SUPREME COURT OF INDIA

Narayanaru Thrivikranaru

Vs.

V.Madhavan Potty

(D.P. Wadhwa and Syed Shah Mohammad Quadri JJ.)

10.02.2000

JUDGMENT

THOMAS J.

Appellant won the cause at all the tiers in the judicial hierarchy during trial stage but the fruits of the decree which he earned thereby are still eluding him. The decree is practically rendered nonest during execution stage as the High Court upheld t he contentions of the contesting respondents in disregard of the contrary findings made during trial stage. The order so passed by a learned single judge of the High Court of Kerala is now being challenged in this appeal by special leave.

Facts, spread over to a wide range of period covering more than half a century by now, can be stated as follows:

In 1943 a document (Ex. P1) was executed styling it as "Otti and Kuzhikanam" in favour of the first respondent in respect of the suit propert es. In fact those properties were outstanding on lease with the respondent before the execution of Ex.P1. A suit for redemption of mortgage was filed by the appellant, claiming to be entitled to redeem the mortgage, on the premise that Ex. P1 was a us fructuary mortgage. First respondent, after admitting the execution of Ex.P1, contended that it was not meant to terminate the earlier lease arrangement and hence he continued to be a lessee of the property notwithstanding the execution of Ex.P1. The t ial court found that first respondent was in possession of the land as mortgagee and not as lessee. On the strength of such a finding the trial court passed a decree for redemption of the mortgage on condition that the mortgage amount and value of the i provements effected by the first respondent on the property should be paid to him.

First respondent filed a regular appeal against the said judgment before the sub-Court and that court upheld the decree passed by the trial court. He then filed a second appeal before the High Court of Kerala. As per the judgment dated 12.1.1967 the Hi gh Court dismissed the second appeal.

Thus, the decree for redemption of the mortgage became final.

It was in the second round of the litigation, when appellant moved for execution of the decree after depositing the entire amount due thereunder that he had to face harder hurdles. The Kerala Land Reforms Act (for short the Act) came into force in the m eanwhile which conferred fixity of tenure on tenants of agricultural lands. First respondent raised a contention, in the execution court, that he is a tenant on the land and is hence entitled to the protection envisaged in the Act. The execution court eferred the said question to the Land Tribunal as provided in Section 125(3) of the Act for a decision on the aforesaid claim of the first respondent. The Land Tribunal answered the reference

against the first respondent and forwarded the records of the case back to the execution court. On the strength of the finding so recorded by the Land Tribunal the execution court directed delivery of the suit property to be given to the appellant as per its order dated 30.11.1995.

First respondent filed a revision before the High Court challenging the said order of the executing court. The revision was allowed by the High Court as per order dated 12.1.1996 rendered by a learned single judge who set aside the order of the executio n court, which is being challenged now.

We heard the arguments of Mr. C.S.Vaidyanathan, Senior Advocate for the appellant and Mr. P. Krishnamurthy, Senior Advocate for the first respondent. Another written submission has been put in by the advocate on behalf of respondent Nos. 3 and 4, thoug h they did not contest the case at any earlier stage. All of them were duly considered by us.

Learned single judge, in the impugned order, held that the earlier lease (which existed prior to Ex.P1) in favour of the first respondent did not come to an end despite execution of Ex.P1. The following are the main reasoning adopted by the learned sing le judge:

"There is nothing on record to show that they had agreed to surrender tenancy right on the execution of the mortgage deed. Lease was a valuable right. In the case of mortgage, mortgagor was having the right to redeem the mortgage.

There is nothing on ecord to show that the lessees in the instant case were conscious of the possibility of redemption of the mortgage by the mortgagor when they executed Ottikuzhikanam deed in 1943. So also, there is no clear statement in the Ottikuzhikanam deed of 1943 t at parties wanted to terminate their earlier relationship of landlord and tenant. The fact that parties were aware that for the termination of leasehold right a document to that effect has to be executed is evident by the execution of document No.1159 o 1943 when they wanted to terminate leasehold interest in respect of 53 cents of properties comprised in Sy.No.43. In such a situation, if they had intended to terminate leasehold interest in respect of the decree schedule properties, there should have een a release deed of leasehold interest or should have made necessary statements in the Ottikuzhikanam deed expressing their clear intention to give an end to the lease arrangement. In the absence of such clear statements in the Ottikuzhikanam deed, I ind it difficult to hold that the leasehold interest was terminated by the execution of document No.1158 of 1943." It was not open to the High Court to consider at this stage, whether Ex.P1 did not come into force or whether the earlier lease survived the transaction covered by the said document. Those were the points hotly disputed during trial stage of the same li tigation and definite findings have been made thereon by the trial court. Those findings were against the first respondent which were confirmed in appeal and they have become final. However, learned counsel for the first respondent contended that Secti n 12(1) of the Act enabled the parties to re-agitate such issues notwithstanding any finding made in the judgment. We will, therefore examine the said provision. Section 12(1) of the Act reads thus:

"12. Right to prove real nature of transaction.- (1) Notwithstanding anything in the Indian Evidence Act, 1872, or in any other law for the time being in force, or in any judgement, decree or order of court, any person interested in any land may prove hat a transaction purporting to be a mortgage, otti karipanayam, panayam, nerpanayam or licence of that land is in substance a transaction by way of kanam, kanam-kuzhikanam, Kuzhikanam, verumpattam or other lease, under which the transferee is entitled t fixity of tenure in accordance with the provisions of section 13 and to the other rights of a tenant under this Act." It enables any person interested in the land to prove that a transaction purporting to be a mortgage is, in substance, a transaction by way of lease. The non-

obstante limb of the Section insulates a transaction which purports to be a mortgage, from any other law or judgment or decree.

What is saved thereby is "the transaction purporting to be a mortgage." But that saving clause is not a carte blanche for ignoring the transaction altogether. Section 12 of the Act does not permit the court to superse e the findings made by the Court to the effect that the earlier lease came to an end with the execution of the transaction which purports to be a mortgage. In other words, what section 12 entitles a person is to prove the real substance of the transacti n covered by Ex.P1, albeit the ostensible tenor of the document. Hence the finding of the High Court in the impugned order cannot be salvaged with the aid of Section 12 of the Act.

Learned counsel for the first respondent then contended that even apart from the reasoning made in the impugned order first respondent can establish that Ex.P1 is really a lease. On the language of Section 12 of the Act it is possible to concede such a right to the first respondent, but the question is whether first respondent succeeded in establishing that the transaction covered by Ex.P1 is really a lease or that first respondent is a tenant of the suit properties.

A "tenant" is defined in Section 2(57) of the Act as including an "Ottikuzhikanamdar." This item was inserted in the inclusive definition of "tenant" as per Act 35 of 1969.

It means that a person holding land under Ottikuzhikanam arrangement would be a tenant. Now it is necessary to know what is meant by "Ottikuzhikanam." That expression is defined in Section 2 (39A) as under: 39A. Ottikuzhikanam means a transfer for consideration by a person to another of any land other than nilam for the enjoyment of that land and for the purpose of making improvements thereon, but shall not include a mortgage within the meaning of the Trans er of Property Act, 1882." The above definition recognises that there are two types of "Ottikuzhikanam." One type would be a mortgage within the meaning of Transfer of Property Act. It is clear that the said type of "Ottikuzhikanam" is specifically excluded from the ambit of th definition. It is the other category of non-mortgage "Ottikuzhikanam" alone has been brought within the purview of the definition. So, even if the nomenclature of the transaction is "Ottikuzhikanam" it should not be a mortgage, if the transaction is t fall within the purview of the definition.

In this context it is pertinent to remind that the finding entered by all the courts during the trial stage in this case is that Ex.P1 is a mortgage. Such a finding is binding on the parties to this lis as a normal rule, but Section 12 of the Act enable d the first respondent to prove that Ex.P1, in substance, is not a mortgage even in spite of such a finding. However, first respondent has only endeavoured to show that the earlier lease survived Ex.P1 and not that Ex.P1 is not a mortgage.

One question is to be answered, if the parties wanted the earlier relationship to continue; Why should they have changed from lease to "Otti and Kuzhikanam" in 1943 by the execution of Ex.P1? We did not get any satisfactory answer to the said question. In this context we cannot forget the fact that during the said period of 1943 a lease of land, whether it was agricultural land or otherwise, had no special protection either legislative or otherwise. A usufructuary mortgage was during then comparative y more durable than a lease since a mortgagee could continue in possession until the mortgage debt was paid off. A lessee, during those period was vulnerable to eviction by the landlord at any time. A tenancy right acquired superior position vis-�-vis he usufructuary mortgage only many years later. Thus usufructuary mortgagee was in a better position than a lessee during 1943. Hence when parties decided to change from lease to "Ottikuzhikanam" in 1943 it must have been because they definitely meant or the change.

The mortgage amount stipulated in Ex.P1 was Rs.850/-.

Learned single judge of the High Court highlighted the cash payment made on the date of execution of the deed as Rs.100/- and observed that "the amount so advanced is negligible when compared with th e value of 1.78 acres covered by the document." The said reasoning is very tenuous as the actual mortgage amount reserved in the document was Rs.850/- out of which the mortgagor had acknowledged receipt of Rs.750/- which was payable by him to the mortga ee by way of value of improvements. The said amount of Rs.850/- could not be described as negligible by any standard during the year 1943 in respect of an agricultural land comprising of 1.78 acres situated in a rural area.

Another feature to be noticed is that in Ex.P1 there was no stipulation to pay rent to the landowner. The mortgagee was permitted to utilize the property on the strength of Rs.850/- which the mortgagor had acknowledged to be the debt due from him to the mortgagee. This feature has to be juxtaposed with the recital in the earlier lease deed that the lessee should pay rent to the landlord.

Thus, the recital in Ex.P1 including its nomenclature, and the amount of mortgage debt are poignantly in favour of holding the transaction to be a mortgage and not a lessee.

Hence, the finding made by the Court in this case during the trial stage, which is binding on the parties, cannot be disturbed. The decree holder is, therefore, entitled to the fruits of his hard-earned decree. The impugned order of the High Court is li able to be set aside. In the result we allow this appeal and set aside the order of the High Court now under challenge and the revision petition filed by the first respondent in the High Court would, therefore, stand dismissed.