

(2010) 10 KL CK 0182

In the High Court Of Kerala

Case No : Regular Second Appeal No. 901 of 2005

Udayakumar and Others

APPELLANT

Vs

Rajaleshmi and Others

RESPONDENT

Date of Decision : 07-10-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144
Trusts Act, 1882 — Section 87, 90

Citation : (2010) 3 KLJ 549

Hon'ble Judges : S.S. Satheesachandran, J

Bench : Single Bench

Advocate : R.S. Kalkura, for the Appellant; L. Mohanan, M. Ramaswamy Pillai, P.M. Joseph and A. Chandrasekharan, for the Respondent

Judgement

S.S. Satheesachandran

1. Second appeal arises from the final decree and judgment passed in a suit for redemption namely OS No. 252/1974 on the file of the 3rd Additional Munsiff Court. Thiruvananthapuram. The case has a long chequered career and for the purpose of disposal of this appeal, it is unnecessary to advert to the factual basis of the claim raised by the plaintiff or the contentions advanced by the contesting defendants resisting the relief canvassed and also the disputes, which emanated therefrom for adjudication before the court. Suffice to state, the above suit, which was one for redemption, was jointly tried along with another suit, O.S. No. 593/1974 in which the plaintiff therein also set up a claim for redemption over the same property. Subject matter involved in both the suits is fifteen cents of land outstanding on a mortgage. The plaintiffs in the respective suits set up rival claims on the basis of their status as legal heirs of the mortgagor, who, had executed the mortgage deed over the property which was sought to be redeemed. During the course of the litigation, decrees were passed in the suits in favour of one or the other plaintiff, with appeals preferred thereto by the aggrieved party, and later such appeals disposed, setting aside the previous

judgment of the trial court and remitting the case for fresh consideration and disposal on merits. Since those disputes have been settled and sealed with finality by the judgment rendered by the apex court in C.A.No. 3115/1989 dated 11/02/1999, specific reference to the decrees granted from time to time or its reversal by the superior courts is quite unnecessary as indicated earlier for disposal of this appeal. However, after a preliminary decree in favour of the predecessor of the appellants, the plaintiff in O.S.No. 593/1974, was passed by the trial court, after the case being remanded to that court setting aside its previous judgment, and the decree so granted confirmed by the lower appellate court, while second appeals against the decisions rendered in the two suits were pending consideration before this court at the instance of the plaintiff in O.S. No. 252/1974, the predecessor of the present appellants moved for passing of a final decree and that decree being passed, ultimately, the mortgaged property was redeemed in execution and delivery of the property effected in his favour. But the second appeals arising from the decree dismissing O.S. No. 252/1974, and preliminary decree passed in 593/1974 were ultimately decided in favour of the plaintiff decreeing his suit O.S. No. 252/1974, and the other, O.S. No. 593/1974, reversing the judgments of the courts below, was dismissed. As against the common judgment rendered in the two second appeals, the predecessor of the present appellants preferred the above stated civil appeals before the apex court and those appeals as already stated were dismissed. Now, the question posed for consideration in the present appeal is the validity, legality and correctness of the final decree passed in favour of the plaintiff in O.S. No. 252/1974 by the trial court after a preliminary decree was passed in the second appeal as aforesaid, which was later confirmed by the decision of the apex court. Pending the second appeal, the plaintiff in O.S. No. 593/1974, by virtue of the decree passed by the lower courts allowing redemption of the mortgage property in his favour, as already stated, had redeemed that property. So much so, when the plaintiff in O.S. No. 252/1974 applied for passing of the final decree, it was contended by the present appellants that since the property had already been redeemed by the decree passed earlier in O.S. No. 593/1974 nothing more survived for consideration and so much so, no decree as sought for could be passed. Negating that contention, the trial court has passed the final decree in favour of the present respondents 1 to 6, who claim under the plaintiffs in the above suit (O.S. No. 252/1974). That decree was confirmed by the lower appellate court negating the challenges raised in appeal by the present appellants. Concurrent decision so rendered by the courts below that despite redemption of the property in execution of a decree by the present appellants in O.S. No. 593/1974, still, the respondents 1 to 6, the successors, in interest of O.S. No. 252/1974 are entitled to get a final decree passed in their favour for redeeming the property, is challenged in this second appeal.

2. I heard the counsel on both sides. In the suit for redemption (O.S. No. 593/1974), after deposit of the mortgage price, through the court the property had already been delivered over to the appellants and hence passing of a final

decree empowering the respondents 1 to 6 to redeem such property when no more mortgage subsisted for redemption is wholly irregular and unsustainable is the submission of the learned counsel for the appellants. On the other hand, the learned counsel appearing for the respondents relying on Section 87 and 90 of the Indian Trusts Act, 1882, contended that in the given facts of the case, at best, the redemption of the mortgage property by the appellants on the basis of the decree passed in O.S. No. 593/1974 by the court, which, later, was set aside, would entitle such appellants to retain such property only as a security and on behalf of the successful party, in whose favour, after final adjudication, a decree for redemption was passed by the court. The position of the appellants, at the most, is only that of a debtor who got the security in his favour from the mortgagee and he can retain it only for the benefit of the creditor, the successful party in the suit, the respondents 1 to 6, who claim under the plaintiffs in O.S. No. 252/1974, in whose favour a decree for redemption was finally granted by the court, submits the counsel.

3. Having regard to the submissions made and the facts and circumstances presented in the case, I find, the question to be examined whether a party to a suit obtaining a wrongful gain under an erroneous order of the court, after such order had been set aside by the superior forum, can resist the successful party in the litigation from having the benefits of the decree granted in his favour. No doubt, the principles of restitution covered by Section 144 of the CPC apply with full force in such circumstances. Irrespective of the question whether after redemption of the property by the appellants on deposit of the mortgage price and whether or not any mortgage remain to be redeemed, the vital and most significant question involved is whether on the basis of the wrongful order passed by the court the benefit obtained by the appellants, to the peril of the successful party in the litigation could be protected. The maxim "*actus curiae neminem gravavit*" (the act of court shall prejudice no man) needs no illustration. The decree by which the appellants got redemption of the property is shown to be wrong and it was ultimately set aside in the second appeal by this court. That presupposes that the decree by which the appellants obtained delivery of the property was found to be erroneous and unsustainable. The gain obtained by the appellants on the basis of such wrongful decree passed by the court by no stretch of imagination should cause any prejudice or injury to the successful party, respondents 1 to 6, who have been later found entitled to get redemption of the suit property. The apex court in *South Eastern Coalfields Ltd. Vs. State of M.P. and Others*, has held thus:

Section 144 of the C.P.C. is not the fountain source of restitution; it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the Court has inherent jurisdiction to order restitution so as to do complete justice between the parties.

4. So, away from the rule of Section 144 of the C.P.C. where it has been brought to the notice of the court that by virtue of a wrongful order passed by the court,

a prejudice or injury has been caused to one of the parties and wrongful gain to another party, it is the duty of the court to undo that wrong. That is the mandate demanded by justice, equity and fair play, for which the court as the temple of justice exist. In Lal Bhagwant Singh Vs. Rai Sahib Lala Sri Kishen Das, , the apex court considering the ambit and scope of Section 144 of the C.P.C. has held thus:

The doctrine of restitution is that on the reversal of a judgment the law arises an obligation on the party to the record, who received the benefit of the erroneous judgment, to make restitution to the other party for what he had lost and it is the duty of the Court to enforce that obligation unless it is shown that restitution would be clearly contrary to the interests of justice.

5. In the present case, the respondents 1 to 6 have not hitherto applied for restitution on the basis of the decree passed in the second appeal as confirmed by the apex court despite the redemption of the property by the appellants makes no difference at all as indicated earlier since it is the duty of the court to undo the wrongful gain obtained by the appellants on the basis of the erroneous decree passed by the court, which was later set aside. On the facts and circumstances presented in the case, it is crystal clear after the passing of the final decree nothing more remain to be done by the mortgagee as the property had been redeemed and delivered over to the appellants by the court on the basis of a previous decree passed in his favour which was subsequently set aside in appeal. It is shown that the predecessor of the appellant had got herself impleaded as additional 4th defendant in O.S.No. 252/1974, the final decree of which is now impeached in this appeal and so much so, he is a party to the suit. What remains to be done is only the restitution of the property which was outstanding on mortgage and redeemed by the 4th respondent in execution of the final decree in favour of respondents 1 to 6 in the present appeal. This court, while disposing of the second appeals S.A. No. 924/1982 and 931/1982 by judgment dated 30/08/1988 has ordered that the trial court will work out further details at the time of passing of the final decree. But it is noticed that despite the contention raised by the present appellants as to the redemption of the property by virtue of the decree in their suit, which was later set aside, while passing the final decree the trial court failed to invoke Section 144 of the Code to the case, for passing appropriate orders in moulding the relief. So much so, having regard to the fundamentals covering the applicability of Section 144 of the Code and also that even away from Section 144, the court has inherent jurisdiction to order restitution to do complete justice to the party, it is ordered that the respondents 1 to 6 will be entitled to have delivery of the property from the appellants in execution of the final decree subject to the payment of the mortgage price which is, admittedly, under deposit before the court. Final decree of the court shall stand modified as indicated above. Respondents 9 to 11 are stated to be the tenants in occupation of five cents of property not covered by the mortgage property. The learned counsel for the respondents raised an apprehension that under the decree for redemption their occupation is under threat of eviction, though they have been unnecessarily impleaded in the suit.

The learned counsel appearing for respondents 1 to 6 submits that the five cents of property in which the above respondents are in occupation is not covered by the mortgage and as such under the decree, their rights of tenancy is no way impaired though such tenancy is subject to termination as per the provisions of law. It is conceded by the appellants and respondents 1 to 6 that respondents 9 to 11 were unnecessary parties to the suit for redemption and their tenancy claim over the buildings in occupation is not, in any way covered by the adjudication involved in the suit. Submission made as above is recorded, which, no doubt, is sufficient to allay the apprehension expressed by the counsel for respondents 9 to 11.

Appeal is disposed as indicated above directing both parties to suffer their cost.