Korrapati Sreeramulu Vs. Nadella Ramakrishnayya and ors.

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Court : Chennai

Decided On : Dec-05-1935

Reported in : AIR1936Mad500; (1936)70MLJ532

Appellant : Korrapati Sreeramulu

Respondent : Nadella Ramakrishnayya and ors.

Judgement :

Venkataramana Rao, J.

1. This is a suit for contribution. The late father of the fourth defendant Krishtayya and one Mandava Lakshmayya were undivided brothers and members of a joint family. On the 1st August 1910 they mortgaged two items of their joint family property being items 6 and 1 of the plaint A schedule and items 1 and 2 of the plaint B schedule for Rs. 600 to one Akkayya, the father of defendants 1 and 5. On 3rd June 1913 they again mortgaged the said two items and other six items in all eight items of the A Schedule properties for Rs. 1,000 to one Kotayya. On certain promissory note debts due by the said Krishtayya and Lakshmayya, Akkayya filed O.S. No. 292 of 1917 on the file of the District Munsiff's Court of Avanigadda against the fourth defendant who was a minor and his uncle Lakshmayya and obtained a decree against them. In execution of the said decree Lakshmayya's half share in the A schedule property was brought to sale on the 7th April 1919 subject to the mortgages both in favour of Akayya and Kottayya and in the execution sale Akkayya purchased the half share in item 6, third defendant purchased the half share in items 1, 2, 3, 4 and 7 and the second defendant purchased the half share in item 8. Subsequent to this, the fourth defendant fded a suit O.S. No. 994 of 1919 on the file of the said Court against Lakshmayya and his son for partition. To this suit both the mortgagors and all the auction purchasers were parties. There was a decree for partition and in the judgment in the said suit it was held that the mortgage in favour of Kotayya was binding on the fourth defendant only to the extent of Rs. 720 out of Rs. 1,000. The decree was passed on 22nd December 1921. In 1925 Kotayya's son filed O.S. No. 336 of 1925 to enforce his mortgage against all the defendants in the present suit and Lakshmayya. In that suit there was a decree in and by which Rs. 2,302-14-11 was directed to be recoverable from the entire hypotheca and Rs. 895-15-7 from the share of the said Lakshmayya, that is the fourth defendant and his uncle Lakshmayya were made jointly liable in respect of the said sum of Rs. 2,302-14-11 by virtue of the declaration in the partition suit, and Lakshmayya was made solely liable for the additional sum of Rs. 895-15-7. Akkayya also filed a suit to enforce his mortgage being O.S. No. 837 of 1926 on the file of the same Court against the fourth defendant, Lakshmayya's son, the plaintiff in O.S. No. 336 of 1925 and the third defendant. During the pendency of the said suit the decree-holder in O.S. No. 336 of 1925 took out execution and brought the fourth defendant's half share of the property in A

schedule to sale and on 10th September 1928 the fourth defendant paid a sum of Rs. 2,434-6-7 to avert the sale of his share thus discharging the entire liability imposed under the decree and the fourth defendant subsequently assigned his right to contribution from the defendants in favour of the plaintiff and he has filed the present suit on the strength of the said assignment. Apart from other defences the main defence raised was that the fourth defendant and therefore the plaintiff was not entitled to any contribution, and fourth defendant not having paid the entire amount due in respect of the mortgage in favour of Kotayya under the decree in O.S. No. 336 of 1925 including the amount decreed against Lakshmayya separately and until that amount is paid he will not be subrogated to any right and have any charge in respect of the amount paid by him and the suit is also barred by limitation. Both the lower Courts have negatived the contentions and decreed the Plaintiff's claim. Against the said decisions third defendant alone has filed the present second appeal. Defendants 1 and 5 have filed S.A. No. 254 of 1934.

2. It is contended by Mr. Lakshmayya on behalf of the appellants that the fourth defendant being a co-mortgagor under the mortgage in favour of Kotayya and the decree passed in pursuance thereof, he does not acquire any right to contribution till he has discharged the entire amount decreed under the mortgage. The amount decreed under the mortgage was a sum of Rs. 3,198-14-6 which included also the sum of Rs. 895-15-7 payable by Lakshmayya separately. Until that is done the mortgaged property could not be said to have been redeemed and no right would accrue to the fourth defendant for any contribution and that alternatively if it be held that the fourth defendant should be deemed to have discharged the entire liability and therefore became subrogated to the rights of the mortgagee, the suit not having been instituted within twelve years from the date of the original mortgage, must be deemed to have been barred by limitation and he relies strongly on the decision in Ibu Hasan v. Brijbhukan Saran I.L.R.(1904) 26 All. 407 (F.B.) and Perianna Servaigaran v. Marudainayagam Pillai (1899) 9 M.L.J. 166 : I.L.R 1899 22 Mad. 332. Before dealing with the said contentions the question will have to be determined as to what is the position of the fourth defendant in respect of the mortgage of Kotayya. Under the partition decree he was held liable only to the extent of Rs. 720 and under the mortgage decree in O.S. No. 336 of 1925 he and the fourth defendant and their shares in the joint family property were held liable only for a sum of Rs. 2,302-14-11. The fourth defendant and Lakshmayya are only co-mortgagors in respect of this debt of Rs. 2,302 which has been declared by the decree to be due. In' respect of the balance the fourth defendant could not be a co-mortgagor with Lakshmayya. Persons contract as co-promisors when they unite in making one and the same promise. A person can only be a co-mortgagor with another person in respect of the same obligation or debt which they are jointly liable to discharge; that is, they must be bound by the contract as promisors in respect of the same performance; as seen from Section 82 of the Transfer of Property Act, the right of contribution arises where the properties are mortgaged to secure one debt. Therefore the one debt in respect of which both Lakshmayya and Kotayya were liable is the debt of Rs. 2,302. In respect of the balance of Rs. 895 there is no debt so far as the fourth defendant was concerned. In this view the fourth defendant must be deemed to have discharged the entirety of the obligation under which he was jointly liable with Lakshmayya and from such discharge his right to contribution arises. The question is, is it a right of subrogation, or is he entitled to a charge? The payment having been made on 10th September, 1928, Section 95 of the Transfer of Property Act before the amendment will govern the case. Under Section 95 one of several mortgagors redeeming the mortgaged property has a charge on the share of the co-mortgagor. Opinions have varied as to

whether it is a right of subrogation, of merely a charge. Preponderance of view has been in favour of the right being only in the nature of a charge. This is the view which was taken by a Bench of this Court in Iyathurai Aiyar v. Kuppamuthu Padayachi (1819) 49 I.C. 416 : 9 L.W. 120. Vide also Ramachandra Dikshitar v. Narayanaswami Reddiar : (1928)55MLJ326 . The language of the section is plain and unambiguous and I am inclined to think that the Privy Council in Ahmad Wall Khan v. Shamshu-ul-Jahan Begam (1905) 16 M.L.J. 269 : L.R. 33 IndAp 81 : I.L.R. 28 All. 482 (P.C.), meant to declare that only a charge was created under Section 95. I agree with the observations of Sulaiman, Ag. C.J., in Collector of Farrukhabad v. Kishore : AIR1932All250 who after referring to Ahmad Wall Khan v. Shamsh-ul-Jahan Begam (1905) 16 M.L.J. 269 : L.R. 33 IndAp 81 : I.L.R. 28 All. 482 (P.C.), observed:

Reading Sections 82, 95 and 100 of the Transfer of Property Act in the light of the observations made by their Lordships of the Privy Council, there can be no doubt that a mortgagor redeeming the whole mortgage was entitled to enforce his charge against his co-mortgagors. The right to enforce it obviously accrues on the date of payment. The article applicable to such a claim would obviously be Article 132 of the Limitation Act. It was therefore impossible to hold that if twelve years had expired by the time the mortgage decree was passed on the mortgage and one of the mortgagors paid up the whole amount, he had no remedy left.

3. Vide also the decision of the Calcutta High Court in Umar Ali v. Asmat Ali I.L.R. (1930) 58 Cal. 1167. Therefore the plaintiff's claim is sustainable and his remedy is not barred by limitation.

4. Then the question arises as to how the right of contribution should be worked out. In arriving at the actual amount payable regard must be had to the principle laid down by their Lordships of the Privy Council in Faqir Chand v. Aziz Ahmad and the value of the prior mortgage in favour of Akkayya and also the value of the charge on the half share of Lakshmayya in respect of Rs. 895-10-7 made payable under the decree in O.S. No. 336 of 1925 must be taken into account. With this modification this suit is remitted to the District Munsif's Court of Masulipatam to pass a revised decree in the light of the above observations.

5. Costs of all the Courts may abide the result.