(1923) 09 MAD CK 0036

In the Madras High Court

V.A. Subba Row APPELLANT

Vs

Ponnammai Nadathi alias Pakkiammai Nadathi (Dead) and Others RESPONDENT

Date of Decision : 13-09-1923

Acts Referred:
Transfer of Property Act, 1882 — Section 83

Citation : 80 Ind. Cas. 363 : (1924) 19 LW 294

Hon'ble Judges : Waller, J;Kumaraswamy Sastri, J

Bench : Division Bench

Judgement

1. This Second Appeal arises out of a suit by appellant to redeem a mortgage executed by him in favour of the husband of the 1st defendant who died leaving the 1st defendant, his widow, and defendants Nos. 2 and 3 his minor daughters. The first defendant in 1909 and after her husband''s death sub-mortgaged the property and the 4th defendant claims to he entitled to the amount due on the sub-mortgage. The contention of defendants Nos. 1 to 3 is that the sub-mortgage originally created by the 1st defendant was a nominal transaction. The District Munsif found that the sub-mortgage was a genuine transaction supported by consideration but the Subordinate Judge on appeal reversed the decree on this point. In 1917 the appellant filed O.P. No. 33 of 1917 and deposited in Court the amount due on the mortgage. It is not disputed that the amount deposited was the amount legally payable on the mortgage. He seems to have stated that there was a sub-mortgage and that the 4th defendant claimed under it. Notice was issued to defendants Nos. 1 to 3 and to the 4th defendant that the sub-mortgage was nominal and that the 4th defendant was not entitled to any portion of the money deposited in Court, the money was not paid to anybody but remained in Court. It was after decree in the suit (O.S. No. 515 of 1917) ordered to be paid out by the District Munsif to the 4th defendant who drew this sum.

2. The first question is whether the deposit made under the provisions of Section 83 of the Transfer of Property Act in O.P. No. 33 of 1917 was a proper one.

Section 83 of the Act enacts that a mortgagor may, at any time before a suit for redemption is barred, deposit in a Court having jurisdiction to the account of the mortgagee the amount remaining due on the mortgage. There can be little doubt that the word mortgagee includes the legal representatives and assigns of the mortgagee. It is argued that a sub-mortgagee is not an assign and that a deposit of the money as payable both to the legal representatives and the sub-mortgagee is not a proper deposit.

3. We are unable to uphold this contention, Fisher in his Law of Mortgage observes "Mortgages are frequently transferred by way of sub mortgage. In that case the sub-mortgage is a compound mortgage consisting of a mortgage of a chose in action, (viz., the original mortgage debt) and of the property which is security for the original mortgage debt." In cases of suits where there is a sub-mortgage the decree has to direct an account of what is due on the original mortgage and of what is due on the sub-mortgage and payment of what is due on the sub-mortgage not exeeding the sum due on the original mortgage and the residue, if any, to the original mortgagee. Form No. 9, Appendix D to the CPC refers to suits by a sub-mortgagee against the original mortgagor and mortgagee and shows that an account has to be taken on the above footing. Ghose in his work on the law of mortgage in India observes "Debts secured by mortgage are also frequently assigned by way of security. Such transactions are known as sub-mortgages and may be evidenced merely by a deposit of title deeds. The sub-mortgagee by virtue of the assignment is not only entitled to the usual remedies against his own mortgagor but also against the original mortgagor." It is clear that a claim by a sub-mortgagee against the original mortgagor cannot be met by a plea of want of privity as the sub-mortgage is only an assignment of the original mortgagee''s rights. Where the sub-mortgage is for an amount equal to or in excess of the original mortgage-debt it will operate as a complete assignment, and if for any lesser sum, as an assignment pro tanto.

4. We have not been referred to any case where a deposit in Court u/s 83 of the Transfer of Property Act has been held to be bad owing to the assignee of the mortgage being stated as the person entitled to the money. Where a person having notice of an assignment pays the money into the Court and names only the original mortgagee who has parted with his rights as the person entitled to receive the sum deposited we do not see how he can if the money is taken away resist a suit by the assignee of the mortgage before such deposit; (See Narayana Mudali v. Baghavammal 18 M.L.J. 462. A sub-mortgagee will be a necessary party to a suit for redemption and we think that a deposit will not be bad merely because the petition states the persons entitled on the original and sub-mortgages and the Court issues notices to them. The case will of course be different if the mortgagor alleges claims of persons not the legal representatives or assings of the mortgagee for the purpose of seeing that the money is not drawn out or of supporting the case of persons with no title.

5. We do not think that Madhavi Amma v. Kunhi Puthamma 28 M. 510 : 8 Ind.

Dec. 768 and Debendra Mohan Roy v. Sona Kunwar 26 A. 291 : A.W.N. (1901) 21 : 1 A.L.J. 5 referred to by the respondent apply to the case of sub-mortgages. They were oases where strangers having no right in the mortgage were mentioned as persons entitled to the money deposited.

6. The fact that the mortgagee and sub-mortgagee have disputes inter se either as to the validity of the sub-mortgage or the amount due thereunder will not affect the mortgagor. Where the fact of a sub-mortgage is not disputed it is no part of the business of the mortgagor to decide whether the sub-mortgage is real or nominal. In the case of legal representatives it has been held in Nagathal v. Arumugam Pillai 79 Ind. Cas. 40 : 44 M.L.J. 362 : 17 L.W. 154 : 82 M.L.T. 371 : AIR (1923) (M) 354 that any dispute that may arise between the heirs as to their shares will not affect the mortgagor making the deposit and we can see no reason why a similar rule should not apply where disputes arise as to the right to the money between the mortgagee and the sub-mortgagee from him. A person executing a sub-mortgage and giving an apparent title should not cast on the mortgagor a stranger the duty of deciding who is entitled. To hold otherwise would in effect deprive the mortgagor of the rights given to him by Section 83 where a mortgagee disputes the effect of his own act in executing a document which on the face of it creates rights in another to the mortgage money.

7. We are of opinion that a sub-mortgage is an assignment of the mortgage and that having regard to the remedies of the sub mortgagee a deposit in Court does not contravene the provisions of Section 83 of the Transfer of Property Act merely by reason of the fact that the mortgagor recites the sub-mortgage in his petition and the Court directs notice to issue and the money is owing to disputes between the mortgagee and his sub-mortgagee, not paid out.

8. The next question is as to the liability of the defendants for mesne profits. The 2nd and 3rd defendants are minor daughters and they cannot be liable for mesne profits owing to any wrongful act of their mother; so far as the 1st and 4th defendants are concerned it is immaterial to the plaintiff whether the 1st defendant continued in possession or parted with it to somebody else. 1st defendant died pending Second Appeal and her Legal representatives are brought on record. If she created a sub-mortgage it was her duty to get back possession and hand it over to the mortgagor. The 1st defendant is found by the Subordinate Judge to be in possession. So far as the rate of mesne profits is concerned there is no dispute. We think that defendants Nos. 2 and 3 as legal representatives of the 1st defendant and out of her assets and 4 are jointly liable to pay the amount decreed for the mesne profits.

9. As regards the amount deposited in Court in O.P. No. 33 of 1917 which has been drawn by 4th defendant we think that on the findings of the Subordinate Judge the 4th defendant is liable to pay the sum to the 1st defendant. As we hold that the deposit was valid there is no reason why the plaintiff should pay the sum over again. There will be a decree in favour of the 1st defendant against the 4th defendant for recovery of the amount drawn by him.

10. The decree of the Subordinate Judge will be modified as decided above. As the appellant has succeeded in all the grounds urged respondents No. 1 and 4 will pay his coats of the appeal and in the Courts below.

