HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

A.S.No.1285 of 1995

JUDGMENT:

The 5th defendant in O.S.No.30 of 1985 on the file of Subordinate Judge, Penukonda preferred this appeal challenging the decree and judgment dated 14-11-1994 passed by trial Court granting preliminary decree for partition of schedule property into three equal shares and allotment of one such share to the plaintiffs 1 and 2.

For convenience of reference, ranks given to the parties in O.S.No.30 of 1985 before the trial Court will be adopted throughout the judgment.

The plaintiffs, who are minors children of D-2, filed suit through their next friend- mother claiming maintenance in favour of plaintiff No.1 at the rate of Rs.500/- per month, to create charge over 3/4th share of defendants 1 and 2 to realize the maintenance amount of the 1st plaintiff, to pass a preliminary decree for 1/3rd share of the plaintiffs and put them in possession thereof and for costs, alleging that the schedule property is the ancestral property of the plaintiffs and D-1 and others. The 5th defendant–the appellant herein is the purchaser of item No.2 of A-schedule property during the pendency of the suit and came on record as per orders vide I.A.No.129 of 1992, dated 24-02-1993.

The 1st defendant contended by filing written statement that the schedule property is the separate property and the plaintiffs are not entitled to claim any partition of the schedule property,

the 5th defendant after he came on record filed his written statement contending that he purchased the property in the court auction in execution of the final decree passed for realization of the amount on the strength of the mortgage. Therefore, he is bonafidee purchaser for value consideration and requested the Court to permit him to claim equities for allotment of item No.2 of schedule property to the share of judgment-debtor in the decree.

The other defendants also filed written statement. The contentions raised by them in the written statement are not necessary for deciding the present issue involved in the appeal.

On the strength of above pleadings, the trial Court framed the following issues and additional issues:

1) Whether the person who signed in the plaint is competent to represent the plaintiffs and file the suit?

2) Whether the 1st plaintiff is entitled for maintenance and if so at what rate?

3) Whether the plaintiffs are entitled for partition and separate possession of their alleged shares in the suit properties?

4) Whether the 1st plaintiff is entitled to have a charge over the suit properties for realization of maintenance amount in case if she is granted any such amount?

5) Whether the frame of suit is not proper?

6) Whether the suit is bad for non-joinder of causes of action?

7) Whether the debt pleaded by 1st defendant are true?

8) To what relief?

ADDITIONAL ISSUES:

1. Whether the suit against defendants 3 to 5 is bad for misjoinder of parties?
2. Whether the plaintiffs are in joint possession of item 2 of plaint schedule?
3. Whether the court fee paid is correct?
4. Whether the defendants 3 to 5 are entitled to equities of allotment of item no.2 to defendant No.1 and consequently to defendant No.5?

During trial on behalf of plaintiffs, 1st plaintiff was examined as PW.1 and marked Exs A-1 and A-2. On behalf of respondents, the 1st defendant was examined as DW.1 and marked Exs B-1 to B-4.

Upon hearing the argument of both counsel, considering oral

and documentary evidence, the trial Court held that the plaintiffs are entitled to 1/3rd share in the suit schedule property, while permitting the 5th defendant to claim equities for allotment of item no.2 of schedule properties in the mortgage suit. Aggrieved by the judgment, the 5th defendant alone filed the present appeal questioning the decree on various grounds. However, during the course of hearing, learned counsel Sri R.V.Prasad has contended that he is limiting his plea only with regard to allotment of the item No.2 of the
A- schedule property to the judgment-debtor in the mortgage suit claiming equities.

None appeared for the respondents despite service of notice.

Considering the contentions of counsel for the appellant, perusing the judgment and decree under challenge, the sole point that arises for consideration is,

> ***" Whether the appellant-5th defendant is entitled to claim equities for allotment of item No.2 of A-schedule property to the share of judgment-debtor in O.S.No.3 of 1989 on the file of Additional District Judge, Hindupur".***

P O I N T:

Undisputedly, the 5th defendant-appellant purchased the item No.2 of A-schedule property in the court auction in E.P. in execution of decree in O.S.No.3 of 1989 based on mortgage, but the contention is that the same was collusive. The trial Court, while deciding issue
Nos.3 and 7 and additional issue Nos. 2 and 4 held that the item no.2 of A-schedule property is the joint family property and that the decree obtained in O.S.No.3 of 1989 is without impleading the plaintiffs, thereby does not bind them and declined to permit the 5th defendant to allotment to the share of judgment debtor in the decree passed in O.S.No.3 of 1989.

Admittedly the property was purchased in the court auction on payment of consideration in to the court. Therefore, the 5th defendant being purchaser of the property, of course, during pendency of the suit is entitled to claim equities, because he parted with an huge amount of money for purchase of the property. In similar situation, in a judgment of **Krishna Pillai Rajasekharan Nair (D) by Lrs. V. Padmanabha Pillai (D) by Lrs. And others**[1], the Apex Court held as follows:

> " A subrogation rests upon the doctrine of equity and the principles of natural justice and not on the privity of contract. One of these principles is that a person, paying money, which another is bound by law to pay, is entitled to be reimbursed by the other. This principle is enacted in Section 69 of the Contract Act, 1872. Another principle is found in equity: he who seeks equity must do equity."
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> The present case is a case of subrogation by the operation of law and hence governed by the first para of Section 92 of the Transfer of Property Act. The provision recognizes the same equity of reimbursement as underlies Section 69 of the Indian Contract Act that " a person who is interested in the payment of money, which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other". Such a payment made, carries with it, at times, as equitable charge. Section 92 of Transfer of Property Act does not have the effect of a substitute becoming a mortgage. The provision confers certain rights on the redeeming co-mortgagor and also provides for the remedies of redemption, foreclosure and sale being available to the substitutee as they were available in the substituted. These rights the subrogee exercises not as a mortgagee reincarnate but by way of rights akin to these vesting in the mortgagee. The co-mortgagor can be a co-owner too. A property subject to mortgage is available as between co-mortgagor for partition, of course, subject to adjustment for the burden on the property one of the co-mortgagors, by redeeming the mortgage in its entirety, cannot claim a right higher than what he otherwise hand, faced with a claim for partition by the other co-owner. He cannot defeat the legal claim for partition through he can insist on the exercise of such legal right claimed by the other co-owner-cum-mortgator being made subject to the exercise of the equitable right vesting in him by subrogation.
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> In our opinion, the suit filed in the present case being a suit for partition primarily and predominantly and the relief of redemption having been sought for only pursuance to the direction made by the High Court in its order of remand, the limitation for the suit would be governed by Article 120 of

> Limitation Act, 1908. For a suit for partition the starting point of limitation is-when the right to sue accrues that is, when the plaintiff has notice of his entitlement to partition being denied. In such a suit, the right of the redeeming co-mortgagor would be to resist the claim of non-redeeming co-mortgagor by pleading his right of contribution and not to part with the property unless the non-redeeming co-mortgagor had discharged his duty to make contribution. This equitable taken by the redeeming co-mortgagor in the written statement would not convert the suit into a suit for contribution filed by the non-redeeming co-mortgagor.

In an another judgment of **T.S.Swaminathaudayar v.The Official Receiver of West Tanjore**[2], the Apex Court while placing reliance on the principles of equity referring the Lawrence on Equity Jurisprudence held that '***the person, who purchased the property is entitled to claim equity***'. In the present case, the 5th defendant/appellant purchased the property paying sale consideration in the auction held by the Court in execution of the decree in O.S.No.3 of 1989 on the file of Additional District Judge, Hindupur and thereby, he is a bonafidee purchaser for value.

The trial Court, after appreciating the evidence concluded that the compromise decree itself is not binding on the plaintiffs. Thereby, the 5th defendant is not entitled to claim equities for allotment of the share of judgment debtor. The said finding of the trial Court is not based on any material. Moreover, the judgment-debtor in O.S.No.3 of 1989 is none other than the father of D-2, who is competent to alienate the property for the benefit and interest of joint family. Therefore, it is difficult to hold that the decree in O.S.No.3 of 1989 is a collusive decree. Even assuming for a moment, it is a collusive decree the purchaser cannot be debarred claiming rights having paid sale consideration in the Court auction. Hence, considering the facts and circumstances of the case, payment of sale consideration in the Court auction, in execution of the decree, he became the owner of the property and entitled to claim equities for allotment of item 2 of

A-schedule property to the share of Judgment-debtor in O.S.No.3 of 1989 on the file of Additional District Judge, Hindupur, while passing final decree. Accordingly, the point is answered in favour of the 5th defendant/appellant and against the plaintiffs and defendants 1 to 4.

In view of foregoing discussion made, the 5th defendant is permitted to claim equities at the time of passing final decree for partition of the schedule property by metes and bounds and delivery of possession of the property and the trial Court is directed to consider the request for allotment of the item no.2 of A-schedule property to the share of judgment-debtor/1st defendant, while passing final decree towards his 1/3rd share in the entire property.

The Appeal is allowed to the extent indicated above. In consequence, Miscellaneous Petitions, if any, pending in this Appeal shall stand closed.

M. SATYANARAYANA MURTHY, J

25-06-2015
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[1] 2004 (2) ALD 21 (SC)

[2] AIR 1957SC 577