

IN THE COURT OF PRINCIPAL SUB JUDGE, NORTH PARAVUR

Present:- Sri.T.G.Varghese, LL.B., Principal Sub Judge

Friday, the 30th day of August, 2019/ 8th Bhadra, 1941

O.S.No.145/2017

Plaintiffs:-

1. Ranjini Ramaswamy, aged 62 years, W/o.T.S.Ramaswamy, 20/943, Suryaramam, Main Road, Thripunithura, Ernakulam.
2. Umesh, S/o.Damodaran, aged 77 years, Director, Assyst International Private Limited, Choornikkara Panchayath, 11/138, residing at Amritha Adarsa Nagar, Kakkanad.

By Advs.K.Narayanan & Bijjuvarma M.R.

Defendants:-

1. Nedumbassery Panchayath Service Co-Op. Bank Ltd., Mekkad, represented by its Secretary.
2. Smt.Anitha Sajeev, aged 50 years, W/o.Saji.K.Mathew, Kavanakkudiyil House, Nethaji Nagar, Vattekkunnam, Edappilly North P.O., Pin - 682024.
3. Sri.T.Baburaj, aged 75 years, S/o.Thomas, Thottathil House, Nedumbassery Village, Athani Desom.
4. Sri.Thomas Babu, aged 48 years, S/o.Bburaj, Thottathil House, Nedumbassery Village, Athani Desom.
5. Sri.George Thomas, aged 52 years, S/o.Thomas, Thottathil House, Nedumbassery Village, Athani Desom.
6. Shala George Thomas, aged 48 years, Thottathil House, Nedumbassery Village, Athani Desom.
7. Annie Anna Varghese, aged 46 years, Vayalipparambu, Nedumbassery Village, Athani.
8. Dr.Monicka Isaac, aged 37 years, W/o.Isaac Babu, Thottathil House, Nedumbassery Village, Athani Desom.
9. Dr.Isaac Babu, aged 40 years, S/o.Baburaj, Thottathil House, Nedumbassery Village, Athani Desom.

D1 – By Advs.M.C.Mony & Asha P.Nair.

D2 to 4, 7 & 8 – By Advs.Jayasankar G., Anil V.Pappachan
(Exparte)

D5 & 6 – By Adv. Tomy Augustine.

D9 – Exparte.

This suit having been finally heard on 24.08.2019 and the court on 30.08.2019 delivered the following:-

JUDGEMENT

Suit for mandatory injunction.

2. Plaintiff's case in brief is as follows-

Plaint schedule property originally belonged to the 2nd defendant. 2nd defendant mortgaged the plaint schedule property with the 1st defendant as security for the loan availed by the defendants 4 to 9. Pending the loan repayment, 1st plaintiff purchased the plaint schedule property as per document No.1466/16 and 1490/16 of Chengamanad Sub Registry. Later, the 1st plaintiff executed sale deed No.1439/17 SRO Chengamanadu in favour of 2nd plaintiff for valuable consideration with a direction to effect payment to the 1st defendant bank and get back the documents.

3. Though the plaintiff tendered the mortgaged amount together with the interest to the 1st defendant bank, it was not prepared to accept the amount offered and return the documents of plaint scheduled property. The plaint schedule property is the subject matter of loans in George Thomas SOL 902, Issac Babu SOL 903, Shala George Thomas SOL 904, Annie Anna Varghese SOL 905 and Dr. Monica Issac SOL 906. The said loans have been subsequently renewed by the

1st defendant on the same mortgage as SOL 997, 998, 1000, 1004 and 1005 which stand in the name of George Thomas, Shala George Thomas, Annie Anna Varghese and Dr. Monica Issac and Issac Babu. In the circumstance that the 1st defendant has refused to receive the loan amount and return the documents, the plaintiffs have filed suit for a mandatory injunction directing the 1st defendant to receive the amount legally due to it under the above mentioned loan and return the documents to the 2nd plaintiff and for the costs of the proceedings.

4. Defendants 2 to 4 and 7 to 9 are ex-parte. 5th and 6th defendants have filed written statement contenting that the sale deeds executed by the second defendant in favour of plaintiffs are not sale deeds in the legal sense and that those documents were created by way of security only. However, they failed to appear subsequently and contest the suit.

5. 1st defendant bank has filed written statement opposing the suit. The following are the grounds urged in the written statement.

1. The suit is barred u/ss 69 and 100 of the Kerala Co-operative Societies Act 1969.
2. It is true that 2nd defendant mortgaged plaintiff schedule properties with the 1st defendant when the defendants 5 to 9 availed loan from the 1st defendant.
3. The 1st defendant is ready and willing to return mortgaged deeds to mortgagee or after clearing the entire liability.
6. Based on rival contentions my learned predecessor in office has raised

the following issues-

1. Is the suit barred u/ss.69 or 100 of the Co-operative Societies Act, 1969 Kerala?
2. Is the 1st defendant bound to accept the amount towards liability from the second defendant?
3. Is it bound to release the mortgaged document to the plaintiff?
4. Is the plaintiff entitled to decree of mandatory injunction as prayed for?
5. Reliefs and costs?

7. As part of evidence from plaintiffs side 2nd plaintiff was examined as PW1 and Exts.A1, A2 and A5 to A10 were marked without objection. Exts.A3 and A4 were marked subject to objection being photocopies. Counsel for the 1st defendant cross examined the PW1. Counsel for other defendants were absent on the day of evidence. Objection to Ext.A3 and A4 has been upheld.

8. 1st defendant did not adduce any oral or documentary evidence.

9. This court has heard the counsel for the plaintiffs and the first defendant.

10. Issue No. 1

Exts.A1 and A2 are two registered documents as per which the 1st plaintiff purchased the property from the 2nd defendant. While purchasing the said property by the 1st plaintiff the plaint schedule property was under simple mortgage with the 1st defendant society. If put in other words, pending the mortgage liability 1st plaintiff purchased the plaint schedule property from the 2nd defendant. Later, 1st

plaintiff sold the plaint schedule property to the 2nd plaintiff as per Ext.A7 registered document. Ext.A5 is the authorization given by the 2nd defendant to the 1st plaintiff to release the mortgaged property after clearing the liability to the 1st defendant.

11. Now the plaintiff's case is that though the 2nd plaintiff is ready to clear all the liabilities created under the above mentioned mortgage transaction, 1st defendant society is willing to receive the amount due and but not ready to release documents to plaintiffs.

12. The case of the 1st defendant is that it is prepared to receive the money towards loan liability but it is ready to give the document to the 2nd defendant only as the 2nd defendant was the original mortgagor.

13. One of the main contentions raised by the counsel for the 1st defendant was that as per Sections 69 and 100 of Kerala Co-operative Societies Act, trial of the suit is barred before this court and resultantly the suit is liable to be dismissed.

Section 100 of the Kerala Co- Operative Societies Act provides that no civil or revenue court shall have any jurisdiction in respect of any matter for which provision is made in this Act. Section 69 of Kerala Co- Operative Societies Act provides that disputes to be decided by Co-operative Arbitration Court and Registrar. The section says as follows-

1) Notwithstanding anything contained in any law for the time being in force, if a dispute arises, -

a) among members, past members and persons claiming through members, past members; or

- b) *between a member, past member or persons claiming through a member, a past member or deceased member and the society, its committee or any officer, agent or employee of the society ; or*
- c) *between the society or its committee and any past committee, any officer, agent or employee or any past officer, past agent or past employee or the nominee, heirs or legal representatives of any deceased officer, deceased agent or deceased employee of the society; or*
- d) *between the society and any other society; or*
- e) *between a society and the members of a society affiliated to it; or*
- f) *between the society and a person, other than a member of the society, who has been granted a loan by the society or with whom the society has or had business transactions or any person claiming through such a person ; or*
- g) *between the society and a surety of a member, past member, deceased member or employee or a person, other than a member, who has been granted a loan by the society, whether such a surety is or is not a member of the society ; or*
- h) *between the society and a creditor of the society ; such dispute shall be referred to the co-operative Arbitration Court constituted under Section 70A, in the case of non-monetary disputes and to the Registrar, in the case of monetary disputes and the Arbitration court, or the Registrar, as the case may be, shall decide such dispute and no other court or other authority shall have jurisdiction to entertain any suit or other proceedings in respect of such dispute.*

14. A reading of Section 69 and 100 of Kerala Co-operative Acts would reveal that a suit is barred when it is filed by a present or past member in a co-operative society. Evidently plaintiff has not been a member of the 1st defendant society at any point of time. If put in other wards plaintiffs are neither past members nor present members in the society. Evidence of PW1 has shown that he has not been a member at any point of time in the 1st defendant society. Therefore the suit is not barred u/ss. 69 and 100 of Kerala Co-operative Societies Act. Accordingly issue No.1 is found against the defendants including the 1st defendant.

15. Issues No.2 to 4:- Issues No.2 to 4 are considered together.

It is to be noted that 2nd defendant is the original mortgagor. She has not chosen to appear and oppose the suit by filing written statement. Other defendants are not mortgagors with respect to the plaint schedule property. They are in fact the beneficiaries of the mortgage. Section 60 of the Transfer of Property Act says that at any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor or the mortgage-deed and all documents relating to the mortgaged property, which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that

any right in derogation of his interest transferred to the mortgagee has been extinguished. **Section 59 A of TP Act** reads as follows – Reference to mortgagors and mortgagees to include persons deriving title from them. Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively. A reading of the Section 60 of TP Act would convince a legal mind that at any time after the principal money has become due, mortgagor has right to tender the money to the mortgagee and require the mortgagee to return the title deeds and delivery of possession to the mortgagee itself or to a third person as he may direct. A reading of Section 59 A also would convince that the ‘word’ mortgagor and mortgagee include persons deriving the title under them. The commentary on section says that the mortgagor include the subsequent purchaser of the mortgaged property. The word mortgagee includes the purchaser of the mortgaged rights. In the decision reported in **2001 KHC 356 Gnanam A vs. Palaniyappa** a Division Bench of Hon'ble Madras High Court has held that a right of redemption does not remain independent of the mortgaged property. It was further held that a sale of mortgaged property to a stranger who had nothing to do with the mortgage and who was not a party to the same would convey complete title of the property to him and once the title to that property goes equity of redemption shall also accompany the property. In the case at hand one may note that the 2nd defendant has not chosen to oppose suit and file written statement suggesting the fact that she has no objection to releasing the documents to the 2nd plaintiff by the 1st defendant. Though the remaining

defendants had taken a contention that the exhibit A1, A2 and A7 are sham documents created by way of security, they have also not chosen to substantiate their plea on evidence. Besides Ext.A5 letter has authorized the 1st plaintiff to pay the mortgage liability to the first defendant and get the release of mortgaged deeds. Exhibit A7 sale deed was executed by the 1st plaintiff in favor of 2nd plaintiff. A reading of Ext.A7 would reveal that the 1st plaintiff had retained the mortgage money with the 2nd plaintiff authorizing him to pay the mortgage debt to the 1st defendant and get the document released from the 1st defendant. In the light of above legal position, this court is of the view that upon payment of full mortgage money up to the date of payment with respect to above mortgages the 1st defendant is bound to return deposited deeds and documents in favor of 2nd plaintiff. Accordingly issues are found in favor of the plaintiffs.

16. Issue-5

Considering the facts and circumstance of the case parties are directed to suffer their respective costs.

17. In the result, the suit is decreed in the following terms-

1. 2nd plaintiff is granted a decree of mandatory injunction in his favor directing the 1st defendant to receive a mortgage money legally due to it as on the date of payment under loan account towards SOL 902 to 906 which were later renewed as SOL 997, 998, 1000, 1004 and 1005 which stand in the name of 5th defendant George Thomas, 6th defendant Shala George Thomas,

7th defendant Annie Anna Varghese, 8th defendant Dr. Monica Issac and 9th defendant Issac Babu and also to return the deposited documents to the 2nd plaintiff.

2. If any release deed need be registered, the 1st defendant is also bound to execute such release deeds at the expenses of the second plaintiff.
3. Parties are directed to suffer their respective costs.

(Dictated to the Confidential Assistant, transcribed and typed by her, corrected and pronounced by me in open court on this the 30th day of August 2019).

T.G.Varghese,
Principal Sub Judge

Appendix:-

Plaintiff's Exhibits:-

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| A1. | 22.04.2016 | Original Sale Deed No.1466/16 of Chengamanad, SRO. |
| A2. | 23.04.2016 | Original Document No.1490/16 of Chengamanad, SRO. |
| A3. | | True photocopy of judgment in O.S.48/2016 of the Court of Sub Judge, Ottappalam. |
| A4. | 07.06.2016 | True photocopy of compromise in O.S.48/2016 of the Court of sub Judge Ottapalam. |
| A5. | 31.03.2016 | Authorisation. |
| A6. | 08.05.2017 | Copy of Registered notice issued by 1 st plaintiff's husband to defendants 3 & 4. |
| A7. | 02.06.2017 | Original Title Deed No.1439/17 of Chengamanad, SRO. |

- A8. 27.04.2017 True copy of the letter.
A9. 05.06.2017 True copy of representation.
A10. 07.08.2017 Certified copy of Writ Petition order in WP (C)22540/2017.

Defendant's Exhibits:- Nil

Plaintiff's Witness:-

PW1. 13.08.2019 Umesh

Defendant's Witness:- Nil

Principal Sub Judge

Typed by:
Com. By: