(1964) 08 MAD CK 0038

In the Madras High Court

Case No : Second Appeal No. 1733 of 1961

Palanithurai Mudikondar APPELLANT

Vs

Veerappa Thevar and Others RESPONDENT

Date of Decision : 19-08-1964

Acts Referred:

Limitation Act, 1908 — Article 134, 148
Transfer of Property Act, 1882 — Section 83

Citation : AIR 1966 Mad 64 : (1965) ILR (Mad) 427

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Judgement

(1) One Rangavellala Thevar, the plaintiff''s grandfather''s brother executed a mortgage in favour of one Sabhapathi Patharin 1882.The properties

survived to the undivided brother of Rangavellala Thevar, Vaithi.Vaithi''s son is Panchanatha Thevar.Panchanatha had two sons, one Marudiah and

the plaintiff. Marudiah died issueless, so that the plaintiff claimed that he is the sole surviving member of the family who is entitled to the equity of

redemption.

(2) Before his death, this Marudiah Thevar sold the property to the fifth defendant in 1920. The mortgage right changed hands in the mortgagee''s

family in the following manner.After the death of the original mortgagee Sabhapathi Pathar, his undivided brother Arunachala was in enjoyment of

the property.In a will executed by him, he is said to have admitted that the family owned only a mortgage right in the property.Defendants 1 to 3

became entitled under the will.That was in 1903.In 1922, defendants 1 to 3 executed a mortgage in favour of one Mangalambal. Mangalambal

assigned his mortgage in 1928 to the fourth defendant.Subsequently, defendants

1 and 2 executed a sale deed conveying their right to the 4th

defendant.The plaintiff claimed that he had been living in Singapore from the year 1922 onwards and that it was only on his return to India in 1958

that he became aware of these transactions.He issued notices to the defendants expressing his willingness to redeem the property.But the notices

sent to defendants 1 to 3 were undelivered and the fourth defendant did not render any reply to the notice.The plaintiff further alleged that the fifth

defendant, who had obtained a sale deed in 1920 from the plaintiff''s elder brother Marudiah, can claim to title under that document, as that sale is

a nominal one.It is in these circumstances that the plaintiff purported to be entitled to redeem the property and filed the suit.

(3) It was the contention of the fourth defendant that defendants 1 to 3 were in possession and enjoyment of the property as full owners and that

they purported to execute a mortgage over the property in exercise of such rights as full owners in favour of Mangalambal, from which person the

4th defendant derived title.As stated already, defendants 1 and 2 had also conveyed there right in the properties by a sale deed to the 4th

defendant.It was alleged therefore that from 1928 onwards the 4th defendant had been in continuous possession openly as the owner of the lands.

The 5th defendant, who claims under the sale deed from the plaintiff''s brother, alleged that the plaintiff is not the heir of the original mortgagor.

According to him, Marudiah Thevar acting for himself and as guardian of his minor younger brother, the plaintiff, sold the property for valuable

consideration and directed the fifth defendant to discharge the said mortgage. It was claimed that the fifth defendant filed an application under S. 83

of the Transfer of Property Act in O. P. 18 of 1920, but as the mortgagee refused to receive the amount, the petition was dismissed. While alleging

that the plaintiff had no right of redemption, the 5th defendant claimed that he is the person entitled to redeem the mortgage.

(4) The learned Subordinate Judge found that while the plaintiff is no doubt the heir of the original mortgagor Rangavellala Thevar, the sale

executed by the plaintiff''s elder brother Marudiah was not shown to be a nominal transaction, as alleged by the plaintiff. He held that the 5th

defendant was not able to establish the family necessity and that the sale would be binding on the plaintiff''s half share in the suit property. He, however found upon the evidence that in so far as the fifth defendant was concerned, he was aware of the sale in favour of the 4th defendant in the

year 1932, and that, whatever right the might have got under the sale deed from Marudiah he lost that right, as he allowed the 4th defendant to be

in adverse possession for 12 years from 1932.That disposed of the claim of the 5th defendant that he was the only person entitled to redeem. In

disposing of the plaintiff''s claim, the learned Subordinate Judge held that since the sale in favour of the 5th defendant by Marudiah was valid till set

aside, the lack of possession on the part of the 5th defendant would equally affect the plaintiff. That being so, the possession by the 4th defendant

was as much adverse to the plaintiff as to the 5th defendant.

(5) With that decision, the plaintiff dropped out of the suit. But an appeal was filed by the 5th defendant in the court of the District Judge, West

Tanjore, and he contended that his right to redeem did not stand barred under Art. 134 of the Limitation Act.The learned District Judge examined

the evidence in this regard and found it fully established that notwithstanding the sale in his favour, the 5th defendant, knowingly allowed the 4th

defendant to be in possession of the properties on foot of a hostile title.That being so, the conclusion reached by the trial court was confirmed.

(6) Mr. K. S. Naidu, learned counsel for the fifth defendant-appellant, concedes that the finding of the question that the 5th defendant had

knowledge of the claims of the 4th defendant is a finding of fact and does not challenge it.He argues, however, that Art. 134 of the Limitation Act

would apply only when the transferee had no notice of the limited nature of the vendor''s right.According to him, when Arunachala Pathar, the

brother of the original mortgagee, had admitted in a will executed by him that his right in the suit items was only that of a mortgagee and when

defendants 1 to 3 became entitled to this right under the will, there had been an acknowledgment of the fact that the right which the family had was

only that of a mortgagee.In 1950, when the fifth defendant issued a notice to the 4th defendant, a reply thereto was given by the 4th defendant.This

did not establish, according to the learned counsel, that any such absolute right as now set up was claimed therein.It is also contended by the

learned counsel that in the written statement of the 5th defendant, threes an assertion that the fifth defendant came to know of the sale in favour of the fourth defendant only after the filing of the suit.

The specific contention of the fourth defendant in her written statement was that defendants 1 to 3 were in open enjoyment of the land and had

effected a usufructuary mortage in favour of Mangalambal in 1922 and in this document there is an express recital that they were enjoying the

properties absolutely in their own rights.The subsequent transaction by Mangalambal also indicated that no title other than that of defendants 1 to 3

as the owners was recognised.But, nevertheless, the question that has to be considered is whether the contention that Art. 134 will not apply finds

any support from decided cases.

(7) In Mariyumma and Others Vs. Andu and Others, , it was held that if a purchaser from a mortgagee honestly and after due care believed that

his transferor was the full owner, it may be presumed that what he had intended to acquire was full ownership and therefore Art. 134 would govern

his case.Again in Roman Catholic Mission Vs. (Medai Dalavoi) Thirumalaiyappa Mudaliar, , it was held that when a transferee knows well that his

transferor has no absolute right that he can transfer, the transferee cannot be held to have bargained for transfer of that non-existent right.But, in

this very same decision, it is pointed out that even if the transferee had only the bare assertion of his vendor that the vendor had an absolute title,

that does not necessarily prove that the transferee did not believe his vendor, so that he could rely upon that fact in support of his claim that he

bargained for full ownership.

In Motilal v. Gita Rama AIR 1952 Bom 214 the nature of a transfer by a mortgagee contemplated by Art. 134 was considered at some length.The

learned Judges refer to the decision of the Privy Council in James Richard Rennel Skinner Vs. Kunwar Naunihal Singh, , and quotes the following

passage:

The transfer of property mortgaged contemplated by Art. 134 of the Limitation Act 1908 is admittedly something other than the express transfer

of the original mortgage.The Article contemplates the transfer by a mortgagee purporting to transfer a larger interest than that given by the

mortgage, or, at any rate, an interest unencumbered by a mortgage.The Article is not, however, limited in its application to cases where the

mortgagee transfers the property mortgaged while still ostensibly a mortgagee, nor to cases where the mortgagee transfers possession which he

had obtained qua mortgagee.It is immaterial, for the purpose of Art. 134, that the mortgagee should have thought he was the absolute owner, if, in

fact, he was the mortgagee, and immaterial whether he got possession before, under or after the mortgage, if, in fact, he purported the property to

the transferee.Art. 134 does not protect a transferee of a mortgage by express transfer, nor does it protect a person who has taken a transfer only

of a mortgage, but has taken it without his knowledge, mistakenly supposing that he was getting something better.

Relying upon this passage, the learned Judges of the Bombay High Court held that a purchaser from a mortgagee would be entitled to the benefit

of Art. 134 of the Limitation Act, when the transfer was under circumstances, which would lead to the conclusion that the mortgagee was

transferring to him not merely the mortgagee''s rights but a larger interest than that given by the mortgage.

(8) While the 5th defendant purported to acquire only the mortgagor''s interest in the property by reason of the sale to him by the plaintiff''s brother

Marudiah Thevar in 1920, the 4th defendant purported to purchase the full ownership in the property from defendants 1 and 2.These defendants

are the successor-in-interest of the original mortgagee Sabapathi Pathar and whatever might have been admitted in the will executed by

Arunachala, from 1922 onwards, when they executed the mortgage in favour of Mangalambal, defendants 1 to 3 had been claiming an absolute

interest in the property.While Mangalambal assigned the othi to the fourth defendant, the 4th defendant purchased the equity of redemption from

defendants 1 and 2. It was not merely a mortgage interest that came into the hands of the fourth defendant, but undoubtedly an interest which right

from 1922 was claimed to be larger than the mortgage right.

In Karuppanan Servai Vs. Daivasigamania Pillai, , the scope of Art. 134 again came to be considered.In that case, the mortgagee''s interest in the

property was purchased in court auction, and that purchaser effected a private sale to another proper party.The question was whether the last

purchaser could claim the benefit of Art. 134. It was held that he could.The learned Judges observe thus:

To understand the true scope if Art. 134, it is necessary to read it along with Art.

148.Art. 148 provides a period of 60 years for redemption of a

mortgage and Art. 134 cuts down that period to 12 years when there is a transfer by the mortgagee. Art. 134 is, therefore, an exception to Art.

148. In both the Articles, the same word ""Mortgagee"" is used.It must clearly have the same meaning in both the articles.If ""Mortgage"" in Art. 148

should mean only the original mortgagee, then the present action for redemption of Ex. P.1 would not be maintainable as against the defendant,

who, is the purchaser from Balaguru.But if ''mortgagee'' in Art. 148 includes all persons who succeed to the interest of the mortgagee, it must bear

that meaning under Art. 134 as well, and the appellant will be entitled to its benefit.If the defendant is under a liability to be redeemed under Art.

148, he is also entitled to the protection afforded by Art. 134.Likewise, the right of a mortgagor to redeem under Art. 148 is subject to the bar

enacted in Art. 134 in favour of transferee.

(9) It should follow from the above decisions that Art. 134 should necessarily apply to the instant case.There is no doubt that when the successors

of the original mortgagee purported to transfer full ownership in the property, the right which the mortgagor has to recover possession is controlled

by Art. 134, and no longer by Art. 148.Coupled with the finding that the 5th defendant-appellant had knowledge of the transaction from 1932

onwards but took no action whatsoever to enforce his rights to redemption, his claim at the present time is consequently barred.The appeal fails

and is dismissed with costs.No leave.

(10) Appeal dismissed.

