

Krishnan and Two Others Vs. Subhashini and Two Others

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Court : Chennai

Decided On : Sep-08-2000

Reported in : 2000(4)CTC579

Judge : K. Sampath, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) -- Sections 100

Appeal No. : S.A. No.1182 of 1998

Appellant : Krishnan and Two Others

Respondent : Subhashini and Two Others

Advocate for Def. : Mr. K. Sreekumaran Nair, Adv.

Advocate for Pet/Ap. : Mr. P. Anantha Krishnan Nair, Adv.

Judgement :

ORDER

1. Plaintiffs 2 to 4 in O.S.No.499 of 1984 on the file of the Principal District Munsif, Kuzhithurai, are the appellants in the second appeal. The suit filed by them and their mother Valliamma for redemption of a mortgage was dismissed by the trial Court and this decision was confirmed in the appeal A.S.No.53 of 1996 filed by them before the learned Subordinate Judge, Kuzhithurai, on 30.4.1998.

2. The facts leading to the present proceedings may be stated as follows:

The first plaintiff Valliamma in the present proceedings and one Chellappan Pillai were sister and brother. Plaintiffs 2 to 4 are the children of the first plaintiff. The first defendant is the wife of one Kuttan Panicker. The second defendant is the daughter while the third defendant is the daughter's husband. On 22.1.1968 under Ex.A-1 Valliamma created an othi in favour of the first defendant. The extent was 2 cents. The description of the property as set out in the plaint is as follows:

'Kadavilagom Purayidom bearing S.No.629 measuring 5 acres 87 cents in the northern portion of 3 acres 2 cents.

East of the property in the possession of Kuttan Panicker.

South of the property mortgaged (othi) to C.Sathyabhama.

West of the plaintiff's house. North of Vellachipara Road.'

On 2.5.1968 under Ex.B-17 Valliamma's brother Chellappan Pillai executed a sale deed in favour of Kuttan Panicker in respect of 10 cents in S.No.629. Under Ex.B-1 on 17.4.1969 after the mortgage by Valliamma in favour of the first defendant; Kuttan Panicker executed a gift deed in favour of defendants 2 and 3. The area subject matter of gift is an extent of 8 cents and it is specifically mentioned in Ex.D-1 that out of the 10 cents purchased by him under Ex.B-17 Kuttan Panicker reserved an extent of 2 cents for himself and the balance of 8 cents was being gifted.

In 1971 Kuttan Panicker filed a suit O.S.No.854 of 1971 before the District Munsif's Court, Kuzhithurai, on the basis of Ex.B-17 against the first plaintiff herein (Valliamma) and six others of whom Kuttan Panicker's vendor Chellappan Pillai was the fourth defendant and his wife Subashini, the first defendant in the present suit, was the seventh defendant. The suit was for demarcation of the property covered by the sale deed Ex.B-17.

The present first defendant Subashini filed a written statement in her capacity as the seventh defendant in the other suit stating that she had taken a mortgage from Valliamma over 2 cents of lands just adjacent to and east of the 10 cents belonging to the plaintiff therein, viz. Kuttan Panicker under Document No.2267 of

1968 dated 22.7.1968 (the present Ex.A-1), that she was in possession of the same and that the said 2 cents could be demarcated on land. The suit was dismissed by the learned District Munsif on 31.7.1974 holding that the sale deed in favour of Kuttan Panicker (Ex.B-17 in the present suit) was invalid as the vendor Chellappan Pillai has no right to execute the sale deed, he being one among several members of a joint family, to which the property belonged. There was an appeal in A.S.No.244 of 1976 and the appellant, viz. Kuttan Panicker having endorsed on the appeal memo that the appeal was not pressed and that it was settled out of Court, the appeal was dismissed by the learned Subordinate Judge, Nagercoil, on 28.3.1977 as settled out of Court and as not pressed. Thereafter, the present suit came to be filed as already stated for redemption of the mortgage executed by the first plaintiff Valliamma in favour of the first defendant Subhashini, wife of Kuttan Panicker.

3. Though the first defendant on the one hand and defendants 2 and 3 on the other filed separate written statements; their defence was practically identical. In the written statement of the first defendant, it is pleaded that the plaint schedule property was not available on land and that she never assigned her right to defendants 2 and 3 and that defendants 2 and 3 were not in possession of the plaint schedule property. The further averments in the written statement of the first defendant are as follows:

The house of the plaintiff was situated just east of the 10 cents of the lands purchased by Kuttan Panicker. No land was available between the 10 cents and the plaintiff's house. Thus, the plaint schedule property was not available on land. Even if it was available, it lay only east of Kuttan Panicker and defendants 2 and 3's lands. So the plaintiff was to identify the plaint schedule property before seeking redemption. By getting redemption she was not entitled to disturb the 8 cents of defendants 2 and 3 and the 2 cents of Kuttan Panicker, the husband of the first defendant.

4. The second defendant filed a written statement and apart from what the first defendant had stated in her written statement, it stated that Kuttan Panicker executed a gift deed in their favour in respect of 8 cents and the building therein

out of 10 cents as per the gift deed dated 17.4.1979 and that Kuttan Panicker excluded 2 cents at the south east for his purpose. The rest of the area and the building he gifted to defendants 2 and 3. The gift was accepted and acted upon and they were in enjoyment of that area from the date of the gift. The plaintiff's house was situated just east of the 10 cents purchased by Kuttan Panicker and there was no land in between the 10 cents and the plaintiff's house. The plaintiff impleaded these defendants alleging an assignment of plaintiff mortgage in their favour of them, but there was no such assignment. To avoid any future trouble these defendants prayed that there must be specific direction in the decree if passed, directing the plaintiff not to disturb or to put any claim over these defendants property, which they got under the gift deed, i.e. 8 cents and the building.

5. The trial Court on the basis of the pleadings framed the following issues:

(1) Whether the plaintiffs are entitled to redeem the mortgage in respect of the suit property?

(2) Whether the suit property is identifiable on land? And

(3) Whether the suit is barred by the principles of res judicata in view of the decision in O.S.No.854/71 ?

6. On the side of the plaintiffs, the second plaintiff got himself examined as P.W.1 and Exs.A-1 and A-2 were marked. On the side of the defendants, the third defendant was examined as D.W.1 and Exs.B-1 to B-20 were marked. The Advocate Commissioner appointed in the suit ThiruMurugan was examined as Court Witness and the report and the plan submitted were marked as Exs.C-1 and C-2. The trial Court held that even in the prior suit it was not made clear as to whether the property stated to have been othied was available on land and that there was no inconsistency in the case of the first defendant, that she had maintained the same stand as she took in the earlier suit and that the principles of res judicata would not apply to the facts of the present case. The trial Court found that the property was not available on land and therefore, the plaintiffs should fail. So holding by judgment and decree dated 31.10.1994 the trial Court dismissed the

suit. As already stated, the lower Appellate Court confirmed the finding by the trial Court and dismissed the appeal. The lower Appellate Court also found from Exs.B-2 to B-16 that the suit property belonged to defendants 2 and 3 and that they were in possession on the strength of their title and the plaintiffs were not entitled to any relief.

7. Notice of motion was ordered and after notice the respondents appeared through Counsel. It should be pointed out that the same Counsel Mr. Sreekumaran Nair represented all the respondents.

8. On the contentions raised by the learned counsel for the appellants, Mr.Ananthakrishnan Nair, the following substantial questions of law arise for decision in the second appeal:

(1) Whether the Courts below have gone wrong in dismissing the suit when the mortgage sought to be redeemed is admitted by the mortgages? And

(2) Whether in law it is not the paramount duty, of the mortgagee to surrender possession on redemption of the suit property, which was put in his possession at the time of execution of the mortgage ?

9. Mr.Ananthakrishnan Nair, learned Counsel for the appellants, submitted that the mortgage cannot deny title and consequently possession and in the instant case, there were vital admissions by the defendants to the effect that the mortgage property was still there on ground and that there had been a mixing together of the property purchased by Kuttan Panicker and the property mortgaged to Subashini, the first defendant and it is for the mortgagee to properly locate the property and give back possession of the same to the mortgagor. The learned counsel referred to the admissions on the side of the defendants and also relied on the following decisions in support of his contentions:

(1) Appu Gounder v. Munuswami Kone and others : AIR1962 Mad395 ; (2) Anandrao Purshottam Hathar v. Bhikaji Sadashiv Vaishempayan, AIR 1922 Bom. 156 and (3) Ramachandra Mahadeo v. Mukund Babaji, 1901 (3) BLR 152.

10. Mr.Sreekumaran Nair, learned counsel for the respondents, submitted that the plaintiffs could if at all only redeem the property mortgaged, that the descriptions given in the mortgage deed were vague and the mortgaged property was to the east of the 10 cents purchased by Kuttan Panicker and the plaintiffs could in the event of a decree being passed in their favour, very well take 2 cents to the east of the extent of 10 cents purchased by Kuttan Panicker. The earlier suit by Kuttan Panicker for demarcation of the 10 cents alleged to have been purchased by him from Chellappan Pillai was dismissed on the ground that Chellappan Pillai had no right to sell the property belonging to the joint family and according to the learned Counsel this would not in any way help the case of the appellants.

11. It has already been noticed that the present first defendant was the 7th defendant in that suit and her specific contention was that she had taken a mortgage from the first plaintiff and the two cents she had taken mortgage of should also be demarcated. Thus, it is not disputed that a particular extent of property was mortgaged by Valliamma to the first defendant. It is also evident that she was put in possession. What transpires from the evidence is that there was a mixing together of the property purchased by Kuttan Panicker and the property mortgaged to the first defendant. The third defendant as D.W.1 has in the chief examination stated as follows:

In cross-examination, this is what he has stated:-

12. In the teeth of such vital admissions, it was indeed very strange for the lower Appellate Court to have held that there was no property on ground and that the plaintiffs had not proved that the suit property existed. There has been a gross misappreciation of evidence going to the root of the matter. Vital documents and vital admissions have been totally ignored by the Courts below. This has necessitated interference by this Court.

'When the findings by the Court of facts are vitiated by non-consideration of relevant evidence or by essentially erroneous approach to the matter, this Court is not precluded from recording proper findings.' - Vide Jagadish Singh v. Natthu Singh : AIR 1992 SC1604 .

13. There is an admission that the suit property exists. It has been held in *Appu Gounder v. Munuswami Kong and others* : AIR1962 Mad395 as follows:

'It is well established that a mortgagee who has been put in possession by the mortgagor pursuant to a mortgage is estopped so long as that relationship continues between them from denying the mortgagor's title to the property. That rule prevents the mortgagee from disputing the title of the mortgagor and its application cannot be avoided by going into the very question and finding that the mortgagor had no title on the date of the execution of the mortgage.'

14. In *Anandrao Purshottam Hatkar v. Bhikaji Sadashiv Vaishempayan*, AIR 1922 Bom. 156 it has been held by a Division Bench of the Bombay High Court that,

'the mortgagee is liable for the restoration of such property as he has through negligence allowed to pass into the hands of third persons and the question as to what the liability of the mortgagee is to account for the properties of which he had given possession should be determined in the suit for redemption itself and not be left to be decided in a separate suit.'

15. In a very interesting case decided in the year 1901 *Ramachandra Mahadeo v. Mukund Babaji and another*, 1901(3) BLR 152 in almost identical circumstances as in the present second appeal, in suits to redeem, where the defendant denies the mortgage, very slight prima facie proof that a mortgage had been originally made will be sufficient to shift the entire burden of proof on the defendant. When a mortgagor seeks to redeem, the mortgagee who has been in possession under the mortgage is, except under special circumstances, bound to account for and to restore the property in its entirety and he cannot be heard to say he does not know what had happened to a portion of the property mortgaged. It is the duty of the mortgagee or those who have held as his assignees to identify fully the property mortgaged and if he or they fail to do that, they come within the principles of *Wake v. Conyers*, 2 W & T.L.C. 438, namely, that,

'the Court, in cases relating to confusion of boundaries, proceeds upon the same principle as it does where an agent, or bailiff or any other person, who is under an obligation, express or implied, to keep his own property separate from the property

of another, mixes them together, for under such circumstances he will have the onus thrown on him of distinguishing his own property, and, if he is unable to do so, the other person will be entitled to the whole property.'

16. It is not necessary to go that far. Suffice it to observe that the defendants have admitted that there was a mortgage of an extent of 2 cents by the first plaintiff to the first defendant. The mortgaged property had been mixed with the property purchased by Kuttan Panicker and the first defendant is in possession of the same. These vital admissions have been totally lost sight of by both the Courts below.

17. Mr. Sreekumaran Nair submitted that any property to an extent of 2 cents to the east of the 10 cents purchased by Kuttan Panicker could be taken as the mortgaged property. This submission cannot be accepted. The attitude of the defendants is to have the best of everything. They want to have the cake and eat it too. This cannot be allowed. An extent of 2 cents to the west of the plaintiff's property has to be demarcated and possession of the same given to the plaintiffs by the defendants.

18. Consequently, both the substantial questions of law are answered in favour of the appellants. The judgments and the decrees of the Courts below are set aside and the suit O.S.No.499 of 1984 on the file of the Principal District Munsif, Kuzhithurai, will stand decreed as prayed for. There will, however, be no order as to costs.

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