

Varki Chacko Vs. Ouseph Pramena

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Court : Kerala

Decided On : Dec-05-1956

Reported in : AIR1957Ker48

Judge : Sankaran and; T.K. Joseph, JJ.

Acts : [Transfer of Property, 1882](#) - Sections 52, 60 and 67; ;[Code of Civil Procedure \(CPC\), 1908](#) - Sections 11 - Order 34, Rule 1; Limitation Act, 1908 - Schedule - Articles 142 to 144; [Evidence Act, 1872](#) - Sections 115

Appeal No. : A.S. No. 583 of 1954

Appellant : Varki Chacko

Respondent : Ouseph Pramena

Advocate for Def. : T.S. Krishnamurthy Iyer, Adv.

Advocate for Pet/Ap. : M.T. Paikaday, Adv.

Judgement :

I.K. Joseph, J.

1. This appeal arises out of a suit by the representatives of a prior mortgagee-auction-purchaser for recovery of possession of mortgaged property from the representative of the puisne mortgagee-auction-purchaser, on payment of the mortgage money. The facts necessary for the decision of the appeal may be briefly stated.

2. The property which is the subject-matter of the suit belonged to one Mathen Augusthy of Pulickal. On 20-3-1088 he executed a simple mortgage in favour of one Chandy Devasia who sued on it in O. S. No. 234 of 1099 and obtained a decree (Ext. B) on 18-4-1099. In execution of the decree he purchased the property on 21-10-1101 and then transferred the same under Ext. AA dated 26-2-1102 to one. Mathoo Mathai who obtained a record of delivery (Ext. C) dated 27-3-1103. At the time of institution of that: suit there were three later mortgages one of which was a usufructuary mortgage (Ext. H) dated 22-9-1093 in favour of one Mathoo Devasia who had sub-mortgaged the same on 20-7-1095.

As the usufructuary mortgagee was not a party to O. S. No. 234 of 1099, Mathoo Matbai could not get effective physical possession under Ext. C. The other two mortgages were two sknple mortgages of 1092 and 1095 in favour of one Narayana Iyer, charging the plaint property and another, Narayana Iyer instituted a suit, O. S. No. 150 of 1101 against Mathen Augusthy the mortgagor and Mathoo Devassia the usufructuary mortgagee, and obtained a decree, copy of which has been produced as Ext. V. He purchased the plaint property and the other item in execution of his decree on 12-3-1103 and then assigned tho same to the first defendant, Ext. Q is copy of the sale certificate and' Ext, R the assignment deed to the first defendant. The first defendant obtained a record of delivery (Ext. VIII) on 30-6-1106.

In the meanwhile Kuruvilla Ouseph in whom the sub-mortgage right vested had sued in O. S. No. 507 of 1103

for recovery of the amount due to him. The defendants in that suit were Mathoo Devassia the mortgagee and Mathoo Mathai, who had purchased the auction right in O. S. 234 of 1099. He obtained a decree (Ext. XII) and in execution, he purchased the mortgage right of Mathoo Devassia on 9-10-1105. Mathoo Devassia surrendered possession to Kuruvilla Ouseph on 8-3-1106 under a deed, Ext. XIV, and the latter transferred his rights to the first defendant on 23-11-1108 under Ext. XIII. By taking Ext. XIII, the first defendant who had obtained the puisne mortgagee's auction right perfected the possession obtained under Ext. VIII.

It is necessary to refer briefly to certain legal actions between Mathoo Mathai, who claimed title and possession under the first mortgage, and the first defendant and his predecessors. The earliest of these was a suit, O. S. No. 543 of 1103, filed on 6-8-1103 by Mathoo Mathai against Mathen Augusthy and Mathoo Devassia alleging that they had trespassed into the property. Ext. D is copy of the plaint and Ext. E the written statement of Mathoo Devrtssia in that suit. A decree was obtained by Mathoo Mathai and Ext. F is copy of the same. In execution of the said decree he obtained another record of delivery (Ext. G) dated 17-3-1106. Mathoo Mathai then filed a criminal complaint against the first defendant alleging trespass, but this was dismissed.

Thereafter, he conveyed his rights to Thommen Ouseph, grandfather of the plaintiffs-respondents, under Ext. A dated 7-9-1107. Thommen Ouseph instituted a suit as O. S. No. 166 of 1118 for declaration of his title and recovery of possession of the property from the first defendant; Though he obtained a decree in the original Court, the same was reversed by the High Court of Travancore in A. S. No. 77 of 1122. Ext. XIX is copy of the appellate Judgment. In dismissing the suit the High Court observed that the rights between the parties who were representatives of successive mortgagees who had obtained decrees without impleading each other and had purchased the property in execution of their respective decrees should be worked out in appropriate proceedings and further Indicated that the appropriate remedy would be a suit for redemption of the puisne mortgages.

This suit has accordingly been brought for redemption of the puisne mortgages on the strength of the title under the Court sale in execution of the decree on the earliest of the mortgages.

3. The first defendant contested. His main contentions were that the assignment (Ext. AA) taken by Mathoo Mathai was benami for his brother Mathor). Devassia, the mortgagee under Ext. H, that the rights obtained by the latter were extinguished by the sale in execution of Narayana Iyer's decree, that Mathoo Mathai never had possession, that the decree and execution proceedings in O. S. No. 543 of 1103 were collusive, that the present suit was barred by res judicata by reason of the decision in O. S. No. 16G of 1118, that the suit was also barred by limitation and adverse possession and that in the event of redemption he was entitled to a sum of Rs. 7,000 as compensation for improvements effected on the property.

4. The Court below held that the suit was maintainable, that it was not barred by res judicata, limitation or adverse possession, and that the plaintiffs were entitled to recover possession of the property on payment of the proportionate amount under the puisne mortgages and value of improvements. Accordingly, a preliminary decree was passed allowing redemption. The first defendant has preferred this appeal from the said decree.

5. The first point urged on behalf of the appellant was that Mathoo Mathai under whom the plaintiffs claim was only a bcnarnidar of his brother Mathoo Devassia and that the latter being a party to Narayana Iyer's suit, the sale in execution of that decree extinguished his rights under the prior mortgage. Reliance was placed on the fact that in the suit filed by the grandfather of the plaintiffs the appellate Court held that Mathoo Mathai was only a benamidar for his brother Mathoo Devassia. It was contended that Ext. XIX operated as res judicata so far as this point was concerned. The learned Judge did not accept this plea on the ground that the point did not, substantially arise in the former suit.

We are unable to appreciate the reasons given by the learned Judge. Learned counsel for the respondents did not seriously attempt to support this finding. It has to be stated that the former suit based on identical title was resisted by the first defendant on the ground that Mathoo Mathai was only a benamidar and that Mathoo

Devasia, the real owner, was bound by the sale in Narayana Iyer's suit. The appellate Court upheld this contention. The learned Judge was not right in characterising this finding as a 'halting' one. We uphold the plea of *res judicata* raised by the first defendant.

6. The appellant cannot, however, succeed on the strength of this finding because even if Mathoo Devasia was the real owner, he acquired the rights under the earlier Court sale only long after the decree was passed in Narayana Iyer's suit. The decree (Ext. V) was passed on 13-3-1101. Ext AA, the assignment deed, was on 26-2-1102. In fact, the Court sale in the earlier suit on the earlier mortgage was held only on 21-10-1101.

It is seen from Ext. V that Mathoo Devasia was impleaded in that suit only as a mortgagee in possession. On the date of the suit the rights under the earlier Court sale vested in Chandy Devasia and he was not a party to Ext. V. The rights obtained by him under the Court sale could not therefore be affected by the sale in execution of Narayana Iyer's decree. Sri Paikaday, learned counsel for the appellant, fairly conceded that in view of the facts stated above, the finding on the question of *res judicata* could not be of any assistance in deciding this suit.

However, another argument was advanced by him, that Mathoo Devasia was bound to put forward his claims under Ext. AA at least when the property was sold in execution of the decree (Ext. V) and that having failed to do so, he was estopped from relying on Ext. AA. We are unable to accept this argument. The plea of estoppel was not taken either in the pleadings or in the memorandum of appeal.

There is no evidence that Narayana Iyer was induced to alter his position to his prejudice by the alleged omission of Mathoo Devasia to plead his claim under Ext. AA. Narayana Iyer was not bound to implead the earlier mortgagee in the suit, and he could not implead him after the suit was decreed. The plea of estoppel must therefore be over-ruled.

7. The question on which decision is called for is comparatively simple. Successive mortgagees sued for sale of the mortgaged property without impleading each other in their respective suits. The prior mortgagee instituted the suit earlier and his purchase in execution is also earlier in point of time.

So far as the High Court of Travancore is concerned, there were some conflicting decisions regarding the respective rights of, such rival purchasers but the dispute was finally set at rest by the decision of a Full Bench of five judges in *E. Varghese v. K. Sanku*, 29 Trav LJ 263 (A), which held that the earlier purchaser had the right to redeem the later mortgage in such a case. This was the view held by the High Court of Cochin also as seen from the decision in *George v. Raghava Menon*, 39 Cochin LR 430 (B).

The High Court of Madras has also adopted this view -- see *Chimnaswami Padayachi v. Darmalinga Padayachi*, AIR 1932 Mad 566 (C); *Nagendra Chettiar v. Lekshmi Ammal*, AIR 1933 Mad 583 (FB) (D) and *Bogi Arjisah v. Kanniappa Mudaliar*, AIR 1954 Mad 266 (E). The High Court of Travancore-Cochin followed this view at least in two reported decisions, *Pyli v. Jacob*, 1951 Ker LT 198: (A1B 1951 Trav-C 36) (F) and *U. Chacko v. Raman Pillai*, 1953 Ker LT 695: (AIR 1953 Trav-C 554) (G). Thus it can be seen that so far as the three component parts of this State are concerned the same view was being uniformly followed.

We make this observation because Sri Paikaday argued that this Court was not bound to follow the decisions of the High Courts of Travancore, Cochin or Travancore-Cochin. Sri Paikaday wanted us to re-consider these decisions on the ground that the view, taken on the question of *lis pendens* in 29 Trav LJ' 263 (A), was not in conformity with the view held by the majority of judges in *Ram Sanehi Lal v. Janki Prasad*, AIR 1931 All 466 (H). He also brought to our notice the decision of Pal, J., in *Md. Jmnan Mia v. Akali Mudiani*, ATR 1943 Cal 577 (I).

It may be stated that the view taken by the High Courts of Travancore, Cochin, Madras and Travancore-Cochin on the question of *lis pendens* is the one taken by Mukherji, J., in AIR 1931 AH 466 (FB) (II). It is that the rule of *lis pendens* applies only to transfers by the plaintiff or defendant of their respective interests after the suit including transfers by court sale in money decrees against either party and that it does not apply to previously

existing transfers including mortgages or legal proceedings to enforce such mortgages by those entitled.

We do not consider it necessary, or proper to depart from this view. In this connection we may state that the view of Sulaimian, C. J., and the other learned Judges who concurred with him on the first question raised in AIR 1931 All 466 (H), is sufficient to dispose of this case.

The question was 'whether the auction-purchaser in execution of a decree obtained on a prior mortgage without impleading the subsequent mortgagee acquires at least the rights of the mortgagor who was a party including his rights to possession in cases where both the mortgages were simple'. The answer to this question is given- in the following terms.

'1. (A). If (he purchaser in execution of the prior mortgagee's decree is not in possession and is suing as plaintiff the purchaser in execution of the subsequent mortgagee's decree, -

(a) he can enforce his remedy, if limitation on the prior mortgage has not yet run out, but

(b) he cannot recover the mortgage money, if limitation has run out.

(B) (a) If he was the earlier purchaser in point of time, he can redeem the second mortgage and recover possession, even though the prior mortgage is barred by time.

(b) But if he was the later purchaser in point of time then his suit even on redemption cannot be decreed,"

So far as this case is concerned the prior mortgagee's suit was the earlier one and the sale in execution of the decree in the prior mortgagee's suit was earlier in point of time and he is therefore entitled to redeem the puisne mortgage. This is the view taken by the lower Court, and we affirm the same.

8. Sri Paikaday raised yet another - point, namely, that the suit was barred by limitation and adverse possession. No question of limitation can arise here as the suit is one for redemption and not one in ejectment. There is no force in the contention based on adverse possession either. The possession that the first defendant got is from the mortgagee, Devasia, who surrendered possession to the first defendant's predecessor under Ext. XIV. That mortgage is also sought to be redeemed here, and as possession of the first defendant is merely that of a mortgagee, no question of adverse possession can arise.

9. As the appellant is not entitled to succeed on the points raised here, the appeal must fail.

10. The plaintiffs-respondents have filed a memorandum of objections. The first point raised is that the Court below erred in directing the plaintiffs to pay the whole amount covered by the decree in O. S. No. 507 of 1103 which is the decree obtained by the sub-mortgagee. According to the respondents they are liable to pay only the amount covered by the mortgage, Ext. H. It is stated by the learned Judge that this point was given up at the time of final hearing. The difference was only a sum of about Rs. 12 and this apparently was the reason why the point was not pressed in the lower Court.

We do not feel that in these circumstances interference is called for on this point. The other point relates to the question of costs. Plaintiffs were directed to pay the costs of the first defendant and to bear their own. We do not feel justified in interfering with the discretion exercised by the learned Judge.

11. In the result, the decree of the Court below is confirmed and the appeal and memorandum of objections are both dismissed with costs.