(1975) 11 KAR CK 0002

In the Karnataka High Court

Case No : Second Appeal No''s. 40 and 41 of 1971

Lakshminarasamma and Others APPELLANT

Vs

C.V. Raghavachar and Others RESPONDENT

Date of Decision : 21-11-1975

Acts Referred:
Karnataka Money Lenders Act, 1961 — Section 26

Citation : AIR 1976 Kar 209 : (1976) 1 KarLJ 114

Hon'ble Judges : M. Sadanandaswamy, J

Bench : Single Bench

Advocate : V. Krishna Murthy and V. Tarakaram, for the Appellant; L.S. Varadaraja Iyengar, for the Respondent

Judgement

1. The suit property originally belonged to one Srirangachar. It consists of a house in Chamaraja Mohalla, Mysore City, bearing Door No. 2895. He borrowed Rs. 8,000/- from C. K. Ramachandra Rao and executed a registered deed of simple mortgage in his favour hypothecating the suit property and another land situated at Doddegowdana Koppal, Srirangapatna Taluk. He again borrowed from A. N. Dattu Rao, Rs. 1,000/- on 21-3-1947 and Rs. 1,500/on 31-5-1947 and executed two registered deeds of simple mortgage hypothecating the suit property. He also borrOV7ed Rs. 1,000/- on 9-6-1951 from C. S. Raghunatha Rao and executed a deed of simple mortgagee hypothecating the suit property as security.

2. The first mortgagee C. K. Ramachandra Rao filed a suit 0. S. No. 122 /1951-52 on the file of the subordinate Judge''s Court, Mysore, on 29-3-1952 against the mortgagor alone for the recovery of the mortgage money then due by sale of the suit property, since he had released earlier from his mortgage the other mortgaged property, namely, the land. The suit was decreed. In execution of the said decree, the suit house was brought to sale and. C. K. Ramachandra Rao himself purchased it on 29-11-1955. The sale was confirmed on 9-1-1956. The subsequent mortgages were not impleaded in the suit filed by

the first mortgagee.

3. On 6-12-1956, Dattu Rao filed a suit on his mortgage bonds dated 21-31947 and 31-5-1947 to recover the mortgage monies due to him in 0. S. 716/56 in the Court of the First Munsiff, Mysore, against Srirangachar - the mortgagor and his sons, the legal representatives of the fourth mortgagee, who was dead by that time, and also against C. K. Ramachandra Rao, the first mortgagee.

4. C. K. Ramachandra Rao disputed the truth as well as the validity of the second plaintiff''s mortgages, and contended that he was not liable to pay the mortgage money claimed in the suit but the other defendants in the said suit consented to a decree. There upon, Datturao decided not to press the suit as against C. K. Ramachandra Rao without prejudice to his right to institute a separate suit against him for redemption of his mortgage dated 28-8-1946 and withdrew his suit as against C. K. Ramachandra Rao, with the leave of the Court.

5. Datturao executed the decree obtained by him in 0. S. No. 716/1956 and brought the suit property to sale subject to the first mortgage of C. K. Ramachandra Rao. At that sale C. V. Raghavachar purchased the property subject to the first mortgage. The sale was confirmed on 10-10-1958. Later on, C. V. Raghavachar took possession of the suit property except the hind portion, which is described as "B" schedule in 0. S. No. 889 of 1962, through Court in Mis. 209 of 1958 and claims to be in possession there of through his tenants, K. S. Raghavachar and K. Rajgopal. C. V. Raghavachar claims to have acquired the rights of Datturao as well as Raghunatha Rao as mortgagees.

6. C. V. Raghavachar and A. N. Datturao filed 0. S. No. 889 of 1962 in the Court of the First Munsiff, Mysore, for redemption of the first mortgage dated 28-8-1946 offering to deposit Rs. 1,800/being the amount due under the said mortgage and have prayed for possession being delivered to them of the "B" schedule property which is a part of the mortgage property.

7. In 0. S. No. 889 of 1962 Srirangachar and C. K. Srinivasa Murthy were the defendants. Both the lower Courts held that C. V. Raghavachar is entitled to redeem the first mortgage and hence decreed the suit 0. S. 889 of 1962. The legal representatives of C. K. Srinivasa Murthy have come up in appeal in R. S. A. No. 40 of 1971.

8. C. K. Ramachandra Rao obtained delivery of the entire mortgage property in Mis. Case No. 28 of 1957 on the file of the Sub-Court on 18-9-1957. On the same day he leased the Property to P. S. Raghavachar son of Srirangachar, the mortgagor, under the lease deed dated 18-9-1957, on a rent of Rs. 35/- per month. On 8-1-1958 Ramachandra Rao executed a sale deed in respect of the suit property in favour of Sri. K. Srinivasa Murthy. As the lessee defaulted in the payment of rents C.K.Srinivasa Murthy, the purchaser under the sale deed executed by C.K. Ramachandra Rao, obtained an order of eviction against the lessee in H.R.C. No. 234 of 1958 on the file of the Munsiff, Mysore, in respect of the mortgage property on 31-7-1959. The order was confirmed in appeal in

H.R.C. Appeal No. 39 of 1959 on the file of the Dist. Judge, Mysore on 31-10-1961. C.K. Srinivasa Murthy, thereafter, applied for delivery of possession of the suit property in Execution No. 1045/1961. K.S. Raghavachar, K. Rajgopal and C.V. Raghavachar obstructed the delivery on 11-4-1962. In Mis. Case No. 116 of 1962 C.K. Srinivasa Murthy applied for removal of obstruction and the same was dismissed on 30 th August, 1963. C.K. Srinivasa Murthy died during the Course of the proceedings and his legal representatives were brought on record.

9.The legal representatives of C.K.Srinivasa Murthy filed O.S. No.563 of 1964 in the Court of the Subordinate Judge, Mysore for setting aside the order dated 30-8-1963 passed in Misc. Case No. 116 of 1962 and for possession of the mortgaged property as well as for future mesne profits. In O.S. No.563 of 1964. P.Srirangachar, P.S. Raghavachar were the defendants. Both the lower Courts dismissed the suit O.S. No.563 of 1964. Hence the legal representatives of C.K. Srinivasa Murthy have come up in appeal in R.S.A. No.41 of 1971.

10. It is urged by Sri Krishna Murthy, learned counsel appearing for the appellants, that C.K. Srinivasa Murthy, having stepped into the shoes of the purchaser in Execution of the decree obtained by the prior mortgagee, namely C.K.Ramachandra Rao, is entitled to priority over C.V.Raghavachar, the purchaser in execution of the decree obtained by the puisne mortgagee Datturao.All the four mortgages are simple mortgages.Since the suit was filed by Datturao on the basis of both the second and third mortgages in his favour and since C.S. Raghunatha Rao the mortgagee under the 4th that suit, C.V. Raghavachar can be said to have acquired the rights of all the subsequent mortgages. Hence, the contest is between the purchaser in the first mortgagee''s suit and the purchaser in the suit filed by the puisne mortgagee. The subsequent mortgages were not impleaded in the prior mortgagee''s suit. The prior mortgagee was initially impleaded in the puisne mortgagee''s suit, but subsequently the suit was withdrawn as against the prior mortgagee. Hence, the prior mortgagee must be deemed to have been not impleaded in the puisne mortgagee''s suit.

11. In the Law of Mortgage by Sir Rashbehary Ghose, Fifth Edition, Vol. 1, 1922 at Page 625, the passage from Jones has been extracted. It is as follows:

"When a Party in interest," says Jones, "Other than the owner of the equity of redemption, is not made a party to the bill, the foreclosure is not generally for this reason wholly void. It is effectual as against those persons interested in the equity who are made parties. The sale vests the estate in the purchaser subject to redemption by the person interested in it who was not made a party to the proceedings. His only remedy, however, is to redeem. He cannot maintain ejectment against the purchaser. He cannot have the sale set aside by intervening by petition in the foreclosure suit. His only right is the right of redemption. The sale, though it fails to be effectual in every other respect, operates as an assignment of the mortgage and all the mortgagee''s rights to the purchaser, who may Proceed de novo to foreclose".

With regard to priority as between the two rival purchasers it has been stated at page 659 as follows:-

"I may here observe, in passing, that b as between two rival purchasers the title to the outstanding equity of redemption is determined by the Priority not of the respective mortgages but of the respective sales; and the person who first buys the equity of redemption, whether he is the mortgagee himself or a stranger, will be entitled in his character of transferee to redeem all subsisting mortgages on the property, and thus acquire an absolute title to it."

12. In N. A. Singalachar v. Thimme Gowda alias Anne Gowda ((1938) 16 Mys LJ 49) the dispute was between rival Purchasers of the same property in mortgage suits brought by the respective simple mortgagees without impleading each other. The prior mortgagee had sued and Obtained a decree and in execution had purchased the property before the subsequent mortgagee preferred his own suit. It was held that the priority of the date of purchase of the mortgagor''s right to Possession gives priority of title to Possession in disputes between rival purchasers of the same -property in mortgage suits brought by the respective mortgagees without impleading each other and that the mortgagee who purchased the -property earlier is entitled to remain in possession until the rights of parties are worked out in a -pro-per suit in which all persons interested are parties. It was held that a puisne mortgagee or a representative in interest of his is certainly entitled to redeem the prior mortgage. But that a purchaser in execution of a decree on the prior mortgage can, apart from holding out the prior mortgagee as shield against the puisne mortgagee or his representative in interest, claim as the owner of the equity of redemption to redeem the puisne mortgage.

If the two rights to redeem, viz., the right of the puisne mortgagee to redeem the prior mortgagee and the right of the prior mortgagee as assignee of the equity of redemption to redeem the puisne mortgagee, conflict, the right of the prior mortgagee to redeem the puisne mortgagee was held to take priority, following 75 Ind Cas 899 : AIR 1924 Na-a 198 and Ram Baran Chaube and Another Vs. Bhagwati Pandey and Others, The decision in (1908) 8 CLJ 173, which takes a contrary view, was not followed. Since the off er to redeem came from the purchaser in the decree of the first mortgage and since both the purchasers were on record, it was held desirable to adjust the equities between parties instead of all6wing them to fight out the matter in a subsequent suit.

13. In Sabastian D''Cruz Vs. Laxman Shreepad Deodhar and Others, the prior mortgagee had brought to sale the mortgaged property and purchased it himself. But he had not made the puisne mortgage a party to his suit. The prior mortgagee was held entitled, as assignee of the equity of redemption, to redeem the puisne mortgagee and that the original mortgagor lost his right to redeem since the prior mortgagee who had purchased the mortgaged property as auction purchaser had purchased his right to redeem the puisne mortgage.

14. The decision in (1938) 16 Mys LJ 499 applies to the facts of the present case also. The sale in execution of the decree obtained by the prior mortgagee had taken place before the suit by the puisne mortgagee was instituted. The -purchaser in the prior mortgagee''s suit obtained the rights of the prior mortgagee as well as the rights of the original mortgagor as on the date of his suit. The rights of the original mortgagor included the right to redeem the puisne mortgagee. The purchaser in the puisne mortgagee''s suit obtained the rights of all the subsequent mortgagees. But he obtained them subject to the rights of the original mortgagor or his assignee. Though the original mortgagor had been impleaded in the puisne mortgagee''s suit all the rights of the mortgagor had been by then transferred to the purchaser in the prior mortgagee''s suit.

15. The puisne mortgagee has a right to redeem the prior mortgage. If he does so he acquires the rights of the prior mortgagee also. But the mortgagor can exercise his right of redemption against every one of the mortgagees. Such a right can be defeated by the mortgagee only by foreclosure. At any time before foreclosure the mortgagor can always exercise his right to redeem. Though the puisne mortgagee can redeem the prior mortgage he cannot deprive the purchaser in the prior mortgagee''s suit of the right of redemption since the right of redemption which belonged to the original mortgagor has vested in the purchaser in the prior mortgagee''s suit. Hence the puisne mortgagee cannot have a priority to redeem as against the purchaser in the prior mortgagee''s suit. The purchaser in the puisne mortgagee''s suit cannot have a better right than the puisne mortgagee himself. Hence, as between the two purchasers it is only the purchaser in the prior mortgagee''s suit who has priority of right of redemption.

16. A different view has been expressed in Kedar Prosanna v. Girindra Prosad, M908) 8 CLJ 173). But there is no discussion of the- points involved and it appears to have been assumed that the puisne mortgagee who purchased the property in a subsequent suit in which the prior mortgagee was not made a party had a preference over the prior mortgagee who had purchased in the earlier suit to which the puisne mortgagee was not made party.

17. Mr. Varadaraja Iyengar, learned counsel appearing for the respondents has relied on the decisions in Nagu Tukaram Ghatule Vs. Gopal Ganesh Gadgil, and Shanmugha Nadar Vs. Sivan Pillai and Others, . In Ramji Lal and Others Vs. Roshan Singh and Others, the respondents were unrepresented. The only contention which was considered on their behalf was the appellants'' right to have the profits set off against interest each year. The right of the mortgage purchaser to redeem does not appear to have been urged by them. Hence the observation that the puisne mortgagee can ignore the decree obtained by the prior mortgagee without impleading the puissance mortgagee must be considered to be obiter dictum.

18. In Nagu Tukaram Ghatule Vs. Gopal Ganesh Gadgil, the mortgagors executed a simple mortgage in favour of defendant No. 1 and thereafter executed a mortgage of the same property in favour of V.V brought a suit without

impleading defendant No. 1 and in execution of the decree obtained in 1927 purchased the property at the Court sale in 1931. In the meantime, defendant No. I sued on his mortgage in 1929 without impleading V and in execution of his decree purchased the property at the Court sale in 1934. Defendant No. I sold the Property to defendant No. 2 in 1940. The plaintiff purchased the Property from V in 1947 and sued for redemption of the first mortgage. The rights of the rival purchasers were considered and it was observed as follows:-

"If the respective rights and liabilities of the parties such as the mortgagor, the first mortgagee and the second mortgagee are analysed, the question which falls to be considered in a contest between rival claims made by the two sets of mortgagees would not really Present great difficulty. If the puisne mortgagee obtains a decree against his mortgagor in enforcement of the mortgage without impleading the prior mortgagee, the decree and the sale which may follow it are all subject to the rights of the prior mortgagee. Similarly, if a prior mortgagee obtains a decree and executes it by putting the mortgaged Property to auction sale, that does not affect the puisne mortgagee''s rights at all so long as the puisne mortgagee''9 rights are enforceable under the law. It is possible that at the time when the prior mortgagee brings his suit the equity may vest both in the mortgagor and the puisne mortgagee; or, it may be that the equity may vest only in the puisne mortgagee when he has obtained a decree against his mortgagor and the equity vesting in the mortgagor has been purchased by him at Court sale. It is also possible that the equity may vest solely in the mortgagor and such a case would arise where the puisne mortgagee''s right to enforce his mortgage is extinguished. In the present case the equity had vested in the mortgagor and the puisne mortgagee when the suit was brought and it had vested only in the puisne mortgagee at the time when the auction sale took place at the instance of the prior mortgagee. In such a case, it seems to us difficult to hold that the auction sale made defendant No. 1 the owner of the property. If the rights of the puisne mortgagee cannot be affected at all by whatever may have happened between the prior mortgagee and the mortgagor, since he had not been impleaded to the proceedings between them, it must be held the prior mortgagee continues to be a mortgagee qua the puisne mortgagee. In other words, the supine mortgagee''s right to redeem the prior mortgagee will subsist in spite of the said auction sale. If the puisne mortgagee''s right to enforce his rights is itself barred by limitation, the position may be different. In the present case not only had the puisne mortegagee''s rights not been barred, but they had been effectively exercised, and, in fact, as I have just mentioned, at the material time of the auction sale in favour of the prior mortgagee, he was the 5ale owner of the equity of redemption".

19. It is clear, therefore, that the puisne mortgagee V was held to be the sole owner of the equity of redemption at the time of the auction sale subsequently in favour of defendant No. 1. It is because of this that the purchaser from V was held entitled to redeem defendant No. 1. It is therefore clear that the representative of the puisne mortgagee was held entitled to priority not because

he represented the purchaser in the puisne mortgagee''s suit but because the sale in consequence of the puisne mortgagee''s suit was earlier in point of time and by the time the sale was held in the suit filed by the prior mortgagee the equity of redemption had already vested in the purchaser at the sale held in the puisne mortgagee''s suit. Hence, this decision does not support the case of the respondents. On the other hand, it supports the case of the appellants.

20. In Shanmugha Nadar Vs. Sivan Pillai and Others, in the suit filed by the Prior mortgagee the puisne mortgagee was not impleaded. In the puisne mortgagee''s suit the prior mortgagee was not impleaded. The sale in execution of the decree obtained by the prior mortgagee was earlier. It was held that though in law the purchaser in the prior mortgagee''s sale as an assignee of the mortgagor is, entitled to redeem, his right of redemption in law or in equity cannot prevail over the puisne mortgagee''s right to redeem. Me reasoning adopted appears to be that if the puisne mortgagee had been made a party in the prior mortgagee''s suit he would have had the option of redeeming the prior mortgage and that such a right cannot be taken away nor can the rights of the purchaser without notice to the puisne mortgagee be enhanced; that the right of a prior simple mortgagee cannot be enlarged by his omission to implead a puisne mortgagee in his suit and that he cannot take advantage of his own omission. The fact that the auction purchaser in the prior mortgagee''s suit became an assignee of the rights of the mortgagor was noticed, but the legal consequence of that circumstance, namely, that in his capacity as such assignee he could exercise his right of redemption against the puisne mortgagee has not been noticed in that decision by the learned single Judge.

21. Mr. Varadaraja Iyengar urged that though the purchaser in the prior mortgagee''s suit might have acquired a preferential right to redeem tie lost the same by his conduct. In 0. S. No. 716 of 195-6 the suit brought by the puisne mortgagee, C. K. Ramachandra Rao, was impleaded as 5th defendant. He disputed the execution and the passing of consideration under the-mortgage deeds in favour of Datturao and Raghunath Rao. He also alleged that the mortgagee''s right vested in himself in so far as the plaintiff in that suit and the 4th mortgagee are concerned were intact and that his right cannot be questioned. He further stated that the plaintiff and the fourth mortgagee may realise their amount out of the amount in deposit in the suit brought by the prior mortgagee as part of the sale price of the mortgaged property, On 21-10-1957 the plaintiffs submitted to the Court that the 5th defendant was given up without prejudice to any suit for redemption which may be filed against him. On the same day a preliminary decree was drawn up on the consent of the other defendants.

It is urged by Mr. Varadaraja Iyengar that in that suit C. K. Ramachandra Rao did not put forward his claim to redeem the puisne mortgagees. It is also urged by him that even the present suit, 0. S. No. 563 of 1964, is not a suit for redemption and that the conduct of C. K. Ramachandra Rao as stated above amounts to waiver. it is difficult to understand how the fact that the plaintiff in 0. S. No. 716 of 1956 chose to Rive up the 5th defendant or, in other words, not to press his suit against C. K. Ramachandra Rao would adversely affect the rights of C. K. Ramachandra Rao. The fact that the present suit, 0. S. No. 563 of 1964, is not one for redemption is not sufficient to come to the conclusion that there is a waiver on the part of C. K. Ramachandra Rao of his right to redeem. In fact the preferential right to redeem has been set up in 0, S. No. 899 of 1962. Hence this contention has to be rejected.

22. In the present case the suit brought by C. K. Srinivasa Murthy is not one for redemption, But in 0. S. No. 889 of 1962, the suit brought by C. V. Raghavachar, the legal representatives of C, K. Srinivasa Murthy have urged their preferential right to redeem the plaintiffs in that suit in the alternative. Hence, in the Present case also it is not desirable to drive the parties to another suit and it is desirable to determine the Priority as between the rights of redemption claimed by the rival purchasers. Since the prior mortgagee had become the owner of the equity of redemption of the mortgagor even before the suit was brought by the puisne mortgagee, Dattu Rao, the purchaser in the puisne mortgagee''s suit cannot resist the right of redemption sought to be exercised by the Purchaser in the prior mortgagee''s suit and his representative in interest viz., C. K. Srinivasa Murthy. Hence, the appeal R. S. A. No. 40 of 1971 will have to be allowed and there will be a preliminary decree for redemption in favour of the L. Rs. of C. K. Srinivasa Murthy, in 0. S. No. 889 of 1962.

23. Since the equity of redemption of the mortgagor vested in the purchaser at the earlier sale in the prior mortgagee''s suit and since all the mortgagee are simple mortgages the habit to possession also got transferred to the purchaser in the prior mortgagee''s suit. Hence, C. K. Srinivasa Murthy became entitled to possession of the mortgaged property. It is admitted that C. V. Raghavachar took possession of the mortgaged property on 17-10-1956. Hence the possession of C. V. Raghavachar from 17-101958 will be unlawful Possession. R. S. A. 41 of 1971 will have to be allowed and the suit 0. S. No. 563 of 1964 will have to be decreed.

24.The principal amount due under the second, third and fourth mortgages is Rs. 2,750/- after deduction Rs. 750/- which had been already received by Datturao, as is evident from the plaint in 0. S. No. 716 of 1956. The maximum amount of interest which can be claimed under these mortgages by the mortgagees is, therefore, Rs. 2,750/-. The rule of Damdupat applies. Moreover, u/s 26 of the Karnataka Money Lenders Act the maximum interest payable would be equal to the principal. Since appellants are willing to pay the above said maximum amount of interest viz., Rupees 2,750/- there is no necessity to direct further inquiry as to the amount of mortgage money which has to be paid by the appellants before they can seek redemption.

25. In 0. S. No. 563 of 1964 an amount of Rs. 980/- has been claimed as arrears of mesne profits for three years from 1-10-1961 to 28-2-1964 at Rs. 35/per

month. This claim has not been considered by the lower Courts. But the appellants are entitled to mesne profits for that period.

26. Mr. Varadaraja Iyengar, learned counsel appearing for the respondents, urged that the plaintiffs in 0. S. No. 889/62 are entitled to the costs incurred by Datturao, in 0. S. No. 716 of 1956. He has relied on a decision in Nadershaw Sheriarji v. Shirinbai Bapuji (AIR 1974 Bom 264). That was a case in which a third -party had filed a suit impleading the mortgagee. That suit was dismissed and the mortgagee was awarded costs of that suit but he could not recover the same since the plaintiff in that suit was adjudged insolvent. Since the Court was of the opinion that it was necessarily for the mortgagee to defend the suit the costs of that suit were awarded to the mortgagee as payable by the mortgagor at the time of redemption. But in the present case, the puisne mortgagee impleaded the purchaser C. K. Ramachandra Rao in the prior mortgagee''s suit but, deliberately withdrew the suit against him. Hence. it cannot be said that he is entitled to the costs of that suit to be paid by the present appellants as condition precedent to redemption.

27. Hence, both the appeals are allowed and there will be a preliminary decree for redemption in favour of appellants. In R. S. A. 40 of 1971 they shall deposit Rs. 5,500/- in the trial Court within three months from this date for being paid to plaintiff-1 in 0. S. No. 889 of 1962. Plaintiffs are entitled to their costs in 0. S, No. 889 of 1962 of the trial Court from the appellants in R. S. A. No. 40 of 1971 viz the legal representatives of C. K. Sreenivasa Murthy. The decree shall be drawn up after the appellants pay the requisite court-fee on the claim for redemption set up in their written statement in 0. S. 889 of 1962.

28. R. S. A. No. 41 of 1971 is allowed. 0. S. No. 563 of 1964 is decreed with costs throughout. There shall be an enquiry into past mesne profits for the Period stated above as well as future mesne profits under Order 20, Rule 12 of the Code of the Civil Procedure.

29. The parties shall bear their n this Court in R. S. A. No. 40 of 1971.

30. Appeals allowed.

