
(1962) 09 AP CK 0013

In the Andhra Pradesh High Court

Case No : Second Appeal No. 929 of 1958

Sreeram Venkatasubbamma

APPELLANT

Vs

Somisetti Subbayya and Others

RESPONDENT

Date of Decision : 14-09-1962

Acts Referred:

Transfer of Property Act, 1882 — Section 54

Citation : AIR 1964 AP 21

Hon'ble Judges : P. Chandra Reddy, C.J.; Chandrasekhara Sastry, J

Bench : Division Bench

Advocate : V. Venkataramaiah, for the Appellant; M. Jagannadharao, for M. Krishnarao, for the Respondent

Final Decision : Dismissed

Judgement

Chandra Reddy, C.J.—The point that calls for adjudication in this Second appeal relates to the effect of an oral sale of the right to redeem a usufructuary mortgage to the mortgagee.

2 The facts that have a bearing on this controversy may be shortly set out. A small house situated in Kanigiri originally belonged to Menta Patchayya. He had two wives, Subbamma and Kanakamma alis Audemma. The plaintiff is the daughter of the first wife. Her mother pre-deceased her father, who died on 25-12-1917. Subsequent to the death of her husband, Kanakamma acquired absolute right to this property under some arrangement with which we are not concerned here. She executed a usufructuary mortgage over this house in 1919 to the first defendant. A year later she sold her right to redeem the property to the mortgagee himself under an oral sale. Sometime later, the first defendant, mortgagee, sold the house to the second defendant. In the year 1922, Kanakamma died leaving behind her step children, namely, the plaintiff and her sister as her sole heirs.

3 In the year 1953, i.e., thirty one years after they succeeded to the estate of

Kanakamma, the present suit was instituted for redemption of the mortgage and for other incidental reliefs.

4 The suit was contested on the defence that the first defendant had become the full owner of the property by virtue of the sale of the equity of redemption in the year 1920, and, consequently, the right to redeem did not inhere in the reversioners of Kanakamma.

5 This was sought to be met by the answer that there was no oral sale as pleaded by the defendants and that, in any event, the sale was ineffective, it not having been evidenced by a registered instrument.

6 This contention of the plaintiff did not prevail with the Dt. Munsif, who accepted the defence as to the factum, and validity of the oral sale. In the result, he dismissed the suit.

7. On appeal, the Subordinate Judge, Kavali, confirmed the judgment and decree of the trial Court.

8. The aggrieved plaintiff carried the matter in second appeal to this Court. When it came on for hearing before our learned brother, Manohar Pershad J., he referred it to a Bench, as he felt that an important question of law was involved in this appeal.

9. The primary question that falls to be determined in this second appeal is as to the impact of the relevant statutory provisions of Transfer of Property Act on the sale.

10. At the outset, it must be mentioned that the finding that there was an oral sale as pleaded by the defendants is not attacked before us. We may, therefore, proceed on the assumption that there was a sale of the right to redeem the mortgaged property in the year 1920.

11. In order to appreciate the issues involved in this appeal we have to turn to the provisions of Section 54 of the Transfer of Property Act. It recites:

" "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Such transfer, in the case of tangible Immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. In the case of tangible Immovable property, of a value of less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

12. In this enquiry we are first concerned with the connotation of the expression "tangible Immovable property." Could the right of the mortgagor in a usufructuary mortgage be described as tangible Immovable property? The view sought to be pressed upon us by Sri Venkataramiah, learned Counsel for the plaintiff is that the right of the mortgagor in a usufructuary mortgage is intangible property and as such it is excluded from the purview of the third

paragraph of Section 54 of the Transfer of Property Act.

13. The corner-stone of this argument is the decision of Bhasyam Ayyangar J. in *Ramaswami Pattar v. Chinnan Asari* ILR Mad 449 . The learned Judge observed:

"The equity of redemption in a usufructuary mortgage is only an intangible thing like "a reversion" which immediately precedes the expression "or other intangible thing" (Vide Williams in "Real Property" 18th Edition, pages 30, 31) and it can be transferred by sale only by registered instrument, and not by delivery of the property. Equity of redemption in a simple mortgage may be tangible Immovable property, and its sale can be effected if its value be below Rs. 100/- without a registered instrument by mere delivery of the property."

The learned Judge also stated that the right of a simple mortgagee in the property mortgaged is only an intangible thing like a charge on Immovable property within the meaning of Section 64. It may be mentioned here that the other learned Judge, Sheperd J., did not express himself on this topic.

14. This view of the learned Judge was shared by some of the High Courts. In *Rahmat Ali v. Muhammad Nazhar Hussain* 11 All LJ 407, it was ruled by a Division Bench of the Allahabad High Court consisting of Richards C. J. and Tudball J. that the right of the mortgagor to redeem a mortgage came within the expression "other intangible thing" in the second paragraph of Section 54 of the Transfer of Property Act. To a like effect is the opinion of a Bench of the Calcutta High Court in *Hushmat v. Jamir* 52 Ind Cas 558 : AIR 1919 Cal 325 and of a single Judge of the Chief Court, Oudh in *M. Bahadur Singh v. Chandrapal Singh* AIR 1921 Oudh 124 and also of Sulaiman C. J. in *Sohan Lal and Others Vs. Mohan Lal and Others*,

15. We are unable to subscribe to the theory that the right of the mortgagor to redeem the mortgaged property is not "tangible Immovable property" within the ambit of paragraph 3 of Section 54. While Bhashyam Ayyangar and the other learned Judges who laid down this rule did not discuss the matter, Sulaiman C. J. who dissented from the majority of the Full Bench, gave the reason that the interest of the mortgagor in the usufructuary mortgage was not identical with the property itself as some interest had already passed to the mortgagee, including the right to remain in possession and appropriate the profits and the interest which the mortgagor possessed was not itself capable of being touched, nor was it such that an actual delivery of its possession could be effected by the mortgagor to the mortgagee. In the judgment of the learned Chief Justice, he could not conceive of a thing as being tangible when it was not capable of actual delivery of possession. With great deference to the learned Chief Justice, we must demur to this proposition. Though the mortgagor had parted with some of the rights in the Immovable property, he does not cease to be the owner. The ownership subsists in him though stripped of some out of the bundle of rights pertaining to the property. So, when the mortgagor transfers his remaining interest Viz., the right to redeem the mortgage, it could not be characterised as

intangible property.

16. We may mention here that the opinion of Bhasyam Ayyangar J. that the interest of the mortgagee in a simple mortgage was an intangible thing runs counter to several of the rulings of the Madras High Court, namely, *Subramaniam v. Perumal Reddi* ILR Mad 454 and *Cunniah v. Gopal Chettiar* 26 Mad LT 242 : (AIR 1919 Mad 547) both being decisions of Division Benches and *Dwarka Doss Govardana Doss v. Danakoti Ammal* 15 Mad LT 198 : (AIR 1914 Mad 353) a decision of a single judge, it looks to us that the principle embodied in this line of cases is the sounder one. However, it is unnecessary for us to express any final opinion on this aspect of the matter, as that does not here arise, except to indicate that the reasoning of Bhashyam Ayyangar, J. was not acceptable to the learned Judges who decided the two cases cited above.

17. The opinion which we have expressed above receives confirmation from a number of rulings of several of the High Courts. *Sohan Lal and Others Vs. Mohan Lal and Others*, the view of the majority was that the right to redeem the usufructuary mortgage is "tangible property" falling within the scope of Paragraph 3 of Section 54 of the Transfer of Property Act. Mukherji J. who delivered the leading opinion of the Majority, said that the mortgagor remained the owner and so what he transferred by way of sale after the mortgage would be the property itself and not mere interest or right that was left in him. In support of his opinion, he relied on the following passage in Holland on his "Elements of Jurisprudence."

"Ownership may.....continue to subsist although stripped of almost every attribute which makes it Again at page 223, he says:

"One or more of the subordinate elements of ownership such as a right of possession or user may be granted out while the residuary right or ownership.....remainsunimpaired."

Mukherji J. then extracted what the "author said while talking of pledge.

"Probably, the rudest method is that which involves an actual transfer of ownership in the thing from the debtor to the creditor. and such is the English mortgage of lands or goods. . . . except in so far as its theory has been modified by the determination of the Court or Chancery and of the legislature to continue, as long as possible, to regard the mortgagor as the owner of the property."

18. He also called in aid the following passage in Salmond's jurisprudence.

"The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees and other encumbrances. His ownership may be reduced to a mere name rather than a reality. Yet, he nonetheless remains the owner of the thing, while all others, own nothing more than "rights" over it.He, then, is the owner of a material object, who owns a right to the general of residuary uses of it, after the deduction of all special and limited rights of use vested by way of encumbrance in other persons."

19. We are satisfied that the reasons adduced by the majority in Sohan Lal and Others Vs. Mohan Lal and Others, are more logical and they accord with the ordinary notions of tangible property and it appeals to us.

20. In Suraj Prasad Vs. Mt. Aguta Devi and Others, Full Bench decision of the Patna High Court, it was laid down inter alia:

"The mere fact that the possessor has the right to touch the property while the owner has no immediate right to do so will not, in my judgment, be of any consequence because it is the property and not the right which is tangible. A property is tangible because it can be touched by any one and not because it is capable of being touched by a person who is in possession and has an immediate right to touch it."

Likewise, it was ruled by a Division Bench of the Bombay High Court in Tukaram Ganpatrao Surve Vs. Atmaram Vinayak Gondhalekar, that the equity of redemption in the case of a usufructuary mortgage was tangible property and, consequently, it could be transferred by an unregistered deed where the value of the property was below Rs. 100/-. Both of them specifically dissented from the rule stated by Bhashyam Ayyangar J. in ILR Mad 449.

21. We think that Muthukaruppan Samban and Others Vs. Muthu Samban, lends support to this rule. Of course, the question as to the character of the right was not directly considered, namely, whether the equity of redemption could constitute "tangible immovable property" within the range of Section 54 of the Transfer of Property Act. But the decision implied that such a right was tangible immovable property. The controversy there was similar to the one here, namely, whether the sale of the right to redeem a usufructuary mortgage to the mortgagee himself unaccompanied by a registered instrument was effective or not and the learned Judges, Seshagiri Ayyar and Kumaraswami Saslriyar JJ. answered it in the affirmative. They could not have furnished that answer if they had felt that the transfer of such an Interest in the property was an intangible thing contemplated by paragraph 2 of Section 54 of the Transfer of Property Act. Whether this ruling really helps the respondent, or not, we feel that such a right to redeem is tangible Immovable property, what is transferred being the property itself subject to the mortgage and the incapacity to deliver possession "immediately not making any difference in that behalf. We also think that the test propounded by Sulaiman C. J. is not decisive and the fact that at the relevant time the transferor is not in possession of the property does not alter the character of the property. We, therefore, feel that the first requisite of paragraph 3 of Section 54 is satisfied.

22. But, that by itself would not render the transaction valid unless it is accompanied by delivery of property. In cases where the transaction is not evidenced by a registered document in regard to property of the value of less than Rs. 100/-, to make it effective, there should be delivery of the property. Could it be said that in the case of a usufructuary mortgage, the mortgagor could

be said to have delivered the property within the terms of that paragraph? On this aspect of the matter also, there is divergence of judicial opinion.

23. In *Sibendrapada Banerjee v. Secy. of State for India* ILR Cal 207, it was held that when the mortgagee was in occupation of the property from the date of the mortgage and there was not any delivery of possession when the sale was made, the requisite of Section 54 as to delivery of possession was not satisfied. This was accepted as correct by the Full Bench of the Allahabad High Court in *Sohan Lal and Others Vs. Mohan Lal and Others*,

24. But there is a long line of cases to the effect that despite the fact that property was already in possession of the mortgagee, delivery could be effected to the vendee mortgagee as to satisfy this ingredient of paragraph 3 of Section 54. It is true that the usufructuary mortgagee whose possession is referable to lawful title could not by his unilateral act convert that possession into one adverse to the mortgagor. In other words, by his own acts he could not alter the legal character of possession which he obtained as the usufructuary mortgagee. But that doctrine has no bearing on the effect of an agreement between the parties that from the date of sale the possession as a mortgagee should cease and from that date his possession should be as an absolute owner. Delivery should be such as the property is capable of. If the animus of the mortgagor, viz., to pass title and also possession as owner, is disclosed by appropriate declarations, delivery would be effective within the scope of Section 54 of the Transfer of Property Act, paragraph 3. This position is established by a number of decisions of the Madras and other High Courts.

25. In *Palani v. Selambara* ILR Mad 267 a Bench of the Madras High Court ruled that attornment by the tenants was sufficient delivery of possession within the terms of Section 48 of the Indian Registration Act. It may be mentioned here that so far as delivery of possession was concerned, there is no difference between the provisions of Section 48 of the Indian Registration Act and Section 54 of the Transfer of Property Act, the principle applicable to both being the same. Similarly, in *Kannan v. Krishnan* ILR Mad 324 the principle was enunciated that possession under a mortgage which was followed by an agreement to sell was equivalent to delivery of possession as to satisfy the requirements of Section 48 of the Registration Act. This doctrine applies with full vigour to the instant case despite the fact that the above two cases dealt with Section 48 of the Registration Act. To a like effect is the judgment of the Bombay High Court in *Bai Kushal v. Lakshma Mana* ILR Bom 452. There it was stated that where one of the donees is in physical possession of certain property, a declaration by the owner to the donee in occupation that he had parted with possession was sufficient to validate the gift.

26. A Full Bench of the Patna High Court in *Suraj Prasad Vs. Mt. Aguta Devi and Others*, to which reference has already been made in another context, expressed the view that all that was necessary in a case like this was that the vendor should do whatever he could in the circumstances so as to indicate definitely and

without any ambiguity his intention to pass title and also possession as owner to the vendee by making appropriate declarations.

27. The whole case-law on the topic was reviewed in *Muthukaruppan Samban and Others Vs. Muthu Samban*, already referred to. The learned Judges decided in that case that it was sufficient to pass title if the vendor converted by appropriate declarations or acts the previous possession into possession as vendee and it was not necessary that the person in possession should give it up formally and take it alter-wards as the vendee, They declined to follow ILR Cal 207. This is also the principle laid down in *M.K. Sheik Dawood Saheb Vs. Moideen Batcha Saheb and Others*, . *Muthukaruppan Samban and Others Vs. Muthu Samban*, held that a direction by the vendor to the vendee, who happened to be usufructuary mortgagee, to keep the property as absolute owner amounted to delivery of possession.

28. It is thus seen that there is abundant authority in favour of the view that there could be delivery of property within the purview of Section 54 of the Transfer of Property Act to a usufructuary mortgagee to satisfy the requirements of Section 54 if there is agreement between the parties that after the sale the possession of the mortgagee should be that of an absolute owner and that the intention of the mortgagor to convert the nature of possession as full owner was made clear by appropriate acts or declarations. In a case like this, oral sale of the right to redeem the usufructuary mortgage could be effective and a registered instrument to evidence it is not quite indispensable.

29. Even assuming that this view is open to challenge the right of the vendee could be sustained on another ground, namely that having been in possession of the property as full owner thereof for the statutory period, he has prescribed title thereto. It is true that there is a decision of the Madras High Court in *Ariyaputhira v. Muthu-Komaraswami* ILR Mad 423 : (AIR 1914 Mad 489) to the effect that a transaction not evidenced by a registered document could not be proved for showing the change of the mortgagee's possession into adverse possession, since the intention to discharge the mortgage involved the intention to make certain transfers and it could not be said that if those transfers failed both the parties nevertheless intended to discharge the mortgage.

30. But a contrary opinion is expressed in a series of decisions of the Madras High Court. In *Usman Khan v. Dasanna* ILR Mad 545 : AIR 1914 Mad 578 It was ruled that the possession of the mortgagee under the circumstances for over twelve years would be adverse to the mortgagor and as such his right to redeem was barred by limitation. *Muthukaruppan Samban and Others Vs. Muthu Samban*, ; *Karnam Kandaswamy Pillay Vs. Chinnabha alias Subbaraya Pillay and Others*, and *Musigadu v. M. Gopala Reddy* 13 Mad LW 400 : (AIR 1921 Mad 213) are in consonance with this principle. There is also an unreported judgment of three judges of the Madras High Court containing the same principle in L.P.A. No. 207 of 1915 (Mad) and referred to in 13 Mad LW 400 : (AIR 1921 Mad 213). In *Kandaswami Mudaliar and Another Vs. Ponnuswami Mudaliar*, the cases decided

up to that date were referred to. A Division Bench consisting of Jackson and Ananthakrishna Ayyar JJ. accepted as correct the above mentioned doctrine.

31. Recently, a Division Bench of this Court in Venugopala Rao v. Hanumantha Rao AIR 1958 AP 541 expressed the opinion that there is nothing standing in the way of the mortgagor and the mortgagee agreeing that the latter should from a certain date hold possession of the mortgaged lands as an owner.

32. To a situation like this, the principle enunciated by the Judicial Committee of the Privy Council in *Corea v. Appuhamy* 1912 AC 230 is inapplicable. All that was laid down there was that possession was never considered adverse if it could be referred to a lawful title. What it means is that a mortgagor or a co-owner by his own acts could change the character of his possession, that has nothing to do with the situation like the present one, where the character of possession is altered by agreement between the parties or with their express consent. For these reasons, we hold that the possession of the defendants became hostile from the date of sale in 1920 to the mortgagor and the rights of the mortgagor if any, in the property had been extinguished. Consequently, the plaintiff could not redeem the property, the subject-matter of this appeal.

33. In the result, the second appeal fails and is dismissed with costs.