

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 30.08.2019

Judgment Pronounced on : 12.09.2019

CORAM:

THE HONOURABLE MR. JUSTICE RMT.TEEKAA RAMAN

S.A.Nos.349 and 350 of 2001

M.B.Kumar .. Appellant/Respondent/Plaintiff in both S.As

....Versus....

1.Bhojan

2.J.Halen

... Respondents/Appellants/Defendants in both S.As

PRAYER in S.A.No.349 of 2001:This Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 29.09.2000 made in A.S.No.3 of 2000 on the file of the Sub Court, Udagamandalam, reversing the judgment and decree in O.S.No.130 of 1997 dated 03.09.1998 on the file of the District Munsif Court, Coonur.

PRAYER in S.A.No.350 of 2001:This Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 29.09.2000 made in A.S.No.20 of 2000 on the file of the Sub Court, Udagamandalam, reversing the judgment and decree in O.S.No.130 of 1997 dated 03.09.1998 on the file of the District Munsif Court, Coonur.

For Appellant :: Mr.N.Damodaran in both S.As

For Respondents :: Mr.S.K.Rakhunathan in both S.As

J U D G M E N T

These two appeals arises out of a common judgment made in A.S.No.3 of 2000 and A.S.No.20 of 2000. The appellant in S.A.No.350 of 2001 is the plaintiff in the suit in O.S.No.130 of 1997.

2. For the sake of convenience, the parties are referred to as per the ranking in S.A.No.350 of 2001.

3. The plaintiff is the appellant and the plaintiff/appellant has filed a suit, seeking declaration of his title and for Permanent Injunction against the defendants on the ground that the suit property was originally mortgaged by his father, during the lifetime, under Exhibit B2 and as the amount

was not paid. Accordingly, the mortgagee had filed O.S.No.130 of 1997 resulted in passing of final decree in the mortgage proceedings and under Exhibit A4, dated 27.10.1993, he has discharged the mortgage amount due on the Exhibit A3, thereby he has become the owner of the property and further, alleged that there was an oral partition among his widow mother, wherein this property was allotted to him and hence, he discharged a decree amount under Exhibit A4 and he is in possession and enjoyment of the suit property relied on Exhibits A5,A6,A7,A8 and A9 and also contended that after the discharge of the mortgage amount, he raised loan from the Co-operative Land Development and also paid E.M.I filed Exhibit A7,A8,A10 and A12. Further, relied upon Ex.A9 and Ex.A11 for the alleged possession before the learned Munsif Court and he also filed Exhibits A13 to A23 had demonstrated that he has supplied tea leaves that was harvested in the suit land.

4. The respondent herein who are the defendant could allege that pending mortgage, after the death of the father of the plaintiff, the mother along with son, for family necessity, sold the property under Exhibit B3 to one Ranga Gowder who in turn sold the property under Exhibit B4-sale deed to the father of the defendant and since the date of Exhibit B4 sale deed, they are in possession and enjoyment of the suit property as a true owner and filed Exhibits B5,B6,B7,B8,B9 and B10 and also filed Exhibit B14 in respect of supply of green leaves to the factory.

5. Before the Trial Court, the plaintiff has examined himself as P.W.1 and marked as Exhibits A1 to A33 and the defendant has examined himself as D.W.1 and marked as Exhibits B1 to B14.

6. The Trial Court rejected the suit in respect of declaration of the title. However, granted the relief of Permanent Injunction in favour of the plaintiff and hence, as aggrieved against the disallowed portion of, declaration of title and the plaintiff has preferred in A.S.No.20 of 2000.

7. While, in respect of grant of decree for Permanent Injunction, the defendant filed in A.S.No.3 of 2000. Pending appeal, the defendant had filed Interlocutory Application under Order 41 Rule 27 C.P.C for the receipt of the originals of the sale deed which is marked as Exhibits B3 and B4. Before the Tribunal, as the same was allowed by the lower Appellate Court. Thereby, Exhibits B15 and B16 are marked. In other words, while Exhibit B3 and Exhibit B4 are the certified copies of the sale deed and Exhibits B15 and B16 are the respective original thereof.

8. The lower Appellate Court on appreciation of the evidence has held that under Exhibits B3 and B4 sale deed, the sale was effected by none other than the mother of the plaintiff herein for herself and on behalf of the other minors and allowed

the appeal filed by the defendant and dismissed the appeal of the plaintiff. In the result, entire suit is stands dismissed.

9. The above Second Appeals are admitted on the following Substantial Questions of Law:-

(i) Whether the Courts below are right in holding that person continues to be in possession even after the final decree for mortgage has been passed cannot claim any right, title, interest based upon discharge of time barred debt or mortgage money?

(ii) Whether the payment by a person of the entire due to a mortgage will not entitle that person to step into the shoes of the mortgage and protect his possession as against the persons who are purchasers of equity of redemption, unless and until they seek redemption in a manner known to law?

(iii) Whether the Courts below are right in holding the plaintiff is not the real owner on the ground that plaintiff's mother sold the property to defendants' father namely, Joghee whereas the vendee of the document marked as Ex.A15 and Ex.B16 stands in the name of one Joghan who is admittedly not the father of defendants?

(iv) Whether non filing of suit by plaintiff within three years after attaining majority for setting aside sale which is not at all existence would vitiate the claim?

10. The learned counsel for the appellant would submit that in view of Ex.A4 discharge receipt, the mortgage stands cancelled and he become the absolute owner of the property and to prove the possession, he relied upon Exhibit A9 and Exhibit A11 and also relied upon Exhibits A7,A8,A10 and Ex.A12 to show and demonstrate that he exercised Act of ownership by mortgaging the property with the Co-operative Development Bank and raised the loan and paid the E.M.I.

11. The learned counsel for the respondents would submit that the plaintiff who filed a suit for declaration of title and for Permanent Injunction is the one of the minor son at the time of execution of Ex.A2- mortgage deed and after the death of the father, the mother for herself and on behalf of minors have sold the property under Exhibit B3 to Ranga Gowder who in turn has sold under Exhibit B4 to the father of the defendant and thereby, the right of equity of redemption was also conveyed to the defendant's father. Since, on the date of the sale, the mortgage was subsisting and further contended that the mortgagee has filed a suit in O.S.No.161/70 on the date of filling of suit, the sale as stated under Ex.B3 and Ex.B4 were already been effected ought to have impleaded them as a party-defendant.

However since they are purchaser of the property, they were not impleaded as the party-defendant and only legal heirs of the mortgagor is alone has been made as a party to the suit and the said suit, preliminary decree was passed on 13.10.1970 and final decree was passed on 26.11.1971 and it has culminated into foreclosure. Therefore, the only optional left for the parties at the time was only under Order 34 of C.P.C., but they filed to do so and subsequently, the suit was filed in the year 1997 and as per the evidence of P.W.1, he had attained a majority in the year 1980 ought to have filed a suit in the year 1983 itself and hence, the claim is barred by limitation and made submissions in support of the judgment of the Lower Appellate Court.

12. After hearing both the parties and taking note of the rival submissions and the documents, the core points that have to be decided are:-

(i) Whether the respondent who had purchased the property from the mother of the appellant/representing minors at that time, has a valid title?

ii) Whether the alleged discharge of mortgage amount by the plaintiff under Ex.A4, who claims deposited amount of mortgage with the M/s.Nanjundiah and sons is true and valid?

13. It is seen that in the Lower Appellate Court application under Order 41 Rule 27 C.P.C has been filed to receive Exhibits B15 and B16 viz the original sale deeds of certified copies of sale deed Ex.B3 and B4 and the same was allowed. As the mother of the plaintiff have sold the property under Ex.B3 which was in turn sold to the father of the defendant under Ex.P16 along with the equity of redemption goes which purchaser.

14. Furthermore, in the suit that has been filed by M/s.Nanjundiah and sons, the mortgagee/the purchaser of the property were not made as a party and also it is seen from Ex.A3-Suit Register for the said O.S.No.161/70, preliminary decree was passed on 13.10.1970 and final decree was passed on 26.11.1971 and therefore, the right of redemption under the said mortgage under Ex.A2 has been culminated into foreclosure in the year 1971 itself and therefore, the only option open to the legal representatives of the mortgagor namely, the plaintiff is that only under Order 34 of C.P.C., he ought to have deposited the amount for the reasons best known, the legal representatives of the said persons has not deposited the amount. At this juncture, it remains to be stated that as per the recital under Ex.B3 equivalent to Ex.B15 and Ex.B4 equivalent to Ex.B16 mother of the appellant sold the property by stating that it is as for family necessity and to pay the mortgage amount as recited therein also assumes significance.

15. As pointed out by the learned counsel for the respondent that the plaintiff as P.W.1 in the cross-examination is admitted that he attained majority in the year 1980 ought to have filed the suit to redress his grievance, if any on or before 1983, however, chosen to file the suit in the year 1997. As per Ex.A4-receipt for alleged mortgage amount said to have been taken place on 27.10.1973 and absolutely, there is no evidence on record to show for delay in approaching the Court for 14 years even after alleged payment also assumes significance.

16. The Trial Court as well as the Lower Appellate Court, taking note of the fact that Ex.B15 and Ex.B16 original document of sale deed dated 03.10.1964 and 26.09.1969 respectively and applying the Law on the point of presumption under Section 90 of the Indian Evidence Act has held that the sale deed effected by the plaintiff's mother in favour of the father of the defendant is true and held in favour of the recital contained therein.

17. On consideration of the documentary evidence adduced before the Courts below, it is seen that the subject matter of the suit property was purchased by the father of the plaintiff under Exhibit A1 on 27.03.1958 and he had mortgaged property under Exhibit A2 on 02.04.1958 in favour of M/s.Nanjundiah and sons and thereafter, on the death of the plaintiff's father, his mother along with his brother, also representing the plaintiff (who was minor at that time) had executed the sale deed under Ex.B3 on 03.10.1964 in favour of one Ranga Gowder who in turn had sold to the defendant's father under Exhibit B4 dated 26.09.1969. It is further seen from the suit extract in O.S.No.161/70, the suit was filed by the said mortgagee for recovery of the amount and the final decree has been passed on 26.11.1971 and it is also seen from Exhibit A4-discharge receipt alleged to have been issued by M/s.Nanjundiah and sons on 27.10.1993.

18. It remains to be stated that in the suit by mortgagee, the preliminary decree was passed on 13.10.1970 and final decree in the mortgage suit in O.S.No.161/70 was passed on 26.11.1971 and hence, the right of redemption has been gets terminated on passing of the final decree in the mortgage suit., at the instant of the mortgagee. 13 years time is given for execution of the said mortgage decree for the said amount and since as it mentioned earlier under Ex.A4-discharge receipt, it was only on 27.10.1993, the plaintiff claims have paid the mortgagee amount. In other words, he seems that he has paid the time barred alleged debt and hence, in view of the above factum as narrated above coupled with the admission of P.W.1 in the cross-examination that he has not filed any suit challenging the sale deed Ex.B4 and Ex.B5 in favour of the defendant on immediately attaining majority and also he has not filed any suit to set aside the final decree within the time limit and hence, the finding of the Trial Court that the plaintiff claims

falls under the category of repayment of time barred debt and the same, cannot confirm any right or title upon him is justifiable and the same cannot be termed as erroneous.

19. Furthermore, as narrated above, Ex.B3 and Ex.B4 marked which are the certified copy of the sale deed and Ex.B15 and Ex.B16 are the original sale deed or 30 years old document. Consequently, as per the presumption clause under Section 90 of the Indian Evidence Act, they are deemed to true and valid and accordingly, the father of the defendant has obtained the title his favour along with equity of redemption and hence, in view of the finding in the presiding paragraphs that no execution proceedings has been taken based upon the final decree in O.S.No.161/70 dated 26.07.1971. Then, for any alleged payment by the plaintiff/appellant can be treated only as a time barred date and the same cannot need rights to any title in favour of the plaintiff as equity of redemption is already passed to father of the defendant, subsequently to the defendant under Ex.B15 and Ex.B16.

20. It is also seen from Ex.B16 that the brother of the plaintiff namely Nanjan has attested the sale deed in favour of the father of the defendant under Ex.B16 also assumes significance and furthermore subsequent to Ex.B16-sale deed in favour of the father of the defendant/respondent Ex.B9 and Ex.B10 demonstrate that loan has been paid for the year 1970, 1972, 1977, 1978 and 1985 and the Lower Appellate Court has also taken note of the fact that Ex.A1 which has been filed by the appellant/plaintiff to show his possession is of the year 1996 and no document has been produced by the plaintiff to show prior to 1996, neither the plaintiff nor the family of the plaintiffs were in possession and enjoyment of the suit property appears to be more probable and also taking note of the fact that even Exhibit A11 has been cancelled by the Divisional R.D.O, Coonnur under Ex.B2 on 22.11.1996 as could be seen from the recitals therein in Ex.B2 and therefore, in view of Ex.B2, the Lower Appellate Court has rightly come to the conclusion that Ex.A5 and Ex.A9 does not advanced the case of the plaintiff and the said finding of factual appreciation appears to be just and reasonable and the same is hereby confirmed.

21. It is to be stated that though the suit has been filed by the plaintiff alleging that the sale in favour of the father of the plaintiff and Ranga Gounder under Ex.B4 and Ex.B3 has been effected by the mother of the plaintiff. During his minority, he never whispered anything regarding the family necessity nor he challenged the sale deed executed by his mother. Furthermore, as observed earlier, the brother of the plaintiff is one of the attesor under Ex.B4 (Ex.B16) whereby, the father of the defendant had obtained the title to the property also goes against the plaintiff.

22. As rightly pointed out by the learned counsel for the respondent that the right of redemption of mortgage has been completed by passing of the final decree in the year 1971 because of the foreclosure and hence, the alleged payment said to have been made by the plaintiff to the mortgagee under Ex.A4 dated 27.10.1993 is no unavail to plaintiff as he said to have deposited the amount after 22 years.

23. Accordingly, the finding rendered by both the Courts below that the plaintiff is not entitled for relief of declaration of title does not warrant any interference and accordingly, the said finding by both the Courts below is hereby confirmed.

24. Based upon Ex.B1 and Ex.B2 as discussed supra, the Lower Appellate Court has come to the conclusion that the respondent/defendant are in possession of the property from the date of sale deed in their favour and the plaintiff is not in possession of the suit property and all the documents namely Ex.A12 to A32 are of recent origin does not disclose the alleged possession of plaintiff/appellant and hence, the finding rendered by the Lower Appellate Court that the defendants are in possession of the property is also confirmed. Consequently, in the absence of any title to the property. the plaintiff the seeking the relief of injunction against true owner not be granted and hence, this finding is also hereby confirmed and accordingly, in view of the discussion mentioned in supra, the first substantial question of law has not based upon the factual position. Since the defendant only is in possession, not the plaintiff, hence, as stated above, the substantial question of Law (i) the same does not arises for consideration and with regard to the second substantial question of law since the repayment of the amount by the plaintiff under Ex.A4 is only time barred and hence, he is not entitled to under suits mortgage, as he also out of possession, for the reasons stated in the presiding paragraphs, the second substantial question of law also does not arise for consideration.

25. With regard to the third substantial question of law does not arises for consideration, in view of the specific evidence of D.W.1, the same is also does not reflect factual position as spoken to by D.W.1 and in view of the above discussion, it is held that the suit has not been filed within a period of three years, the suit has to fail for non-filing of the suit by the plaintiff within three years on attaining majority and consequently, all the substantial questions of law are held against the plaintiff/appellant and the same is answered on negation against the appellant/plaintiff.

26. In the result,

(i) These Second Appeals are dismissed with costs throughout.

(ii) The Judgment and Decree passed in A.S.No.3 of 2000 and A.S.No.20 of 2000 on the file of the Sub-Court, Udagamandalam are confirmed.

(iii) Consequently, the said O.S.No.130 of 1997 on the file of the learned Principal District Munsif Court, Coonnur stands dismissed.

Sd/-

Assistant Registrar(CS-V)

//True copy//

Sub Assistant Registrar

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To

- 1.The Sub Court, Udagamandalam
2. The District Munsif Court, Coonur
3. The V.R.Section, High Court, Madras.

+1cc to Mr.N.Damodaran, Advocate SR.No.78556

S.A.Nos.349 and 350 of 2001

RJI (CO)
GMY (15/06/2020)

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