



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE **G.R. SWAMINATHAN**

S.A.(MD)No.59 of 2010

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Muthulekshmi (Died)

1.Rajendran

2.Sundar raj

3.Leela Bai

4.Manoharan

5.Sundara Bai

... Appellants / Appellants 2 to 6 /
Plaintiffs 3 to 7

-Vs-

1.Thankian (Died)

2.Sarojam

3.Vijayakumari

4.Vijayarani

5.Ramachandran

6.Rajendran @ Raju

(R2 to R6 are brought on record

as Lrs of R1 vide order dated 21.04.2016)

... Respondents / Respondents /
Defendants 1 & 3 to 7

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree in A.S.No.77 of 2006, dated 31.03.2009 by the Sub Court, Kuzhithurai confirming the judgment and decree passed in O.S.No.286 of 1998, dated 08.12.2004 by the second Additional District Munsif Court, Kuzhithurai.

For Appellant	: Mr.S.C.Herold Singh
For R1	: Died
For R2 to R6	: Mr.K.P.Narayana Kumar

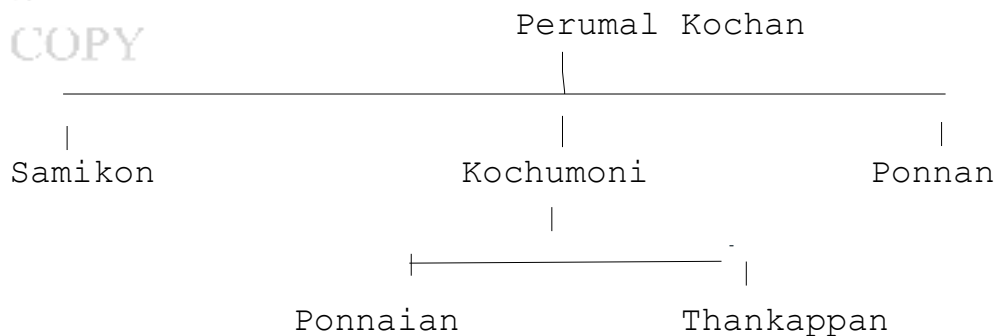
JUDGMENT

The plaintiffs in O.S.No.286 of 1998 on the file of the second Additional District Munsif Court, Kuzhithurai are the appellants in this second appeal. The suit was filed seeking the relief of partition as well as redemption. The suit was instituted by one



Ramakrishnan Nadar. During the pendency of the suit, he passed away and the appellants herein came on record as his legal representatives. To understand the facts of the case better, the following genealogy is relevant:-

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2. The suit property was part of a larger extent of property measuring one acre and 20 cents. It belonged to Perumal Kochan. His grand son Ponnaian filed O.S.No.1153 of 1969 on the file of the District Munsif Court, Kuzhithurai seeking the relief of partition. Ramakrishnan / original appellant figured as 5th defendant in the suit. During the pendency of the suit, Ramakrishnan sold 10 cents of land by way of two sale deeds in favour of the first defendant namely Thankian, though the defendants would claim that Ramakrishnan executed two sale deeds of mortgage in favour of Chellamma w/o Thankian.

3. The case of the plaintiff is that he executed only one mortgage. The fact remains that the deed of mortgage covered 14 cents of land. Though the defendant would claim that Ramakrishnan received Rs.2,200/- as mortgage money, Ramakrishnan would claim that he received only Rs.1,000/- as mortgage money. Be that as it may, the factum of mortgage is not in dispute. Though Ramakrishnan anticipated that he would be allotted 14 cents of land in the partition suit, he was eventually allotted little over 18 cents of land. Actually 18 cents of land was not available on ground; what was available was only 14.64 cents of land. The case of Ramkrishnan is that since he had sold only 10 cents of land in favour of Thankian, he is entitled to redeem the remaining 4.64 cents of land. With these averments, O.S.No.286 of 1998 was filed. The suit claim was strongly contested by the defendants.

4. The stand of the defendants was that in the final decree proceedings, Ramakrishnan filed an affidavit, in which, he agreed that the suit item 7 and suit item 13 can be allotted to Thankian. Ramakrishnan was content to retain item 3 which measures a little over half cent of land. Therefore, the present suit is clearly not maintainable. Based on the divergent pleadings, the trial Court framed the following issues:-

"1. Whether the plaintiff entitled to get decree and Judgment for partition as he prayed for ?



2. Whether the plaintiff entitled to get decree for redemption as he prayed for?
3. Whether the defendant is having mortgage right over the suit property which the plaintiff want to redeem ?
4. Is the suit not maintainable ?
5. Whether the description of property is not correct ?
6. Whether the plaintiff entitled to get suit relief from the defendant ?"

5. On behalf of the plaintiffs, the third plaintiff Rajan examined himself as P.W.1 and marked Ex.A1 to Ex.A4. The 7th defendant Rajendran examined himself as D.W.1 and marked Ex.B1 to Ex.B24. After considering the evidence on record, the learned trial munsif, by judgment and decree dated 08.12.2004 dismissed the suit. Aggrieved by the same, the plaintiffs filed A.S.No.77 of 2006 before the Sub Court, Kuzhithurai. By the impugned judgment and decree dated 31.03.2009, the appeal was dismissed. Challenging the same, the second appeal came to be filed. The second appeal was admitted on the following substantial question of law:-

"1. Whether the right of redemption on the part of Ramakrishnan Nadar, the propositus of the plaintiffs got extinguished by virtue of Ex.B12-the copy of the affidavit filed by Ramakrishnan in E.P.No.340 of 1977 in O.S.No.1153 of 1969 and consequent delivery of the item Nos. 7 and 13 referred to in the decree in O.S.No.1153 of 1969?

2. Whether there is any perversity or illegality in the judgment and decrees of both the Courts below? "

6. The learned counsel appearing for the appellants submitted that it is beyond dispute that by way of two sale deeds namely Ex.B1 dated 14.06.1968 and Ex.B3 dated 16.11.1968, Ramakrishnan Nadar has sold only 10 cents of land in favour of Thankayyan Nadar. It cannot be the case of the defendants that Ex.B1 and Ex.B3 conveyed more than 10 cents of land. As on date, as per the final decree passed in O.S.No.1153 of 1969, Ramakrishnan was allotted 14.64 cents of land. Therefore, anything that is presently in the possession of the defendants over and above 10 cents of land can only be said to be a mortgaged property. "Once a mortgage is always a mortgage" is a well settled principle. The defendants cannot obviously plead limitation as defence. Therefore, the plaintiffs are entitled to redeem whatever is in excess of 10 cents of land.

7. The learned counsel would submit that as per the Transfer of Property Act, property can be conveyed either by sale or by relinquishment but only in the mode prescribed by law. The defendants cannot take advantage of any affidavit filed by the original plaintiff in the final decree proceedings. He called upon this Court to answer both the substantial questions of law in favour

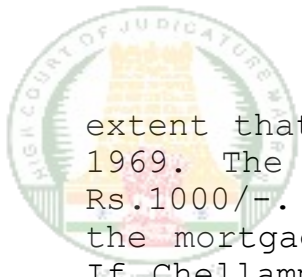


of the appellants and set aside the impugned judgment and decree and decree the suit as prayed for.

8. Per contra, the learned counsel appearing for the respondents submitted that the impugned judgment and decree does not call for any interference.

9. I carefully considered the rival contentions and went through the evidence on record. No doubt, the original plaintiff had sold only 10 cents of land in favour of Thankian vide Ex.B1 and Ex.B3. It is equally true that the original plaintiff Ramakrishnan eventually got 14.64 cents in the final decree proceedings in O.S.No.1153 of 1969 on the file of the District Munsif Court, Kuzhithurai. But the question is whether the present suit for partition and redemption is maintainable. Though the appellant's counsel had built up a formidable case, I am afraid that I cannot accept the same and allow this appeal. As rightly pointed out by the learned counsel appearing for the respondents, what is now sought to be redeemed were items that were specifically allotted to Thankian in the final decree proceedings. The affidavit filed by Ramakrishnan on 22.07.1967 in the final decree proceedings in O.S.No.1153 of 1969 on the file of the District Munsif Court, Kuzhithurai has been placed before me. Ramakrishnan had in clear and categorical terms stated that items 7 and 13 can be allotted to the 13th defendant namely Thankian. After purchase under Ex.B1 and Ex.B3, Thankian was also impleaded as 13th defendant in the final decree proceedings. Since Ramakrishnan had categorically stated that these two items can be allotted to 13th respondent, delivery was also accordingly effected under Ex.B13. The defendants have been in possession and enjoyment of the property which were handed over to them under delivery receipt Ex.B13. That is duly evidenced by Ex.B14 to Ex.B24 also. Ramakrishnan was content to retain the third item alone. The third item measures half cent of land. When based on the effective statement made by Ramakrishnan in the form of solemn affidavit the Court had allotted the properties in the final decree, the same cannot be one again re-agitated. Matters that have been finally adjudicated cannot be unsettled. The present proceedings clearly suffer from the vice of re-litigation.

10. The learned counsel appearing for the appellants would construe the aforesaid affidavit as saying that Ramakrishnan only consented for allotment of what was sold by him in favour of Thankian vide Ex.B1 and Ex.B3. I do not agree. Of-course, in the affidavit, the sale deeds executed by him are referred to. The net result of the said affidavit is that these two items namely Item 7 and Item 13 were to be allotted to Thankian / 13th respondent. Having done so, the plaintiffs cannot wriggle out the consequences flowing therefrom. The final decree proceedings stand on different footing altogether. It is beyond dispute that though Ramakrishnan eventually got only 14.64 cents, he had executed the mortgage for an



extent that was beyond his entitlement. We are talking of the year 1969. The mortgage money received by Ramakrishnan was admittedly Rs.1000/-. Of-course, the defendant would claim that Rs.2,200/- was the mortgage money. We need not enter into the said controversy. If Chellamma had enforced the said mortgage, she would have got 14 cents. Therefore, this equitable aspect should also be borne in mind. That is why, Ramakrishnan agreed that item 7 and item 13 in the suit schedule can go to Thankiann and fairly made such concession in the form of an affidavit. Ramakrishnan became greedy 21 years later. That is the reason for filing the present suit. The Courts below have correctly non-suited the plaintiffs. The impugned judgment and decree do not warrant interference. The substantial questions of law are answered against the appellant. The second appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To

- 1.The Sub Court, Kuzhithurai .
- 2.The second Additional District Munsif Court,
Kuzhithurai.
- 3.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.S.C.HEROLD SINGH, Advocate (SR-22974[F] dated 16/07/2021)

+1 CC to M/s.K.P.NARAYANAKUMAR, Advocate (SR-22978[F] dated 16/07/2021)

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