

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.03.2019

PRONOUNCED ON: 12.04.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1386 of 2003

1. S.Gopalan (Died) .. Appellant

2. Vijayalakshmi

3. G.Ramesh

[Appellants 2 and 3 brought on record
as LRs of the deceased sole appellant
vide order of Court dated 11.03.2019
made in C.M.P.Nos.246 to 248 of 2015]

.. 2 & 3 Appellants/
Lrs of the 1st Appellant

Vs.

Subbarayalu Chettiar .. Respondent/Respondent

Prayer:

Second Appeal filed under Section 100 of C.P.C., against
the judgment and Decree dated 22.03.1999 passed in A.S.No.24 of
1997 on the file of the Sub Court, Villupuram, confirming the
judgment and decree dated 29.09.1995 passed in O.S.No.1169 of
1993 on the file of the Additional District Munsif's Court,
Villupuram.

For Appellants : Mr.S.Kingston Jerald

For Respondent : No appearance

Set exparte vide order dated 28.3.2019

J U D G M E N T

In this second appeal, challenge is made to the
judgment and decree dated 22.03.1999 passed in A.S.No.24 of 1997
on the file of the Subordinate Court, Villupuram confirming the
judgment and decree dated 29.09.1995 passed in O.S.No.1169 of
1993 on the file of the Additional District Munsif Court,
Villupuram.

2. The second appeal has been admitted on the following substantial questions of law:

1. Whether the suit is barred by Limitation as held by Court below?

2. Whether the provisions of Act 40 of 1979 for the purpose of calculating limitation by the lower appellate court is applicable to the present suit?

3. Is not the appellant entitled to the benefit of Act 4 of 1938?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. For the sake of convenience, the parties are referred to as per the rankings in the trial court.

5. The suit has been laid by the plaintiff for declaration, possession and mesne profits.

6. On the basis of the materials placed on record by the respective parties, the Courts below were pleased to dismiss the suit on the point of limitation.

7. From the materials placed on record, it is seen that the suit property belonged to the plaintiff's father Sambamurthy by way of the partition dated 28.08.1932, the certified copy of which has been marked as Ex.A1. It is found that Sambamurthy had usufructuarily mortgaged the suit property in favour of the defendant's father Lakshapathi Chettiar on 27.08.1945, the copy of which mortgage deed has been marked as Ex.A2. It is found that the mortgagee had been put in the possession of the mortgaged property on the date of mortgage. Sambamurthy died leaving behind the plaintiff, his brother Nagarajan and one daughter Savithiri as his legal representatives. His daughter Savithiri died leaving behind her daughter Malathi as her legal representative. It is found that the plaintiff's brother Nagarajan had laid the suit for partition in O.S.No.456 of 1971 on the file of the District Munsif Court, Thirukovilur seeking partition against the plaintiff and others and the said suit had ended in favour of the plaintiff's brother and the certified copies of the preliminary decree and final decree passed in the abovesaid suit had been marked as Exs.A3 and A4. It is not in dispute that the

suit property is also covered in the abovesaid suit. It is further seen that the plaintiff's brother Nagarajan had alienated the suit property in favour of the plaintiff by way of the sale deed dated 20.10.1991, which document has been marked as Ex.A5. Subsequent thereto, Nagarajan has also written a letter to the defendant informing about his sale of the suit property in favour of the plaintiff by way of Ex.A5 sale transaction and the said letter has been marked as Ex.A9. It is thus found that the defendant has been put on notice about the purchase of the same by the plaintiff under Ex.A5 sale transaction. Thus it is seen that based on the abovesaid sale transaction Ex.A5, the plaintiff would be entitled to redeem the mortgage deed dated 27.08.1995 and accordingly seeking appropriate reliefs with reference to the same, the suit has been laid by the plaintiff.

8. Though it has been pleaded by the defendant that the mortgage debt had been discharged during 1969 and even thereafter the plaintiff or his brother had not taken steps to recover the possession of the suit property and thereby he had prescribed title to the suit property by way of adverse possession, however as rightly determined by the first appellate court, there is no acceptable material placed on record to evidence that the mortgage debt had been discharged or settled during 1969 as put forth by the defendant. With reference to the same, no proof evidencing the payment of the mortgage debt or endorsement has been projected in support of the defence version. If the abovesaid version of the defendant is true, the defendant would have averred the same and sent a reply pointing to the same to Nagarajan in response to the notice under Ex.A9. On the other hand, the defendant has not responded to Ex.A9 notice sent by Nagarajan. Furthermore, even though the defendant is also a party to the proceeding in O.S.No.456 of 1971, the defendant not made any pleas in the said suit that the mortgage debt has been discharged during 1969 itself as now put forth by him. Therefore when the defendant has not come forward with the specific case as to on what date the mortgage debt had been repaid/discharged and not also placed any material evidencing that the mortgage debt had been discharged and accordingly the first appellate court had rightly determined that the mortgage debt had not been repaid.

9. On the basis of the materials placed on record, particularly considering the avocation of the plaintiff and the properties owned by him in extenso, the Courts below had rightly held that the plaintiff is not entitled to the benefits of the Debt Relief Act No.IV of 1938. The abovesaid determination is based on the right appreciation of the factual materials placed on record, hence no reason is warranted to interfere with the same in the second appeal.

10. On a perusal of the mortgage deed dated 27.08.1945 marked as Ex.A2, there is no clear recital as to when the mortgagor had undertaken to repay the mortgage debt. The terms read as if the mortgagor is entitled to discharge the mortgage debt in any Aadi month and thereby entitled to recover the possession of the property mortgaged. Accordingly, it has been rightly determined by the Courts below that no specific period has been mentioned as to when the mortgagor should settle the debt and redeem the property mortgaged. Accordingly, it is found that the Courts below had invoked the provisions of the Tamil Nadu Debt Relief Act [Act 40 of 1979] and rightly found that as per the provisions contained in the said Act, particularly section 9 of the abovesaid Act making special provisions in respect of the mortgages executed at any time before 14.07.1978 and accordingly, when it is found that the mortgage transaction Ex.A2 is also covered under the abovesaid Act as per the provisions contained in section 9 of the abovesaid Act, in the light of the factual position, that the mortgagee had been entrusted with the possession of the property mortgaged on the date of the mortgage and invoking the same, the Courts below had rightly held that the right of redemption would commence 10 years after the execution of the mortgage deed and so viewed, further rightly held that the deed of mortgage being dated 27.08.1945, the right of redemption would commence after the expiry of 10 years from the said date i.e, from 27.08.1955 and accordingly invoking Article 61 (a) of the Limitation Act 1963, the Courts below had determined that the plaintiff should have laid the suit within 30 years from 27.08.1955 i.e., he should have laid the suit on or before 27.08.1985. However the present suit instituted by the plaintiff having been laid on 02.11.1993, consequently held that the suit laid by the plaintiff is clearly barred by Limitation and accordingly dismissed the plaintiff's suit.

11. Considering the mortgage transaction involved in respect of the suit property covered under Ex.A2 and the application of the Debt Relief Act, 1979 to the abovesaid mortgage and applying the provisions contained in the said Act to Ex.A2 mortgage, when the right of redemption commences from 27.08.1955, as rightly determined by the Courts below, the plaintiff should have institute the suit for the redemption of the mortgage within 30 years from 27.08.1955 and on the other hand, the plaintiff having come forward with the suit only in the year 1993, it is obvious that the suit laid by the plaintiff is hit by the law of Limitation as correctly determined by the Courts below.

12. In the light of the abovesaid position, there is no warrant to interfere with the determination of the Courts below that the plaintiff's suit is barred by Limitation by invoking the provisions of Tamil Nadu Debt Relief Act No.40 of 1979.

Accordingly the substantial questions of law formulated are answered.

13. In conclusion, the second appeal fails and is accordingly dismissed. No costs. Consequently, connected miscellaneous petition if any is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1. The Subordinate Judge,
Sub Court, Villupuram.
- 2.The Additional District Munsif,
Villupuram.

Copy to
The Section Officer,
VR Section, High Court, Chennai.

+1 cc to Mr.S.K.Rakhunathan, Advocate, Sr.No. 36575

BR(CO)
CSL/24.07.2019

judgment made in
S.A.No.1386 of 2003

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