

Krishnan Vs. Muthu Gounder and Others

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Court : Chennai

Decided On : Jul-16-1996

Reported in : AIR1997Mad57; (1997)IMLJ9

Judge : A.R. Lakshmanan, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 47 and 151 - Order 21, Rule 11 - Order 34, Rules 7, 8, 9, 10 and 11 - Order 47, Rule 1

Appeal No. : Civil Revn. Petn. No. 2193 of 1991

Appellant : Krishnan

Respondent : Muthu Gounder and Others

Advocate for Def. : R.M. Krishna Raju, Adv.

Advocate for Pet/Ap. : V. Raghavachari, Adv.

Judgement :

ORDER

1. The Civil Revision Petition has been filed by the petitioner herein who is the plaintiff in O.S. 1282 of 1968 on the file of the District Munsif Court, Mettur against the order dated 28th April, 1989 in R.E.P. No. 161 of 1987. The present R.E.P. No. 161 of 1987 was filed under Order 21, Rule 11 of C.P.P. to deliver possession of the property in question. O.S. 1282 of 1968 was filed by the petitioner herein for

usufructuary mortgage and for possession. One Chinnathambi Gounder, rather of the respondents 1 to 16 herein was the defendant in the said suit. The said Chinnathambi Gounder filed O.S. 1051 of 1968 for declaration on his title to the suit property and for permanent injunction restraining the defendants therein from interfering with his possession of the suit property. The present petitioner Krishnan was the 5th defendant in the said suit. Both the suits were tried together. The learned Principal District Munsif of Sankari decreed the suit O.S. 1282 of 1968 and dismissed the other suit filed by Chinnathambi Gounder in O.S. 1051 of 1968. The Court held that the petitioner Krishnan who is the plaintiff in the redemption suit is entitled to redeem the mortgage under Ex. A1. It is pertinent to notice that the suit property was usufructuary mortgaged by the plaintiffs vendors (Krishnan's vendors) for Rs. 500/- in favour of Chinnathambi Gounder, the defendant therein.

2. That in pursuance of the mortgage, Chinnathambi Gounder was put in possession of the property and that the plaintiff Krishnan purchased the property for Rs. 2000/- undertaking to discharge the mortgage and therefore he is entitled to redeem the mortgage. It is also further stated that when the mortgage amount was offered, Chinnathambi Gounder was not willing to receive the amount and therefore the suit was filed for redemption and possession after depositing Rs. 500/- into the Court.

3. The learned District Munsif of Sankari also specifically held that the plaintiff Krishnan has deposited Rs. 500/- into Court. Aggrieved against the common judgment and decrees, Chinnathambi Gounder filed A.S. 117 of 1972 and A.S. 143 of 1972 on the file of the District Judge, Salem who by his judgment dated 20th August, 1973 dismissed both the appeals with costs. Chinnathambi Gounder thereafter filed Second Appeals Nos. 1390 and 1391 of 1973 against the judgment and decree in A.S. Nos. 117 and 148 of 1972 preferred against the decree of the Court of District Munsif of Sankari at Salem in O.S. 1051 and 1282 of 1968. The said Second Appeals were also dismissed by Ismail, J. (as he then was) on 28th April, 1976, confirming the judgment and decrees of the Courts below. Petitioner Krishnan thereupon filed two other Execution petitions in E.P. 114 of 1981, E.P. 203 of 1982 and also R.E.P. 161 of 1987 for delivery of the property pursuant to the decrees obtained by him.

4. The learned District Munsif, Sankari on 24-4-1980 passed the following order :

'Petitioners are ready for enquiry. Passed over till 4.10 p.m. The respondents R. 13 to R. 17 called absent and set ex parte and respondents counsel called absent. No representation for the respondents side. Hence deliver. Batta in 3 days : 21-6-89.

Sd/-

24-4-89'.

5. The Officie thereupon submitted a note as follows :

'The suit in O.S. 1282/68 on the file of Sankari District Munsif Court has been filed to redeem the mortgage. The suit was decreed on 18-2-72 and a preliminary decree was passed. Afterwards the defendants went on appeal in A.S. 117/72 before the District Judge, Salem. The said appeal has also been dismissed on 20-3-73, confirming the Lower Court decree. Against the said appeal a second appeal was filed before the High Court, Madras in S.A. 1390/73. The Second Appeal was also dismissed on 28-4-76 confirming the decree of Lower Appellate Court.

The decree holder in his case filed E.P. 114/82 on 10-8-81 for delivery. In this case only the preliminary decree was passed. It seems from the E.P. records no final decree is produced. The decree holder ought to have filed the final decree petition after the disposal of the second appeal within 3 years, from the date of disposal of the second appeal. The then E.P. Clerk ought to have called for the final decree copy before even taken on file. The subsequent E.Ps. were also taken without the copy of final decree. There was no order for delivery in the preliminary decree. This E.P. is not maintainable without a final decree.

For Orders.

Sd/-

28-4-89'.

6. On 28-4-1989, the District Munsif passed the following Order; which is now impugned in this Civil Revision Petition.

'Records perused and office note put up by the Head Clerk perused. The E.P. is not maintainable without the final decree copy. Hence suo motu, I revise my previous order dated 24-4-1989. So, E.P. is dismissed as the E.P. is not maintainable.

Sd/-

District Munsif

28-4-1989'.

Aggrieved against the above order, the Civil Revision Petition has been filed by the petitioner/plaintiff.

7. I have heard Mr. V. Ragavachari for petitioner and Mr. R. M. Krishna Raju for the respondents. Mr. Raghavachari raised the following contentions.

(a) The order of the District Munsif holding that the E.P. is not maintainable without a final decree being produced is contrary to law.

(b) The preliminary decree for redemption of the mortgage and for possession of the suit property should be deemed to be a composite decree comprising both preliminary and final decree and therefore the E.P. is quite competent.

(c) The learned District Munsif failed to see that the suit filed by the petitioner herein in O.S. 1282 of 1968 for redemption of the usufructuary mortgage and for possession of the mortgaged property was decreed on 18-2-1972 and confirmed on appeal filed by the rather of the respondents herein in A.S. No. 117 of 1972 dated 20-3-1973 and further confirmed by the High Court in S.A. Nos. 1390 and 1391 of 1973 filed against the judgment and decree in A.S. 1171 and 11.72 of 1972 which was preferred against the decrees of the Court of the District Munsif of Sankari at Salem in O.S. No. 1051 and O.S. 1282 of 1968.

(d) The District Munsif who originally ordered delivery of the suit property on 24-4-1989 has no suo motu power to review his previous order without any application for review of the order by the respondents herein. The Order dated 28-4-1989 is therefore without jurisdiction.

(e) The District Munsif has failed to see that the question of maintainability of the Execution Petition was not at all raised at any point of time.

(f) The lower Court has failed to see that the suit in question is one for redemption and for possession of the mortgaged property and the entire mortgage amount of Rs. 500/- was deposited even at the time of institution of the suit and therefore, the dismissal of the Execution Petition is wholly unjustified.

8. Mr. R. M. Krishnaraju, learned counsel for the respondents, contained that the order of the Court below in dismissing the Execution Petition as not maintainable is correct, that the decree in question is not executable, that the respondents, who are the sons of deceased Chinnathambi Gounder, are enjoying the petition mentioned properties in their own right as absolute owners for more than the statutory period and it is their absolute property, that the Execution Petition is barred by limitation and that therefore, the same is liable to be dismissed in limine. According to him, the petitioner is not entitled to file an Execution petition asking for delivery of possession without filing an application for passing of a final decree.

9. I am unable to agree with the contention of the learned counsel for the respondents. As already seen, the suit was filed by the petitioner against the father of the respondents viz., Chinnathambi Gounder, in O.S. No. 1282 of 1968 for redemption of usufructuary mortgage and for possession of the mortgage property. It is also not in dispute that the suit for redemption was filed after depositing Rs. 500/- into Court. The suit was decreed as prayed for after contest and the appeal and the Second Appeal filed by the father of the respondents were also dismissed by the District Judge, Salem, and by this Court. The respondents admittedly being the legal representatives of deceased Chinnathambi Gounder are bound by the decrees obtained by the petitioner against their father for redemption of the suit property and for delivery of possession. The petitioner is therefore, in my opinion, entitled to maintain the present Execution Petition for delivery or possession as

per the decree obtained by him.

10. This apart, the suit filed by the father of the respondents in O.S. No 1051 or 1968 on the file of the District Munsif of Sankari at Salem, for declaration of his title to the very same property and for permanent injunction restraining the defendants therein from interfering with his possession of the suit property was dismissed by the District Munsif on 18-2-1972 and his appeal to the District Judge, Salem, in A.S. No. 143 of 1972 and the further appeal to this Court in S.A. No. 1391 of 1973 were also dismissed. Therefore, the defence now taken by the respondents herein in their counter is not at all entertainable in view of the decree passed by the three Courts for redemption and for delivery of possession of the property.

11. The preliminary decree dated 18-2-1972 in O.S. No. 1282 of 1968 reads as follows :

'(i) That the plaintiff or any later date up to which time the payment may be extended by the Court the said sum of Rs. 579.50.

(ii) That, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under Rule 10, together with such subsequent interest as may be payable under Rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the security property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or such person as he appoints, and the defendant shall, if so required, reconvey or re-transfer the said property to the plaintiff free from the said mortgage and clear off from all encumbrances created by the defendant or any persons claiming under his or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceful possession of the said property.

(iii) And it is hereby further ordered and decreed that, in default of payment aforesaid, the defendant may apply to the Court for a final decree for the sale of the security property; and on such application being made, the security property or

a sufficient part thereof shall be directed to be sold; and for the purposes of such sale, the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the security property.'

12. Under the preliminary decree, six months time was granted, to the petitioner to pay the decree amount of Rupees 500/- and Rs. 70.50 being the cost, making in all the sum of Rs. 579.50. As already seen, the petitioner has deposited the sum of Rs. 500/- into Court while filing the suit O.S. No. 1282 of 1968. Therefore, the plaintiff/petitioner, on compliance with Clause (1) of the decree, is entitled for reconveyance or re-transfer of the property free from the said mortgage and clear off from all encumbrances created by the defendant or any person claiming under him or any person under whom he claims, and deliver to the petitioner/plaintiff quiet and peaceful possession of the property. Clause (3) of the preliminary decree will come into play only in default of payment of the amount mentioned in Clause (1) of the decree aforesaid, and only in the event of default, the defendant has to apply to the Court for final decree for the sale of the security property, and on such application being made, the security property shall be directed to be sold.

13. In view of the preliminary decree being passed by the trial Court, the respondents, who are in occupation of the property in question, are bound to deliver the suit property free from the said mortgage and deliver quiet and peaceful possession of the property to the petitioner. The respondents claim right to the suit property only under their father Chinnathambi Gounder, in whose favour the property was mortgaged. Though the respondents have claimed in their counter-affidavit filed in the Execution Petition that they are enjoying the property in their own right as absolute owners for more than the statutory period and it is their absolute property, they have miserably failed to establish their claim.

14. Though the respondents have contended in paragraph 5 of the counter-affidavit that they are enjoying the property in question in their own right without any let or hindrance from any one, much less from the petitioner, and have acquired title to the property, they have not placed any material to show that they are independently entitled to enjoy the property in question. The further contention raised by the respondents that the decree obtained by the petitioner herein against

their father Chinnathambi Gounder is not binding on them as they have exclusive title for the property in question is equally untenable. The respondents being the legal representatives of deceased Chinnathambi Gounder and who are in possession of the property in question, are bound to deliver the property to the petitioner herein. There is no need for the petitioner also to file a petition for passing a final decree since he has already complied with Clause (1) of the preliminary decree, which is not only for redemption of the usufructuary mortgage but also for possession of the same.

15. Order 34, Rule 7 of the Code of Civil Procedure deals with passing of preliminary decree in redemption suits. In this case, the trial Court has passed a preliminary decree fixing the amount payable by way of principal and interest on the mortgage and also the cost of the suit awarded. If the plaintiff/petitioner makes default, then the mortgagee should have the right to ask for a final decree either for fore closure or for sale as provided by Order 34, Rule 8, C.P.C. It is settled law that when deposit is made to discharge a valid mortgage, a final decree may be passed without being preceded by a preliminary decree. Since the money has been deposited, there is no need for the mortgagee to apply for a decree for sale. Where the deposit is not made within the time fixed, the proper procedure is to order sale of the property and not to dismiss the suit for redemption.

16. The decree passed by the trial Court in this case, though it is termed as a preliminary decree, in my view, it is final. That is, final so far as it is a decree for possession and deposit of Rs. 500/- is concerned, being the mortgage amount. Order 34, Rule 8, C.P.C., deals with final decree in redemption suits. This rule applies to redemption suits only. This rule distinctly lays down that payment must be made into Court, which has been complied with in this case.

17. The decision reported in Nainar Mohamed Rowther v. Minor Vijayasankar 1988 TLNJ 195 by M. Srinivasan, J.) deals with the case of passing of final decree straightway and the power of the Court in passing such a final decree. That was a case of a suit for redemption for the usufructuary mortgage. The main defence raised by the defendants in the written statement was that the sale deed in favour of the plaintiffs was not valid and that the defendants were in possession of the

mortgage property for thirty years. The trial Court granted a decree in favour of the plaintiffs and straightway passed a final decree for redemption as the entire amount due under the mortgage had been deposited into Court and there was no dispute with regard to the quantum of amount due. Against the judgment of the trial Court, the defendants preferred an appeal to the Subordinate Judge, Tenkasi, who modified the judgment and decree of the trial Court, against which the defendants preferred a Second Appeal in this Court, and the plaintiffs preferred a memorandum of cross-objections in so far as the decree is against them, in the sense, that the final decree passed by the trial Court is set aside and substituted by a preliminary decree. The learned Judge held as follows :--

'What remains to be considered is the memorandum of cross-objections filed by the plaintiffs. The trial Court straightway passed a final decree for redemption. The lower appellate Court has chosen to substitute it with a preliminary decree on the ground that the entire amount due under the mortgage was not deposited to the credit of the suit. This view of the lower appellate Court is factually wrong. Learned counsel for the respondents produced before me a certified copy of the suit register extract which shows that the amount deposited to the credit of O.S. No. 3 of 1977 was already directed by the trial Court by order dated 31-8-1979 in I.A. No. 1380 of 1979 to be sent for to the credit of the present suit for redemption. It is represented by learned counsel for the respondents that pursuant to the said order, the amount had been entered to the credit of the suit for redemption. Thus, the entire amount having been brought to the credit of the suit for redemption, and there being no dispute with regard to the quantum of the amount due under the mortgage, the plea that there should be preliminary decree in the first instance and thereafter a final decree, is nothing but a hyper-technicality. Nothing else remains to be done in the suit by passing a preliminary decree. It is clear from a reading of Order 34, Rule 7 of the Code of Civil Procedure that a preliminary decree is to be passed for taking of account as to what was the amount due to the defendant at the date of the decree for principal and interest of the mortgage, costs of suit, if any, awarded to him and other costs, expenses properly incurred by him up to the date of decree in respect of the mortgage security together with interest thereon. In this case, the claim made by the defendants that they had made improvements and that they were entitled to be compensated there is no dispute with respect to

the amount due under the mortgage. There is no impediment to pass a final decree straightway.'

18. In the instant case, the entire amount had been deposited into Court and there is no amount due under the mortgage and therefore, the contention of the learned counsel for the respondents that there should be a preliminary decree at the first instance and thereafter final decree is to be passed is nothing but an empty formality or as observed by M. Srinivasan, J., in the above judgment, hyper technicality.

19. The decision reported in *Mosa Rajayyan v. Jacob Haris* : AIR1981 Ker135 is a converse case wherein it has been held as follows (Para 3) :--

'It is true that a final decree without the passing of a preliminary decree is seen to have been passed in this case at a time when the Kerala amendment to Order XXXIV, C.P.C had not come into force. It is also seen that the decree did not specify the date within which the amount due to the mortgagee was to be deposited by the plaintiff-decree-holder. That would not, however, render the decree null and void incapable of being executed. The relevant rules in Order XXXIV, C.P.C. contemplating the passing of a preliminary decree in the first instance, and final decree at a later stage, are intended to enable the Court to determine the correct amount due to the mortgagee-defendant, and to give an opportunity to the mortgagor-plaintiff to deposit that amount within a specified time, on the fulfilment of which he is entitled to recover the property mortgaged. These might, however, be ceased where the amount due to the mortgagee-defendant as stated in the plaint is admitted by him (mortgage) and therefore, it might be possible for the Court to pass a (final) decree straightaway. May be that such cases might be few and far between; all the same possibility of such occasion arising could not be ruled out. It cannot therefore be contended that for the simple reason that a (final) decree, without a preliminary decree preceding it, has been passed, the decree is null and void. Even otherwise, once the decree is allowed to become final, without being appealed against, any irregularity, even illegality, unless it be a case of total lack of jurisdiction, would not render the decree null and void or incapable of being executed. The executing Court is bound to allow the

execution of the decree without going behind it.'

20. In the decision reported in *Mari-muthu Muthiriar v. Ayyathurai* : AIR1978 Mad246 by N. S. Ramaswami, J. it has been held as follows :--

'In the present case, the plaintiff-mortgager deposited the mortgage amount even on the date of filing of the suit. The fact that the said amount was being deposited as the amount due to the mortgagee was also mentioned in the plaint. The defendant did not care to appear and contest the suit. Under such circumstances, the trial Court was not wrong in passing a final decree for redemption without first passing a preliminary decree.... The provisions contained in Order 34, Rules 7, 8 and 9 contemplating the passing of preliminary decree first and final decree at later stage are for the purpose of giving an opportunity to the mortgagor to deposit the mortgage amount due to the mortgagee. But in a case where there was no dispute regarding the amount due to the mortgagee and the mortgagor had in fact deposited the mortgage amount even at the time of filing of the suit, the Court is not without jurisdiction to straightway pass a final decree for redemption.'

21. In the decision reported in *ManickaChetti v. Kuppusami Asari*, AIR 1526 Mad 644, by Venkatasubba Rao, J. it has been held as follows :

'As has been pointed out in *Arunabati Kumari v. Ram Niranjana* (1920) 58 IC 299 : AIR 1921 Pat 320 and *Sivasubramania Pillai v. Rakkumuthu Mooppan* AIR 1924 Mad 645 it is not absolutely necessary that in every mortgage suit there should be a preliminary decree before a final decree is passed. If the terms of the compromise are that a decree should be forthwith passed, a decree which is capable of execution, it is perfectly competent to a Court to give effect to the compromise and pass such a decree. Agreeing with the lower Court I hold that the decree that we passed in this case was an executable decree. My decision on both the points is against the petitioner. C.M.S.A. fails and is accordingly dismissed with costs.'

22. In the decision reported in *Roshan Lal v. Bhuri Singh* : AIR1922 All479 by Gokul Prasad, J. it has been held as follows :

'Where there is a valid mortgage and a deposit is made in the Court by the mortgagor to redeem it, the Court is not bound to first pass a preliminary and then a final decree which means the prolongation of the proceedings, if no injustice will be done to either party by the passing of the final decree at once.'

23. As rightly pointed out by Mr. V. Raghavachari, the respondents have not raised any objection to the executability of the decree in the present proceedings and in fact, neither the respondents nor their counsel was present inspite of several repeated opportunities given to them for contesting the application, and the Court ultimately passed the order for delivery of possession on 24-4-1989 and subsequent thereto, the executing Court has passed the impugned order suo motu reviewing its previous order without any application for review of the order by the respondents and on the basis of an office note and as if the Court has no jurisdiction to pass such an order. It is seen from the order, that the lower Court has reviewed its order and the procedural irregularity committed by the lower Court goes to the root of the matter and renders its order illegal and void and therefore, in my opinion, the said order is liable to be set aside.

24. As already seen, there were previous E.P. Nos. 203 and 214 of 1982 filed and the question of maintainability was not at all raised and therefore, the Court below should have seen that such a plea is barred by res judicata even if the respondents have raised such a plea, and that the Court below is not competent to raise such a plea suo motu and decide the case against the petitioner by review of its earlier order on the basis of the office note and without notice to the petitioner to argue the maintainability. Therefore, in my opinion, the decision and conclusion arrived at by the Court below in E.P. No. 161 of 1987 in O.S. No. 1268 of 1968 dated 28-4-1989 is perverse and therefore, liable to be set aside. Order 47, Rule 1, C.P.C. provides for filing of an application for review of a judgment. Any person aggrieved by a decree or order, from which an appeal is allowed but from which no appeal has been preferred, may apply for review of the Judgment to the Court which passed the decree or made the order.

25. In this case, the respondents have not taken any steps for filing an appeal or revision against the order dated 24-4-1989 ordering delivery. The lower Court has

reviewed its earlier order pursuant to the office note put Up. The power of review is not an inherent power. It must be conferred by law either specifically or by necessary implications. The question whether the order of the Court below dated 24-4-1989 is correct or valid in law does not arise for consideration. In these proceedings so long as that order is not set aside or declared void by a competent Court. Therefore, the earlier order dated 24-4-1989 cannot be ignored.

26. In this case, the law does not confer any special privilege on the respondents to sleep over their rights by neglecting the legal remedies open to them. The respondents have not challenged the earlier order dated 24-4-1989 and therefore, the said order has become final and as such, suo motu review by the Court is impermissible.

27. The two decisions cited by Mr. R. M. Krishnaraju reported in *Marath Sivaraman Nair v. Seshu Pathar*, AIR 1922 Mad 299 : 16 Mad LW 589 and *Reba Sircar v. Bisweswar Lal Sharma* : AIR1980 Cal328 are not applicable to the facts and circumstances of the case on hand and are distinguishable on facts.

28. For the fore going reasons, the Civil Revision Petition is allowed, the order of the Court below is set aside and the petitioner is entitled to take delivery of the property from the respondents and proceed further in execution. However, there will be no order as to costs.

29. Revision allowed.