



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 15.03.2022
Delivered On : 28.03.2022

CORAM

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THE HONOURABLE MRS. JUSTICE R. THARANI

S.A.(MD)No.518 of 2015

1.Shanthi
2.Alexander

.. Appellants / Respondents /Defendants

Vs.

Vasudevan Pillai

.. Respondent /Appellant/ Plaintiff

Prayer : This Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree, dated 19.12.2014, made in A.S.No. 64 of 2012, on the file of the Camp Court, Kuzhithurai (II Additional Sub Judge, Nagercoil), reversing the judgment and decree, dated 25.07.2012, made in O.S.No.214 of 2007, on the file of the I Additional District Munsif, Kuzhithurai.

For Appellants : Ms.J.Anandhavalli
For Respondent : Mr.G.Ramathan
for K.Sree Kumaran Nair

JUDGMENT

This second appeal has been filed against the judgment and decree, dated 19.12.2014, made in A.S.No. 64 of 2012, on the file of the Camp Court, Kuzhithurai (II Additional Sub Judge, Nagercoil), reversing the judgment and decree, dated 25.07.2012, made in O.S.No.214 of 2007, on the file of the I Additional District Munsif, Kuzhithurai. The appellants herein are the defendants and the respondent herein is the plaintiff in the original suit.

2. Brief substance of the plaint, in O.S.No.214 of 2007, is as follows:

The suit property originally belonged to a lady, named Snegapoo. The said Snegapoo executed a mortgage deed in favour of her daughter Gnanal and her son-in-law-Samuel. On 03.10.1961, Gnanal and Samuel assigned the mortgage in favour of Chellakan, D/o. Chinnappan. On 27.02.1964, Chellakan executed a mortgage sale deed in favour of the plaintiff. The plaintiff is in enjoyment of the property. On 05.06.1969, Snegapoo executed a settlement deed in favour of her daughters, viz., Annal and Gnanal. In that settlement deed, she has mentioned about the earlier mortgage. Annal and



Gnanal and Samuel were all dead. They have not redeemed the mortgage. The plaintiff obtained the title and he is in possession of the property. The defendants try to trespass into the property and hence, the suit.

3. Brief substance of the written statement filed by the defendants in O.S.No.214 of 2007, is as follows:-

It is true that the property belonged to one Snegapoo and she executed a mortgage in favour of her daughter Gnanal and her husband Samuvel. But it is wrong to state that the lease was assigned to Chellakan, on 03.10.1961. The alleged assignment of mortgage was never in force, even before the alleged mortgage, on 06.06.1119 Malayala Varudam, Gnanal and Samuvel executed a lease deed in favour of Backiyam D/o. Isakki, on 22.12.1956. Gnanal and Samuvel executed another lease deed in favour of Selvamani Nadar. The lease deed, dated 03.10.1961, was subsequent to the earlier release deeds. But, none of the mortgagees were given actual possession of the property. Gnanal and Samuvel were running a chit fund. They used to execute lease deeds in favour of their customers as a security. But the property was in possession and enjoyment of Gnanal and Annal. They were having the absolute title and possession and they constructed a compound wall and they planted rubber and coconut trees. When the lessor herself was not having any possession, the plaintiff can not claim possession. The property is mentioned as 10 cents in the documents. The actual extend available on ground is only 8 cents. After the death of Samuvel and Gnanal, the Legal representatives of Samuvel and Gnanal on due consideration executed a sale deed on 05.04.1991 in favour of the defendants. The defendants are having title and enjoyment in the property. The property is already in the enjoyment of the defendants and hence, there is no necessity for the defendants to trespass into the property.

4. On the above said pleadings, the trial Court framed the following issues:-

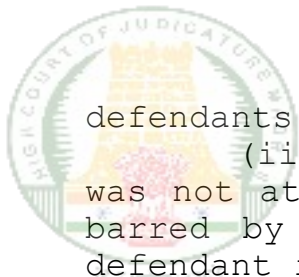
- (i) Whether the plaintiff is entitled for a declaration of title and for permanent injunction?
- (ii) What are the other reliefs available to the plaintiff?

5. On the side of the plaintiff, two witnesses were examined and 17 documents were marked. On the side of the defendants, 2 witnesses were examined and 21 documents were marked. One court witness was examined and 2 court documents were marked. After considering the pleadings and evidence, the trial Court dismissed the suit.

6. Against the judgment and decree, the plaintiff preferred an appeal in A.S.No.64 of 2012 on the file of the Camp Court, Kuzhithurai, on the following grounds:-

(i) The trial Court failed to consider the evidence in the proper prospective.

(ii) The trial Court failed to consider the documents filed by the plaintiff. The possession was not handed over to the



defendants. The defendants cannot depose against Ex.A1.

(iii) The trial Court failed to consider that the mortgage was not at all redeemed. The right for redemption of mortgage was barred by limitation and hence, the sale deed in favour of the defendant is not valid.

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7. On the above grounds of appeal, the First Appellate Court framed the following issues:-

"(i) Whether the plaintiff is entitled for the relief sought for by him?

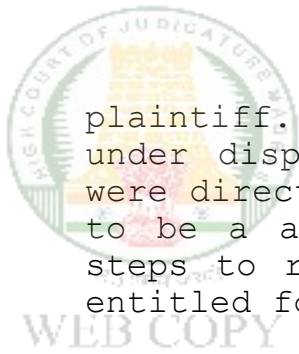
(ii) Whether the judgment and decree, dated 25.07.2012 in O.S.No.214 of 2007 on the file of the I Additional District Munsif, Kuzhithurai, is to be set aside and that the appeal is to be allowed?

8. After hearing both sides, the first appellate Court has allowed the appeal in A.S.No.64 of 2012 and set aside the decree and judgment of the trial Court. Against which, the defendants/appellants herein have come forward with this Second Appeal, on the following grounds:-

8.1. The first appellate Court is erred in reversing the well considered judgment and decree of the trial Court. The first appellate Court has failed to consider that the alleged deed of assignment of mortgage is against the right of the persons, who are the purchasers from the original owners. The first appellate Court has failed to consider that none of the mortgagees got possession of the property and the plaintiff, who is an assignee mortgagee cannot claim the possession of the property.

8.2. The first appellate Court has failed to consider that the theory of "possession follows title" is applicable only to the defendants and not to the plaintiff. The first appellate Court has failed to consider that there was no explanation from the plaintiff, how the cemetery of the appellants ancestor had come into existence in the suit property. The first appellate Court is erroneous in considering that the suit property is a vacant land. The claim of the plaintiff is based on the deed of assignment of a mortgage. The plaintiff cannot claim a better title than that of the mortgagee and particularly against a person, who claim title based on a sale deed. The first appellate Court failed to consider that the defendants are in possession from the year 1991 and the sale deed was not challenged by the plaintiff.

8.3. Ex.A7 to Ex.A10 are subsequent to the suit and they cannot be taken into consideration. The first appellate Court has failed to consider that though Gnanal and Samuel executed several mortgage deeds, possession was not given to the mortgagees and that the plaintiff did not get any possession under the alleged deed of assignment, dated in the year 1964. The first appellate Court has failed to consider Ex.B9 to B16, which establish the possession of the defendants. The defendants put up houses and are residing in the property. The existence of the house was not disputed by the



plaintiff. The right of plaintiff as assignee mortgagee itself is under dispute. Even in the deed of settlement, Annal and Gnanal were directed to redeem the mortgage. The plaintiff, who is alleged to be a assignee mortgagee from the year 1964, did not take any steps to redeem the other mortgages within 30 years and he is not entitled for a declaration of title.

9. This Court, by its order, dated 10.09.2015, has admitted the second appeal on the following substantial question of law:-

"(A) Whether the application of Section 78 of Transfer of Property Act by the Lower Appellate Court to the present suit is sustainable in law?

(B) Is not the Lower Appellate Court committed an illegality in granting a decree in favour of the respondent/plaintiff when the suit itself is not maintainable?

(C) Having found that the respondent/plaintiff is not in possession of the suit property, whether the decree for permanent injunction is sustainable in law?

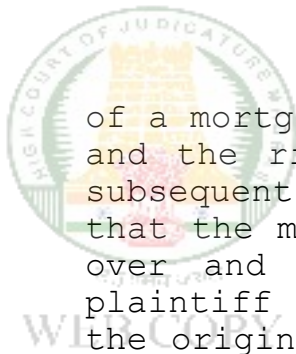
(D) Whether the judgment and decree of the Lower Appellate Court is sustainable in law applying the principles of possession follows title ignoring Exs.B.9 to B.21 and when there is no title deed in favour of the respondent/plaintiff?"

Issue No. A :-

10. On the side of the appellants / defendants, it is stated that the appellants are purchasers from Gnanal and her LRs. They purchased the property on 05.04.1991, through Ex.B18. The suit was filed after 16 years from the date of sale. But, the plaintiff failed to question the sale deed and that there was no prayer for declaring the sale deed as null and void.

11. On the side of the appellants / defendants, it is stated that the plaintiff claim assignment of mortgage through a document dated 1964. The plaintiff filed only a tax receipt of the year 2007. Annal failed to redeem the mortgage with Gnanal and her husband and hence, the said Gnanal become the absolute owner of the property. The Prior mortgagor was not impleaded as a party to the suit. The LRs of the prior mortgagor were not impleaded as parties. LRs of Gnanal and Annal and their LRs, who are all the original title holders, were not impleaded as parties. The settlement deed was executed in the year 1959, prior to the alleged assignment of mortgage in favour of the plaintiff. Even in Ex.A5 and Ex.A11, there was no reference to the other mortgagees or the possession of the plaintiff.

12. On the side of the respondent / plaintiff, it is stated that under Section 78 of the transfer of property Act, "the assignee



of a mortgage is entitled for the security of the mortgaged property and the right of the private mortgagee shall be postponed to the subsequent mortgagee". On the side of the respondent, it is stated that the mortgage was not redeemed and the period of limitation was over and that the title of the mortgagee is confirmed. The plaintiff as the assignee mortgagee is entitled for the rights of the original mortgagee and since the mortgage was not redeemed, the plaintiff is entitled to a declaration of title.

13. The plaintiff claimed the property through an assignment of mortgage. It is seen that land in Re-survey No.355/17, with an extend of 19 cents belonged to Snegapoo, D/o. Marimuthu. Snegapoo has executed a settlement deed in favour of her daughter Annal and Gnanal, bequeathing 5 cents each, with a condition that Gnanal has to redeem the mortgage in favour of Gnanal and her husband Samuel and Annal has to redeem the mortgage with Pethuru and his wife. The claim of the plaintiff is that on 20.10.1961, Gnanal and her husband Samuel assigned the mortgage in favour of one Chellakan. When Gnanal is entitled only for 5 cents of land, she could not have executed an assignment of mortgage for an extent of 10 cents.

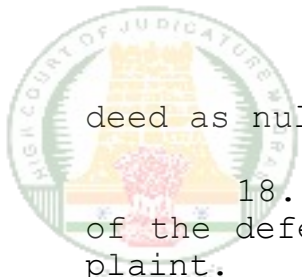
14. On 14.08.1970, Annal and her LRs sold 5 cents of land through Ex.A14 and Ex.A15. On 10.11.1972 Gnanal and her LRs sold 2 cents of land through Ex.A16 and Ex.A17. This documents were not questioned by the plaintiff. Before the statutory period of redemption of mortgage, the said Chellakan has executed lease sale deeds in Ex.A5 and Ex.A11 in favour of the plaintiff. If Ex.A5 and Ex.A11 are genuine, there is no possibility of executing Ex.A14 and Ex.A16.

15. The claim of the appellants / defendants is that Gnanal and Samuel were doing chit business and they used to execute nominal mortgage deeds as security. To substantiate this claim, Ex.B1 to Ex.B8 were marked. It is stated that possession was not handed over on the basis of this mortgages. All these documents are prior to the alleged mortgage in favour of Chellakan. It is seen that those prior mortgages were not redeemed and there is no evidence as to the handing over of possession. From Ex.B1 to Ex.B8, it is clear that Gnanal and Samuel used to execute nominal mortgage deeds as a security. When earlier mortgagee was not having possession, the subsequent assignee of the mortgage cannot get possession. The plaintiff cannot claim better title than that of his predecessor.

16. In the above circumstances, the question of law raised by the appellants is sustainable.

Issue No. B:-

17. On the side of the appellants / defendants, it is stated that the suit itself is not maintainable. The plaintiff failed to question the sale deed in favour of the defendants, even after a lapse of 16 years and that there is no prayer to declare the sale



deed as null and void and the suit itself is not maintainable.

18. The plaintiff failed to question the sale deed in favour of the defendants. The sale deed was 16 years prior to the date of plaint. Without questioning the sale deed in favour of the defendants, the case for declaration of title filed by the plaintiff is not maintainable.

Issue No.C:-

19. The plaintiff is claiming possession as an assignee of a mortgage. The plaintiff filed Ex.A7 to Ex.A10 tax receipts. All the tax receipts are subsequent to the suit. Ex.A13 is a house tax receipt. As per Ex.X1 and Ex.X2, there is no house in the suit property and hence, Ex.B13-house tax receipt is not a valid document.

20. On the side of the appellants, it is stated that the plaintiff is claiming title only through Chellakan. On the side of the appellants, it is stated that possession was not handed over to Chellakan and that possession was only with Gnanal and her LRs. The tax receipts in the name of Gnanal were marked Ex.B9 to Ex.B13. Receipt in the name of the son of Gnanal was marked as Ex.B14. Patta in the name of Gnanal was marked as Ex.B15. The sale deed in the name of the defendants was marked as Ex.B18 and Ex.B19. Patta books in the name of the defendants was marked as Ex.B20. Tax receipts in the name of the defendants were marked as Ex.B21. The plaintiff has admitted that the cemeteries of one Thangaiyan and Rajaiyan are available in the suit schedule property. Rajaiyan is the son of Gnanal and the date of death of Rajaiyan was 17.10.1987 and the date of death of Thangaiyan another son of Gnanal was 01.04.2005.

21. If at all the plaintiff and his predecessor were in possession of the suit property from the year 1964, there was no possibility of two cemeteries of the relatives of the defendants to have found place in the suit property. The plaintiff failed to prove that the plaintiff is in possession and enjoyment of the property. Hence, it is decided that a relief for permanent injunction, without proof of possession is not sustainable.

Issue No.D:-

22. On the side of the appellants / defendants, it is stated that there is no title deed in favour of the plaintiff, whereas, the defendants are having sale deed Ex.B18. Documents Ex.B9 to Ex.B21 were filed by the defendants to prove the possession of the defendants, "Title follows possession". The first appellate Court is wrong in applying a principle "possession follows title" ignoring Ex.B9 to Ex.B21.

23. The documents on the side of the plaintiff regarding possession are after the suit. The plaintiff himself has admitted that the cemeteries of the relatives of the defendants are



available in the suit property. When possession is not proved, a doctrine that "possession follows title" could not be applied in this case. Hence, the question of law raised by the appellants is sustainable.

24. All the questions of law raised by the appellants are sustainable. The judgment and decree, dated 19.12.2014, made in A.S.No. 64 of 2012, on the file of the Camp Court, Kuzhithurai (II Additional Sub Judge, Nagercoil), is hereby set aside and the judgment and decree, dated 25.07.2012, made in O.S.No.214 of 2007, on the file of the I Additional District Munsif, Kuzhithurai, is hereby confirmed. The Second Appeal is allowed. No costs.

Sd/-

Assistant Registrar (CS-II)

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/ /2022

Sub Assistant Registrar(CS)

Ls

To

1.The Camp Court, Kuzhithurai (II Additional Sub Judge),
Nagercoil.

2.The I Additional District Munsif,
Kuzhithurai.

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

+1 CC to M/s.J.ANANDHAVALLI, Advocate (SR-14738[F] dated 28/03/2022)

+1 CC to M/s.K.SREE KUMARAN NAIR, Advocate (SR-15406[F] dated 30/03/2022)

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28.03.2022

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