IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.10.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No. 1041 of 2019

1.Mangathil
2.Periasamy
3.Andjale
4.Selvy
5.Porquile @ Purani
6.Ammakannu
7.Ambiga
8.Radha
9.Jayalakshmy ..Appellants/Appellants/Plaitniffs

Vs.

1.Palaniammal
2.Chandra ..Respondents/Respondents/Defendants

Prayer: Memorandum of Second Appeal filed under Section. 100 of C.P.C. against the judgment and decree dated 27.03.2019 in A.S.No.89 of 2018 on the file of the Principal Sub-Ordinate Judge, Puducherry thereby confirming the judgment and decree dated 10.09.2018 in O.S.No. 617 of 2013 on the file of the First Additional District Munsif, Puducherry.

For Appellants : Mrs.V.Kamala Kumar

J U D G M E N T

The plaintiffs in O.S.No.617 of 2013, who sought for a decree for recovery of possession upon dismissal of the suit by the lower Appellate Court has come up with this second appeal.

2. According to the plaintiffs, the suit property having an extent of 86 Ca belong to Harikrishnan and Iyyanarappan, sons of Narayanasamy. The said Harikrishnan died in the year 1983 leaving behind the plaintiffs 1 to 5 as his legal heirs to inherit the property. According to the plaintiffs, with the approval of the other co-owner Iyyanarappan, the first plaintiff had taken a loan of Rs.2,000/- in the year 1985 for meeting her son's marriage expenses. In lieu of the interest payable, the first plaintiff had handed over possession of the schedule mentioned property to the first defendant and thereby created an

oral usufructuary mortgage in favour of the first defendant. It is also claimed that the other co-owner Iyyanarappan died on 25.12.2008 leaving behind the plaintiffs 6 to 9 as his legal heirs to succeed and inherit his one half share in the property. Despite demand made by the plaintiffs' to handover possession, upon receipt of a sum of Rs.2,000/-, the first defendant did not come forward to handover the possession hence, the plaintiffs had come up with the above suit for recovery of possession.

3. The suit was resisted by the defendants. The defendants would contend that there was no mortgage created in favour of the 1st defendant. It was also claimed that the plaintiffs are not the heirs of Iyyanarappan. The defendant would claim that the suit property has been in her possession since September 1987 and they have also put up construction in the suit property. The property has also been assessed to house tax and the municipality as defendants have been paying taxes. The defendants have been in open, continuous and uninterrupted possession of the property and they have prescribed the title by adverse possession. The Trial Court, upon a consideration of the evidence disbelieved the claim that there was an oral mortgage. The Trial Court, relying upon the judgment in Dharini Ammal Vs. Arayee reported in 2015(1) CTC 577 concluded that there was no usufructuary mortgage. It also concluded that the usufructuary mortgage for a value of above Rs.100/- must be by way of registered instrument and there cannot be an oral usufructuary mortgage. On the above conclusion, the learned Trial Judge dismissed the suit holding that the plaintiffs suit for recovery of posession is barred by limitation. Aggrieved, the plaintiffs preferred an appeal in A.S.No. 89 of 2018. The lower Appellate Court also concurred with the findings of the Trial Court and dismissed the appeal. Aggrieved, the plaintiffs have come up with this second appeal.

4. I have heard Ms. V.Kamala Kumar, learned counsel appearing for the appellants.

5. Mrs.V.Kamala Kumar, learned counsel appearing for the appellants would rely upon the judgment of this Court in Dharani Ammal Vs. Arayee to contend that there can be an oral usufructuary mortgage and she would also draw my attention to the conclusion of this Court that after the expiry of the period of 12 years, the person put in possession as a mortgagee under a invalid mortgage can be dispossessed only by a suit for redemption and recovery of possession and not a simple suit for recovery of possession. Relying upon the above conclusions, the learned counsel would vehemently contend that the Courts below are not right in dismissing the suit for redemption. The submission for the learned counsel is based on the misreading of the judgment of this Court in Dharani Ammal Vs. Arayee reported

in 2015(1) CTC 577. In the case on hand, the plaintiffs have come to Court with the specific case that the defendants were put in possession of the property as usufructuary mortgagees having advanced a sum of Rs.2,000/- in the year 1985. Admittedly, the mortgage is not a registered mortgage, it is claimed that it was an oral mortgage.

6. In view of the Section 59 of the Transfer of Property Act, an oral usufructuary mortgage is invalid. Therefore, only if the claim of the plaintiffs that the defendants were put in possession pursuant to an oral usufructuary mortgage is accepted, the possession of the defendants would be referable to an invalid mortgage. But, in the case on hand, the defendants had stoutly denied the existence of the mortgage, the claim of the defendants is that there were in possession of the property from September 1987 to the knowledge of the plaintiffs and they have perfected title by adverse possession. The suit filed in the year 2013 is clearly barred by limitation. The effect of the judgment in Dharani Ammal Vs. Arayee reported in 2015(1) CTC 577 is that if the mortgagee is in possession pursuant to an invalid mortgage will acquire the right of a mortgagee on the expiry of 12 years and therefore, it is for the mortgager to sue for redemption but if the mortgage is not proved, a suit for redemption will not lie and a suit for recovery of possession alone would lie. The following observation of this Court in Dharanee Ammal Vs. Arayee would be relevant:

> "35. In view of the above settled possession of law, one thing is crystal clear that form the date of entering into the invalid mortgage, if the so called mortgagor wants to recover the possession, he can file a simple suit for recovery of possession and not a suit for redemption of mortgage as there is no valid mortgage. If he fails to do so within twelve years, on the expiry of twelve years period, if the so called mortgagee becomes an actual mortgagee thereby acquiring all the rights of mortgagee by prescribing the same by adverse possession asserting mortgagee rights thereafter, the mortgagor can only file a suit for redemption of mortgage and for recovery of possession and not a simple for recovery of possession.
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> 36. In the instant case, invalid mortgage was entered into in the year 1993 by which possession was given to Mr.Muniyan. Admittedly, Mrs.Arayee did not file a suit for recovery of possession within this twelve years period of limitation prescribed under Article 65 of the Limitation Act. Mr.Muniyan continued to be in possession from the year 1993, but, he did not continue to be in possession asserting mortgagee rights so as to become a full-fledged

mortgage in the year 2005. According to the written statement, there was no such oral mortgage and thus, he never had the animus that he was in possession of the property to assert his mortgagee rights. Thus, his possession was not adverse for the purpose of asserting mortgagee rights. Therefore, in the year 2005, there id not come into being a full fledged mortgage and thus, Mr.Muniyan did not acquire mortgagee rights. Therefore, the remedy for Mrs.Arayee is only to file a simple suit for recovery of possession, which she has rightly done in the instant case. Mr.Muniyan has not even pleaded adverse possession either for prescribing mortgagee rights or to prescribe title. Therefore, though he was in possession continuously from the year 1993, he has not perfected mortgagee rights neither has he perfected title by adverse possession. He has only pleaded that his wife Mrs.Dharani Ammal has been in possession under the sale agreement which has been found to be false."

7. Admittedly, the plaintiffs have not sued for possession,. They have sued for redemption of the mortgage. Even as per the judgment referred to by the learned counsel for the appellants, the suit for redemption of the mortgage is not maintainable after a period of limitation prescribed under law. Apart from the above, there is a factual difference. Unless the mortgage is proved, a mortgagee put in possession pursuant to an invalid mortgage would not acquire the rights of a mortgagee after the expiry of 12 years. It is for the plaintiffs to prove a invalid mortgage at least. Both the Courts below have concurrently found that the plaintiffs have not established that the defendants were put in possession pursuant to an invalid mortgage. The said factual findings cannot be disturbed unless I find that the same to be perverse. The perusal of the judgments of the Courts below would demonstrate that the finding relating to the character of possession in the hands of the defendants is based on evidence and the same cannot be termed as perverse. In view of the same the suit as framed for redemption cannot be maintained. Therefore, the Courts below were right in dismissing the suit. I do not find any question of law much less a question of law in order to enable me to entertain this second appeal. This appeal fails and it is accordingly dismissed without being admitted. No costs.

Sd/-
Assistant Registrar(CS-V)

//True copy//

Sub Assistant Registrar

kkn

To:-

1.The Principal Sub-Court, Puducherry.

2.The I-Additional District Munsif, Puducherry.

Copy To
The Section Officer,
VR Section, High Court, Madras

+1cc to Mrs.V.Kamala Kumar, Advocate SR.No.89864

+1cc to Mr.J.Kumaran, Advocate SR.No.89435

S.A.No. 1041 of 2019

RJI(CO)
GMY(10/01/2020)