



S.A.No.1896 of 2004

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 03.01.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.1896 of 2004

1.Ghouse Baig

2.A.Nazeer Ahmed

...Appellants

Vs.

1.Mahamuda Begum (Died)

2.Fazal Baig

3.Rahima

4.M.Y.Khader Basha

5.M.Y.Nasheer Ahamed

6.M.Y.Ummar

7.M.Y.Jameela

8.M.Y.Yasmeen

...Respondents



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(R4 to R8 brought on record as Lrs of the deceased 1st respondent vide order dated 30.01.2019 made in C.M.P.No.52 of 2019 in S.A.No.1896 of 2004)

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree in A.S.No.91 of 2003 on the file of the Principal District Judge, Vellore, dated 24.12.2003 confirming the Judgement and Decree in O.S.No.915 of 2000 dated 14.07.2003 on the file of the Principal District Munsif Court, Vellore.

For Appellants : Mr.P.Jagadeesan

For Respondent 1: Died

For Respondents : Notice dispensed with.
2 & 3

For Respondents : Mr.K.Harishankar
4 to 8

JUDGMENT

The 2nd and 3rd defendants in the suit O.S.No.915 of 2000 on the



file of the Principal District Munsif, Vellore, are the appellants before this Court. The appellants seek to challenge the concurrent Judgement and Decree against them. The facts which has culminated in the filing of the Second Appeal is herein below set out and the parties are referred to in the same rank as before the Trial Court.

2. The plaintiff had filed a suit for permanent injunction restraining the defendants from interfering with her peaceful possession and enjoyment of the suit property. The suit property was a house site with a basement constructed thereon bearing Door No.25 on Military Bazaar Street, Vellore Town, measuring East to West 4 ½ yards, North to South 9 Yards, bounded on the north by the street, on the south by Karim Sahib's house on the west by Kazim Baig's house and east by Shaju Sahib's house.

3. It is the case of the plaintiff that the suit property belonged to one Mohamad Kasim @ Sabjan Sahib and his wife Johara Bibi, who



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had sold the same to the plaintiff under a registered sale deed dated 05.02.1968. Kazim in turn had purchased the property from one Syed Kadar Sahib under a sale deed dated 17.08.1933.

4. It is the case of the plaintiff that from the date of her purchase she has been in possession of the property by paying property tax. Originally at the time of the purchase there was a tiled house in the suit property which had got dilapidated. In and around the year 1996 the plaintiff had removed the same and a fresh basement was put up. Thereafter, owing to certain financial constraints, the plaintiff was not able to proceed further with the construction. Just prior to the filing of the suit, the plaintiff had resumed the construction at which point in time, the defendants had started obstructing her work. Therefore, left with no other alternative, the plaintiff had come forward with the suit.

5. The 2nd and 3rd defendants had filed a written statement inter alia contending that the sale in favour of the plaintiff was a sham and



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nominal one. It is the case of these defendants that after the purchase of the property by Kasim from Syed Kadar Sahib on 17.08.1933, he had executed a usufructuary mortgage deed in favour of Fathima Bibi Ammal and Essac Sahib under a registered mortgage deed dated 19.08.1937. Thereafter, on 17.03.1941, the said Fathima Bibi had released her rights in the mortgage in favour of her son Essac Sahib. The said Essac Sahib died leaving the properties in the hands of his maternal uncle's son Karim Beig, who was the only legal heir living at that time.

6. It is further case of the defendants that Karim Beig was already the owner of Door Nos.24 and 26. Since Kasim Sahib had not redeemed the mortgage within stipulated time, he had orally sold the property to Karim Beig under a settlement deed dated 15.07.1946. Karim Beig had thereafter settled the property in favour of his son Ghouse Beig, the 2nd defendant in the suit. At the time of the settlement, Ghouse Beig was a minor and possession was taken on his



behalf by his mother Amidha Bi.

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7. The defendants would submit that the sale in favour of the plaintiff, who is none else than the daughter in law of Mohammed Kasim and Johara Bibi, during the subsistence of the mortgage was invalid and that apart the plaintiff has never been in possession of the property. The tax receipts which have been produced are all created for the purpose of the case since the suit property is a vacant site. On 31.05.2000, the 2nd defendant had sold the property to the 3rd defendant, who is now in possession and enjoyment of the property. They therefore prayed that the suit may be dismissed.

8. The learned Principal District Munsif, Vellore had framed the following issues:

- i. Whether the plaintiff is entitled for permanent injunction?*
- ii. To what other relief the plaintiff is entitled to?*



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9. The plaintiff had examined herself as P.W.1. Ex.A.1 to Ex.A.10 were marked on the side of the plaintiff. On the side of the defendants, the 2nd defendant had examined himself as D.W.1 and Ex.B.1 to Ex.B.4 were marked on the side of the defendants. The 3rd defendant had not entered the box to adduce evidence.

10. The defendants 1 and 4 had not filed a written statement and remained an ex parte.

11. The learned Principal District Munsif, Vellore has held that the 2nd defendant had not let in any evidence to prove that he is the legal heir of Essac Sahib and as to how Karim Beig had come into possession of the suit property. Further, there was no documents to show the possession by the defendants. In fact, the 2nd defendant as D.W.1 has admitted that there is a basement which has not been put up either by himself or by the 3rd defendant. D.W.1 would further depose that Essac Sahib had a son which admission he had



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immediately retracted.

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12. The learned Principal District Munsif, Vellore further held that since the defendants had not been able to show proof that Karim Beig was the legal heir of Essac Sahib. the settlement in favour of the 2nd defendant and subsequent sale in favour of the 3rd defendant is not valid.

13. The Trial Court had considered the documents filed on the side of the plaintiff to show her possession and enjoyment of the property and ultimately decreed the suit. Aggrieved by the said Judgement, the 2nd and 3rd defendants had filed A.S.No.91 of 2003 on the file of the Principal District Court, Vellore. By her Judgement and Decree dated 24.12.2003, the learned Principal District Judge, Vellore was pleased to dismiss the appeal and confirm the Judgement and Decree of the Trial Court.



14. Aggrieved by the said Judgement, the defendants 2 and 3 are before this Court.

15. The above Second Appeal has been admitted on the following Substantial Questions of Law:

“1. Whether or not the plaintiff's vendor lost his title to the suit property as per Section 27 of the Limitation Act, as he failed to redeem the usufructuary mortgage (Ex.B.1) within the period of limitation?

2. Whether the suit for bare injunction without a prayer for declaration of title to the suit property is valid in law, especially when the plaintiff's title was seriously disputed by the defendants?

3. Having regard to the fact that the suit property had been dealt with by the second defendant and his parents, whether the plaintiff is entitled to a decree for permanent injunction as prayed for by her?



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16. The argument of the learned counsel appearing for the defendants 2 and 3 / appellants was that the mortgage had to be redeemed within a period of 30 years and since the right to redeem had been extinguished the suit filed was not maintainable as the plaintiff claims right under the mortgagor. The learned counsel would rely upon the Judgement reported in **2006 (4) SCC 484 – Prabhakaran and others Vs. M.Azhagiri Pillai (Dead) and others**, in support of his contention. The learned counsel would rely upon paragraph no.13 of the said Judgement to buttress his argument that the right to redeem would arise immediately in the case of usufructory mortgage which does not fix any date for repayment. He would therefore contend that the mortgage had been executed as early as in the year 1937 and there is no proof to show that the same has been redeemed. Consequently, the suit had to be dismissed.

17. The learned counsel would further contend that the suit for



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bare injunction without a prayer for declaration was also not valid and would squarely come within the contours of the Judgement of the Hon'ble Supreme Court reported in **2008 (4) SCC 594 – Anathula Sudhakar Vs. P.Buchi Reddy (Dead) and others.**

18. The learned counsel would also submit that the suit property is a vacant site and since the mortgage had not been redeemed, the 2nd defendant as a son of the legal heir of the Essac Sahib was in possession and therefore, the plaintiff was not entitled to a decree for injunction.

19. Per contra, Mr.Harishankar, learned counsel appearing on behalf of the plaintiff at the outset would submit that the Judgement reported in **2006 (4) SCC 484 – Prabhakaran and others Vs. M.Azhagiri Pillai (Dead) and others** cited supra has been overruled. By the Judgement reported in **2014 (9) SCC 185 – Singh Ram Vs. Sheo Ram and others.** Therefore, the contention that the right to



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redeem had extinguished cannot be sustained since the right to seek redemption of the mortgage in the instant case, opened after two years from the date of the mortgage deed and the deed does not specify any time limit for redemption. That apart, the learned counsel would submit that the defendants have not been able to produce the original mortgage deed and it was the plaintiff who had produced the registered copy of the usufructory mortgage deed.

20. The learned counsel would submit that the defendants have not been able to establish the fact that Karim Beig was the legal heir of Essac Sahib. Further, D.W.1 in his cross examination has stated that Essac Sahib had a son. Though he had retracted the said statement, however, an admission to this effect having been made, the contention of the defendants that Karim Beig was the sole legal heir of Essac Sahib automatically fails and consequently the settlement in favour of the 2nd defendant and sale in favour of the 3rd defendant has to necessarily be held as invalid. The plaintiff has proved her



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possession of the suit property by filing Ex.A.3 to Ex.A.6 and Ex.A.8.

The learned counsel would therefore submit that the appeal has to be dismissed and the Judgement and Decree of the Courts below be sustained.

21. Heard the learned counsels and perused the records.

22. A perusal of Ex.B.1 would show that the usufructory mortgage had been created by Kasim in favour of Fathima Bibi and her son Essac Sahib. The deed in question would state that the mortgagors are put in possession of the property and the rents would be adjusted towards interest payable by the mortgagor to the mortgagee. The deed would further state that the right to redeem commences after two years from the date of the mortgage. However, the deed does not give any time limit for exercising the right of redemption.



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23. In the Judgement reported in **2014 (9) SCC 185 – Singh Ram Vs. Sheo Ram and others**, the Hon'ble Supreme Court was reconciling the Judgements in **2006 (4) SCC 484 – Prabhakaran and others Vs. M.Azhagiri Pillai (Dead) and others**, **1985 (4) SCC 162 – Jayasingh Dnyanu Mhoprekar Vs. Krishna Babaji Patil** and the full bench Judgement of the Punjab and Haryana High Court in **AIR 2008 P&H 77 – Ram Kishan Vs. Sheo Ram**.

24. After discussing the provisions of Section 58, 60 & 62 of the Transfer of Property Act, Article 61 of the Limitation Act and the Judgements cited supra, the Hon'ble Supreme Court has held as follows:

*“22. We, thus, hold that special right of usufructuary mortgagor under **Section 62** of the T.P. Act to recover possession commences in the manner specified therein, i.e., when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Until then, limitation does not start*

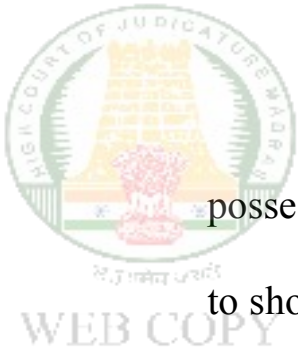


for purposes of [Article 61](#) of the Schedule to the [Limitation Act](#) a usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly.

23. On this conclusion, the view taken by the Punjab and Haryana High Court will stand affirmed and contrary view taken by the Himachal Pradesh High Court in [Bhandaru Ram vs. Sukh Ram](#) will stand over-ruled. The appeals are dismissed.”

Therefore, from the above, it is clear that the right to redeem the mortgage has not been extinguished.

25. That apart, the 2nd defendant seeks to claim title to the property on the premise that he is the legal representative of the original mortgagee Essac Sahib. However, there is no document to prove the same. That apart, during his own deposition, he has admitted the fact that Essac Sahib had a son. Therefore, the Substantial Question of Law no.1 is answered against the defendants. The defendants have not been able to file any proof to show



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possession of the property. However, the plaintiff has filed documents to show possession of the property in the form of Ex.A.3 to Ex.A.8.

26. The suit is one for bare injunction and the person who is questioning the title is a third party to the property. Therefore, the Substantial Question of Law nos.2 and 3 are also answered against the defendants.

27. In the result, the Second Appeal is dismissed. No costs.

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Index : Yes/No
Internet : Yes/No
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1.The Principal District Judge,
Vellore.

2.The Principal District Munsif Court,
Vellore.

P.T. ASHA, J,

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