(1952) 06 KL CK 0018

In the High Court Of Kerala

Case No : A.S. No. 132 of 1124 (Tr)

Krishna Kammathi Ramchandra Kammathy APPELLANT

Vs

Narayana Shenoi Padmanabha Shenoi and Others RESPONDENT

Date of Decision : 02-06-1952

Acts Referred:

Citation : AIR 1952 Ker 112

Hon'ble Judges : K.T. Koshi, C.J;Gangadhara Menon, J

Bench : Division Bench

Advocate : N. Devaresa Kammath, for the Appellant; T.S. Krishnamoorthi Iyer, for the Respondent

Judgement

Koshi, C.J.—This is a Plaintiff''s appeal. The suit out of which it arises was brought, to realise certain amounts personally from Defendant 6 and by way of first charge on seven out of the eleven items of Immovable properties mentioned in the schedule annexed to the plaint. Defendant 6 was the owner of the eleven items mentioned in the plaint schedule. On 25th Edavom 1098, he sold three items among them to the Plaintiff''s father and on the selfsame day usufructuarily mortgaged the remaining items to the same person. At that time there were three subsisting encumbrances on those eleven items. The first was a hypothecation of 1087 which had by then ripened into a decree. The second and the third encumbrances were also under hypothecation bonds and they were respectively of the years 1090 and 1091. The third hypothecation was in favour of the predecessor-in-interest of Defendants 1 to 5 and he had also obtained a decree thereon. To mention only such details as are relevant for our present purpose the Plaintiff''s father was directed to discharge the first and second charges and Defendant 6 received the balance consideration for the sale and mortgage in cash undertaking to discharge the third.

Pursuant to the sale and mortgage in his favour possession of the properties passed to the Plaintiff''s father and he duly discharged the 1st and 2nd encumbrances. Defendant 6 however failed to satisfy, the decree obtained on foot of the third hypothecation and the decree holder brought the properties to sale and purchased them himself. The sale related to some of the plaint schedule items and we are here concerned with items 3 to 9. The sale was confirmed in Mithunam 1112 and on the first of Vrischikom 1113 the decree-holder purchaser obtained delivery of the properties comprised in his sale certificate. The Plaintiff''s father having died in the meantime Plaintiff brought the present suit to recover the proportionate amounts of the first and second charges leviable on the properties thus lost. Value of improvements effected by him and his father on those properties was also claimed. The lower Court fixed the proportionate amount of the two charges at Rs. 1500/- and the value of improvements at Rs. 50 Ch. 17 and cash 8. A decree was granted to the Plaintiff for these two amounts personally against Defendant 6 and against items 3 to 9 of the plaint schedule subject to the rights of Defendants 1 to 5.

Defendant 6 has not preferred any appeal against the said decree nor did Defendants 1 to 5 seek to impugn the decree charged on the properties subject to their rights. ''Prima facie'' there is some difficulty to understand what the lower Court meant when it passed a decree against items 3 to 9 subject to the rights thereon of Defendants 1 to 5. The parties are however agree as to its true meaning and we shall explain it in due course. The Plaintiff felt dissatisfied with the lower Court relegating him to a secondary position vis-a-vis the charge and hence this appeal for a primary charge over the items mentioned for the amounts decreed in his favour. Defendant 1 who is Respondent 1 in the appeal has preferred a memorandum of objections stating that the lower Court under-estimated the value of improvements effected by him after he came into possession of the properties in question in 1113. The said memo was however not pressed at the hearing.

2. We are by no means satisfied with the reasons the lower Court gives to grant the Plaintiff a secondary charge over items 3 to 9. In our view either the Plaintiff ought to have been subrogated to the rights of the first and second charge holders or not at all. The recognition of a charge in his favour subject to the rights of Defendants 1 to 5 is really inexplicable. In the view we take as to the decision we should give in the appeal we do not however think it necessary to examine the fallacies underlying the lower Court''s decision. The Respondent''s learned Counsel raised several nice and intricate questions relating to the law of subrogation. While we are unable to see eye to eye with him on several propositions propounded by him as at present advised, we are inclined to agree with one, namely, that the claim for subrogation was put in suit long out of time. The legal implication of the acceptance of that view would lead to the conclusion that the Plaintiff should have been non-suited with reference to the charge claimed by him. So long as there is no appeal by Defendants 1 to 5 or any attempt to impugn the correctness of the decree giving a charge by other means known to law we shall rest content by leaving the lower Court''s decree undisturbed. We cannot grant any further relief to the Plaintiff in his appeal.

3. There is no consensus of judicial opinion as to when time begins to run for the enforcement of a claim by way of subrogation. One school of thought which we might for the sake of convenience, call the orthodox school, is of opinion that a subrogee must bring his action within such time as the mortgagee in whose place he gets substituted ought to have brought the action; that is the subrogee must bring his suit within 12 years of the mortgage money becoming due. Several Indian High Courts including Madras and Cochin have taken this view. The advanced view is that the subrogee''s cause of action arises only from the date of his payment to the mortgagee in whose place he seeks to stand. The Allahabad and Travancore High Courts have taken this view. A third view is that when the prior mortgage has ripened into a decree, the date the decree fixes for payment of the mortgage money furnishes the starting point of limitation for the subrogee''s action to enforce his right. The Calcutta High Court appears to favour this view.

4. Here in this case there is clear evidence that the present suit was brought long after 12 years had expired from the date of the discharge of the first charge. Ex. D the execution diary in the first hypothecatee''s suit shows that satisfaction of the decree was entered so long ago as 6-4-1099. The present Plaintiff it was who paid the decree-debt. This suit was brought only on 3-4-1114. Payment towards the first charge represents well nigh two- thirds of the amounts claimed by the Plaintiff as subrogee. Whichever view as to the starting point for limitation is applied the claim was clearly barred when the action was brought.

5. As for the discharge of the amount due as per the second hypothecation (1090) there is no definite evidence as to its exact date. The Plaintiff however swears that it was discharged by his father while he was alive and that at the time of the sale and mortgage in favour of the father the hypothecatee - church owed large amounts to the father and that the discharge of the bond Defendant 6 had executed in favour of the church in 1090, was effected by adjustment towards the amounts due to the father. Evidently this must have been soon after the sale and mortgage in favour of the Plaintiff''s father in 1098. It is for the Plaintiff to show that his suit was brought within time. Though evidence as to the exact date of discharge is wanting the Respondent''s assertion at the bar that the suit was brought after the expiry of 12 years there from was not sought to be controverted by the Appellant''s Counsel nor did he ask that further enquiry should be made about it. In these circumstances we do not think that a decision that the suit was brought after 12 years of the payment will be wrong. On that basis the claim in respect of the second charge had also got time-barred when the suit was instituted. To reckon that the period of limitation starts from the date of payment to the prior charge holder is the most favorable view that could be taken from the point of view of the subrogee and even on that reckoning the suit for enforcement of the payment of the two prior charges in the right of the subrogee was barred in Vrischikam 1114 when the suit was filed. We are therefore unable to grant any relief to the Plaintiff-Appellant.

6. The plaint states that the cause of action arose with the dispossession of the Plaintiff; while that would mark the commencement of the running of time against the mortgagor we have not been told how that would furnish or revive a cause of action to the Plaintiff in the capacity of the subrogee. No argument was raised nor was any authority cited in that behalf.

7. It remains for us now to explain the true implication of the lower Court''s decree for a charge subject to the rights of Defendants 1 to 5. They had purchased the property in court auction and after stating that the Plaintiff''s mortgage sales were vitiated by ''lis pendens'' a decree subject to the rights of the court auction purchaser looks meaningless. However the Respondent''s Counsel conceded that what the lower Court meant was a secondary charge in favour of the Plaintiff subject to a primary charge in favour of Defendants 1 to 5 for the amount they paid for the court purchase evidenced by Exhibit V. and the value of the improvements Defendants 1 to 5 had effected after they came into possession which the lower Court estimated to be Rs. 37 Ch. 14. Subject to a first charge in favour of Defendants 1 to 5 for those two amounts the Plaintiff-Appellant will be free to sell items 3 to 9 for the amounts decreed to him by the lower Court. With this clarification of the lower Court''s decree we dismiss the appeal as also the memorandum of cross-objections. In the circumstances of the case we make no order for costs.

