

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 25.06.2019

CORAM

THE HON'BLE MR.JUSTICE N.SESHASAYEE

S.A.NO.263 OF 2005
AND
C.M.P.NO.9162 OF 2006

Muslim Educational Society,
Rep. by its President Jakerya Basha,
11, Mohammedan Street,
Athur Town.

...Appellant/Appellant/2nd Defendant

Vs.

1.Abdul Sathar

2.Shahjahan

3.Tamilnadu Wakf Board,
Tamil Nadu Govt.
Rep. by Special Officer,
Office at Santhome,
Chennai - 600 004.

4.Gowri Bai

5.Amir Basha

6.Sardhar Basha

7.Taji Babulal

8.Gulabjohn Babulal

9.Najimunisha

...Respondents/Respondents/
Plaintiffs 3 ot 10 & 12th Defendants

Prayer:- Second Appeals filed under Section 100 of Civil Procedure Code against the Judgment and Decree dated 28.11.2003 and made in A.S.No.14 of 1997 on the file of Sub-Court, Athur confirming the Judgement and Decree dated 30.3.1995 and made in O.S.No.57 of 1993 on the file of District Munsif Court, Atthur.

For Appellant : Mr.S.T.Bharath Gowtham
for Mr.T.R.Raja Raman

For Respondent : Mr.T.R.Rajagopal for R1, R2 & RR4 to 9
Mr.V.Lakshmi Narayanan for R3

JUDGMENT

The second defendant in a suit for redemption, having suffered a decree for the same successively before the Courts below has come forward with the present appeal. The parties would be referred to by their ranks before the trial court.

2.The facts are straight forward and they may be bullet pointed as below:

- The suit originally belong to certain Mustafa Khan. He had three sons: (a) Dhawood Khan (b) Mohideen Khan and (c) Khader Khan. The said three brothers had 1/3 share each in the suit property. While so, on 27.04.1920 Vide Ext.B.2, sale deed Khader Khan sold his 1/3rd share in the suit property to Dhawood Khan. This implied that Dhawood Khan would have 2/3rd share in the suit property, whereas, his brother Mohideen Khan would continue to retain his 1/3rd share.
- Subsequently, both Dhawood Khan and Mohideen Khan created two mortgages successively in favour of the first defendant on the security of the suit property. These mortgages are dated 27.04.1920 and 09.08.1920 and are respectively under Ext.B.1 and Ext.B.3.
- Subsequently, on 22.03.1926, under Ext.B.4, Mohideen Khan sold his 1/3rd right to the mortgagee, the first defendant. It is in this scenario, the plaintiff who claimed under Dhawood Khan as his daughter had filed a Suit in 1436/1968 (which was later taken on file as O.S.57/1993 following a remand by this court S.A.13/1974) for redemption of mortgage. The suit was laid for redeeming the mortgages under Ext.B.1 and Ext.B.3. The first defendant did not contest the suit. The suit was laid on 07.10.1968.
- The second defendant had taken up the contention that the first defendant became the absolute owner of the entire suit property, that on 22.08.1944 the first defendant had sold the entire suit property to the second defendant under Ext.B.5, sale deed.

3.Before the trial Court, the defendant could only produce Ext.B-4, sale deed executed by Mohideen Khan in favour of the first defendant. This sale deed pertains to Mohideen Khan's

1/3rd share in the suit property and this has resulted in merger of right of mortgagee under the first defendant. The trial Court accepted merger of rights in favour of the mortgagee as evidenced by Ext.B-4 as concerning 1/3 share of Mohideen Khan, and granted a decree for redemption of remaining 2/3 share. The second defendant, the present appellant preferred A.S.No.146 of 1972 against the same and that came to be dismissed. He again moved this Court in S.A.No.13/1974 and this Court Vide its judgment dated 31.08.1976 remanded the matter back to the trial Court.

4. Thereafter, for the next 17 years, the trial Court did not take up the case back on record and decide the aspect directed to be considered by this Court. This Court is informed that the Munsif Court was constituted in Attur, and the case is taken on its record in O.S.No.57/1993. After remand, the trial Court yet another time decreed the suit for redemption of 2/3 share in the suit property and the same came to be confirmed by the first Appellate Court in A.S.No.14/1997. Aggrieved by the said decree, the appellant/second defendant is before this Court in this appeal.

5. The second appeal was admitted on the following substantial questions of law :

- 1) Whether the Courts below are right in giving a finding that Ex.B-3 is a continuation of Ex.B-1 when admittedly Ex.B-3 reads as a Simple Mortgage?
- 2) Is the Courts below right in granting a decree for redemption when there is an ouster of Civil Courts jurisdiction by virtue of Section 6(1) of Wakf Act, 1995?
- 3) Is not the suit barred by limitation as against Ex.B-3?
- 4) Is not the appellant entitled to the property by adverse possession, when the vendor of the appellant was holding the 1/3rd share in the property as absolute owner?

6. The learned counsel for the appellant would argue that the second defendant lost the suit solely because he could not produce the sale deed dated 12.10.1926, executed by Dhawood Khan concerning his 2/3rd share to the first defendant. Inasmuch as this sale deed is now produced, though belatedly, it would admittedly go to show that no right of redemption inhere in the plaintiffs and subsequently, they cannot maintain their suit for redemption. In other words, argued the learned counsel that the document now produced before this Court would demonstrate that the plaintiffs have no cause of action for instituting it.

7. Per contra, the learned counsel appearing for the respondents/plaintiffs forcefully submitted that the copy of the sale deed served on him raised certain questions and it requires to be investigated if title was conveyed to the first defendant under the document now produced. The document now produced before this Court has a potential to settle the entire dispute with utmost clarity and certainty. However, it's genuineness or the extent of right thus conveyed etc., has been now doubted by the learned counsel for the respondents since he found some material to discredit it.

8. Since the present document, if proved then it will have the effect of non-suiting the plaintiffs even on the question of maintainability of the suit for want of cause of action for them to seek redemption, the document has to be considered even if it is produced belatedly. Therefore, this Court finds that the sale deed dated 12.10.1926, can be admitted in evidence under Order 41 Rule 27 (2) of the Civil Procedure Code.

9. It has become necessary for this Court to remit the matter back to the first Appellate Court, and the appellant should be allowed to formally prove the sale deed dated 12-10-1926, and the plaintiffs shall have the right to cross examine him, and if necessary shall have the right to adduce rebuttal evidence.

10. Accordingly, the second appeal is allowed and the Judgment and Decree dated 28.11.2003, and made in A.S.No.14 of 1997 on the file of Sub-Court is set aside and the matter is remanded back to the first appellate court for the purposes indicated above. No costs. Consequently, the connected civil miscellaneous petition No.9162 of 2006 is allowed.

11. The parties are directed to appear before the Subordinate Court, Athur on 17.07.2019. The matter must be disposed of within 45 days thereafter and the Court shall not grant any time to either of the parties, since the matter is 50 years old.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

tsg

To

1. The Sub-Court,
Athur.

2.The District Munsif Court,
Atthur.

3.The Section Officer
VR Section,
High Court,
Madras.

+1cc to Mr.V.Lakshminarayanan, Advocate, S.R.No.52158
+1cc to Mr.D.Aravindan, Advocate, S.R.No.52643

S.A.No.263 of 2005
and
C.M.P.No.9162 of 2006

BS (CO)

RRS (16/07/2019)



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