

CASE NO.:
Appeal (civil) 6544 of 1999

PETITIONER:
Rukmani Ammal and Anr.

RESPONDENT:
Jagdeesa Gounder

DATE OF JUDGMENT: 09/11/2005

BENCH:
Arijit Pasayat and C.K. Thakker

JUDGMENT:
JUDGMENT

C.K. THAKKER, J.

The present appeal is directed against the judgment and decree passed by the High Court of Madras in Second Appeal No. 1939 of 1986. By the said appeal, the High Court set aside the judgment and decree passed by the Subordinate Judge, Tindivanam in Appeal No. 6 of 1983 which in turn set aside the judgment and decree passed by District Munsif, Tindivanam in Original Suit No. 63 of 1983.

To appreciate the controversy raised in the present Appeal, factual background may be stated in brief:

The appellants herein were original defendants and respondent was the original plaintiff. One Annamalai was the absolute owner of the property bearing R.S. 81 situated at village Peravur in Taluka Tindivanam, admeasuring 1 acre and 52 cents (hereinafter referred to as the 'suit property'). Annamalai mortgaged the said property by a usufructuary mortgage to defendant No. 1 Rukmani Ammal by a document Ex. B-5 dated June 27, 1962 to secure repayment of Rs. 400 on a pro-note. Defendant No. 1 was put in possession of the property. Annamalai had also taken another loan from Rukmani Ammal on another pro-note executed by him. On August 13, 1964, Annamalai sold 67 cents from the suit property to plaintiff-Jagdesa by a registered sale-deed Ex. A-1 for Rs. 800/-. There was a recital in the sale-deed that the defendant No. 1 was in possession of property as a mortgagee and the plaintiff had thus purchased the equity of redemption from Annamalai. Since the defendant No. 1 was not repaid the amount of another loan under pro-note, she instituted a money suit being Small Cause Suit No. 176 of 1965 wherein a decree was passed. The suit-property was put up for sale in execution of money decree. The auction took place on August 3, 1966. The defendant No. 1 purchased the property with the leave of the Court. Sale was confirmed on September 5, 1966 and sales certificate Ex. B-7 was issued in her favour, and she took delivery of possession through Court on January 18, 1967. The property was subsequently sold by Rukmani Ammal (Defendant No. 1) to Krishna Gounder (Defendant No. 2) on August 16, 1979 by a sale-deed, Ex. B-19.

On March 1, 1980, the plaintiff issued a notice to defendant No. 1 asking her to hand over possession of 67 cents from the property to the plaintiff but the defendant No. 1 refused to do so. The plaintiff, therefore, filed a suit on June 6, 1980 for declaration of title and also for possession of property. It was alleged by the plaintiff that defendant No. 1 was mortgagee in possession of the property and since the mortgage was usufructuary one and the defendant No. 1 was in possession for a continuous period of ten years, the mortgage was deemed to be discharged under the Tamil Nadu Debt Relief Act, 1979 and defendant No. 1 was bound to deliver possession of the property to the plaintiff. It was also alleged by the plaintiff that he was not aware of Small Cause Suit No. 176 of 1965 by

defendant No. 1 nor the decree passed in the said suit and attachment and sale of property; that the Court auction was illegal and invalid as no notice was issued to the plaintiff before undertaking auction sale nor an opportunity was afforded to him. The auction, therefore, would not bind him as it was fraudulent. A prayer was accordingly made to declare auction sale invalid and to put plaintiff in possession of the property. According to the plaintiff, he purchased 0.67 cents out of 1 acre, 52 cents of the suit property and had become owner of that portion.

The suit was resisted by defendant No. 1, inter alia, contending that it was not maintainable inasmuch as the plaintiff ought to have instituted a suit for redemption of mortgage and not for declaration of title. It was also contended that a decree was passed in favour of defendant No. 1 in the previous suit and in execution of the said decree, the property was sold in public auction and after obtaining leave of the Court, the defendant No. 1 purchased the property and had become full and absolute owner thereof. She further contended that the debtor was not entitled to any benefit under the Tamil Nadu Debt Relief Act. In any case, after the auction sale and confirmation thereof by a Court, her possession of property was as owner of the property and thus, she was in adverse possession. She had become owner as she had acquired title by adverse possession and the suit filed by the plaintiff was barred by limitation. It was also stated that the sale in favour of defendant No. 1 was confirmed by a competent Court of law. The defendant No. 1 had also sold the property to defendant No. 2 on August 16, 1979 under the sale-deed, Ex. B-19 and thereafter the suit of the plaintiff against her was not maintainable and was liable to be dismissed. Defendant No. 2 remained ex-parte.

The trial Court, on the basis of allegations and counter allegations of the parties, framed necessary issues and by judgment and decree, dated November 18, 1982, held that the claim put forward by the plaintiff was well founded and he was entitled to a decree for possession as prayed by him to the extent of 67 cents. The Court observed that defendant No. 1 was in possession only as a mortgagee of the property and even after auction sale by the Court, she continued to remain in possession as the mortgagee and could not get title by adverse possession. The trial court also held that as defendant No. 1 was in possession of property since more than ten years, the mortgage was statutorily discharged and the defendant No. 1 was bound to hand over possession of the property to the mortgagor. As the plaintiff had purchased 67 cents in R.S. 81, he was the absolute owner and was entitled to that portion of the property. Accordingly, relief was granted in favour of the plaintiff.

Being aggrieved by the decree passed by the trial Court, the defendant No. 1 preferred an appeal in the Court of the Subordinate Judge, Tindivanam. The lower Appellate Court held that it was no doubt true that Annamalai was the owner and mortgagor of the property and defendant No. 1 was in possession as a mortgagee of the suit property. The Court, however, held that after the auction sale by the Court on August 3, 1966 and confirmation of sale and grant of sale certificate in favour of defendant No. 1 on September 5, 1966, she no more continued to be mortgagee in possession and her title was adverse to the mortgagor. Her possession was thereafter adverse possession so far as the owner was concerned. In the circumstances, relying on a decision of this Court in *Soni Lalji Jetha (deceased) through his LRs v. Soni Kalidas Devchand & Ors.*, AIR (1967) SC 978 : [1967] 1 SCR 974, the Court held that the defendant No. 1 had become owner by adverse possession and the suit filed by the plaintiff was not maintainable. The Court also held that the suit ought to have been filed under Order 34 of the Code of Civil Procedure, 1908 for redemption of mortgage and not for declaration of title and possession of mortgage-property. According to the appellate Court, the suit filed by the defendant No. 1 against Annamalai was for recovery of money and the plaintiff-Jagdesa was not necessary party to the said suit and the decree passed in that suit and sale of the suit-property in execution was binding to the plaintiff also. Accordingly, the appeal was allowed. Judgment and decree passed by the trial Court was

reversed and the suit filed by the plaintiff was dismissed.

The plaintiff was aggrieved by the decree of the lower Appellate Court and filed Second Appeal in the High Court of Madras. The High Court, relying on the fact that the defendant No. 1 was only mortgagee in possession and the mortgagor was entitled to redeem the mortgage, held that defendant No. 1 continued to be a mortgagee only and she would not become owner of the property by adverse possession. Therefore, according to the High Court, the trial Court was right in passing decree in favour of the plaintiff for title and possession of the property and the lower Appellate Court committed an error in allowing the appeal and setting aside the decree. The High Court also held that the decree passed in favour of defendant No. 1 in Small Cause Suit was not binding to the plaintiff as he was not joined as a party defendant in that suit. The High Court, therefore, allowed the appeal and decreed the suit of the plaintiff.

The appellants-defendants have challenged the decree passed by the High Court in the present appeal.

We have heard learned counsel for the parties. Learned counsel for the appellants contended that the High Court committed an error of law in holding that the suit filed by the plaintiff for declaration of title and possession of property was maintainable. According to the learned counsel, the plaintiff ought to have filed a suit for redemption under Order XXXIV of the Code of Civil Procedure, 1908. He, having purchased equity of redemption, could not have filed a suit for declaration and possession of mortgage property but for redemption of mortgage. The counsel also contended that the High Court was not right in holding that defendant No. 1 had not become owner of the property by adverse possession since she was a mortgagee of the suit property. Once the mortgagee purchased the property in execution proceedings and in auction-sale with leave of the Court, she had become owner of such property. Sale was confirmed and sale certificate was issued in favour of defendant No. 1. Even if it is assumed that the title of the mortgagee was defective, the status of the defendant No. 1 was changed from mortgagee into a person claiming ownership of property and the suit filed by the plaintiff was barred by the law of limitation. It was also submitted that the High Court was wrong in holding that the decree passed in Small Cause Suit was of no effect as the plaintiff was not joined as defendant in that suit. The learned counsel for the appellants, therefore, submitted that the appeal deserves to be allowed by confirming the judgment and decree of the lower Appellate Court and by dismissing the suit filed by the plaintiff.

The learned counsel for the respondent-plaintiff, on the other hand, supported the decree passed by the trial Court and confirmed by the High Court. He submitted that defendant No. 1 was mortgagee in possession and as the sale in favour of the plaintiff was in accordance with law, defendant No.1 continued to be mortgagee in possession. The counsel submitted that it is settled law that "once a mortgage, always a mortgage". It was, therefore, open to the mortgagor or a person claiming through such mortgagor to redeem the property. Since the plaintiff was claiming the right and title of the mortgagor, it was open to him to file a suit for declaration and possession of the property to the extent of 67 cents and by passing a decree in favour of plaintiff, no illegality had been committed by the trial Court. As the lower Appellate Court had committed an error in setting aside the said decree, the High Court was right in correcting the error and in restoring the decree of the Trial Court. He, therefore, submitted that the appeal deserves to be dismissed.

Having heard the learned counsel for the parties and having considered the relevant provisions of law in the light of decisions cited before us, in our view, the appeal deserves to be allowed by setting aside the decree passed by the trial Court and confirmed by the High Court and by restoring the decree of the first Appellate Court.

From the facts, it is clear and is not disputed before us that Annamalai was the original owner of the property who mortgaged it to defendant No. 1. Thus, Annamalai was mortgagor and Rukmani Ammal-defendant No. 1 was mortgagee. Since it was an usufructuary mortgage, defendant No. 1 was put in possession of the property as mortgagee. It was in June, 1962. It is also not in dispute that defendant No. 1 had advanced another loan on a different pro-note to Annamalai. Annamalai sold part of the property to the present plaintiff on August 13, 1964 when the property was in possession of defendant No. 1 as mortgagee. It has come on record that since the amount under separate pro-note was not repaid by Annamalai to defendant No. 1, the latter filed Small Cause Suit for recovery of money due and a decree was passed against Annamalai by a competent court. In execution proceedings, the suit property was sold by the Court in public auction and defendant No. 1, with the permission of the Court, purchased it on August 3, 1966. Auction was confirmed and sale certificate was issued in favour of defendant No. 1 on September 5, 1966. It is, therefore, clear that according to defendant No. 1, he became absolute owner of the property in view of purchase of property in Court auction by her as the sale was confirmed and sale certificate was issued. In our opinion, the learned counsel for defendant No. 1 is right in contending that when Annamalai sold part of the suit property to the plaintiff in 1964, the property was already mortgaged to defendant No. 1 who was in possession of the property. Defendant No. 1 is, therefore, right in submitting that the plaintiff ought to have filed a suit for redemption of mortgage and not for declaration of title and possession of property. The learned counsel for defendant No. 1 is also right in submitting that once the property was sold to defendant No. 1 who was mortgagee in possession, she could not be continued as mortgagee inasmuch as after the sale, she was claiming the property as an owner thereof. Her status as mortgagee came to an end with the purchase of property and in the eye of law, it could be said that she was claiming title over the property which was adverse to the owner of the property. In this connection, our attention was invited by the learned counsel to few decisions:

In Padma Vithoba Chakkayya v. Mohammed Multani & Anr. AIR (1963) SC 70 : [1963] 2 SCR 229, this Court held that once a person gets possession of property as mortgagee, he cannot by a unilateral act or declaration claim a title over the property by adverse possession against the mortgagor since in law his possession is that of the mortgagor. But if mortgagor and mortgagee subsequently enter into a transaction under which the mortgagee is to hold the property thereafter not as a mortgagee but as owner, that would be sufficient to start adverse possession against the mortgagor even if the transaction is for any reason inoperative under the law.

The Court stated:

"On the finding reached above that the first defendant entered into possession of the properties as usufructuary mortgagee in 1916, the question is what are the rights of the appellant. On the basis of the sale deed by the second defendant in favour of Rajanna, he would be entitled to redeem the mortgage. But the present suit is not one for redemption of the mortgage but for ejectment and that by itself would be a ground for dismissal of the suit. But in view of the fact that this litigation had long been pending, we consider it desirable to decide the rights of the parties on the footing that it is a suit to redeem the usufructuary mortgage, without driving the parties to a separate action. We have now to consider the defence of the first defendant to the suit, treating it as one for redemption. Now the contention of Mr. Ranganathan Chetty for the respondent is that he had been in possession of the properties as owner ever since 1923, when the second defendant sold them to him, that he had thereby acquired a prescriptive title to them, and that the right of the appellant to redeem was thereby extinguished. It is not disputed that when a person gets into possession of properties as mortgagee, he cannot by any unilateral act or

declaration of his prescribe for a title by adverse possession against the mortgagor, because in law his possession is that of the mortgagor. But what is contended is that if the mortgagor and mortgagee subsequently enter into a transaction under which the mortgagee is to hold the properties thereafter not as a mortgagee but as owner that would be sufficient to start adverse possession against the mortgagor if the transaction is for any reason inoperative under the law. This contention, in our opinion, is well founded. Though there was at one time a body of judicial opinion that when a person enters into possession as a mortgagee he cannot under any circumstances acquire a title by prescription against the owner, the law is now fairly well settled that he can do so where there is a change in the character of his possession under an agreement with the owner, vide *Karnam Kanda Sami v. Chinnabba*, AIR (1921) Mad. 82)." (emphasis supplied)

A similar question came up for consideration in *Soni Lalji Jetha*. There it was held by this Court that a mortgagee in possession under the terms of mortgage cannot, by merely asserting rights of ownership in the mortgage property, convert his possession as mortgagee into possession hostile to the mortgagor. But the mortgagor can sell the mortgage property to his mortgagee and thereby put the mortgagee's estate to an end and thereafter all the right, title and interest in the property would vest in the mortgagee. Such a sale would be valid and binding and thereafter the character of possession as a mortgagee would be converted into possession as an absolute owner. Even if such a sale is held to be voidable and not binding on a subsequent purchaser, the character of possession based on assertion of absolute ownership by the mortgagee does not alter, and if such possession continues throughout the statutory period it ripens into a title to the property.

The Court in the circumstances stated:

"It is true that as mortgagees-in-possession Kanji and Lalji derived their title to possession through the mortgagors and by virtue of their rights under the said mortgage. They were entitled, therefore, to continue to be in possession under the said mortgage and so long as it subsisted. By merely asserting rights of ownership in the said shops they could not convert their possession as mortgagees and unilaterally alter their lawful possession as mortgagees into possession hostile to the mortgagors. But it is a well settled proposition that a mortgagor can sell the mortgaged property to his mortgagee and thus put the mortgage's estate to an end and thereafter all the right, title and interest in the property would vest in the mortgagee. Such a sale would be valid and binding as between them and thereafter the character of possession as a mortgagee would be converted into possession as an absolute owner. Even if such a sale is held to be voidable and not binding on a subsequent purchaser the character of possession based on assertion of absolute ownership by the mortgagee does not alter, and if that possession continues throughout the statutory period it ripens into a title to the property." (emphasis supplied)

In *L. Shankaran Laxmi & Ors. v. Adim Kunju*, AIR (1965) Ker 132, a Division Bench of the High Court of Kerala held that once a mortgagee purchases the property in execution proceedings, he claims to be the owner of the property and does not remain to be mortgagee. The Court stated that unless there is a default in performance of some obligation by the mortgagee, the purchased by mortgagee in execution of decree with the leave of the Court makes him the owner of the property.

In *K. Gopalan Thanthri v. Ittira Kelan & Ors.*, AIR (1970) Ker 305 (FB), it was held by the Full Bench of the High Court of Kerala that after the sale of mortgage property in favour of mortgagee, possession of mortgagee becomes adverse to tarwad and if a suit for redemption is not filed within

the stipulated period of twelve years, it would become barred by limitation.

In the case in hand, Annamalai was the owner of the property. He mortgaged it to defendant No. 1 in 1962 and since then defendant No. 1 was in possession of the property as mortgagee. Annamalai then sold part of the property to the plaintiff in 1964 and the sale-deed recited the factum of mortgage by the owner to defendant No. 1. In a suit for recovery of money by defendant No. 1 against Annamalai, a decree was passed and in execution proceedings, the property was purchased by the mortgagee (defendant No. 1) in 1966. The auction was confirmed and sale certificate was issued in favour of defendant No. 1 on September 5, 1966. The submission of defendant No. 1 is well founded that thereafter she did not continue to remain mortgagee but became absolute owner or claimed to be the absolute owner of the property. As held by this Court in the cases referred to hereinabove, once the mortgagee is claiming to be an absolute owner of the property, his/her status as mortgagee comes to an end and his/her possession becomes adverse to the original owner. Even if such sale is voidable (and not void), it will not alter legal position and adverse title of the original mortgagee continues and if the period of twelve years expires, he/she becomes owner of the property by adverse possession.

In the case on hand, the auction took place on August 3, 1966 and the sale was confirmed and sale certificate was issued in favour of defendant No. 1 on September 5, 1966. Admittedly, the suit was filed by the plaintiff on June 26, 1980, that is, after a period of twelve years. In the circumstances, in our opinion, the lower Appellate Court was right in dismissing the suit. It was barred under Article 61 of the Limitation Act, 1963. The lower Appellate Court, in our opinion, was also right in observing that since the plaintiff was claiming through Annamalai (original owner), he ought to have filed a suit for redemption of mortgage and not for declaration and possession of the property. Such suit was not maintainable as held by this Court in Padma Vithoba.

Though the trial court as well as the High Court, relying upon an earlier decision in Ramaswami Gounder v. Ramaswami Gounder, (1974) 1 Mad LJ 350 : 87 LW 454 held that failure of defendant No. 1 in impleading the plaintiff in previous suit was fatal and the decree passed in favour of defendant No. 1 against Annamalai could not bind the plaintiff and hence, auction sale in favour of defendant No. 1 could not adversely affect the rights of the plaintiff, in our opinion, the lower Appellate Court was right in distinguishing the said case. In that case, suit was instituted by the mortgagee for recovery of money due under the mortgage and got a decree in his favour. The Court, therefore, held that when the mortgagor had sold the property to a third party and the mortgagee in the suit did not implead such purchaser as party-defendant, the decree in favour of the mortgagee would not bind the purchaser and his right of redemption would not get adversely affected.

In this case, the Small Cause Suit, decree passed therein and execution proceedings and auction sale did not relate to mortgage dues but an independent transaction and a separate pro-note and recovery of that amount. In such suit, plaintiff-Jagdesa was neither necessary nor proper party and non-joinder of Jagdesa was of no consequence. As in execution of money-decree in that suit, defendant No. 1 purchased the property with the leave of the Court, she became the owner of the property and plaintiff-Jagdesa had no right to raise an objection against the right of defendant No. 1.

Regarding deemed discharge of debt under the Tamil Nadu Debt Relief Act, it may be stated that as held by us, after 1966, defendant No. 1 was not holding the property as mortgagee in possession. On auction-sale in her favour, she became the owner of the property or in any case, she was claiming to be in adverse possession of the suit property. As her possession after 1966 was not as mortgagee in possession, the provisions of

the above Act were not applicable and neither Annamalai nor plaintiff could claim benefit of the said Act.

On all the above grounds, in our opinion, the trial Court as well as the High Court were in error in passing decree in favour of the plaintiff. The appeal, therefore, deserves to be allowed and is accordingly allowed. The decree passed by the trial Court and by the High Court is set aside and the decree passed by the lower Appellate Court is restored and the suit filed by the plaintiff is ordered to be dismissed, however, with no order as to costs.

JUDIS