum of Rs. 5,000/- and forced their entry into the suit land, it led to the institution of criminal proceedings u/s 144 Cr. P.C. against the plaintiff and an ex parte interim order was made therein. After the expiry of the period of that order there was a fresh quarrel between the plaintiff on one hand and defendants 1 to 11 on the other, it led to the institution of fresh proceedings u/s 145 Cr. P. C. In those proceedings defendants 6 to 11 were found to be in possession. Therefore the learned Magistrate directed that defendants 6 to 11 be put into possession of the suit land.

3. In order to get rid of that order the plaintiff filed the present suit for eviction of defendants 6 to 11 and for recovering possession of the suit land from them. Defendants 1 to 5 filed their written statement. So also did defendants 6 to 11. Though they filed separate written statement there was only one defence which they raised They contended that possession was not delivered to the plaintiff and that defendants 6 to 11 have been in possession of the suit land by virtue of the usufructuary mortgage taken by them from defendants 1 to 5.

4. The learned trial Judge found defendants 6 to 11 in possession under the usufructuary mortgage Ex. B-1. He held that the mortgage transaction evidenced by Ex. B-1 was valid and was proved. The next finding which he recorded was that the agreement Ex. A-1 in favour of the plaintiff and the endorsement Ex. A-8 made on Ex. A-2 were also true and proved. He took the view that the transaction of mortgage prevailed over mere agreement and that therefore the plaintiff could not maintain the suit. He therefore dismissed it.

5. Plaintiff appealed against that decree to the lower appellate Court. The learned appellate Judge found that Ex. B-1 was not supported by consideration and was therefore void. Secondly he held that Exs. A-1 and A-8 were true and valid. Thirdly he held that the plaintiff had been in possession of the suit land until the institution of the proceedings in the Criminal Court u/s 145 Cr. P. C. He therefore allowed the appeal, set aside the decree passed by the learned trial Judge and passed decree in favour of the plaintiff or possession.

6. It is that appellate decree which is challenged by defendants 6 to 11 in this second appeal.

7. On behalf of the appealing defendants the principal contention which has been raised by Mr. M.S.R. Subrahmanyam is that the plaintiff cannot maintain the suit

unless he establishes his title. In order to show that the plaintiff has no title he has invited my attention to Exs. A-1 and A-8, Ex. A-1 is the agreement which defendants 1 to 5 executed in favour of the plaintiff on 27-3-1965. It provided that in order to enable defendants 1 to 5 discharge their debts due under promissory notes and also the mortgage debt defendants 1 to 5 obtained from the plaintiff a loan of Rs. 4,000/- with interest at 6 percent per annum. It further provided that in order to secure that loan defendants 1 to 5 would execute a usufructuary mortgage of the suit land within one month from the date of that agreement. These recitals incorporated in Ex. A-1 clearly show that it was merely an agreement which was to be followed by a regular mortgage deed. It is needless for me to say that no such mortgage deed was thereafter executed. Since Ex. A-1 was an agreement and nothing more it was not required to be registered. However Ex. A-1 could not confer upon the plaintiff any title to the suit land. Reliance has been placed on behalf of the plaintiff on Ex. A-8 which was an endorsement made on Ex. A-2 which in its turn was the mortgage deed dated 27-3-1957 executed by defendants 1 to 5 in favour of defendants 6 and 7. The endorsement Ex. A-8 was made on 27-3-1965. It inter alia stated that defendants 6 and 7 who had taken mortgage of the suit land from defendants 1 to 5 had received from the plaintiff a sum of Rs. 1,000/- which was a debt owed by defendants 1 to 5 to defendants 6 and 7 and that the possession of the suit land was delivered to the plaintiff. The plaintiff relies upon this endorsement to establish his title. He has stated in the plaint that by discharging the debt owed by defendants 1 to 5 to defendants 6 and 7 the rights of defendants 6 and 7 had been subrogated to him. The contention which has been raised by Mr. Subrahmanyam is that Ex. A-8 was not admissible in evidence for want of registration because it was compulsorily registerable. Ex. A-8 brings out two facts very eloquently. The mortgage debt owed by defendants 1 to 5 to defendants 6 and 7 was discharged by the plaintiff. Secondly the possession of the suit property which defendants 6 and 7 were holding as mortgagees was delivered by them to the plaintiff. u/s 91 of the Transfer of Property Act, "any person other than the mortgagee of the interest sought to be redeemed who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same is entitled to redeem or institute a suit for redemption of the mortgaged property". Section 92 provides that such a person "other than the mortgagor or and any co-mortgagor shall, on redeeming the property subject to the mortgage have so far as regards redemption, foreclosure or sale of such property, that same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee". Such a right is called "the right of subrogation and a person who acquires such rights is called subrogee and is "subrogated to the rights of the mortgagee whose mortgage he redeems".

8. It is therefore clear that by paying the mortgage debt owed by defendants 1 to 5 to defendants 6 and 7 at the request of the former the rights of the defendants 6 and 7 was subrogated to the plaintiff and that the plaintiff became the subrogee. The question therefore is whether such a transaction which Ex. A-8

purported to bring into existence could have been brought about without a registered document. It is not in dispute before me that Ex. A-8 was not registered. There is no dispute about the fact that the payment made by the plaintiff to defendants 6 to 7 had fully redeemed the mortgagee executed by defendants 1 to 5 in favour of defendants 6 and 7 in 1957.

9. Paragraph 3 of the section 92 contemplates a registered transaction. However when a person otherwise competent to redeem a mortgage on behalf of the mortgagor and to acquire the rights of subrogation redeems a mortgage and becomes the subrogee the rights to the immovable property which the mortgagee had acquired under the mortgage transaction would stand transferred to him. The transfer of such a title to immovable property under the aforesaid circumstances, in my opinion, falls under clause (b) of sub-section (1) of section 17 of the Registration Act and therefore such a transfer could not have been brought except by a registered document. Since Ex. A-8 was in my opinion compulsorily registrable and since it was not registered no title to the suit property passed to the plaintiff under Ex. A-8, Therefore the plaintiff did not acquire title to the suit land.

10. So far as the defendants are concerned they relied upon Ex. B-1 which evidenced the transaction of subsequent mortgage. The learned appellate Judge having considered the whole evidence led by the parties has recorded the conclusion that the transaction was nominal and was not supported by consideration. Obviously therefore the transaction evidenced by Ex. B-1 was void and did not create any rights in favour of defendants 6 to 11 to the suit land. The finding recorded by the learned appellate Judge in regard to Ex. A-1 is a finding of fact with which I cannot interfere in this second appeal.

11. Mr. Subrahmanyam has indeed tried to make an attempt to show that finding was not well founded. Having perused the appellate Judgement I am of the opinion that, that finding is supported by evidence and is not perverse. Accepting the finding, as I must do in second appeal, the only conclusion to which I can come is that defendants 6 to 11 have not established their title to the suit land. In those circumstances it is quite dear that neither the plaintiff nor defendants 6 to 11 against whom decree for possession has been passed have established their title to the suit land.

12. The further question which therefore arises for my consideration is whether the plaintiff's suit for want of title must necessarily fail. It has been argued by Mr. P.V.R. Sarma that a mere suit for possession without showing title is maintainable under certain circumstances. He has invited my attention to few decisions which have a bearing on this aspect.

13. In Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others, the Supreme Court has observed that section 8 of the Specific Relief Act does not limit the kinds of suit but only lays down that procedure laid down by the CPC must be followed. It has next been observed by the Supreme Court that u/s 9 of

the CPC all Suits of civil nature are triable excepting suits of which their cognizance is either expressly or impliedly barred. The Supreme Court has quoted with approval the principle laid down by the Madras High Court in *Mustapha Sahib V. Santha Pillai* 1900 ILR 23 Mad. 179 which states "that a party ousted by a person who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title". It is therefore clear that as between two persons, who have no title to the land, a person who is in possession and who has been ousted by the other can successfully recover possession of the property from which he has been ousted.

14. The next decision to which he has invited my attention is that of Madras High Court in (Medipalli) *Narayanappa Vs. Kuruba Hanumanthappa*, The principle which has been laid down in that decision is that where in a suit brought for possession of land neither the plaintiff nor the defendant has been able to prove his title but the plaintiff has shown that he was in possession for five years when he was dispossessed, the plaintiff is entitled to a decree for possession.

15. While laying down that principal the Madras High Court has followed the decision of Privy Council in *Ismail Ariff V. Mahommed Ghouse* 20 I.A. 99.

16. Mr. Sarma has also invited my attention to the decision of this court in *Fakrulla Khan V. Perka Pocha* 1964 (2) ALT 118. The principle which has been laid down in that decision is that in a suit for possession if the plaintiff bases his claim on title and possession and if he fails to prove his title but establishes his previous possession he is entitled to a decree against the defendant who is a trespasser and who has no better title against the plaintiff. This decision makes it clear beyond any doubt that if neither the plaintiff nor the defendant is able to prove his title the plaintiff is entitled to a decree for possession if he establishes his previous possession and if the defendant has no better right to hold the possession. Where the dispute between the parties relates to possession only, it has been argued by Mr. Sarma, it is not necessary for the plaintiff to prove a particular length of possession. In order to make good that proposition of his, he has invited my attention to another decision of Madras High Court in *Ramalinga Pandaram and Others Vs. Anthonimuthu Vathiar and Others*, in which it has been laid down that where the only question relates to the possession of the plaintiff as against that of the defendant and no question as to who the real owner of the land is arises the plaintiffs are entitled to a declaration that they are lawfully entitled to the possession of the land if they held the possession before they were dispossessed. It has been further observed that in such a case the question of length of possession does not arise.

17. Bearing in mind the twin conclusions that neither the plaintiff nor defendants 6 to 11 have been able to prove the title to the suit land, can the plaintiff obtain decree for possession only on the ground that he had been in possession before he was dispossessed by defendants 6 to 11. It has been argued by Mr. M.S.R. Subramanyam that the plaintiff has specifically pleaded that he was subrogated

to the rights of defendants 6 and 7 that unless he makes out that case he cannot succeed. The contention raised by Mr. Subramanyam runs contrary to the principle laid down by this Court in Fakrulla Khan Vs. Parke Pocha 1964 (2) ALT 118 and therefore cannot be accepted. However, it has been found by the lower appellate court as a fact that the plaintiff was in possession and was ousted by defendants 6 to 11.

18. Therefore short of proving the title, the plaintiff has proved that he was in possession of the suit land before defendants 6 to 11 ousted him. Hence he is entitled to decree for possession. There is no doubt about the fact that the plaintiff has a better right to possession because he has discharged the mortgage debt which defendants 1 to 5 owed to defendants 6 and 7 and obtained possession of the suit land. In that view of the matter we find no infirmity in the decree passed by the learned appellate Judge. Consequently second appeal No. 400 of 1975 fails and is dismissed with costs.

19. So far as second Appeal No. 447 of 1976 is concerned defendants 6 to 11 in second appeal 400 of 1975 filed the suit for recovering damages against the plaintiff for the years 1965-66 and 1966-67 during which the suit was land in possession of the plaintiff.

20. So far as the year 1965-66 was concerned receiver was appointed by the learned trial Judge who collected the produce and realised the sale proceeds. He deposited that amount in the trial-court which defendants 6 to 11 have taken away. Nothing therefore remains to be done in so far as the produce for 1965-66 is concerned. So far as the year 1966-67 is concerned it has been found by the court below that there was failure of crops during that year and that therefore there was no produce. In view of this finding therefore nothing is required to be done in respect of that year as well. Otherwise also since defendants 6 to 11 have failed in second Appeal No. 400/75 this appeal which arises out of the suit filed by them must necessarily fail. Second Appeal No. 446 of 1976 is therefore dismissed with no costs.