

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :09.12.2020

Pronounced on :16.12.2020

CORAM:

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.143 of 2000

1.Manikkam

2.Murugayyan (deceased)

3.Jothi

4.Hema Priya

(appellants 3 and 4 and R7 brought on record as LR's of the deceased 2<sup>nd</sup> appellant vide order of Court dated 08.11.2013 made in C.M.P.No.662/2013 in S.A.No.143 of 2000)

5.Raja Thirumudi

(To transposed the 7<sup>th</sup> respondent as the 5<sup>th</sup> appellant vide order of Court dated 15.10.2020 made in C.M.P.No.11622/2020 in S.A.No.143 of 2000 (Dr.GJJ)) .. Appellants/Defendants

/versus/

1.Kaliyaperumal

2.Shanmugam

3.N.Soranbai (deceased)

4.N.Neelabai

5.R.Santha

6.Renukavathi

7.N.Rajaraman

8.Amutha

9.N.kaliyamoorthy

10.Rajathi

11.N.Keerthivasan

(RR7 to 11 brought on record as LR's of the deceased R3 vide order of Court dated 22.03.2018 made in C.M.P.No. 1815 to 1817/2017 in S.A.No.143/2000 (MDIJ))

.. Respondents/Plaintiffs 2 to 7

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 18.08.99 made in A.S.No.152/98 on the file of Additional Subordinate Judge, Mayiladuthurai reversing the well considered judgment and decree dated 26.08.1992 made in O.S.No.76/1982 on the file of the District Munsif Court of Sirkali.

For Appellants :Mr. A.Muthukumar

For Respondents :Mr.M.Devendran for R1,R4 to R6  
R3-died  
No appearance for R2,R7 to R11

### J U D G M E N T

(The case has been heard through Video Conferencing)

The defendants in the original suit are before this Court as appellants. The suit filed in the year 1982 for the relief of permanent injunction. Pending suit, in the year 1986, an amendment for alternate relief of recovery of possession of the suit property was sought and the same was allowed. Thereafter, the suit went for trial and the trial Court dismissed the suit on 26/08/1992. On appeal by the plaintiffs, the lower appellate Court held that the plaintiffs are entitled for recovery of suit property from the defendants and possessing the same till the mortgage is discharged.

2.The second appeal is filed alleging that the lower appellate Court gravely erred in granting the decree of recovery of possession, based on the mortgage deed, when the plaintiffs laid their suit for permanent injunction and recovery of possession, claiming title, based on the provision in the Will of Late.Manickam Chettiar.

3.At the time of admitting the second appeal, this Court formulated Substantial Questions of Law. Later, the Substantial Questions of Law was rephrased on 07/12/2018 as below:-

(1)Whether the lower appellate Court is right in granting recovery of possession when it was not the case of the plaintiffs that the claim was based under the usufructuary of mortgage Ex.A2 and Assignment Ex.A3?

(2)Whether the Will in favour of Rajathi

Ammal under Ex.A1 granting limited estate would flower into absolute estate under Section 14(1) of the Indian Succession Act?

4.The facts as found in the amended plaint:-

The suit property is land and building in R.S.No.111A/3A in Poraiyur village at Mayuram Taluk with specific linear measurement and boundaries. It belongs to one Manickam Chettiar. Under his Will dated 02/12/1932, Manickam Chettiar gave life interest to his wife Rajathi Ammal, without any power of alienation. After her life time, the property has to go to the any male member of Senaithalaivar caste, Vellaiyamgotharam. Manikkam Chettiar, after registering the Will, went to South Africa and died. Rajathi Ammal during her life time along with one Mariappa Chettiar, created a registered usufructuary mortgage of the suit property on 15/05/1950 in favour of one Marimuthu Ammal. The usufructuary mortgage was assigned to R.S.Ratinasamy by Marimuthu ammal under a registered assignment deed dated 12/10/1953. From that day onwards, Rathinasamy and his family is in possession of the suit property. Rathinasamy belongs to Senaithalivar chettiar caste of Vellaiyam Gothram. The plaintiffs are the wife and children of Rathinasamy.

5.Rajathiammal died in the year 1969. Mariappan Chettiar died in the year 1970. Plaintiffs on their own right are in possession of the suit property and enjoying the same in terms of the Will of Manickam Chettiar, as they belong to Senaithalivar Chettiar caste of Vellaiyam Gothram. On the death of the life interest holder Rajathiammal, the suit property has devolved upon the plaintiffs, which was in their possession as assignee of the usufruct mortgage. Being in possession for more than 12 years, they have also perfected the title by adverse possession. When the suit building become very old and required renovation, the plaintiffs temporarily shifted their residence elsewhere keeping the suit property under lock and key. The defendants, who are the sons of late Marimuthu one who mortgaged the suit property along with Rajathiammal, on 10/02/1982 tried to break open the lock of the premises and trespass into the suit property. There is likelihood of obstructing the repair work in the suit property. Hence, suit for injunction to restrain them from trespass. Pending suit, the prayer was amended and relief of recovery of property was sought, in case the Court holds that the plaintiffs are not in possession.

6.The facts as found in the written statement:

The fact that the property belong to Manickam Chettiar is

admitted. The description of the suit property is admitted. The fact that Manickam Chettiar executed a Will also admitted. But the recital in the Will is not as construed by the plaintiffs. Rajathiammal, W/o Manickam Chettiar in the year 1945 adopted Mariappa Chettiar as per the Sastaric Hindu Law. Mariappa Chettiar belongs to Velliayam Gotharam. The adoption deed was registered on 30/04/1945. The defendants are the sons of Mariappa Chettiar. During her life time, Rajathiammal who became the absolute owner of the suit property, bequeathed the suit property to her adopted son Mariappa Chettiar. The usufructory mortgage jointly created by Rajathiammal and Mariappa Chettiar is admitted. However, in the year 1975 the plaintiffs vacated the suit premises, pursuant to the panchayat held on 16/04/1975. They are residing in their newly constructed house elsewhere. After enjoyment of the suit property for nearly 25 years, the mortgage has got extinguished. As per the terms of panchayat towards discharge of the mortgage, a sum of Rs 400/- was paid and possession was redeemed. The plaintiffs came in possession of the suit property as mortgagee in the year 1953 and handed over the possession of the suit property to the defendants on discharge of the mortgage pursuant to the compromise arrived in the panchayat held on 16/04/1975.

7. Based on the above pleadings, the trial Court framed the following issues:-

1. Whether the plaintiff was in possession before the suit?
2. Whether the plaintiff is entitled to the permanent injunction as prayed for?
3. Whether the description of property is correct?
4. Whether the adoption pleaded by the defendant viz., Rajathi adopted Mariyappa on 30.04.1945 is true?
5. Whether the interpretation of the Will of 1932 by the plaintiff is correct? Whether the plaintiff has got any right under the Will of 1932?
6. Whether the plaintiff had perfected title by adverse possession as contended by them?
7. Whether any panchayat took place on 16.04.1975 and whether the defendant are in possession of the property?

8. Three witnesses on the side of the plaintiffs and three witnesses on the side of the defendants were examined. 8

exhibits for the plaintiffs and 5 exhibits for the defendants marked. The Advocate Commissioner Report and his sketch were marked as Ex.C-1 and Ex.C-2.

9.The trial Court held that Ex.B-2 adoption deed dated 30/04/1945 is valid. The plaintiffs can have no claim over the suit property based on the Will Ex.A-1 dated 02/12/1932. PW-3 evidence proves that the plaintiffs have left the suit property about 10,15 years ago. On the date of filing the suit, the plaintiffs were not in possession of the suit property. The signatures of plaintiffs 2 and 3 found in the panchayat deed Ex.B-5 dated 16/04/1975 were compared with the signatures in the plaint and vakalath of the plaintiffs 2 and 3 and were found tally. Therefore, the trial Court held that as per the terms of the panchayat Ex.A-5, the plaintiffs have received Rs.400/-and handed over the mortgaged suit property. Since then the defendants are in possession and enjoyment of the suit property.

10.On appeal to the first appellate Court, the finding of the trial Court was reversed. Relief of recovery of possession granted.

11.The first appellate court, while appreciating the documentary evidence, has observed that there is no dispute in respect of Ex.A-1 to Ex.A-3. There is no need to examine, whether Ex.B-1 and Ex.B-2 are true and genuine. Whether Rajithiammal has right to bequeath the property through Will or whether her adoption of Mariappa Chettiar is valid or not, requires no deliberation. The plaintiffs were in possession of the suit property as assignee of the usufruct mortgage. Since the parties accept the mortgage Ex.A-3, The point for determination is whether the mortgage was discharged under Ex.B-5 or not .

12.The first appellate Court has held that the trial Court failed to take note of the fact that in the lawyer notice dated 03/07/1975-Ex.A-4 issued by defendants 2 and 3 to the plaintiffs, there is no reference about the discharge of mortgage under Ex.B-5 dated 16/04/1975 and no witness to Ex.B-5 was examined to prove the genuineness of Ex.B-5. Held that Ex.B-5 is not a genuine document. As a result, the lower appellate Court ordered delivery of possession to the plaintiffs with liberty to the defendants to file separate suit for redemption of the mortgaged property.

13. On reading the plaint one can easily understand that the prayer in alternate is self destructive. From the plaintiffs witnesses itself, it is proved that on the date of filing the suit (ie) 16/02/1982, the plaintiffs were not in possession of the suit property. In fact, they left the property even 10, 15 years ago. The suit was laid for the relief of permanent injunction. Only in the year 1986, the suit prayer was amended for the alternate relief of recovery of possession. The suit is not for foreclosure of the mortgage in exercise of the right conferred to a mortgagee under Section 67 of the Transfer of Property Act. It is the suit filed for perpetual injunction and recovery of possession under the Specific Relief Act.

14. As per the plaint, the cause of action arose on 10/02/1982 when the defendants began to threaten and gave out their intention to give obstruction to the plaintiffs carrying the repair to the suit house. In the plaint, for commencement of possession to plead adverse possession, the assignment of mortgage is referred. Otherwise, for the relief of permanent injunction and recovery of possession, title on their own, based on the Will of Manickam Chettiar is relied. The case of the plaintiffs is that the property has devolved upon them, as per the terms of the Manickam Chettiar Will Ex.A-1 dated 02/12/1932.

15. Based on the pleadings as stated above, the issues were framed and the parties went on trial. It is very surprise to note that, when the main dispute centres around Ex.A-1-Will dated 02/12/1932 of Manickam Chettiar and the subsequent Will of Rajathiammal Ex.B-1 and her right to adopt Mariappa Chettiar, the first appellate Court had proceeded without examining the scope of enlargement of the limited interest vested to the female under Will dated 02/12/1932, after the enactment of Hindu Women's Right of Property Act 1937 and Section 14 (1) of the Hindu Succession Act, 1956, by simple saying there is no dispute regarding the said Will and there is no need to examine the right of Rajathiammal to execute the Will Ex.B-1 and the adoption deed Ex. B-2.

16. The error and fallacy in the first appellate Court judgment is manifestly demonstrated as below:-

The foundation of the plaintiffs case is that Rajathiammal was given only limited interest till her life. No right to mortgage or alienate was given to her under the Will. Therefore, on the death of Rajathiammal as members of the Senaithalivar

Vellaiyam Gothram, the suit property had devolved upon the father of plaintiffs 2 and 3 and his widow the deceased first plaintiff. The moment the appellate Court accepts the mortgage deed Ex.A-3 executed jointly by Rajathiammal and Mariappa as valid and the assignment of the said mortgage to R.S.Rathinasamy is also valid, then automatically the very foundation of the plaintiffs that the property devolve upon them as per the terms of the Will-Ex.A-1 falls to ground and there can be no further adjudication required in the matter. But, the lower appellate Court had converted the case of injunction based on title as a suit on mortgage without any pleading or issues.

17.The lower appellate Court failed to note that the alternate relief of re-possession sought, based on setting up the title on themselves and not on the strength of mortgage deed Ex.A-3.

18.On close scrutiny of the plaint, the plaintiffs have placed their prayer for injunction and re-possession based on (i) Ex.A-1 Will of Manickam Chettiar and (ii) adverse possession. On examination of Ex.A-1-Will, it is found that life interest limited to enjoyment given for Rajathiammal had blossomed into absolute right by statute, as per Section 14(1) of the Hindu Succession Act. Even before that, the Will, which say that the property to vest with any male member of Senaithalaivar caste born in Vellayam Gotharam suffers the ill of uncertainty and hence, the later part of the Will become unenforceable and void.

19.Under Section 89 of the Indian Succession Act, a Will or bequest not expressive of any definite intention is void for uncertainty. After rejecting the uncertain part of the Will as void, if the remaining part is clear and unambiguous, it should be given effect as per Section 78 of the Indian Succession Act. In this case, after eschewing the uncertain part of the Will Ex.A-1, the enforceable part of life interest to Rajathiammal becomes absolute by testament itself as well by the subsequent legislation of Section 14(1) of Hindu Succession Act, 1956 which has retrospective effect.

20.The lower appellate Court has disbelieved Ex.B-5 only because in the lawyer notice Ex.A-4 issued few months after

Ex.B-5 there is no reference about Ex.B-5. When Plaintiffs 2 and 3 had signed Ex.B-5 and their signatures are compared with admitted signatures and found to be tallied, the plaintiffs are bound to explain the Court and prove why Ex.B-5 is not a valid document. When independent witnesses speaks about the voluntary execution of Ex.B-5 by plaintiffs 2 and 3, absence of reference to Ex.B-5, in the lawyer notice Ex A-4 is not a fact, which could be drawn adverse inference about the existence of the document. The lower appellate Court has erred on this score also.

21.If the suit had been filed for foreclosure of mortgage in exercise of right under Section 67 of the Transfer of Property Act, then the plea of discharge of mortgage debt under Ex.B-5 being an unregistered document might have been rejected as inadmissible in evidence. But, in the suit for injunction, for the collateral purpose the mortgage deed, the assignment deed and the panchayat recorded on 16/04/1975 were introduced by the parties and without protest admitted into evidence by the Court. The genuineness of the Ex.B-5 tested by the trial Court. For a different reason, which is presumptive and hypothetical, the lower appellate Court has held it to be a invalid document.

22.To sum up, the lower appellate Court unfortunately got misdirected and gone tangent from the pleadings and proof while formulating and deciding the point for determination. It has lost sight of the fact that the suit laid for permanent injunction and in alternate, recovery of possession based on the title. However the lower appellate Court has decreed recovery of possession based on the assignment of mortgage though proved to be discharged under Ex.B-5.

23.As a result, the Substantial Questions of Law rephrased on 07/12/2018 is answered as below:-

(i) The lower appellate Court erred in granting recovery of possession based on Ex.A-2 mortgage deed and Ex.A-3 deed of assignment, when the case of the plaintiffs was on title and adverse possession.

(ii)The limited life interest granted to Rajathiammal under Ex.A-1 has blossomed into absolute interest, when the later part of the Will vesting the absolute interest on uncertain person. If not, when she adopted Mariappa Chettiar in the year 1945 as her son and when there is no evidence to disprove his Velliayam Gotharam, if not then, certainly after Section 14(1) of the Hindu Succession Act, 1956 came into force on 17/06/1956 with

retrospective effect.

24. Therefore, for the reasons stated, the Second Appeal is allowed. The judgment and decree of the lower appellate Court viz., Additional Subordinate Court, Mayiladuthurai dated 18.08.1999 made in A.S.No.152/1998 is set-aside. The judgment and decree of the trial Court viz., District Munsif Court, Sirkali, dated 26.08.1992 made in O.S.No.76 of 1982 is confirmed. No order as to costs.

Sd/-

Assistant Registrar (CS-IV)

//True copy//

Sub Assistant Registrar

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To:

1.The Additional Subordinate Judge, Mayiladuthurai

2.The District Munsif Court, Sirkali

Copy To

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

+1cc to Mr.A.Muthukumar, Advocate SR.No.41240

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S.A.No.143 of 2000

PA (CO)

GMV (16/04/2021)

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