

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.07.2017

CORAM:

THE HON'BLE JUSTICE DR.G.JAYACHANDRAN

Second Appeal No.459 of 1999

1.Jacob Anthonisamy (deceased)

2.A.Pilominal

3.J.John Palendiran

4.J.Jesindha mary

5.J.Larensiya Mary

6.J.Stella Mary ... Appellants/1<sup>st</sup> Defendant  
& LRS of 1<sup>st</sup> Defendant

(Appellants 2 to 6 brought on record  
as Legal Representatives of the deceased  
first appellant vide order of Court dated  
25.06.2007 made in C.M.P.No.1268/2007)

Vs.

1.Siluvestri (died) ...1<sup>st</sup> Respondent/1<sup>st</sup> Plaintiff

2.Arokiyasamy ...2<sup>nd</sup> Respondent/2<sup>nd</sup> Plaintiff

3.Pushpam ...Respondents 3 & 4/Defendants 2 & 3

4.Dherasa

5.Mary Stella

6.Santha Ruby ...LRS of the 1<sup>st</sup> Respondent

(Respondants 5 and 6 brought on record  
as Lrs of deceased first respondent,  
Vide order of the Court 10.07.2017 in  
C.M.P.Nos.342 to 344 of 2004)

PRAYER: This Second Appeal filed under Section 100 of C.P.C,  
against the judgment and decree on the file of the learned  
Subordinate Judge, Namakkal, made in A.S.No.17 of 1985 dated  
24.12.1998, setting aside the judgment and decree on the file of  
the learned Principal District Munsif, Namakkal made in  
O.S.No.783 of 1983 dated 22.01.1985.

For Appellants : Mr.T.Dhanya Kumar

For R2, R5, R6 : Mr.S.Saravanakumar

For R3, R4 : Given up

## JUDGMENT

The Second Appeal is directed against the judgment in A.S.No.17 of 1985 reversing the judgment in the suit filed in O.S.No.783 of 1983 for permanent injunction.

2.The pleadings relevant for disposal of the Second Appeal are under:

(i) The defendants grandfather by name Gnanadigam is the brother of one Anthonisamy. The plaint allegation is that on 07.08.1925 under Ex.A-5, Gnanadigam created an usufructory mortgage to one Palaniandi Gounder, who under Ex.A-6, assigned the same to one Amavasai. From Amavasai, the plaintiffs father got the usufructory mortgage assigned to them on 27.05.1930 and from then onwards, the plaintiffs father was in possession and after his death, the plaintiffs are in possession. Apprehending that their possession is likely to be interfered, the suit had come to be filed on 14.11.1983.

(ii) The case of the defendant is that he was a resident of Ceylon and returned to India in the year 1983; there was a panchayat held in the month of September, 1983, in which the plaintiffs surrendered the suit properties to the defendants and from that time onwards, the defendants are in possession of the suit properties.

3. The Trial Court dismissed the injunction suit on the ground that plea of redeeming the property by the defendants in the year 1983 on return from Sri Lanka is acceptable and probable. The deposition of the P.W.1 that the suit properties were given to the first defendant on the return from Sri Lanka, which supports the plea of redemption of the mortgage property through settlement between the parties and the kist receipts Ex.B-1 in the name of defendants were considered in favour of the defendants to prove their possession.

4. However, on appeal the Lower Appellate Court has reversed the findings by relying upon the mortgage deed which was marked as Ex.A-5 and subsequent assignment deeds Ex.A-6 and Ex.A-7. Further referring to Section 90 of the Indian Evidence Act, the judgment and decree of the Trial Court was set aside.

5. The Lower Appellate Court has held that there is no dispute about the execution of the mortgage vide Ex.A5 so the need of proof under proviso to Section 68 of the Evidence Act does not arise. Further, the First Appellate Court has also

relied upon certain documents which were marked as additional documents during the course of first appeal, namely Exs.A8 to A11, where the defendants had given representations to the Collector and Legal Services Authority seeking legal assistance for recovery of possession, which goes to show the defendants were not in possession of the suit property.

6. Aggrieved by the reversing judgment of the First Appellate Court, the present Second Appeal is preferred by the first defendant. This Court, at the time of admission of the second appeal, has formulated the following question of law.

"Has not the Lower Appellate Court erred in law in not considering the admission of P.W.1 as found by the Trial Court in a proper perspective in reversing the judgment of the Trial Court?"

7. On hearing the learned counsel for the appellants as well as the respondents, in the light of the documents relied on by the parties, it is clear that in the year 1925 Gnanadigam has created a usufructory mortgage and said mortgage deed in favour of Palaniyandi is a registered document. Through Ex.A-6, on 19.06.1928 Palaniyandi has made over the mortgage to one Amavasai. The said Amavasai through Ex.A-7 has made over the mortgage to Anthonysamy on 27.05.1930, these facts are admitted facts. The plaintiff is son of Amavasai and he had been in possession of the property paying kist.

8. Therefore, when there is no documentary evidence to show that the mortgage was redeemed in the year 1983, it is not open to the defendants to say that by oral agreement they are in possession. The kist receipt Ex.B-1 relied by the defendants to prove their possession, is subsequent to filing the suit, whereas Exs.A1 to A4 goes to show the plaintiffs are in continuous possession.

9. However this Court, makes it clear that the right of redemption under Limitation Act arises from following manner. Under Article 61 of the Limitation Act, the suit for redemption by a mortgage can be filed for recovery of possession within 30 years from the date on which right to redeem accrues. On reading of Ex.A.5, this Court finds that it is a usufructory mortgage for Rs.350/- initially for a period of five years for redemption and there is a specific clause in the deed that if mortgagee is not able to redeem within five years, he can do so at any time in future during the month of Cithirai on paying the mortgage amount. When the right of redemption is not restricted for specific period, it is always open to the mortgagee or his legal heirs to seek redemption of the mortgaged property, in the light of the specific clause in Ex.A5. Therefore, while pointing out the right to the appellants to seek redemption of the property, the Lower Appellate Court decree is confirmed on the ground that

the appellants/defendants have failed to prove possession by oral redemption of the suit property in the year 1983.

10. Accordingly, this Second Appeal is disposed of with the said observations. No costs.

s/d-  
Assistant Registrar (CS VII)

True Copy

Sub-Assistant Registrar

dm

To

1. The Subordinate Judge, Namakkal.
2. The Principal District Munsif, Namakkal.

copy to

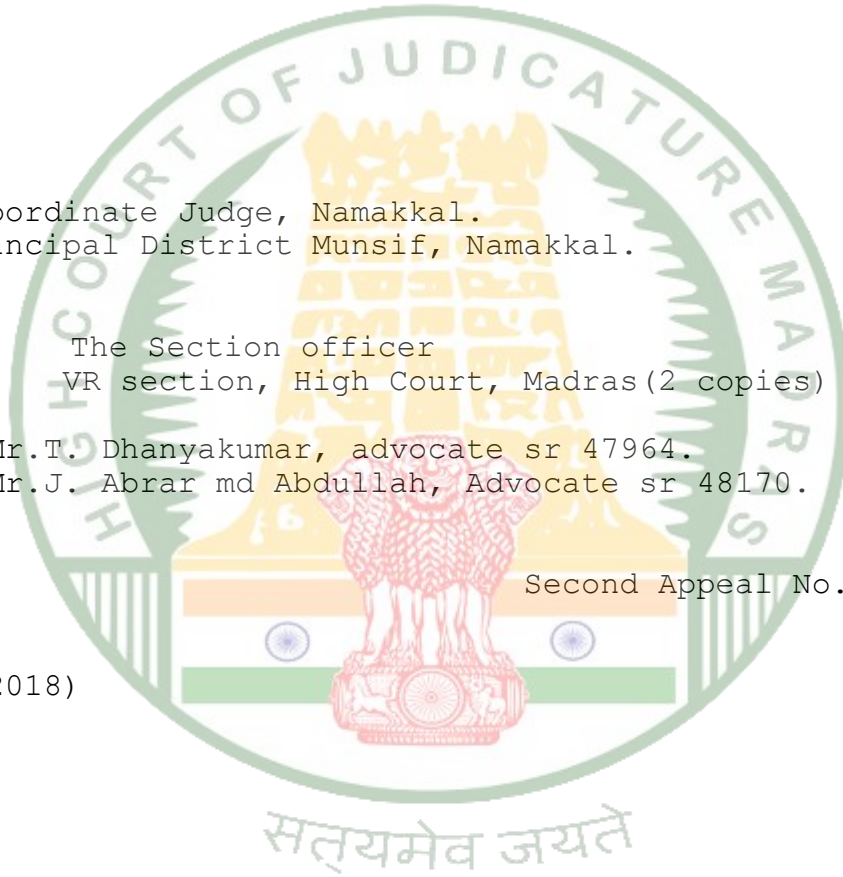
The Section officer  
VR section, High Court, Madras (2 copies)

+1 CC to Mr. T. Dhanyakumar, advocate sr 47964.

+1 CC to Mr. J. Abrar md Abdullah, Advocate sr 48170.

Second Appeal No.459 of 1999

MP (CO)  
SP (21/02/2018)



WEB COPY