Devadas (Minor) and ors. Vs. Maniyam Sadasiva Reddiar and ors.

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Court : Chennai

Decided On : Feb-21-1947

Reported in : AIR1947Mad411; (1947)1MLJ333

Appellant : Devadas (Minor) and ors.

Respondent : Maniyam Sadasiva Reddiar and ors.

Judgement :

Frederick William Gentle, C.J.

1. In this civil revision petition the plaintiff in the suit is the petitioner and he challenges the correctness of the learned Subordinate Judge of Salem in rejecting his suit for redemption of a mortgage on the ground that an insufficient amount of court-fees had been paid. The amount of court-fee which the petitioner had paid was calculated on the amount of the principal of the mortgage debt. The learned Subordinate Judge held that in addition to the amount already paid, Rs. 652-7-0, the petitioner was required to pay about Rs. 150 in respect of a claim which, the learned Judge held, was made for the balance due to him for acts of waste or wrong alleged to be committed by the mortgagee.

2. A usufructuary mortgage was executed on the 5th May, 1926, by one Vasudeva Reddiar in favour of the first and second defendants and the father of the third defendant in the suit, as mortgagees, to secure a loan of Rs. 9,000 ; some property in a mitta in the District of Salem was security for the mortgage. In regard

to that property the mortgagor, Vasudeva Reddiar, was entitled absolutely to a one-half share and, in respect of the other half a perpetual right of enjoyment conditioned upon payment of Rs. 175 per annum as rent ; failure to pay the rent was a ground for forfeiture of that half of the property. In the mortgage deed the mortgagees covenanted to pay the above annual rent. On the 2nd April, 1930, the equity of redemption was transferred to the plaintiff in the suit and, by virtue of that transfer he instituted the suit for redemption. It is convenient hereafter to refer to him as the mortgagor.

3. The mortgagees failed to pay the annual rent of Rs. 175 and therefore failed to observe their obligation under the mortgage deed, and, as a consequence, one half of the property has been forfeited. The plaintiff alleges that the value of his interest in the lost property, prior to its forfeiture is represented by a sum of Rs. 12,000 and he contends that, Rs. 9,000 of that sum being appropriated towards the mortgage debt, that debt is fully discharged and he is entitled to an order for redemption of the property. Further, he alleges that he is entitled to obtain from the mortgagees the balance of Rs. 3,000 the difference between the value of the lost land and the amount of the mortgage debt.

4. His assertion regarding the recovery of payment over to him of the balance arises out of Section 76(c) of the Transfer of Property Act which provides that when, during the continuance of the mortgage, the mortgagee takes possession of the hypotheca, he must, in the absence of a contract to the contrary, out of the income of the property, pay all rent accruing due in respect of it. The section further provides that if the mortgagee fails to perform any of the duties imposed upon him by the section, he may, when accounts are taken in pursuance of a decree made under the Chapter of the Act in which Section 76 is included, be debited with the loss, if any, occasioned by such failure.

5. It is now convenient to refer to the relevant provision of the Court-Fees Act. That is Section 7(ix) which enacts as follows :

In suits against a mortgagee for the recovery of the property mortgaged...(the amount of fee payable shall be computed) according to the principal money expressed to be secured by the instrument of mortgage.

Notice of the present proceedings was given to the learned Government Pleader since the present question arises under the Court-Fees Act, and, in argument, he contended that the claim by the mortgagor in the suit is not entirely a claim contemplated by Section 7(ix), namely, a suit for the recovery of the property mortgaged. Consequently, he contended, that in regard to the assertion by the mortgagor that he is entitled to the Rs. 3,000, the difference above mentioned, that is not a claim contemplated by Clause (ix) and must be separately assessed with regard to court-fee.

6. Several decisions of this Court have been cited which deal with the peculiar law applicable to the Malabar district and to mortgages cum leases of property in that area. In my opinion, those decisions are not in point and in the present instance reference to them is not necessary.

7. When a mortgagor under a usufructuary mortgage wishes to terminate the existence of the mortgage, he is entitled to institute a suit for redemption. In that suit, upon a decree being passed, the Court, as a rule, in the absence of admission between the parties which make it unnecessary, directs an account or accounts to be taken to ascertain whether the mortgage debt has been discharged or, if not, how much remains, and for what sum, if any, the mortgagee, who has been in possession of the property is obliged to account to the mortgagor in respect of his stewardship, to ascertain any moneys which should be payable or credited to the mortgagor for any acts of waste committed by the mortgagee and, also, in the event of the mortgagee failing to observe his duties set out in Section 76 of the Transfer of Property Act, particularly as in this case, relating to his obligation to pay rent, the amount for which the mortgagee should account to the mortgagor. Not infrequently when an account is taken it is found that there are surplus profits derived by the mortgagee from the estate, for which he is bound to account to the mortgagor. When the account has been taken the decree directs redemption. Such decree may also, if the circumstances required, direct that the property shall be reconveyed to the mortgagor conditional upon him paying a specified sum to the mortgagee ; or the decree may provide for the transfer of the property by the mortgagee to the mortgagor and also payment to the mortgagor of some stipulated sum.

8. The question of the amount of court-fee and the principle on which it should be ascertained in a suit for redemption has been considered on two occasions by single Judges of this Court in suits where the mortgagor was asserting a right to obtain surplus profits, either stipulated sums or sums which would be reflected after accounts had been taken between the parties. These decisions are Granthi Pothanna v. Satyananda Charyulu : AIR1931 Mad479 and Radhakrishna Chetli v. Teckla Schomberg : AIR1941 Mad115 . In each of these cases it was held that an additional court-fee was not required ; the provisions of Section 7(ix) of the Court-Fees Act regarding a suit for recovery or redemption of mortgaged property included claims or prayers for surplus profits. In the course of his judgment Abdur Rahman, J., in Radhakrishna Chetti v. Teckla Schomberg : AIR1941 Mad115 observed at page 869 as follows :

Since the main relief claimed by the plaintiff is one for redemption and her prayers for surplus profits or for accounts are only subservient to the main relief claimed by her and as the ascertainment of the amount payable by one party to the other is a condition of redemption and is incidental thereto, the valuation put by the plaintiff in her plaint is correct.

The valuation which the plaintiff had put was the amount of the mortgage debt.

9. I am unable to find any difference in principle between those two decisions and the present case. I would observe that, with respect, I agree with the decisions expressed in both those cases. Since surplus profits which are received by a mortgagee and for which he has to account in a redemption suit are not the subject of a separate valuation, but a redemption suit is subject only to court-fee ascertained by reference to the mortgage debt, I am unable to see why the same principle should not be applicable when, instead of surplus profits, there is, what I will call, surplus deficiencies. The mortgagor in a redemption suit is entitled to claim the return of the mortgaged property. If, as is alleged in the plaint in this suit, the mortgagee has occasioned by his default part of the mortgage property to be lost, then in fact the mortgagor will not recover back that part of the property ; what he seeks to recover is what represents the lost property. Further, since the mortgagee must account for surplus profits and also account in respect of loss

which he has caused, surplus profits not being the subject of a separate court-fee assessment, I see no reason why surplus deficiency should be treated differently. In my view they should not be, and they are not, liable to a separate assessment.

10. In my opinion, the learned Judge in the lower Court was wrong in rejecting the plaint in the suit on the ground that insufficient court-fee had been paid. The order rejecting the plaint should be set aside, this revision petition be allowed and the matter remanded back to the Subordinate Judge of Salem for him to accept the plaint and to act in accordance with this judgment. The petitioner is entitled to his costs which will be paid by the Government.

11. Appeal No. 434 of 1945 is also allowed. Costs of that appeal will be costs in the suit. Court-fee paid on the memorandum of appeal will be refunded.

Rajamannar, J.

12. I agree.