

Valliamma Champaka Pillai

Vs

Sivathanu Pillai and Others

Civil Appeal No. 1295 of 1969

(R.S. Sarkaria, P.N. Shinghal, O. Chinnappa Reddy JJ)

24.08.1979

JUDGMENT

SARKARIA, J. –

1. This is a plaintiff's appeal directed against a judgment and decree, dated March 26, 1964, of the High Court of Madras, passed in letters patent appeal on. 18 of 1961. The relationship of the main contesting defendants will be apparent from the following genealogical table :

Thanuvan | ----- || Madhavan Sivathanu || Madhavan Thanuvan
Padmanabhan Pillai = Ammalu Ammal (D-4) Valliamma Champaka | Pillai (Pltf.) -----
----- || Sivathanu Easwara Velayudha Pillai Pillai Pillai (Dfdt. 1) (Dfdt. 2) (Dfdt. 3)##

2. Valliamma, appellant herein, is the original plaintiff. She is the grand-daughter of Madhavan. Respondents 1 to 3 are the original defendants 1 to 3. They are the grandsons of Sivathanu. The properties in dispute are items 31 to 42 and 44 detailed in the plaint.

3. Between the years 1881-1884, the two brothers Madhavan and Sivathanu mortgaged these properties by ways of usufructuary mortgages, which were redeemed by Padmanabhan, father of defendants 1, 2 and 3 between the years 1913 and 1918 by paying the entire redemption money and he alone obtained possession thereof. The redemption was effected by obtaining release deeds from the former mortgagees-in-possession. The particulars of these mortgages and the release deeds executed in favour of the redeeming co-mortgages are as under :

(i) Exhibit III, dated September 29, 1059 (1884), is the mortgages executed by the two brothers in respect of items 34 to 36, 38 and 39 and 44 in favour of the grandfather of DW 2. Exhibit IV is the release deed, dated April 18, 1093 (1918), in favour of Padmanabhan.

(ii) Exhibit IX is the mortgage, dated August 19, 1056 (1881), executed by the two brothers in favour of Cochi Ravi Pillai in respect of items 32 and 40. Exhibit XIV, dated February 21, 1088 (1913), is the release deed in favour of Padmanabhan.

(iii) Exhibit XV is the mortgage, dated February 25, 1058 (1883), in respect of plaint item 41 by the two brothers in favour of Arumugham Narayana. Exhibit XVIII, dated August 31, 1088 (1913), is the release deed.

(iv) Exhibit XIX is the mortgage, dated August 14, 1058 (1883), in respect of items

31, 33 and 37 in favour of Chinnakannu Pandaram. Exhibit XX is the release deed, dated January 23, 1088 (1913).

(v) Besides the above, the two brothers had executed a Vellaolai Othi in 1043 (1868) in respect of item 42. Exhibits 21 and 22, dated August 21, 1088 (1913), are the release deeds.

4. The plaintiff, the granddaughter of the non-redeeming co-mortgagor, Madhavan, instituted the suit on July 15, 1946 for partition and possession of her one-half share of the suit properties. In respect of items 34 to 36, 38, 39 and 44, she claimed possession on contribution of her share of the mortgage money that had been paid by the redeeming co-mortgagor to the mortgagees. It was alleged in the plaint that this half share of the plaintiff's father devolved on his widows on his death, without male issue, and subsequently, on the death of the widows, the same was inherited by the plaintiff.

5. Defendants 1 to 3 resisted the plaintiff's suit, inter alia, on the ground that even if the courts come to the conclusion that the division of the joint family status alleged by the plaintiff was true, the plaintiff would not be entitled to recover her half share in the plaint Schedule, items 31 to 42 and 44, because the period of limitation for redemption of these mortgages, under the Travancore Limitation Act, was 50 years, which had expired long before the filing of the suit.

6. The suit was tried by the Second Judge of the District Court, Nagercoil, who on February 16, 1948 passed a preliminary decree in favour of the plaintiff, declaring her right over one-half share of the Schedule properties and her right to recover the same, together with mesne profits, after division by a Commissioner appointed by the Court. The case was adjourned for final decree proceedings. By the same judgment, dated February 16, 1948, the questions covered by issues 3 to 9, including that of limitation, were left for decision in the final decree to be passed in the case.

7. Against the preliminary decree, defendants 1 to 3 preferred a first appeal in the Travancore-Cochin High Court. The High Court dismissed the appeal on October 19, 1953, and affirmed the preliminary decree passed by the trial Court. Thereafter, the plaintiff took out a commission to divide the properties by metes and bounds. The Commissioner submitted his report, lists and plan of division.

8. Against the final decree, both the plaintiff and defendants 1 to 3 preferred first appeals Nos. 49 and 37 of 1955, respectively, to the Travancore Cochin High Court, which allowed these appeals and sent the matter back to the trial Court for passing a fresh final decree.

9. The suit was thereafter transferred to the Court of the subordinate Judge of Padmanabhapuram, who passed a final decree on March 19, 1957. It is from this final decree and judgment that this appeal has arisen.

10. The learned Subordinate Judge held that the right of the plaintiff to recover her half share of the plaint items 31 to 42 and 44 is not barred by limitation. Following a decision of the Travancore-Cochin High Court, reported in 8 Dominion Law Reporter (T.C.) 562, he held that the period of limitation for a suit by a non-redeeming co-mortgagor against the redeeming co-mortgagor is 50 years under Article 136 of the Travancore Limitation Regulation (corresponding to Article 148 of the Limitation Act, 1908) and that the starting point of limitation is the date of redemption by the redeeming co-mortgagor. He reasoned that since the suit was instituted within 50 years of that date,

it was within time. He further held that the various release deeds by which the mortgages were redeemed by the father of defendants 1 to 3, amounted to 'acknowledgments', giving fresh starts of limitation.

11. Against this final decree of the Subordinate Judge, defendants, 1 to 3 preferred first appeal 305 of 1957 in the High Court of Judicature at Madras. The appeal was heard by a learned single Judge (P. Ramakrishnan, J.), who by his judgment, dated December 23, 1960, held that the suit was barred by limitation so far as plaint items 31 to 42 and 44 were concerned. In his view, the plaintiff, who is in the position of a non-redeeming co-mortgagor, would have only a period of 12 years' limitation under Article 144 of the Limitation Act, 1908; and that Article 148 of that Act (corresponding to Article 136 of the Travancore Limitation Act) is not the proper article to be applied to such a suit where the Transfer of Property Act, as amended by the Amending Act of 1929, was not in force. In taking this view, the learned Judge declined to follow the decision of the Travancore-Cochin High Court.

12. Aggrieved by this judgment and decree of the learned single Judge, the plaintiff preferred a letters patent appeal. The appeal was ultimately heard by a Full Bench of three learned Judges. S. Ramachandra Iyer, C.J. and Jagadeesan, J., in their separate but concurrent judgments held that a non-redeeming co-mortgagor has two periods of limitation within which he may file his suit against the redeeming co-mortgagor for redemption of his share, namely, within 50 years provided for by the Travancore Limitation Act, starting from the date of the mortgage, or, if that period has already expired, within 12 years of the date of redemption by the redeeming co-mortgagor, under Article 132 of the Travancore Limitation Act corresponding to Article 144 of the Indian Limitation Act, 1908. On this reasoning, the majority held that the plaintiff's suit for recovery of possession in respect of all the aforesaid items except item 41 was barred by limitation. The third learned Judge in his dissenting judgment, held that the plaintiff would get a period of 50 years' limitation starting from the date of the redemption of her share against the redeeming co-mortgagor. On this reasoning, he found the suit to be within time.

13. Hence this appeal on certificate issued by the High Court under Article 133 of the Constitution.

14. The first contention advanced by the learned Counsel appearing for the appellants is that at the time when the two brothers, Madhavan and Sivathanu made the mortgages in question they were members of a joint Hindu family and the mortgages were also made of the joint family property; consequently, the redemption by one of the co-mortgagors of the whole property, could only be on behalf of and for the benefit of all the members of the joint family, including the plaintiff. In the alternative, it is submitted that even if it is conceded that some time after the mortgages but before the redemption, the family had divided in status, then also, after the redemption, the two branches of the family would be deemed to be holding the property as tenants-in-common or co-owners in defined shares, In either case, it is argued, no question of adverse possession or limitation would arise as the possession of the redeeming co-mortgagor would in law, be the possession of the non-redeeming co-owners, also.

15. We are afraid, the appellant cannot be allowed to turn round and rake up this plea which she had not agitated, either before the learned single Judge or the Letters Patent Bench of the High court. In this connection, the learned single Judge has observed : "Though there was an issue that these two branches (of Madhavan and Sivathanu) were undivided in status, the finding of the court below was that they were divided at all material times and this finding is not the subject of controversy in this appeal".

16. Counsel points out that the observation of the learned single Judge to the effect, that the "Court below" (trial Court) had found that the two branches of the family were divided in status, was wrong inasmuch as he referred to a finding in an earlier judgment of the trial Court which had been set aside in appeal. It is submitted that after the remand such a finding was not reiterated by the Subordinate Judge. Be that as it may, the crucial part of the learned Judge's observation, which has been underlined, is obviously correct. The fact remains that this plea about the family being joint in status at the material time, was not agitated before the learned single Judge, nor pressed into argument before the Full Bench in letters patent appeal. The first and the second appellate courts below, therefore, proceeded on the assumption that the two brothers who created the mortgages in question, and their branches were, at all times material, not members of an undivided Hindu family, having a joint status. Nor was the alternative plea, that the two branches of the family were holding these properties as co-owners, and as such, the possession of the redeeming co-mortgagor would be deemed to be on behalf of the non-redeeming co-mortgagor also, ever pressed into argument before the courts below. Moreover, the material on the record is too meagre to furnish adequate factual foundation for this contention including its alternative limb. Indeed, the Counsel requested that the case should be remanded to the trial Court for determining this plea after giving the parties another opportunity to produce evidence thereon.

17. For the aforesaid reasons we do not permit the appellant to re-agitate this plea which in any of its aspects was not pressed into argument in the court below.

18. The second contention of the learned Counsel is that the release deeds executed by the original mortgagees would amount to an acknowledgement of the liability to be redeemed, and thus furnish a fresh start of limitation for a suit for redemption. Reliance for this argument has been placed on some decisions of the Travancore High Court namely : Raman Pillai v. Arthan Pillai (23 Tr LJ 947); Muthiah Nadar v. Ramaswami Nadar ((1953) 8 DLR 563) and Parameshwaran v. Narayanan ((1953) 8 DLR 562). It is emphasised that at the material time the suit properties were situated in the territory of the erstwhile Travancore State, and in view of the States Reorganisation Act, 1956, the law applicable to the case is the law prevailing prior to November 1, 1956, and not the law in the Madras State to which the territory from which the case has arisen, was added. The point sought to be made out is that the Madras High Court was legally bound to apply the Travancore Limitation Regulation as interpreted by the Travancore High Court, in preference to the earlier decisions of the Madras High Court. It is urged that even on the doctrine of state decisis, the learned Judges of the High Court ought to have adhered to the view taken by the Travancore Court in the said cases.

19. This contention was raised before the appellant Bench of the High Court, also, and was rightly rejected. Under Section 18, Limitation Act, one of the essential requirements for a valid 'acknowledgement' is that the writing concerned must contain an admission of a subsisting liability. A mere admission of a past liability is not sufficient to constitute such an 'acknowledgement'. Hence a mere recital in a document as to the existence of a past liability, coupled with a statement of its discharge, does not constitute an 'acknowledgement' within this section. Tested on this touchstone, the release-deeds, Exs. IV, XIV, XXI and XXII pertaining to items 31 to 36, 39, 40 and 44, executed by the original mortgagees stating in effect, that the mortgages had been extinguished by payment of the mortgage debts in entirety, by the redeeming co-mortgagor, do not amount to acknowledgement of a subsisting liability, which could give a fresh starting point of limitation.

20. If we may say so, with due deference, the view taken by the Travancore (or T.C.) High Court in the aforesaid decisions did not proceed on a correct interpretation of the corresponding provisions of the Travancore Regulation. We find ourselves in respectful agreement with the reasoning and the

finding of the High Court (majority) on this point, in the judgment under appeal.

21. These erroneous decisions of the Travancore Court could, at best, have a persuasive effect and not the force of binding precedents on the Madras High Court. There is nothing in the States Reorganisation Act 1956 or any other law which exalts the ratio of those decisions to the status of a binding law nor could the ratio decidendi of those decisions be perpetuated by invoking the doctrine of stare decisis.

22. In short, the plaintiff's suit could not be saved from being time barred in respect of items 31 to 36, 39, 40 and 44 on the ground that the release deeds relating thereto amount to 'acknowledgement' within the contemplation of the relevant limitation statute.

23. The case of item 41, however, (it is common ground before us) stands on a different footing. The High Court's finding, that in respect of this item the suit is within time, has not been challenged before us.

24. The last and the most important question that falls to be determined is : Which article of Travancore Limitation Regulation will govern a suit by a non-redeeming co-mortgagor to recover possession of his share of the hypotheca on payment of the proportionate amount of the mortgage debt discharged by the redeeming co-mortgagor ?

25. The Counsel for the appellant submit that the High Court was wrong in holding that limitation for such a suit (brought after the expiry of 50 years from the date of the original mortgages) was governed by Article 132 of the Travancore Limitation Regulation corresponding to Article 144, Indian Limitation Act, 1908, because this Article cannot apply to a suit for redemption of his share by a non-redeeming co-mortgagor against the redeeming co-mortgagor, and the latter's possession cannot become adverse to the plaintiff. It is maintained that limitation for the suit will be governed by Article 136 of the Travancore Regulation (corresponding to Article 148 of the Indian Limitation Act, 1908), but the starting point of limitation will not be the date of the old mortgage but the date on which the old mortgage was redeemed by the redeeming co-mortgagor and in its place, a split-up mortgages in an abated form confined to the plaintiff's share came into being. It is argued that in this view situation the non-redeeming mortgagor's "right to redeem and to recover possession" will accrue only after the redemption of the old mortgage, with the result, that under Article 136 of the Travancore Regulation, the plaintiff would have a period of 50 years commencing from the date of the redemption, to recover possession of his share from the redeeming co-mortgagor. In short, Counsel have canvassed for the dissenting view taken by Venkataraman, J. According to Counsel, this was also the view taken by the former Travancore High Court, and the same ought to have been followed on the principle of stare decisis by the Madras High Court.

26. For dealing with this contention in the right perspective, it is necessary to appreciate the true position of a co-mortgagor redeeming the whole hypotheca by discharging the entire mortgage debt. Does such a co-mortgagor step into the shoes of the mortgagee whom he had paid off, vis-a-vis the non-redeeming co-mortgagor ? That is to say, is the redeeming co-mortgagor's right merely one of subrogation to the rights of the mortgagee discharged ? If so, to what extent ? Further, what are the correlated rights of the non-redeeming co-mortgagor in the property after the entire mortgage has been redeemed by this co-debtor ? Does he retain only the rights under the former mortgage ? Or, does he acquire a further right, consequent on redemption, to get back his portion or share of the hypotheca from the redeeming co-mortgagor on payment of the proportionate amount of the common mortgage debt discharge by the latter ? These are some of the preliminary questions which

have to be answered before ascertaining the appropriate article of the relevant statute which will govern limitation in this case.

27. In that connection, it is important to bear in mind that both at the time of making these mortgages and their redemption by one of the co-mortgagors, the Transfer of Property Act or any like statute was not in force in the State of Travancore, wherein these properties were situated. The questions posed are, therefore, to be answered in accordance with the principles of justice, equity and good conscience.

28. Steering clear of the tangled web of conflicting and confusing decisions rendered on an interpretation of the relevant provisions of the Transfer of Property Act, 1882, as they stood before the amendment of 1929, we may say at once that even where the Transfer of Property Act was not in force, a redeeming co-mortgagor discharging the entire mortgage, was, in equity, entitled to be subrogated to the rights of the mortgagee redeemed and to treat the non-redeeming co-mortgagor as his mortgagor to the extent of the latter's portion or share in the hypotheca and to hold that portion or share as security for the excess payment made by him. This equitable right of the redeeming co-mortgagor stems from the doctrine that he was a principal debtor in respect of his own share only, and his liability in respect of his co-debtor's share of the mortgage debt was only that of a surety; and when the surety had discharged the entire mortgage debt, he was entitled to be subrogated to the securities held by the creditor, to the extent of getting himself reimbursed for the amount paid by him over and above his share to discharge the common mortgage debt.

29. For the view we take, we derive support from certain observations of this Court in *Ganeshi Lal v. Joti Parshad* (AIR 1953 SC 1 : 1953 SCR 243 : 1952 SCJ 649). While discussing the nature and extent of a redeeming co-mortgagor's right to recover contribution from his co-debtor, this Court speaking through Chandrasekhara Aiyar, J., made these incidental observations which for our purpose are apposite :

Equity insists on the ultimate payment of a debt by one who in justice and good conscience is bound to pay it, and it is well recognized that where there are several joint debtors, the person making the payment is the principal debtor as regards the part of the liability he is to discharge and a surety in respect of the shares of the rest of the debtors. Such being the legal position as among the co-mortgagors, if one of them redeems a mortgage over the property which belongs jointly to himself and the rest, equity confers on him a right to reimburse himself for the amount spent in excess by him in the matter of redemption; he can call upon the co-mortgagors to contribute towards the excess which he has paid over his own share While it can be readily conceded that the joint debtor who pays up and discharges the mortgage stands in the shoes of the mortgagee he will be subrogated to the rights of the mortgagee only to the extent necessary for his own equitable protection 'so far as it is necessary to enforce his equity of reimbursement' It is as regards the excess of the payment over his own share that the right can be said to exist The redeeming co-mortgagor being only a surety for the other co-mortgagors, his right, strictly speaking, is a right of reimbursement or contribution.

30. It is noteworthy that *Ganeshi Lal v. Joti Parshad* (AIR 1953 SC 1 : 1953 SCR 243 : 1952 SCJ 649) was a case from Punjab where the Transfer of Property Act was not in force, and this Court had affirmed the judgment of the Punjab High Court determining the claim of the redeeming co-mortgagor for contribution against the non-redeeming co-mortgagors on principles of justice, equity

and good conscience.

31. From what has been said above it is clear that where the Transfer of Property Act is not in force and a mortgage with possession is made by two persons, one of whom only redeems discharging the whole of the common mortgage debt, he will, in equity, have two distinct rights : Firstly, to be subrogated to the rights of the mortgagee discharged, vis-a-vis the non-redeeming co-mortgagor, including the right to get into possession of the latter's portion of share of the hypotheca. Secondly, to recover contribution towards the excess paid by him on the security of that portion or share of the hypotheca which belonged not to him but to the other co-mortgagor. It follows that where one co-mortgagor gets the right to contribution against the other co-mortgagor by paying off the entire mortgage debt, a correlated right also accrues to the latter to redeem his share of the property and get its possession on payment of his share of the liability to the former. This corresponding right of the 'non-redeeming' co-mortgagor, to pay his share of the liability and get possession of his property from the redeeming co-mortgagor, subsists as long as the latter's right to contribution subsists. This right of the 'non-redeeming' co-mortgagor, as rightly pointed out by the learned Chief Justice of the High Court in his leading judgment, is purely an equitable right, which exists irrespective of whether the right of contribution which the redeeming co-mortgagor has as against the other co-mortgagor, amounts to a mortgage or not.

32. The ground is now clear for ascertaining the appropriate provision of the relevant statute of limitation which prescribes limitation for a suit to enforce this correlated right of the 'non-redeeming' co-mortgagor against the redeeming co-mortgagor.

33. Be it noted, that the suit, out of which this appeal has arisen, though, in form, a simple suit for partition raises, in substance, a claim for redemption with regard to items 31 to 42 and 44 which were under mortgage and had been redeemed in entirely by one of the co-mortgagors. Indeed, in the courts below the claim in respect of these items has been fought by the parties as if it were one for redemption.

34. Since subrogation of the redeeming co-mortgagor would give him the right under the original mortgage to hold the non-redeeming co-mortgagor's property as security to get himself reimbursed for the amount paid by him in excess of his share of the liability, it follows that a suit for possession of his share or portion of the property by a non-redeeming co-mortgagor on payment of the proportionate amount of the mortgage debt, may be filed either within the limitation prescribed for a suit for redemption of the original mortgage or within the period prescribed for a suit for contribution by the redeeming co-mortgagor against the other co-mortgagor.

35. Article 136 of the Travancore Limitation Regulation (which corresponds to Article 148 of Indian Limitation Act 1908) reads as under :

#----- Description of suit Period of Time from
which period limitation begin" to run-----Article
136. Against a mortgagee Fifty When the right to redeem to redeem or to years or to recover
possession recover possession of accrues. immovable property mortgaged.-----
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36. The original mortgages were made during the years 1881 to 1884. They were redeemed by the co-mortgagor in Sivathanu's line between the years 1913 to 1918 by paying the entire common mortgage debt and obtaining possession of the entire hypotheca. The plaintiff who is the successor-

in-interest of the non-redeeming co-mortgagor, Madhavan, filed the suit in 1946, (which was renumbered as O.S. 135 of 1956) for redemption of her half share on payment of her half share of the mortgage amount and expenses to the defendant-respondents successors-in-interest of Sivathanu. The suit was thus filed more than 12 years after the expiry of the 50 years' limitation prescribed for a suit for redemption under Article 136 of the Travancore Regulation, and more than 28 years after the redemption, in 1918, of the last mortgage by the redeeming co-mortgagor. This being the situation, the non-redeeming mortgagor's suit for his share of the property on payment of his proportionate share of the mortgage money would be barred irrespective of whether the limitation is governed by the provisions of Limitation Regulation corresponding to Article 132 or 144 or any other article of the Indian Limitation Act, 1908. Therefore, as at present advised, we do not feel the necessity of laying down the law with regard to this aspect of the case. Since the limitation started running in 1913 or 1918, the suit was time-barred from every point of view.

37. For all the foregoing reasons, we uphold the finding of the High Court that the plaintiff's claim in regard to suit items 31 to 40, 42 and 44 was time-barred and dismiss the appeal. In the peculiar circumstances of the case, the parties are left to pay and bear their own in this Court.

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