

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 27.03.2015

DELIVERED ON: 02.06.2015

CORAM

THE HON'BLE MR.JUSTICE P.R.SHIVAKUMAR

S.A.No.810 of 2006

Govindasamy Padayachi

Appellant/ Plaintiff

vs.

Ezhumalai

Respondent/ Defendant

Second Appeal against the judgment and decree dated 27.9.2005 made in A.S.No.38 of 2004 on the file of the Principal Subordinate Judge, Villupuram confirming the judgment and decree dated 30.1.2004 made in O.S.No.212 of 2001 on the file of the Additional District Munsif, Villupuram.

For appellant : Mr.R.Sunilkumar

For respondent : (no appearance)

JUDGMENT

The plaintiff in the original suit, who lost his case before the trial Court, after unsuccessfully prosecuting an appeal before the lower appellate Court, has come forward with the present second appeal.

2. The appellant in the second appeal filed O.S.No.212 of 2001 on the file of the District Munsif, Villupuram against the respondent herein for recovery of possession of the property described in plaint "B" schedule, for past and future mesne profits and also for costs. The prayers were made on the basis of his contention that the respondent herein/defendant, being the mortgagee of 32 cents of land in suit Survey Number based on a deed of usufructuary mortgage dated 03.03.1973, had encroached upon a portion measuring 6 cents in the property of the appellant, which is described in plaint 'A' schedule and annexed the said encroached portion with the property held by him as mortgagee.

3. The suit was resisted by the respondent herein / defendant contending that though the mortgage deed recited the extent of the property mortgaged as 32 1/3 cents, the actual extent mortgaged was

33 cents; that he was in possession of that 33 cents alone and that he was not in possession of any extent over and above the above said 33 1/3 cents mortgaged to him. He also disputed the plaint allegation that the respondent herein/defendant was in possession of 42 cents. It was his further contention before the trial Court that the subject matter of mortgage had been purchased by his wife; that the failure to make either the mortgagor or the purchaser would make the suit bad for non-joinder of necessary parties and that unless the entire property comprised in the relevant survey field from which the portions of the respondent herein/defendant and the portions in the occupation of others including the appellant / plaintiff was measured by a surveyor, it could not be claimed that any portion of the appellant's / plaintiff's property had been encroached upon. Based on the said pleadings made in the written statement, the respondent herein had prayed for the dismissal of the suit with costs.

4. The learned Additional District Munsif, Villupuram, who tried the case framed the following issues:- "1) Whether the plaintiff is entitled to the relief of delivery of possession as prayed for? 2) Whether the plaintiff is entitled to get past mesne profits of three months from the defendant as prayed for? 3) Whether the plaintiff is entitled to get future mesne profits as prayed for? and 4) To what other reliefs?"

5. In the trial, three witnesses were examined as Pws 1 to 3 and seven documents were marked as Exs.A1 to A7 on the side of the appellant herein/plaintiff. Two witnesses were examined as Dws 1 and 2 and no document was produced on the side of the respondent herein/defendant. Adangal registers produced by the witness, namely PW2, have been marked as Exs.X1 to X4.

6. The learned Additional District Munsif, Villupuram, after hearing the arguments advanced on both sides and on an appreciation of evidence, rendered a finding that the appellant herein/plaintiff had failed to prove the alleged encroachment made by the respondent herein/defendant in respect of any portion of appellant's/plaintiff's land described in plaint 'A' schedule and in particular, six cents of land described in plaint 'B' schedule, which is said to be part and parcel of the property described in plaint 'A' schedule. The learned trial Judge also recorded a finding that the respondent herein/defendant in whose favour usufructuary mortgage had been created by the execution of the original of Ex.A5 in respect of 32 1/3 cents was not proved to be in possession of any extent over and above 33 cents admitted by him to be in his possession. It was the further finding recorded by the trial Court that even if the respondent herein/defendant was in possession and enjoyment of more than the extent of land mortgaged to him, the appellant herein/plaintiff could not get the reliefs sought for without proving the excess land in the possession of the respondent/plaintiff to be a portion of plaint 'A' schedule property described as plaint 'B' schedule property. The learned trial Judge

also held that the suit was bad for non-joinder of necessary parties since the mortgagor /actual owner had not been made a party to the suit. Based on the said findings, the learned Additional District Munsif, Villupuram, by a judgment and decree dated 30.01.2004, held that the appellant herein/plaintiff was not entitled to any relief as sought for in the plaint and dismissed the suit without costs.

7. Aggrieved and challenging the decree of the trial Court dated 30.01.2004, the appellant herein/plaintiff preferred an appeal on the file of the lower appellate Court (Court of the Principal Subordinate Judge, Villupuram) in A.S.No.38 of 2004. The learned lower appellate Judge, after hearing both sides and on a re-appreciation of evidence, concurred with the findings of the trial Court in all respects and dismissed the appeal by a judgment and decree dated 27.09.2005, thereby confirming the decree of the trial Court dismissing the suit filed by the appellant herein/plaintiff. As against the said decree of the lower appellate Court dated 27.09.2005 made in A.S.No.38 of 2004 on the file of the Principal Subordinate Judge, Villupuram, the present second appeal has been preferred on various grounds set out in the memorandum of grounds of second appeal.

8. The arguments advanced by Mr.R.Sunilkumar, learned counsel for the appellant and by Ms.Shakkia Banu, learned counsel for the respondent were heard. The judgments of the courts below and the materials on record sent for from the courts below were also perused and taken into consideration.

9. Unlike first appeal, which is by way of right, a second appeal will lie only on a substantial question of law. Section 100 of the Code of Civil Procedure states that an appeal from the appellate decree of a Court subordinate to the high Court shall lie to the High Court if the High Court is satisfied that the case involves a substantial question of law. The section proceeds further to states that the appellant in the second appeal should precisely formulate the substantial question (s) of law and state the same in the grounds of second appeal. The High Court shall admit the second appeal if it is satisfied that it involves a substantial question of law. While admitting the second appeal, the High Court shall formulate the substantial question/substantial questions of law on which the second appeal is admitted. Once the second appeal is admitted identifying and formulating the substantial question (s) of law, the normal procedure is to hear the appeal only on such substantial question (s) of law. However, the power of the high court to hear the appeal on any other substantial question of law arising in the second appeal is kept intact by the proviso, which states that the appellant in such second appeals may raise any other substantial question of law with the permission of the High Court. Similarly, the respondent in the second appeal, in

whose absence the questions could have been formulated as substantial question of law, does have a right to contend that the questions formulated as substantial questions of law are not in fact substantial questions of law involved in the second appeal and that though they are the substantial questions of law involved in the second appeal, the decision to be made on such questions should be in favour of the respondent in the second appeal and not in favour of the appellant in the second appeal. The respondent can also contend that the decisions to be rendered on such substantial question of law will disentitle the appellant from getting the relief/reliefs sought for by him.

10. Keeping the above said broad principles of law in mind, the challenge made to the decree of the lower appellate Court by the appellant herein in the present appeal has got to be considered. The appellant herein/plaintiff had formulated and incorporated in his grounds of second appeal, three questions as substantial question of law involved in the second appeal. At the time of admission of the second appeal, without any correction or modification, the very same questions found in the grounds of second appeal were accepted to be the substantial questions of law involved in the second appeal and the second appeal came to be admitted on 18.08.2006. The substantial questions of law formulated at the time of admission of the second appeal read as follows:

"1. Whether the courts below did not err in dismissing the plaintiff's suit although he had established an unimpeachable documentary evidence that the Settlor of the plaintiff had purchased the property as early as on 15.5.1947 and settled the property in his favour on 5.5.1972, while the defendant had no document at all to displace the plaintiff's title?

2. Whether the valid title obtained through a registered document can be annulled by wrong revenue entries made in the name of the defendant who had no proprietary right over the property?

3. Whether the courts below had not abdicated its powers in failing to record a finding on title by the only fact that a Commissioner had not been appointed and affirm the encroachment complained of by the plaintiff against the defendant was not established.?"

11. The first and third questions have not been happily worded. They suggest a preconceived notion that the appellant/plaintiff had established title by impeachable documentary evidence and the Courts below erred in dismissing the plaintiff's suit and that the Courts below also abdicated their powers to record a finding on title. In view of the same, the questions formulated at the time of admission as substantial questions of law involved in the second appeal deserve to be reformulated and recast. Accordingly, the substantial

questions of law involved in the second appeal were re-formulated and recast as follows:

- 1) Whether the title obtained by the appellant/plaintiff through a registered document can be nullified by a wrong revenue entry made in the adangal register?
- 2) Whether the Courts below have committed an error in not recording a finding as to the title to the suit 'B'schedule property as claimed by the appellant/plaintiff?
- 3) Whether the Courts below have rendered a perverse finding that the plaintiff failed to prove encroachment on a portion of his property by the defendant in the light of the entries made in the Adangal marked as Exs.X1 to X3?

12. After such re-formulation of the substantial questions of law, further arguments advanced by the counsel appearing on either side were also heard.

13. The facts leading to the filing of the second appeal are as follows:

i) An extent of 1.18 acres comprised in S.No.218/5 in Rambakkam Village originally belonged to Sundara Puchi @ Sundara Padayachi. He gifted the said property along with other properties to his second wife Chinnaponnu Ammal under a registered settlement deed dated 15.05.1947 marked as Ex.A1. From the date of Ex.A1, Chinnaponnu Ammal was in possession and enjoyment of the said property. The appellant herein/plaintiff and one Lakshminarayana Padayachi are the sons of the said Chinnaponnu Ammal. By a registered gift settlement deed dated 19.09.1970, registration copy of which has been marked as Ex.A3, the said Chinnaponnu Ammal settled 65 1/3 cents forming the northern part of S.No.218/5 in favour of one of her sons, namely Lakshminarayana Padayachi and the said Lakshminarayana Padayachi was in possession and enjoyment of the same from the date of the said settlement. The remaining extent in the said survey number, namely 52 1/3 cents was settled by Chinnaponnu Ammal in favour of her other son, namely the appellant herein/plaintiff under a registered settlement deed dated 05.05.1972 marked as Ex.A2. The account in extent does not tally and 1/3 cents remains unaccounted for. Hence, the extent of the property settled on the appellant/plaintiff and his brother Lakshminarayana Padayachi under Ex.A2 and original of Ex.A3 respectively can be taken as 52 ½ cents and 65 ½ cents respectively. The property settled on Lakshminarayana Padayachi lies on the north and the property settled on the appellant / plaintiff lies on the south. The same has been shown as plaint 'A' schedule property.

ii) Lakshminarayana Padayachi divided his property into two portions and sold the western portion measuring 33 ½ cents to one Panduranga Gounder under a sale deed dated 20.08.1972, a certified copy of which has been marked as Ex.A4. He mortgaged the eastern portion of his property to the respondent/defendant under a deed of usufructuary mortgage, a copy of which has been produced as Ex.A5. Though the property mortgaged under the original of Ex.A5 was stated to be 32 cents, the respondent herein/defendant, claims that the actual extent available was 33 cents and he was in possession and enjoyment of that 33 cents as mortgaged under the said mortgage deed. However, subsequently S.No.218 /5 came to be sub-divided into 218/5A, 218/5B and 218/5C. The area in each sub-division came to be noted as follows: 218/5A-0.13Hec.00, 218/5B- 0.17Hec.00 and 218/5C - 0.68Hec.00. The field map found in the FMB register showing the sub-divisions in S.No.218 has been marked as Ex.X4. Contending that the portion in the possession and enjoyment of the respondent/defendant was 0.17Hec.00, which is equivalent to 42 cents and that the same would show encroachment of a portion of plaint 'A' schedule property which has been described as plaint 'B' schedule property, the appellant / plaintiff filed the suit for recovery of six cents of land allegedly encroached upon by the respondent/defendant and also for past and future mesne profits.

iii) The respondent / defendant contended that he got a mortgage of 32 cents from Lakshminarayana Padayachi, but the actual extent mortgaged was 33 cents and that he was in possession and enjoyment of 33 cents alone. It was also contended that since he was only a mortgagee, the mortgagor or the original owner of the subject matter of the mortgage should have been made a party to the suit and failure to make such person a party to the suit would make the suit bad for non-joinder of necessary party. He had also contended that the property mortgaged to him was subsequently purchased by his wife. Though no document was produced to show such purchase made by his wife, the said contention was not disputed by the appellant herein/plaintiff. PW1, during cross-examination, admitted that the said property mortgaged by Lakshminarayana Padayachi in favour of the respondent herein/defendant was sold by Lakshminarayana Padayachi to the wife of the respondent/defendant. The relevant portion in the evidence in vernacular reads as follows:

“1973k ஆண்டு பிரதிவாதியின் மனைவிக்கு லக்ஷ்மிநாராயண படையாட்சி போக்கியம் வைத்த சொத்தை விற்றுவிட்டார்.”

Under the said circumstances, the respondent/defendant also took a plea that the suit was bad for non-joinder of necessary parties since his wife, who had become the owner of the said property, had not been made a party to the suit.

iv) The suit was dismissed by the trial Court on the following grounds:

- 1) The suit was bad for non-joinder of necessary party since neither the mortgagor under Ex.A5 nor the wife of the respondent/defendant, who purchased the mortgaged property, was made a party defendant to the suit.
- 2) Though the revenue records show an extent of 0.17Hec.00 to be under the cultivation of the respondent/defendant, it was not proved by the appellant/plaintiff that the excess extent refers to the portion of the plaintiff's property was encroached upon by the respondent/defendant. Accordingly the learned trial Judge dismissed the suit and on appeal the learned lower appellate Judge confirmed the same. Hence the second appeal.

14. It is the contention of the learned counsel for the appellant that by reliable oral and documentary evidence, the appellant herein/plaintiff has proved that the defendant who is entitled to 32 cents alone is in possession and enjoyment of 42 cents, whereas the appellant/plaintiff, who is entitled to 52 ½ cents, is in possession of 44 ½ cents alone; that the same will make it clear that the respondent/defendant has encroached upon a portion of the plaintiff's property and that despite such a proof, the Courts below have rendered a perverse finding to the effect that even though the defendant is found to be in possession of excess area than the area which was mortgaged to him, such excess extent could not taken to be the portion allegedly belonging to the appellant/plaintiff and encroached upon by the respondent/defendant.

15. Per contra, it is the contention of the respondent/defendant that without seeking appointment of a commissioner for measuring the entire land and fixing the boundaries of the portion belonging to the appellant/plaintiff and the portion mortgaged to the respondent/defendant, the appellant/plaintiff cannot be said to have substantiated his case that the respondent/defendant has encroached upon a portion of the land belonging to the appellant/plaintiff.

16. This Court, upon considering the above said submissions and also the evidences available on record, is of the considered view that the above said contention of the learned counsel for the appellant/plaintiff does have substance in it and the same deserves countenance. The reasons are as follows:

- i) Admittedly, the total extent available in S.No.218/5 before further sub-division was 1.18 acres. Out of total extent of 1.18 acres, the northern portion measuring 65 1/3 cents (actual measurement 65 ½ cents) went to Lakshminarayana

Padayachi by virtue of settlement deed dated 19.09.1970, a certified copy of which has been produced as Ex.A3. The southern portion measuring 52 ½ cents (actual measurement noted as 52 1/3 cents) was settled on the appellant/plaintiff under Ex.A2 settlement deed dated 05.05.1972. The northern portion settled on Lakshminarayana Padayachi was divided into two portions, one forming the eastern part and the other forming the western part. The western part extending 33 ½ cents was sold by Lakshminarayana Padayachi to one Panduranga Gounder under the original of Ex.A4 dated 20.08.1972. The remaining portion, namely eastern part of the property of Lakshminarayana Padayachi had been mortgaged under the original of Ex.A5 in favour of the respondent / defendant. As per the document, the extent mortgaged was only 32 cents. The said property alone is said to have been purchased by the wife of the respondent/defendant. So it goes without saying that the property purchased by the wife of the respondent/defendant was only 32 cents. However, as per the revenue records, the entire extent of 1.18 acres came to be sub-divided into 218/5A, 218/5B and 218/5C with the corresponding extents of 0.13Hec.00, 0.17Hec.00 and 0.18Hec.00 respectively. S.No.218/5C is accorded in the name of the appellant/plaintiff. The extent shown in S.No.218/5C is 0.18Hec.00 equivalent to 44.5 cents. The property settled on him under Ex.A1 was 52 ½ cents. Therefore, there is a deficiency of 8 cents, whereas as against 32 cents as per the mortgage deed, the respondent/defendant is in enjoyment of 42 cents which is equivalent to 0.17Hec.00. Hence it is crystal clear that the respondent/defendant is in possession and enjoyment of an excess extent of 10 cents over and above the 32 cents which was mortgaged to him under the original of Ex.A5. The other person, namely Panduranga Gounder who purchased the western portion, is in enjoyment of 0.13.0 Hectares which was assigned S.No.218/5A and the same is equivalent to 32 cents. The total extent of all the three sub-divisions come to 1.18 acre and ½ cents as per the survey measurements.

- ii) The evidence of PW2, the Deputy Tahsildar and the evidence of PW3, the Taluk Sub-Inspector coupled with Exs.X1 to X3 Adangal entries and Ex.X4 FMB makes it clear that Panduranga Gounder is in enjoyment of an extent which is equivalent to the extent mentioned in his sale deed, namely original of Ex.A4 and the respondent/defendant is in possession of an excess extent of 10 cents over and above the extent mortgaged to him under the original of Ex.A5. However the portion in the possession of the appellant/plaintiff is only 44 ½ cents which is 8 cents less than the property settled on him under Ex.A1 settlement deed. The same shall make it clear that the respondent/defendant has encroached upon a portion of the property of the appellant/plaintiff which has been described

in plaint 'A' schedule.

iii) Despite the fact that such unimpeachable oral and documentary evidence has been adduced in proof of the case of the appellant/plaintiff that the respondent/defendant had pushed the southern boundary of the property held by him under mortgage towards further south and thereby encroached upon a portion of the plaintiff's property at least to the extent of 6 cents, both the Courts below have rendered a perverse finding that the appellant/plaintiff had failed to prove the alleged encroachment made by the respondent/defendant solely on the ground encroachment or otherwise could not found out without appointing a Commissioner for measuring the property. When the Courts below felt so, they could have very well suo motu appointed the Advocate Commissioner to measure the properties with the help of the surveyor to fix the boundaries and in stead of doing it, the Courts below have chosen to simply disallow the claim of the plaintiff and dismissed the suit on such a technical ground.

iv) Even without an appointment of a Commissioner to survey the lands by unimpeachable documentary evidence, the appellant/plaintiff has proved the alleged encroachment made by the respondent/defendant. Therefore, this Court does have no hesitation in holding that both the Courts below rendered a perverse finding that the appellant/plaintiff failed to prove the encroachment of a portion of plaint 'A' schedule property which is described as plaint 'B' schedule property and that the said finding deserves to be interfered with and set aside. The third substantial question of law is answered accordingly in favour of the appellant/plaintiff.

17. The case of the plaintiff is that the respondent/defendant, who is in possession of the property, abutting plaint 'A' schedule property on its north eastern portion encroached upon a portion of the plaint 'A' schedule property and such encroached portion has been shown as plaint 'B' schedule property. The respondent's / defendant's contention is that he is in possession of 33 cents alone and he is not in possession of any extent more than 33 cents. Excepting the interested testimony of the respondent/defendant as DW1, there is no reliable evidence to prove that the property in his possession is only an extent of 33 cents. As against such a vacuum in the evidence of the respondent/defendant, the appellant/plaintiff has adduced oral and documentary evidence in the form of revenue records marked as Exs.X1 to X4, the authenticity of which and the correctness of which have not been challenged, to prove that the respondent/defendant is in possession of 42 cents. The respondent/defendant having taken a plea that he is in possession of 33 cents alone and that he has not encroached upon any portion of plaint 'A' schedule property belonging to the appellant/plaintiff, cannot successfully make any plea that he has perfected title by adverse possession in respect of the excess portion in his

possession and enjoyment. Therefore, this Court comes to the conclusion that the first substantial question has got to be answered in favour of the appellant / plaintiff holding that the title obtained by the appellant/plaintiff through Ex.A2-registered settlement cannot be nullified by wrong entries made in the revenue records, namely Adangal register and FMB Register. Accordingly, the first substantial question of law is answered.

18. The learned trial Judge, without even framing an issue as to whether the suit is bad for non-joinder of necessary parties, chose to hold that since the respondent/defendant was only a usufructuary mortgagee, the actual owner of the property should have been added as a party and that hence the suit was bad for non-joinder of necessary parties. The said finding was rendered by the trial Court without naming the person who should have been added as party to the suit. The learned lower appellate Judge held that Lakshminarayana Padayachi, the mortgagor was not a necessary party. However, relying on the statement made by the respondent /defendant that the property held by him as mortgagee had been purchased by his wife, chose to hold that the non-impleadment of the wife of the respondent/defendant would make the suit bad for non-joinder of necessary party.

19. In this regard, though there is such an admission, the person who is said to have purchased the property which is held by the respondent/defendant as mortgagee, is none other than the wife of the respondent/defendant. The mortgagee, who is in possession will sufficiently represent the interest of the mortgagor. The purchaser is none other than the wife of the mortgagee. There is no evidence to show whether the mortgage in favour of the respondent/defendant has been kept alive or it has been discharged. On the other hand, the respondent /defendant has proceeded on the footing that he continues to be in possession as mortgagee. It is not the case of the appellant / plaintiff that the owner of the property mortgaged had encroached upon a portion of the property of the appellant/plaintiff. On the other hand, it is the clear and categorical stand taken by the appellant/plaintiff that the respondent/plaintiff, who is the mortgagee in possession of the property lying on the north eastern portion of the plaintiff's land, has encroached upon a portion of the plaintiff's land and that hence, the relief of recovery of possession of the encroached portion and mesne profits have been claimed only against the respondent/defendant. Under the said circumstances, it is not necessary for the appellant/plaintiff to make the owner of the property, who ever it may be, as party defendant in the suit. The cause of action is the alleged encroachment made by the respondent/defendant. Therefore, the finding of the Courts below that non-impleadment of the wife of the respondent/defendant shall make the suit not-maintainable as one bad for non-joinder of necessary parties has got to be interfered with, reversed and set aside. The second substantial question of law is answered accordingly holding that the suit is not bad for non-joinder of

necessary parties for the non-impleadment of either the mortgagor under Ex.A5 or the wife of the respondent/defendant as a party to the suit.

20. In view of the forgoing discussions and the answers given to the substantial questions of law 1 to 3, this Court comes to the conclusion that the second appeal shall be allowed setting aside the decree of the trial Court dismissing the suit as confirmed by the lower appellate Court and that appellant/plaintiff is entitled to the grant of a decree for recovery of possession as prayed for. It is made clear that the encroached portion has been clearly defined in plaint 'B' schedule furnishing four boundaries. If the encroached portion is found to be more than the extent mentioned in plaint 'B' schedule, the entire portion encroached shall be handed over relying on the principle that the boundaries shall prevail over extent. If any difficulty would arise in executing the decree, the executing Court can appoint a Commissioner, if necessary, for identifying the encroached portion. So far as the mesne profits, past and future, is concerned, it is relegated to be decided in a separate proceeding under Order XX Rule 12 CPC.

21. In the result, the second appeal is allowed without cost through out. The judgment and decree of the Principal Subordinate Judge, Villupuram dated 27.09.2005 made in A.S.No.38 of 2004 and the judgment and decree of the Additional District Munsif, Villupuram dated 30.01.2004 made in O.S.No.212 of 2001 are set aside. O.S.No.212 of 2001 on the file of the trial Court is decreed granting a decree for recovery of possession as prayed for, with the clarification indicated above. Determination of past and future mesne profits is relegated to a separate proceeding under Order XX Rule 12 C.P.C.

Sd/-

Deputy Registrar (Judicial)

/true copy/

Sub Asst. Registrar

gpa

To

1. The Principal Subordinate Judge,
Villupuram.

2. The Additional District Munsif,
Villupuram.

S.A.No.810 of 2006

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