

(1963) 05 KL CK 0003

In the High Court Of Kerala

Case No : Second Appeal No. 801 of 1959

Padmanabhan Kochu Kurumpa and Others

APPELLANT

Vs

Sankara Pillai Narayanan Pillai

RESPONDENT

Date of Decision : 28-05-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 1

Citation : AIR 1965 Ker 104

Hon'ble Judges : S. Velu Pillai, J

Bench : Single Bench

Advocate : P. Subramonian and S.A. Nagendral, for the Appellant; S. Narayanan Potti, P. Karunakaran Nair and N.K. Varkey, for the Respondent

Final Decision : Dismissed

Judgement

S. Velu Pillai, J.—In this second appeal, plaintiffs 1 to 7 challenge the correctness of the direction in the judgment of the IN Subordinate Judge on appeal, that they could retain possession of the suit property only on redrawing the respondent--1st defendant. The plaintiffs have come into possession of the property, in pursuance of the sale in execution of the decree in O. S. 396 of 1099, obtained on the strength of two hypothecation bonds, Ext. B of the year 1090 and Ext. C of the year 1094. There was an intermediate bond, Ext. M of the year 1093, the hypothecatee under which was not impleaded. Ext. M also was put in suit in O. S. 1244 of 1106, without impleading the plaintiffs' predecessor in interest, who at the time represented the equity of redemption pursuant to the court sale in O. S. 398 of 1099 and to subsequent assignments. Defendants 1 to 8 claim under the execution sale in O. S. 1244 of 1106. When they attempted to take delivery of possession, plaintiffs 1 and 2 and others put up objections which were disallowed. This led to the institution of the suit which has given rise to this second appeal.

After disposing of other contentions between the parties, the Subordinate Judge has held that while the defendants have a right to redeem the plaintiffs as

claiming under Ext. B, the prior hypothecation, the latter, by virtue of the purchase of the equity of redemption in O. S. 396 of 1099 have the option to redeem the former and retain possession, and has accordingly given the direction now impugned. I am satisfied that the direction is in accordance with law and cannot be disturbed.

2. It is well settled, that in suits by two mortgagees in each of which the other mortgagee is not impleaded, the earlier purchaser has the right to be in possession. The sale in execution of the decree in O. S. 396 of 1099 being earlier, the plaintiffs as owners of the equity of redemption, are entitled to be in possession. But viewing that decree as one based on Ext. B, the prior hypothecation, the rights of the defendants as subsequent hypothecates, notwithstanding the court sales in these decrees, are not affected; this right is to redeem the plaintiffs. This they can do, notwithstanding, that the plaintiffs have come by the equity of redemption. Once the defendants exercise their right of redemption, the sale and execution proceedings in O. S. 396 of 1099 would fall and the right of the original hypothecates would stand revived. *Giriyamman Narasimhan v. Ramachandran Venkitarayan* 1954 Ker LT 131 : (AIR 1954 Trav-Co. 384).

3. The rights inter se of rival purchasers in sales in execution of decrees on mortgages, have been the subject of consideration in several decided cases. The result of these has been summarised as follows in A.I.R.1957 3 CCPC 3791

"C executes simple mortgages first in favour of A and then in favour of B. A obtains a decree upon his mortgage without impleading B and in execution thereof purchases the property himself and obtains possession. B thereafter files a suit on his mortgage, purchases the same property in execution of his decree and then sues A for possession. Does the suit lie? No. The reason is that at the time of B's suit on the mortgage the right to redeem and the right to possession having both already vested in A, the latter cannot be affected by anything done in B's suit. B has, however, two remedies open to him, viz., (a) to redeem A and (b) to sue A for: sale on the subsequent mortgage subject to the prior mortgage. If B adopts the former remedy and redeems A, the latter, in his turn, as owner of the equity of redemption, can redeem B. Both these rights can, however, be adjusted on equitable grounds in the same suit. If B adopts the latter remedy, A can, in equity, claim that B should redeem the prior mortgage rights vested in him before disturbing his possession. In other words, A can set up his prior mortgage as a shield against the claim of B. This right of A is a weapon of defence and not of attack and can be set up notwithstanding the fact that the claim on the mortgage itself is barred by limitation."

It was ruled in *Ulahannan Chacko v. Raman Pillai*, 1953 Ker LT 695 : (AIR 1953 Trav-Co. 554), that the option was with the earlier purchaser, who was the prior mortgagee, to elect whether he should redeem the puisne mortgagee or get redeemed by the latter. This is not affected by the fact, that in the suit by one of them the other is not impleaded. A separate suit for enforcement of the right of

redemption is not necessary, when the two mortgagees are brought face to face with each other in the same suit. Lakshmi Amma Vs. Rama Iyer, .

4. In the above view, the plaintiffs have the option to redeem the defendants or to submit to redemption, by the latter. It may be taken, as stated by learned counsel for the first defendant, that O. S. 396 of 1099 was instituted on both Exts. B and C. Though Ext, C is subsequent to Ext M, the decree in O. S. 396 and 1099 is indivisible. Therefore the considerations adverted to above apply.

5. The judgment of the Subordinate Judge allowing the plaintiffs to retain possession only on payment of the proportionate amount of the decree in O. S. 1244 of 1106 is right and is confirmed. This second appeal is without merit and is dismissed with costs.