

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5476 OF 2008
(Arising out of SLP (C) No. 17663 of 2006)

K. VILASINI & ORS.

... APPELLANTS

Versus

EDWIN PERIERA & ORS.

... RESPONDENTS

J U D G M E N T

S.B. Sinha, J.

1. Leave granted.
2. This appeal is directed against the judgment and order dated 6.3.2006 passed by the High Court of Kerala in Writ Petition (C) No. 33208 of 2005 and I.A. No. 3350 of 2006 in Writ Petition No. 12156 of 2005.

Defendant – judgment debtor is the appellant before us.

The properties in suit belonged to one Francis Periera (Periera), the predecessor-in-interest of the respondent. A deed of usufructuary mortgage was executed by him in favour of one Kumaran Kesevan, the predecessor-in-interest of the appellants. Periera is said to have executed a will in terms whereof the equity of redemption in respect of the said mortgage ultimately

devolved on some of his children. A suit was filed for redemption of the said mortgage by his successors. A preliminary decree was passed therein. Final decree was passed on 11.7.1997 directing the respondents herein to deposit a sum of Rs.41,33,508.70 within a period of six months purported to be as a part of the redemption being the value of the substantial improvements effected by the mortgagees in the said properties. Indisputably, the said amount was not deposited. An application for extension of time being I.A. No. 247 of 1998 was filed by the respondents on 6.1.1998, which was allowed in terms whereof the time for deposit of the amount was extended upto 11.7.1998. However, on 10.7.1998, another application for extension for a period of six months was filed. It was marked as I.A. No. 5800 of 1998, but the same was dismissed. The earlier Application being I.A. No.247 of 1998 also came to be dismissed ultimately by an order dated 13.7.1998 for default. An application for restoration thereof was filed on 1.9.1999. By an order dated 8.2.2001, the said application for restoration was allowed and the time to deposit the amount was extended till 16.2.2001.

On 22.2.2005, the 19th plaintiff, respondent No. 1 herein, being son of the deceased 4th plaintiff filed an application marked as I.A. No. 2253 of 2005 praying for condoning the delay in making the deposit and for

issuance of challan for depositing the amount stating that he was not aware that the said amount has to be deposited and he could come to know thereabout only when he received the certified copy of the decree on 20.10.2004.

3. The II Additional Munsiff by his order dated 31.3.2005 allowed the said I.A upon condoning the delay on payment of cost of Rs.1000/- directing:

“But the petitioner filed affidavit stating that he came to know about the amount only on 20.10.2004. The petitioner could have filed the affidavit by stating the dismissal of the earlier applications filed for extending the time for paying the amount. The petitioner has no complaint against his counsel. Considering the huge amount to be paid by the petitioner I hold that the delay can be condoned subject to condition to pay cost of Rs.1000/- to the contesting second counter petitioner for the ends of justice.

In the result I.A. is allowed and the delay is condoned on payment of cost of Rs.1000/- to the second counter petitioner. The challan shall be issued to the petitioner for remitting the amount as per final decree. The petitioner shall deposit the said amount on or before 7.4.2005 otherwise the petition will be stand dismissed.”

Indisputably, the said order was not complied with. Respondent No. 1 filed another application being I.A. No. 4106 of 2005 for further extension of time, which was rejected on 8.4.2005.

Aggrieved thereby and dissatisfied therewith, a Writ Petition which was marked as Writ Petition (C) No. 12156 of 2005 was filed. By reason of a judgment and order dated 20.5.2005, the said Writ Petition was allowed without any notice to the respondents therein, directing:

“2. Considering the facts of this case, I find that it is not necessary to issue notice to all the 12 Respondents. Hence, notice is waived.

3. Taking into account the various facts brought to my notice and also the quantum of the value of improvements to be deposited by the Petitioner, I extend the time granted by the trial Court under Ext. P2 by one month. Petitioner shall deposit the amount stated in Ext. P2 order accordingly.

This Writ Petition is disposed of as above.”

Indisputably, the value of improvements was deposited by the respondent No. 1 in the trial court on 18.6.2005.

Appellants filed a Writ Petition being Writ Petition (C) No. 33208 of 2005 challenging the order of the II Additional Munsiff passed on 31.3.2005. An application for recall of the order dated 20.5.2005 passed in Writ Petition (C) No. 12156 of 2005 granting one month's time to deposit the value of the improvements was also filed. The said application was marked as I.A. No. 3350 of 2006 in Writ Petition (C) No. 12156 of 2005.

By reason of the impugned judgment, the said Writ Petition as also the interlocutory application filed by the appellants was dismissed directing to revalue the improvements effected by them on the suit property purported to be in terms of the provisions of the Kerala Compensation for Tenants Improvements Act, 1959.

4. Second appellant thereafter filed an application for determination of the value of improvements to the suit property effected by the appellants after passing of the final decree.

Before proceeding further, we may notice that although in the body of the memorandum of appeal the order dated 6.3.2006 passed in both Writ Petition (C) No. 33208 of 2005 and I.A. No. 3350 of 2006 in Writ Petition (C) No. 12156 of 2005 had been mentioned, but the main prayer reads as under:

“It is, therefore, most respectfully prayed that Your Lordships may graciously be pleased to grant the Petitioner Special Leave Petition against the judgment dated 6.3.2006 passed by the High Court of Kerala in Writ Petition (C) No. 33208 of 2005 and pass any other order or orders which may be deemed fit and proper to meet the ends of justice.”

Thus the appellants have questioned only the order of the High Court passed in Writ Petition (C) No. 33208 of 2005.

The deposit of the amount by the appellant had been made in terms of the order passed in I.A. No. 2253 of 2005, which is not under challenge.

Notice in this appeal was directed to be issued on 10.11.2006 whereby liberty was granted to the appellants to mention after the service was complete. There is nothing on record to show as to whether the interim relief was pressed for or not. The execution application, however, proceeded in the court of Additional Munsiff. A Commissioner was appointed for determining the value of improvements made to the suit property after passing of the final decree. Respondents were directed to deposit a sum of Rs.5,38,269.50. The said order has been complied with by the respondents whereafter they were put in possession of the suit properties through process of the Court on 23.2.2007.

5. Mr. Subramonium Prasad, learned counsel appearing on behalf of the petitioner in support of this appeal would urge:

- i. The extension of time had wrongly been granted by the courts below on so many occasions.

- ii. Even the peremptory time granted by the trial court having not been complied with, the respondents' application should have been dismissed by reason whereof; they must be held to have lost their right of redemption; the logical consequence whereof would be that the mortgage did not subsist.

6. Mr. Nageshwar Rao and Mr. P. B. Suresh Kumar, learned counsel appearing on behalf of the respondents, on the other hand, pointed out that the appellants have not filed any application for foreclosure of mortgage. Drawing our attention to the Kerala Amendment of Order XXXIV Rule 5 of the Code of Civil Procedure, the learned counsel would contend that the same provides for a power in the court to postpone the date of payment. In any event, it was urged that in view of the subsequent events appellants have waived their right of foreclosure of mortgage, if any.

7. A right of foreclosure is to be exercised in terms of Order XXXIV Rule 8(3) of the Code wherefor no decree was passed. The suit for redemption was decreed. Rule 5 of Order XXXIV as amended by the State of Kerala reads as under:

“5. Date of payment.—The Court may, upon good cause shown and upon such terms, if any, as it

thinks fit, postpone the date fixed for payment under this Order from time to time.”

It is this power which the learned trial judge has been exercising from time to time. We have noticed hereinbefore that though a peremptory time was granted, the High Court in terms of its order dated 20.5.2005 passed in Writ Petition (C) No. 12156 of 2005 granted respondent No. 1 herein one month's further time to deposit the value of improvements. The said order was complied with.

Although the said order was ex parte in nature, appellants should have questioned the correctness thereof. Instead, he filed an interlocutory application. The same was also dismissed. The order passed in the said interlocutory application for recalling of the order dated 20.5.2005, as noticed hereinbefore, is also not the subject matter of this appeal. The challenge in this appeal is confined only to the order dated 6.3.2006 passed in Writ Petition (C) No. 33208 of 2005.

8. Mr. Subramonium Prasad submitted that by mistake no prayer has been made for setting aside the order, but even in the substantial questions of law formulated no ground had been taken that the ex parte order passed in favour of the respondent No. 1 herein was illegal.

Even if we had not taken note of the aforementioned technicality, the subsequent events, in our opinion, categorically show that the appellants herein in view of their conduct are estopped and precluded from questioning the correctness of the order dated 6.3.2006 passed in Writ Petition (C) No. 33208 of 2005. We would, however, advert to the said question a little later.

9. We may at this stage notice that an order permitting foreclosure in terms of Order XXXIV Rule 8(3) can be passed only upon ascertaining the nature of the mortgage and the rights of the parties thereunder. The deed of mortgage has not been filed before this Court. No foundational fact, therefore, had been laid by the appellants so as to enable the trial court to pass a decree for foreclosure. No step was also taken for enforcement of the said purported right.

10. This Court in Achaldas Durgaji Oswal (Dead) through LRs. v. Ramvilas Gangabisan Heda (Dead) through LRs. & ors. [(2003) 3 SCC 614] stated the law, thus:

“22. The right of redemption of a mortgagor being a statutory right, the same can be taken away only in terms of the proviso appended to Section 60 of the Act which is extinguished either by a decree or

by act of parties. Admittedly, in the instant case, no decree has been passed extinguishing the right of the mortgagor nor has such right come to an end by act of the parties.”

We may also notice that in Mhadagonda Ramgonda Patil & ors. v. Shripal Balwant Rainade & ors. [(1988) 3 SCC 298], this Court held as under:

“12. It is thus manifestly clear that the right of redemption will be extinguished (1) by the act of the parties or (2) by the decree of a Court. We are not concerned with the question of extinguishment of the right of redemption by the act of the parties. The question is whether by the preliminary decree or final decree passed in the earlier suit, the right of the respondents to redeem the mortgages has been extinguished. The decree that is referred to in the proviso to Section 60 of the Transfer of Property Act is a final decree in a suit for foreclosure, as provided in Sub-rule (2) of Rule 3 of Order XXXIV and a final decree in a redemption suit as provided in Order XXXIV, Rule 8(3)(a) of the CPC. Sub-rule (2) of Rule 3, inter alia, provides that where payment in accordance with Sub-rule (1) has not been made, the court shall, on an application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property. Thus, in a final decree in a suit for foreclosure, on the failure of the defendant to pay all amounts due, the extinguishment of the right of redemption has to be specifically declared. Again, in a final decree in a suit for redemption of mortgage by conditional sale or for redemption of an anomalous mortgage, the extinguishment of the right of

redemption has to be specifically declared, as provided in Clause (a) of Sub-rule (3) of Rule 8 of Order XXXIV of the CPC. These are the two circumstances-(1) a final decree in a suit for foreclosure under Order XXXIV, Rule 3(2); and (2) a final decree in a suit for redemption under Order XXXIV, Rule 8(3)(a) of the CPC-when the right of redemption is extinguished.”

The two circumstances in which the right of redemption is extinguished by passing of a decree are: (i) a final decree in a suit for foreclosure under Order XXXIV Rule 3(2), CPC; and (ii) a final decree in a suit for redemption under Order XXXIV Rule 8(3) thereof. {See Philomina Jose v. Federal Bank Ltd. & ors. [(2006) 2 SCC 608]}

As the time for deposit of payment has been extended by the court from time to time in terms of Rule 5 of Order XXXIV of the Code as amended by the State of Kerala, we do not think that the appellants can be permitted to raise their purported claim of right of foreclosure before us. Indisputably, the court has the power to extend the time. Grant of extension of time to deposit the amount, however, is not automatic. The jurisdiction has to be exercised judiciously. However, the fact that the court has the requisite jurisdiction to extend the time is neither denied nor disputed. Once the court exercises its power to postpone the date fixed for deposit of the amount due under the mortgage, the same could have been subject

matter of challenge, but as noticed hereinbefore, the appellants have failed to do so.

11. Coming now to the subsequent events, which we have noticed heretofore, it appears, that appellant No. 1 herself had filed an application before the court of Munsiff being E.P. No. 359 of 2005 in O.S. No. 885 of 1960 which is to the following effect:

“I am the 5th defendant in the above case. I have constructed a Piggary Farm in the Schedule Property and the said farm is being run by my son Shri Mohandas who has taken a license for the same. He has applied for the license in the Panchayath Office. The Piggary farm is constructed by me. Since I cannot run it directly, I made Mohandas to apply for the licence. I am claiming the amount deposited for the improvements since I incurred expenditure for constructing the same. I have the right to claim for the same. All the above stated facts are true.”

(emphasis supplied)

She, therefore, claimed the amount deposited by the respondents by reason whereof she waived her right. Apart from the same they proceeded in the execution case despite pendency of this Appeal. They filed applications for determination of the value of the improvements made by them. Only on their application, Commissioner was appointed; they filed

objections thereto; the same had been considered and order was passed and pursuant thereto the respondents deposited the amount.

12. We have noticed hereinbefore that apart from other mortgagors who are not the appellants, appellant No. 1 herself had filed an application for withdrawal of the amount. Even possession has been delivered in favour of the respondents. The right to redeem a mortgage thus having been enforced, in our opinion, it is not a fit case where the impugned order should be interfered with. It is now a well settled principle of law that even a legal right can be waived. It is also well settled that nobody can approbate and reprobate at the same time. [See Deewan Singh and Ors. v. Rajendra Pd. Ardevi and Ors. (AIR 2007 SC 767)].

13. The principle of estoppel would also apply in a case of this nature. Appellants could have filed an application for stay before us; they did not seem to press for their interim relief when the execution case was proceeding. They did not file any application for stay before this Court. They even took part in the execution petition. They did not state that they were doing so without prejudice to their rights and their contentions. No prayer was made before the Executing Court that any order passed therein should be subject to the result of this appeal. At least after the amount was

deposited, they could have approached this Court and/or Executing Court not to deliver possession of the property. They chose not to do so.

14. In any event, as indicated hereinbefore the order dated 31.3.2005 passed by the Additional Munsiff in I.A. No. 2253 of 2005 was not the subject matter of challenge. By the impugned judgment, a writ petition as also the I.A. has been disposed of. It was thus obligatory on the part of the appellants to challenge the order passed in both the proceedings. As the amount of Rs. 41,33,508.70 had been deposited, appellants must be held to have accepted the correctness of the said order dated 20.5.2005 disposing of the Writ Petition (C) No. 12156 of 2005.

15. For the reasons aforementioned, we find no merit in this appeal which is dismissed accordingly. However, in the peculiar facts and circumstances of the case, there shall be no order as to costs.

.....J.
[S.B. Sinha]

.....J.
[Aftab Alam]

New Delhi;
August 29, 2008