Rahamathbe, and ors. Vs. Parvathamma, and ors.

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SooperKanoon Citation : sooperkanoon.com/911912

Court : Karnataka

Decided On : Mar-09-2011

Judge : Mr Justice Huluvadi G Ramesh, J.

Acts : Limitation Act. - Articl 61(b); Transfer of Property Act.

Appeal No. : Regular Second Appeal 326 / 2005.

Appellant : Rahamathbe, and ors.

Respondent : Parvathamma, and ors.

Advocate for Pet/Ap. : Sri M Sivappa. Adv.

Judgement :

1. This is a plaintiffs' second appeal seeking for recovery of possession and redemption of mortgage.

2. Plaintiffs' father is the purchaser of the suit property from the original owner in the year I960. The suit property was the subject matter of mortgage by the vendor of the plaintiffs, Puttamadamma in the year 1959 in favour of one Puttanna. Later, Puttanna sold his mortgage rights in favour of one Subbegowda, father of the 9* defendant in the year 1963. The mortgage was a usufructory mortgage for a period of six years. The plaintiffs who had the right to redeem the mortgage filed a suit against the respondents who are the legal representatives of late Puttanna and against the 9lh defendant who is the son of Subbegowda in -whose favour Puttanna had sold his mortgage rights. The matter was contested. The trial court

raised the following issues:

a. Whether the plaintiffs prove the mortgage deed dated 1.8.1959:

b. Whether plaintiffs further prove that they are eniiiled for redemption of suit schedule property;

c. Whether defendant No.9 proves that one Puttamadamma and Others executed a registered mortgage deed in favour of one Puttanna on 1.8.1959;

d. Whether 9th defendant further proves that Puttanna made over the document in respect of said mortgage property in favour of Subbegowda, the father of 91-defendant through a registered made over document dated 30. 10. 1963;

e. Whether 9th defendant further, proves that he is in lawful possession of suit (schedule property by way of made over document daeed 30.10.1965;

f. To what order or relief the parties are entitled.

3. After inquiry, having held issue 2 in the negative and. taking into consideration the contention of the defendants that they have purchased the mortgage rights under the mortgage deed in favour of Puttanna and the said mortgaged property was assigned in favour of Subbegowda, the father of the 9" defendant, the trial court dismissed the suit of the plaintiff. Against the said order, appeal was preferred before the Civil Judge (Sr.Dvn.), Chamarajanagar. The lower appellate court, having raised a poini Tor consideration as to whether the judgment of the trial court is erroneous and perverse, while referring to the judgment in die case of Krishnaji Kulkarni VS Balakrishna Yellappa Gnodake - ILK 1988 KAR 1987, however distinguishing the said judgment, based only on the conduct of the plaintiffs that they have not bothered to discharg.-the mortgage amount and get their names entered in the revenue records and rather the father of the 9v defenJam got his name entered from its owner and is in continuous possession, without considering the point of limitation, has dismissed the appeal filed by the plaintiffs. Hence, this second appeal.

At the time of admission, the following substantial question of law has been framed for consideration - Whether the courts below were justified in holding that plaintiff who is the purchaser of the right of redemption, has lost hi> right to redeem the property as he has not filed (he suit within twelve years from the date of redemption of mortgage in iavoer of the defendants as contemplated under Art.6l (b) of the Limitation Act.

4. Heard the counsel representing the parties.

5. Relying upon the judgment of the Apex Court in the case of Nani Bai Vs Geetha Bai - AIR 1958 SC 706 and the Division Bench decision of the Madras High Court in the case of R Dhanalakshm: Animal Vs G Anthuraj & Ors - AIR 1972 Madras 195, appellants' counsel contended, only in the event the mortgagee has transferred a larger interest than the mortgage, then Art.61 (b) of the Act has to be made applicable if suit for redemption of mortgage is not filed within twelve years from the date of knowledge and, in the case on hand, plaintiffs are the purchasers of the mortgage property from the mortgagor in the year 1960. the mortgage was in the year 1959. The mortgagor has mortgaged the property in favour of Puttanna during 1959 by way of a usufructory mortgage for a period of six years. Before the expiry of six years, i.e., in 1963, Puttanna ha.- assigned his mortgage right in favour of Subbegowda, the father of the 9th defendant. The suit is filed for redemption of mortgage well within thirty years and that is not in dispute. There is no assignment of larger interest than the mortgagor's rights by Puttanna in favour of 9th defendant's father Subbegowda as such. Art.61(b) of the Act does not arise requiring to file a suit for redemption within twelve years from the date of knowledge. More over, that issue has not been raised by both the courts below and. on the point of limitation, the suit has been entertained and accordingly, it is contended, both the courts below have committed an error in law in simply dismissing the suit on the ground of limitation, without taking into consideration as to what is the period of limitation.

6. Per contra, counsel representing the defendants, relying upon the decision of the Orissa High Court in the ease of Smt Subhadramani Dhal & Ors Vs J ago with Paira & Ors - AIR 1975 Orissa 30, as to the application of Art.61 (a) and ib) of the

Limitation Act is concerned, contended that where the mortgagee transfers absolute title, suit for recovery of possession has to be filed within twelve years i.e., clause (b) of Art.61 applies and. in the ease on hand, the suit is tiled beyond twelve years from the date of knowledge as such, both the courts below were right in holding that the plaintiffs failed to exercise their right of redemption within reasonable time and therefore, the appeal is liable to be dismissed.

7. As narrated above, the facts are not in dispute. 1.1 appears the plaintiffs have exercised their right of redemption which is said to have been assigned to them by way of sale of the entire properly which was subject to redemption of mortgage. The principle is once a mortgage is always a mortgage. In the case of mortgage, normally from the date of redemption i.e., from the last date the cause of action arose on the maturity of the mortgage, the limitation is thirty years. Another contingency provided in the Limitation Act is, to exercise the right of redemption in the even of mortgagee assigning his right in favour of a third person by way of offering larger interest than justified by the mortgage, it is for the mortgagor or the assignee of the mortgagor's right to file a suit within twelve years from the date of knowledge of assigning larger interest than the mortgage rights.

8. As per- the pleadings, and also on the evidence on record, as admitted by the defendant himself, he assigned the mortgage rights that hail been assigned to him in favour of the father of the 9lh defendant i.e., Subbegowda. That speaks to the fact of - what has been mortgaged by the vendor of the plaintiffs in favour of one Puttanna is, a transfer of mortgage rights to the subsequent mortgagee by the first mortgagor herself as has been assigned by the first mortgagee and not beyond that and, no larger interest is shown to have been created either by completely alienating the property in excess of the mortgage rights. In the circumstances, the Apex Court with reference to application ol An.61 (b) of the Limitation Act is concerned, in the decision noted above, has held that mortgagee or his successor in interest has to prove that the mortgagee has transferred a larger interest than justified by the mortgage, then the normal limitation of thirty years is made applicable. Even the Division Bench 61 the Madras High Court has held that when the mortgagee purporting t.o be the absolute owner, transfers the property covered by the mortgage; tit? mortgagor's remedy is to institute the suit for

recovery of possession under Art.61 (b) of the Limitation Act within twelve yearn from the day transfer becomes known to the plaintiff and if the suit is filed more than twelve years after the date of montgage, the suit will be barred.

9. The case dealt by the Orissa High Court appears to be case of mortgage by conditional sale. But the present case is one ot usufructary mortgage and on facts, it is distinguishable. Apart from that, what is noted is. on such non-compliance or breach of condition of mortgage by conditional sale, normally the mortgagee gets absolute right than the mortgagor on the property if the condition is not fulfilled i.e.. if the amount is not repaid and possession of the land is not re-conveyed, then necessarily it would be treated as mortgage by conditional sale. There is a clog on redemption. Under the Transfer of Property Act. the principle once a mortgage is always a mortgage coniemplatcs that despite noncompliance of the condition, right is given lo ;he mortgagor as against the mortgagee in case of ergiish mortgage to get the property redeemed by way of filing suit for redemption In case of mortgage by conditional sale, the subsequent mortgagee aiso gets title by way of sale as it happens by non-compliance/ron payment of money borrowed within the time stipulated which confers rights on the mortgagee. In the fact situation, what is contemplated is, originally there was a mortgage created by the mortgagor in favour of mortgagee. On non- fulfillment of the condition by the mortgagor in not getting the mortgage redeemed/discharged by paying the amount within the time stipulated, then the mortgagee acquires a larger interest. The mortgagee on such acquisition of larger interest, when he assigns it, confirms a large;" interest which accrued to him and he sells the property apart from mortgage rights, as it is a mortgage by conditional sale. Then, in such a situation, provisions of Art.61 (b) cff the Act would come into picture requiring the mortgagor or assignee of the mortgagee's rights to file a suit within twelve years from the date of knowledge of such assignment of rights by the mortgagor in favour of a third person since larger interest ha;; been conferred. The mortgage in the present case is a usufructary mortgage. Even before the expiry of the time stipulated in the mortgage deed which was for a period of six years, there was assignment of mortgage rights in .favour of u third person viz., Subbegowda, the father of the 9" defendant. The mortgagee, in this case, had not been conferred with a larger right so as to transfer the same in favour of a third person. What has- been assigned is only

mortgagee rights which is nothing but usufructory mortgage that could be enjoyed by the third person in the event the is filed for redemption of mortgage immediately after 1.965 - on that date the period of usufructory mortgage came to an end and the. right of redemption would be gone. Since no belter right or higher right has accrued with the mortgagee to assign in favour of a third person. Art.61 (a) of the Limitation Act applies so as to enlarge the assignment of mortgagor's right or mortgagor himself 'o file a suit for redemption within thirty years and not twelve years from the assignment of mortgagor's right. This aspect has not been taken note of by the courts below. When the facts are not in dispute, both the courts below committed an erroi of law in dismissing the suit. Accordingly, while answering the substantial question raised in favour of the plaintiffs/appellants, the appeal is allowed. The suit filed by the plaintiffs is decreed. The assignee of the mortgagee rights shall deliver vacant possession of the property. The amount deposited at the rime of fifing the suit for redemption be transferred in favour of the assignee i.e., 9th defendant. In the circumstances, there is no order as to costs.