



1

S.A.(MD)No.29 OF 2010

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

**RESERVED ON : 27.04.2022**

**PRONOUNCED ON : 06.06.2022**

**CORAM**

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

**S.A.(MD)No.29 of 2010**

**and**

**M.P.(MD)No.1 of 2010**

**&**

**C.M.P.(MD)No.794 of 2017**

1. Mariakkan Nadachi

2. Thangabai

3. Kamalam

4. Glory Bai

... Appellants / Respondents 1 to 4 /  
Plaintiffs

Vs.

1. Paulraj

2. Johnrose

3. Lazar

4. Thanganaadan

... Respondents 1 to 4 / Appellants /  
Defendants 1 to 4

5. Sathiyanesan

6. Aamose

... Respondents 5 & 6 /  
Respondents 5 & 6 /  
Defendants 5 & 6



**Prayer:** Second appeal filed under Section 100 of C.P.C., against the Judgment and Decree dated 03.07.2009 passed in A.S.No.34 of 2005 on the file of the Subordinate Judge, Kuzhithurai (Camp Court), reversing the Judgment and Decree dated 24.03.2005 passed in O.S.No.422 of 2000 on the file of I Additional District Munsif Court, Kuzhithurai.

For Appellants : Ms.J.Anandavalli

For R-1 to R-4 : Mr.Mr.K.N.Thambi

For R-5 : No appearance.

.....

### **JUDGMENT**

The plaintiffs in O.S No.422 of 2000 on the file of the First Additional District Munsif Court, Kuzhithurai are the appellants in this second appeal. The suit was filed seeking declaration that the plaint schedule property belongs to the plaintiffs and for consequential injunction restraining the defendants 1 to 4 from interfering with their right and peaceful possession over the suit property.

2.The suit property is comprised in Re-Survey No.47/7 corresponding to Old Survey No.1428 in Kizhiyur Village,



Vilavancode Taluk, Kanyakumari District. The suit property measures 62 cents. The case of the plaintiffs is that the suit property originally belonged to one Gurupatham Nadar. He had two sons, namely, Samuel and Yovan. Following the demise of Gurupatham, the suit property devolved equally in favour of his two sons. The plaintiffs and the defendants 5 and 6 belong to Yovan branch while the defendants 1 to 4 belong to Samuel branch. The plaintiffs claim that following oral partition, northern portion was enjoyed by Yovan while southern side was enjoyed by Samuel. After the death of Samuel, his wife Backiyamuthu Nadathi executed Ex.A1 mortgage on her behalf and on behalf of her minor children, namely, Solomon and Harris on 28/12/1104 M.E in favour of Aaron Nadar who was the son of Yovan for valuable consideration. The defendants 1 to 3 are the children of Solomon and the fourth defendant is the son of Harris. After Aaron passed away, it devolved on his wife and children. While the first plaintiff is the wife of Aaron, the plaintiffs 2 to 4 and D5 and D6 are the children of Aaron. Since D5 and D6 were not sailing with the plaintiffs, they were also shown as defendants.



3.The stand of the plaintiffs is that they have title over the northern half of the suit property in their own capacity and that they have become title holders in respect of the southern half too on account of the mortgage deed executed in favour of Aaron Nadar, son of Yovan as it has become time barred.

4.The defendants 1 to 4 contested the claim of the plaintiffs. They filed written statement raising many contentions. They impeached Ex.A1 mortgage deed as fraudulent. In the same breadth, they also claimed that Ex.A1 was not acted upon. They also pleaded adverse possession. Based on the divergent pleadings, the trial court framed as many as five issues. The second plaintiff examined herself as PW.1 and marked Exs.A1 to A9. The defendants 1 to 3 examined themselves as witnesses . Exs.B1 to B17 were marked. An Advocate Commissioner was appointed and his report and plan were marked as Exs.C1 and C2. The trial Court considered the evidence on record and also the pleadings of the plaintiffs. It was noted that the plaintiffs had conceded the existence of two houses belonging to the contesting defendants. The plaintiffs also conceded that the defendants 1 to 4 are residing in those houses. While the



defendants 1 to 3 are residing in one house, the fourth defendant is residing in the other house. The plaintiffs had made it clear that they are seeking relief after excluding the said two houses. Recording the same, decree was granted in favour of the plaintiffs as prayed for after excluding the said two houses lying on the southern side of the property. Questioning the said judgment and decree dated 24.03.2005, defendants 1 to 4 filed A.S No.34 of 2005 before the Sub Court, Kuzhithurai. By the impugned judgment and decree dated 03.07.2009, the decision of the trial court was reversed and the appeal was allowed and the suit came to be dismissed. Challenging the same, this second appeal was filed. The second appeal was admitted on the following substantial question of law :

“Whether the first appellate court acted perversely by interfering with the finding of the trial court in favour of the plaintiffs as regards Ex.A1 mortgage deed and Ex.A4 patta?”

5.Heard the learned counsel on either side.

6.The learned counsel appearing for the appellant strenuously reiterated all the contentions set out in the memorandum of grounds. She also filed written arguments. She



called upon this Court to answer the substantial question of law in favour of the appellant and set aside the impugned judgment and decree and restore the decision of the trial court. She relied on the following case-laws :

1.Singh Ram (D) Thr.L.Rs v. Sheo Ram & ors  
(2014) 9 SCC 185 and

2.Murugan & ors v. Kesava Gounder (dead)  
Thr.Lrs. and ors (Civil Appeal No.1782 of 2019, dated  
25.02.2019).

7.Per contra, the learned counsel for the contesting respondents submitted that the impugned judgment and decree do not warrant any interference. His core argument was that Backiyamuthu Nadathi was incompetent to execute Ex.A1. He also submitted that there is nothing on record to show that the entire suit property was partitioned between the two sons of Gurupatham Nadar. If really possession of the southern half had been handed over to Aaron, then, the plaintiffs are obliged to explain as to how the two houses of the contesting defendants came to be put up. The plaintiffs cannot give an easy explanation that by the plaintiffs permitted those houses to be constructed. He would also argue that there is no bar or limitation to redeem an usufructuary mortgage. He relied on the following case laws :



1.Achaldas Durgaji Oswal (dead) through Lrs v. Ramvilas Gangabisan Heda (dead) through Lrs (2003) 3 SCC 614.

2.Venkatesa Mudaliar and ors v. N.Krishnaswami Mudalliar Trust (1991) 1 MLJ 592

3.Thankamma and four ors v. Santhakumari (1997-3-L.W-67) and a decision of the Madras High Court in SA No.1318 of 2003 dated 26.10.2018).

8.I carefully considered the rival contentions and went through the evidence on record. The suit property measures a total extent of 62 cents and is comprised in Old Survey No.1428 corresponding to Re-survey No.47/7. It belonged to Gurupatham Nadar. Following his demise, it devolved on his two sons, Samuel and Yovan. Even though there is no formal document to show that there was a partition between Samuel and Yovan, as rightly found by the trial court, the northern half was enjoyed by Yovan while the southern half was enjoyed by Samuel. The trial court after a careful consideration of the evidence on record, particularly, Ex.A1 and pattas marked on the side of the plaintiffs, found that the subject matter of Ex.A1 is the southern half. The first appellate court has not given any convincing reason for interfering with the said finding. The first appellate court did not



come to grips with the reasoning of the trial court. I, therefore, have no hesitation to hold that Yovan branch has been in possession and enjoyment of the northern half measuring 31 cents and have title over the same by way of inheritance and that the dispute pertains only to the southern half. On a proper construction of Ex.A1, one can come to a definite conclusion that as regards the subject matter of Ex.A1, it pertains only to southern half measuring the remaining 31 cents. I restore the findings of the trial court and set aside the finding of the first appellate court in this regard.

9.I arrive at such a finding for more reasons than one. The house put up by the Yovan branch is on the northern side while both the houses put up by Samuel branch are on the southern side. The plaintiffs have marked Ex.A4 patta which relates to the entire suit property. On the other hand, patta marked by the contesting defendants is having corrections and inter-lineations and therefore, the trial court rightly rejected the same. These considerations impel me to conclude that Samuel branch was entitled only to the southern half and that this was the subject matter of Ex.A1. It is beyond dispute that the parties



are Christians. Following the demise of Samuel,  $1/3^{\text{rd}}$  of his estate devolved on his wife Backiyamuthu Nadathi while the remaining  $2/3^{\text{rd}}$  on his children. There is a reference to another son but he had already attained majority. Be that as it may, the right of Backiyamuthu Nadathi over  $1/3^{\text{rd}}$  of southern half is beyond dispute. Backiyamuthu Nadathi claimed that she was the guardian of the minor children. That alone would not have enabled her to execute Ex.A1 mortgaging the entire 31 cents in favour of Aaron Nadar. Backiyamuthu Nadathi had title only over  $1/3^{\text{rd}}$  and therefore, Ex.A1 can be valid only to the extent of  $10-1/3^{\text{rd}}$  cents of land in the southern half of the suit property. It is true that the patta marked by the plaintiffs covers the entire suit property in R.S No.47/7, but I am not impressed by the same for the simple reason that the plaintiffs themselves have conceded the existence of two houses on the southern side belonging to defendants 1 to 4.

10.I carefully went through the Advocate Commissioner's report and plan. While one house belongs to D1 to D3 and the other house belongs to D4. The two houses have not been contiguously put up. While the house of D1 to D3 is on the



eastern side, the house of the fourth defendant is on the western side. If in Ex.A4, these two houses had been excluded, then, Ex.A4 would have commanded greater confidence. While the plaintiffs and D5 and D6 have absolute right over the northern half, they have to necessarily seek partition of 10-1/3<sup>rd</sup> cents of land in the southern side.

11.Of course, I have to deal with the contention of the learned counsel appearing for the contesting respondents that Ex.A1 mortgage even if it is assumed to be valid can be redeemed at any point of time. I am not persuaded by the said submission for more reasons than one. The case-laws relied on by the learned counsel for the contesting respondents are anchored on Article 61 of the Schedule appended to the Limitation Act, 1963. Ex.A1 was executed in the year 1929. It is well settled that once limitation starts running, it cannot be arrested. The case on hand will have to be decided only with reference to the earlier Limitation Act. That apart, Ex.A1 has been described as Othi. The parties hail from Kanyakumari District which was part of the erstwhile Travancore region. In the said region, the expression “Othi” had a particular connotation.



12.The Hon'ble Kerala High Court in the decision reported in **AIR 1973 Kerala 270 (Mathew Mathew vs. Alexander Muthalali)** held that othi is an anomalous possessory mortgage and that the mortgagor is personally liable for the mortgage amount. While usufructuary mortgage does not impose personal liability on the mortgagor, a person who borrows money on othi is personally liable for the amount as in the case of hypothecation bond. In other words, all the elements of hypothecation bond are present in an othi transaction and in addition possession of property secured is given to the mortgagee, so that he may take the profit in lieu of interest. The term "othi" if it occurs in the document implies then it was a mortgage to which all the incidents of othi would have applied and no special covenant for repayment by the mortgagor is necessary.

13.Thus, a person executing a Othi also had a personal liability to clear the mortgage. Therefore, limitation would obviously start running either from the date prescribed for redemption and if no specific date has been described, it would start from the date of mortgage itself. Othi cannot be equated to



usufructuary mortgage. It is an anomalous mortgage as described in the aforesaid case. I have no hesitation to come to the conclusion that Ex.A1 had become time barred. The plaintiffs have marked the original mortgage deed. It is an ancient document. Therefore, the presumption available under Section 90 of the Indian Evidence Act will apply with full force. It is also a registered document. The trial court rightly came to the conclusion that the plaintiffs proved the due execution of mortgage. I restore the finding of the trial court as regards proof of due execution of Ex.A1. The substantial question of law is answered accordingly.

14.From the foregoing discussion, the following conclusions emerge :

a) Yovan branch have title and possession over the northern portion measuring 31 cents of land in the suit property by virtue of inheritance.

b) Samuel branch was enjoying the southern portion measuring 31 cents of land in the suit property.



WEB COPY



c) By executing Ex.A1 dated 28/12/1104(ME), the southern half was mortgaged in favour of Aaron Nadar S/o.Yovan.

d) Ex.A1 has become time-barred and it had not been redeemed either by the mortgagors or by their legal heirs. However, Ex.A1 is valid only to the extent of  $1/3^{\text{rd}}$  share of Backiyamuthu Nadathi in the southern half i.e.,  $10 \frac{1}{3}^{\text{rd}}$  cents out of 31 cents.

e) Though the expression “Othi” would mean that possession was handed over, the plaintiffs have not been able to explain as to how the two houses belonging to the defendants came to be put up. Since Ex.A4 patta was marked on the side of the plaintiffs, I come to the conclusion that the present position is that Aaron Nadar branch is in joint possession and enjoyment of the southern half measuring 31 cents. Aaron Nadar branch is entitled to seek partition and separate possession of their  $10 \frac{1}{3}^{\text{rd}}$  of cents in the southern half.



f) The transaction is almost a century old.

WEB COPY

The parties have already witnessed two rounds of litigation. Since the right of Aaron branch over 10 1/3<sup>rd</sup> cents of has already been declared in these proceedings, the plaintiffs are entitled to file a petition for passing final decree on this basis. As and when such a petition is filed, the same shall be disposed of within a period of one year thereafter.

15.The impugned judgment and decree of the first appellate court are modified and the second appeal is partly allowed on the above terms. Connected miscellaneous petitions are closed. No costs.

**06.06.2022**

Index : Yes / No

Internet : Yes/ No

SKM

**Note:** In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.



WEB COPY



15

S.A.(MD)No.29 OF 2010

**To:**

1. The Subordinate Judge,  
(Camp Court)Kuzhithurai.
2. The I Additional District Munsif,  
Kuzhithurai.
3. The Record Keeper, V.R.Section,  
Madurai Bench of Madras High Court,  
Madurai.



WEB COPY



16

S.A.(MD)No.29 OF 2010

**G.R.SWAMINATHAN, J.**

SKM

**S.A.(MD)No.29 of 2010**

**06.06.2022**



WEB COPY



17

S.A.(MD)No.29 OF 2010