

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 30.08.2019

Judgment Pronounced on : 05.06.2020

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1483 of 2005
and CMP.No.19253 of 2005

1. Krishnammal (deceased) ..1st Appellant/ 2nd Defendant
2. Mohan
3. Siddarthan
4. Sumathi
5. Malar ..Appellants 2to5/Defendants 2to6

(Appellants 2 to 5 are recorded as Lrs of the deceased 1st appellant viz., Krishnammal, Vide order of the Court dated 04.3.2019 made in SA.No.1483/2005, memo dated 04/3/2019 is recorded)

Vs

- 1.V.Gurunathan ..1st Respondent/Plaintiff
- 2.V.Baskaran
- 3.Parthiban
- 4.Mathivanan ..2 to 4 Respondents/Defendants 1,7 & 8

Prayer :- Second Appeal filed under Section 100 of CPC, to set aside the decree and judgment dated 17.08.2005 passed in A.S.No.65/2004 on the file of the I Additional Sub Court, Cuddalore confirming the judgment and the decree dated 20.07.2004 passed in O.S.No.229/2004 before the Principal District Munsif Court, Cuddalore.

For Appellants : Ms.Hema Sampath, Senior Counsel
Assisted by Ms.R.Meenal

For Respondents : Mr.R.Gururaj [R1]
R3 & R4 - Given up
R2-No Appearance

JUDGMENT

The second defendant in a suit for partition is the appellant herein. The suit was decreed by the trial Court which came to be confirmed by the first Appellate Court. Parties would be referred to by their ranks before the trial Court.

2. Two broad statements can be made at the outset:

- a) That the suit is chiefly directed against the first defendant who according to the plaintiff is his only co-sharer. The second defendant / appellant however resist the

very claim of title of the plaintiff and the first defendant to the suit property.

b) Facts which the rival side rely on to pitch their respective, yet independent title are substantially admitted by both. It is the legal implications that flow out of these facts that forms the basis for the dispute.

3. As outlined in the earlier paragraph, facts and the documentary evidence that aid their proof, are admitted and hence it would be advantageous to narrate the same sequentially:

- a) The suit property is described as a plot measuring 110 ft. x 20ft., with a residential building therein. It belonged to a certain Sundaram Chettitar. On 14-02-1945, he had executed a simple mortgage deed in favour of one Singaravelu. Singaravelu's mortgage-debt was to become payable only on 14.2.1958.
- b) While so, on 15.12.1945 Sundaram Chettiyar died, leaving behind him surviving his wife Thirupurasundarai alias Hamsavalli Ammal (henceforth in this judgment she would be referred to only as Hamsavalli). The couple did not have any issues themselves. Therefore, when Sundaram Chettiyar died, Hamsavalli succeeded to this property with one Virupakshi Chettiar (brother of Sundaram Chettiar) as her immediate reversioner.
- c) While so, on 25.2.1946, under Ext.B1 sale deed, Hamsavalli sold the property to a certain Kanniammal. The document recites about the mortgage created by Sundaram Chettiyar in favour of Singaravelu. There is a direction in Ext.B-1 sale deed that the purchaser thereunder (Kanniammal) should pay off the mortgage debt.
- d) Losing no time, Virupakshi Chettiyar laid a suit in O.S.No.95/1947 against Kanniammal and Hamsavalli, to declare that Ext.B1 sale deed executed by Hamsavalli in favour Kanniammal was not valid and that it would not bind his reversionary right. On 17.7.1948, this suit came to be decreed. Ext.A1, is the copy of the judgment and Ext.A2 is the decree in that suit. Aggrieved by the said decree, Kanniammal preferred A.S.No.453/1948 before District Court, Cuddalore, against Virupakshi Chettiyar and Hamsavalli. This appeal came to be dismissed. Ext.A3 judgment and Ext.A4 decree evidences the same.
- e) Both the trial Court in O.S.95/1947 and the first appellate Court in A.S.453/1948 had held that Virupakshi Chettiyar would be entitled to obtain possession of the property only on the demise of Hamsavalli.
- f) While things stood thus, mortgagee-Singaravelu laid a suit for recovery of mortgage money in O.S.No.84/1960. The

defendants in the suit are Hamsavalli, Kanniammal and Virupakshi Chettiyar. Ext.B4 is the copy of the suit register of that suit, according to which, a preliminary decree was passed on 22.8.1960 and a final decree for sale was passed on 13.1.1961. Thereafter, the mortgagee/ decree holder laid E.P.No.199/1961 for sale of the suit property. The sale too was ordered as could be seen from Ext.B5, auction notice. Now, Kanniammal raised funds, paid off the mortgage debt, and obtained receipt for discharge of the debt from Singaravelu and averted the same. Ext.B6 contains the said receipt and this document taken alongside with Ext.B4 would indicate that execution petition for sale has been terminated. It may be mentioned that in the receipt referred to above, the decretal amount due to the decree-holder was stated to have been paid by one Natesa Padayachi on behalf of the defendants.

- g) According to Kanniammal, she raised necessary funds payable to the mortgagee, Singaravelu by creating a mortgage in favour of her brother Natesa Padayachi (the one who had paid the amount as referred to earlier). This may imply that Virupakshi Chettiar, the reversioner of the property, though a party in O.S.No.84/1960 as well as in the Execution Petition, did not pay the mortgage money to Singaravelu. (There is however, some dispute over it, and that would be considered later).
- h) While so, on 23.08.1970, under Ext.B8, Kanniammal settled the suit property in favour of Krishnamurthy. He is dead and his widow was Krishnammal, the second defendant.

4.1 The case of the plaintiff is along the least complicated lines: Since Virupakshi Chettiyar had obtained a decree under Ext.A2 in O.S.No.95/1947 and had the same confirmed in AS.No.453/1948 as evidenced by Ext.A4 decree, the sale to Kanniammal under Ext.B1 by Hamsavalli can have effect only till Hamsavalli lived. Some time in 1975, Virupakshi Chettiar died, and he left behind his two sons, the plaintiff and the first defendant and a daughter by name Ramani Bai. On 16.4.1983, Ramani Bai released half share in the suit property to the plaintiff under Ext.A5. On 22.07.2000, Hamsavalli died. After the demise of Hamsavalli, reversioner's right to obtain possession took effect, and hence the plaintiff filed the suit for his half share in the property against his brother, the first defendant and the widow of Krishnamurthy (the settlee of the suit property under Ext.B-8).

4.2 So far as the suit for mortgage-money that Singaravelu had filed, the Execution Petition that he had filed for the sale of the suit property was terminated by the Court on recording full-satisfaction of the decree, and thus the property had become encumbrance free. The suit register shows only Virupakshi Chettiar had at least made an appearance through a counsel,

whereas neither Hamsavalli, nor Kanniammal had ever entered appearance at any stage. And, it was Virupakshi Chettiar who paid the decree-debt to Singaravelu.

5.1 The defendants' case is that when Kanniammal raised funds by mortgaging the property with Natesa Padayachi to discharge the decree-debt of the decree holder Singaravelu, that she had paid Rs.1,000/- to Virupakshi Chettiar, whereupon, the latter gave up his reversionary right in favour of the former. Once Virupakshi Chettiar gave up his right over the property, nothing survives for his heirs to succeed to. It is in these circumstances, Kanniammal executed Ext.B8, settlement deed dated 23.8.1970 to one Krishnamoorthy.

5.2 Ext.B-8 settlement deed recites about O.S.No.95/1947 laid by Virupakshi Chettiar, and the subsequent suit laid by the mortgagee in O.S.No.84/1960 and how Virupakshi Chettiar stated his inability to discharge the decree-debt due to Singaravelu, and how Kanniammal herself had paid Rs.1000/- to Virupakshi Chettiar and had his reversionary right over the suit property orally relinquished. The suit property is in possession of the tenants/defendants 7 & 8.

5.3 In the additional written statement filed, it is alleged that the limited right of Hamsavalli in the suit property has enlarged into an absolute right under the provisions of the Hindu Succession Act.

6.1 The trial Court has upheld plaintiff's right to seek partition on the ground that inasmuch as under Ext.A2 which was later confirmed in Ext.A4 decree, Virupakshi Chettiar's right as a reversioner to obtain possession of the property on the demise of Hamsavalli has been upheld, and granted a decree to the plaintiff accordingly. So far as the second defendant's defence that Virupakshi Chettiar had given up his reversionary interest in the property to Kanniammal is concerned, the court held that it was not proved through documents, and hence the said defence was not believed.

6.2 Before the Appellate Court, other than the contentions laid before the trial Court, arguments were advanced to establish enlargement of widow's interest under Sec.14(1) one of the Hindu Succession Act. Rejecting this, the first appellate Court held that Hamsavalli had parted with her interest in favour of Kanniammal even in 1946, and had also parted her possession, and hence Sec. 14(1) of the Hindu succession Act would not come to play. This apart in terms of Sec.14(2) of the Hindu Succession Act, any right acquired under the decree of the civil court is saved for the purpose of operation of Sec.14(1) of the Act. And, since Virupakshi Chettiar had obtained a decree in O.S.No. 95/1947, the case falls under Sec. 14(2) and not under Sec.14(1) of the Act. As to the rest, the first appellate court adopted the same line of reasoning of the trial court, and dismissed the appeal.

7. The appeal is admitted on the following substantial questions of law :

"(i) Whether in law the courts below are right in omitting to see that under section 14(1) of the Hindu Succession Act, the life estate of Tirupurasundari Ammal blossomed into a absolute one?

(ii) Whether in law the courts below are right in omitting to see that under Section 43 of the Transfer of Property Act even if Tirupurasundari* had no little on the day of grant, on her acquiring absolute interest subsequently the estate passed insistently to the purchaser.

(iii) Whether in law the courts below are right in failing to apply the principle of feeding the grant by estoppel to the instant case?"

7A. On 19.06.2019, an additional substantial question of law was raised as below:

Whether in law the courts below are right in failing to see that the suit for possession is barred by Sec.27 of the Limitation Act and that the appellants had prescribed title by adverse possession?

[Note: As indicated in paragraph 3(b) above Thirupurasundari is also known by another name as Hamsavalli, and in the judgment she is referred to only as Hamsavalli]

Arguments:

8. The learned Senior Counsel appearing for the appellant made the following set of arguments to sustain her case :

a) Under Sec.91 of the Transfer of Property Act, any person, other than the mortgagor, who has an interest in the mortgaged property can redeem the mortgage. It cannot be disputed that Kanniammal was not a party interested in the suit property when Singaravelu brought the suit property to sale in E.P. 199/1961 in O.S.84/1960. She was the person in possession of the property, and she had the right to be in possession at least till the demise of Hamsavalli in terms of Ext.A4 decree passed in A.S.453/1948. Virupakshi Chettiyar was a party to O.S.84/1960, and there is nothing on record to indicate that he had paid the money.

b) Kanniammal has raised the amount by mortgaging the property again with her brother Natesa Padayachi. It would be seen that Natesa Padayachi had paid the decree debt payable to Singaravelu as could be seen by Ext.B7 full satisfaction memo. Even though Singaravelu himself had executed this receipt only in favour of Natesa Padayachi,

yet it would enure only to the advantage of Kanniammal, as the receipt itself mentions that the amount was paid by Natesa Padayachi only for the defendants in that suit. When the mortgagee was paid, Kanniammal was subrogated to the right of the mortgagee, and since she was already in possession of the property, the plaintiff ought to have filed a suit for redemption. Consequently, the present suit has to fail on grounds of limitation since the plaintiff now claims as the heirs of reversioners had not filed a suit for redemption within time.

Reliance was placed on the authorities in Rukmini Ammal & another Vs Jagdesa Gounder [(2006)1 SCC 65], Jaganathan Pillai Vs Kunjithapadam Pillai [(1987)2 SCC 572], Jaisri Sahu Vs Rajdewan Dubey & Others [AIR 1962 SC 83], Karuppanan servai V Deivasigamani Pillai [AIR 1954 Madras 650 : (1954)2 MLJ 12 ; (1954)67 LW 89 (DB)], Chullinkana Shamba & Others Vs Cherakudluy Narayana Bhatta & Others [AIR 1951 Madras 917 : (1951) 64 LW 497] and Gopalaswamy Iyengar & Others Vs Nummachi Reddiar & Others [74 IC 416 (Madras)]

9. Per Contra, it was argued by the counsel for the plaintiff/first respondent, that inasmuch as Hamsavalli's sale in favour of Kanniammal was undone by Ext.A-2 decree in O.S.95/1947, which was later came to be confirmed by Ext.A-4 decree in A.S.453/1948, neither Kanniammal, nor anyone who claims under her can claim any right to the suit property. Even they cannot plea adverse possession as the same was not available to them Vide ratio in Ram Kristo Mandal & another Vs Dhankisto Mandal [AIR 1969 SC 204]. Secondly, whatever that were submitted by the defendants 2 to 6 / appellants is a new plea that was not even pleaded, and today they are forbidden from raising it as per the ratio in Pandit Ishwardas Vs State of Madhya Pradesh [(1979)4 SCC 163]. Thirdly, even if it were to be presumed that this plea could be admitted, yet the issue on the validity of the sale in favour of Kanniammal by Hamsavalli had become final, and the findings there on in A.S.453/1948 (with which the judgement in O.S.95/1947 merged), the same will operate as resjudicata. Reliance was placed on the authorities in Mohanlal Goenka Vs Benoy Krishna Mukherjee & Others [AIR 1953 SC 65], State of West Bengal Vs Hemant Kumar Bhattacharjee & Others [AIR 1966 SC 1061] and Narayana Prabhu Venkateswara Prabhu (dead) by Lrs., Vs Narayana Prabhu Krishna Prabhu [AIR 1977 SC 1268].

Of Discussion & Decision

10.1 The suit is laid chiefly for partition against the first defendant, with an ancillary relief of recovery of possession from defendants 7 and 8, but the defendants 2 to 6 (heirs of Krishnamoorthy) in their defence dispute the very title of the plaintiff and the first defendant over the suit property, in order a decree for partition itself might be denied.

10.2 If the appellants /defendants 3 to 6 herein were to succeed then they ought to establish that notwithstanding Ext.A-4 decree passed in A.S.453/1948 by which sale in favour of Kanniammal by Hamsavalli was invalidated, and the right of Virupakshi Chettiar to succeed to the estate of his brother Sundaram Chettiar as the immediate reversioner of Hamsavalli, Kanniammal need to show a superior right in her that will have the effect of forfeiting the right which the reversioner had obtained by virtue of the aforesaid decree.

11.1 Before the advent of the Hindu Succession Act, 1956, when a male Hindu dies, his widow succeeds to his estate absolutely, but with her power of alienation limited to one of necessity or for saving the property. The nature of right of the immediate reversioner is a mere spes successionis. See Jaisri Sahu Vs Rajdewan Dubey & Others [AIR 1962 SC 83].

11.2 Accordingly, when Sundaram Chettiar died in December, 1945, what devolved on his widow Hamsavalli was the equity of redemption alone, since the property was outstanding on a mortgage to Singaravelu. When she sold the property to Kanniammal under Ext.B-1, she could sell only that right which she had over the suit property and no more. In other words, what she could have sold was only her right of redemption she had. Ext.B-1 sale did refer to the mortgage to Singaravelu, but notwithstanding the same, the said sale was invalidated by the reversioner's suit. It might be that when Virupakshi Chettiar laid his suit O.S.95/1947, Singaravelu's suit for mortgage-money (in O.S.84/1960) was nowhere in contemplation. Still the fact remains that what Kanniammal had obtained Vide Ext.A-4 decree was a mere right to be in possession of the suit property during the lifetime of Hamsavalli, and no more.

12. The next set of undisputed facts are the decree passed in O.S.84/1960 pursuant to which the suit property was brought to sale by the mortgagee- decree holder, and payment of decree-debt to him and the avoidance of the intended court auction sale. Even though it is pleaded by the plaintiff that Virupakshi Chettiar had paid this amount, yet Ext.B-6 alongside Ext.B-7 preponderates a proof to the contra. These documents produced by the defendants indicate that one Natesa Padayachi had paid the decree-debt to the mortgagee on behalf of the defendants in that suit which included Kanniammal. The present contention of the appellants/defendants 2 to 6 herein is that by virtue of this payment, Kanniammal was subrogated to the rights of the mortgagee and since neither Hamsavalli, nor the reversioner had redeemed the mortgage, the same was lost to them by efflux of time, and that Kanniammal had become the absolute owner of the suit property, and hence this property was not even available for the heirs of Virupakshi Chettiar for partitioning it among them. The tenability of this argument may have to be considered.

13. This Court finds that this argument is flawed for the following reasons:

- First, if according to the appellants the mode of acquisition of absolute right over the suit property was in the manner argued, then it ought to have been adequately pleaded. Their pleading has been that at the time when Singaravelu's debt was paid under Ext.B-6 and evidenced by Ext.B-7, Virupakshi Chettiar had orally relinquished his right obtained under Ext.A-4 decree. This fact was not proved. Therefore, an alternate argument claiming absolute title to the suit property by reconstructing the available facts and evidence cannot be permitted.
- Second is the fallacy that is permitted to define the legal consequence in building the alternative case now attempted. As indicated earlier in this judgement, after the Ext.A-4 decree, the right which Kanniammal had in the suit property was to only occupy and enjoy it during the lifetime of Hamsavalli. Necessarily, no part of the equity of redemption had vested in her. The equity of redemption had vested only in Hamsavalli, and the reversioner had obtained the right of redemption Vide Ext.A-4 decree, subject to Hamsavalli's power of future alienation. No such sale subsequent to Ext.B-1 sale however, ever took place. It is in these circumstances, when the purchaser from this widow had paid off the decree-debt of the mortgagee, either directly or through another, can such purchaser, which in the instant case was Kanniammal, become a subrogee of the mortgagee? Here following aspects are significant:
 - ◆ For subrogation to happen within the meaning of Sec.92 of the Transfer of Property Act, the mortgage-debt ought to have been paid by the one who has a right in the equity of redemption under Sec.91 of the Transfer of Property Act. A mere right to occupy a building for a limited time does not vest a person with any substantial right in the equity of redemption. See: Narayana Kutti Gounden Vs Pechiammal [(1912) 22 MLJ 364], which the appellants themselves have produced.
 - ◆ Secondly, the mortgage in favour of Singaravelu was a simple mortgage, which imposes only a personal obligation on the mortgagor to repay the debt with a right to bring the property to sale when the debt is not repaid. In terms of Sec.67 of the Transfer of Property Act, the right of redemption of a mortgagor of a simple mortgage cannot be foreclosed by the mortgagee. Therefore, a purchaser from a widow, at the best can have only a right to claim payment of the money from the one in who the right of redemption is vested. To state it differently, after Ext.A-4 decree, Kanniammal had only a right to institute a suit for the money that was paid to the mortgagee,

against Virupakshi Chettiar. She however, did not institute any such suit for money. The consequence that would now visit Kanniammal was that she would lose the money paid to the mortgagee, but it would not affect the right of the reversioner, since, and as has been mentioned, Kanniammal cannot foreclose the right of redemption vested in Virupakshi Chettiar.

- ◆ Thirdly, there cannot be any extinguishment of right of redemption either to clothe the widow's purchaser with any absolute right in the suit property, since under proviso to Sec.60 of the Transfer of Property Act, the right of redemption can be extinguished either by the act of parties, or by a decree of a Court. It does not accommodate any other. The facts of this case disclose that the auction-sale attempted in the execution proceedings in O.S.84/1960 was only averted and not allowed, and hence the right of redemption cannot be said to have been extinguished in terms of the Proviso to Sec.60 of the Transfer of Property Act.
- ◆ Fourthly, there are two separate rights that Kanniammal had, the first pertaining to her right to be in possession of the suit property during the lifetime of Hamsavalli, and the second was to seek recovery of the decree-debt paid to the mortgagee Singaravelu. Both are separate in character, and they cannot merge at any point of time to vest absolute right over the suit property in Kanniammal.

14. Now, if the authorities cited by the learned Senior counsel for the appellants are considered, this Court finds that their relevancy cannot be fitted in the context. The only similarity they share with the present case is that they relate to certain aspects of mortgage, and the similarity stops there. It needs to be emphasised that a decision is a precedent only for what it actually decides, and for a decision to apply as a precedent, the issues involved in the case decided, and the one to be decided ought to be substantially similar. The question involved in the present case is to ascertain the nature of right which a purchaser from a Hindu widow, who herself had only a right of redemption in the suit property, after the same was conferred in her reversioner under a decree of a competent Court. The question of limitation has to be tested only to the nature of the right which a purchaser had obtained. This issue was not the central theme in any of the authorities cited by the learned senior counsel for the appellant.

15. The conclusion is to state the obvious: The appeal fails. In the result, this appeal is dismissed, and the decree in A.S.No.65/2004 dated 17.08.2005 passed by the I Additional Sub Court, Cuddalore is hereby confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True copy//

To: Sub Assistant Registrar

1. The Principal District Munsif, Cuddalore.
2. The I Additional Subordinate Judge, Cuddalore.

Vd(co)
krd 19/12

S.A.No.1483 of 2005



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