

SUPREME COURT OF INDIA

Vallikat Thekkedath Valappil Lakshmikutty Amma

Vs.

Vallikat Thekkedath Valappil Demodara Menon

C.A.No.15610 of 1996

(K. Ramaswamy and G. T. Nanavati, JJ.)

29.11.1996

ORDER

1. Leave granted.
2. We have heard learned counsel on both sides.
3. This appeal by special leave arises against the judgment and decree of the Kerala High Court, made on 22-7-1993 in S. A. No. 616/85.
4. The admitted facts are that item 6 of the Plaint Schedule Property belonged to the Tarawad. The Karanawan had executed the possessory mortgage as per Exhibit B-1 for a sum of Rs. 200/-. The appellant Ithiridutty Appachi filed suit No. OS-114/70 in the Court of Munsiff, Pattambi for redemption of the mortgage, Exhibit B-1. The property was redeemed by the appellant. Thereafter, the present suit came to be filed for partition of the Plaint Schedule Property in their respective

shares. We are not concerned in this case with other items. We are concerned only with respect to item 6 of the mortgage property. Based on the contentions, it was found and accepted by the trial Court and the District Court that since the appellant had redeemed the property, he subrogated himself into the shoes of the mortgagee. Since the respondents have not redeemed the mortgage within a period of 30 years from the date of execution of Exhibit B-1, the appellant has become absolute owner of the property. As a result, the suit for partition in respect of item No. 6 of the Plaintiff Schedule Property is not partible; it does not lie. The High Court in the above impugned judgment has reversed the finding and held that item 6 is also partible.

5. The learned counsel appearing for the appellant relied on *Valliamma Champaka Pillai v. Sivathanu Pillai*, (1979) 4 SCC 429: (AIR 1979 SC 1937), and contended that the respondent have failed to redeem the property within the limitation and, therefore, they cannot file a suit for partition. It is difficult to accept the contention of the learned counsel. It is seen that in that case in the suit for redemption by one of the mortgagors, he had redeemed the mortgage but the suit was filed for delivery of the possession after 50 years or after the expiry of 12 years from the date of the redemption of the mortgage was decreed. The question, therefore, was; when the limitation for filing the suit for possession would arise? It was held in para 28 as under:

"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 the 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 debt, which was the joint and several liability of himself and co-mortgagor, 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.

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.

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."

6. It is now settled legal position that one of the co-owners or one of the co-mortgagors is entitled to redeem the mortgage and on redemption, he subrogates into the shoes of the mortgagees. To the extent of his liability for the mortgage, he gets discharge and to the extent of the shares of other co-mortgagors, he stands in the position of mortgagee viz-a-viz other co-mortgagors. Therefore, it would be open to the other mortgagors to sue for possession of the property, after paying their share within the period of limitation. It is not in dispute that 12 years is a period of limitation for possession of the property since the appellant came into possession to the extent of the share of other co-owners, namely, their Karvans of the Tarwad as a mortgagee. They are entitled to pay to the extent of the respective share of the mortgage amount and seek possession from the co-mortgagor, namely, appellant within 12 years from the date of the redemption of the mortgage. Under these circumstances, suit has been filed within Limitation for a partition of property and preliminary decree shall follow subject to the payment of mortgage amount to the extent of their shares to the appellant.

7. The appeal is accordingly dismissed with the above modifications but, in the circumstances, without costs.

Appeal dismissed.