
(2005) 02 KL CK 0017
In the High Court Of Kerala
Case No : W.A. No. 2201 of 2004

Meenachil Co-op. Agri. and Rural Devt. Bank	APPELLANT
Vs	
K.S.F.E. Ltd. and Others	RESPONDENT

Date of Decision : 09-02-2005

Acts Referred:

Transfer of Property Act, 1882 — Section 12

Citation : AIR 2005 Ker 189 : (2006) 132 CompCas 358 : (2005) 1 KLJ 806 : (2005) 1 KLT 992

Hon'ble Judges : B. Subhashan Reddy, C.J.;Kurian Joseph, J

Bench : Division Bench

Advocate : Viju Abraham, Joy C. Paul and Benoy K. Kadavan, for the Appellant; Antony Dominic, C.K. Abdul Rahim (GP) and Georgekutty Mathew, for the Respondent

Final Decision : Dismissed

Judgement

Subhashan Reddy, C.J.—Two different financiers are fighting over their priorities in recovering the amounts from their respective debtors. The priority of the first respondent, who was the writ petitioner before the learned Single Judge, was upheld over the one claimed by the appellant herein. The appellant is a registered cooperative society doing banking business. It is governed by the Kerala Cooperative Societies Act. The First respondent is the Kerala State Financial Enterprises Limited running Chitties. Respondents 4 and 5 were the subscribers of two Kuries in Chitty No. 2/1994 having a sale of Rs. 5 lakhs each and were assigned Chittal Nos. 30 and 25 respectively. During 1994, the Kuries were prized and for the purpose of release of the prize money, an equitable mortgage was created on 4-7-1994 by depositing title deeds of an extent of Ac. 2.98 cents of land in Survey No. 328/3 of Thalappalam village of Meenachil Taluk of Kottayam District. The amounts so realised were received by respondents 4 and 6. They were obliged to pay the unpaid instalments. But, having paid some amounts towards some instalments, they had defaulted in paying the subsequent instalments. Hence, the money for the unpaid instalments remained due and

payable to the first respondent, and, in so far as the mortgage in favour of the first respondent and its validity thereof are concerned, there is absolutely no dispute. In the year 1995, the 4th respondent who is the husband of the 6th respondent, had transferred the land in the name of the latter, who had mortgaged the same with the appellant-Bank and raised loan. There was a default in payment of the same, and then the amount became due and payable to the appellant-Bank and the appellant-Bank also became entitled to realise its debt.

2. While the first respondent sought to realise its amount from the 4th respondent, who was the owner of the property when he mortgaged and still remained its debtor-mortgagor, the amount was sought to be realised by the initiation of proceedings under the Revenue Recovery Act. There is a power to invoke the above provisions, and, there is no dispute. But, the appellant-Bank also invoked its power under the provisions of the Co-operative Societies Act on the ground of priority over the debt of the first respondent and tried for recovery. The stand of the appellant-Bank was upheld by the Joint Registrar of Co-operative Societies, 3rd respondent herein, as an adjudicating authority, which prompted the first respondent to file the writ petition. After hearing both the parties through their counsel and after considering the matter very comprehensively, the learned Single Judge upheld the contention raised by the first respondent herein and allowed the writ petition. Hence, this writ appeal.

3. Mr. Viju Abraham, learned counsel appeared for the appellant. Mr. Antony Dominic appeared for the first respondent. Mr. C.K. Abdul Rahim, learned Government Pleader appeared for respondents 2 and 3 and Mr. Georgekutty Mathew appeared for respondents 4 and 6.

4. The learned counsel for the appellant strenuously contended that being a special statute, the provisions of the Kerala State Co-operative (Agricultural and Rural Development Banks) Act, 1984 prevail over the general law, i.e. the Transfer of Property Act and, more particularly, in view of the non-obstante clause contained in the above special statute. It is submitted that after the loan has been granted by the appellant-Bank, a declaration has been made u/s 12 of the above Special Act and, by operation of law by such mortgage created, the properties of the mortgager stands transferred to the appellant-Bank and that u/s 12 of the said Act, there is a preference for the realisation of the amount payable to the appellant-Bank. Section 12 reads thus:

12. Priority of Gehan, mortgage and hypothecation:-

(1) Any amount payable under a Gehan created or mortgage or hypothecation executed in favour of the Agricultural and Rural development or primary bank shall have priority over any claim of the Government arising from a loan under the Kerala Land Development Act, 1964 (17 of 1964) or the Kerala Agriculturist's Loans Act, 1961 (27 of 1961), granted after the creation of the Gehan or the execution of the mortgage or hypothecation.

(2) Notwithstanding anything contained in any law for the time being in force, a Gehan created or mortgage or hypothecation executed in favour of the Agricultural and Rural Development Bank or a primary bank shall take precedence over any attachment or equitable mortgage over the properties, where after publication of a notice in the prescribed form, the claim or interest under such attachment or equitable mortgage has not been notified to such bank within the time prescribed in the said notice.

The learned counsel for the first respondent counters the above argument on the ground that it is the first mortgage and there was no right for the 4th respondent to transfer the rights without the consent of the first respondent when the mortgage was validly subsisting, and, any declaration made by the appellant-Bank only binds its debtors and not the first respondent and that the debt has been granted by the appellant-Bank to the 6th respondent basing on the sale deed executed by the 4th respondent and that the said transfer was not valid and, in any event, was subject to the realization of the debt by the first respondent and, in that sense, neither the mortgage nor a Gehan which was declared by any notification and to which only the 6th respondent was a party on the premise that she was the owner, can take precedence and that the non-obstante clause cannot work against the first respondent and the preference which is claimed u/s 12 of the above Special Act cannot abrogate the rights of the first respondent under the validly created mortgage under the Transfer of Property Act. Under sub-section (1), the priority is over any claim of the government arising from a loan under the Kerala Land Development Act, 1964 or the Kerala Agriculturist's Loans Act, 1961 granted after creation of the Gehan or the execution of the mortgage or hypothecation in favour of the Agricultural and Rural Development Bank. The transaction in favour of the first respondent is not covered by that. The precedence is claimed by the appellant-Bank under sub-section (2) of Section 12, which contains a non-obstante clause to the effect that if any attachment or equitable mortgage over the properties is not notified after the publication of a notice in the prescribed form, any claim thereafter basing upon any such attachment or equitable mortgage cannot be enforced. It is needless to mention that if a mortgage or a Gehan or hypothecation is made in favour of the appellant-Bank after the same was effected in favour of the appellant-Bank, then appellant-Bank will have precedence as a matter of right under law. But, a legal friction of precedence on the ground of not making any claim or interest after publication of notice in the prescribed form cannot work against the first respondent for the reason that the first respondent is not a person claiming through or under the 6th respondent. The mortgage in favour of the first respondent was created by the 4th respondent as the owner thereof. The first respondent was the mortgagee and the 4th respondent was the mortgagor. But, while coming to the appellant, it was the mortgagee of which the 6th respondent was the mortgagor and the notification which has been made is inapplicable in so far as the 4th respondent is concerned, whose mortgage in favour of the first respondent was intact. In view of this, the non-obstante clause

of precedence of recovery of amount contained in sub-section (2) of Section 12 of Act 20 of 1984 cannot defeat the pre-existing rights of the first respondent and we accordingly uphold the order of the learned Single Judge. However, liberty is given to the appellant-Bank to clear off the debt of the 4th respondent under mortgage to the first respondent within a period of one month from today and, upon doing so, the mortgage in favour of the first respondent gets extinguished, thereby, entitling the appellant to enforce its rights for the recovery of the amounts against the 6th respondent.

The writ appeal is dismissed. No costs.