

O.M. Jalali Vs. AnusuddIn and ors.

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Court : Chennai

Decided On : Mar-16-1973

Reported in : AIR1974Mad340

Judge : Ramanujam, J.

Acts : Transfer of Property Act, 1929 - Sections 92 and 95; ;Limitation Act - Sections 19 - Schdule - Article 148

Appeal No. : Second Appeal No. 457 of 1971

Appellant : O.M. Jalali

Respondent : AnusuddIn and ors.

Advocate for Pet/Ap. : Mr. M. S. Venkatarama Iyer

Judgement :

1. The first defendant is the appellant. The suit is one for redemption of the usufructuary mortgage deeds, Ex. B-1 dated 29-3-1859 and Ex. B-2 dated 30-3-1889 for Rs.100 and Rs. 150 respectively executed by one Ansuddin, the grandfather of the plaintiffs and the second defendant in favour of one Mohammed Noohu. The plaintiffs' case is that the suit property measuring one acre and three cents belonged to their grandfather, Ansuddin, that the said Ansuddin had created the said two mortgages over that property, that the period prescribed for redemption under both the documents was one year, that there has been a

partition in the family of the mortgagee, Mohammad Noohu whereunder the suit mortgages had been allotted to one Ahmed Ali Bathumal, that her father and guardian had assigned the usufructuary mortgages to the first defendant under a registered deed of assignment dated 5-6-1911 and that since then, the first defendant as an assigned of the mortgages has been in possession and enjoyment of the suit land. The further case of the plaintiffs is that after the death of the mortgagor, Ansuddin, the equity of redemption had devolved on Mohideen Abdul Kader, the father of the plaintiffs and the second defendant and after his death on the plaintiffs and the second defendant and that therefore, they are entitled to redeem the mortgages in question. The plaintiffs also contended that in view of the provisions of S. 9-A of the Madras Agriculturists Relief Act, the mortgage debts stand discharged and therefore, they are entitled to redeem the mortgages without payment of any sum.

2. The first defendant contested the suit. She denied that the suit property originally belonged exclusively to the plaintiffs paternal grandfather, Ansuddin. It is stated that the suit land belonged to Asanachi, the mother of Ansuddin that on her death the first defendant's father as also Ansuddin became entitled to a half share each, and that on her father's death the first defendant became entitled to a half share in the suit property. The first defendant also contended that by virtue of her redeeming the mortgage by getting an assignment from the mortgagee's legal representatives the mortgages as such have become extinguished and that, therefore, the plaintiff's remedy, if any, is to file a suit for possession within a period of 12 years from the date of assignment, that the suit for redemption as framed cannot be maintained, and that in any event, the suit for redemption is barred by time.

3. On these pleadings and on the evidence adduced on either side, the trial court held that the suit property originally belonged to Assanachi, the mother of Ansuddin and that, therefore, the plaintiffs and the second defendant on the one hand and the first defendant on the other became entitled to a moiety in the suit properties. It also held that the assignment Ex. B-3 taken by the first defendant will not constitute an acknowledgment of the mortgagor's right to redeem so as to afford a fresh starting point of limitation for redemption, as alleged by the plaintiffs

and that the suit for redemption having been filed more than 60 years after the date of the original mortgages is barred by limitation. In that view, it dismissed the plaintiff's suit.

4. On appeal, the lower appellate court practically agreed with the findings of fact arrived at by the trial court that the suit property vested in moieties on the plaintiffs and the second defendant on the one hand and the first defendant on the other, and that the first defendant has taken an assignment of the mortgages from the mortgagee's representatives in the year 1911, by virtue of her right to a half share in the suit properties. But it did not agree with the trial court that the suit is barred by limitation. It held that the assignment of the mortgages Exs. B-1 and B-2 under Ex. B-3 dated 15-6-1911 executed by the mortgagee's legal representatives constituted an acknowledgment by the mortgagee giving a fresh period of limitation of 60 years from the date of that assignment and that, therefore, the suit is well within time. In that view the lower appellate court decreed the suit for redemption in favour of the plaintiffs and the second defendant in respect of their undivided half share in the suit properties.

5. In this second appeal, the only question that arises for consideration is as to whether the suit for redemption is barred by limitation or not.

6. It is urged by Mr. M. S. Venkatarama Iyer, learned counsel for the appellant, that the lower appellate court has erroneously assumed that the amendments brought about in Sections 92 and 95 of the Transfer of Property Act in 1929 were retrospective, that the true legal position before 1926 is that wherever a co-mortgagor redeems the mortgage, the mortgage gets extinguished and in its place a charge comes into existence in favour of the redeeming co-mortgagor and there is no question of the redeeming co-mortgagor being subrogated to the rights of the mortgagee when he redeems and that the assignment of the mortgages taken by the first defendant in his capacity as a co-mortgagor completely extinguishes the mortgages as also the right to redeem and brings in its place fresh rights and liabilities as between the first defendant and the plaintiffs. The learned counsel refers to the decision in *Ayyan Ammal v. Vellayammal* : AIR1956 Mad354 , in support of his stand that Sections 92 and 95 as amended in 1929 are not

retrospective in operation and that the statutory right of subrogation conferred by Section 92 on a redeeming co-mortgagor was not available in 1911 when the mortgages had been assigned to the first defendant. In that case a Full Bench of five Judges considered the question whether Sections 92 and 95 as amended in 1929 were retrospective or not. It was held that the amending Act of 1929 by necessary intendment did not provide for retrospective effect being given to Sections 92 and 95 among other sections referred to in clause 2 of Section 63, neither expressly nor by necessary intendment Sections 92 or 95 or both of them taken together provide for retrospective effect being given to the statutory right of subrogation conferred by Section 92 on a redeeming co-mortgagor. The Full Bench also referred to the view taken by this court in *Sinnan Chetti v. Sivakamiammal*, : AIR1921 Mad326(1) and *Murajalli Kuria Goundan v. Ramasami Chetti*, ILR (1918) Mad 650 = AIR 1918 Mad 19 before the amending Act of 1929, that Sections 92 and 95 of the Transfer of Property Act did not confer rights of subrogation as such on a redeeming co-mortgagor. It is pointed out by the learned counsel that so far as the suit mortgages are concerned, they came to be redeemed before 1929, under Ex. B-3 and as such there is no question of treating the first defendant, the redeeming co-mortgagor as standing in the shoes of the mortgagee and applying the period of limitation under Art. 148 of the old Limitation Act.

7. I am of the view that the question whether the amending Act of 1929 which brought about certain changes in Sections 92 and 95 of the Transfer of Property Act is retrospective or not is not material for the decision in this case. The contention of the learned counsel proceeds on the basis that the first defendant is a co-mortgagor, that in such capacity he has redeemed the suit mortgages and that, therefore, the mortgages stand extinguished. But on the facts of this case it is clear that the mortgages have admittedly been executed only by Ansuddin who was entitled only to a half share in the suit property. The other half has been held to belong to the first defendant's father. Though Ansuddin purported to execute the mortgages in relation to the entirety of the suit property, and that it has been found that Ansuddin was entitled only to a moiety, the mortgages should be taken to cover only the mortgagor's half share. Therefore, the half share belonging to the first defendant's father cannot be the subject-matter of the suit mortgages created

by Ansuddin. It is not, therefore, possible to treat the first defendant as a co-mortgagor. She has got an independent title to a half share in the suit property. Thus, when the first defendant took the assignment of the mortgages in 1911, she cannot be said to have done so in her capacity as a co-mortgagor, neither the first defendant nor her father was a co-mortgagor. If she is not a co-mortgagor, the question is whether her taking an assignment of the mortgages created by Ansuddin will put an end to the mortgages themselves. According to the learned counsel the assignment taken by the first defendant in 1911 had extinguished the mortgages and had created new rights between the parties, that it has resulted in the creation of a charge over the shares of non-redeeming co-mortgagors for the aliquot shares of the mortgaged money, that there is a corresponding right created in favour of the non-redeeming co-mortgagors to claim delivery of possession by tendering the aliquot share of the mortgaged money to the redeeming co-mortgagor. The contention of the learned counsel in substance is that a suit for redemption will not lie after the mortgages have been redeemed by a co-mortgagor and the only right of the non-redeeming co-mortgagors is to file a suit for redemption. But in my view it is unnecessary to consider the tenability or otherwise of the said contention on the facts of this case. As already stated, the first defendant is not a co-mortgagor entitled to redeem the mortgages and she has taken only an assignment of the mortgages from the heirs of the original mortgagee. The question is whether the said assignment would extinguish the mortgages as such, leaving the heirs of the mortgagor to file a suit for possession within the time prescribed by law. If the assignment cannot be taken either as discharging the mortgages or as extinguishing the same, then the plaintiffs are entitled to redeem the mortgage.

8. Therefore the main question to be considered on the facts of this case is whether the assignment of the mortgages taken by the first defendant amounts to an acknowledgment under Section 19 of the Limitation Act. If it is construed to be an acknowledgment of the mortgagor's right to redeem, then there will be a fresh period of limitation of 60 years from the date of the assignment for redeeming the mortgage. The learned counsel for the appellants referred to the various decisions of this court and other High Courts rendered before the amendment of Sections 92 and 95 of the Transfer of Property Act to show that where one of several

mortgagors redeems the whole mortgage and obtains possession, a suit against him by another mortgagor to recover his share of the mortgaged property on payment of his share of the expenses of redemption is not governed by Art, 148 of the Limitation Act. But I am not referring to any of those decisions, as in my view, the first defendant is neither a co-mortgagor much less a redeeming co-mortgagor and as such the principles laid down in those decisions cannot be applied to the facts of this case. Here the first defendant who is not a co-mortgagor has taken an assignment of the mortgagor which are found to comprise only the half share belonging to Ansuddin, the original mortgagor. Thus the mortgaged property is only the half share belonging to Ansuddin in the suit property though he purports to execute the mortgages in relation to the entirety of the properties. The first defendant cannot be said to have any interest in the property mortgaged that is the half share belonging to the mortgagor in the suit property. Therefore, he cannot be said to have any right to redeem the mortgage. I cannot, therefore, agree with the learned counsel for the appellant that the assignment taken by the first defendant amounts to redemption of the mortgage resulting in the extinction of the same. Thus the first defendant is neither a co-mortgagor nor could she redeem the mortgages which relate only to the half share belonging to the mortgagor Ansuddin. Therefore it is clear that the mortgages as such have not been extinguished by discharge or otherwise in 1911.

9. Then we have to consider as to whether the assignment, Ex. B-3, amounts to an acknowledgment as contemplated in Section 19 of the Limitation Act of 1963, so as to give a fresh period of limitation for redemption. In *Padmanabha v. Lakshmi* AIR 1953 Trav-Co 244, there was a deed of assignment of the mortgage right. The assignee created another mortgage in respect of the same. It was held in that case that the assignment amounted to a clear admission that the mortgagee had at the relevant time only mortgage right over the property implying thereby that the property was liable to be redeemed and that such a deed of assignment of an existing mortgage right constitutes a valid acknowledgment to save limitation for a suit for redemption. In *Sankara Pillai v. Ananda Pillai* : AIR1958 Ker307 it was held that the real nature of the transaction rather than the name given to it by the parties should decide its nature, that whether or not there is an acknowledgment is to be decided only on the recitals contained in the

document, and that the acknowledgment of the subsistence of the mortgage by the mortgagee is binding on his assignee, who derives his title to the mortgage right from him and gives fresh starting point of limitation for a suit for redemption. In *Nallathambi Nadar v. Ammal Nadachi* : AIR1964 Mad169 , a Full Bench of this court laid down the essential requirements for the purpose of invoking Section 19 of the Limitation Act, (1) there should be an acknowledgment of liability in respect of the property or the right in question and (2) it should be by the party against whom such property or right is claimed. According to the Full Bench an acknowledgment of liability pre-supposes that the person acknowledging possesses some interest which can be bound by his statement and acknowledgment of liability must involve an admission of a subsisting jural relationship between the parties and a consciousness and an intention of continuing such a relationship until it is lawfully terminated. The same Full Bench in a subsequent decision in *Valliamma v. Sivathanu* : AIR1964 Mad269 expressed the view that in order to constitute a valid acknowledgment for purpose of limitation there should be a subsisting liability and that a mere recital of past liability accompanied by a statement as to its discharge cannot be construed as an acknowledgment of liability.

10. In this case the heirs of the mortgagee have assigned their mortgage rights under Ex. B-3. It is clearly stated in Ex. B-3, that what is made over under the document was the othi rights under Exs. B-1 and B-2. In view of the clear recitals in the deed of assignment, it is impossible to say that there is no acknowledgment of a subsisting mortgage. As has been pointed out already, it is well established that any acknowledgment by the assignor binds the assignee as well. Therefore the first defendant cannot be permitted to say that she is not bound by the acknowledgment made by her assignors. The decision in *Sidhari Ram v. Gargi Din*. AIR 1924 All 458 is also in point. In that case a mortgagee executed a sale deed in favour of the defendant of mortgagee rights in a grove. In that sale deed he stated that he was a mortgagee of the grove and he was selling his rights as mortgagee to the defendant. It was held that the very fact of the mortgagee selling his mortgage rights amounts to an express acknowledgment of the existence of a subsisting mortgage and of his subsisting rights which he was competent to sell, that the very fact of the defendant purchasing those rights was an acceptance on

his part of an existing mortgage a mortgage which was in force as subsisting mortgage on the date of the sale to him, and that, therefore, he cannot set up any defence inconsistent with the mortgagee's rights. In this case, the assignment deed makes it clear that the assignment was only of the mortgagee's rights. The first defendant having got an assignment of the mortgage rights cannot now take up an attitude that the mortgages are not liable to be redeemed. In my view, the lower appellate court is right in holding that the suit is not barred by limitation in view of the acknowledgment contained in Ex. B-3.

11. The result is the second appeal fails and is dismissed with costs. No leave.

12. In the memorandum of objections filed by the respondent they question the findings of the courts below as regards the ownership of other half share. In view of the fact that the courts below have concurrently held that the suit property originally belonged to Asanachi and not to Ansuddin, the finding that half share belonged to the first defendant cannot be successfully challenged. The memorandum of objections is therefore dismissed. No costs.

13. Appeal dismissed.