

Variavan Saraswathi and Another

Vs

Eachampi Thevi and Others

Civil Appeal No. 8244 of 1983

(R. M. Sahai, B.P. Jeevan Reddy JJ)

13.11.1992

JUDGMENT

R. M. SAHAI, J. –

1. Whether a junior member of the Tarwad, in Kerala, who redeems the mortgage and is in possession for more than 50 years is a 'mortgagee holding the land comprised in a mortgage' so as to acquire rights of tenant under Section 4-A of the Kerala Land Reforms Act, is the legal issue that arises for consideration in this appeal by successors of other members of the Tarwad whose suit for partition was dismissed in second appeal by the High Court.

2. In the year 1045 (1870) a mortgage was executed by the Karnavan (akin to Manager) of the Tarwad (somewhat like a joint family). Two junior members, of the Tarwad, paid the amount in the years 1061 (1886), got the property released, obtained possession and they or their descendants continued in possession as such. In 1967 a suit for partition was filed by successors of other members of the Tarwad, in whose favour equity of redemption, of the land in suit, was transferred in a family partition in 1962. The suit was resisted amongst others on acquisition of right of tenant under Section 4(1)(a) of the Land Reforms Act. Since there was no dispute on basic facts, namely, redemption of mortgage by two junior members and their continuance in possession for more than fifty years on the date Section 4(1)(a) was added to the Land Reforms Act the rights of parties were decided, more, as a matter of law. According to the trial court and first appellate court the junior members, as a result of getting the property released, were holders of special right under Marumakkathayam Law. They could not be held to be mortgagee, therefore, they did not acquire any right under the Land Reforms Act. But the High Court held otherwise, mainly because in 1962 when the Tarwad was partitioned the property was treated as under mortgage since equity of redemption for the same was given to the plaintiff appellant. It was found that, even, in the plaint it was averred that in consequence of release the mortgagee right vested in the predecessors of defendants who were junior members of the Tarwad. The High Court, therefore, held that the defendants being assignee of mortgage in possession for fifty years, on the date the Land Reforms Act was amended and Section 4(1)(a) was added by Act 35 of 1969, were entitled to rights as tenants.

3. The High Court thus, accepted the claim of defendants because the members of the Tarwad treated the mortgage to be continuing on the date the suit was filed. This, apart, it was held that a junior member of the Tarwad paying off the debt of Tarwad becomes a mortgagee of the excess share in his own right. But this enunciation of law was not accepted as correct by a Division Bench of the Kerala High Court itself in Raghavan Nair v. Anandavally Amma (1986 KLT 623 (Ker HC)). The question, therefore, is if a junior member of the Tarwad who redeems the property, and gets

release, is holder of special right only or he steps into the shoes of mortgagee.

4. Nature of right of a junior member in the Tarwad, a family corporation, in which every member male or female possesses equal right has been explained by this Court in *K.K. Kochuni v. State of Madras* (AIR 1960 SC 1080, 1099) thus :

"... The incidents of a tarwad are so well-settled that it is not necessary to consider the case-law, but it would be enough if the relevant passages from the book 'Malabar and Aliyasanthana Law' by Sundara Aiyar are cited. The learned author says at p. 7 thus :

'The joint family in a Marumakkathayam Nayar tarwad consists of a mother and her male and female children, and the children of those female children, and so on. The issue of the male children do not belong to their tarwad but to the tarwad of their consorts. The property belonging to the tarwad is the property of all the males and females that compose it. Its affairs are administered by one of those persons, usually the eldest male, called the karnavan. The individual members are not entitled to enforce partition, but a partition may be effected by common consent. The rights of the junior members are stated to be (1) if males, to succeed to management in their turn, (2) to be maintained at the family house, (3) to object to an improper alienation or administration of the family property, (4) to see that the property is duly conserved, (5) to bar an adoption, and (6) to get a share at any partition that may take place. These are what may be called effective rights. Otherwise everyone is a proprietor and has equal rights.'

5. One of the rights according to this decision which vests in the junior member is to see that the property is duly conserved. Such a right, obviously includes a right to redeem the property by paying the debts outstanding against the Tarwad. It is an incidence of co-ownership or co-proprietorship which flows from the nature of Tarwad. But whether the person who thus conserves the property steps into the shoes of the mortgagee and holds the same right and interests or he is a surety holding the property on behalf of the Tarwad subject to right of contribution has to be decided on general principles of mortgage as the customary law of Tarwad does not throw any light on it. Mortgage has been defined in Section 58 of the Transfer of Property Act as transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced. The definition brings out clearly the nature of mortgage. It was understood and followed in the same sense, even before the Act came into force. In *Gopal v. Parsotam* ((1883) 5 All 121, 137 (FB) : 1882 AWN 128) it was observed :

"Mortgage as understood in this country cannot be defined better than by the definition adopted by the Legislature in Section 58 of the Transfer of Property Act (IV of 1882). That definition has not in any way altered the law, but, on the contrary, has only formulated in clear language the notions of mortgage as understood by all the writers of text-books on Indian mortgages. Every word of the definition is borne out by the decisions of Indian Courts of Justice."

It was not different where customary law prevailed. Even in customary Marumakkathayam Law, governing section of people inhabiting the West Coast, the law of mortgage was understood in no different sense.

6. Since the transfer in a mortgage is, only, of interest and not of the entire right and title, as takes place in sale, the mortgagor and the mortgagee can transfer or assign their interest. A mortgagor may assign or transfer the equity of redemption or may even create second mortgage. Similarly a mortgagee may assign his interest or create another mortgage. What happens when a mortgagee assigns his interest in favour of another person ? Since an assignor can pass on interest that he has, the assignee becomes holder of the same interest that a mortgagee has. In other words, he steps into the shoes of the mortgagee. Can the same be said where a co-mortgagor or anyone on behalf of mortgagor authorised under law, pays the amount and brings to an end the interest the mortgagee had ? Mortgage is creation of an interest in the property for payment of debt. Once the mortgage debt is discharge by a person beneficially interested in equity of redemption the mortgage comes to an end by operation of law. Consequently the relationship of mortgagor and mortgagee cannot subsist. What then is the status of a person paying off debt to secure the property either with consent of others or on own volition ? In law he becomes the owner, entitled to hold and posses the property. But in equity the right is to hold the property till he is reimbursed. In other words, he may hold the property in surety or he may bring the claim for contribution. In *Ganesh Lal v. Joti Pershad* (1953 SCR 243 : AIR 1953 SC 1) it was held :

".. 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 recognised that where there are several joint debtors, the person making the payment is a 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...."

Similarly the co-mortgagor whose share has been got redeemed is entitled, in equity, to get possession over his share of property on payment of the amount of his share. In *Valliamma Champaka Pillai v. Sivathanu Pillai* ((1979) 4 SCC 429 : (1980) 1 SCR 354) the principle was explained thus : (SCC p. 439, para 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 person, one of whom only redeems discharging the whole of the common mortgage debt, he will, in equity, have two distinct right : 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 or 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...."

7. But these rights in equity, either in favour of the person who discharges the debt or the person whose debt has been discharged, do not result in resumption of relationship of mortgagor and mortgagee. Even under subrogation, a legal concept, meaning substitution, applied, on English Law principle even earlier, inserted now as Section 92 in Transfer of Property Act since 1929, the rights that are created in favour of a co-mortgagor as a result of discharge of debt are "so far as regards

redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage the redeems". What is the meaning of the expression 'right as mortgagee' ? Does a person who, in equity, gets subrogated becomes mortgagee ? Or his rights are confined to foreclosure or sale ? A plain reading of the section does not warrant a construction that the substitute becomes a mortgagee. The expression is, 'right as the mortgagee' and not right mortgagee. The legislative purpose was statutory recognition of the equitable right to hold the property till the co-mortgagor was reimbursed. And not to create relationship of mortgagor and mortgagee. The section confers certain rights on co-mortgagor and provides for the manner of its exercise as well. The right are of redemption, foreclosure and sale. And the manner of exercise is as mortgagee. The word, 'as' according to Black's Law Dictionary means 'in the manner prescribed'. Thus a co-mortgagor in possession, of excess share redeemed by him, can enforce his claim against non-redeeming mortgagor by exercising rights of foreclosure or sale as is exercised by mortgagee under Section 67 of the Transfer of Property Act. Act that does not make him mortgagee. Therefore, a co-mortgagor or a junior member of the Tarwad who continued in possession over the excess share, got redeemed by him, could not be deemed to be mortgagee so as to acquire right under Section 4-A(1)(a) of the Kerala Land Reforms Act.

8. The legal position explained above does not alter either because during partition equity of redemption in respect of property redeemed by junior members was transferred or because in the plaint it was claimed that mortgage subsisted. None of these actions could effect the operation of law.

9. In the result this appeal succeeds and is allowed. The judgment and order of the High Court is set aside and the order of the trial court decreeing the suit for partition is restored. Parties shall bear their own costs.

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