

Kesavanchari Gopalakrishnan Achari

Vs

Velu Achari Pappukutty Achari and Others

Civil Appeal No. 2053 of 1996

(G.N. Ray, G.T. Nanavati JJ)

17.01.1996

JUDGEMENT

-

G. N. RAY, J.:-

1. Leave granted. Heard learned counsel for the parties.

2. This appeal is directed against judgment dated 9-10-1991 passed by the Kerala High Court in C.R.F.No.1239 of 1990-G setting aside order dated 17-1-1990 passed by the learned Munsif, Attingal in Execution Application No. 61 of 1984 in Execution Proceeding No. 69 of 1980 arising out of decree passed in O. S. No. 115 of 1994.

3. The appellant was tenth defendant and son of second defendant in a partition suit (O.S. No.115 of 1964) in the court of the learned Munsiff at Attingal. In the plaint of the said partition suit, it was contended that the properties in suit originally belonged to one Ummini. He died issueless leaving five sisters who inherited his interest in the said properties. The said sister executed a 'Ottikuzhikanam' deed in favour of the first defendant Kesavan Achari. The said Kesavan executed a deed of release in favour of defendant No. 2 surrendering his interest as Ottikuzhikanamder. One Kochu-eshavan claiming to be the son of original owner Ummini executed a sale deed of the property in suit in favour of second defendant purporting to be transfer of equity of redemption. However ignoring the said document executed by Kochudeshavan and the deed of release by defendant No. 1 the plaintiffs being sons of two of the five sisters prayed for partition of their 2/5th share and also for redemption of mortgage granting in favour of defendant No. 1

4. Defendants 1 and 2 contested the said partition suit by contending inter alia that in view of document executed by Kochukesavan, the plaintiffs have no interest in the suit properties. The second defendant also claimed title by adverse possession in respect of the properties in suit. The said suit dismissed by the trial Court. The lower appellate court, however, held that Kochukesavan was not the son of Ummini and the document executed by him in favour of defendant No. 2 was therefore null and void. The suit was finally decreed allowing partition and redemption of mortgage as prayed for by the plaintiffs. The Appeal No.117 of 1967 filed by the second defendant against the final decree was also dismissed. The second defendant thereafter preferred a second appeal (S.A.NO.619 of 1970) before the High Court of Kerala assailing the Judgment and passed in the said appeal No.177 of 1967. The second defendant contended before the High Court that as the mortgagee had constructed a building on the mortgaged property for residence, the mortgagee must be deemed to be a tenant under Section 4A (1)(b) of Kerala Land Reforms Act (Act 35 of 1969). It

was also contended that according to amended provisions of the said Act, an Ottikuzikanmar was a 'tenant' and therefore the mortgage was not redeemable. The High Court dismissed the second appeal by keeping the said question of right of Ottikuzhikanamdar as a tenant under the Kerala Land Reforms Act open and granting liberty to the said defendant to raise such question in the execution proceeding. The second defendants leaving behind her, defendant Nos. 3 to 10 as heirs and legal representatives. The tenth defendant, a son of defendant No. 2 filed application before the executing court being E.A. No.61 of 1984 claiming fixity of tenancy right under section 4A (i)(b) of Kerala Land Reforms Act. The said petition was allowed and the said defendants were found entitled to fixity of tenure in the disputed property.

5. The respondents in this appeal preferred a revision petition being C.R.F. No. 1239 of 1990-G before the Kerala High Court challenging the said decision of the executing court. By the impugned judgment, the High Court has set aside the order of the learned Munsif in E. A. No.61 of 1984. The High Court has held that defendant No. 2 passed her right on a sale from Konchukesavan which was found invalid. Therefore, she had not acquired any right in the property or Ummini or his heirs. Consequently, defendant No. 2 had no right to secure release of the interest of her husband and her act of securing release or surrender was unauthorised and unlawful. The High Court has held that defendant No.2 was an intruder claiming title under the invalid sale and is therefore liable to be evicted by the decree holders whose right in the property had been established. The appellant namely the tenth defendant and son of defendant No.2 had challenged the correctness of the decision of the High Court by filing a special leave petition before this Court.

6. For the purpose of appreciating the rival contentions of the learned counsel for the parties it will be appropriate to note that under the amended provision of Section 2(57) (dd) of the Kerala Land Reforms Act (hereinafter referred to as Land Act) tenant means and include an Ottikuzhikanamdar. It may be stated here that Ottikuzhikanam is a tenure relating to land in Kerala which partakes both the characteristics of a mortgage (otti) and improvement lease (Kuzhikanam). Section 4A of the Land Act was inserted by amendment. Section 4A of the Land Act (excluding explanation thereof, nor relevant for the disposal of this appeal) is set out hereunder:

Section 4A

"4A Certain mortgages and lessees of mortgagees to be deemed tenants - (1)
Notwithstanding anything to the contrary contained in any law or in any contract, custom or usage, or in any judgment decree or order of court, a mortgagee with possession of land, other than land principally planted with rubber, coffee, tea or cardamom, or the lessee of a mortgagee of such land shall be deemed to be a tenant if-

(a) the mortgagee or lessee was holding the land comprised in the mortgage for a continuous period of not less than fifty years immediately preceding the commencement of the Kerala Land Reforms (Amendment) Act, 1969, or

(b) the mortgagee or lessee has constructed a building for his own residence in the land comprised in the mortgage and he was occupying such building for such purpose for a continuous period of not less than twenty years immediately preceding such commencement:

Provided that a mortgagee or lessee falling under this clause shall not be deemed to be

a tenant if he or, where his is a member of a family, such family was holding any other land exceeding two acres in extent on the date of publication of Kerala Land Reforms (Amendment) Bill, 1968 in the Gazette; or

(c) the land comprised in the mortgage or land to which the Madras Preservation of Private Forests Act, 1949 would have applied if that Act had been in force at the time of mortgage, and-

(i) the mortgagee or lessee was holding such land for a continuous period of not less than thirty years immediately preceding the commencement of the Kerala Land Reforms (Amendment) Act, 1969 and (ii) the mortgagee or lessee had effected substantial improvements on such land before such commencement."

7. Mr. Poti, learned Senior Counsel appearing for the appellant has contended that the question that arises for consideration by this Court is whether the appellant, a son of second defendant is entitled to claim tenure right as Ottikuzhikanamdar in view of amended provisions of Kerala Land Reforms Act when such amendment has come into force with effect from 1-1-1970 when the partition suit was pending. Mr. Poti has submitted that in the second appeal arising from the decree passed in the said partition suit the High Court did not disallow the claim of tenancy right as Ottikuzhikanamdar by the defendant No. 2 but kept such question open with liberty to defendant No. 2 to raise such claim before the executing court.

8. The plaintiff in the partition suit have 2/5th share in the properties in suit. The properties had an outstanding mortgage of 1095 Malabar Era (1920 A.D.). Such mortgage right had devolved on the first defendant. The Second defendant took a sale deed from Kochukesavan claiming to be son of original owner Ummi. The second defendant also obtained a release deed of mortgagee's right from the first defendant who was husband of second defendant.

9. Mr. Poti has submitted that it has been held by the court that as Kochikesavan was not the son of Ummi the defendant No.2 did not acquire any title to the properties in suit by virtue of the sale deed executed by the said Kochukesavan. There is however no dispute that the defendant No. 2 obtained a deed of release from her husband, the defendant No. 1 surrendering his interest as Ottikuzhikanamdar Accordingly, even if the defendant No. 2 had failed to obtain any proprietary right in respect of the said properties, her right as Ottikuzhikanamdar did not disappear. There is no dispute that the suit properties had an outstanding mortgage of 1095 (Malabar Era). Such mortgage right must be held to have devolved on defendant No. 2 in view of the said deed of release executed by defendant No.1.

10. Mr. Poti has contended that a release is also a transfer of property and is termed as release only because it is executed in favour of a person who is entitled to seek such transfer by virtue of a superior right. If a person who obtains a release, has also right of ownership of the property, the two rights merge in the same person by operation of law. When the two rights devolve on the same person, there is merger of mortgage in the ownership right and the mortgage does not survive except for certain purposes such as subrogation etc. On the other hand, if the mortgagee conveys whatever right he has to a person who has no title to the property, there is no question of merger by operation of law and whatever the rights the mortgage had only devolve on the transferee. Such transferee, therefore, by the purported release, gets the rights of the mortgagee.

11. Mr. Poti has submitted that in the facts of the case, there is no question of subrogation.

Subrogation arises only when a person who has interest in the property such as owner or a superior mortgagee pays off a mortgage. Normally, there would be extinction of the mortgage right in such a case but mortgage security is kept alive for certain purposes to protect the interests of the person who discharges the mortgage debt. In this connection, Mr. Poti has referred to Section 92 of the Transfer of Property Act. Mr. Poti has submitted that when a person who purports to take a release has no superior title to the property, there is no question of subrogation because subrogation under Section 92 of Transfer of Property Act arises only when any person referred to in Section 91 redeems property subject to mortgage.

12. Mr. Poti has submitted that in this case the defendant No. 2 has no ownership or prior interest in the property. She however purported to redeem the property although it was found that she had no right to redeem. In such a case, by discharging the liability under the usufructuary mortgagee the defendant No. 2 did not get any title other than that of the usufructuary mortgagee since held by defendant No.1 Mr. Poti has, submitted that unfortunately the High Court failed to appreciate the facts of case and came to a wrong finding that by the deed of release executed by defendant No.1 the defendant No.2 did not get the Ottikuzhikanamdar's right into the disputed property.

13. Mr. Poti has submitted that the amended provisions of Land Act came into force when the suit for partition was pending. Since the Ottikuzhikanam was created in 1905 (Malabar Era) corresponding to 1920 AD and the defendant No. 2 had built her residence on the said land under mortgage, she was entitled to claim tenancy right on the said land under the Land Act and such mortgage was not redeemable. Mr. Poti has, therefore submitted that the impugned decision should therefore, be set aside and the decision of the executing court should be affirmed.

14. Mr. Iyengar, the learned Senior counsel appearing for the respondent No. 1 has however refuted the contentions of Mr. Poti, Mr. Iyengar has submitted that on the death of Ummini, his five sisters inherited the right, title and interest of Ummini in the properties in suit. They executed a deed of usufructuary mortgage (locally known as Ottikuzhikanam) in favour of a son of one of the sisters namely defendant No. 1 in 1095 M.E. While the first defendant was in possession, his wife namely defendant No. 2 took a sale deed of the equity of redemption from one Kochikesavan in 1124 M.E.(1949 A.D.) and on the strength of such sale deed, paid off the mortgage amount and obtained a deed of release in 1124 M.E. itself from the first defendant and remained in possession. The two sons of two deceased sister are the plaintiffs in the partition suit (O.S.No 115 of 1964) who claimed their 2/5th share on payment of proportionate mortgage amount borrowed under the said mortgage of 1095 M.E. The said suit was resisted by defendants Nos. 1 and 2 on two grounds namely (a) sale deed taken by second defendant from Kochikesavan was valid and defendant No.2 having extinguished the mortgage by paying off the mortgage debt to the first defendant, she became absolute owner and (b) defendant No.2 had perfected her title by adverse possession. The trial court, though found that the sale deed executed by Kochikesavan was invalid, dismissed the suit on the ground of adverse possession. The appellate court however negated the finding of adverse possession in favour of defendant No. 2 and passed a preliminary decree for partition of 2/5th share and for consequential relief. The second appeal was also dismissed by the High Court by keeping the claim of the alleged tenancy right of defendant No. 2 under the amended provisions of Land Act open.

15. Mr. Iyengar has submitted that the plaintiffs applied for the issue of commission and separate allotment of 2/5th share decreed in their favour by the preliminary decree. The Commissioner also ascertained the value of improvements payable to defendants. On the basis of Commissioner's report and plan, final decree was passed by the trial court on 18-8-1979. Such plan has been filed as

Annexure II to the counter affidavit of the respondent in the special leave petition. The land where the building put up by the predecessor of the appellant stands, has been allotted to appellant and other heirs of defendant No. 2 and what has been allotted to the respondents is only the southern west portion measuring 25.40 cent (ABCDE plot).

16. Mr. Iyengar has submitted that only with an intention to frustrate the final decree in favour of the plaintiffs, in the said partition suit, the defendant No.1 filed an application before the executing court claiming tenancy right under the amended provisions of Land Act although such contention was not at all tenable in law. Mr. Iyengar has submitted that the possession of the appellant was not under the mortgage of 1095 (ME) because that mortgage did not subsist after the release was taken by defendant No.2 Lakshmi Kalyani. That apart the plot where the building stands has not been sought to be recovered by the tenth defendant appellant because the same was allotted to the appellant and other heirs of defendant Nos. 1 and 2 and final decree having been allowed to be passed allotting the specific plot to the plaintiffs and giving them the right to recover possession thereof, it is not open to the appellant to object to the recovery of possession in execution.

17. Mr. Iyengar has submitted that the High Court has held that the sale taken by defendant No. 2 from Kochikesaman being invalid, she had not got any title to redeem. Hence, she having paid off the mortgage debt and by taking a release from the first defendant, had not become a mortgagee on account of taking the said release. Mr. Iyengar has submitted that if a stranger to the mortgage pays off the mortgage debt, such stranger does not become mortgagee and the doctrine of subrogation is also not applicable to a mere stranger who volunteers to pay off the mortgage debt of another without any assignment or agreement for subrogation when such stranger was under no legal obligation to make payment or under any compulsion to make payment for possession of the property.

18. In support of this contention Mr. Iyengar has relied on a decision of Calcutta High Court in *Surdeo Singh v. Chandrikah Singh* (1909)ILR 36 Cal 193. It has been held in the said decision that:

"The doctrine of subrogation is not applied for a mere stranger- a volunteer who has paid the debt of another without any assignment or agreement for subrogation being under no legal obligation to make the payment and not being compelled to do so for the preservation of rights or properties of his own."

"That principle is that subrogation as a matter of right is never applied in aid of a mere volunteer. Legal substitution into the right of a creditor for the benefit of a third person takes place only for his benefit, who being himself a creditor satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the encumbrance upon his estate or of a co-obliger or surety who discharges the debt, or of an heir who pays the debt of the succession.

xxxx xxxxx xxxxxxxxx

Any one who is under no obligation or liability to pay the debt is a stranger and if he pays the debts he is a mere volunteer."

19. M. Iyengar has submitted that the said decision of the Calcutta High Court has been approved by the Privy Council in *Janki Noth v. Pramatha* AIR 1940 PC 38. It has also been contended by Mr. Iyengar that the position of defendant No.2 was that of a volunteer paying off of mortgage debt.

But by such payment, she had not become the mortgagee. The contention that the defendant No.2 had in law become an assignee of the mortgagee right of the defendant No.1 is not at all tenable because release brings about extinguishment of an encumbrance but an assignment is a transfer of encumbrance of one person to another. Moreover, it is not the law that any person who volunteers to pay off a mortgage debt will be a mortgagee by such payment.

20. Mr. Iyengar has also submitted that even if it is assumed that by the release, the defendant No.2 was subrogated to the right of a mortgagee, the legal consequence of such a transaction is not that a subrogee becomes a mortgagee. In support of this contention Mr. Iyengar has referred to the decision of this Court in *Vairavan Saraswathi v. Eachamb Theri* 1993 Suppl (2)SCC 201 : (1992 AIR SCW 3673). It has been held in the said decision that one of the rights which vest in the junior member of a tarward is to see that the property is duly conserved. Such a right includes a right to redeem the property by paying the debt outstanding against the tarward. It is an incidence of co-ownership or co-proprietorship which flows from the nature of tarward. But the person who thus conserves the property does not step into the shoe of the co-mortgagee so as to acquire right under Section 4A (i)(a) of Land Act. He is only a surety holding the property on behalf of the tarward subject to right of contribution. Therefore, a junior member of a tarward in Kerala who redeems the mortgage and is in possession for more than 50 years, is not a mortgagee so as to acquire rights of a tenant under Section 4A of the Land Act.

21. Mr. Iyengar has submitted that the defendant No.2 by paying off the mortgage debt to defendant No.1 in taking release from him may have a claim in equity which a stranger volunteering to pay off a mortgage debt may claim but by no stretch of imagination, she gets assignment of mortgagee's right Mr. Iyengar has, therefore, submitted that this appeal should be dismissed with cost.

22. After giving careful consideration of the facts and circumstances of the case and the submissions made by the learned counsel for the parties it appears to us that the predecessor-in-interest of the appellant Sm. Lakshmi Kalyani (defendant No.2)intended to purchase the superior interest of the landlord in respect of the properties involved in the said partition suit. She obtained a sale deed executed by one Kochikesavan on the footing that the said Kochikesavan was the son of the admitted owner of the aforesaid properties namely Ummini. After obtaining such sale deed from the said Kochikesavan, she obtained a deed of release of Ottikuzhikanam interest of her husband the respondent No. 1. Such action of obtaining a deed of release from the defendant No.1 was presumably taken to make the superior title to the properties, purported to have been validly acquired from Kochikesavan, free from all encumbrances.

23. It was not the case of the defendant No. 2 Lakshmi Kalyani that she had in reality obtained a deed of assignment of Ottikuchikanamdar's interest from her husband the defendant No.1 by the said deed of release or that she had intended to obtain such assignment. As a matter of fact in the written statement filed by the defendant No.2 in the said suit for partition, it was contended by her that the suit for partition must fail because the predecessors-in-interest of the plaintiffs namely two sister of Ummini had no interest in the property and she having purchased the properties in suit from Kochikesavan title to the property. It was also contended by the defendant No.2 that she had been possessing the said properties openly and as a right by asserting her title as owner and had also constructed her residential building on a portion of the properties involved in partition. Accordingly her title had, in any event, been perfected by adverse possession. The trial of title on the strength of sale deed executed by Kochikesavn because it was found that the said by adverse possession was however found by the trial court and the partition suit was dismissed. The court of appeal, however, did not accept the case of adverse possession found in favour of the defendant No.2 and the

plaintiffs being sons of two sisters of the said Ummini their 2/5th share in the properties in suit was decreed. Later on, by the final decree, specific plot has been allotted to the plaintiff and defendant No. 1 being a son of one of the sisters of Ummini was also held to be a co-sharer and the plot where the family residential building stands has been allotted in the share of the successors-in-interests of defendants Nos. 1 and 2 after taking note of the improvements effected on the plot allotted to them.

24. It was only when the claim of title to the properties in suit as made by the defendant No. 2 on the strength of the sale deed executed by Kochikesavan was negated by the courts below, the defendant No.2 claimed tenancy right by contending that Ottikuzhikanamdar' right of defendant No.1 having devolved on her by obtaining a deed of release from the defendant No. 1. She became a tenant under the amended provisions of the Land Act, which came into force during the pendency of the partition Suit. The High Court, although dismissed second appeal preferred by the defendant No.2 against final decree in the partition suit did not go into such contention raised by the defendant No.2 and keeping such question open, granted liberty to the defendant to raise such contention before the executing court.

25. In our view, the contention raised on behalf of the appellant the tenth defendant in Partition Suit (a son of defendants Nos.1 and 2)by Mr. Poti the learned senior counsel, that since defendant No. 2 could not acquire any superior interest in the properties in question by virtue of invalid deed of sale executed by Kochikesavan, the deed of release obtained by her from defendant No. 1 of his Ottikuzhikanamdar's Interest in favour of defendant No. 2 though ingenious, cannot be accepted.

26. The defendant No. 2 was a stranger to the mortgage. In law she was only a volunteer who had obtained a deed of release from a mortgagee of such mortgagee's interest by paying off mortgage debt. Such stranger, who had volunteered to pay off the mortgage debt and obtained a deed of release from the concerned mortgagee. does neither acquire a right of a subrogee nor of the mortgagee. Such stranger volunteering to pay off mortgage deed may have a claim in equity against the mortgagor but by such action the said stranger does not step into the shoe of the mortgagee because a deed of release executed by a mortgagee on satisfaction of mortgage debt, only extinguishes the mortgage. Assignment of mortgagee's right. Hence, extinction of mortgagee's right is ex facie incompatible with the concept of assignment of such right in favour of another. The extinction of mortgage by the deed of release therefore, does not create an assignment of mortgagee's interest in favour of the person paying off mortgage debt when such person had no obligation to pay off such debt and has also no interest in the property.

27. In our view the principle of law enunciated in Gurdev Singh's case,(1909-ILR 36 Cal 193), (supra) since approved by the Privy Council in Janaki Nath's case (AIR 1940 PC 38)(supra) squarely applies in the facts of this case. In Variavarns case (1992 AIR SCW 3673) (supra) this Court has also held that simply on account of paying off mortgage debt and obtaining release from a mortgagee, a junior member of a tarward who had obtained such release, does not step into the shoe of the mortgagee.

28. In the aforesaid facts, no interference is called for in this appeal and the same is dismissed with costs. Appeal dismissed.