

Ayyan Govindan and ors. Vs. Ayyan Kunjan

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Court : Kerala

Decided On : Jan-10-1964

Reported in : AIR1964Ker309

Judge : S. Velu Pillai, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 1, Rule 9 - Order 34, Rule 1

Appeal No. : Second Appeal No. 298 of 1960

Appellant : Ayyan Govindan and ors.

Respondent : Ayyan Kunjan

Advocate for Def. : S. Nilakanta Iyer and; P.N. Rajan, Advs.

Advocate for Pet/Ap. : G. Viswanatha Iyer, Adv.

Disposition : Appeal allowed

Judgement :

S. Velu Pillai, J.

1. The suit property which is the subject of the mortgage in suit is the western half of a property, 1 acre and 3 cents in extent. The mortgage was by Kali Aiyar and Chadayan Kunjart, being Ex. C of the year 1093; it was followed by a purakadom by Chadayan Kunjan, being Ex. E of the year 1096. The, right under Exs. C and E

became vested in one Velu by assignment Ex. I. Velu leased the property to one Kochuraman and afterwards by Ex. A to the first plaintiff with direction to redeem Kochuraman. Kochuraman was redeemed. Velu transferred his mortgage right in the property to the defendant who filed a suit O. S. 569 of 1952 against the first plaintiff for recovery of possession and obtained a decree. That decree was not executed. The four plaintiffs who are the children of Kali Aiyan have instituted the suit out of which this second appeal arises, for redemption of Exs. C and E on payment of the amount due to the defendant. The defendant pleaded that there was a partition between Kali Aiyan's heirs and Chadayan Kunjan under which the mortgaged property fell wholly to the share of the latter, and that therefore the plaintiffs have no right to redeem. The Subordinate Judge has found against the partition so pleaded and has also found that one-half of the property belonged to Kali Aiyan in these words:

'It is clear from Exs. C and E that only one-half of the plaint property belonged to Kali Aiyan.'

But he dismissed the suit on the ground that Chadayan Kunjan's heirs are not parties to the suit. Incidentally the Judge recorded a finding in these terms also:

'So the lower court's finding that the plaintiffs have not proved that they are the owners of the equity of redemption is correct.'

This in terms does not follow from his reasoning. Having held earlier that the partition set up by the defendant is not proved, it followed as a matter of course, that the plaintiffs as heirs of Kali Aiyan are entitled to a half share of the equity of redemption. As co-mortgager the plaintiffs have a right to redeem the whole mortgage.

2. As I understand the judgment of the Subordinate Judge, his view seems to be, that without the heir of the other-co-mortgager on record, no decree for redemption could be passed. Under Section 91 of the Transfer of Property Act, a co-mortgager is a person entitled to redeem the mortgage, but it is prescribed by Order 34, Rule 1, C. P. C. that all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any

suit relating to the mortgage. In this view, the other co-mortgagor also is a necessary party to the suit. But the question to determine is whether in his absence, a decree could not be granted to the mortgagor who sues for redemption. In this case learned counsel for the plaintiffs have also taken the point, that the objection as to nonjoinder not now open to the defendant, not having set up the objection at an early stage as laid down by Order 1. Rule 9 C. P. C., his case being only that the plaintiffs have no right to redeem. However that be, it has been held in *Bansidhar Pandey v. Masuden Singh*, AIR 1962, Pat 191 that the true test for deciding the point is, whether the rights of the parties on the record can be fully determined in the absence of the other co-mortgagor and whether that determination can be made so as not to affect the rights of the absent party. Following an earlier decision of the same court in *Mt. Rai Mohni Debt v. Harihar Mahton*, AIR 1958 Pat 67 it was held, that one of the fractional owners of the equity of redemption may sue to redeem the whole mortgage and the suit is not liable to be dismissed for non-joinder of the other co-mortgagors. In the present case, as the owner of the half share of the equity of redemption the plaintiffs can be allowed to redeem the mortgage by payment to the defendant of whatever is found due to him on settlement of accounts. This will effectually dispose of the case as between the plaintiffs and the defendant and will in no way affect or prejudice the rights of the heirs of Chadayan Kunjan. So I think, this is a case in which the ratio of the decision cited may be applied.

3. It has been concurrently found, that Chadayan Kunjan has left heirs and this will stand. In the result, in reversal of the decree of the lower courts dismissing the suit, a decree is given to the plaintiffs for redemption as aforesaid, and the case will go back to the first Court for settlement of the amount payable to the defendant for redemption. The parties shall bear their costs throughout.