

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.01.2017

PRONOUNCED ON : 07.02.2017

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.164 of 1999 & CMP.No.2445 of 1999

Aruna Deivayanai Achiappan ...Appellant/Appellant
Plaintiff

Vs

1. Venkatesan
2. Pandian @ Shanmuga Nadar
3. Devarajan
4. Narayanan
5. Saroja ... Respondents/Respondents/Defendants

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree of the learned Subordinate Judge, Mayiladuthurai in A.S.No.89/1997 dated 18.08.1998 confirming the judgment and decree of the learned District Munsif, Sirkali in O.S.No.272/1987 dated 28.11.1996.

For Appellant : Mr.G.Susheela
For R.1 : A.Muthukumar
For RR2 to 5 : Not ready in Notice

JUDGMENT

This second appeal is directed against the judgment and decree of the first appellate Court in A.S.No.89 of 1997 (on the file of the Principal Sub Judge, Myladuthurai) confirming the judgment and decree of the trial Court in O.S.No.272 of 1987 (on the file District Munsif, Sirkali).

2. The fourth defendant in O.S.No.272 of 1987 is the appellant herein. The suit schedule property was mortgaged by Namachivaya Nadar and his sons Arunachala Nadar and Kulandaivelu Nadar in favour of Thirupurathammal as early as 04.08.1936 for Rs.100/- on condition of sale with right to redeem after expiry of 8 years. The plaintiff who is the grand son of

Thirupurathammal has laid the suit for declaration of title and 1/4 share in suit property with the plea that the mortgagor Arunachala Nadar and others failed to redeem the property after the expiry of 8 years. Thus the property which was given into possession of Thirupurathammal, the mortgagee has become her absolute property by virtue of conditional sale and she had been in enjoyment of the suit property by leasing it out to various persons.

3. In the year 1972, the suit property was rented to the fifth defendant and he continued to be the tenant till July 1975. He vacated the premises after issuance of quit notice on the ground of default in payment of rent. Taking advantage of the absence of the landlord, one Dhanalakshmi Ammal broke open the suit premises and trespassed into the suit property. On complaint to the police, Dhanalakshmi Ammal started paying rent to Thirupurathammal and after her death to the plaintiff's paternal junior uncle Veeragavan. During the life time of Thirupurathammal, she executed a Will on 20.07.1976 bequeathing the suit property in favour of the plaintiff and defendants 1 to 3. Thus, the plaintiff is entitled to $\frac{1}{4}$ share in the property.

4. While so, the fourth defendant has alienated the property to fifth and sixth defendants, without any right or title over the property. On coming to know the fraudulent transaction, notice was issued on 10.10.1986 which did not evoke any response. However, the fourth defendant has forcibly trespassed into the suit property without any right on 12.11.1986 and had disturbed the peaceful possession of the plaintiff and defendants 1 to 3.

5. According to the fourth defendant, who is the appellant herein, admitting the fact that the suit property was originally owned by Namachivaya Nadar and his sons Arunachala Nadar and Kulandaivelu Nadar, denied the mortgage of conditional sale by Namachivaya Nadar and his sons. His contention was that the property was possessed and enjoyed by Arunachala Nadar till his death in the year 1973. Thereafter, his wife, the fifth defendant and daughter, the sixth defendant were enjoying it. He purchased the suit property from the fifth and sixth defendants on 24.06.1986. The alleged mortgage by conditional sale was not accepted and possession was always with his vendors family till he purchased it. Therefore, the Will alleged to have been executed by Thirupurathammal has no validity since she herself had no title over the suit property. The plaintiff Thirupurathammal was never in possession of the suit property. Hence the suit suffers from want of cause of action.

6. Before the Trial Court, the plaintiff has marked Ex.A.1 to A16 and the defendants have marked Ex.B.1 to B4. P.W.1,

D.W.1 to D.W.4 are the witnesses examined.

7. The trial Court based on the evidence and accepting Ex.A.1 as a deed of mortgage by conditional sale, covered under section 58(c) of the T.P. Act, held it a valid transfer conferring title to Thirupurathammal, the plaintiff's predecessor in title. As a consequence, the Will of Thirupurathammal Ex.A.2 executed in favour of the plaintiff and others also being a registered document was held to be proved and valid and as a result, allowed the suit.

8. The fourth defendant dissatisfied with the judgment of the trial Court preferred an Appeal in A.S.No.78 of 1997 questioning the conclusion of the trial Court accepting Ex.A.1 and rejection Ex.B.2 dated 28.06.1975, a mortgage deed executed in favour of Manonmaniammal by the fifth and sixth defendants, who are the heirs of Arunachala Nadar and Ex.B.1 the sale deed executed by defendants 5 and 6 in favour of the fourth defendant on 24.06.1986 and the ocular evidence of D.W.3 and D.W.4, who are the independent witnesses given evidence in favour of the fourth defendant. The lower appellate Court has dismissed the appeal and confirmed the trial Court judgment holding that, Ex.A.1 is a mortgage by conditional sale. The mortgagee have failed to redeem it within the period of limitation prescribed. Further Ex.A.6 agreement executed by Arunachala Nadar proves the possession with Thirupurathammal.

9. Aggrieved by the concurrent finding, the fourth defendant has preferred this second appeal raising the following substantial question of law :

1. Whether the Will Ex.A.2 has been properly proved in accordance with law?

2. Whether the conclusion of the courts below that the 4th defendant cannot get any title to the suit property under Ex.B.1 is sustainable in law?

3. Whether the view of the courts below regarding the character of possession of defendants 5 and 6 after the date of Ex.B.2, is sustainable in law?

10. The learned counsel for the appellant submitted that the Courts below while appreciating Ex.A.1 mortgage deed has failed to consider the provisions of law governing transfer of property, proof of documents and limitation aspects in proper perspective. The said failure has lead to miscarriage of justice Ex.A.1 and A6 being contemptuous document, it ought not to have been taken as proof of Ex.A.1 to hold it was acted upon. The appellant being a bonafide purchaser from lawful title holder, his defence ought not to have been rejected, over looking the documents and ocular evidence let in his support. Relying upon Ex.B.2, counsel emphasised that the suit filed

after 12 years from the date of the execution of Ex.B.2 was not at all considered by the Courts below. Under Ex.B.2 Dhanalakshmi Ammal had entered into possession as the mortgagee of defendants 5 and 6. Therefore, the plaintiff was never in possession of the property for more than 12 years.

11. It is an admitted fact that the property was originally held by Namachivaya Nadar and his sons. The mortgage deed dated 04.08.1936 marked as Ex.A.1 is a registered document and its execution is not challenged. The contention of the appellant who is the purchaser of the property from the descendants of Namachivaya Nadar is that Ex.A. 1 was not acted upon. The suit property not conveyed to plaintiff's grand mother Thirupurathammal under Ex.A.1. The possession was always with his vendor and their predecessor in title. Hence, his purchase under Ex.B.1 is valid. Since the said transfer under Ex.B.1, the possession is with him, so the suit is barred by limitation.

12. As far as Ex.A.1 is concerned, the law which governs document of that nature is Section 58(c) of T.P. Act and the judgment apt to the facts of the case which has dealt Section 58 (c) is the Vol.9 L.W. 36 (Karuppanna Gounder and another V. Thirumalai Gounder and others), where it is stated that,

"2. The learned counsel for the appellants contends that the language of Ex.B-2 fulfills the required of S.58(c) of the T.P. Act and consequently, the transaction under Ex.B.2 must be construed to be only a mortgage by conditional sale unless there are express words in the document or other attendant circumstances to establish that the parties intended to treat the transaction as an absolute sale accompanied by an agreement for reconveyance. I am of the opinion that this contention is well-founded. S.58(c) of the T.P. Act states

"Where the mortgagor ostensibly sells the mortgaged property -

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

Provided that no such transaction shall be deemed to be a mortgage, unless the conditional

is embodied in the document which effects or purports to affect the sale."

The proviso was introduced, for the first time by the amending Act XX of 1929. Prior to that, there was no stipulation as to whether the condition for re-purchase should be embodied in the same document or not.

4. With reference to such a situation, the Supreme Court in *Chundhum Jha V. Abadat Ali and another* (AIR 1954 SC 345) has observed as page 347

"The legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages; therefore, it is reasonable to suppose that persons, who after the amendment, choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words, and if the conditions of S.58(c) are fulfilled, then we are of opinion that the deed should be construed as a mortgage."

The Supreme Court further observed at page 348.

"Now, as we have already said, once a transaction is embodied in one document and not two and once its terms are covered by S.58(c) then it must be taken to be mortgage by conditional sale unless there are express words to indicate the contrary, or, in a case of ambiguity, the attendant circumstances be necessarily lead to the opposite conclusion."

13. In the light of the above judgment, if Ex.A.1 is analysed, we find an explicit recital that if the mortgagee fails to redeem the mortgage after 8 years from its execution i.e., 04.08.1944,, Ex.A.1 itself shall be taken as sale deed. As pointed out, the condition is embodied in the same document and it is not embodied in a separate document. The terms of Exhibit A-1 are covered by S.58(c) of the Transfer of Property Act. Therefore, according to the observation of the Supreme Court referred above, the transaction under Ex.A.1 must be taken to be a mortgage by conditional sale in the absence of express words to indicate the contrary, or, ambiguity, with attendant circumstances necessarily lead to the opposite conclusion."

14. The next question which arise is for how long the mortgagee can wait for the mortgagor to redeem. For this, the answer lie in Section 61(a) of the Limitation Act, which says "the mortgagor have the right to redeem or recover the possession of the immovable property mortgaged within 30 years

from the date the right to redeem". In this case, the right to redeem commenced on 04.08.1944 and expired on 03.08.1974. It is evident that neither the mortgagor nor their legal representatives attempted to redeem the suit property within the time prescribed. Therefore, the appellants, being the purchasers from the vendors who have lost title or right as early as on 03.08.1974, have no legs to agitate against the plaintiff based on Ex.B.1 dated 24.06.1986 or Ex.B.2 dated 28.06.75, mortgage deed of one Dhanalakshimi which is totally irrelevant to the facts of the case and have no binding on the plaintiff.

15. In the result, the second appeal fails and accordingly, the same is dismissed. The judgments of the Courts below shall stand confirmed. There shall be no order as to cost. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The District Munsif,
Sirkali.

2.The Principal Subordinate Judge,
Mayiladuthurai

+1cc to Mr.G. Susheela, Advocate, S.R.No.7862
+1cc to Mr.A. Muthukumar, Advocate, S.R.No.7631

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