Kolathoor Variath And Anr. vs Pairaprakottoth Cheriya Kumhahammad ... on 13 December, 1973

Equivalent citations: AIR1974SC689, (1974)1SCC590, AIR 1974 SUPREME COURT 689, 1974 (1) SCWR 258 1974 (1) SCC 590, 1974 (1) SCC 590

Author: S.N. Dwivedi

Bench: P. Jaganmohan Reddy, P.K. Goswami, S.N. Dwivedi

JUDGMENT

S.N. Dwivedi, J.

1. The dispute is about some land. The appellants instituted a suit against the respondent for possession over the land and for certain amount and mesne profits. In outline the plaint allegations were that the land was mortgaged with possession to one Kottat H Ahmad for Rs. 600/- subject to payment of purappad of 291 paras of paddy per annum after deducting interest on the mortgage amount. The mortgage was oral. The mortgagee's right was purchased in & Court auction by the respondent Since then the respondent is in possession as a mortgagee. The mortgage amount is fully paid up by the arrears of purappad. The appellants are entitled to remain in possession. The respondent contested the claim. He denied that he and his predecessor-in-interest have been in possession as a mortgagee. The oral mortgage cannot be proved in a Court According to him, his predecessor-in-interest was a tenant, and so he also is a tenant The trial Court decreed the suit. the trial Court held that the respondent was In possession as a mortgagee and not as a tenant His appeal was dismissed by the District Judge. The District Judge held that he was in pos-session as a mortgagee and not as a tenant He then filed a second appeal in the High Court of Kerala. The High Court allowed the Appeal and set aside the decree for possession passed by the trial Court and the District Judge in favour of the appellants. The High Court granted a decree for the recovery of purappad. In support of its judgment the High. Court gave two reasons. Firstly, the alleged mortgage was made some time after 1495 when the Transfer of Property Act was in force. A mortgage could be made only by a registered instrument, not by word of mouth. So no evidence could be led to prove an oral mortgage. The claim of the appellants based on an oral mortgage was accordingly, rejected. Secondly, the respondent was tenant.

2. Counsel for the appellant has strenuously contended before us that the first reason is plainly erroneous. He has endeavoured to draw support from certain decisions. He has also urged that the High Court should net have upset the finding of fact recorded by the Courts below as regards tenancy. In any case, this finding of the High Court is plainly wrong. For the reasons to be stated presently, we do not think that it is necessary to examine the first submission of Counsel for the

appellants. It appears to us that they are entitled to the relief of possession on another short ground.

3. Where a plaintiff cannot regain possession on the basis of an Oral mortgage as it cannot be proved in a Court of law for want of registration, it is open to him to recover possession on the strength of his title. (See Ma Kyl v. Maung Thon AIR 1935 Rang 230 at p. 232 (FB) and Hansia v. Bakhtawarmal) Luckily for them, the appellants did net base their suit solely on the oral mortgage. They also founded their claim on their title. Notice the relief A (1) in the plaint:

> That in case the Court is of opinion that the plaintiffs are not entitle to sue on the strength of mortgage as there is no mortgage deed in respect of the properties the plaintiffs are entitled to sue on the strength of the title of their Tavashi and hence the Court may be pleased to decree the suit ordering the defendant to surrender the properties to the 1st plaintiff, with the past and future mesne profits relinquishing all the rights of the defendant.
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> In paragraph 1 of the plaint they set up their title to the disputed land. In paragraph 4 of his written Statement the respondent says that he is not a mortgagee but a tenant and has Kudiayma rights in the land. So far from denying their title, he has impliedly admitted that they are the owners in the land. Again, he has not claimed ownership of the land by virtue of adverse possession. He simply claims permissive possession as a tenant under them. In the result, they are entitled to regain possession on the strength of their title unless he is held to be or to have become under any Kerala land reform measure a tenant

4. So the crucial question Is whether the respondent is a tenant. The lower appellate Court, after discussing the oral and documentary evidence held that the respondent "had failed to prove that he was in possession of the property as a lessee." It is a finding of fact. It cannot be said to be perverse or affected with any such Infirmity as should invite the High Court's intervention in second appeal. Ex A. 52 is an admission by the predecessor-interest of the respondent. He has admitted that he was in possession under a usufructuary mortgage for Rs.600/-. Ex. A. 54 records an admission of the respondent himself that he was in possession under a mortgage. These documents would not be admissible to prove the terms of an oral mortgage; but surely they can be admitted to prove that neither the respondent nor his predecessor-in-interest was claiming possession as a tenant. Surprisingly, the High Court has upset the finding of the lower appellate Court in the absence of cogent reasons. The High Court has relied on two documents filed by the respondent. Ex. B. 1 and Ex. B. 2. Exhibit B. 1 is the sale certificate issued to him on May 29, 1943. Exhibit B. 2 is the document showing delivery of possession to him pursuant to the sale certificate. In Ex. B-1 the encumbrance on the property is shown as the purappad and interest payable thereon. In Ex. B-2 the right of the judgment-debtor is shown as the Munpattom right for Rs. 600/-. None of these documents can be used against the appellants because they were not parties to the suit and to the execution proceedings against the respondent's predecessor-in-interest. The High Court plaint. In paragraph 2 of the plaint the appellants have stated that the respondent paid the purappad in 1127 (1951-52), when one of the appellants demanded that the mortgage amount should be increased to Rs. 2000/- and the purappad should be enhanced to 300 paras. The respondent agreed to pay

Rs.1400/- in addition to Rs. 600/- and raised the mortgage amount to Rs. 2000/-. He also agreed to enhance purappad to 300 paras of paddy. From these averments the High Court has spelt out a tenancy right in favour of the respondent. The High Court says:

> They say therein that in 1127 (the appellants) made a demand to increase the mortgage amount to Rs. 2000/- and to increase the Purappad to 300 paras of paddy per year, which was not complied with by the (respondent). If the property were given to the transferee as security for the amount advanced by him, what can be expected is that out of the income derivable from the property, after deducting the interest on the mortgage money and probably the cultivation expenses, the rest has to be paid to the mortgagor as excess profits derived from the property. The consequence is that if a further amount of Rs. 1400/- was also taken as mortgage money, what can reasonably be expected is a proportionate reduction in the Purappad payable. What I find, on the other hand, was a demand for an increase of dues from 291 paras of paddy to 300 paras, per year even after taking an additional amount of Rs. 1400/-. This is tell-tale that the (appellants) were trying to get an increased pattom from the (respondent), which means that the arrangement was only a lease arrangement.

5. There is little wax-rant for Jettisoning the finding of the lower appellate court, based as it is on appraisal of the whale evidence from an averment in the appellants' plaint, which, at worst, may be echoing two voices. More, the respondent did not admit the averment. This part of their case was not pressed by them. Courts below did not act upon it. The trial Court granted a decree for arrears of Purappad at the rate of 291 paras of paddy as stated by them in paragraph 1 of their plaint and not as claimed in paragraph 2 thereof. The High Court itself has affirmed this part of the decree. In the circumstances of this case, the High Court should not have Interfered with the finding of fact recorded by the lower appellate Court. So we would uphold the finding of tne lower appellate Court that neither the respondent nor his predecessor-in-interest was inducted to the property in dispute as a tenant.

6. This does not conclude the matter. Counsel for the respondent has urged before us that the respondent has become a tenant under the Kerala Land Reforms Act. But this point was not raised before the High Court. For various reasons, we think that this question should be decided first by the High Court Accordingly, we propose to remit the case to the High Court for decision of this question and for disposal of the second appeal accordingly.

7. The appeal is allowed. The Judgment and decree of the High Court are set aside, The case is remanded to the High Court for rehearing and deciding the second appeal in the light of the finding on the question whether the respondent has become a tenant under the Kerala Land Reforms Act. If it is found that the respondent has not become a tenant under the said Act. the appellants should be given a decree for possession with other consequential reliefs. Parties shall bear their own costs.