



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 29.08.2019
Delivered on : 15.11.2019

WEB COPY

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

S.A.(MD)No.933 of 2009

1. P.Perumal (died)
2. Papammal
3. Nagammal
4. Amaravathi
5. Jeyachitra
6. Kannan
7. Lakshmi

(Appellants 2 to 7 brought on record
as LR's of deceased sole appellant
vide order dated 10.03.2016
made in M.P.(MD)No.1/2015

... Appellants

Vs.

- 1.P.Raju
- 2.M.Sekar

... Respondents

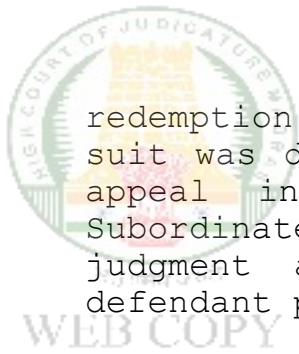
Prayer : This Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.No.576 of 2004 on the file of the learned Additional Subordinate Judge, Dindigul, dated 02.06.2009 reversing the judgment and decree passed in O.S.No.85 of 2001 on the file of the learned District Munsif, Nilakottai, dated 05.10.2004.

For Appellants : Mr.H.Lakshmi Sankar
For Respondents : No appearance

J U D G M E N T

This Second Appeal has been filed against the judgment and decree passed in A.S.No.576 of 2004 on the file of the learned Additional Subordinate Judge, Dindigul, dated 02.06.2009 reversing the judgment and decree passed in O.S.No.85 of 2001 on the file of the learned District Munsif, Nilakottai, dated 05.10.2004.

2.The first appellant is the first defendant. The appellants 2 to 7 are the legal representatives of the deceased first appellant/first defendant. The first respondent is the plaintiff. The second respondent is the second defendant in the suit. The first respondent filed a suit in O.S.No.85 of 2001 for a prayer of



redemption and for compensation till possession is handed over. The suit was dismissed by the trial Court. Against which he filed an appeal in A.S.No.576 of 2004 before the learned Additional Subordinate Judge, Dindigul and the appeal was allowed. Against the judgment and decree of the first Appellate Court, the first defendant preferred this Second Appeal.

3. Brief substance of the plaint is as follows:

The suit property belonged to the mother of the plaintiff, she bequeathed the property to the plaintiff by way of a Will, dated 14.03.1985. When the plaintiff's mother Subbammal was alive, she executed a mortgage deed in favour of the first defendant, after borrowing a sum of Rs.2,400/-, stating that the first defendant can enjoy the property instead of getting an interest. The said Subbammal had a daughter by name, Muthammal through her second husband. The second defendant is the son of Muthammal.

4. The plaintiff filed a suit in O.S.No.827 of 1988 before the learned District Munsif, Madurai Taluk, for declaration of title and also for possession. In that suit, the Court has passed a judgment on 21.09.1989, decreeing the suit. Against that judgment and decree, A.S.No.36 of 1990 was filed before the learned Subordinate Judge, Madurai and in the appeal the judgment and decree was modified confirming the declaration of title, but, making an observation that only after redemption of mortgage, the plaintiff is entitled for possession. On the above observation, the plaintiff filed another suit in O.S.No.681 of 1992 for possession of the suit property after receiving Rs.2,400/- from the plaintiff. That suit was dismissed on the ground that without seeking for a prayer of redemption of mortgage possession could not be prayed for. The appeal filed by the plaintiff in A.S.No.106 of 1994 was dismissed on 15.07.1997 on the above observation. On the basis of the above two judgments, the plaintiff has come forward with this suit for redemption of mortgage.

5. Brief substance of the written statement is as follows:

The plaintiff did not explain how subbammal obtained the property and that the said subbammal has right to execute a Will, dated 14.03.1985 why the plaintiff did not seek for prayer of redemption in his earlier suits was not explained by the plaintiff. The plaintiff did not reserve such a right in the earlier suits. The suit is not maintainable under Order 2 Rule 2 of the Code of the Civil Procedure. The description of the property is not correct. The suit property was not cultivable and the defendant after spending Rs.10,000/- had developed the land and cultivated the same during rainy season. The plaintiff is not having any right over the property. If at all the plaintiff is entitled to get a relief sought for in the suit, the plaintiff is liable for the development charges paid by the defendant.



6. On the above said pleadings, the trial Court framed the following issues:-

1. Whether the plaintiff is entitled for redemption of mortgage after paying Rs.2,400/- and to get the possession of the property from the first defendant?

2. Whether the plaintiff is entitled for means profit from the first defendant till possession is handedover?

3. Whether the suit is maintainable under Order-2 Rule-2 of the Code of the Civil Procedure?

4. What are the reliefs available to the plaintiff?

7. On the side of the plaintiff, eight documents were marked [Ex.A1 to A8] and one witness was examined [P.W.1]. On the side of the defendant one witness was examined [D.W.1] and three documents were marked [Exs.B1 to B3].

8. After considering both sides, the trial Court dismissed the suit against which the plaintiff preferred an appeal in A.S.No.85 of 2001 after hearing both sides, the First Appellate Court set aside the judgment and decree of the trial Court and allowed the appeal.

9. Against the First Appeal, the first defendant preferred this Second Appeal on the following grounds:-

The First Appellate Court failed to consider that the present suit is hit under Order -2 Rule 2 of the Code of the Civil Procedure, since the plaintiff omitted to sue for a prayer of redemption of mortgage in the earlier suits. The First Appellate Court failed to consider that the description of the property in the mortgage deed dated 06.05.1985 and the description of the suit property were different. The First Appellate Court failed to note that the title of the plaintiff's predecessor is disputed by the first defendant. The First Appellate Court had decreed the suit without even advertng to the cross examination of P.W.1, wherein the plaintiff had made admission discrediting his own case. The First Appellate Court failed to consider that the plaintiff did not deposit the mortgage amount in A.S.No.106 of 1994 and that the First Appellate Court is wrong in re-opening the said issue in this suit. The First Appellate Court failed to know that even in this suit, the plaintiff did not deposit the mortgage amount. Even though the property was sub-divided the sub-division was not mentioned in the description of the property in the plaint which is un-sustainable in law. The First Appellate Court failed to consider that a decree for declaration of title in the earlier suit with respect to plaint schedule property would not entitle the plaintiff to redeem the property.

10. On the basis of the above said grounds of appeal, this court admitted this Second Appeal on the following substantial questions of law:-



I. Is not the present suit for redemption of mortgage and mesne profits barred under Order 2 Rule 2 of Civil Procedure Code as the plaintiff had unsuccessfully prosecuted two earlier suits for recovery of possession of the suit property on the basis of mortgage?

II. Whether the first appellate Court is correct and justified in decreeing the suit for redemption of the plaint schedule property which is not the subject of mortgage under the 06.05.1985 mortgage deed?

Issue No.I:

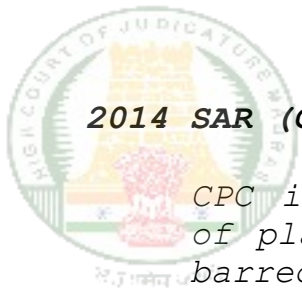
11. On the side of the appellants, it is stated that the prayer for redemption of mortgage is barred by limitation and the plaintiff is not entitled for redemption of mortgage and means of profits under Order -2 Rule -2 of the Code of Civil Procedure and that the plaintiff was un-successful in his earlier suits for recovery of possession, on the basis of the mortgage.

12. On the side of the appellants, it is stated that in an earlier suit in O.S.No.827 of 1988, the plaintiff obtained a decree of declaration of title and for recovery of possession, but, in the appeal, the title of the plaintiff was confirmed, but, regarding the recovery of possession, the appeal was dismissed, since the mortgage was not redeemed. The plaintiff filed another suit in O.S.No.681 of 1992 for recovery of possession and that suit was dismissed with an observation that the plaintiff was not entitled for recovery of possession before the redemption of mortgage. This is the third suit for redemption of mortgage and the property did not belong to Subbammal and the property only belong to Polaya Gounder. It is further stated that since the plaintiff did not sought for a relief of redemption in the earlier suits, this suit for redemption is barred by limitation. The First Appellate Court failed to consider that the mortgage amount was not deposited and failed to consider that the mortgage was only a simple mortgage and not an usufructuary mortgage.

13. On the side of the appellants, it is further stated that the recitals in the mortgage deed, Ex.B2, dated 04.10.1973, was only a simple mortgage and there is no question of redemption of mortgage as the relief sought for by the plaintiff is barred by limitation. The plaintiff is claiming the property which did not belong to him and that earlier two suits were dismissed, no title deeds, patta and sale deeds was filed on the side of the plaintiff. On the side of the appellant, it is stated that multiple suits for the same cause of action is barred under Order-2 Rule-2 of the Code of the Procedure Code and under Order-7, Rule-7.

14. The learned counsel for the appellants relied on the Judgment passed by the Hon'ble Supreme Court Court in the case of **State Bank of India Vs. Gracure Pharmaceuticals Ltd** reported in

<https://hcservices.ecourts.gov.in/hcservices/>



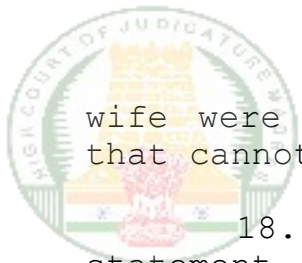
2014 SAR (Civil) 14, which reads as follows:

"Appellant's application under Order 7 Rule 11 CPC in latter suit before District Court for rejection of plaint in suit for damage on ground that the same is barred by Order 2 Rule CPC. Allowed by stating that the cause of action in both suits was same. High Court vide impugned order, set aside the order of District Court. The facts on basis of which subsequent suit was filed, existed on the date on which the earlier suit was filed. Earlier suit was filed on 15.03.2003 and subsequent suit was filed on 21.05.2003. No fresh cause of action arose in between the first suit and the second suit. "

15. A copy of the judgment and decree made in O.S.No.827 of 1988 was marked as Ex.A1. The plaintiff filed a suit in O.S.No.827 of 1988 for a prayer of declaration of title and for recovery of possession and the suit was decreed. In the appeal filed by the first defendant in A.S.No.36 of 1990, it was decided that the plaintiff was entitled for declaration of title and he would be entitled for recovery of possession only after the redemption of the mortgage, copy of the judgment and decree in A.S.No.36 of 1990 was marked as Ex.A2. It is seen that again the plaintiff filed a suit in O.S.No.793 of 1991, calling upon the defendant, to receive Rs.2,400/- and to hand over possession. The suit was transferred to the District Munsif, Nilakottai and was re-numbered as O.S.No.681 of 1992 and the suit was dismissed with an observation that the plaintiff had to sought for redemption of mortgage. The judgment and decree in that suit was marked as Ex.A3. This judgment was confirmed by the Additional Sub-Judge, Dindigul in A.S.No.106 of 1994. A copy of the judgment and decree were marked as Ex.A4 and A5.

16. The case of the appellants in the written statement is that the suit property belong to one Polaya Gounder and that Palanisamy was the son of the above said Polaya Gounder and the sale deed executed by Palanisamy in favour of Subbammal was marked as Ex.B1, and that the said Subbammal executed an othi deed in favour of one Murugan on 04.10.1979 and that othi deed was marked as Ex.B2 and the mortgage deed executed by Subbammal in favour of first defendant dated 06.05.1985 was marked as Ex.B3.

17. The case of the plaintiff is that the suit property belonged to Subbammal, the contention of the appellant is that the plaintiff failed to prove the title of Subbammal and that the plaintiff failed to mark any document to prove title. But the documents filed on the side of the defendant clearly reveal that the suit property belongs to Subbammal. It is seen that the property was subsequently subdivided and the subdivision was not mentioned in the mortgage deed. Merely because the first appellant and his



wife were having some other properties in the same survey number that cannot be a ground to deny the right of the plaintiff.

18. In the written statement, the defendant has made a statement that even if the Court decides to decree the suit, the amounts spent by the defendant for the development of the property has to be given to him. However, the defendant has not come forward with any counter claim for recovery of money.

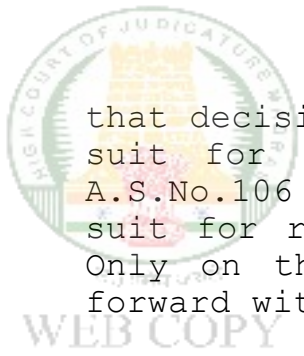
19. On the side of the appellants, it is stated that the suit property was not the property mortgaged under the mortgage deed dated 06.05.1985. On the side of the appellants, it is stated that the suit property did not belong to Subbammal and the title of the Subbammal herself was questioned by the appellant and the plaintiff did not file any documents of title and the plaintiff is not entitled for any relief since the plaintiff failed to prove that the suit property is the subject matter of the alleged mortgage deed. It is seen that already in O.S.No.827 of 1988 and in A.S.No.36 of 1990 the title of the plaintiff was declared and the same was not further questioned by this appellant by way of second Appeal. Hence, the appellant cannot question the title.

20. A perusal of the records reveals that redemption was not clearly sought for in the earlier suit, the first appellant has failed to specifically mention the prayer for redemption in the earlier suit. In A.S.No.36 of 1990, the First Appellate Court has observed that plaintiff was entitled for recovery of possession after the redemption of mortgage. Even though there was no specific prayer for redemption, it is seen that the appellant had deposited a sum of Rs.2,400/- on 25.09.1991 in O.S.No.793 of 1991.

21. The First Appellate Court had made an observation that the amount of Rs.2,400/- was deposited by the plaintiff on 25.09.1991 through Challan No.103 of 1991. After the suit was transferred to the District Munsif, Nilakottai, it was taken on file as O.S.No.681 of 1992, the amount deposited before the Madurai Taluk Munsif Court was not transferred to the Nilakottai District Munsif Court. It is seen that since the amount was in deposit before the Munsif Court for a very long period, after giving a publication in the District Gazette on 23.11.2007, the amount was forfeited to the Government.

22. Since the amount was not sent to the District Munsif Court, Nilakottai, the District Munsif, Nilakottai was not aware of the deposit and he dismissed the suit. The First Appellate Court in A.S.No.106 of 1994 was also not aware of the deposit of the mortgage amount, dismissed the appeal.

23. Admittedly the defendant is in possession of the suit property. The title of the plaintiff was already declared in the first defendant did not file any Second Appeal on



that decision. In A.S.No.36 of 1990, liberty was given for filing a suit for recovery of possession. In O.S.No.681 of 1992 and in A.S.No.106 of 1994, the lower Appellate Court has observed that a suit for redemption of mortgage should be filed by the plaintiff. Only on the basis of that observations, this plaintiff has come forward with this suit.

24. The case of the plaintiff is that the property was handed over to the first defendant and the first defendant could enjoy the property instead of paying interest, defendant did not claim that he paid interest periodically. In the above circumstances, the suit is not barred by limitation. Only due to technical reasons, the earlier suits filed by the first respondent were dismissed with regard to the prayer of possession and the appellant cannot take advantage of the same. For the above reasons, it is decided that this suit is not barred under Order-2 Rule-2 of the Code of Civil Procedure and that question raised by the appellant herein is unsustainable.

Issue No.II:

25. On the side of the appellants, it is stated that the burden is upon the plaintiff to prove the description of the property and it is stated that in the description of the property in Ex.B3 mortgage deed, the subdivision was not mentioned and the mortgaged property cannot be considered as the suit property and that the plaintiff failed to prove that the mortgage property and the suit properties are one and the same.

26. On the side of the appellants, it is further stated that the appellant and his wife purchased some properties in the same survey number and it is the duty of the plaintiff to prove the mortgage and that 3 survey numbers were mentioned in the mortgage deed Ex.B3, but, only 2 survey numbers were mentioned as suit properties and the subdivisions were not stated in the description of the suit properties and the plaintiff failed to prove that the mortgage property and the suit property are the same and that the First Appellate Court failed to consider this facts and failed to discuss anything regarding the description of the property and allowed the First Appeal.

27. The learned counsel for the appellants relied on a Judgment passed by the Hon'ble Supreme Court in the case of **Gopal Krishnaj Ketkar Vs. MMohamed Haji Latif** reported in **AIR 1968 SC 1413**, which reads as follows:

" Survey number on portion of which the Dargah was located held on evidence produced to belong to the Dargah and not to the appellant whose family was shown in relevant documents as "Khatedar" or occupant. Such entries held were not of much significance since the family was in fiduciary position of a manager of the



Dargah and was lawfully in possession of the survey number in that capacity. Origin and history of the Dargah traced."

28. The learned counsel for the appellants relied on another Judgment passed by the Hon'ble Supreme Court in the case of **Narayan Vs. Gopal Vinayak** reported in **AIR 1960 SC 100**, which reads as follows:

"The expression "burden of proof" really means two different things. It means sometimes that a party is required to prove an allegation before judgment can be given in its favour; it also means that on a contested issue one of the two contending parties had to introduce evidence. The burden of proof is of importance only where by reason of not discharging the burden which was put upon it, a party must eventually fail. Where, however, parties have joined issue and have led evidence and the conflicting evidence can be weighed to determine which was the issue can be decided, the abstract question of burden of proof becomes academic."

29. On the side of the appellants, it is stated that the First Appellate Court failed to consider the discrepancies in the deposition of the plaintiff and that P.W.1 had admitted that he was not aware of the sub divisions made in survey number 109/6 and that the mortgage amount was not paid in the suit. It is seen that a sum of Rs.2400/- was deposited in the earlier suit in O.S.No.793 of 1991 before the District Munsif Court, Madurai Taluk and the same was not sent to the account of the District Munsif, Nilakottai in O.S.No.681 of 1992 which leads to the dismissal of the suit.

30. This question raised by the appellants is not a question of law. In the above circumstances, it is decided that the question raised by the appellant is not maintainable.

31. For the reasons aforesaid, it is decided that there is no reason sufficient enough to interfere with the order passed by the First Appellate Court. The first respondent is directed to deposit a sum of Rs.2,400/- before the District Munsif Court, Nilakottai, in O.S.No.85 of 2001 within a period of one month from the date of receipt of a copy of this order. On such deposit, the LR's of the deceased first defendant / appellants 2 to 7 are directed to hand over the possession of the suit property within a period of one month from the date of deposit of the mortgage amount.

32. With the above observations, this Second Appeal is dismissed by confirming the judgment and decree passed in



A.S.No.576 of 2004 on the file of the learned Additional Subordinate Judge, Dindigul. No costs.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

Ls

To

- 1.The Additional Subordinate Judge,
Dindigul.
- 2.The District Munsif,
Nilakottai.
- 3.The Section Office,
VR Section, (2 Copies)
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.H. LAKSHMI SHANKAR, Advocate (SR-99201[F] dated
18/11/2019)

order made in
S.A.(MD)No.933 of 2009
15.11.2019

MK (18.12.2019) 9P 6C