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Rahimansa Rowther and anr. Vs. the Madras Islamia Educational Institution, Vallam, Represented by Its Secretary and Representative, Mohideen Batcha Rowther

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Court : Chennai

Decided On : Jan-29-1952

Reported in : AIR1953Mad366; (1952)IIMLJ404

Judge : Subba Rao, J.

Acts : [Registration Act, 1908](#) - Sections 17(1) and 49; [Evidence Act, 1872](#) - Sections 91; [Transfer of Property Act, 1882](#) - Sections 60; Limitation Act, 1908 - Schedule - Article 148

Appeal No. : Second Appeal No. 1673 of 1948

Appellant : Rahimansa Rowther and anr.

Respondent : The Madras Islamia Educational Institution, Vallam, Represented by Its Secretary and Representative,

Advocate for Def. : R. Gopaldaswami Iyengar, Adv.

Advocate for Pet/Ap. : K. Venkatarama, Adv.

Disposition : Appeal dismissed

Judgement :

Subba Rao, J.

1. This is a second appeal against the decree and judgment of the Court of the Subordinate Judge of Tanjore confirming that of the District Munsif of Tanjore in O. Section No. 134 Of 1943, a suit filed by the respondent for redemption of the usufructuary mortgages and for possession of properties pertaining to its 7/10th share. One Natharsa Rowther had four sons and two daughters. They were Kadir Hussain, Kadirasa, Mohideensa, Mohammad Kanni, Miran Bivi and Chinna Pillai Bivi. Natharsa Rowther mortgaged his three shops bearing Nos. 11, 12 and 13 situated in survey number 176/l-A at Vallamvadakku, Sethi village to one Nizam Rowther on 27th, 28th and 29th March 1867 for a sum of Rs. 297. Natharsa's son Mohideensa created a mortgage in regard to the same properties in favour of the said mortgagee for a sum of Rs. 50 on 5-12-1878. After the death of the original mortgagor his four sons became entitled to 2/10th share each and the two daughters 1/10th share each. Noor Bivi daughter of Chinna Pillai Bivi and also daughter-in-law of Kadirasa succeeded to her mother's 1/10th share and also to Kadirasa's 2/10th share and thus became entitled to 3/10th share in the mortgaged properties. Defendants 1 to 10 are her heirs. The other heirs of Natharsa conveyed then interest to the plaintiff and the plaintiff therefore became entitled to the 7/10th share in the said properties.

2. On 16-11-1891 there was a partition in the mortgagee's family and his sons, Kamal, Mohideensa and Natharsa got one shop each. Mohideensa assigned his shop to Kamalsa. Kamalss's heirs received their proportionate share of the mortgage amount from Noor Bivi and released shops, Nos. 11 and 12. Noor Bivi Instituted O. S. No. 98 of 1933 on the file of the District Munsif's Court, Tanjore, for redemption of shop No. 13 and obtained a decree on 28-6-1933 and took delivery of the shop on 18-7-1934. The daughters of Noor Bivi conveyed these shops to defendant, under Ex. D. 9 dated 13-12-1938.

3. The plaintiff who became the owner of 7/10th share in the mortgaged properties filed the aforesaid suit for redemption and possession of the properties pertaining

to its share. Defendants 1 and 10 pleaded that in a partition between the heirs of Natharsa the equity of redemption in the suit properties was allotted to Kadirsa and that, therefore, the other heirs of Natharsa ceased to have any interest in the equity of redemption. They further contended that they acquired right by adverse possession to the suit items. Both the, Courts found that defendants failed to establish the exclusive right of Kadirsa to the plaint schedule properties. They also agreed in holding that the defendants did not establish their plea of adverse possession. Defendants 1 and 2 have preferred the above second appeal.

4. The first question is whether the equity of redemption was allotted to Kadirsa in the alleged partition. In support of such an allotment defendants relied upon Ex. D. 2 dated 16-12-1878. Learned counsel for the respondent contended that this document was not admissible in evidence as it required registration. Ex. D. 2 purports to be an agreement entered into between the surviving sons of Natharsa and his grandsons. As the arguments turned upon the recitals in the document the material portions may be extracted:

'Whereas Natharsa Rowther, our father and grandfather of Sheik Mohammad Rowther after partitioning and giving to us the other properties set apart for the maintenance of himself and his wife and also for funeral expenses the shops situated in the eastern row of the Jevuli shop street, vallam Whereas father and mother Ismail Bivi were under the protection of the aforesaid Kadirsa Rowther after the partition effected in our family; whereas the said Kadirsa Rowther met the funeral expenses of Ismail Bivi Ammal on her death, whereas in accordance with the wish expressed by Natharsa Rowther while he was alive that his funeral expenses should also be met by Kadirsa Rowther himself and that he should take the three shops absolutely the said Kadirsa Rowther himself met the funeral expenses of the said Natharsa Rowther, whereas disputes arose among us as Mohideensa Rowther effected a second usufructuary mortgage over the middle shop to Nadirsa Rowther, son of Nijam Rowther of Kolik-kottai on the 5th of this month for a sum of Rs. 50 claiming the same as belonging to himself and took the amount himself, whereas we have agreed to the settlement made by the panchayatdara that in lieu of the sum of Rs. 50 got by Mohideensa Rowther through the Othi Sheik Muhammad Rowther should get the jewels worth Rs. 45

which belonged to Ismail Bivi and which were with sheik Muhammad Rowther and about which there was a dispute, that Kadirsa Rowther should give a sum of Rs. 45 to Muhammad Gani Rowther, that Kadirsa Rowther himself should pay the Othi amount of Rs. 347 payable by Natharsa Rowther and Mohideensa Rowther in respect of the aforesaid shops and redeem them and take them absolutely.

Now, therefore, we consent and agree that Kadirsa Rowther should pay a sum of Rs. 297 being the amount due under the usufructuary mortgage executed by Natharsa Rowtner in respect of the three shops and the sum of Rs. 50 being the amount due under the mortgage executed by Mohideen Rowther, in all a sum of Rs. 347, redeem the said shops and take them absolutely.'

The document was signed by the sons and grandsons of Natharsa Rowther and was attested by several witnesses.

Under this document the heirs of Natharsa Rowther other than Kadirsa carried out the wish of Natharsa Rowther that the said shops should be given to Kadirsa Rowther. After the death of Natharsa Rowther there were disputes, between the members of the family. Those disputes were settled through the intervention of Panchayatdars. As part of their decision Kadirsa had taken over the liability of Mohammad Gani and the other members gave the shops to Kadirsa. They fulfilled the wish of Natharsa Rowther by transferring the said items to Kadirsa. Under Ex. D. 2 they purported to confer for the first time title on Kadirsa in respect of the three shops. The document conferred title on Kadirsa and therefore it required registration and not having been registered it is inadmissible in evidence.

5. But it is contended that Ex. D. 2 did not create interest in the immovable property but had recorded the pre-existing gift. As I have already pointed out, it is clear from the recitals that Ex. D. 2 itself purported to create title though disputes between the members of the family had their origin in a wish expressed by Natharsa Rowther. Learned counsel relied upon the judgment of the Judicial Committee in --'Bageshwari Charan Singh v. Jagarnath Kuari', 62 Mad LJ 296. There, the owner of an impartible estate made a gift in June 1909 of a portion of the estate in favour of his second wife who thereupon entered into possession. In 1916 the owner of the estate filed a petition with the commissioner in which he

related the deed of gift to his wife, expressed a doubt as to whether the deed of gift was valid, and asked the commissioner either to declare that the deed was valid or to give sanction to the execution of a fresh deed of gift. The wife also filed a similar petition. One of the questions raised was whether the petition filed by the wife was admissible in evidence as it was not registered. Their Lordships in connection with that contention made the following observations at page 301:

'The distinction is between a mere recital of a fact and something which in itself creates a title In the present case the statement in the petition of the respondent did not create any right in the Thakur. It merely acknowledged as a fact that such right was his. There was, therefore, no necessity for registration.'

Their Lordships, therefore, held that the petition did not create any right in Thakore but only acknowledged his pre-existing right. This judgment, therefore, has no bearing on the admissibility of Ex. D. 2. Here the document itself creates a right in praesenti and, therefore, not having been registered is inadmissible in evidence.

6. It is then contended that this document though not admissible to establish title of Kadirsa or his heirs could be relied upon for the collateral purpose of showing the nature of possession. It is undoubtedly true that a document inadmissible for want of registration can be relied upon for proving the character of possession. The appellants can, therefore, rely upon this document for the purpose of showing that after Ismail Bivi redeemed the mortgages, that is from the years 1931 and 33 she claimed to be in possession in her own right. But this circumstance will not be of any practical value to the appellants if the suit for redemption be otherwise in time. A few relevant facts bearing on the question of limitation or adverse possession may now be stated. The usufructuary mortgages were dated 27, 28 and 29th of March 1867. Under Ex. P. 1 dated 16-11-1891, i.e., the partition that was effected between the- soils of the mortgagee they admitted their possession of the three shops as usufructuary mortgagees. The Court below held that the said admission operated as acknowledgment within the meaning of Section 19, Limitation Act. That, that admission was an acknowledgment was not disputed before me. One of the co-mortgagors, that is Noor Bivi redeemed mortgages in 1931 and 1933. The representatives of the other mortgagors filed the suit for redemption on 3-6-1946.

If they are entitled to redeem the mortgage their suit would be well within time under Article 148, Limitation Act as that article prescribes the period of limitation as sixty years. As the acknowledgment was dated 16-11-1891 the suit would not be barred before 16-11-1951, and the suit having been filed on 3-6-1946 would, therefore, be within time.

7. The question, therefore, is whether one of several co-mortgagors could file a suit for redemption against the other co-mortgagors who redeemed the mortgage. The relevant provisions of the Transfer of Property Act read as follows:

Section 91: 'Besides the mortgagor any of the following persons may redeem or institute a suit for redemption of the mortgaged property namely, (a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

Section 92: Any of the persons referred to in Section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.'

Section 95: When one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under Section 92 against his co-mortgagors, be entitled to add to the mortgage money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.'

Under the aforesaid sections it is obvious that the co-mortgagor will be subrogated to the rights of the mortgagee if he redeems the mortgage. To put it in other words he will be substituted for the mortgagee whom he has paid off.

The aforesaid sections have been amended by Act XX of 1929. Before the amendment there was a sharp conflict of judicial opinion in regard to the right of one of several mortgagors if he redeems the entire mortgage. But that conflict was

set at rest by the amending Act. The effect of the amendment on the rights of a co-mortgagor has been succinctly and accurately stated by Sir D.P. Mulla in his Transfer of Property Act at page 598 (3rd Edn.)

'All these defects now disappear, and under the combined effect of Sections 91 and 92 the case of one co-mortgagor redeeming is merely an instance of subrogation. The redeeming mortgagor has not merely a charge, but the mortgage, as to his share in extinguished, and as to the shares of the other mortgagors he stands in the shoes of the mortgagee Where a co-mortgagor redeems the entire mortgage, his right as a mortgagee relates back to the date of the mortgage which he has redeemed for the benefit of priority over subsequent mortgages.'

The question of limitation in regard to such a suit fell to be considered in -- 'Mukha Narain Singh v. Ramlochan Tiwari', 19 Pat 938. The facts in that case were, defendant 4's predecessor-in-interest executed a usufructuary mortgage in 1866 in favour of the predecessor-in-interest of defendant 3. The due date for payment was May or June 1870. Defendant 1 who is a transferee of a share of the mortgage property redeemed the mortgage in 1905. The plaintiffs who became the owners of the entire equity of redemption filed the suit on 4th September 1933 for redeeming their share of mortgage by proportionate payment of the mortgage debt. It was not in dispute that Article 148, Limitation Act applied. The question was whether the period of limitation started in 1870 from the due date of payment or in 1905 when defendant 1 redeemed the mortgage. The learned Judges after noticing the conflict of views that existed prior to the Amending Act of 1929 pointed out that by the Amending Act the co-mortgagor who redeemed the mortgage was clearly subrogated to the position of the mortgagee and they expressed their view on the question of limitation at page 944:

'Here also time had begun to run against all the mortgagors from the time when the right to redeem accrued, that is to say, from the due date of the mortgage, and did not cease to run against the plaintiffs merely because the other co-mortgagors redeemed the 'mortgage.'

This judgment is, therefore, authority for the position that one of several mortgagors who redeems the mortgage is subrogated to the rights of the mortgagee and therefore the co-mortgagor can redeem the subrogee within the period prescribed under Article 148 Limitation Act, that is sixty years from the due date of payment. Broomfield and Lokur JJ. expressed the same view in -- 'Raghavendracharya v. Vaman Srinivas', : AIR1943 Bom191 . There also a co-mortgagor redeemed the entire mortgage and the other co-mortgagors filed a suit for redemption against the said co-mortgagor. The question for consideration was whether limitation would run under Article 148, Limitation Act from the date of redemption or from the date when the debt becomes due under the original mortgage. The learned Judge observed at page 194:

'If the subrogee has the same rights as the mortgagee, the period of limitation for a suit against him must be the same and not different.'

They pointed out 'that by reason of the amendments to Section 92 and 95, T.P. Act, a co-mortgagor who had redeemed the mortgage had all the rights of the mortgagee including the right to interest on being redeemed. I respectfully agree with the view expressed by the Bombay and Patna High Courts as they are consistent with the provisions of Sections 92 and 95, T. p. Act. Indeed Section 92, T. P. Act clearly states that the co-mortgagor redeeming the mortgage has the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

8. I, therefore, hold that the plaintiff's suit for redemption having been filed within the period of sixty years from the date of the acknowledgment is clearly within time. In the result the judgment of the Court below is correct and this second appeal is dismissed with costs. (Leave refused).

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