

(1978) 08 KL CK 0029
In the High Court Of Kerala
Case No : Second Appeal No. 3 of 1975

Krishna Pillai Raghavan Pillai

APPELLANT

Vs

Velayudhan Pillai Raghavan Pillai and Others

RESPONDENT

Date of Decision : 08-08-1978

Acts Referred:

Kerala Land Reforms (Amendment) Act, 1969 — Section 4A(1)
Transfer of Property Act, 1882 — Section 92

Citation : AIR 1979 Ker 47

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J.; T. Chandrasekhara Menon, J.; K. Bhaskaran, J

Bench : Full Bench

Advocate : S. Narayanan Potti and S. Sankara Subban, for the Appellant; K.N. Narayanan Nayar, M.N. Sukumaran Nayar and P. Sukumaran Nair, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskaran, J.—Considering the importance of the question of law involved, the learned single Judge, before whom this second appeal came up for hearing, adjourned it to be heard by a Division Bench which, in its turn, has referred it to a Full Bench for an authoritative decision on the question as to whether, in the case of mortgage arising out of Travancore area before the Transfer of Property Act (Act 4 of 1882) was extended to that area, a superior mortgagee (melottidar) who redeemed the prior mortgage with the amount reserved with him for that specific purpose and in terms of the covenants in the mortgage deed in his favour, is entitled to get himself subrogated to the position of the prior mortgagee for the purpose of Section 4-A (1) (a), read with Explan. II to that subsection, of the Kerala Land Reforms Act, Act 1 of 1964 as amended by Act 35 of 1969, hereinafter called the Act; and that is how the matter is now before us.

2. Facts are not in dispute, and are not required to be stated in detail for a decision of the question of law referred to us which virtually will dispose of the

second appeal it-self. The suit is one for recovery of possession of the plaint schedule properties, redeeming Ext. P-2 mortgage (melotti) dated 5-7-1119 created in favour of the appellant herein (the first defendant in the suit) by one Krishna Pillai Sankara Pillai to whom the properties originally belonged. Prior to Ext P-2 mortgage (melotti) the said Krishna Pillai Sankara Pillai had executed Ext. P-1 settlement deed (dhananischayam udampadi) dated 14-10-1104, settling his properties on his mother and his children. Pursuant to Ext. P-2 melotti. Ext. D-2 prior mortgage dated 5-7-1083 was redeemed and the plaint schedule properties were reduced to his possession by the appellant as per Ext. P-3 release deed dated 16-7-1119.

3. In the year 1967, after the said Krishna Pillai Sankara Pillai died on 25-8-1964. plaintiffs 1 and 2 (original defendants 4 and 5 were subsequently transposed at plaintiffs 4 and 3 respectively) instituted the suit claiming title to the properties as his legal heirs and also on the strength of Ext. P-1 dhananischayam Udampadi. The defence of the appellant as the first defendant in the suit, inter alia, was that he was not liable to be evicted from the plaint schedule properties, he being a cultivating tenant entitled to fixity of tenure u/s 13 of the Act, inasmuch as Ext. P-2, though styled as a melotti, in effect and substance evidenced a lease; and, alternatively, that, as a mortgagee he is entitled to the benefits of Section 4-A (1) (a) of the Act, tracing his rights and continuous possession from the date of Ext D-2 which was redeemed by Ext. P-3 release deed, on the principle of subrogation. This second appeal by the first defendant it directed against the concurrent decision of the courts below in favour of the plaintiffs allowing redemption of Ext. P-2 mortgage and recovery of possession of the plaint schedule properties, repelling the contentions of the appellant.

4. No doubt, various grounds are seen to have been raised in the memorandum of second appeal; however, all that is highlighted during the course of the arguments centres round the point whether the appellant, in law and on the facts of the case, is entitled to invoke Section 4-A (1) (a) of the Act as a shield against redemption and eviction. It is the contention of the appellant that he, as a subsequent mortgagee under Ext. P-2, is entitled to use Ext. D-2 prior mortgage which was released in his favour as per Ext. P-3 release deed, as a shield against redemption and eviction invoking Section 4-A (1) (a) of the Act.

5. It is not disputed before us that the appellant redeemed Ext. D-2 mortgage as per Ext. P-3 release deed utilising the amounts specifically earmarked for that purpose and reserved with him out of the amount secured by Ext. P-2 melotti and in accordance with the covenants contained therein. On a reading of the relevant portions of Exts. P-2 and P-3 we are satisfied that the redemption contemplated in Ext. P-2 and obtained as per Ext. P-3 release deed is one extinguishing Ext. D-2 mortgage without keeping it alive for any purpose, and that the contention of the counsel for the appellant that the redemption under Ext. P-3 amounts only to an assignment, not to extinguishment, of the prior

mortgage (Ext. D-2) cannot be accepted. Construing almost identical recitals in the documents concerned in *Raghavan Vydia v. Parvathi Amma* 1973 KLT 1024 this Court has In para. 7, at page 1029, held as follows :--

"In the instant case what was done by the appellant, as has already been stated, was to redeem Ext. D-1 mortgage in pursuance of the direction given by the mortgagor in Ext. P-2, with the money reserved with him out of the amount secured by Ext. P-2. It cannot be construed in terms of the provisions contained in Section 92 of the Transfer of Property Act, to be an act by which he was entitled to get himself subrogated to the position of the mortgagee under Ex. D-1. Considering the recital in Ext. P-2 and the conduct of the parties, even giving a liberal interpretation to Expln. II to Section 4-A (1), I think, there is no justification for taking the view that the first defendant is a mortgagee who had been holding the property for more than 50 years on the date of the coming into force of Act 35 of 1969. It would also be just and equitable to conclude that Ext. P-1 evidences an extinguishment of the mortgage under Ext. D-1 and that it enures to the benefit of the mortgagor alone, as it was done with his money and under his direction in terms of Ext. P-2, and the first defendant who secured the release of the property from the prior mortgagee as an agent of the mortgagor is not entitled to claim that his possession of the property is in continuation of that of the prior mortgagee, and to invoke Section 4-A (1) for establishing the status of a deemed tenant with the aid of Expln. II to Section 4-A (1)."

The view expressed by the single Judge in the passage quoted above has been approved by a Division Bench of this Court in A. S. no. 15 of 1975.

6. It was, however, submitted on behalf of the appellant that the Travancore High Court had consistently held that the subsequent mortgagee or a purchaser of the mortgagor's right, who in his document has been directed to discharge earlier mortgage with the amount reserved for that purpose, was entitled to step into the shoes of the prior mortgagee. Decisions reported in *Athicha v. Kochu* (1929) 19 KLJ 8 *Pranchu Ouseph v. Punnan Mathai* (1937) 27 KLJ 1127 and *Kunjuraman Sadasivan v. Ponnann Kesavan* 1943 KLR 1193 were cited as instances. It was also pointed out that following the dictum laid down by the Supreme Court in *Ganeshi Lal Vs. Joti Pershad*, a Full Bench of this Court has observed in *Lakshmi Pilla Subhadra Amma and Another Vs. Easwara Pillai Velayudhan Pillai and Another*, that strictly speaking the provisions of the Transfer of Property Act would not apply to cases arising from Travancore area prior to the Transfer of Property Act being made applicable to that area; this Full Bench decision has also indicated that the law of subrogation has to be judged on the date of the transaction of the mortgage, not when the mortgage was redeemed. In this case the controversy as to whether the date of mortgage or the date of redemption is relevant for the purpose of subrogation does not arise, inasmuch as Ext. D-2 mortgage was created and redeemed before the T. P. Act (Act 4 of 1882) was extended to the Travancore area.

7. The counsel for the respondents submitted that in the absence of statutory

provision similar to Section 92 of the T. P. Act (Act 4 of 1882) what should govern the case is the salutary principles of justice, equity and good conscience. It is also contended that even assuming that a superior mortgagee, redeeming a prior mortgage in pursuance of the covenants with the mortgagor for redemption with the money reserved for that purpose, is to be deemed to be the substitute in the place of the mortgagee under the mortgage which he redeemed for the purpose of claiming priority among the mortgagees, it could never be used as a shield against the mortgagor in an action for redemption and recovery of possession. The following pass-age in *Athicha v. Kochu* (1929) 19 KLJ 8 is cited in support of this contention:--

"Her having taking the sale deed, Exhibit 1, with an undertaking to redeem the debt, could not render her personally liable for the debt to the mortgagee. The undertaking might probably estop her from claiming the benefit of subrogation as against her vendor; but there is nothing either in law or equity to disentitle her to the same, as against the plaintiff."

Our attention has also been drawn to the following observation by Nokes, J., who delivered the supporting judgment in *Kunjuraman Sadasivan v. Ponnann Kesavan* (1943 KLR 1193 at page 1206:--

"Questions of subrogation, however, do not usually arise unless there is more than one mortgage."

We see the force of this argument. Though the counsel for the appellant submitted that the disability of estoppel as against the mortgagor would not hold good as against his legal heirs with whom the mortgagee who redeemed the prior mortgage did not enter into any covenant in that behalf, we are not inclined to bold that to be the correct view. In our opinion, for the purpose of subrogation what is a bar against the mortgagor should hold good against his legal heirs also.

8. Having found that in terms of Exts. P-2 and P-3 there is a complete extinguishment of EM. D-2 mortgage without being kept alive for any purpose, and applying the principles of justice, equity and good conscience to this case arising from the Travancore area before the T. P. Act (Act 4 of 1882) was extended to that area, and even assuming without examining, for the purpose of this case that the decisions of the Travancore High Court cited before us lay down the correct law on the question of subrogation in regard to superior mortgagee redeeming prior mortgage, we have no hesitation in holding that a superior mortgagee redeeming a prior mortgage in pursuance of the covenant between him and the mortgagor is not entitled to claim the benefit of subrogation as against the mortgagor, and therefore the appellant is not entitled to tack on the mortgagee's possession under Ext. D-2 to his own possession from Ext. P-3 release date, namely, 16-7-1119, for the purpose of invoking Section 4-A (1) (a) of the Act. Accordingly, we confirm the decision of the courts below and dismiss this second ap-peal with costs.

Gopalan Nambiyar, C.J.

9. I agree with the judgment of Bhaskaran, J., delivered on behalf of the Bench, but add a few words of my own.

10. Counsel for the appellant contended that the decision in *Raghavan Vydian v. Parvathi Amma* 1973 KLT 1024) had stated the principle that a person who redeems in pursuance of a covenant with the mortgagor is not entitled to subrogation, rather broadly, and that the settled common law of the Travancore area disclosed a different position. For the said proposition, he invited our attention to *Franchu Ouseph v. Punnan Mathai* (1937) 27 KLJ 1127. That decision recognised that where the person paying the prior mortgage is not himself the primary debtor, he is entitled to subrogation even if the payment is made under a covenant or agreement (vide page 1132). The principle of the decision was followed in *Velayudhan Nair v. Thomas* (1942) 32 KLJ 507 which has referred to the early decision in *Athicha v. Kochu* 1929 19 KLJ 8 to which I shall immediately refer. Counsel also cited the decisions in *Kunjuraman Sadasivan v. Ponnann Kesavan* 1943 KLR 1193 which is stated to have followed the principle in *Velayudhan Nair v. Thomas* ((1942) 32 Trav L.T 507) and the decision in *Subramonia Iyer Vs. Pachi Amma Lekshmikutty Amma*, following *Raghavan Vydian v. Parvathi Amma* 1973 KLT 1024. We also referred us to the Division Bench ruling in *Krishna Menon Bhaskara Menon and Others Vs. Madhavan*, which followed *Raghavan Vydian v. Parvathi Amma* 1973 KLT 1024: 1975 KLT 38 and to the Full Bench judgment in *Lakshmi Pilla Subhadra Amma and Another Vs. Easwara Pillai Velayudhan Pillai and Another*, <.

11. The decisions in *Athicha v. Kochu* (1929) 19 KLJ 8 and *Kunjuraman Sadasivan v. Ponnann Kesavan* 1943 KLR 1193 properly analysed and understood, lay down that before the covenant can exclude subrogation, it must be with the mortgagee. It also seems to be the principle of these decisions that while a puisne mortgagee who redeems a prior mortgage can keep it alive and claim subrogation as against subsequent mortgagee, he cannot do so as against the mortgagor. This seems to be implicit from the passage from the judgment in *Kunjuraman Sadasivan v. Ponnann Kesavan* (1943 KLR 1193) at page 1207 and in the passage extracted from *Athicha v. Kochu* 1929 19 KLJ 8. There seems to be no justification even to understand the Travancore common law in this limited and qualified sense after the pronouncement of the Supreme Court in *Ganeshi Lal Vs. Joti Pershad*, which generally laid down the law in respect of areas not governed by the Transfer of Property Act.