

(1953) 12 MAD CK 0003
In the Madras High Court
Case No : A.A.O. No. 387 of 1950

Parukutti Amma and Others

APPELLANT

Vs

C. Balameenakshi Amma and Another

RESPONDENT

Date of Decision : 02-12-1953

Acts Referred:

Tamil Nadu Agriculturists Relief Act, 1938 — Section 9A(8)
Transfer of Property Act, 1882 — Section 60

Citation : AIR 1954 Mad 818 : (1955) ILR (Mad) 274 : (1954) 67 LW 588

Hon'ble Judges : Satyanarayana Rao, J;Rajagopalan, J

Bench : Division Bench

Advocate : M.K. Nambiar, for the Appellant; K. Kuthikrishna Menon and V. Balakrishna Eradi, for the Respondent

Final Decision : Allowed

Judgement

Satyanakayana Rao, J.—This appeal is by the plaintiffs against the decision of the learned Subordinate Judge of Palghat, dismissing their

application, I. A. No. 560 of 1949, for scaling down the debt in O. Section No. 53 of 1945.

2. On 14-7-1933 an usufructuary mortgage was executed by the Tavazhi of the plaintiffs, which was a branch of Manavaahi tarwad, for a sum of

Rs. 16000, in favour of the first defendant in the suit, who is the first respondent in this appeal. The mortgage itself seems to be in renewal of

certain earlier debts, the details of which are not relevant for this appeal. Contemporaneously with the mortgage there was a lease back of the

mortgage property to the mortgagors for a rent of Rs. 1150 per year. A 3/5th share in the equity of redemption on the hypotheca eventually

devolved on the 2nd defendant, who is no other than the daughter of the first defendant. On 11-9-1936 the mortgagors surrendered possession of

the properties to the first defendant, the mortgagee, and the mortgagee continued in possession of the properties by the date of the suit, O. Section No. 53 of 1945.

That suit was instituted for partition and separate possession of the plaintiff's $\frac{2}{5}$ th share in the plaint schedule properties, and the second

defendant, who owned the undivided $\frac{3}{5}$ th share, was impleaded as a party. The properties in the tayazhi, other than those which comprised in the

suit, were divided earlier, and the suit was, therefore, confined to the property covered by the usufructuary mortgage deed Of 1933. With a view

to have the debt due to the first defendant ascertained and determined, she was also impleaded as a party to the action. Various defences were

raised to the action, and one of the issues in the suit covered the dispute between the parties concerning the correct amount due to the first

defendant on account of the mortgage and the lease back.

The first defendant also claimed in the action that she was entitled to the value of the improvements, and an issue on that question was also raised in

the suit. The plaintiffs claimed in the suit also a relief under the Madras Agriculturists Relief Act, Act 4 of 1938. The issues in which the first

defendant was interested, namely, issues 6 and 7, were also considered by the trial Judge, and findings were recorded on those issues. The correct

amount due to the first defendant was determined to be Rs. 16000, the principal of the mortgage, as also the arrears of rent as found under issue 6

and interest thereon was calculated at 10 per cent. As the first defendant failed to establish that she was entitled to any value of the improvements,

the issue relating to that was found against the first defendant.

During the course of the trial of the suit, the first defendant agreed and endorsed on the plaint that she was willing to allow partial redemption of the

plaintiffs' $\frac{2}{5}$ th share of the mortgage property when they sought to redeem the same. She also agreed to the apportioning of the liability due under

the mortgage of the lease back as determined by the court in the ratio of $\frac{2}{5}$ th to be borne by the plaintiffs and $\frac{3}{5}$ th by the second defendant. The

second defendant, who was a party to the action, did not object to the arrangement to which the first defendant was a party, under which the

liability under the mortgage and the lease back was split up in the proportions stated above and which also allowed the plaintiffs to redeem their

2/5th share on payment of the proportionate amount due to the first defendant. In pursuance of this arrangement and the findings recorded by the

court, a preliminary decree was passed In the suit on 18-3-1947. Two clauses of this decree are relevant for the decision of this appeal. They are

clauses 2 and 3 of the decree. Clause 2 of the decree is as follows:

That the plaintiffs are liable to pay the first defendant 2 out of 5 shares of the mortgage amount of Rs. 16000 due to her towards the principal as

well as 2 out of 5 shares in the arrears of rent which were specified the second defendant being liable to pay the balance of 3 out of 6 shares

to the first defendant as calculated above.

Clause 3 is

that as agreed to by the first defendant after division of the properties by metes and bounds the plaintiffs be at liberty to redeem their 2/5th share

on payment of the proportionate amount of the mortgage and arrears of rent due to the first defendant as shown above.

On 17-4-1947 an application was filed for passing a final decree in the suit. While these proceedings were pending, on 4-10-1947, the second

defendant, as evidenced by Ex. B. 1, ozhimuri, or release deed, as it is called -- purported to pay the full mortgage amount to the first defendant,

who is her mother, and redeem the entire mortgage and obtain possession of the properties from the first defendant. On 7-4-1949 the application,

I. A. No. 560 of 1949, for scaling down the debt under Sections 8, 9, 9-A and 17-a of the Madras Agriculturists Relief Act, as amended by the

Act of 1948, was filed by the plaintiffs.

The learned Subordinate Judge passed a final decree in the suit on 18-4-1949 without disposing of the application, I. A. No. 560 of 1949, but

providing under the final decree that, if it was found ultimately that the mortgage amount and arrears of rent are liable to be scaled down, then the

plaintiffs should pay 2/5th of the reduced mortgage amount and the arrears of rent. Afterwards the application for scaling down the decree debt

was taken up for consideration by the learned Subordinate Judge and he dismissed the application on 17-9-1949 on the ground that the mortgage

was protected under Sub-section 8 of 3. 9-A of the Madras Agriculturists Relief Act, which section was introduced by the amending Act of 1948.

Hence this appeal.

3. u/s 9-A, Sub-section 8, protection is given to a co-mortgagor redeeming the usufructuary mortgage, if the redemption was of the entire

mortgage made during the period between 30-9-1937 and 30-6-1948. The sub-section runs as follows :

Where the equity of redemption in the property subject to the usufructuary mortgage belonged to, or devolved on, two or more persons and any

of them or any person claiming under any one of them has, during the period referred to in Sub-section (7), Clause (ii) (a), redeemed the entire

mortgage nothing contained in this section shall affect the rights or the reliefs to which the person redeeming the mortgage might be entitled to under

any other law for the time being in force as against the other persons aforesaid.

(The explanation Is omitted as not being relevant). The point for determination is whether at the moment when the second defendant paid the

mortgage amount under B. 1 on 4-10-1947, she was a co-mortgagor in respect of the usufructuary mortgage entitled to redeem the entirety of the

mortgage. A contention was raised before the learned Subordinate Judge, that B. 1 was a nominal transaction entered into at a time when the bill

to amend the Madras Agriculturists Relief Act, which ultimately became the Act of 1948, was under consideration of the Select Committee, and

that it was brought into existence with a view to defeat the provisions of the Act, which would enable the plaintiffs to have the debts scaled down.

But the findings of the learned Subordinate Judge, based on the evidence of the husband of the first defendant, who was a member of the

Legislative Assembly, is against the plaintiffs. Notwithstanding the attack levelled against that finding by the learned counsel for the appellants we

are not convinced that the finding of the learned Subordinate Judge regarding Ex. B. 1 is erroneous. We therefore proceed on the footing that the

transaction under Ex. B. 1 was a real transaction and not a nominal one.

4. The question regarding the applicability of the exception contained in Sub-section 8 of Section 9-A of the Act really turns upon the construction

of the preliminary decree In the suit, O. Section No. 53 of 1945. The learned Subordinate Judge, while disposing of the application, in our opinion,

overlooked and failed to appreciate the significance of Clause 2 of the decree extracted above. He was of opinion that the amount due under the

mortgage was stated in the preliminary decree, and that what was stated was

not that the amount, payable by the second defendant would be so much and by the petitioner so much. It is this mistake, which is of a fundamental character, which, in our opinion, has vitiated most of the findings.

He took the view that the right given under the preliminary decree to the plaintiffs to redeem their 2/5th share was a contingent right, the contingency being the passing of the final decree partitioning the properties, and that until that event had occurred, the mortgagee continued to hold all the properties owned and possessed by the two sharers who were jointly and severally liable for the entirety of the mortgage amount, and that when the second defendant redeemed the mortgage, she was entitled to redeem not only her share, but also the share of the plaintiffs, as by that date, 4-10-1947, the final decree was not made. Therefore, on this reasoning, the learned Subordinate Judge reached the conclusion that the exception in Sub-section 8 of Section 9-A applied to the case.

5. As is clear from Clause 2 of the preliminary decree, all the parties to the suit, the plaintiffs and the second defendant and the mortgagee, agreed that the liability for the mortgage amount and the arrears of rent should be apportioned in the manner laid down in Clause 2 of the decree. It is no doubt true that expressly the second defendant did not endorse on the plaint as was done by the first defendant. But it was in her presence the arrangement was reached, and that arrangement was embodied in the decree without any demur by the second defendant. It was not raised merely at the stage of the arrangement between the plaintiffs and the first defendant, but was embodied in the decree to which the second defendant is a party. The second defendant, therefore, cannot now be permitted to go behind the decree.

In our opinion the decree had the effect of not only splitting up the integrity of the mortgage, in the sense it is understood u/s 60 of the Transfer of Property Act, but also of splitting up the liability under the mortgage and for the arrears of rent, so as to constitute in effect and substance two different and separate mortgages, the plaintiffs being entitled to redeem 2/5th share of the hypotheca by paying the proportionate share of the amount, in the same manner as the second defendant was entitled to redeem a 3/5th share on paying the proportionate share of the amount. The object of Clause 3 of the decree was to recognise the right of redemption by the

plaintiffs in respect of their 2/5th share, but the exercise of that right was postponed to the date of actual division of the properties by metes and bounds, for the simple reason that if before that the redemption was effected, the plaintiffs would have got only joint possession with the second defendant, who had already obtained possession of the properties, and that would have necessitated a further suit for partition.

As the very object of the parties was to have the property divided by metes and bounds, and also to have the liability in respect of the mortgage determined, and to have it apportioned, there was no point in providing for redemption at a point of time earlier to the actual division of the properties by metes and bounds. That does not, however, mean that immediately after the preliminary decree was passed in the suit, the mortgage liability was not split up, and that the properties to which the plaintiffs on the one hand, and the second defendant on the other were entitled continued jointly and severally liable for the full mortgage amount.

The language of Clause 2, in our opinion, is clear, and if a suit had been filed by the second defendant on the footing of the mortgage, after the preliminary decree in the suit and before the final decree was passed, she would not be entitled to claim the full amount from the 2/5th share of the plaintiffs in the manner, in which she could have done if there had been no decree in the suit. In our opinion the case has to be determined not on

the principles laid down and recognised by Section 60 of the Transfer of Property Act. Apart from it, in the present case, with the consent of all

the parties Interested in the mortgage including the mortgagee, the amount due under the mortgage liability in respect of it was apportioned

between the two sets of properties, that is 2/5th share owned by the plaintiffs and the 3/5th share owned by the second defendant, thereby in effect

and substance constituting what was one mortgage originally, into two distinct and separate mortgages. In such an event the principles laid down

u/s 60 of the Transfer of Property Act would have no application.

It cannot be disputed that, if there was once a mortgage effected between the parties, mortgage being a contractual transaction, it would be open

to the parties by their consent to split up the mortgage into two distinct and separate mortgages. Thereby they are not trying to evade or in any way

infringe the principles laid down in Section 60, T. P. Act. Section 60 of the

Transfer of Property Act has application only so long as the mortgage continues without being modified or split up by agreement between the parties. By the Amendment introduced in 1939 in the proviso to Section 60 of the Act, it is no doubt true, as was pointed by Mulla in his Commentary, that the other modes of splitting up the integrity of a mortgage were probably intended to be negatived, and the only way by which the integrity would be broken is in the manner laid down in the last clause in Section 60. But that is only when there is no modification of the mortgage by consent of the parties.

It is no doubt the law that a mortgage continues to be indivisible not only for the benefit of the mortgagee, but also for the mortgagor. If the integrity of the mortgage is broken, as provided by the last clause of Section 60, it would be open to the mortgagor either to redeem his own share on payment of the proportionate amount of the liability, or to insist on the redemption of the entirety of the mortgage even against the will of the mortgagee. But that is only a statutory right in respect of a mortgage, which was not in any manner altered by mutual consent of the mortgagor and the mortgagee.

The cases, therefore, cited before us, which establish the principle that the mortgagor is entitled notwithstanding that the integrity of the mortgage is broken, to redeem not only his share but the entire mortgage, have no bearing upon the question, which we are called upon to decide in this case.

An arrangement which was embodied in a decree, to which all the persons were parties and which has become final, precludes the parties from

going behind the decree and from claiming rights contrary to it. There may be instances of cases, which are outside the purview of Section 60, as

an instance of that kind is to be found in -- AIR 1944 225 (Nagpur)

6. The situation, therefore, on the date on which B. 1. came into force was that the second defendant was no longer a co-mortgagor with the

plaintiffs entitled to redeem the entire mortgage as contemplated by Sub-section 8 of Section 9-A of the Act. If she paid to her mother more than

the legitimate amount, which she was bound to pay under Clause 2 of the preliminary decree, it was a mere voluntary payment and not a payment

in respect of which she could claim the rights of a co-mortgagor as against the plaintiffs. The decree not only split up the mortgage amount and

apportioned it between the two sets of mortgagors, but also in effect ""and in substance it extinguished the right of one mortgagor to redeem the share of the others. That is the effect also of Clause 3 of the decree. The right of redeeming each share is available only after physical division of the properties by metes and bounds.

The situation after the preliminary decree and before the final decree was passed was in substance and effect that each mortgagor was treated as

being liable only to the apportioned amount, and, therefore, it created a separate and distinct mortgage. There was no relationship thereafter of the

relationship of mortgagor and co-mortgagor between the second defendant and the plaintiffs. The second defendant could not have legally and

validly exercised the right to redeem the entire mortgage. The protection, therefore afforded by Sub-section 8 of Section 9-A would not avail the

second defendant, and the plaintiffs are entitled to have the amount scaled down.

7. The appeal is, therefore, allowed and the order of the learned Judge is set aside and the petition remanded for determining the scaled down

amount. The appellants are entitled to their costs in this court.