

SUPREME COURT OF INDIA

Variavan Saraswathi

Vs.

Eachampi Thevi

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

13.11.1992

JUDGMENT

R.M. SAHAI, J.

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 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 who suit for partition was dismissed in second appeal by the High Court.

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 year 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 member 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 holder 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 predecessor 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 XXXV of 1969, were entitled to rights as tenants. The High Court, thus, accepted the claim of defendants because the member of the Tarwad treated the mortgage to be continuing on the date the suit was filed. This, apart, it was held that 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. 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.

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 *Kochuni v. States of Madras & Kerala*, AIR 1960 SC 1080 at 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."

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 shoes of mortgagee and holds the same rights 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 same sense, even, before the Act came into force. In *Gopal v. Parsotam* 1883 5 All. 121. 137 F.B. 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.

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 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 discharged 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 possess 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 *Ganeshi Lal v. Joti Pershad*, [1953] SCR 243, 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 Pillay v. Sivathanu Pillay & Ors.*, [1980] I SCR 354 the principle was explained thus: "From what has been said above it was 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 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 co related 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 "

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 he redeems'. What is the meaning of expression 'right as mortgagee'? Does a person who, in equity, gets subrogated become 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 of 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 rights are of redemption, foreclosure and sale. And the manner of exercise is as mortgagee. The word, 'as' according to Black's Legal 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. But 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 4A(1)(a) of the Kerala Land Reforms Act.

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.

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. N.P.V.

Appeals allowed.

STATE bank of india and anr.

v.

V. PARTHASARATHY ETC.

NOVEMBER 9, 1992

[KULDIP SINGH AND P.B. SAWANT, JJ.]

Civil Services:

State Bank of India-Promotion to the post of Head Clerk- Circular No. 42-Clause Three options- Outside the city-within city and within the same office-Debarment on refusal of third and final offer-Local Head Office and five other offices to be considered as one Unit-Final offer made in one such office Whether valid and debars the optees permanently on refusal to accept.

The appellant-Bank issued Circular No. 42 containing an understanding reached with the Staff-union laying down the policy for promotion of clerks to the post of Head Clerks. As per clause 1(d) of the Circular the employees who decline to accept Head Clerk s post at a branch office outside the city in which they work, will have a further option when a vacancy arises at any one of the Bank's offices within that city. However, this was subject to the condition that at the material time there was no other senior employee who had similarly declined the post outside his branch office, in which case the senior-most would have the first choice. It was further provided that if an employee declines to accept the post of Head Clerk at an office within the same city, his case would be considered only when a vacancy arises at his office. This was also subject to the condition that there was no senior employee similarly situated at the material time. If the third and final offer is

declined, there would be a permanent debarment of promotion. Since there were six offices at the Madras Local Head Office, a common seniority was maintained and all the six offices were considered as one office, viz. local Head Office of which the other five offices were only parts. The Respondents declined their first, second and final offers, though indisputably the final offer was made to them for being posted in an office forming part of the local Head Office. Both the Respondents moved the High Court by way of Writ Petitions and the High Court took the view that the final offer made was not in the same office and so they were entitled to be posted as Head Clerks in the same office. Being aggrieved by the said two decisions of the High Court, the appellant-Bank preferred the present appeals. On the question of interpretation of clause 1(d) of the circular in question:

Allowing the appeals, this Court,

HELD :1. The High Court's interpretation of cl. 1(d) of the Circular that the third offer made was not in the office where the Respondents were working and therefore their refusal to accept the post did not exhaust the third option and they were entitled to be posted as Head Clerks in the Office where they were working is incorrect in view of the fact that the local Head Office was split into six different offices which together constituted one unit. By refusing to accept the third and final offer, the Respondents had clearly exhausted all the three options and had become permanently debarred from seeking promotion to the post of Head Clerk. [366-E-G]

2. This Court does not intend to interfere with the appointment of the respondents to the post of Head Clerk in the Regional Office in the facts and circumstances of these matters which show that in one case a fortuitous appointment had arisen due to death of an employee within almost a month of the Respondent's refusal to accept the offer, and in the other case, the Respondent has already been accommodated in the post of Head Clerk in the Regional Office itself. However, this would not be treated as a precedent and this would not affect the interpretation of clause 1(d) of the Circular, placed by this Court. [366-H; 367-A] CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 4799 4800 of 1992.

From the Judgments dated 4.3.1992 and 8.4.1992 in Madras High Court in W.P. No. 246/92 and W.A. No. 349 of 1992.

G. Ramaswamy Attorney General, K. Sankaran, A. Ranganathan and A.V. Rangam for the Appellants. M.K. Ramamurthi, M.A. Krishnmoorthy, M.A. Chinnaswamy, H. Subramaniam and Ms. C. Ramamurthi for the Respondents. Rajendra Sachhar, Ambrish Kumar and M.D. Pandey for the Inter-vener.

The Order of the Court was delivered:

Intervention application is allowed.

Leave granted.

Civil Appeal No. 4799 of 1992.

2. The controversy in this case is in a narrow compass. The appellant-Bank issued Staff Circular No. 42 containing an understanding reached with the Bank staff-union laying down the policy for

promotion of clerks to the post of Head Clerks. Clause 1(d) of the said circular states as follows: Employees who decline to accept Head Clerk's post at a Branch Office outside their place of service, i.e., outside their city, will again be offered the appointment only when a vacancy arises at any one of the offices within that city, provided that at the material time there is no other senior employees at that office who had earlier declined a posting outside his Branch, as a Head Clerk in which case the senior-most employee will first be offered the appointment. Also, if an employee declines to accept the post of a Head Clerk at an office within the same city, his case for appointment as Head-Clerk will be considered only when a vacancy arises at his office, in the order of his seniority. His case cannot be considered for a vacancy at any of the other offices in the city."

3. It will be apparent from the above provision of the said clause that those employees who decline to accept the Head Clerk's post at a branch office which is outside the city in which they work will have a further option. Such employees would be offered the post of Head Clerk again but only when a vacancy arises at any one of the Bank's offices within that city. This is of course subject to the condition that at the material time, there is no other senior employee who had similarly declined the post outside his branch office, in which case, the senior-most would have the first choice. The further provision of this rule and with which we are concerned in the present case is as follows. If an employee declines to accept the post of Head Clerk at an office within the same city his case for appointment as Head Clerk would be considered only when a vacancy arises at his office. This is also subject to the condition that there is no senior employee similarly situated at the material time. If the third and the final offer for the post of Head Clerk is declined, there is a permanent debarment of the promotion. One more thing necessary to be stated before we come to the facts of the present case is that the appellant- Bank has a local Head Office at Madras. In 1972, it was split into two - the local Head Office and Madras Main Branch. In 1976-77, there was a further splitting up of the local Head Office and the Main Branch and ultimately in 1979, the Madras Local Head Office was divided into following six offices as part of the same Head Office: "(i) Local Head Office

(ii) Madras Main Branch

(iii) Overseas Branch

(iv) Regional Office, which is called Zonal Office

(v) The Commercial Branch

(vi) Siruthozhil Branch"

4. There is no dispute that as far as the Clerks and the Head Clerks in all the six parts of the same local Head Office are concerned, a common seniority list is maintained. The effect of the aforesaid arrangements for the purposes of the clause 1(d) is that "the employees" in the said clause means the employees in all the said six parts of the local Head Office. In other words, if a vacancy for a Head Clerk occurred at any of the said six offices, it was considered to be a vacancy in one office, viz., the local Head Office of which the other five offices were only parts.

5. It appears that respondent Parthasarathy was working as a clerk in the Madras Regional Office (now called Zonal Office) which is, as will be clear from above, a part of the Local Head Office itself. On 21st August, 1973, he was offered the post of Head Clerk at Deva Kottain which is outside Madras city. This offer was declined by him. On 1st July, 1980, he was offered the post of

Head Clerk in the Sowkarpeth branch office in the same city which was less than 2 kms, from his Regional office where he was working. He declined the said offer too. He was then entitled to be considered for posting as Head Clerk only in his office which meant in any of the six parts of the local Head Office, that being the third and the final offer that could be made to him. The third offer was made to him for the post of Head Clerk at the Overseas branch, and that being part of the same local Head Office, he was bound to accept it. However, he declined the third and the final offer also, and issued a lawyer's notice to the Bank contending that the Overseas branch was different from the Regional office where he was working and, therefore, the offer given to him was contrary to the said clause 1(d). The allegations made in the notice were of course denied by the bank.

6. On 6th September, 1983, one A. Nizamuddin who was working as Head Clerk in the Regional office passed away and that post became vacant. On 24th September, 1983, the respondent filed a writ petition before the High Court for quashing the third and the final offer made to him on 4th August 1983, and for a direction for posting him in the Regional office where the vacancy had occurred. The High Court took the view that the third offer made was not for the post of the Head Clerk in the same office where the respondent was working and, therefore, his refusal to accept the post did not exhaust the third option and he was entitled to the vacancy created by Nizamuddin's death in the Regional office where the respondent was working. We are afraid this interpretation is incorrect in view of the position explained above with regard to the local Head Office which was split into six different offices which together constituted one unit. The respondent, when he was offered the third option in the Overseas branch, was offered the post in the same office where he was working, the Regional office being as much a part of the Head Office as the Overseas branch. By refusing to accept the said third and the final offer, the respondent had clearly exhausted all his three options and had become permanently debarred from seeking promotion to the post of Head Clerk.

7. We, however, do not interfere with the appointment of the respondent to the post of Head Clerk in the Regional office in the facts and circumstances of the case which show that a fortuitous appointment had arisen within almost a month of his refusal to accept the offer. This, however, will not be treated as a precedent nor does it affect the interpretation that we have placed on the clause 1(d) as above.

Civil Appeal No. 4800 of 1992

In this case also, the respondent Sampath was working as a Clerk in Madras Regional Office. The first offer of the post of Head Clerk was made to him on 6th August, 1973 at Mudukulathur branch which is in Madras city. This was declined by him. On 12th May, 1980, he was given the second offer for the post of Head Clerk at Air Force Station branch, Tambaram which was in Madras city. The third and final offer was made to him on 4th August, 1983 to the post of Head Clerk in the Stationery department of the Madras Local Head Office. There is no dispute that Stationery department of the Local Head Office and the Regional Office form part of one unit, viz., Madras Local Head Office. The respondent declined this offer as well, and on 23rd January, 1984 filed a writ petition in the High Court for quashing the third offer and for posting him in his office, viz., Regional Office as the Head Clerk. The learned Single Judge of the High Court quashed the order making the third offer and allowed the petition following the earlier decision in Parthasarathy's case with which we have dealt with earlier. The Division Bench of the High Court also confirmed the order.

For the reasons we have given in C.A.No. 4799 of 1992, we are unable to accept the interpretation given by the High Court on clause 1(d) of Staff Circular No. 42. However, if in the present case, the respondent has already been accommodated in the post of Head Clerk in the Regional Office itself, we do not intend to interfere with the same. It is nonetheless made clear that it is the interpretation that we have placed on the said clause that will prevail and not the interpretation placed by the High Court. With these observations, the appeals are allowed only to the extent that the interpretation placed by the appellant-Bank on clause 1(d) of the Staff Circular No. 42 is correct and the decision of the High Court on the point is incorrect. There will be no order as to costs. G.N. Appeals allowed

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