(1993) 01 MAD CK 0026

In the Madras High Court

Case No : Second Appeal No. 473 of 1982

Saraswati Ammal APPELLANT

Vs

Shanmughavadivammal, and Others RESPONDENT

Date of Decision : 25-01-1993

Acts Referred:

Constitution of India, 1950 — Article 14
Contract Act, 1872 — Section 72
Tamil Nadu Debt Relief Act, 1980 — Section 12
Transfer of Property Act, 1882 — Section 54(4), 55(5)

Citation : AIR 1994 Mad 234 : (1993) 2 MLJ 424

Hon'ble Judges : Abdul Hadi, J

Bench : Single Bench

Advocate : P. Ananthakrishan Nair, for the Appellant; R.S. Ramanathan, for Mr. P. Venkataseshan, for the Respondent

Judgement

The 1st defendant is the appellant in this second appeal against the concurrent decree for a sum of Rs. 5,000/-with a charge over the property in

question, given by both the Courts below.

2. The undisputed facts are : The plaintiff borrowed from defendants 2 to 4 a sum of Rs. 5,000/- and as security for the repayment of the said sum,

usufructuarily mortgaged his properly under Ex. A1 dated 14-8-1967 in favour of defendants 2 to 4. Subsequently, the plaitiff sold the said

property under Ex. A1 dated 28-5-1969 to the 1st defendant for Rs. 8,000/-. Though the sale consideration therefore was Rs. 8,000/ -, the

plaintiff received from the 1st defendant only Rs. 3,000/- and allowed the 1st defendant to retain the balance of Rs. 5,000/- for redeeming Ex. Al

mortgage. Subsequently, the 1st defendant filed O.S. No. 105 of 1979 on the file of the District Munsif of Tirunelveli for redemption of the said mortgage, claiming that the mortgaged was deemed to have been discharged under Tamil Nadu Act 40 of 1979 even without paying the mortgage

amount of Rs. 5000/-, Since the 1st defendant was a ""debtor"" under the said Act. Apart from the present defendants 2 to 4, the plaintiff herein was

also one of the defendants in that suit. The plaintiff herein also claimed in that suit that he was a debtor under the said Act. Subsequently, the

plaintiff herein also filed the present suit O.S. No. 605 of 1980 for recovery of the abovesaid sum of Rs. 5,000/- from the 1st defendant on the

footing that in view of the said Act 40 of 1979, there was no necessity for him to pay the said sum to defendants 2 to 4 for discharging Ex. Al

mortgage.

3. The trial court tried both the suits together. It decreed O.S. No. 105 of 1979 as prayed for, holding that the 1st defendant and the plaintiff

herein as debtors under the abovesaid Act. It also decreed the present suit O.S. No. 605 of 1980 for a sum of Rs. 5,000/-with a charge over the

property.

4. There was no further appeal against the judgment and decree in O.S. No. 105 of 1979. But as against the judgment and decree in O.S. No.

605 of 1980, the 1st defendant preferred A.S. No. 2 of 1981, But, there also he failed. Hence this second appeal.

5. The main point argued by the appellant''s Counsel is that the abovesaid Ex. A.2 sale is subject to the abovesaid Ex. Al mortgage, and not free

from the said mortgage, that what was sold was only equity of redemption in the said property and that therefore, there is no scope for the

application of Section 54(4)(b) or Section 55(5)(b) of the Transfer of Property Act. He also points out that at any rate Section 55(5)(b) will have

no application at all since it deals with a case before completion of sale, and not after, as in the present case.

6. But, the learned Counsel for the Ist respondent plaintiff submits that Ex. A.2 is a sale of the suit property as such, free from mortgage and that

hence, the plaintiff can get back Rs. 5,000/- as per Section 55(4)(b) or Section 55(5)(b) of the Transfer of Property Act.

7. Therefore, it has to be seen whether Ex. A.2 sale is subject to martgage or free from mortgage. The relevant recitals in Ex, A.2 are as follows :

(Matter in vernacular hence omitted. Ed.)

In Vinaitheertha Thevar v. Viswanatha Ayyar (1953) 2 MLJ 504 cited by the learned Counsel for the appellant, it was held approving ILR (1948)

Pat 898 and stating that Section-55(5)(b) is reciprocal or complementary to Section 55(4)(b) as follows :

In the present case the sale has not been free of any encumbrance because Ex. D1 specifically states that the vendee is directed to redeem the

usufructuary mortgage- It is not as if the vendor has agreed to redeem the mortgage and deliver the property free of any encumbrance to the

vendee after receiving the consideration from the vendee. If that had been the case, then it would have been money remaining unpaid to the vendor

and a charge might possibly have arisen. In our opinion the existence of a statutory charge can arise only if there is a contract between the vendor

and the vendee that the latter would pay the consideration into the hands of the vendor who would redeem the mortgage and deliver the property

free of encumbrance to the vendee. In such a case it can be said that there is really a vendor''s lien but such a statutory lien cannot be said to exist

where the agreement is that the vendee should himself discharge the mortgage and recover possession of the property.

8. In the present case also, it is not as if the plaintiff vendor under Ex. A.2 has agreed to redeem the mortgage and deliver the property free of

encumbrance. But, under Ex. A.2, the 1st defendant-vendee alone is directed to redeem the usufructuary mortgage.

9. But, the learned Counsel for the 1st respondent heavily relies on the decision in Avvari Subba Row and Others Vs. Kondamudi Varadaiah

(deceased) and Others, . The appellants therein purchased immovable properlics for a certain amount from the respondents, of which sum, a

certain portion was left with the appellants to be paid for principal and interest due on a subsisting mortgage on the property. The balance was

adjusted towards debts due from respondents to appellants therein. The Madras Agriculturists'' Relief Act having come into force in the mean time,

the respondents therein issued a notice to the appellants therein requiring them not to pay the amount to the mortgagee, but the pay it with interest

to themselves in order that they might pay of the amount directly to the mortgagee after scaling down the debt. But, the appellants therein refused

to comply with the demand claimign that they thernselalves being agricturists, were entitled to the benefit of the Act by which they were entitled to the reduction of the debt by scaling down . In that context, the abovesaid Division Bench has held that as the sale therein was intended to be free

from encumbrances, the sum left with the appellants therein for paying of the mortgage was part of the purchase money which was left for the

specific purpose of paying off the mortgage on behalf of the respondents therein who were bound to discharge that encumbrance and therefore the

appellants therein should return the enex-pended balance which as a result of the statutory reduction of the debt, it was subsequently found

unncessary to pay to the mortgagee.

10. On facts, the Division Bench in Avvari Subba Row and Others Vs. Kondamudi Varadaiah (deceased) and Others, thus held that the sale in

question before it was free from encumbrance only and not subject to encumbrance. There was also the following recital in the sale deed in

question in the said case (at p. 485) :

By way of your having agreed to pay to the mortgage, without our having any concern with the same, the said sum together with interest that may

accrue in the future according to the terms of the mortgage and get the property released from the mortgage, the said sum of Rs. 5,682-7-0 has

been received by us"".

Yet despite the use of the expression ""without our having any concern with the same"", the said Division Bench has held thus (at p. 485) :--

But the whole clause amounts, in our opinion, to no more than a recognition in express terms of what a vendee is entitled and bound to do under

the proviso of Section 55(5)(b) of the Transfer of the Property Act, and is perfectly consistent with the sale being free from encumbrances.

It appears to me that this earlier Division Bench, on facts not materially dissimilar from that of the later Division Bench Case (1953) 2 MLJ 504 ,

drew an inference different from (1953) 2 MLJ 504 (supra). I also find that in (1953) 2 MLJ 504 (supra), there is no reference to the earlier

Division Bench case in Avvari Subba Row and Others Vs. Kondamudi Varadaiah (deceased) and Others, . In the circumstances my duty is

normally to suggest a Full Bench decision (vide Tribhuvandas Purshottamdas Thakur Vs. Ratilal Motilal Patel, and Sundarjas Kanyalal Bhathija

and others Vs. The Collector, Thane, Maharashtra and others,), But I think that there is no necessity to do so in the present case in view of the decision I propose to take in relation to the next argument of the learned Counsel for the plaintiff as indicated below.

11. The learned Counsel for the Ist respondent brought to my notice that without even going into the question whether the abovesaid sale is subject

to encumbrance or free from encumbrance, the decree given by the Courts below should only be confirmed on the ground that the Ist defendant

cannot be allowed to make an unjust gain at the cost of the plaintiff, who alone, in law, is really a debtor under the abovesaid Debt Relief Acts, and

not the Ist defendant-purchaser. In this connection, he relies on the decisions in S. Abraham Vs. State of Tamil Nadu and Others, , Subbaraya

Mudaliar v. Narayanaswamy Mudaliar 99 LW 125 , Kuppusamy Ayyar, B.A. v. T. K. Subbaraman (1990) 2 LW 324, Subbammal v. The

Special Tahsildar (1990) 2 LW 504 (sic) and Dhanalakshmi Animal v. Krishnammal (1988) 2 LW 504 (sic). All those decisions have held that a

purchaser of a property which was mortgaged earlier, is not a ""debtor"" under the relevant Debt Relief Acts. The learned Counsel also points out

that both the 1st defendant and the plaintiff were parties to O.S. No. 105 of 1979 and the trial Court has declared them to be ""debtors"" under the

relevant Debt Relief Acts. But, this decision, in relation to the Ist defendant, is wrong in view of the above referred to decisions. So, according to

the Counsel, only because the plaintiff was a debtor, the Ist defendant was able to get the abovesaid decree in O.S. No. 105 of 1979 and redeem

the mortgaged property even without paying (he mortgage amount. If so according to the said Counsel, the Ist defendant has made an unjust gain

only because the plaintiff was a ""debtor"". So, the Ist defendant must give back the said benefit got by him to the plaintiff, to whom alone it is due.

He also points out the following observation in S. Abraham Vs. State of Tamil Nadu and Others, .

The said provision (Section 12(i) of the Tamil Nadu Debt Relief Act (XIII of 1980)) exempting the debt representing the portion of the purchase

price of the property purchased by a debtor is intended to see that the debtor does not make an unjust gain by withholding the price of the

property purchased by him, taking advantage of the provisions of the Act. In this case, the fourth respondent has retained the sum of Rs. 12,000/-

out of the sale consideration payable by him to the vendor and he has undertaking to discharge the liability of the vendor to pay the said mortgage amount of Rs. 15,000/-. If the fourth respondent does not discharge his obligation of paying Rs. 15,000/- to the mortgagee, the petitioner herein,

the vendor can file a suit and recover the entire amount of Rs. 15,000/- notwithstanding the provisions of Act XIII of 1980.

As against this submission of the learned counsel for the Ist respondent, the learned counsel for the appellant no doubt does not dispute the legal

position that the Ist defendant, as purchaser, is not a debtor under the relevant debt relief Acts, in view of the above referred to several decisions

cited by the learned counsel for the Ist respondent. But, he only says that rightly or wrongly, the said question has been concluded by the decree in

O.S. No. 105 of 1979, which has become final. Further, he points out that in the abovesaid S. Abraham Vs. State of Tamil Nadu and Others, ,

the vendor was not a party to the proceeding and the Bench was not deciding the claim of the vendor as against the vendee, but was concerned

only with the claim of the mortgagee as against the subsequent vendee. But, it being the decision of a Division Bench. I am bound by the principle

laid down there that when there is such an unjust enrichment by the purchaser, the relief could be given to the vendor. Further, in O.S. No. 105 of

1979, the plaintiff herein was also a party and held to be a ""debtor"" under the relevant Debt Relief Act. Further, he also accepted in his written

statement therein that the Ist defendant is entitled to the benefits of the said relevant Debt Relief Act. So, it cannot also be said that the trial Court

came to an independent conclusion -- (without relying on the abovesaid acceptance of the plaintiff herein) -- that the Ist defendant is a ""debtor

under '' the said Act. Therefore, accepting the argument of the learned Counsel for the plaintiff, I see no reason to disturb the concurrent decree

given by the Courts below.

12. In the result, the second appeal is dismissed with costs.

13. Appeal dismissed.

