(1952) 07 KL CK 0013

In the High Court Of Kerala

Case No : Second Appeal No. 120 of 1124 (C)

Mangu Thampi Kavunni Karthava and Another — APPELLANT

Vs

Narayanan Nair and Others — RESPONDENT

Date of Decision : 08-07-1952

Acts Referred:
Cochin Namboodiri Act, 1114 — Section 9

Citation : AIR 1952 Ker 269

Hon'ble Judges : K. Sankaran, J

Bench : Single Bench

Advocate : M. Narayana Menon, for the Appellant; T.S. Venkiteswara Iyer, for the Respondent

Judgement

Sankaran, J.—This Second Appeal arises out of a suit for redemption. The plaint property belonging to the Maruthompilli Mana was usufructuarily mortgaged in favour of Defendant 1 for a consideration of Rs. 650/-, under the document Ex. II dated 3-8-1106 executed by the then karnavan of the Illom. Subsequently the Melpanayam deed Ex. B dated 5-3-1119 was executed by Parameswaran Nambuthiri, who had by that time become the karnavan of the Marutompilli Mana, in favour of the Plaintiffs, authorising them to redeem Ex. II and recover possession of the property from Defendant 1. The suit for redemption was resisted by Defendant 1 on several grounds; the most important of them being that Ex. B is an invalid document lacking consideration and good faith, that Ex. II in favour of Defendant 1 has created an irredeemable tenure and that in any case Defendant 1 has become entitled to retain possession of the property for a period of 12 years from the elate of the receipt Ex. III dated 3-8-1118 executed by Parameswaran Nambuthiri on receipt of a sum of Rs. 127-8-0 towards the fee for renewal of the demise under Ex. II. Defendant 1 also contended that before redemption, in addition to the mortgage amount he should be paid the value of the different items of improvements effected upon the property. Excepting the claim for value of improvements, all the other contentions of Defendant 1 were negatived by the trial Court which gave the Plaintiffs a decree for recovery of possession of thief; property with mesne profits on payment of mortgage amount as well as the value of improvements found due to Defendant. 1. On appeal by Defendant 1 the lower appellate Court held that the receipt Ex. III was valid and binding on the jenmi of the property and that the payment of the renewal fee as mentioned in Ex. III is sufficient to entitle Defendant 1 to retain possession of the property for a further period of 12 years, and on the strength of such a finding reversed the trial Court''s decree and dismissed the suit. The Plaintiffs have, therefore, come up in second appeal.

2. As already stated, the Plaintiffs suit for redemption is based on the right conferred on them by the Melpanayam deed Ex. B dated 5-3-1119. The validity of this document is questioned by Defendant 1 on the ground that it is a document which has offended the provision contained in Section 9, Cochin Nambuthiri Act. That section lays down that except with the written consent of the majority of the major members of the Illom, no karnavan can sell, mortgage or pledge property, movable or immovable, or lease it for a period of over 6 years, or grant renewals of the same for mora than 12 years or give discharge of the mortgages or pledges. It is obvious that this section has been enacted for the benefit of the Illom and for safeguarding its interests. The section confers a right on the junior members of the Illom to avoid documents brought into existence by the karnavan in contravention of the restrictions imposed on his powers of alienation by the section. In construing the section it was ruled in - ''Pareeth v. Alavi'' 37 CLR 96 (A) that the only consequence flowing from the section is to render a document executed by the karnavan of the Illorn in contravention of the direction contained in the section not binding on the Illom and not to make it void as against the whole world and that strangers have no right to take advantage of any such defect in the document and to resist the rights arising from the document. In this view of the matter it is clear that Defendant 1 who is a stranger to the illom of the executant of Ex. B, is not entitled to impeach the validity of the document.

Apart from this aspect there is evidence in this case to show that Ex. B was executed in strict compliance with Section 9, Cochin Nambuthiri Act. Exhibit A dated 10-2-1119 is a document executed by the adult members of the illom authorising the karnavan Parameswaran Nambuthiri to execute a Melpanayam like Ex. B in favour of the Plaintiffs. Parameswaran Nambuthiri is also a party to Ex. A. It refers to an oiler made by the Plaintiffs to accept a mortgage of, the plaint property on terms better than those contained in Ex. II and states that the acceptance of such an offer is advantageous to the illom. It is also stated that in view of the difficulty of getting together all the adult members of the illom, who are residing in different localities,'' they have decided to authorise the Karnavan to act on behalf of the illom! and to accept the offer made by the Plaintiffs and to execute a melpanayam deed in their favour. The karnavan who has been examined as D.W. 3 has proved Ex. A and has admitted that he is a party to it. P.Ws. 1, 5 and 7 are three of the ether members of the illom and they too have sworn to the execution of Ex. A. In the light of such an admission made by the

Karnavan and other members of the Illom, there is no reason to doubt the genuineness of Ex. A. This document has to be accepted as genuine and as recording the consent of all the adult members of the Illom in the matter of the execution of Ex. B Melapanayam deed by the karnavan of the illom. It follows, therefore, that there is no force or substance in Defendant 1''s contention that Ex. B is an invalid document and that the Plaintiffs are not entitled to maintain the present suit on the strength of Ex. B.

3. The plea of Defendant 1 that an irredeemable tenure akin to a kanam was created under Ex. II is also seen to be equally unsustainable. Even though the nomenclature of the document is no decisive test, the fact is there that Ex. II is syled as Kozhuvirkka Panayam indicating that the transaction is a usufructuary mortgage. Coming to the stipulations as contained in the document it is unmistakably clear that the parties never intended to create a permanent tenure. Far from fixing any term there is an express provision in the document that the transaction could be brought to an end at any time at the option of either party by claiming redemption or making a demand for the mortgage money. In the face of such an stipulation, it is idle to contend that a permanent tenure akin to a kanam was intended to be created under Ex. II.

4. Then there is the contention based on Ex. III receipt purporting to be a receipt for payment of the renewal fees due under Ex. II. As already stated, there is no term fixed in Ex. II and it did not contemplate any renewal. Such being the nature of Ex. II the question of its renewal could not arise at all. All the same Ex. III receipt says that a fee of Rs. 127-8-0 has been received under it towards renewal of the demise under Ex. II for a further period of 12 years. The term thus fixed is in direct conflict with the stipulation for surrender demand as contained in Ex. II. Hence Ex. III can, if at all, be taken only as evidencing the creation of an entirely new transaction. Apart from the question of the truth or otherwise of any such consent having been given by Parameswaran Nambuthiri, the karnavan of the Maruthompilli Mana, it is clear that the creation of such a fresh mortgage by the karnavan alone is prohibited by Section 9 of the Nambuthiri Act, Defendant 1 has no case that any of the other adult members of the illom had given their consent to the creation of such a mortgage by the karnavan. The mortgage brought into existence without the written consent of the majority of the adult members of the illom could be avoided by the junior members of the illom. It has to be taken that they have exercised their option in that direction when they executed Ex. A on 10-2-1119 authorising Parameswaran Nambuthiri to execute Ex. B in favour of the Plaintiffs, directing them to redeem. Ex. II. Since the new mortgage. purporting to have been created as per the agreement embodied in Ex. III receipt has thus been effectively avoided by the junior members of the illom who have an undoubted right to do so, Defendant 1 is not entitled to take his stand on Ex. III and to claim to retain possession of the property for 12 years more from the date of Ex. III.

5. Coming to the agreement for renewal attempted to be proved by Ex. III, there

is the direct evidence of Parameswaran Nambuthiri himself who is the executant of the receipt that he never agreed to grant any renewal in favour of Defendant 1 and that no amount towards renewal fees was received by him. Regarding this matter the lower Courts have come to divergent conclusions. The direct evidence relating to the execution of Ex. III has to be examined and appreciated in the light of certain outstanding circumstances. (After discussion of evidence his Lordship proceeded:) On, a consideration of the evidence on record in the light of these circumstances and probabilities, I agree with the trial Court''s conclusion that the jenmi of the property had not agreed to give Defendant 1 mortgagee a period of 12 years as stated in Ex. III and that the amount of Rs. 127-8-0 as stated in the receipt was not paid or received towards any such renewal fees. It follows, therefore, that the present suit for redemption is sustainable and is not premature and that Defendant 1 is bound to surrender possession of the property on getting the full amount of the redemption price due to him.

6. Regarding the mortgage amount due under Ex. II there is no dispute between the parties. But they could not agree on the question of value of improvements. That question was, therefore, inquired into by the trial Court which ultimately found that Defendant 1 was entitled to get a sum of Rs. 319-2-4 as value of improvements. The lower appellate Court was also inclined to accept this value as correct. The deposit made by the Plaintiffs towards the redemption price fell short of this amount so far as the time of value of improvements is concerned. Only from the date of the deposit of the full amount due to the mortgage the Plaintiffs would become entitled to get mesne profits decreed by the lower Court, To this extent the trial Court''s decree requires modification. In the nature of the contentions put forward by Defendant 1 mortgagee, it is clear that he has been guilty of the gross misconduct in respect of this litigation and as such the direction regarding costs in the trial Court''s decree does not call for any interference.

7. In the result this appeal is allowed with costs and in reversal of the decree of the lower appellate Court the decree of the trial Court is restored subject to the modification that the: Plaintiffs will be entitled to get mesne profits only from the date of deposit with notice to Defendant 1, of the full amount of the redemption price inclusive of the value of improvements found to be due to the Defendants.

