



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 25.02.2020

CORAM :

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A. (MD) .No.924 of 2006

Chinnammal

..Appellant/Appellant/Plaintiff

Vs.

1.Arulmary
2.Rani
3.Irudayaraj
4.Theresa

..Respondents /Respondents/Defendants

PRAYER : Second Appeal filed under Section 100 of Civil Procedure Code, against the Judgment and Decree in A.S. No.100 of 2000 on the file of the II Additional Subordinate Court, Tiruchirapalli, dated 15.12.2005 confirming the Judgment and Decree in O.S.No.778 of 1992 dated 15.09.1999 on the file of the Principal District Munsif Court, Tiruchirapalli.

For Appellant : Mr.K.Prabhakar
For Respondents : No Appearance

JUDGMENT

Aggrieved over the concurrent findings of the Courts below, the present Second appeal has been filed.

2.The parties are arrayed in the Second Appeal, as per their own ranking before the Trial Court.

3.The brief facts leading to the filing of the suit are as follows:

The suit property originally belonged to one Arockiyasami. The plaintiff and the defendants 2 to 5 are the daughters and son of one Arockiyasami and his wife Roseammal. After his death, his wife Roseammal and his son, fourth defendant mortgaged the suit property in favour of the first defendant on 11.07.1971, for a sum of Rs.1,000/- and the first defendant was put in possession of the property. After the death of father and mother, the plaintiff and the defendants 2 to 5 have equal share in the suit property. The plaintiff has every right to redeem the mortgaged property. The plaintiff has issued a notice on 22.12.1991, which was replied on 30.12.1991. She also issued a re-joinder notice, dated 18.02.1992. The plaintiff is a debtor as defined under the Tamil Nadu Debt Relief Act, 1979. Hence the suit has been filed for the relief of redemption and to direct the first defendant to hand over all the documents earlier title deed given in support of mortgage and for possession.



4. In the reply statement, it is the contention of the plaintiff that the suit property was in possession of the first defendant and the allegation that the property was dispossessed was also denied. The allegation that the property is in possession of one Yacob, who is said to be a tenant of the temple, is also denied.

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5. The first defendant had admitted the mortgage. It is the contention that the possession is not handed over and the suit property belonged to Sreengam, Arulmighu Renganathaswami Temple and patta was also issued in favour of the temple. The temple has leased out the property to one Yacob and he is in possession of the property. The plaintiff is not entitled to exemption under Tamil Nadu Debt Relief Act, 1979. Hence, she prayed for dismissal of the suit.

6. Based on the above pleadings, the Trial Court framed as many as seven issues. The parties went on trial. On the side of the plaintiff, P.W.1 was examined and Exs.A.1 to A.5 were marked. On the side of the first defendant, D.W.1 was examined and Ex.B.1 was marked.

7. Based on the evidence and materials, the trial Court dismissed the suit on the ground that the suit is bad for non-joinder of necessary parties and the Trial Court has also relied upon the evidence of D.W.1. The First Appellate Court also confirmed the findings of the Trial Court. Aggrieved over the concurrent findings of the Courts below, the present Second Appeal came to be filed.

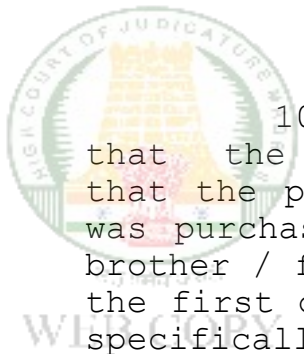
8. At the time of arguments, neither the learned Counsel appearing for the first respondent nor the first respondent appeared in person, before this Court. Heard the arguments of the learned Counsel appearing for the appellant.

9. After hearing the arguments of the learned Counsel appearing for the appellant, the following substantial questions of law have been framed for consideration :-

1. Whether the Courts below are right in holding that the mortgage should have redeemed within four years from the date of mortgage i.e. 11.07.1971 ?

2) Whether the suit is bad for non-joinder of necessary parties ?

2) Whether the mortgagee is not estopped from taking a different stand with regard to the registered document ?



10. The suit has been filed for the relief of declaration that the mortgage is redeemed. It is the case of the plaintiff that the property originally belonged to her father Arockiyaswami, was purchased on 14.07.1960. After his death, his mother and his brother / fourth defendant, mortgaged the suit property in favour of the first defendant and the possession was also handed over. It is specifically stated in the mortgage deed that the amount has to be paid within four years from the date of document. The fact remains that the mortgage admitted by the first defendant. On a careful perusal of Ex.A.1, the same clearly indicates that the mortgage is a usufructuary mortgage, the possession also handed over as per the document. Now the contention of the first defendant that though there was a mortgage registered, possession was not handed over and patta has been issued under the Enam Abolition Act to the Sriirengam Temple and the Temple has leased out the property to one Yacob. Therefore, the plaintiff is not entitled to redeem the mortgage.

11. On a perusal of the entire materials except her pleadings, there is no evidence available on record to prove that contention of the first defendant. The contention of the first defendant that the patta has been issued in the name of the Temple and some third party was in possession as a tenant. The Courts below has swayed away by mere pleadings without any proof in this regard and held that the suit is barred for non-joinder of necessary parties. The possession of the property is not disputed. The title of the mortgage is not disputed by the parties and the terms of the mortgage deed clearly stipulates that the mortgage is in the nature of usufructuary mortgage and the possession was also handed over. Now the mortgagee is estopped from denying the contents of the documents. Now, it is stated that the patta has been issued in the name of the Temple. Absolutely, there is no material whatsoever on record to show that Yacob is in continuous possession as a tenant. The Courts below wrongly placed the burden on the plaintiff and simply relied upon the pleadings of the first defendant and the entire evidence of D.W.1 is also bereft of details.

12. In such view of the matter, once mortgage is accepted the possession has been taken over as per the document, it is not open for the mortgagee to contend that possession is not with her and that somebody is in possession. The cross examination of D.W.1 also clearly indicates that her husband's name is Yacob. In such view of the matter, even assuming that he is in possession only under mortgagee and not on independent right. There is no evidence or materials available on record to show that he was continuing in possession as a tenant of the Temple. In such view of the matter, the suit filed for declaration that the mortgage has been redeemed has to be allowed.

13. It is relevant to note that Section 9(5)(a) of Tamil Nadu Debt Relief Act, 1979, reads as follows :

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"where the mortgagee has been in possession of the whole of the property mortgaged to him for an aggregate period of ten years or more than, notwithstanding anything contained in Sections 8 and 12 the mortgagee, debt shall be deemed to have been wholly discharged with effect from the expiry of the period of ten years or where such period expired before the 14th day of July, 1978, with effect from the said date."

Section 9(5) (a) makes it very clear when the mortgagee has been in possession of the whole of the property mortgaged to him for an aggregate period of ten years or more. The mortgage debt shall be deemed to have been wholly discharged with effect from the expiry of the period of ten years.

14. On a perusal of Ex.A.1, no interest is agreed by the parties and the possession was given, in lieu of the interest paid, as there is no rate of interest is fixed and the mortgagee is continuously in possession for more than ten years, as per the Act 40 of 1979, the mortgage debt shall be deemed to have been wholly discharged.

15. In such view of the matter, the Courts below non-suiting the plaintiff on a different angle without evidence and materials is not sustainable in the eye of Law.

16. Similarly, in **Abraham @ Daveed Nadar and another Vs. Santhakumar**, this Court in Judgment, dated 12.09.2018, has held in paragraph Nos.17, 18, 19 and 20 as follows :

"17. This Act came into force on 15.07.1978. Section 9 deals with the special provision in respect of mortgage, the Explanation (5) (a) is as follows:

"where the mortgagee has been in possession of the whole of the property mortgaged to him for an aggregate period of ten years or more than, notwithstanding anything contained in Sections 8 and 12 the mortgagee, debt shall be deemed to have been wholly discharged with effect from the expiry of the period of ten years or where such period expired before the 14th day of July, 1978, with effect from the said date."

18. In the present case, there is no dispute with the fact that the property

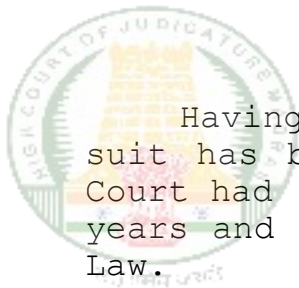


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mortgaged, namely, undivided 17 cents originally belonged to Paulraj and Samraj Nadar. The further fact that usufructuary mortgage had been created in favour of Bathrakaliammal is also not disputed. The further fact that Bathrakaliammal had made over the usufructuary mortgage to the defendant is also not disputed. The fact that the defendant was in possession pursuant to such made over document is also not disputed. The further fact that the plaintiff had purchased the property together with right of redemption had been established during trial. Both the Courts have endorsed that fact. The only issue to be decided is whether the suit had been instituted within the period of limitation. The fact that the plaintiff was entitled to the relief under the Tamil Nadu Debt Relief Act had not been disputed.

19. The date of usufructuary mortgage was 01.07.1965. Pathrakalimmal, mortgagee, had made over the mortgage to the defendant by assignment dated 06.04.1985. The plaintiff had purchased the property with right of redemption of mortgage on 20.03.1979. The Tamil Nadu Debt Relief Act, 1979 came into effect on 15.07.1978. Under Explanation (5)(a) to Section 9, it had been provided that if the mortgagee, was in possession for an aggregate period of 10 years or more than, then the deed shall be deemed to have been wholly discharged with effect from the expiry of 10 years and when such period had expired before 14.07.1978, with effect from the said date.

20. In the present case, the mortgagee was in possession for more than 10 years. The period of 10 years expired before 14.07.1978. Consequently, the mortgage is deemed to have been discharged as on 14.07.1978 the date when Act 40 of 1979 came into effect. Under Article 61 (a) of the Limitation Act, 1963, the period of limitation begins from the date, when the right to redeem starts. In this case, the right to redeem starts from the date when Act 40 of 1979 came into effect, namely, from 14.07.1978. The period of limitation is 30 years. The suit had been filed well within the period of limitation."



Having regard to the above judgment and having found that the suit has been filed within the period of limitation. The Trial Court had found that the amount has not been discharged within four years and the limitation is lost, cannot be sustained in the eye of Law.

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17. In such view of the matter, this Court is of the view that the Courts below have not appreciated the evidence in a proper perspective and erroneously taken an incorrect view. Accordingly, all the substantial questions of law are answered in favour of the appellant.

18. In the result, the second appeal is allowed and the Judgment and decree of both the Courts below are set aside and the suit in O.S.No.778 of 1992 is decreed. However, there shall be no order as to costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

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Sub Assistant Registrar(CS)

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To

1.The II Additional Subordinate Judge,
Tiruchirapalli,

2.The Principal District Munsif ,
Tiruchirapalli.

3.The Record Keeper, (2 copies)
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.K.PRABHAKAR, Advocate (SR-8528[F] dated 26/02/2020)

Judgment in

S.A. (MD) .No.924 of 2006

25.02.2020

VB(18.03.2020) 6P 6C