Gujarat High Court
Hiragauri Ratilal And Ors. vs Hajam Sumar Ladha on 21 August, 2006
Author: R Garg
Bench: R Garg
JUDGMENT

R.S. Garg, J.

1. Mr. S. M. Shah, learned Counsel for the appellants and Mr. B. Y. Mankad, learned Counsel for the respondent. Parties are finally heard.

2. This second appeal is admitted for hearing on 15th October, 1984 on the following substantial question of law.

Whether suit is bad on account of non-joinder of one of the heirs of the deceased-mortgagor ?

3. The facts necessary for disposal of the present appeal are that, the present respondent filed a suit for redemption, submitting inter alia, that his father had mortgaged a property with the defendants. Some of the defendant died during course of the proceedings, therefore, their legal representatives have been substituted in this case. The plaintiff submitted that he was ready and willing to discharge the loan amount and he was entitled to redeem the property with a direction to the defendants to receive money and return back the possession. The defendants contested the suit on almost every point. Sheet anchor of the defendants' argument was that as one of the co-owner was not being joined as party-plaintiff, the suit was bad in view of the express language employed in Rule 1 of Order 39 of the Code of Civil Procedure. The trial Court decreed the suit and directed preliminary decree under Order 39, Rule 1 of the Code. The defendant, who happened to be in possession of the property and was not ready and willing to hand over possession, took up the matter in appeal. The appeal was dismissed, therefore, the defendant has come before this Court. It is to be noted that the suit came to be filed in the year 1978.

4. The submission of the learned Counsel for the appellant is that one of the heir of the deceased-mortgagor is not joined as party-plaintiff, the suit is bad and is worth dismissal. On the other hand, placing reliance upon the judgment of the Supreme Court and Patna High Court, learned Counsel for the plaintiff-respondent submits that the suit by one of the mortgagor is maintainable, because, such mortgagor, who is partially interested in the property is entitled to redeem the entire property and the mortgagor cannot say that he would not redeem the property in favour of any one who undisputedly holds the rights.

5. Order 34, Rule 1 of the Code relates to mortgages of immovable property. Rule 1 says that subject to the provisions of the Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. As the Explanation appended to Rule 1 is not necessary for discussion, it is not being referred.

6. In a given case, if a mortgage is created by some person, who on his death is succeeded by more than one legal representatives, then, each of them would be entitled to redeem the property. If one of them refuses to join as plaintiff, then, in such case, such person may be joined as defendant, but a decree for redemption will have to be passed in favour of the plaintiff only and not in favour of a person who is entitled to redeem the property, but has not chosen to join as plaintiff. In a given case, one of the successor may join hands with the mortgagee and may refuse to join the proceedings. If Rule 1 of Order 34 is applied in its technical sense and used as a sword against the interest of the mortgagors or their successors, then, mortgagee being hand in glove with one of the successor, can always defeat the suit. Such is not the intention of the law. The legislature always wanted to say that any person cannot act dishonest against the interest of others and simultaneously, the law says that for lapse or wrong of anyone, others should not be allowed to suffer. In the present case, the plaintiff, who undisputedly is one of the successor or the mortgagor is entitled to redemption of the property.

If his right is to be taken to be half, then, the suit for redemption of half of the property would not be maintainable and if the suit is not held to be maintainable because of the non-joinder, right of the half of the property would be defeated, others do not propose to join in the matter. In a given case, where a person interested in redemption is not joined as plaintiff and no decree is passed in his favour and the suit is held to be maintainable, then too, such decree would enure to the benefit of the mortgagors/successors though he is not the plaintiff.

7. The law is not a sword with the absolute edge to cut, the law also provides a shield and sheath to the honest people.

8. In the matter of Vallikat Thekkedath Valappil Lakshmikutty Amma v. Vallikat Thekkedath Valappil Damodara Menon , the Supreme Court observed that one of the co-owners or one of the co-mortgagors is entitled to redeem mortgage and on redemption, is subrogated into the shoes of the mortgagee. Though that was a case of redemption outside the Court, but the Supreme Court held that such a person redeems mortgage for and on behalf of every person who is interested in redemption. The Supreme Court observed that to the extent of his liability for the mortgage, he gets discharged from mortgage and to the extent of the shares of other co-mortgagors, he stands in the position of mortgagee. In the present case, if the present plaintiff redeems the mortgage, then, the rights of the co-mortgagors are not defeated.

9. A Division Bench of the Patna High Court, in the case of Raj Mohni Debi v. Harihar Mahton observed that a

suit by one of the co-mortgagors is maintainable. The Division Bench relied upon the observations made by the Privy Council in AIR 1921 PC 125, wherein one of the co-mortgagors, that is, one of the several mortgagors filed a suit for redemption and the Privy Council held that one of the co-mortgagors can always maintain a suit for redemption. In view of the these two authoritative pronouncements and the discussion aforesaid, I am unable to hold that the suit was bad for non-joinder of one of the successors/heirs of the mortgagor. The appeal deserves to and is accordingly dismissed with costs throughout in favour of the plaintiff.

10. The trial Court is hereby directed to conclude the final decree proceedings within a period of six months taking into consideration that the mortgage is of 1937 and the defendant could successfully avoid delivery of possession for last 28 years. A decree be framed accordingly.