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SooperKanoon Citation : sooperkanoon.com/785395

Court : Chennai

Decided On : Oct-06-1953

Reported in : AIR1955Mad245; (1954)IMLJ537

Judge : Krishnaswami Nayudu, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 5 and 72; Debt Law; Madras Agrculturists Relief Act, 1938 - Sections 9A(3), 9A(10) and 16; Madras Agrculturists Relief (Amendment) Act, 1948

Appeal No. : Second Appeal No. 2074 of 1949

Appellant : R.M.S. Benjamin

Respondent : Devadoss and ors.

Advocate for Def. : K.P. Ramakrishna Iyer, Adv.

Advocate for Pet/Ap. : K.V. Srinivasa Iyer, Adv.

Disposition : Appeal dismissed

Judgement :

Krishnaswami Nayudu, J.

1. This appeal arises out of a suit for redemption. There was a usufructuary mortgage under a registered document dated 24-8-1892 for a sura of Rs. 31-8-0 in

favour of Jacob and Mariammal. The mortgagees who were in possession usufructuarily sub-mortgaged their rights in favour of one Marivel Servai for the same sum of Rs. 31-8-0 by a deed dated 21-8-1910 duly executed and registered. As sub-mortgagee Marivel Servai was in possession. In execution of a money decree obtained against Marivel Servai by the second defendant, the mortgage rights of Marivel Servai which he obtained under the deed dated 21-8-1910 were brought to sale and the first defendant purchased the property in court auction and took delivery of possession. The first defendant therefore became entitled to the mortgagee's rights in the usufructuary mort-gage dated 24-8-1892.

The plaintiffs as representatives of the original mortgagors, instituted O. S. No. 504 of 1946 for redemption. The prayer for redemption was granted on plaintiff's paying Rs. 31-8-0, the principal amount and other sums including expenses stated to have been incurred by the first defendant in O. S. No. 219 of 1942, a suit instituted by him to recover possession of the property, as his possession was disturbed by the plaintiffs. There were also certain criminal complaints and counter-complaints of trespass between the parties and it is the first defendant's case that he incurred further expenditure in those proceedings. The first defendant appealed against the decree in respect of the expenses incurred by him in the criminal proceedings which were disallowed by the trial court and for costs. During the pendency of the appeal, the plaintiffs filed an application I. A. No. 205 of 1949 for scaling down the mortgage debt under Section 9-A, Clause (3), Madras Agriculturists' Relief Act, 1938, as amended by Act 23 of 1948.

The learned District Judge held that the amended provision of the Act applied to the case and the principal amount must be deemed to have been wiped out by reason of the application of the Act, rejected the claim of the first defendant for expenses incurred in the criminal proceedings, and as a result modified the decree of the trial court by granting him only the costs of the suit and deleting the principal sum of Rs. 31-8-0 from the decree. The first defendant has preferred this second appeal.

2. As regards the expenses incurred by him in the criminal proceedings, the first defendant is not entitled to get the same from the mortgagor, as, under Section 72,

Transfer of Property Act, a mortgagee is entitled to spend only such money as is necessary among others under Clause (d) for making his own title thereto good against the mortgagor. However much the expenses incurred by him in O. S. No. 219 of 1942 might be held to be justified, in so far as the expenses incurred for the proceedings in the criminal courts are concerned it could not be said that those expenses were incurred for the purpose of making his own title good against the mortgagor. There is no substance in this contention and I agree with the learned District Judge that the first defendant is not entitled to the expenses incurred by him in regard to the criminal proceedings.

3. It is contended that the plaintiffs are not entitled to any reliefs by way of scaling down under Madras Act 23 of 1948 for several reasons. I. A. No. 205 of 1949, it is urged, should have been before the District Munsif who passed the decree and the appellate court had no jurisdiction to entertain an application for scaling down as it was the trial court alone that had jurisdiction under Section 19 of the Act to scale down the debt and amend the decree. In support of this contention the learned counsel relied on a decision of a Bench of this Court reported in -- 'Gangaraju v. Ramayya', AIR 1939 Mad 483 (A), where it was held that Sections 19 and 20, Madras Agriculturists' Relief Act should be read together and that the explanation of the expression 'court which passed the decree' in Section 20 equally applies to Section 19. The 'court which passed the decree' is defined in the explanation to Section 20 of the Act, where it is stated that the expression or words to that effect shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance.

In that case a decree was passed by the lower court and an appeal was filed which was dismissed by the appellate court. As proceedings in execution were taken, the judgment-debtor applied under Section 20 for stay of execution and then presented an application under Section 19 of the Act to the trial court which passed the decree for scaling down. The trial court refused to take cognizance of this application, as in its opinion, the decree having been appealed against, its jurisdiction to amend the decree ceased. On these facts the High Court held that

the application to scale down the decree debt and amend the decree was properly made to the court of first instance and that court had Jurisdiction to deal with it. In the course of his judgment Madhavan Nair J. observed at page 484 of the report thus

'In the present case the reference to the 'court which passed the decree' in Section 20 of the Madras Agriculturists' Relief Act is by its explanation, to the court of first instance, that is, the court to which the petitioner made his application. A perusal of the two Sections 19 and 20 shows clearly that they have to be read together,'

The learned Judge further observes that the petitioner's application to scale down the decreedebt and amend the decree was in their opinion properly made to the court of first instance and that court had jurisdiction to deal with that application. In circumstances of that case, an application made to the trial court for scaling down the decree debt, after an application for stay was made and stay obtained under Section 20 of the Act, was held to be properly made and that the trial court had Jurisdiction notwithstanding the fact that there was an appeal against the decree and the same was dismissed by the appellate court. That decision is no authority for the position that no application for scaling down can be made to the appellate court.

4. Mr. Ramakrishna Aiyar for the respondent referred me to a Pull Bench decision in -- 'V. Sriramareddi v. K. Sriramareddi AIR 1941 Mad 929(B), which, though not directly in point, however, shows that an application for scaling down the decree is not outside the jurisdiction of the appellate court and that the only condition that has to be observed is that such an application should be made during the pendency of the appeal and not after its termination. In that case it was held that where a debt is the subject matter of an appeal, if an application for scaling it down is not made in the appellate court before the Judgment is delivered, the decree must be drawn up in accordance with the terms of the Judgment and no subordinate court has power to pass an order which will affect the decree. Where however an application is made before the judgment is delivered, the proper course will be to reserve the final order until the application for scaling down has been decided. The learned Judges observe:

'It has been the practice of some learned Judges of this Court, where an application for scaling down has been made before judgment has been delivered, to direct that an inquiry into the application should be conducted by the trial court and the amount awarded in the Judgment should be deemed to be subject to the finding on the application, it is not necessary to decide whether this practice is lawful or not, but to avoid any question arising in future, we consider that the proper course will be to reserve the final order until the application for scaling down has been decided. All questions arising in the appeal other than the question of scaling down can be decided and the decree left open until a report has been received from the trial court, the application for scaling down being remitted to that court for inquiry and report.'

These observations clearly indicate that it is within the province of the appellate court to consider any application for scaling down and find the amount that is exactly due either by itself or by referring the matter to the lower court and getting its report and incorporating the same in the decree to be passed. Though it may be convenient for an appellate court to refer applications for scaling down to the lower court and call for reports, it does not necessarily mean that the appellate court cannot, by itself, go into the questions and find out whether there could be a scaling down of the decree, and if so to what extent. It is only for the sake of convenience that such matters are referred to the lower court for enquiry and report, but not on the ground or want of any jurisdiction in the appellate court. What we are here concerned with is whether the appellate court has no jurisdiction to go into the question and in this case the lower appellate court was perfectly in order in going into the merits of the application and giving its decision.

5. The next contention of Mr. Srinivasa Ayyar is that the decree had become final and that it was not open to the judgment-debtors to apply for a scaling down. This argument ignores the effect of Section 16 of the Amending Act of 1948 when the Act is sought to apply under Clause (iii) of that section to all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act. This clause came up for consideration before a Full Bench of this Court in -- 'Venkata-ratnam v. Seshamma', : AIR1952 Mad591 (FB) (C), where it is held that a reading of Section 16 (i) and (iii) would

suggest that Clause (iii) would apply exclusively to executable decrees or orders which, though they have become final before the commencement, of the Act, are still in the stage of unfinished execution and at the stage at which satisfaction Was not fully received. Here the decree has not been executed and it has not been suggested that there has been any satisfaction of the decree apart otherwise from its being executed. It was competent for the plaintiffs to have applied under the Amending Act and they are entitled to have the debt scaled down.

6. Another argument adduced on behalf of the appellant is that the debt being an usufructuary mortgage debt and the first defendant having acquired it in court auction, the sale, certificate having been issued to him on 12-8-1938, the transaction is exempted from the operation of Section 9-A by virtue of Sub-section (10)(ii)(b) which says that nothing contained in Section 9-A except Sub-section (i) of Section 9-A shall apply to any usufructuary mortgage where during the period after 30-9-1937 and before 30-1-1948, the usufructuary mortgagee or any of his successor in interest has transferred, either wholly or in part, the mortgagee's rights in the property bona fide and for valuable consideration, then to the whole or such part, as the case may be. What is urged by Mr. Srinivasa Ayyar is that though it is a purchase at a court auction it is a transfer by the usufructuary mortgagee's successors in interest and that the purchaser at the court auction had acquired it bona fide and for valuable consideration.

The learned District Judge did not accept this contention and held that a court auction purchaser is taken out of the scope of Clause (b) of Section 9-A, Sub-section (10)(ii). A plain reading of the language of the section supports the view taken by the lower court as what is contemplated is a transfer by the usufructuary mortgagee or any of his successors in interest, bona fide and for valuable consideration. Ordinarily questions of good faith and valuable consideration do not arise in court auction sales. It is only a transfer 'inter vivos' that must have been intended under Clause (b) though the words 'inter vivos' which have been used in Clause (a) have been omitted in Clause (b). It is argued that by reason of this omission the transfers that are contemplated under Clause (b) should not be restricted to transfers 'inter vivos' but must include purchases in court auction. There is no definition of 'transfer' in the Madras Agriculturists Relief Act, but

transfer of property as denned in Section 5, Transfer of Property Act means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and 'to transfer property' is to perform such act.

Provisions analogous to Clause (b) in other enactments where transferees for consideration and in good faith and bona fide are protected from the operation of certain provisions of these enactments may be looked at to ascertain the intention of the framers of Clause (b), whether it was intended to restrict it only to transfer by act of parties or to include court auction purchasers. Section 100, Transfer Property Act which defines charge makes an exception that a charge shall not be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge. In construing that exception our High Court held in -- 'Surayya v. Venkataraman-amma'. AIR 1940 Mad 701 (D), that the saving clause does not apply to an auction purchaser who is not a transferee within the meaning of Section 5. Even taking the ordinary meaning of the word 'transfer' It implies that it is a result of act of parties. Unless it is a transfer by act of parties, it cannot come within the exceptions covered by Section 9-A Sub-section (10) (ii) (b), Madras Agriculturists Relief Act and hence a court auction purchase is outside the scope of the sub-clause.

7. The direction of the lower appellate court that the appellant should pay the costs of the appeal is attacked as not being consistent with the finding arrived at. Though the appellant succeeded in the lower appellate court in getting the costs of the suit included, he opposed the application for scaling down and the time of the court having been occupied mainly in hearing the appeal on the question of the Amended Act 23 of 1948, and the respondent having succeeded I consider that the lower appellate court was right in having dismissed the appeal with costs.

8. In the result this appeal is dismissed with costs. No leave.