

(1945) 01 MAD CK 0007
In the Madras High Court

Mattapalli Raju and Others

APPELLANT

Vs

Challa Venkata Raghavayya and Others

RESPONDENT

Date of Decision : 09-01-1945

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1
Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1945 Mad 225 : (1945) ILR (Mad) 803 : (1945) 58 LW 126 :
(1945) 1 MLJ 212

Hon'ble Judges : Patanjali Sastri, J

Bench : Division Bench

Judgement

Patanjali Sastri, J.—These appeals have been brought from decrees passed by the Court of the Subordinate Judge of Cocanada in two suits,

one for redemption and the other for ejectment. The suits were tried and decided separately but the appeals have been heard together as they arise

out of the same mortgages and lease. As the parties are differently arrayed in the suits, it will be convenient to refer to them as the mortgagor, the

mortgagees and the lessees.

2. On the 2nd January, 1914, the mortgagor acting for himself and as the guardian of his undivided minor son granted a mortgage of 51 20 acres of

inam lands in Veera varamj East Godavari District (hereinafter called the suit lands) along with certain other lands to secure a sum of Rs. 30,000 lent

by the mortgagees. The mortgage was non-possessory in respect of the suit lands and possessory in respect of the other lands to which no further

reference need be made as they were sold with the consent of the mortgagees to satisfy the debt in part. On the 27th November, 1915, he

executed another mortgage with possession of the suit lands for Rs. 4,000, but

as the lands were in the occupation of the lessees under a lease for 15 years from Fasli 1320 to Fasli 1334 (1910-11 to 1924-25) at an annual rent of Rs. 1,000 the mortgagees were to receive the rents from the lessees and to take possession of the lands on the expiry of the lease. There was a further mortgage on the 31st July, 191(1, of the suit lands with two additional properties one of which called the Chattram Peradu land with a house thereon was also placed in the possession of the mortgagees. This bond which was also for Rs. 4,000 provided inter alia that on the expiry of the lease at the end of Fasli 1334 30th June, 1925.) the mortgagees should take the suit lands on cowle for an annual rent of Rs. 4,000 which, after the payment of revenue and taxes payable in respect of the lands, should be applied first in reduction of the balance due under the mortgage of 1915, next in discharge of the principal and interest of this bond and thereafter towards the interest due under the first mortgage of 1914. The mortgagees were, however, to relinquish the lands irrespective of the terms of the cowle, whenever the mortgagor paid the amounts due under all the mortgages.

3. As provided in the bond of 1915, the lessees paid the rents to the mortgagees till 1922 when the mortgagor issued a notice to them "the lessees) alleging that all the mortgages aforesaid had been disc barged and demanding that the rent falling due thereafter should be paid to himself. Accordingly the lessees paid the rent for the subsequent period to the mortgagor till the expiry of the lease in June 1925, when it was renewed at first for one year and then for a further period often years under a registered cowle dated the 23rd December. 1925. In view of this repudiation of their rights, the mortgagees, after making ineffectual demands for the arrears of rent and surrender of possession, brought a suit against the lessees in 1926 to recover possession of the suit lands together with arrears of rent from 1922 till the expiry of the original lease in 1925, and mesne profits thereafter till delivery, claiming that the mortgages had not been fully discharged and that they were entitled to possession under the terms of the bonds of 1915 and 1916. The suit was dismissed on the preliminary ground that the mortgagees were not entitled to possession under the bonds, but, on appeal, this Court, by judgment dated 27th April, 1932, reversed the decision and remanded the suit for disposal after full trial. After a

regrettable delay of nearly ten years due for the most part to various interlocutory proceedings some of which were carried to this Court, a

preliminary decree for sale was passed on 31st October, 1942. From this decree the mortgagees have preferred the appeal A.S. No. 174 of

1943.

4. The subsequent events which have led up to the other appeal, A.S. No. 256 of 1942 may now be briefly stated. As a counter move to the

mortgagees' suit to eject the lessees the mortgagor sued in 1929 to redeem and recover possession of the mortgaged properties including the suit

lands after payment of any sums that might be found due to the mortgagees. The suit did not, however, proceed to trial, for, on the 7th November,

1932, there was a compromise between the mortgagor and the mortgagees evidenced by two documents whereby the mortgagor agreed to

convey the suit lands and the two additional items included in the mortgage of 1916 to the mortgagees in discharge of his liability under the

mortgages and for an additional sum of Rs. 100 to be paid by the latter at the time of the registration of the sale deed which was to be executed

within three months, and the mortgagees for their part undertook, on the execution of such deed, to convey to the mortgagor's wife

Mahalakshamma the two additional items mortgaged in 1916 for her maintenance and residence. In pursuance of this compromise the suit was

allowed to be dismissed with costs on the 9th November, 1932, and, it is not now disputed, the Chetram Peradu land in the possession of the

mortgagees (one of the items which they had agreed to convey to the mortgagor's wife) was; delivered over to the mortgagor. No registered

deeds, however, were executed as provided in the compromise nor was the sum of Rs. 100 paid to the mortgagor. It is to be noted that nothing

was said in the compromise about the possession of the suit lands which continued as before in the occupation of the lessees who were not parties

to the settlement, though they had also been impleaded in the suit for redemption as defendants 7 and 8. Notwithstanding the compromise it would

appear that the mortgagor continued to receive from the lessees the rent reserved under the cowl for ten years granted to them on 23rd

December, 1925, and in 1934, he applied to be made a party defendant in the mortgagees' suit to evict the lessees, alleging that the mortgagees

were not fully supported by consideration and had been fully discharged by the payments made by him and by the income received by the mortgagees from the properties placed in their possession. This was obviously an attempt to resile from the compromise and to revive his claim to redeem which he abandoned in 1932 by withdrawing the suit O.S. No. 53 of 1929, taking advantage of his own default in not executing a sale deed as provided for in the compromise. Realising, apparently, that his claim to redeem the mortgages could not succeed if put forward merely as a defence to the mortgagees' suit to recover possession from the lessees, he did not press for the trial of the additional issues raised in consequence of his pleas regarding the mortgages, and by a consent order made by this Court in C.R.P. No. 1406 of 1935 on 6th November, 1936, the trial was confined to the issues originally framed on 11th November, 1926, i.e., before he was added as a party to that suit, with the result that he practically dropped out of those proceedings though his name was not struck off the record. He then instituted the suit O.S. No. 11 of 1938 making substantially the same allegations and claiming redemption and recovery of possession of the suit lands, and a decree for redemption on payment of Rs. 2,655-13-0 found due on the mortgages with interest and costs was passed by the Court below on the 2nd February, 1942. From this decree the mortgagees have preferred the appeal A.S. No. 256 of 1942.

5. It may be mentioned here that the Madras Agriculturists' Relief Act, 1938, having been passed during the pendency of the suit, the mortgagor, being an agriculturist within the meaning of that Act, claimed to have the mortgage debts scaled down in accordance with the provisions of that Act, and the sum found due as aforesaid was arrived at on that basis. This sum was also adopted for the purpose of the decree in the other suit, O.S. No. 54 of 1926, which was passed subsequently on 31st October, 1942.

6. It will be convenient to deal first with the suit for redemption as the determination of the issues arising therein will have a bearing on the question as to the proper decree to be made in the other suit. Two contentions have been raised on behalf of the mortgagees : first, that the suit is barred under Order 23, Rule 1 of the CPC by reason of the dismissal of the previous suit, O.S. No. 53 of 1939, brought for the same relief and secondly,

that the mortgagor having agreed to sell to the mortgagees the remaining mortgaged properties including the suit lands in discharge of the liability

under the mortgages and for an additional sum of Rs. 100 to be paid by them under the compromise of 1932 and the mortgagees, having delivered

back possession of the Chatram Peradu land to the mortgagor in furtherance of such agreement, the mortgagor is debarred u/s 53-A of the

Transfer of Property Act from claiming possession of the properties agreed to be sold, although no registered instrument of transfer has been

executed in accordance with the agreement.

7. On the first point, it has been stated already that in pursuance of the compromise entered into with the mortgagees the mortgagor abandoned his

claim to redeem and recover possession of the suit lands in the previous suit O.S. No. 53 of 1929 which was accordingly dismissed with costs

without trial. Now, Order 23, rule. J so far as it is material here reads thus:

(i) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in Sub-rule (2) he shall be liable for

such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

8. The subject-matter or the claim in the present suit is the same as in the previous suit, the mortgages sought to be redeemed as well as the

properties sought to be recovered (except the Chatram Peradu lands which the mortgagor had already got back in pursuance of the compromise)

being the same. Prima facie, therefore, the rule applies and bars the present suit.

9. It is, however, urged for the mortgagor that redemption actions stand on a special footing as mortgagors have a statutory right to redeem u/s 60

of the Transfer of Property Act at any time after the mortgage money has become due and they can be deprived of such right only in the manner

contemplated in that section, and that, therefore, Order 23, rule I cannot bar the exercise of such right until it is extinguished "" by act of the parties

or by a decree of a Court."" Reliance is placed in support of this argument on the decisions of the Judicial Committee in Raghunath Singh v. Hansraj

Kunwar (1896) 6 M.L.J.53 : L.R. 23 IndAp32 : ILR 19 Mad. 249 and Sri Raja Papamma Rao v. Sri Virapratapa H.V. Ramachandra Raju

(1896) 6 M.L.J.53 : L.R. 23 IndAp32 : ILR 19 Mad. 249 . It is true that Section 60 confers upon a mortgagor a right to redeem on certain

conditions, "" provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court."" But this

enactment cannot have the effect of overriding other statutory provisions which may limit or bar the exercise of such right in certain circumstances.

Order 23, Rule 1 contains no saving provision in favour of suits for redemption and there is nothing in Section 60 of the Transfer of Property Act

to qualify the operation of that rule in such suits.

10. The decisions relied on do not conflict with this view. In Raghunath Singh v. Hansraj Kunwar (1934) 67 M.L.J. 813 : L.R. 61 IndAp 362 :

ILR 56 All. 561 , a decree for redemption and possession was made on payment of a certain sum on or before a certain date, but providing that,

in case of default in such payment, the "" case will stand dismissed."" The mortgagor failed to pay and the mortgagee continued in possession of the

mortgaged property. A fresh suit for redemption, brought after the execution of the previous decree became barred by limitation, was held

maintainable. Their Lordships, while recognising that the previous decree would be res judicata if it involved a decision that the mortgagor's right to

redeem was extinguished, proceeded to examine the effect of that decree in the light of the relevant provisions of the Transfer of Property Act, and

came to the conclusion that, notwithstanding the direction that, in default of payment, the "" case will stand dismissed,"" the old decree did not

operate to extinguish the right to redeem as it was not made in conformity with the provisions of Sections 92 and 93 of the Act. Their Lordships

observed:

The right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in manner enacted for

that purpose, and strictly complied with. In the present case the only basis for the claim that the right to redeem has been extinguished is Section

60; but in their Lordships' view the old decree cannot properly be construed as doing that which it does not purport to do, viz., as extinguishing

the right to redeem.

11. This is no authority for the proposition that when once a suit to redeem a mortgage has been withdrawn or abandoned and consequently

dismissed, a fresh suit for redemption is maintainable notwithstanding the provisions of Order 23, Rule 1, Sub-rule (3); or in other words that

Section 60 of the Transfer of Property Act overrides the provisions of Order 23, rule I. Their Lordships did not have to consider the effect of a

withdrawal of a redemption action in view of Order 23, Rule 1, and their decision lends no support, in our opinion, to the view that suits for

redemption are not affected by the bar enacted in that provision. The learned Counsel for the mortgagor laid stress in particular on the observation:

It is impossible to say (as may be said under English law) that the dismissal of a resumption action operates as a foreclosure, unless the justification

of that statement is to be found in the language of the Act.

12. But the context makes it fairly clear that their Lordships were referring to dismissal for non-compliance with the directions in a decree which

declares and gives effect to the mortgagor's right to redeem, and not to dismissal on grounds such as limitation, withdrawal, etc. The other decision

relied on has still less bearing on the present case. In a suit to enforce a simple mortgage, the decree, instead of ordering a judicial sale in default of

payment as it should have done according to the provisions of the Transfer of Property Act, directed that the plaintiff shall be put in possession of

the mortgaged property "" as provided in the terms of the bond,"" and it was held that the decree did not preclude the mortgagors from maintaining a

suit for redemption as it did not purport to put an end to the relation of mortgagor and mortgagee altogether, but only made the mortgagee

thereafter a mortgagee in possession.

13. As we hold that the respondent's suit is barred under Order 23, Rule 1 of the Code of Civil Procedure, it is unnecessary to consider the

appellant's further contention based on Section 53-A of the Transfer of Property Act.

14. Turning now to the other suit, various questions were raised in defence by the lessees including alleged permanent rights of occupancy but they

have not been argued before us. As has been stated, the main issue in the case, viz., "" whether the plaintiffs are entitled to eject the defendants and

obtain possession "" (issue 2) was found in favour of the mortgagees by this Court by its judgment dated 27th April, 1932. The Court then

observed:

In their capacity as usufructuary mortgagees the plaintiffs would be entitled to recover not only the rents due on the suit lands (as per Ex. D) but

also to eject the defendants after the expiration of the term of their lease and get possession of the same for appropriating the profits thereof

towards the mortgage debt. Plaintiffs would, of course, not be entitled to eject the defendants unless the mortgagor has such a right.

15. This reservation about the mortgagor's right to eject the lessees can have reference only to their claim of permanent rights of occupancy; but

this claim has now been negatived, and though the learned Counsel for the lessees stated he was not abandoning the point, he did not press it

before us in view of the decision of this Court in Kuppu Reddi v. Bheemanna (1922) 45 M.L.J. 91. It would therefore seem to follow that the

mortgagees must have a decree for possession with arrears of rent from 1922 to 1925 and mesne profits thereafter on the footing of unlawful use

and occupation of the lands. But the learned Subordinate Judge, relying upon a decision of the Privy Council in Mohamed Sherkhan v. Raja Seth

Swami Dayal (1921) 42 M.L.J. 584 : L.R. 49 IndAp 60 : ILR 44 All. 185 , and in view of the decree for redemption passed in favour of the

mortgagor in the other suit, held that the defendants in this suit should be given a "" chance to redeem the mortgages,"" and accordingly passed a

decree for sale adopting the amount found due to the mortgagees in the other suit. The question is whether the decree can be supported in all the

circumstances of the case.

16. We are of opinion that the decision of the Privy Council in Mohamed Sherkhan v. Raja Seth Swami Dayal (1921) 42 M.L.J. 584 : L.R. 49

IndAp 60 : ILR 44 All. 185 has no application here. That was a case where the mortgagee claiming to be entitled to possession of the mortgaged

property in the events that had happened sued the mortgagor and obtained delivery of possession. The mortgagor then brought a suit for

redemption but the suit was dismissed by the Courts in India. The mortgagor then preferred appeals to His Majesty in Council from both decrees

and the appeals were consolidated and heard together. Their Lordships held that the mortgagor was entitled to redeem and passed one preliminary

decree for redemption in both suits observing:

As both suits are now before the Board there will be no difficulty in passing one

decree in both so framed as to give due effect to this right.

17. They also gave effect to the mortgagee's right to possession by directing that in taking accounts the period" during which the mortgagee may

have been in pos-session\nder the decree in his suit for possession should be excluded. The position here is essentially different as we have now

held that the mortgagor's suit for redemption must fail, and there is accordingly no question of so moulding the reliefs in both suits as to give effect

to the rights of the mortgagor and the mortgagees. The learned Subordinate Judge was largely influenced by the fact that the mortgagor had already

obtained a decree for redemption in the other suit, and if that decree were to stand there would be much to say in favour of the course adopted by

the learned Judge. But as that decree has to be set aside there seems to be no justification for refusing to the mortgagees the reliefs against the

lessees to which this Court has already held he is entitled.

18. Furthermore, it is to be remembered that under the consent order in C.R.P. No. 1406 of 1935, the issues raised by the mortgagor after he was

added as a party were withdrawn from the suit and the trial was directed to be "" confined to the issues framed on 11th November, 1926, before

remand by the High Court in A.S. No. 470 of 1930."" That is to say, the suit had to proceed as originally brought against the lessees alone. It is true

that the mortgagor was subsequently permitted by order of this Court dated 30th January, 1942, in C.R.P. No. 665 of 1940 to amend his written

statement by including a plea based on the Madras Agriculturists' Relief Act, 1938. Such permission however cannot have the effect of

superseding the consent order which was not apparently brought to the notice of the Court. It seems to us therefore that the suit must be dealt with

as one between the mortgagees and the lessees alone, the mortgagor having chosen to drop out of the proceeding and to seek his remedies by

suing for redemption. In this view the decision in Mohammad Sherkhan v. Raja Seth Swami Dayal (1921) 42 M.L.J. 584 : L.R. 49 IndAp 60 :

ILR 44 All. 185 will have still less application to the present case. On the other hand, it has been held by the Lahore High Court in Hariram Shah

v. Mahim Shah, AIR 1928 Lah. 668, that a mortgagor or persons claiming through him cannot claim to redeem in a suit by the mortgagee to

recover possession in accordance with the terms of mortgage. If so, the rule

must apply a fortiori to persons in the position of the lessees in this case.

19. The learned Subordinate Judge has however relied on the order of this Court dated 29th March, 1940, in C.R.P. No. 1581 of 1938 as a

conclusive determination of the lessee's right to redeem the mortgages in this suit. This is, in our opinion, a misapprehension of the import and

effect of the order; The lessees applied to the lower Court for leave to file an additional written statement raising the plea that the mortgages in

question were liable to be scaled down under the recently passed Madras Act IV of 1938, and that, if so scaled down, no debt would be left and

the suit should be dismissed. The application was rejected and they preferred the civil revision petition. It was contended that by virtue of the

cowle which they obtained from the mortgagor on 23rd December, 1925, they, as persons claiming under him, were entitled to redeem the

mortgages and therefore interested in the determination of the amount properly payable to the mortgagees. this Court accepted the contention and

granted leave to file the statement. How far such a defence to the suit framed as one in ejectment could be successfully maintained was a different

question which could be determined only in the suit. It could hardly have been intended on an interlocutory application of that kind to decide that

question finally. In any case, the order can have no more binding force than an interlocutory order which it really is, and the point is still open to the

mortgagees in this appeal from the decree in the suit (see Section 105 of the Code of Civil Procedure). In the result, both the appeals are allowed.

O.S. No. 11 of 1938 will be dismissed. The appellants will have their costs here and in the Courts below. In O.S. No. 54 of 1926 the appellants

will have a decree for possession and for arrears of rent and mesne profits. As the sums payable in respect of the such arrears and profits have not

been determined, an inquiry will be made by the lower Court and a decree will be passed in, Accordance: with the result of such inquiry 1 The

appellants" will have their costs in both Courts. The memorandum of objections is dismissed with costs.

(These appeals having been set down to be mentioned this day on the letter of the advocate praying for a direction to the lower Court to scale

down the respondent's liability from arrears of rent and mesne profits in

accordance with the provisions of Act IV of 1938, the Court made the following)

20. ORDER--We must decline to make any alteration in the judgment at this stage.