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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.02.2021

PRONOUNCED ON : 15.02.2021

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.656 of 2008

and

M.P.No.1 of 2008

1. A.Sengoda gounder,
S/o, Late Ammasi Gounder
2. A.Iyyanar,
S/o, Late Ammasi Gounder
3. Sellammal
W/o, Duraiswamy
D/o, Late Ammasi Gounder

All residing at
Sevampalayam Village,
Kalparapatty P.O.
Vemadithalam (Via.),
Salem Taluk,
Salem District.

4. Nalliamma
W/o, Rathinavel,
Thirumalaigiri,
Salem Taluk,
Salem District.

... Appellants/Appellants/Plaintiff

Vs.

1. K.Chinnamuthu,
2. K.Sengodan,
S/o, Late Kandasamy
Palamarathukaadu,
Kalparapatty P.O,
Salem Taluk,
Salem District.



3. Periannan,
S/o, Arumugam

4. Duraisamy,
S/o, Arumugham
both residing at
Sevampalayam Village,
Kalparapatty P.O.
Vembadithalam (Via.),
Salem Taluk,
Salem District.

5. Nalliammal
W/o, Late Mani

6. Rajendran,
S/o, Late Mani

7. Sivakumar
S/o, Late Mani

Respondents 5 to 7 residing at
Palamarathukadu,
Kalparapatty P.O
Salem Taluk,
Salem District.

... Respondents/Respondents/Defendants 1,3 to 8

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 07.03.2007 made in A.S.No.183 of 2006 on the file of the Principal Sub Court, Salem, confirming the judgment and decree dated 17.07.2006 made in O.S.No.555 of 2003 on the file of the Principal District Munsif Court, Salem.

For Appellants : Mr.T.Murugamanikam, SC
for M/s. Zeenath Begum

For Respondents : Ms.K.Janani
for M/s.M.Srividya

J U D G M E N T

Challenge in this second appeal is made to the judgment and decree dated 07.03.2007 passed in A.S.No.183 of 2006 on the file of the Principal Subordinate Court, Salem, confirming the judgment and decree dated 17.07.2006 passed in O.S.No.555 of 2003 on the file of the Principal District Munsif Court, Salem.



2. For the sake of convenience, the parties are referred to as per their rankings in the trial court. The plaintiffs in O.S.No.555 of 2003 are the appellants in this second appeal.

3. Suit for declaration and permanent injunction.

4. Briefly stated, the case of the plaintiffs is that the extent of 3.38 acres in Survey No.21/4 situated in Sevampalayam Village, Salem Taluk was originally the ancestral property of Ayyamperumal and he purchased the same under the sale deed dated 17.06.1943 and enjoying the same in his own right and he had only a son by name Ammasi Gounder. The plaintiffs 1 and 2 are the sons and the plaintiffs 3 and 4 are the daughters and the 5th plaintiff is the widow of Ammasi Gounder. Ayyamperumal, his son Ammasi Gounder and his sons, the plaintiffs 1 and 2 jointly borrowed a sum of Rs.2,000/- on 28.01.1971 from one Pappathi Ammal, W/o Kandasamy Gounder and as security, executed a simple mortgage deed in respect of the abovesaid property on 28.01.1971. The interest for the loan was Rs.1.25 /- per Rs.100/- per month. On 25.09.1972, again Ayyamperumal and the abovesaid three persons obtained the second loan of Rs.2,000/- from Pappathi Ammal and executed the second registered mortgage deed dated 25.09.1972 in respect of the abovesaid property and the possession of the abovesaid property remained with the mortgagors. The mortgagors were unable to pay the principal amount from 1971 to 1981 due to the failure of monsoon and other natural causes. However, they had paid the interest till 1981. The mortgagee Pappathi Ammal insisted the mortgagors to pay back principal amount and threatened to go to the court. Left with no other alternative to discharge the debt, the mortgagors permitted Pappathi ammal to cultivate 1.25 acres of land and to adjust the income from the land towards the discharge of the mortgage debt and Pappathi ammal was directed to pay the Kists for the said property. The abovesaid 1.25 acres is the suit property. Thus, Pappathi ammal was directed by the mortgagors to take the possession of 1.25 acres namely the suit property out of 3.38 acres covered in the mortgage deeds. The mortgagee agreed to surrender the possession of the suit property to the mortgagors when the mortgage debt is realized from the income of the suit property. Thus the possession of the suit property by the mortgagee is only permissive possession without transfer of any right, title or ownership in the suit property. Ayyamperumal died about 25 years back and his son Ammasi Gounder died about 16 years back. The plaintiffs are the legal heirs of Ammasi Gounder. The defendants 1 to 3 are the sons of Pappathi Ammal and the defendants 4 and 5 are the Pangalis of the defendants 1 to 3. Pappathi ammal died about 6 years back. From 1992 onwards, the plaintiffs demanded Pappathi ammal and her sons to surrender the possession of the suit property since the mortgage debt should



have been realized by then. But they had been evading to surrender the possession of the suit property apprising that no income was received from the suit property due to the failure of monsoon. The plaintiffs believed the abovesaid version of the defendants and waiting for them to deliver the possession of the suit property. While so, the defendants endeavored to put up the house in the suit property and on being questioned, it was noted that they had obtained patta in the name of Kandasamy qua the suit property who is the father of the defendants 1 to 3. The patta had been stealthily obtained in the name of Kandasamy. The plaintiffs filed the suit in O.S.No.423 of 2002 on the file of the District Munsif Court, Salem against the defendants 3 to 5. The reliefs sought for in the said suit were not asked for as instructed by the plaintiffs and hence the plaintiffs have been advised to file the present suit for the suit property and not for the entire extent of 3.38 acres of land. The transfer of patta in the name of Kandasamy is not binding on the plaintiffs. The plaintiffs 1 and 2 made an appeal to the Tahsildar, Salem and the Tahsildar, Salem directed them to appear before RDO Salem and the plaintiffs filed the appeal before the RDO Salem and the RDO Salem informed them that since the civil suit is pending, he cannot pass any orders. Hence the plaintiffs have been necessitated to lay the present suit for appropriate reliefs.

5. The defendants resisted the plaintiffs suit and after denying all the averments projected in the plaint, putforth the case that the plaintiffs' suit is not maintainable either in law or on facts and according to the defendants, the extent of 3.38 acres in Survey No.21/4 belong to Ayyamperumal by virtue of the sale deed dated 17.06.1943 and admitted the two mortgage deeds dated 28.01.1971 and 25.09.1972 as averred in the plaint and putforth the case that the mortgagors never paid the principal amount or interest towards the mortgages and therefore according to them, the mortgagors come forward to sell the 0.26.5 hectares of land in Survey No.21/4 in favour of Pappathiammal in 1976 in lieu of mortgage debts and in the same year, the defendants 4 and 5 purchased 0.36 cents of land by way of a oral sale from the plaintiffs 1 and 2 along with Ammasi Gounder and Ayyamperumal. Since from the abovesaid transactions, it is only the defendants who are in the occupation and enjoyment of the respective lands purchased by them peacefully and uninterruptedly in their own right and taking into consideration of their continuous possession and enjoyment, the patta was granted in favour of Kandasamy, the father of the defendants 1 to 3 qua the 0.26.05 hectares of land and the patta was granted in favour of the defendants 4 and 5 qua the extent of 0.30 cents purchased by them. At the time of granting patta, the Survey No.21/4 was subdivided. The plaintiffs endeavor to have the patta cancelled before the revenue authorities ended in



vain. The plaintiffs 1 and 2 filed the suit in O.S.No.423 of 2002 for declaration and injunction on the file of the Principal District Munsif Court, Salem and when the suit was in the trial stage, the plaintiffs preferred an application seeking permission to file a fresh suit in respect of the suit property ie., 3.38 acres in Survey No.21/4 on the same cause of action against the defendants. The abovesaid application in I.A.No.413 of 2003 was dismissed on merits on 20.06.2002. No appeal has been laid by the plaintiffs against the said order and thereafter the plaintiffs had wantonly left the abovesaid suit go for dismissal for default on 29.09.2002 and subsequently, filed the present suit along with the sisters and mother against the defendants in respect of the suit property which also forms part of the property covered in O.S.No.423 of 2002. Thus the plaintiffs are barred from filing the present suit on the doctrine of estoppel. In any event, the suit laid by the plaintiffs is barred by limitation and the description of the suit property is incorrect and misleading and prayed for the dismissal of the plaintiffs' suit.

6. In support of the plaintiffs' case, P.Ws.1 to 3 were examined. Exs.A1 to A4 were marked. On the side of the defendants, D.Ws.1 to 3 examined. Exs.B1 to B26 were marked.

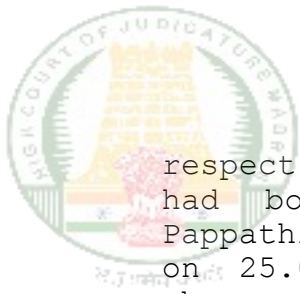
7. On an appreciation of the materials placed on record, both oral and documentary and the submissions putforth by the respective parties, the Courts below were pleased to dismiss the plaintiffs' suit. Impugning the judgment and decree of the Courts below, the present second appeal has been preferred by the plaintiffs.

8. At the time of admission of the second appeal the following substantial questions of law were formulated for consideration.

(a) Whether an oral purchase of the suit properties as pleaded by the defendants can be valid in law?

(b) Whether the grant of patta in favour of the defendants can be valid, without any anterior documents of evidencing conveyance of title in their favour?

9. From the pleas putforth by the respective parties and the submissions made, it is found that the extent of 3.38 acres in Survey No.21/4 in Sevampalayam village originally belonged to Ayyamperumal. Ayyamperumal, his son Ammasi Gounder and the plaintiffs 1 and 2, the sons of Ammasi Gounder had borrowed a sum of Rs.2.000/- from Pappathiammal, W/o, Kandasamy Gounder on 28.01.1971 and executed the registered simple mortgage deed in



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respect of the abovesaid property. Again on 25.09.1972, they had borrowed the second loan amount of Rs.2,000/- from Pappathiammal and executed the second registered mortgage deed on 25.09.1972 in respect of the abovesaid property. The abovesaid facts are not in dispute.

10. The plaintiffs are the legal representatives of Ammasi Gounder. Even as per the case of the plaintiffs, they have not discharged the mortgage debts and according to the plaintiffs as they were unable to discharge the mortgage debts, out of the mortgaged property of an extent of 3.38 acres, they would putforth the case that they had entrusted 1.25 acres to the mortgagee Pappathiammal to remain in the possession of the same and thereby permitted the mortgagee to enjoy the income from the said property in lieu of the mortgage debts. The abovesaid extent of 1.25 acres is the suit property. Thus, according to the plaintiffs, the suit property is in the enjoyment of Pappathiammal, the mortgagee, on the permission granted by the plaintiffs. Further according to the plaintiffs, as Pappathiammal would have derived the mortgage debts out of the income from the suit property, they had been requesting her to handover the possession of the suit property, however the same having not been responded, on the other hand, the defendants 1 to 3, the sons of Pappathiammal and Kandasamy claimed that they had been granted patta in respect of the suit property and on that basis endeavored to put up the construction, according to the plaintiffs, hence they had been necessitated to lay the suit against the defendants 3 to 5 in O.S.No.423 of 2002 on the file of the Principal District Munsif Court, Salem for the entire extent of 3.32 acres and subsequently they had come forward with the present suit qua the suit property against the defendants. Therefore, according to the plaintiffs, they are entitled to seek the reliefs prayed for.

11. The defendants would claim that an extent of 0.26.5 hectares of land out of the mortgaged property had been alienated orally to the mortgagee Pappathiammal in lieu of the mortgage debts and further would putforth the case that the defendants 4 and 5 had purchased 0.30 cents of land by way of an oral sale from the mortgagors and accordingly it is the case of the defendants that they are enjoying the abovesaid properties in their own right and by obtaining patta and putting up the construction and hence the plaintiffs are not entitled to claim the reliefs as prayed for. Further according to the defendants, in view of the dismissal of the suit laid by the plaintiffs in O.S.No.423 of 2002, on 29.09.2002 the present suit laid by the plaintiffs is legally barred and the plaintiffs are estopped from laying the present suit and further also would putforth the case that the reliefs sought for by the plaintiffs is barred by limitation.



12. From the materials available on record, it is found that the plaintiffs 1 and 2 had laid the suit against the defendants 3 to 5 in O.S.No.423 of 2002 on the file of the Principal District Munsif Court, Salem and it is found that the plaintiffs had also preferred an application seeking permission to withdraw the said suit and lay a fresh suit on the same cause of action. However, the abovesaid petition had come to be dismissed and against the dismissal order, the plaintiffs have not preferred any appeal or revision. On the other hand, thereafter they had left the suit in O.S.No.423 of 2002 go for dismissal for default and subsequently have laid the present suit. The abovesaid facts are not in dispute and borne by on records. In such view of the matter, according to the defendants, the present suit laid by the plaintiffs is barred under law and the plaintiffs are estopped from instituting the present suit without obtaining the permission of the Court.

13. From the materials placed on record, it is found that O.S.No.423 of 2002 had been laid for the entire mortgaged property ie., 3.32 acres. However, as above pointed out, the same had been dismissed for default on account of the non prosecution on the part of the plaintiffs 1 and 2. Admittedly, the suit property forms part of the mortgaged property. No doubt the plaintiffs 1 and 2 have laid the present suit along with the plaintiffs 3 to 5. But the plaintiffs on the whole is claiming the right over the suit property by way of inheritance from Ayyamperumal, the original owner of the suit property. Furthermore, the present suit has been laid not only against the defendants 3 to 5, but also against the defendants 1 and 2. The present suit as well as the earlier suit in O.S.No.423 of 2002 had been laid more or less on the same pleas and it is found that the plaintiffs endeavor to withdraw the earlier suit and file a fresh suit on the same cause of action had been rejected. The position being above, the present suit has been laid only with reference to the part of the property comprised in the earlier suit. Considering the position of law outlined in Order 23 Rules 3 and 4 of CPC, when the plaintiffs had not been granted the permission to withdraw the earlier suit or part of a claim and on the other hand, their petition filed for the said relief had been dismissed, in such view of the matter, as rightly concluded by the Courts below, the plaintiffs are precluded from instituting any fresh suit in respect of the same subject matter or in respect of part of the subject matter or such part of the claim. The abovesaid determination of the Courts below as one of the grounds for dismissing the plaintiffs' case do not in any manner warrant interference.

14. As above noted, the mortgages in question under Exs.A1 and A2 are not in dispute. There is no material to hold that the mortgagors have discharged the mortgage debts. There is no



material to hold that the mortgagee Pappathiammal had been entrusted the possession of the suit property only in lieu of the mortgage debts. Though the defendants would claim that they had orally purchased certain extent of the mortgaged property as put forth by them in the written statement, the plea of oral sale put forth by them, as such, cannot be legally countenanced. However, it is found that admittedly the defendants are found to be in the possession and enjoyment of the suit property one way or the other and even according to the plaintiffs, the defendants have obtained the patta in respect of the suit property and put up the construction over the same and accordingly it is seen that the plaintiffs have also come forward with the suit seeking for the delivery of the possession of the suit property. The defendants would claim to be in the possession of more extent of the mortgaged property. Be that as it may, when it is found that the mortgage debts had been incurred on 28.01.1971 and 25.09.1972 and when it is seen that the present suit had been laid by the plaintiffs on 20.08.2003, as rightly concluded by the Courts below, the present suit laid by the plaintiffs is clearly barred by law of limitation. The plaintiffs' right to redeem the suit property having been lost on account of the failure of the plaintiff to redeem the mortgage within the time limit of 30 years as provided under Rule 61(a) of the Limitation Act 1963, when only by way of the redemption of the mortgage, the mortgagors are entitled to recover the possession of the property mortgaged, therefore, it is seen that it is only the Article 61(a) of the Limitation Act 1963 which would be applicable to the case at hand. Accordingly, the plaintiffs' suit having been laid only for redeeming the mortgage or recovering the possession of the mortgage property as mentioned in Article 61(a) of the Limitation Act 1963 and when the plaintiffs' suit for the same is found to be laid beyond the time limit provided under law, obviously, as held by the Courts below, the plaintiffs' suit is barred under law. However, the counsel for the plaintiffs would contend that the mortgagee or the defendants for the matter having not laid the suit for foreclosure ie., debarring the right of the mortgagors to redeem the mortgaged property within the limited time under law, according to him, the plaintiffs' right to the suit property would not be lost and they are entitled to recover the possession of the same. However, when Exs.A1 and A2 have not been disputed by the plaintiffs and when as above pointed out, the defendants are found to be in the possession of the suit property as such and when the plaintiffs had failed to redeem the mortgage or recover the possession of the mortgaged property within the time limit allowed by law as above pointed out, merely on the footing that the mortgagee or the defendants for the matter had not laid the suit for foreclosure, on that footing that it cannot be held that the plaintiffs are entitled to maintain the suit for redemption or



for recovery of the possession of the property mortgaged. In this connection, considering the authority relied upon by the defendants' counsel reported in 2001(1) MLJ 71 [A.Murugesan Vs. Kupppammal], it is noted that considering the time limit provided under Article 61(a) and 65 of the Limitation Act and on the expiry of the period of limitation, a suit of redemption of mortgage which is virtually the suit for the possession of the property, the title of the mortgagor to the property gets extinguished. The position of law has been outlined in the abovesaid decision as follows:

"However, it is not possible to agree with Mr.N.Krishna Mitra, learned Counsel for the appellant that the right to redeem the usufructuary mortgage under Ex.A1 was available even after 1979. The learned counsel is right when he says that the dismissal of Ex.A2 suit would not be a bar for redemption of the mortgage. But then such a suit should have been filed by 1979. It is settled position of law that a suit for redemption of a usufructuary mortgage under Article 61(a) of the Limitation Act and the suit for recovery of property under Article 65 of the Limitation Act would attract Section 27 of the Limitation Act and on the expiry of the period of limitation for a suit for redemption of a mortgage which is virtually a suit for possession of property, the title of the mortgagor to the property extinguished.

15. Applying the abovesaid position of law to the case at hand, as held by the Courts below, the plaintiffs' suit is barred by limitation and the abovesaid determination of the Courts below, in my considered opinion, do not warrant any interference.

16. The substantial questions of law formulated in the second appeal are only with reference to the defence version namely the oral sale pleaded by them and the obtainment of patta secured by them in respect of the properties in their possession. As above discussed, the oral sale pleaded by the defendants cannot be countenanced in law. Equally, the case projected by the plaintiffs that the defendants are in the occupation of the suit property only on the permission granted by the plaintiffs also cannot as such be accepted sans any reliable and convincing material pointing to the same. On the other hand, it is seen that it is only the defendants who had been in the possession and enjoyment of the suit property ie., the property in their possession as claimed by them. Admittedly, the defendants have been granted the patta in respect of the property in their possession. The endeavor of



the plaintiffs to cancel the patta had ended in vain. The plaintiffs have lost their right to recover the possession of the suit property as above pointed out. ie., on the point of limitation. The plaintiffs have miserably failed to establish that the mortgage debts covered under Exs.A1 and A2 had been discharged till date. In addition to that, as above pointed out, the plaintiffs are estopped from instituting the present suit in view of the dismissal of their earlier suit filed by them in O.S.No.423 of 2002 for default. All put together, in my considered opinion, the substantial questions of law formulated in the second appeal are only touching upon the defence version and when the the plaintiffs have failed to establish that they are entitled to maintain the present suit and not estopped from laying the present suit , despite the dismissal of the earlier suit in O.S.No.423 of 2002 and when it is seen that the plaintiffs' suit is clearly barred by limitation accordingly, the substantial questions of law raised by the plaintiffs in the second appeal are answered by holding that the oral sale putforth by the defendants cannot be legally sustained as such and the patta document projected by the defendants cannot be held as the documents of title.

17. In any event, for the reasons aforementioned, considering the judgment and decree of the Courts below, they have properly appreciated the oral and documentary evidence adduced in the matter correctly both on factual matrix and on the question of law and the reasonings and conclusions of the Courts below are found to be cogent, convincing and acceptable as far as the non-maintainability of the plaintiffs' present suit on the ground of estoppel as well as the on the point of limitation and accordingly I do not find any valid reason to interfere with the same.

18. In conclusion, the judgment and decree dated 07.03.2007 passed in A.S.No.183 of 2006 on the file of the Principal Subordinate Court, Salem, confirming the judgment and decree dated 17.07.2006 passed in O.S.No.555 of 2003 on the file of the Principal District Munsif Court, Salem are confirmed. Resultantly, the second appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

mfa



To

1. The Principal Subordinate Judge,
Principal Subordinate Court,
Salem,
2. The Principal District Munsif,
Principal District Munsif Court,
Salem.

Copy to

The Section Officer,
VR Section,
High Court.

+1cc to M/s.Zeenath Begam, Advocate, S.R.No.8439
+1cc to M/s.Srividhya, Advocate, S.R.No.8657

S.A.No.656 of 2008 and
M.P.No.1 of 2008

NRL (CO)
HS (06/09/2021)