(1960) 07 AP CK 0018

In the Andhra Pradesh High Court

Case No : Second Appeal No. 78 of 1957 and Civil Revision Petition No. 1156 of 1955

Kothakapa China Konda Reddy APPELLANT

Vs

R. Venkata Rao and Others RESPONDENT

Date of Decision : 05-07-1960

Acts Referred:
Transfer of Property Act, 1882 — Section 67A

Citation : AIR 1961 AP 175

Hon'ble Judges : Jaganmohan Reddy, J

Bench : Single Bench

Advocate : G. Venkatarama Sastry, for the Appellant; M.S. Ramachandra Rao, M. Krishna Rao and R.V. Subbarao, for the Respondent

Final Decision : Dismissed

Judgement

Jaganmohan Reddy, J.—In this second appeal the point that is urged and argued is whether the suit, the subject-matter of this appeal, which is filed on a subsequent mortgage, is tenable having regard to Section 67-A of the Transfer of Property Act. In order to determine this question a few facts maybe briefly stated. The 1st defendant executed a prior mortgage deed dated 18-10-1940 in favour of Kurnool Co-operative Urban Bank for Rs. 1,500/-. He later executed a second simple mortgage dated 28-4-1945, in favour of Sampathi Maldl Reddi for Its. 3,000/-.

Out of the proceeds of the mortgage amount he discharged the first mortgage by paying Rs. 1,467-7-0. On 18-1-1947 he created a third mortgage in favour of the plaintiff for Rs. 5,000/-undertaking to pay Rs. 3,440/- in discharge of the second mortgage but he only paid a sum of Rs. I,460/-. A fourth mortgage was executed by him in favour of the plaintiff, the third mortgagee, for a sum of Rs. 3,000/- on 12-5-1947.

The first usufructuary mortgage was created in favour of the second defendant-appellant, on 17-2-1949 for Rs. 4,000/- redeemable on 18-2-1952. It may be stated that the third and the fourth mortgages in favour of the third mortgagee were payable on 15-2-1949, but it is contended that when notice was given to the defendant by the plaintiff, the 1st defendant approached the plaintiff and asked for time with respect to the fourth mortgage. Time was given by executing Ex. A-5, a letter dated 1-11-1949 which reads as follows:-

"I consent to grant you one year time from this date for payment of the mortgage bond (dated 12-5-1947) debt principal and interest both. I shall not take any action thereon within the above period."

Under this document the second mortgage debt would become enforceable on 1-11-1950, but the learned advocate for the appellant says that this document could not have been executed by the plaintiff and inasmuch as the first appellate court did not refer to it he is entitled to submit that that document was not a genuine document. It may be stated that the plaintiff alter executing Ex. A-5. filed a suit on the third mortgage which is O. S. 404 of 1949 on the file of the Dt. Munsifs Court, Kumool on 15-12-1949 in which he mentioned in paragraph 8 that the 1st defendant was indebted to the plaintiff on another mortgage bond dated 12-5-1947 for Rs. 3,000/- with interest thereon, that the entire amount is due and that action will be taken in due course.

Both the defendants were served personally and neither of them objected to the suit being filed on only one mortgage. A decree in due course was passed on 22-3-1950 and proceedings for execution were taken by filing E. P. 63/51. In those proceedings the properties were brought to sale on 5-2-1952. The proclamation issued with respect to this sale showed that the property was being sold subject to the two mortgages viz., the second and the fourth mortgage. The purchaser before bidding for it executed Ex. A-16 dated 22-2-1952 in favour of the plaintiff, which states as follows:-

"In the auction which has to be conducted today in O. S. 404/49, E. P. 63/51 on the file of the Dt. Munsif, Kurnool, if the sale is in my favour on account of mine being the highest bid, I can pay to you by 20-4-1952 the principal and interest accrued towards the mortgage deed for Rs. 3,000/-executed on 12-5-1947 by Anaru Sanjeeviah. If for any reason the sale is not confirmed in my favour and if it is cancelled, this chit shall not be valid. I am not responsible. This is the chit written to that effect."

2. Both the courts have held that this document was not a forgery and was a genuine document ''executed before the sale. After the purchase of the property subject to the second and fourth mortgages by the 2nd defendant, the plaintiff filed a suit with respect to the fourth mortgage. The second defendant objected to its maintainability on the ground that Section 67-A of the Transfer of Property Act was a bar to it. Both the Courts have negatived that contention and hence this appeal.

3. Section 67-A of the Transfer of Property Act is in the following terms:-

"A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree u/s 67, and who sues to obtain such a decree on any of the mortgages, shall in the absence of a Contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage money becomes due."

4. This section was inserted by the amending Act IX of 1929 and though it makes it mandatory for the plaintiff to sue on all the mortgages held by him from the same mortgagor in respect of each of which he has to obtain the same kind of decree u/s 67, the section does not provide for any penalty, nor does it indicate what is the consequence of non-fulfilment of the provision. It is obvious that Section 67-A was designed to confer an advantage on the mortgagor and to save him from expense and harassment by the plaintitf having recourse to multiplicity of suits and it left it open to parties to contract to the contrary.

Merely because it is mandatory for the mortgagee to file a suit on the several mortgages executed in his favour by the mortgagor, that by itself does not make a decree invalid without any objection being taken by the mortgagor to the maintain ability of the suit. The second mortgagor could raise an objection and did not choose to do so and hence the provision which was in his favour, could be said to have been waived. He can likewise ask for time to extend the period of the due date by contracting to the contrary in which case the mortgagee can file a suit, on the mortgage which has become due, and postpone the suit with respect to the mortgage regarding which he has postponed payment.

The learned advocate for the appellant, Mr. Venkalarama Sastry, submitted that u/s 67 the mortgage money becomes due on the date provided for in the mortgage deed, and that any extension of time given by the mortgagee does not come within the provisions of Section 67 and consequently when Section 67-A specifies the right of the mortgagee to obtain a decree u/s 67, it must be deemed to mean that the right to obtain a decree accrues only on the date specified in the document and not the extended period, if any, which has been arrived at by agreement,

I am unabic to accept this contention. No authority has been cited for that proposition and the language of Section 67 itself militates against such a contention. Section 67 proceeds with the words "in the absence of a contract to the contrary" and does not use the words to indicate that the mortgage amount becomes payable on the date mentioned in the mortgage deed and not on any other date which may be agreed to between the parties.

What the section says is that in the absence of a contract to the contrary, the morgagee has at any time after the mortgage money has become due to him and before a decree has been made for the redemption of the mortgage property or the mortgage money has been paid or deposited as thereafter provided, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred from his right to redeem the properly or obtain a decree that the property shall be sold.

This right of foreclosure u/s 67 can only arise when the money becomes due, and money becomes due only when under the agreement between the parties it is deemed to become due. It may be stated that Ex. A-5 clearly gives time to the mortgagor for the payment of the fourth mortgage money by one year. I am not impressed by the submission that because Ex. A-8 mentioned in paragraph 8 that the other mortgage money is due and that he could file a suit subsequently, I must hold that Ex, A-5 is genuine.

The trial Court on the evidence held that A-5 was a genuine document executed by the plaintiff when the 1st defendant came to him to ask for time. It was also produced at the instance of the plaintiff on summons being taken to the 1st defendant. It may be that the appellate court did not consider the question of the proof or otherwise of this document because that question may not have been raised before it.

Having regard to the fact that the plaintiff himself sought its production and the defendant in producing it inferentially admitted its genuineness, there is no valid reason not to accept that document as genuine and if that document is accepted certainly the obligation to pay the money due on the fourth mortgage did not arise till 1-11-1950, and the plaintiff could not have filed a suit with respect to the mortgage amount due on that mortgage on the date when he filed the first suit, Ex. A-6 in December, 1949.

If the plaintiff could not file both the suits on the same date because the mortgage money on one of them did not become due by that date, it could not be said that Section 67-A is a bar. Nor is there anything in the provisions of the Transfer of Property Act which could force the plaintiff to postpone his suit on one of the mortgages till money becomes due on the mortgage.

5. The several High Courts which have considered the provisions of Section 67-A have taken the same view viz., that though the provisions are I mandatory, they can be waived by the mortgagor; at any rate his omission to object to the suit being filed on only one of the mortgages will bar any objections subsequent to the execution of the decree. In Premsukh Mahata v. Mangal Chand, 41 Cal WN 854 a Bench of the Calcutta High Court considered the provisions of Section 67-A. One of the Judges viz.. Panckridge J., said that "the words" all the mortgages in respect of which the mortgage money has become due "in Section 67-A of the Transfer of Property Act must be limited to those mortgages which the court, in which the mortgagee sues, has jurisdiction to enforce."

In that case the value of the property situated in Calcutta was almost infinitesimal and there was no real intention to make the property real and effective part of the security which the mortgagee was giving as consideration for the loans. In these circumstances it was held that the mortgagee could not sue on all the mortgages. Panckridge J., at p. 867 observed as to Section 67-A of the Transfer of Property Act as follows:

"I may observe that it is never easy to Construe a statutory enactment which imposes an obligation but is silent as to what is to happen in the case of a breach of that obligation. It appears to me to be unreasonable to suppose that the statute compels a plaintiff mortgagee to do what the respondent did here, namely, include in his suit mortgage claims over which the Court has no jurisdiction. If this is so, the inclusion cannot be pleaded as a compliance with the obligation whatever it may be. I cannot however agree with Mr. Ghose that the failure to include other claims cannot be pleaded by the mortgagor in the first suit which the mortgagee elects to bring although it can be pleaded in subsequent suits brought in respect of the claims which the mortgagee had neglected to include in the former suit ..... The section which was added to the Transfer of Property Act by Act XX of 1929 and which cuts down the former rights of the mortgagees, should not, in my opinion, be Construed more widely than the language clearly warrants. Applying this principle the words "all the mortgages in respect of which the mortgage money has become due" must be limited to those mortgages which the Court, in which the mortgagee, sues, has jurisdiction to enforce."

In Mootha Mohanraj Sowcar Vs. Manicka Goundar and Others, Krishnaswami Nayudu J., fully considered the question and examined, the authorities and while holding that the provisions of Section 67-A of, the Transfer of Property Act are mandatory, none-the-less held that the, object of the provision was to benefit the mortgagor and it is the mortgagor that should take objection at the earliest point of time and if he has failed to do so at the proper time the mortgagee can assume that he was waived that objection and in the circumstances the mortgagor cannot be heard to say that the subsequent suit filed by the mortgagee on the second mortgage should be dismissed in limine. At p. 82 (of Mad LJ) : (at p. 470 of AIR) it is observed as follows:-

"No doubt it is primarily for the mortgagee to comply with Section 67-A and bring a single suit On all the mortgages, but in view of there being no provision made as to the penalty for non-compliance, the mortgagee should not be denied his right to sue on the other mortgage, which in this case due to the failure or the neglect of the mortgagor to raise the objection at the earliest point of time must have put the mortgagee in the belief that the mortgagor, who had a right to object, had apparently waived it. It is in this view that the facts of the case have to be judged with reference to the direction u/s 67-A of the Transfer of Property Act. The justice of the case does not require a denial to the mortgagee of his right to sue under the suit mortgage."

A similar view has been taken by the Madhya Pra-desh High Court in Har Sharan Lal Vs. Surajmal Kundanmal Oswal, , I am in respectful agreement with those views. Apart from the general principle the facts in this case show that the waiver by the mortgagor is a specific one in that under Ex. A-5 he agreed to grant the time. Having regard to this specific agreement to the contrary the mortgagor is not entitled to raise an objection as to the bar of Section 67-A. In this view of the matter, this Second Appeal is dismissed with costs. No leave.

C. R. P. No. 1156 of 1955.

6. With respect to the C. R. P. the question is whether the lower court was right in rejecting the application for amendment of the sale certificate. The petitioner submits that the sale certificate is not in accord with the sale proclamation and is consequently impugning that as a ground of irregularity or illegality. If that is the ground upon which lie is challenging the sale certificate, the lower court was right in saying that the remedy was under Order 21 Rule 91. There seems to be no irregularity or illegality in that order. As such, this revision petition is also dismissed with costs.