Kalaperumal Nadar Michael Nadar Vs Ulakudayaperumal Subramonia Nadar

Court: High Court Of Kerala

Date of Decision: Sept. 27, 1954

Acts Referred: Transfer of Property Act, 1882 â€" Section 61

Citation: AIR 1954 Ker 232

Hon'ble Judges: T.K. Joseph, J

Bench: Single Bench

Advocate: M.P. Ramakrishna Pillai, for the Appellant; T.S. Krishnamurthy Iyer, for the Respondent

Final Decision: Allowed

Judgement

T.K. Joseph, J.
This second appeal arises out of a suit for redemption of one of three properties mortgaged by one Nesakannu Nadar in

favour of defendants 1 and 2 for 3,300 fanams. The equity of redemption was sold in connection of a decree against the mortgagor and the plaintiff

acquired the same from a vendee of the auction-purchaser. Though the plaintiff sought redemption of only one item of property, he offered to pay

the entire mortgage amount of 3,300 fanams. The defence contention so far as it is relevant for this second appeal is that the suit is bad as one for

partial redemption as the defendants are entitled to consolidate three later purakkadoms with the mortgage sought to be redeemed.

The three purakkadoms are Exs. II to IV which were Executed by the mortgagor in their favour in 1118 and 1119 and these cover all the three

items included in the original mortgage. The trial court overruled this contention and granted a decree to the plaintiff allowing redemption of the

plaint property on payment of 3,300 fanams together with a sum of Rs. 109-7-8 as compensation for improvements effected by the defendant. On

appeal, the decree was reversed and the suit was dismissed on the ground that the plaintiff was bound to redeem Exs. II to IV along with the

mortgage. The plaintiff has preferred this second appeal from the decree of the lower appellate court.

2. As the plaintiff has offered to pay the entire sum of 3,300 fanams due under the mortgage the defendants do not now object on the ground that

the two other properties covered by the mortgage should also have been redeemed. So the only point arising for decision is whether the suit is bad

as one for redemption of the mortgage without payment of the amount due under the three purakkadoms or in other words whether the defendants

are entitled to consolidate the purakkadoms and the mortgage. Exs. II to IV provide that the same are to be redeemed along with the earlier

mortgage. It was held by a Bench of this court in - ''P. Neelakantan v. U. Lakshmi Pillal'', AIR 1952 TC 295 (A).

The Travancore law on the subject always remained untrammelled by any provision of the Transfer of Property Act and in jurisdictions where the

said Act was introduced before S. 61 thereof was amended by Act 20 of 1929 in cases where there were two encumbrances on the same

property the mortgagor was not entitled to redeem the one without redeeming the other.

Their Lordships followed a decision of the Travancore High Court in - ''Bhaskaran Moothathu v. Agnisaranaru Namboori'', 1946 Trav LR 546

(B). Normally this contention of the respondents should prevail. It was however contended on behalf of the appellant that there was no scope for

applying this principle to the facts of this case because the three purakkadoms were executed after the mortgagor lost the equity of redemption

over the plaint item by the court sale in execution of the decree against him. The following extract from Mulla''s Transfer of Property Act supports

this argument.

The equity of consolidation does not apply where the equity of redemption of one property was assigned before the mortgage of the other and

there is no right of consolidation unless the right arose before the severances of the equities of redemption, (1949 Edn. p. 430).

The equity of redemption of the plaint property belonged to the plaintiff and not to the mortgagor at the time the latter executed the three

purakkadoms. The plaintiff was therefore in the position of a co-mortgagor at that time. One mortgagor cannot by executing a tacking mortgage

affect the rights of his co-mortgagors to redeem. I am in respectful agreement with this view held in - ''Tokhan Pandey v. Sivakanta Prosad Singh'',

AIR 1920 Pat 66 (C); - Tarkeshwar Vs. Kalka Pathak and Others, and - ''Kanak Singh v. Gajraj Singh'', AIR 1936 Oudh 202 (E). The

mortgagor was incompetent to execute the tacking mortgages after he lost the equity of redemption in respect of one of the properties. Defendants

1 and 2 are not therefore entitled to compel the plaintiff to redeem the purakkadoms along with the mortgage. The ground on which the suit was

dismissed by the lower appellate court is not correct and the decree has to be set aside.

3. In the result, in reversal of the decree of the lower appellate court the decree of the trial court is restored and the second appeal is allowed. The

appellant will get his costs throughout from the respondent.