

T.K. Lakshmana Aiyar Vs. Sankarapandiam Pillai and ors.

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Court : Chennai

Decided On : Oct-13-1925

Reported in : AIR1926Mad311; (1926)51MLJ451

Appellant : T.K. Lakshmana Aiyar

Respondent : Sankarapandiam Pillai and ors.

Judgement :

Spencer, J.

1. I agree with my learned brother's construction of the document (Ex. V) which is before us. As observed by him, this is a very extraordinary document because, if it purported to be an absolute sale and if it purported to pass the rights of a full owner, there was no occasion to recite the transferor's enjoyment of the land under mortgages and sub-mortgages which had not been redeemed. For the respondents two cases to which I was a party have been cited, Kannuswami Thanjirayan v. Muthuswami Pillai (r) and an unreported case, Appeal No. 182 of 1921. The principle upon which those suits were decided was that if a defendant in possession of immovable property puts forward a defence of limitation under Article 134 against a suit for redemption, there is no onus on him to first prove that he obtained a transfer in good faith of that property, or, as stated in Kannuswami Thanjirayan v. Muthuswami Pillai (1917) M.W.N. 5. 'it was not incumbent on the purchaser to prove that he had no notice of the restricted nature of the vendor's title.' No issue was raised in the present case as to whether Kadir Mohideen Rowther acted in good faith when he took Ex. V. The circumstances of the case are such that both the transferor and the transferee must have known that the transferor was unable to confer a higher right than that of a sub-mortgagee on the transferee, and if neither the transferor nor the transferee could have honestly believed that the full ownership was being passed by this document, it will not be of any avail to the defendants who derive their rights from Kadir Mohideen Rowther to show that there are some words in that document, as altered before registration, which might be construed as if they were the words of a person possessing such rights as would enable him to pass a title of full owner to his transferee, while leaving the consideration for the transfer unaltered. Under these circumstances I do not think that it can be maintained that there was an animus to pass anything more than an assignment of the mortgage rights which were vested in the transferor. I therefore agree that the appeal should be allowed and the District Munsif's Court's decree restored with costs in this Court and in the Lower Appellate Court.

Odgers, J.

2. The first thing to be decided in this appeal is the character of Ex. V. The preceding

documents are two undisputed usufructuary mortgage deeds, Exs. C and C-1, Ex. C being of 1873 and being effected by one Sankara-pandiam Pillai in favour of Madappa Muppan. It is in the ordinary form usufructuary for three years, the mortgagee to pay the assessment and at the end of the period the ordinary covenant to repay and redeem. Exhibit C (1) is a sub-mortgage of 1883 in favour of Shanmukham Pillai by Madappa Muppan. It recites the usufructuary mortgage of 1873, is for a period of one year with the stipulations that the sub-mortgagee shall pay the assessment and the usual covenant to redeem. The equity of redemption on Ex. C was attached and sold in Court-auction in 1875 and the predecessor-in-title of the plaintiff purchased it as evidenced by Ex. B, so that at the date of Ex. V, 1893, we have the equity of redemption outstanding on the head mortgage in the plaintiff or his predecessor-in-title and we have the equity of redemption outstanding on the sub-mortgage, Ex. C (1), in Madappa Muppan. In 1893 the son of Shanmukham Pillai, the sub-mortgagee in Ex. C (1), Paramasivam Pillai, executed Ex. V to the defendant. Exhibit V is called a sub-mortgage deed, sets out the head mortgage Ex. C, the sub-mortgage Ex. C (1) and the consideration therefor Rs. 1,500 and proceeds, 'And I had been enjoying it (the land) in virtue thereof (i. e., the sub-mortgage).' It further recites disputes between the executant of the document (Ex. V), to give him a neutral name, and the executees which culminated in O.S. No. 353 of 1892. Stated shortly, the defendants here set up a prior title to the mortgagors in Ex. C by virtue of a sale deed in 1864. This was found to be a forgery and they lost the case. The document, Ex. V, further recites:

As I have also become entitled to that land as full owner in virtue of the statement made in that suit by the sons of the original pattadar Sankara pandiam Pillai that they did not wish to have any right to the same and that the ottidars themselves might enjoy it as full owners.

3. Now that is a peculiar statement to find in a sub-mortgage deed as this document originally purported to be. To begin with, it is untrue, because whatever the sons of the original mortgagor said in the course of Suit No. 353 of 1892, the equity of redemption which they or their father originally possessed had passed from them by the execution proceedings in 1874 or 1875. Further, the statement completely ignores the equity of redemption still outstanding in Madappa Muppan, the sub-mortgagor in Ex. C (1). It is curious to find a statement of title of that sort, particularly after he has carefully recited his title as sub-mortgagee in this document which originally purported to be a sub-mortgage and nothing else. After reciting this so-called title to full ownership he continues, 'I have sub-mortgaged to you the right belonging to me in the said land and received Rs. 1,500, ' which, it will be noted, is the amount of the original mortgage Ex. C and also the amount of the prior sub-mortgage,, Ex. C (1). The executant covenants at the cost of the mortgagee to obtain and deliver to him ' the records connected herewith which are in Courts and other places. ' Now before registration this document was corrected and the correction states that the description of the document as a sub-otti is a mistake and as to the recitals on the 4th page of the document the proper translation runs somewhat as follows:

As shown on the fourth page you will enjoy it in sole right. You are to enjoy it yourself. I have no other rights. I have sold you full rights.

4. Now the question arises, as I have stated at the beginning, what exactly was purported to be passed by the transferor by this document. That they intended

something more than a sub-mortgage is obvious from the alterations. But there are still two alternatives. They may have intended that the sub-mortgagee should drop out and there should be what in English Law we should call an assignment of the mortgage right; or, as contended by the respondents and as found by the Subordinate Judge in this case, the second alternative is that the parties may have intended an out and out sale of the full ownership or fee simple of the land in question. I do not think, on examining the document, that much help can be obtained by the recital as to the full ownership having been acquired by the disclaimer of the original mortgagor's sons in the suit in 1892. Why it should have been inserted in a deed which obviously at first was a sub-mortgage I cannot conceive. It was there obviously out of place. It was also, as I have pointed out, untrue. Now the question is, did the executant of Ex. V purport to represent that he had the full ownership in the land and that he was passing it by this deed? Did the mortgagee think that he was obtaining the full ownership by means of this deed? The matter has been well put, if I may say so, in *Muthaya Shetti v. Kanthappa Shetti* (1915) 34 M.L.J. 431, a case decided by Seshagiri Aiyar and Bakewell, JJ., where they say:

The question whether the transferee from a mortgagee took an absolute interest or only a mortgage interest is a question of intention.

5. They there refer to the Privy Council case in *Radhanaih Doss v. Gisborne* (1871) 14 M.L.A. 1, where their Lordships held that the burden of proving that the purchaser acquired an absolute interest in the property lay on such purchaser. And the learned Judges in the case under reference further point out that, if the transferee bargained for and believed he was bargaining only for the interests of the mortgagee, he cannot acquire title as an absolute owner of the property. ' And Bakewell, J. said:

If, on the other hand, the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention.

6. In *Veerabhadra Tevan v. Veerappa Tevan* (1912) 15 I.C. 609 Wallis and Sankaran Nair, JJ. said:

It was for the defence to prove a purchase affirmatively to bring the case under Article 134.

7. The matter has been lately considered in a case to which my learned brother was a party Appeal No. 182 of 1921, apparently not yet reported. The cases I have already referred to were referred to in their judgment and my learned brother there stated :.

I think that both seller and purchaser must have honestly believed that the entire interest of the owner was being transferred by the document.

8. Ramesam, J. cited the passage from Seshagiri Aiyar, J.'s judgment that I have already cited. Now how does the so-called purchaser in this case prove that what was purported to be transferred to him was really an absolute title? He relies on the recital in the document about the acquisition of full rights to which for the reasons I have given I am unable to attach any weight. He also refers to the second transaction which purports to transfer full rights. But when this is taken in conjunction with the recital which is unaltered setting out the prior transactions, Exs. C and C (I), and

definitely reciting that the executant has been enjoying in virtue thereof,' it seems to me that the transferee cannot be heard to say that under those circumstances he thought he was acquiring an absolute title to the land. The question is, as I have already said, in *Muthaya Shetti v. Kanthappa Shetti* (1915) 34 M.L.J. 431, is one of intention and Seshagiri Aiyar, J., there says:

The real test would be, did he, i. e., the transferee, ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it?

9. It seems to me on the best consideration I can give to the terms of this document, that no reasonable man, particularly a man in the position of the defendants here, who had already fought the question of their title to this land in 1892 and failed, could possibly have supposed that this document was transferring to him or purported to transfer to him an absolute interest in the land. The price, it will be observed, was the same as in the previous undisputed mortgage. One would have expected that if the entire interest as owner of the land were purported to be passed, the price would have been increased. As a matter of fact, the mortgage price is lessened because the Rs. 1,500 was not only the original amount of the sub-mortgage but also included costs and mesne profits. That seems to me to be a very significant circumstance against the full ownership of the land being passed. The learned Subordinate Judge who came to an opposite conclusion reversing the decision of the District Munsif who held that Ex. V was an assignment of whatever rights the transferor possessed and that those rights were not those of a full owner, held that it was more probable that Paramasivam Pillai wanted to treat the property absolutely as his own. I cannot agree, and in my opinion, on the grounds that I have pointed out, I think that all that was transferred by Ex. V was the full interest of the mortgagee. That is to say, Ex. V was converted from a sub-mortgage into an assignment of the rights of the sub-mortgagee. In my opinion, for these reasons, the appeal should be allowed and the decree of the Subordinate Judge reversed with costs here and in the Lower Appellate Court, and the judgment of the District Munsif restored with his directions as to costs in that Court. Time for redemption four months from this date.

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