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(2004) 04 MAD CK 0165

In the Madras High Court

Case No : C.R.P. (NPD) No. 553 of 1997

Neelakanta Pillai, Muthukrishnan, Iyan Pillai, Kumaresan Pillai, Surendran and Kumarasami Pillai — APPELLANT

Vs

Chellappan Pillai — RESPONDENT

Date of Decision : 27-04-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 8(3), 151
Limitation Act, 1963 — Article 137, 61, 5
Transfer of Property Act, 1882 — Section 58

Citation : (2004) 04 MAD CK 0165

Hon'ble Judges : T.V. Masilamani, J

Bench : Single Bench

Advocate : K.N. Thambi, for the Appellant; K. Sreekumaran Nair, for the Respondent

Final Decision : Allowed

Judgement

T.V. Masilamani, J.—This revision petition is filed by the petitioners challenging the order of the II Additional District Munsif, Kuzhithurai In I.A.No.569 of 1996 in O.S.No.202 of 1980 dated 25.11.1996.

2. The revision petitioners are the representatives of the mortgagor, namely, Roopa Narayana Pillaiyar Devaswam. Udayamarthandam, Kuzhithurai. The petitioners filed the application u/s 5 of the Limitation Act and Section 151 of the CPC to excuse the delay in depositing the mortgage amount so as to redeem the same in pursuance of the preliminary decree granted by the Subordinate Judge, Kuzhithurai in A.S.No.22 of 1982 dated 25.10.1982 directing the mortgagor to pay a sum of Rs.2,000/- towards discharge of the suit mortgage deed dated 7.2.1955 on or before 25.1.1993.

3. It is alleged in the affidavit filed in support of the said application that on account of the Second Appeal preferred before this Court in S.A.No.720 of 1988, inasmuch as the same was dismissed on 24.6.1988 and thereafter on account of

the death of the Trustee of the Devaswam Trust, the result of the said Second Appeal was known only on 15.11.1995, copies were applied for on 16.11.1995 and immediately after receipt of the copies, the application was laid after depositing a sum of Rs.2,000/- into Court on 31.1.1996. Hence, they have prayed for the condonation of delay in depositing the said amount. After hearing both sides on the basis of the pleadings, the trial court dismissed the petition. Hence, the revision.

4. The trial Court, namely, the Additional District Munsif Court, Kuzhithurai passed a preliminary decree in O.S.No.202 of 1980 on 21.12.1981 against which the respondent/defendant preferred the appeal inA.S.No.22 of 1982 on the file of the Subordinate Judge, Kuzhithurai wherein the final decree was passed after allowing the appeal in part and the petitioners herein were directed to pay the amount towards discharge of the mortgage as referred to above.

5. The learned counsel for the petitioners has argued at the outset that since the suit was laid for redemption of the usufructuary mortgage, inasmuch as under Article 61(a) of the Limitation Act, the limitation for redemption of mortgage in respect of immovable property is 30 years from the date of right of redemption of possession accrues, the application filed u/s 5 of the Limitation Act by way of abundant caution should have been allowed by the Trial Court and that since the impugned order was passed without recourse being had to the said provision of law, the revision petition has to be ordered in favour of the petitioners.

6. On the contrary, the learned counsel for the respondent has put forth an argument on behalf of the respondent for the first time in the revision petition that the mortgage under question is not a usufructuary mortgage, but it is an anomalous mortgage so as to attract the provision under Article 137 of the Limitation Act whereunder it is provided that within a period of three years from the date of accrual of the right to enforce the same, the petition should have been filed and that therefore the orders passed by the trial Court are sustainable in law.

7. Though he has placed reliance on a Division Bench judgment in NADACHI AMMAL v. NARAYA NADAR AIR 1955 T.C. 207 in support of his contentions, it is stated categorically in para 7 of the counter affidavit filed by the respondent the impugned proceedings as follows:-

"The mortgage sought to be redeemed is dated 7.2.1955. So the 30 years period prescribed for redemption of the mortgage expired on 7.2.1985. But their deposit was if at all made is of the year 1996. ... ... This is long subsequent to the date fixed by the appellate court for deposit and the expiry of the period prescribed for the redemption of mortgage."

8. Hence the learned counsel for the petitioners has argued vehemently that the contention now put forth on the side of the respondent is not only an after thought, but would also run counter to his statement in the counter affidavit filed before the trial Court and therefore, he has urged that the principle enunciated in

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the decision referred to above cannot be made applicable to this case.

9. However, a reading of the said decision would indicate that if under customary law of Trivancore in relation to otti, personal liability is imposed upon the mortgagee, such a document is neither a simple mortgage nor a usufructuary mortgage as defined in the Transfer of Property Act. In this context, it is relevant to extract the definition of the ''usufructuary mortgage'' (vide) Section 58(d) of the Transfer of Property Act, 1982 and it reads as follows:-

"Usufructuary mortgage:-- Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee."

10. The learned counsel for the respondent has produced typed copy of the mortgage deed for the purpose of convenience and a cursory glance of the said document would indicate that the same is a usufructuary mortgage both in form and in substance. Though the learned counsel for the respondent would draw my attention to the last clause in the document with reference to the covenant in respect of any loss caused by the mortgagor in respect of otti amount or the enjoyment of the property, they were held personally liable to compensate the loss so as to fortify his argument that it is not a othi deed or in other words, a usufructuary mortgage.

11. As has been rightly argued by the learned counsel for the petitioners such covenant is part of the terms and conditions of the usufructuary mortgage and therefore the same cannot be equated to the customary of law of Travancore in that a person who borrowed the money on otti is personally liable for the amount as in the case of hypothecation bond. In view of such factual aspect of the matter, this Court is of the considered view that the transaction under question is usufructuary mortgage.

12. Regarding the next contention with reference to the period of limitation, the learned counsel for the petitioners has drawn the attention of this Court to the decision, K.PARAMESWARAN PILLAI v. K.SUMATHI in support of his contention that where preliminary decree for redemption was passed, no limitation began to run until deposit had been made by the mortgagor. The legal principle enunciated in the said decision in paragraphs 4 and 6 may be extracted hereunder:-

"At any time before passing the final decree or confirmation of the sale held in pursuance of the final decree the plaintiff, usufructuary mortgagor has been given right to make payment of the redemption money due under preliminary decree and the subsequent liability incurred thereon. The outer limit for making

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such payment is passing of the final decree or confirmation of the sale made in furtherance thereof. The final decree for foreclosure or sale or redemption in relation to other mortgages, the right to payment has been hedged with the duty to deposit the money declared or quantified in the preliminary decree within the time specified under the preliminary decree or extended period from time to time till final decree debarring the plaintiff from reduction etc. is passed. The outer limit for an usufructuary mortgagor for making payment of the amount due under the preliminary decree, thereby, is passing of the final decree or the date of confirmation of the sale."

13. In paragraph 6, it was held as follows:-

"But in the case of preliminary decree for redemption of usufructuary mortgage no limitation begins to run until deposit is made though there is a conditional preliminary decree and default was committed by the mortgagor for compliance thereof."

14. Hence, the Honourable Supreme Court held that till the date of passing the final decree or till the date of confirmation of sale, the Court has jurisdiction to entertain the application to pass the final decree. Therefore, it goes without saying that in this case also, since there was no final decree passed till the petitioners have filed the application u/s 5 of the Limitation Act before the trial Court, it cannot be said that the limitation as per Article 137 of the said Act began to run from the date of the preliminary decree passed by the first appellate Court.

15. The learned counsel for the petitioners has also relied on the decision, Selvaraj alias Raju Vs. Govindarajulu Padayachi and Another, in support of his contention that as per Rule 8(3) of Order 34 of the Civil Procedure Code, the outer limit for payment of the mortgage money is the date of passing of the final decree or the confirmation of sale debarring the plaintiff from all rights to redeem the mortgaged property. In these circumstances, this Court is of the considered view that the learned District Munsif without applying the mind both on the factual issue and the question of law passed the impuged orders and therefore the same are liable to be set aside.

16. In view of such statement of law enunciated in the decisions referred supra, this Court is of the considered view that the contentions put forth on behalf of the respondent are rejected as untenable.

17. Thus, the Civil Revision Petition is allowed setting aside the impugned orders. The trial Court is directed to entertain the final decree application filed by the revision petitioners, accept the amount deposited into the Court and then to dispose of the final decree application in accordance with law within three months from the date of furnishing copy of this order. No costs.

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