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Court : Chennai

Decided On : Oct-24-1929

Reported in : AIR1930Mad924; (1930)59MLJ234

Appellant : Maila Rai

Respondent : Derappa and ors.

Judgement :

1. This is an appeal against the decision of Phillips, J., reversing the decree of both the Lower Courts and dismissing the suit to redeem.

2. The facts are shortly these. A deed of mortgage executed in 1844 was sought to be redeemed. The deed which is said to be a usufructuary mortgage deed, dated the 11th of December, i844, begins by stating that the mortgagor on account of his necessity usufructuarily mortgaged to the mortgagee for 248 varahas the property described in the document, The material portion is as follows:

Thus in total I received from you 248 varahas as detailed above and delivered this day to your possession the entire land, bagayat house, cow-pen and also out-house bearing the said beriz and I have also given to you one decision obtained by me in respect of the said land and also one yadast executed by Shama Rao, Amin of Uppinangadi Taluk Munsiff's Court, for having delivered the said land to me. In future you alone shall pay the sirkar tirva to Government and enjoy the said land, bagayat house, cow-pen and out-house lying within the boundaries

mentioned in the decision. You shall have no reason. to claim interest for the amount and I shall have no reason to claim any profits out of the said land. I shall pay the consideration amount of 248 varahas to you in one lump sum after a period of twenty-five years and within a period of thirty years from this day and get back from you the said land, bagayat house, cow-pen and out-house, and also the two documents, viz., decision and yadast given to you. If I fail to pay the amount and get back the land, etc., within the period mentioned above, you shall get the warg of the said land entered in your name, plant therein trees, etc., effect improvements therein and shall enjoy the same from generation to generation. I and my descendants shall have no interest therein. To this effect is the usufructuary mortgage deed of land executed out of my free will.

3. The word in the original is 'Moulya' or price. This mortgage was not redeemed within the period specified and a suit was filed in 1920 for redemption. Phillips, J., held that the case came within the ruling Thumbusawmy Moodelly v. Hossain Rowthen which was followed in Bapirazu v. Kamwazu I.L.R.(1881) M. 26 and Ramasami Sastrigal v. Samiyappanaykan I.L.R.(1881) M. 179 (F.B.) The learned Judge observes:

It seems to be immaterial whether the document purports to be a sale with a condition of re-sale or whether it purports to be a mortgage with a condition that on failure to pay the mortgage money the property shall pass to the mortgagee. If the document was executed prior to 1858 when first the above principle of law began to be modified, effect must be given to the intention of the parties.

4. As, regards the second contention that the terms of the document should have been completed before 1858, the learned Judge following Kanthu v. Dasa Upadhya (1914) 26 I.C. 376 held that that made no difference as regards the construction of the terms.

5. It is argued before us by the learned Advocater General that the principle of giving effect to the intention of the parties evidenced by the contract in cases like the present should be confined to cases of mortgage by conditional sale pure and simple, and as regards other mortgages this principle has no application. It is also contended that in cases where the period fixed in the deed would carry us later

than 1858 the principle in Thumbusawmy Moodelly v. Hossain Rowthen should not be applied and the ordinary rule as regards redemption must be applied, As regards the first point, we do not see any reason for confining the principle to mortgages by conditional sale, pure and simple; which have been defined later on by the Section 56 of the Transfer of Property Act. The Advocate-General's contention is, that, unless the document is ostensibly a sale coupled with a condition for defeasance you ought not to apply the ruling in Thumbusavmy Moodelly v. Hossain Rowthen So far as we can see, the decision in Pattabhiramier v. Vencatarow Naicken (1870) 13 M.J.A. 560 was on a document which was not worded as, a sale with a condition for defeasance. On the contrary it begins like, a mortgage and contains a clause converting the mortgage into a sale if not redeemed. The document is set out at p. 561. The report is as follows:

A mortgage bond had been executed by the original parties, stipulating that the mortgagee should enjoy the lands in lieu of interest, and that if the principal should be paid 'in the season of harvest of any year,' the mortgagee should receive it and give up the lands, of which possession was then given to the mortgagee; and it was also alleged that this mortgage debt had been liquidated from the usufruct of the lands.

6. That was not a case of a document which began with sale and ended with power, to redeem. Similarly in Thumbusawmy Moodelly v. Hossain Rowtthen also we find that the document begins as a mortgage, refers to the principal payments by instalments and enjoyment and then winds up by saying:

If, by the 30th of Panguni of the said Pramadhi, the money be. not paid up in full, and balance still remain due, you yourself shall take hold and enjoy such of the lands (herein) as you may like and as may be equivalent to the balance due . . . as if under the. Terms of a deed of absolute sale.

7. We can find very little in Pattabhiramier v. Vencatarow Naicken (1870) 13 M.J.A. 560 or Thumbusawmy Moodelly v. Hossain Rowthen to hold that the Privy Council confined their observations to cases where the document was in the form of a sale with a condition for redemption. If their Lordships of the Privy Council as contended for by the appellants' advocate decided that the rule as to giving effect

to the intention of the parties applied only in cases of mortgage where there was a sale with a covenant to reconvey on the mortgage money being paid, they would have stated the rule especially as the mortgage before them was not such a document. Their judgment applies equally to mortgages with only a clause for reconveyance. In Bapirazu v. Kamarazn I.L.R.(1881) M. 26 it was decided that as regards mortgages executed before 1858 the intention of the parties to the instrument must be given effect to. The Full Bench decision in Ramasami Sastrigal v. Samiyappanaykan I.L.R.(1881) M.179 (F.B.) deals fully with the various kinds of mortgages and it is clear from the judgment of Sir Charles Turner, C.J., that he considered the question as regards the applicability of the ruling in Pattabhiramicr v. Vencatarow Naicken (1870) 13 M.I.A. 560 to cases where the document is in the usual form of usufructuary mortgage containing a condition that it should become an absolute sale in a particular event. At page 183 the learned Chief Justice observes:

The various forms of mortgage known to the Hindu Law are mentioned in Colebrooke's Digest, Edition of 1801, Vol. I, pp. 81, 82.

8. Among these is the mortgage with a condition that, in the event of default being made in the payment of principal on or before a date named, the property mortgaged shall pass to the mortgagee as an absolute purchaser. .

9. He then refers to various forms of mortgage. According to him, the decision in Pattabhiramier v. Vencatarow Naicken (1870) 13 M.I.A. 560 would apply to mortgages prior to 1858. Under these circumstances we think there is no reason to confine the application of the rule to documents which are in form mortgages by conditional sale. The test in these cases is what was the intention of the parties? We must presume that in the case of a mortgage prior to 1858 the intention of the parties according to the terms of the contract should be enforced and the Court should give effect to the intention. The second contention is that as the terms of sale became absolute and the property became absolute property of the mortgagee subsequent to 1858, the ordinary principle of redemption should be applied. Reliance is placed upon a decision of Muthuswami Aiyar and Parker, JJ., in S.A. No. 122 of 1889. In that case the mortgage was executed in 1857 and their

Lordships thought that there was no reason to apply the strict ruling of the Privy Council. The question, however, has been considered in a later case in Kanthu v. Dasa Upadhya (1914).26 I.C. 376 The point directly arose for determination in that case and the learned Judges, Ayling and Sadasiva Aiyar, JJ., had to consider whether the fact that the term in the document went later than 1858 affected the question. The learned Judges observed:

The respondent's learned Vakil, Mr. Yegnanarayana Adiga, tried to take away the transaction under Exhibit XXII out of the class of transactions to which the ruling in Pattabhiramier's case 5 applied by an ingenious comment on two sentences which occur in the later case in Thumbu-sawmy Moodelly v. Hossain Rowthen . Those two sentences in the judgment are:' On a stale claim to redeem a mortgage and dispossess a mortgagee who had, before 1858, acquired an absolute title, there would be strong reasons for adopting the former course.' (That is the course of treating the sale as having been absolute.) 'In the case of a security, executed since 1858, there would be strong reasons for recognising and giving effect to the Madras authorities, with reference to which the parties might be supposed to have contracted.' It was argued that the first sentence favours only those deeds under which the alienees had acquired absolute titles before 1858 and not a deed like the present, under which the absolute title was acquired only in 1859, though the deed itself was executed before 1858. Having regard to the observations in Pattabhiramier's case (1870) 13 M.I.A. 560 and the whole tenor of the observations in Thumbusawmy Moodelly v. Hossain Rowthen (including the second sentence quoted above), we have no doubt that their Lordships of the Privy Council favoured the natural construction of all documents executed before 1858, whether the title had become absolute before 1858 or became absolute only after 1858, provided the suit to redeem was brought after the title had become absolute.

10. It seems to us, with all deference, that the decision in Kanthu v. Dasa Upadhya (1914) 26 I.C. 376 ought to be followed and we have to give effect to the intention of the parties at the date of the transaction. That intention is evidenced by the condition in the document which says:

If I fail to pay the amount and get back the land, etc., within the period mentioned above, you shall get the warg of the said land entered in your name...and shall enjoy the same from generation to generation. I and my descendants shall have no interest therein.

11. If the terms of the deed were to be enforced, the rights must depend on what was agreed to when the mortgage was executed and not on any change in the law at the date when the money was payable.

12. We agree with the decision of the learned Judge on both the points and dismiss the Letters Patent Appeal with costs.

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