

(1985) 06 KL CK 0030
In the High Court Of Kerala
Case No : S.A. No. 554 of 1980

Thazhe Nelliullathil Chatti Avulla and Others	APPELLANT
Vs	
Ayatathil Karuvankandi Ammadkutty Haji and Others	RESPONDENT

Date of Decision : 17-06-1985

Acts Referred:

Kerala Agrlculturists Debt Relief Act, 1958 — Section 11
Limitation Act, 1963 — Article 62
Transfer of Property Act, 1882 — Section 58

Citation : AIR 1985 Ker 275

Hon'ble Judges : K.S. Paripoornan, J

Bench : Single Bench

Advocate : T.P. Kelu Nambiar, P.G. Rajagopalan and P. Devakikutty, for the Appellant; T.L. Viswanatha Iyer, P.S. Narayanan, S.R. Dayananda Prabhu, N. Subramoniam and P. Krishnan, for the Respondent

Judgement

K.S. Paripoornan, J.—Defendants 1 to 5, 7 and 8 in O. S. No. 104 of 1975, Munsiffs Court, Nadapuram, are the appellants. The legal representatives of the plaintiff and defendant 6 are the respondents in this appeal. The suit was filed for recovery of mortgage amount by sale of the mortgaged property. Defendant 1 executed Ext. A1 usufructuary mortgage to the plaintiff on 18-3-1952 for a consideration of Rs. 2000/-. On the same day by Ext. A2 the property was leased back to the mortgagor. Under Ext. A1 the amount is payable after a period of 12 years. It will be payable in 1964. In the meanwhile Act 31 of 1956 came into force. In view of the provisions of the said Act, Ext. A1 mortgage has to be deemed as a simple mortgage. The plaintiff is therefore entitled to sue for the mortgage amount. He can do so within 12 years from the date when the amount is due. The amount is due in 1964. The suit should be filed before 1976. The present suit was laid on 20-6-1975. The defendants contended that there was no consideration for the mortgage. A plea was also raised that the suit is barred by limitation. The trial Court held that the burden of proof to prove consideration is on the plaintiff. This has not been done. So, it was held that Ext. A1 mortgage

lacks consideration. The trial Court also held that under Article 62 Limitation Act, in order to enforce payment of the mortgage money the suit should be filed within 12 years from the date when the money sued for becomes due. In view of Act 31 of 1958, Ext. A1 mortgage should be deemed to be a simple mortgage from 18-4-1952. The money is due since then and the suit for recovery of the debt must have been filed in 1964. The suit filed in 1975 is barred by limitation.

2. The plaintiff filed an appeal before the Subordinate Judge's Court, Badagara. In A. S. 60 of 1978, by judgment dt. 28-3-1980 the learned Subordinate Judge held that the burden of proof is on defendant 1 to prove that Ext. A1 was not supported by consideration. He has miserably failed to prove the said plea. The trial Court cast the burden of proof on wrong shoulders and in holding that the bond is not supported by consideration. Regarding limitation, the lower appellate Court found that under Ext. A1 bond the amount is payable after a period of 12 years. The amount is due only in 1964. The suit could have been filed within 12 years thereafter. The suit filed in 1975, is within 12 years from the date when the amount is due. The suit must be held to be within time. The suit was decreed with costs.

3. Defendants 1 to 5, 7 and 8 have come up in Second Appeal. Three questions of law were formulated as substantial questions of law arising for consideration in the Second Appeal :

(i) Whether on the facts and circumstances of the case the suit is within time, especially in view of the nature of the transaction under the provisions of Kerala Act 31/58.

(ii) Whether the suit is maintainable in view of the provisions in Sections 72 and 127, Kerala Land Reforms Act; and

(iii) On the facts and circumstances of the case, on whom is the burden of proof relating to consideration?

4. When the appeal came up for arguments, appellants' counsel Mr. P.C. Rajagopalan, feebly raised the contention that Ext. A1 is without consideration. Counsel was not able to substantiate that the reasoning and conclusion of the lower appellate Court in this regard is in any way wrong. For very valid reasons, the lower appellate Court found that defendant 1 failed to discharge the burden of proof cast on him to substantiate his plea that Ext. A1 is without consideration. I find no error either in the reasoning or in the conclusion of the lower appellate Court in holding that Ext. A1 is supported by consideration.

5. The only other point stressed by appellants' counsel Mr. Rajagopalan was that the suit is barred by limitation. Counsel contended that Kerala Act 31 of 1958 (Agriculturists Debt Relief Act, Kerala) came into force on 14-7-1958. In view of Section 11(6)(a) of the Act, the mortgage shall be deemed to be a simple mortgage from the date of lease back. So, in this case even from the date of Ext. A1 it should be deemed to be a simple mortgage. At any rate, it should have

been held that the mortgage money became due on the date when Act 31 of 1958 came into force, i.e. on 14-7-1958. So, the last date for filing the suit is 14-7-1970. The instant suit filed on 20-6-1975 is barred by limitation. Counsel pressed into service the decision reported in *Devasy v. Malu* 1975 KLT 407 in support of the proposition that the mortgage amount became due on 14-7-1958.

6. On the other hand, counsel for the respondents contended that the plaintiffs, usufructuary mortgagee, could have remained in possession but for the intervention of Act 31 of 1958. Under Ext. A1 the mortgage amount is payable only after 12 years, i.e. on 18-3-1964. The suit for recovery of the mortgage amount filed within 12 years from the aforesaid date is within time. The relevant provisions of Act 31 of 1958 do not have the effect of totally nullifying or obliterating all the covenants contained in Ext. A1 mortgage. One such covenant that will not be nullified is that the mortgage amount is due or payable only after 12 years, i.e. on or after 18-3-1964. The decision in *Devasy v. Malu* 1975 KLT 407 does not lay down that in all cases the mortgage amount becomes due on the date of the coming into force of Act 31 of 1958, i.e. on 14-7-1958. That depends upon the terms of the particular mortgage. The decision in *Devasy's* case is distinguishable. He prayed for the dismissal of the appeal.

7. I find considerable force in the arguments of the respondents' counsel. Under Ext. A1 mortgage dt. 18-3-1952, the mortgage amount becomes due only after 12 years, i.e. on or after 18-3-1964. The suit is filed on 20-6-1975, within 12 years from the said date. It is prima facie within time. I am of the view that Section 11(6) of Act 31 of 1958 has not the effect of totally nullifying or obliterating Ext. A1 mortgage deed. At any rate, the period fixed in Ext. A1 mortgage deed will survive and will hold good even after Act 31 of 1958. As laid down by Janaki Amma, J. in *Devasy v. Malu* 1975 K LT 407 the words "from the date of the lease back" occurring in Section 11(6) of Act 31 " of 1958 can have reference only for the purpose of calculation of the quantum of the debt and have no application in computing the period of limitation. In the absence of a specific provision in the mortgage deed as to when the mortgage amount is payable, it may be or it could be said that the mortgagee could have sued for the mortgage money as a simple mortgagee as soon as it was so transformed by operation of the law, i.e. after the coming into force of the Act. That is the legal effect flowing from Section 11(6) of the Act. The provisions of Section 11 of Act 31 of 1958 cannot have any application in computing the period of limitation. In this view, the decision reported in *Devasy v. Malu* 1975 KLT 407 is distinguishable.

8. In this context, it is useful to bear in mind the following observations of the Division Bench of this Court in *Seethamma v. Kamala* 1980 KLT 755. Janaki Amma, J. delivering the judgment of the Bench observed as follows :

"It would appear that under the scheme of the Limitation Act, wherever there is the element of a loan and the relationship of debtor and creditor limitation starts from the date of the transaction in spite of the use of the words "on demand"

unless of course a definite date is fixed for payment. Even in cases where a period is fixed for payment the amount becomes due or payable on the expiry of the term and not from the date of demand. In the case of a mortgage where there is an undertaking to pay there is the element of a loan and the relationship of debtor and creditor. In such causes, unless there are words to connote a different intention, mere use of the words "on demand" is not sufficient to postpone the starting point of limitation."

The above observations have relevance in understanding the correct ratio of the decision in *Devasy v. Malu* 1975 KLT 407, as also the scope and effect of Ext. A1 in this case, notwithstanding Act 31 of 1958. In *Devasy's* case 1975 KLT 407, on the facts, the learned Judge construed, that though the mortgage amount was payable on demand, it should be construed as payable or due on the date when the mortgagee lost his right to possession of property on account of the intervention of the Statute. The mortgagee lost the property and became entitled to the sole right of working out his remedies personally against the mortgagor-action on the debt on the date when the Act came into force, though the mortgage deed specified that the mortgage amount is payable "on demand". That was the factual position in *Devasy's* case. That decision cannot apply herein. In this case, the mortgage deed itself provided a period of 12 years for payment of the debt and it was not one payable on demand.

9. In the light of the above, I hold that the judgment and decree of the lower appellate Court are justified in law. No interference is called for in the second appeal. The second appeal is without merit. It is dismissed with costs.