

ishwara Shetty Vs. Ramappa Shetty and ors.

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Court : Chennai

Decided On : Mar-29-1934

Reported in : 152Ind.Cas.201

Judge : Krishnan Pandalai, J.

Appellant : ishwara Shetty

Respondent : Ramappa Shetty and ors.

Judgement :

Krishnan Pandalai, J.

1. The first defendant is the appellant in this Court. The following facts are material:--One Venku Shetty was the mulgenidar of some immovable property. He mortgaged his interest in the same to Appanna Rai and Kantha Rai two brothers for Rs. 500, on a simple mortgage dated May 4, 1892. Venku Shetty sold his interest to one of the mortgagees Kantha Rai on December 2, 1910. Thus Kantha Rai having become himself the owner of the mortgagor's interest, his own half interest in the mortgage was satisfied by the purchase and he became liable to pay the other half Rs. 250, and interest thereon to the other mortgagee Appanna Rai. Immediately after the purchase, Kantha Rai granted a sub-mulgeni to the plaintiff and one Muthaya Manai on December 3, 1910. On January 4, 1912, Kantha Rai sold his interest to the 1st defendant-appellant. Manai's interest was subsequently acquired by the plaintiff who is, therefore, the only person entitled to

the sub-mulgeni right. Soon after the creation of the sub-mulgeni, the other mortgagee Appanna Rai brought his suit for recovery of half the mortgage amount. To this suit, Order 8. No. 23 of 1912, Venku Shetty, the original mortgagor and Kantha Rai the purchaser from him and the 1st defendant the purchaser from Kantha Rai were impleaded but not the sub-mulgenidar, the plaintiff, and Manai. In execution the mortgaged property was brought to sale and the Court on the then plaintiff's application ordered the sale subject to the plaintiff's sub-mulgeni right which was not represented in the suit. But the present appellant objected and appealed to the District Court which ordered that the sale should take place free of the plaintiff's sub-mulgeni right. The result of this order, if carried out, was that the plaintiff's sub-mulgeni right would be sold in execution of the decree to which he was not a party and his interest in the property would be converted into a right to receive surplus sale proceeds, if any. He would no doubt have the right of proceeding by separate suit to redeem the mortgage ignoring the sale and the decree by which he was not bound. This would involve expense and trouble and risk of losing possession pending the proceedings. Therefore, when the property was advertised for sale the plaintiff paid the amount due under the mortgage decree, O.S. No. 23 of 1912, on January 24, 1923, and had the sale stopped. Then he brought this suit against the 1st defendant-appellant and defendants Nos. 2 to 4 the legal representatives of Kantha Rai, for recovery of the money. Both sets of defendants denied liability. The 1st defendant's plea was that he had become the purchaser from Kantha Rai under a deed, Ex. III, which expressly mentioned only Rs. 276-4-0, as payable on the mortgage. He contended that he was not liable to pay more and that as he had bought the mulgeni right subject to the plaintiff's sub-mulgeni, both he and the plaintiff were liable to contribute to, the mortgage. The 3rd defendant's legal representatives contended that Kantha Rai was also not personally liable for the mortgage debt although he had taken the mortgaged property on sale after the mortgage and that Kantha Rai's assets are not liable. It was also contended for the defendants that plaintiff was not entitled to recover anything as he was a mere volunteer. The District Munsif upheld the contention that the plaintiff was a mere volunteer and that he was not entitled to recover anything as he did not satisfy the conditions of Section 69 of the Contract Act and although he worked out the figures which the plaintiff and the 1st

defendant would have to contribute in case the plaintiff was entitled to contribution, he dismissed the suit on the ground that the plaintiff was a mere volunteer.

2. In appeal the learned Subordinate Judge of South Kanara held that the District Munsif had misunderstood the legal rights of the parties. After stating the facts he held that the plaintiff was not a volunteer because, though according to the learned Subordinate Judge, he was not entitled to redeem the mortgage as he was only a sub-lessee under the mulgenidar, still the plaintiff had a right to protect his suh-mulgeni right in the property which was endangered by the impending Court sale and the 1st defendant had in fact the benefit of the payment by the appellant and he thought that the conditions required by Sections 69 and 70 of the Contract Act were satisfied. Having so held against the theory of voluntary payment, the learned Subordinate Judge also rejected the theory of the plaintiff's right being only to contribution. He held that it was not a case of two separate properties subject to the same mortgage where the mortgage has been discharged by the sale of one of them, that the appellant is only a lessee and that he is entitled to recover the whole amount paid by him. He, therefore, reversed the decree of the first Court and gave the plaintiff a decree as prayed for against the appellant but dismissed the suit as against the respondents Nos. 2 to 4 the representatives of Kantha Rai.

3. In Second Appeal, the learned Advocate has not tried to uphold the defence based upon the alleged voluntary character of the payment. The arguments have been directed only to two points. The 1st defendant-appellant is not liable for the amount paid by the plaintiff as he was only a purchaser of the equity of redemption from Kantha Rai who himself was a purchaser from the mortgagor and entitled to half the mortgage amount. Secondly, even if the 1st defendant is liable he is only liable to pay to the extent of a relative value of his interest to the plaintiff's interest.

4. Much of the discussion in both the lower Courts and in this Court has been clouded by want of a clear perception of the legal relation between the parties, and it may be for this reason that Sections 69 and 70 of the Contract Act which are general provisions relating to all contracts have been prominently brought in when there are more specific provisions relating to losses in the Transfer of Property Act

which govern the case. The mortgaged property was, no doubt, a leasehold interest, mulgeni. But that does not affect the question which arises as between the owners of the mortgaged property and the plaintiff, a permanent lessee, sub-mulgeni, of that interest. In short what has happened is that the owner having mortgaged his property by simple mortgage and subsequently sold the equity of redemption, the purchaser without paying the full amount of the mortgage gave a permanent lease of the property and afterwards sold his interest (reversion of the lease and equity of redemption of the mortgage) to the 1st defendant. The mortgagee sued to sell the property over the head both of the purchaser and the lessee, thus wiping out both their interests. The lessee has paid the mortgage amount to protect his possession and the question is whether he can recover either the whole of the money and, if only a portion, what portion, from his lessor or the present owner of the reversion. The case falls within the provisions of the Transfer of Property Act relating to leases.

5. Before mentioning the provisions governing the case I might at once correct an error into which the learned Subordinate Judge has fallen where he says that the plaintiff-respondent had no right to redeem the mortgage in question as he was only a sub-lessee and it was unnecessary to make him a part to the suit, Order 8. No. 23 of 1912. This is incorrect because under Section 91 of the Transfer of Property Act both before its recent amendment and after, 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 may redeem. Here, the property mortgaged was Venku's mulgeni right. Kantha Rai was the owner of the equity of redemption by his purchase from Venku and the plaintiff as the owner of a permanent lease from Kantha Rai had undoubtedly an interest in the right to redeem. Under Order XXXIV, Rule 1, Civil Procedure Code, all persons having an interest in the right of redemption shall be joined as parties to any suit relating to the mortgage. The plaintiff was thus a necessary party to the mortgage suit and he would not have been bound by the sale proceedings. But it was the 1st defendant (appellant's) act in appealing to the District Court and obtaining an order that the sale should be free of the plaintiff's rights which Eade it appear to the plaintiff and was probably so intended that unless the plaintiff paid the mortgage amount himself and avoided the sale he would be turned out of

possession without a chance of redeeming the mortgage. This aspect of the matter, however, is not decisive to determine whether as between the plaintiff and the 1st defendant either or both should pay the amount paid to satisfy the mortgage.

6. By Section 108(c) of the Transfer of Property Act the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

7. By the second clause of this sub section the benefit of such contract may be enforced by the transferee of the leasee's interest. By Clause (g) of that section if the lessor neglects to make any payment which he is bound to make and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor. By Section 109, if the lessor transfers the property leased, the transferee, in the absence of a contract to the contrary, shall possess all the rights and if the lessee so elects, be subject to all the liabilities of the lessor as to the property transferred. (I do not read the parts of the section now, not material). Reading these sections together it is clear that the plaintiff as one of the original lessees and the transferee of the interest of the other lessee is entitled to the benefit of the covenant for quiet enjoyment under Clause (c). It is clear also that according to the terms of the plaintiff's lease the plaintiff was not bound as between himself and the lessor to make any payment towards the previous mortgage but that the lessor Kantha Rai has under the sale-deed Ex. I, by himself undertaken to pay the whole of the mortgage debt out of the purchase money of Rs. 500. The lessor, therefore, when he neglected to pay the balance of the mortgage amount due that is Rs. 250 and interest thereon, neglected to make a payment which he was bound to make and which if not made by him was recoverable against the property leased. In such a case Clause (g) of Section 103 of the Transfer of Property Act, clearly says that the lessee may make the payment himself and recover it from the lessor. So far as Kantha Rai is concerned, the words of Clause (g) appear to be clear that he must make good the mortgage amount which in default of payment by him was recoverable against the property.

8. No Indian case applying this clause to the mortgage amount which the lessor was liable to pay and which had to be paid by the lessee to save the property has been cited. The cases which have hitherto arisen are of Government assessment, ground rent or rates and taxes payable by the landlord. In *Smith v. Dinanath Mookerjee* 12 C 213 the case was of Government of revenue payable by superior landlord who defaulted but paid by the putnidar. The case was dealt with under Sections 69 and 70 of the Contract Act. The Transfer of Property Act was not mentioned. In *Rama Sundari Dasi v. Adher Chunder Sarkar* 22 C 28 the payment made by the plaintiff was of rent due to the landlord for the property of which the defendant was then in possession under an invalid alienation by the plaintiff's mother. The plaintiff, having paid the money to save the property from the rent sale, was held entitled to recover the money from the defendant. This was clearly a case not governed by Clause (g) of Section 108 of the Transfer of Property Act but by the general provisions of Sections 69 and 70 of the Contract Act. The case in *Faiyazunnissa v. Bajrang Bahadur Singh* 104 Ind. Cas. 358 : 104 Ind. Cas. 358 : 1 Luck Cas. 275 was one of land revenue payable by the lessors under a permanent lease. The lessors having defaulted to pay, the lessees paid and were held entitled to recover. This was clearly a case under Clause (g) of Section 108 but the decision was based upon the general provisions of Section 69 of the Contract Act. The case in *Yogambal Boyee Ammani Ammal v. Naina Pillai Marakayar* 3 Ind. Cas. 110 : 33 M 15 : 6 MLT 162 : 19 ML 489 was not one of the lessor and lessee and was rightly regarded as falling precisely under Sections 69 and 70 of the Contract Act. The case in *Bepin Behari Sarvokar v. Kalidas Chatterji* 6 CWN 36 arose between a tenant and an under-tenant of certain non-agricultural land. The payment by the under-tenant of the amount of a decree for rent plus five per cent under Section 310(a), Civil Procedure Code was held not to come within the words 'bound by law to pay' in Section 69 of the Contract Act because the payment by the under-tenant was made after the sale had been completed. The learned Judges said that it would be difficult to say that after the sale in execution has been completed, the amount which the applicant paid into Court was money which the judgment-debtor was bound by law to pay. No reference was made to the Transfer of Property Act and having regard to the ground on which the decision was based, it seems not to afford any guidance for this case because

there was no Court sale in this case. In Woodfall's Landlord and Tenant, 22nd Edition, p. 877, it is stated that the 'usual qualified covenant for quiet enjoyment is likewise broken by an eviction, molestation or disturbance of the lessee by persons claiming under a prior mortgage for a long term granted by the trustees of a settlement with the concurrence of the defendant who joined therein and covenanted for the payment of the mortgage money and for title, etc.' This is as near an authority, as I have been able to get for the situation which has arisen in this case that where the lessee is threatened with disturbance or eviction by the Act of the prior mortgagee, for payment of which debt the lessor has made himself liable by covenanting with some third party such as the mortgagee or his own vendor of the leased premises, that threat amounts to a breach of covenant for his enjoyment. If so, such a sum paid by the lessee to avoid eviction and disturbance must in reason be one which the lessor was bound to make. In my opinion, therefore, as against Kantha Rai the lessor who had undertaken by the sale deed to pay off the mortgage amount the plaintiff lessee has a clear case.

9. The question then is whether the plaintiff has any and what rights against the 1st defendant-appellant the transferee from Kantha Rai. For this we must go to Section 109 of the Transfer of Property Act. The appellant is simply the transferee of the lessor's interest in the premises. Against him the section says that if the lessee so elects the transferee shall be subject to all the liabilities of the lessor as to the property, which expression is taken to mean the burden of all covenants running with the land such as covenant for quiet enjoyment. It was said by Mr. Adiga for the appellant that there was a contract to the contrary in this case. He says that it is to be found in the stipulation in his sale-deed, Ex. H1, where the vendor Kantha Rai directs the purchaser, the appellant to pay Rs. 276-4-0 to Appanna Rai, the other mortgagee. But this does not amount on a proper construction to any contract limiting the appellant's liability to bear the burden of a covenant for quiet enjoyment. It only mentions the amount which the parties then thought sufficient to satisfy the bond. The idea of the vendor Kantha Rai being called upon to pay the excess amount if any, due to the mortgagee was probably never present to the minds of the parties and cannot be deduced from the language of the deed. That the lessee has elected to hold the appellant liable is clear from the fact that he has sued him. I, therefore, think that all the necessary

conditions required by Section 109 of the Transfer of Property Act to make the appellant liable are satisfied.

10. The only point which the appellant might have raised but did not raise, is a contention that there was at the time when the plaintiff paid the money into Court no physical disturbance of possession or eviction but only a threat of eviction. It cannot well lie in the mouth of the appellant to put forward this excuse seeing that it was at his instance and probably deliberately with the intention of compelling the plaintiff to pay what he was himself bound to pay that he appealed to the District Court and got an order for sale of the leasehold interest free from the plaintiff's sub-mulgeni right. It may also be pointed out that in any case Section 69 of the Contract Act applies because the plaintiff as sub-mulgenidar had an interest in making the payment to protect his possession which was threatened and that the appellant was a person who was bound by law to make the payment. The first point raised by the appellant thus fails.

11. The second point that the plaintiff is only entitled to contribution is misconceived. This is not a case of a mortgage of two distinct properties or interests in property concurrently liable to a mortgage to which they must proportionately contribute. But the case is one where as between the lessor and the lessee the lessee is entitled to demand that his interests shall not be prejudiced by the enforcement of a prior mortgage which the lessor was bound to pay. No question of contribution arises at all.

12. The only other question left is whether the appellant having been found liable and the plaintiff having elected to proceed against him respondents Nos. 2 to 4, representatives of Kantha Rai can also be held severally liable. On this the authorities are clear that the plaintiff having once made his election, it is final and the lessee cannot after treating the transferee as liable turn round and charge the lessor in respect of the covenant [See *Stuart v. Joy* (1901) 1 KB 362 : 73 LJK 397 : 90 LT 78 : 20 TLR 109.]

13. The appeal fails and is dismissed with costs.

