



S.A.No. 987 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.12.2023

PRONOUNCED ON : 11.03.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No. 987 of 2021

&

C.M.P.No.18492 of 2021

1.K.Chinnasamy

2.K.Subramaniam

3.Sundarathal

4.Subbathal

Palanisamy Gounder (Died)

5.K.Ramasamy Gounder

6.Mayagathal

7.Sundarathal

8.A.Periyasamy

9.A.Samiyappan

10.Saraswathi

11.Sumathi



S.A.No. 987 of 2021

12.Ravikumar

13.Sundaramurthy

...Appellants

Vs.

Ramathal (Died)

1.R.Kandasamy

2.R.Subramaniam

3.K.Subramaniam

4.S.Govindasamy

5.Nallammal

6.Kondathal

7.Sakunthala

8.Selvi

9.Bagyavathi

10.R.P.Subramaniam

11.P.Vaideeswaran

12.Kamalam @ Thangamani

13.Mailathal

...Respondents



S.A.No. 987 of 2021

PRAYER: Second Appeal filed under Section 100 of CPC against Judgement and Decree dated 24.08.2021 made in A.S.No.5 of 2017 on the file of the Sub Court, Avinashi reversal of the Judgement and Decree dated 02.01.2017 made in O.S.No.64 of 2013 on the file of the District Munsif, Avinashi, Tiruppur.

For Appellants : Mr. N.Manoharan

For Respondents : Mr. C.R.Prasanan
1 to 12

For Respondent 13: Mr. S.Thangavel.

JUDGEMENT

The defendants in the suit O.S.No.64 of 2013 on the file of the District Munsif, Avinashi, (originally O.S.No.357 of 2006 on the file of the District Munsif, Tiruppur) are the appellants before this Court. The facts which have led to the filing of the above Second Appeal is narrated herein below and for ease of understanding the parties are referred to in their ranking as before the Trial Court.



WEB COPY

S.A.No. 987 of 2021



2. Relief claimed in the plaint:

(a) Declaring that the plaintiffs are entitled to the respective shares of the suit properties as detailed in plaint and put them in possession of their respective shares,

(b) Awarding compensation from the defendants at a consolidated sum of Rs.24,000/- per annum towards the damage and mesne profits from the date of suit till the date of possession is surrendered to the plaintiffs

(c) Awarding the costs of the suit to the plaintiff and

(d) With other remedies available and Render Justice.

Plaintiffs' case:

3. It is the case of the plaintiffs that the suit property belonged to one Vedantha Pandithar and Sadasiva Kurukkal. The two of them had executed a usufructuary mortgage in favour of Rama Gounder in the year 1943. On 02.02.1976, after the demise of the original mortgagors, their respective legal representatives had sold the suit properties. Item I of the suit property was sold to Ramasamy Gounder son of Periya Rangana Gounder. Item II of the suit property was sold to Ramasamy Gounder son of Appaji Gounder.



Item III of the suit property was sold to Karichi Gounder son of Subbana Gounder. Rama Gounder, the mortgagee had two sons Nachimuthu and Kumarasamy. Kumarasamy had two sons, namely, Palanisamy and Ramasamy.

4. The plaintiffs would submit that since 30 years had passed, the mortgage deed was deemed to be wiped out under “*Madras Agriculture's Department Relief Act*”. Therefore, the mortgagee or his heirs are bound to surrender possession to the mortgagor or their heirs. Meanwhile, the sons and grand sons of Rama Gounder who took possession of the suit property after the death of Rama Gounder and knowing fully well about the sale deed dated 02.02.1976 filed a suit in O.S.No.6 of 1981 on the file of the Sub Court, Tiruppur for Specific Performance on the basis of an agreement of sale said to have been entered into between Rama Gounder and the original mortgagors against the legal representatives of the original mortgagors and the purchasers, who are the predecessors of the plaintiffs herein.

5. Parallely, O.P.No.39 of 1981 was filed by the predecessors



of the plaintiffs for possession. The suit filed by the legal representatives of Rama Gounder was dismissed holding the oral agreement of sale to be false. O.P.No.39 of 1981 was allowed. Challenging the Judgement and Decree in O.S.No.6 of 1981, the plaintiffs therein had filed A.S.No.41 of 1981 on the file of the District Court, Coimbatore and they had also filed C.M.A.No.35 of 1982 challenging the order in O.P.No.39 of 1981. The Appellate Court dismissed A.S.No.41 of 1981 and allowed C.M.A.No.35 of 1982 contending that the possession could be taken only by filing a civil suit and after paying ad valorem Court fees. The predecessors of the plaintiffs have not preferred any appeal against the order in C.M.A.No.35 of 1982. As against the Judgement in A.S.No.41 of 1981, the predecessors of defendants / legal representatives of Rama Gounder had filed S.A.No.163 of 1988 which was also dismissed in the year 2001. Therefore, the oral agreement of sale pleaded by the defendants had been rejected and their heirs are therefore bound to surrender possession to the purchasers, the predecessors of the plaintiffs herein.



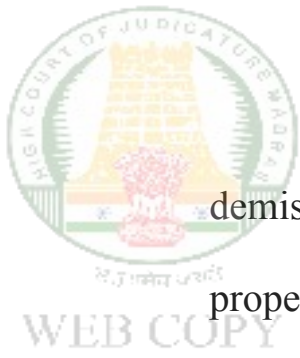
S.A.No. 987 of 2021

of Periya Rangana Gounder to whom Item I was sold, the 7th plaintiff and the 7th defendant claim under Ramasamy Gounder son of Appaji Gounder, who had purchased Item II of the suit property. The 4th plaintiff is the father of the 5th plaintiff and plaintiffs 4 to 6 claim under Karichi Gounder to whom the suit Item III was sold.

7. It is the case of the purchasers that since the suit filed by the legal representatives of mortgagee was pending in appeal they had not taken any steps to file the suit. On 25.04.2006, the plaintiffs and defendants 7 to 8 issued a notice to defendants 1 to 6 calling upon them to surrender possession of the suit property. On 05.05.2006, a reply was sent with totally untenable allegations. Since the original purchasers had passed away, it is their legal representatives who have filed the suit.

Written statement:

8. The written statement was filed by the 6th defendant, which was adopted by defendants 1 to 5. The defendants would deny the averments contained in the plaint. They would contend that after the



S.A.No. 987 of 2021

demise of Rama Gounder, his legal heirs had taken possession of the property. The predecessors of the plaintiffs had filed a petition for possession in O.P.No.39 of 1981 which, though allowed in favour of the plaintiffs therein, had been reversed in the appeal filed by the defendants therein in C.M.A.No.35 of 1982. The plaintiffs have not challenged this order and the same has become final.

9. The defendants would submit that on 01.09.1943 Rama Gounder had taken possession of the suit properties under the usufructuary mortgage executed by Vedantha Pandithar and Sadasiva Kurukkal. The defendants would submit that the plaintiffs who were purchasers from the legal representatives of the original mortgagors are not entitled to any debt relief since as on the date of the coming into force of the Tamil Nadu Agriculturists Debt Relief Act, 1972, the debt due to Rama Gounder was not 30 years old. Therefore, it is the contention of the defendants that the plaintiffs ought to have filed a petition under Section 83 of the Transfer of Property Act, by paying difference amount of the mortgage money and the principal. However, such a procedure had not been adopted by plaintiffs' predecessor in title. On the contrary, they had filed



S.A.No. 987 of 2021

O.P.No.39 of 1981 on the file of the Sub Court, Tiruppur (originally O.P.No.3 of 1977 on the file of the District Munsif Court, Tiruppur).

10. The defendants had also filed O.S.No.270 of 1977 on the basis of the oral sale agreement before the Sub Court, Coimbatore which was transferred to Sub Court, Tiruppur and re-numbered as O.S.No.6 of 1981. Both the suits were tried together and by Judgement and Decree dated 28.01.1982, O.S.No.6 of 1981 was dismissed on the ground that oral agreement was not proved, whereas, O.P.No.39 of 1981 was allowed.

11. The defendants filed A.S.No.41 of 1982 against the dismissal of O.S.No.6 of 1981 and C.M.A.No.35 of 1982 was filed against the order in O.P.No.39 of 1981. By Judgement dated 29.01.1983, A.S.No.41 of 1982 was dismissed but C.M.A.No.35 of 1982 was allowed. The Court had therefore held that the plaintiffs' predecessors were not entitled to possession.

12. Challenging the Judgement and Decree in A.S.No.41 of

1982, the defendants had filed S.A.No.163 of 1988. Against the



Judgement in C.M.A.No.35 of 1982, there was no further appeal.

The defendants would therefore submit that the plaintiffs and their predecessors were not entitled to claim a discharge of debt under the Act.

13. Further, they had alleged that the suit for possession has been filed 22 years after the purchase and therefore it is clearly barred by limitation. That apart, the defendants would plead adverse possession in the event of Court coming to the conclusion that the plaintiffs and their ancestors were entitled to the benefits of the Act. Further, the Courts below observed that neither the plaintiffs nor their predecessors had taken steps to redeem the property mortgaged by them under Section 60 & 62 of the Transfer of Property Act and therefore their right to redeem is lost.

14. That apart, the defendants had pleaded non-joinder of necessary party as some of the heirs of the mortgagees have not brought on record. The claim for mesne profits was also denied and the defendants had contended that the Court fees as calculated was erroneous and the plaintiffs were liable to pay additional Court fees.



Trial Court:

15. The Trial Court had originally framed three innocuous issues, which has been translated into English language:

- (i) Whether the plaintiffs are entitled to the relief?*
- (ii) Whether the plaintiffs are entitled to damages?*
- (iii) To what other relief the plaintiffs were entitled to?*

16. Thereafter, before the Judgement, additional issues were raised:

(i) Whether the defendants contention that the plaintiffs are not entitled to the benefits of the Debt Relief Act is correct?

(ii) Whether suit is barred by limitation as contended by defendants?

(iii) Whether the contention of the defendants that the plaintiffs should file a suit in respect of the usufructuary mortgage is correct?

17. Since the oral evidence and documentary evidence have



been let in in respect of the additional issues as well, the suit was not once again relegated for Trial. The issues were once again re-arranged by the Trial Court in its Judgement, which reads as follows:

“1. வாதி தாவா சொத்தில் கோரிய பாகம்
பெற தகுதியுடையவரா?

2. வாதி கோரிய இழப்பீடு தொகை
கிடைக்கத்தக்கதா?

3. வாதிகளுக்கு தமிழ்நாடு
கடன்நிவாரணசட்டம் 38/1972ன் கீழ் நிவாரணம்
பெற பொருந்தாது என்ற பிரதிவாதிகள் கூற்று
சரியா?

4. இந்த தாவா காலவரையறைச்
சட்டத்தின் படி நிலைக்கத்தக்கது அல்ல என்ற
பிரதிவாதியின் கூற்று சரியா?

5. வாதிகள் போக்கிய அடமானம் குறித்து,
தூவா தாக்கல் செய்து தான் பரிகாரம்
தேடிக்கொள்ள வேண்டும் என்ற பிரதிவாதிகளின்
கூற்று சரியா?

6. வாதிக்கு வேறு என்ன பரிகாரம்?



WEB COPY

S.A.No. 987 of 2021



18. The 2nd plaintiff was examined as P.W.1 and Ex.A.1 to Ex.A.8 were marked on the side of the plaintiffs. On the side of the defendants, the 6th defendant had entered the box as D.W.1 and Ex.B.1 and Ex.B.2 were marked on their side.

19. The Trial Court held that under Ex.B.1, a 5 year period was provided for settling the loan, i.e., the loan was to be settled on or before 1948. The suit ought to have been filed within a period of 30 years but the suit has been filed in the year 2006 and even calculating the period from the order in C.M.A.No.35 of 1992 it was well beyond the period of 30 years.

20. The Trial Court held that Article 61 of the Limitation Act would apply to the case on hand and the same stipulates that the suit to cancel the mortgage should be filed within a period of 30 years however, no steps have been taken within this period. That apart, the property had been sold in favour of the predecessors of the plaintiffs under Ex.A.1 to Ex.A.3 as early as on 02.02.1976, whereas the suit seeking possession has been filed 38 years later. The



contents of the respective sale deeds would indicate that the purchasers were appraised of the mortgage deed in favour of Rama Gounder and the sale consideration was to be adjusted towards mortgage amount due to Rama Gounder. Therefore, the Trial Court proceeded to dismiss the suit.

Lower Appellate Court:

21. Challenging the said Judgement and Decree, the plaintiffs had filed A.S.No.5 of 2017 on the file of the Sub Court, Avinashi. The learned Sub Judge, allowed the appeal and reversed the Judgement and Decree of the Trial Court.

22. The learned Judge has taken note of the recitals in Ex.A.1 to Ex.A.3 which would indicate that the vendors therein, namely, the legal representatives of Vedantha Pandithar and Sadasiva Kurukkal had informed the purchasers about the mortgage and had asked them to pay a portion of the sale consideration to these persons directly. The learned Judge also held that these documents would refer to two earlier mortgages which had been made over to Rama Gounder and from a reading of which it appears that Rama Gounder was put in



possession in the year 1924. Therefore, since the mortgagee has been put in possession of the property well before the enactment of the Act, the Trial Court was wrong in holding that the time would start ticking from the date on which Ex.B.1 was executed since Rama Gounder had been put in possession of the property in the year 1924 itself.

23. The Lower Appellate Court further stated that question of limitation would not apply since Section 14 of the Limitation Act would come to the rescue of the plaintiffs as they had been bonafide prosecuting the earlier proceedings in O.S.No.6 of 1981 and O.P.No.39 of 1981 and therefore the period taken for participating in the proceedings right upto the High Court has to be excluded.

24. The Lower Appellate Court held that the defendants who had knowledge about the sale in favour of the plaintiffs' predecessors had not taken any steps to cancel the sale deeds. That apart, since possession was handed over as early as in the year 1924,



the plaintiffs were entitled to the benefits of the Tamil Nadu Debt Relief Act. Further, the learned Sub Judge held that there was no necessity for the plaintiffs to file a suit for redemption. Consequently, the appeal was allowed and the suit was decreed as prayed for.

Substantial Questions of Law:

25. Challenging this Judgement and Decree the defendants are before this Court and the Second Appeal has been admitted on the following Substantial Questions of Law:

“i)Has the learned first Appellate Court decreed the suit filed by the plaintiffs, which is absolutely barred under Articles 61 (a) and 65 of the Limitation Act, 1963?

ii)Whether the plaintiffs are legally entitled to exclude the time taken under Exhibit A4 to A7 under Section 14 of the Limitation Act to file the present suit on 27.09.2006 for the relief of declaration and



possession, not for redemption of mortgage?

iii) Whether the learned first Appellate Court is right in holding that the mortgage debt dated 01.09.1943 (Exhibit B1) shall be deemed to have been discharged as per Section 8 (5) (a) (i) of the Tamil Nadu Debt Relief Act, 1972, especially in the absence of any application being filed before the Tahsildar having jurisdiction within a time prescribed to get the certificate of discharge?

iv) Whether the suit for redemption of mortgage and recovery of possession filed with disguising as a suit for declaration and consequential relief of recovery of possession is maintainable in law?

26. Though oral arguments had been advanced, both the learned counsels have also filed written submissions and the Court would refer to these arguments.

Submissions of the appellants:

27. The learned counsel for the defendants would contend that



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S.A.No. 987 of 2021

the plaintiffs who are the legal representatives of the purchasers under Ex.A.1 to Ex.A.3 have claimed discharge of the debt under the provisions of the Debt Relief Act. The learned counsel would submit that if the plaintiffs had really intended to get the benefits of the Act, Ex.A.1 to Ex.A.3 would not have contained a recital that a portion of the sale consideration has to be paid to the legal heirs of the mortgagee and possession be recovered from them by the purchasers.

28. The learned counsel would submit that neither the mortgagors nor the purchasers under Ex.A.1 to Ex.A.3 have approached the concerned authorities or Court of law within 7 years from 01.01.1964 as per Section 30 of the Limitation Act for redemption of mortgage or for appropriate reliefs.

29. The learned counsel would further submit that taking into account the language and recitals contained in Ex.A.1 and Ex.A.3, the plaintiffs cannot approbate or reprobate as their arguments are contrary to the provisions of Section 92 and Section 95 of the Evidence Act. In support of the arguments, the learned counsel



would rely upon the Judgement of the Hon'ble Supreme Court reported in **2021 (6) SCC 139** – *Mangala Waman Karandikar (Dead) through Lrs., Vs. Prakash Damodar Ranade*.

30. It is the contention of the defendants that the plaintiffs have claimed a benefit as agriculturists under the Tamil Nadu Agriculturist Debt Relief Act, 1938, which is evident from the defense taken by them in O.S.No.6 of 1981 as well as a reading of the plaint in the instant suit. Even in his evidence as P.W.1, the 2nd plaintiff has deposed that they are claiming a discharge of the debt as per provisions of the aforesaid Act. The learned counsel would submit that the preamble of the Act of 1938 Act, clearly indicates that the Act was enacted to provide relief to indebted agriculturists in the State of Tamilnadu.

31. The learned counsel would further submit that the Act has defined the terms “*agriculturists*” as well as “*debt*” in Sections 3 (ii) 3 (iii) respectively. That apart, Section 7 of the Act deals with the debts payable by agriculturists being scaled down. Further, Section



9 A (1) of the 1938 Act reads that this Section would apply to all mortgages executed at any time before 01.03.1972 and by virtue of which the mortgagee is in possession of the property mortgaged to him.

32. He would therefore contend that in order to seek the benefit of this Act, the plaintiffs have to establish that they are agriculturists as defined under Section 3 (ii) of the Act. He would submit that nowhere in the plaint has the plaintiffs pleaded that they are agriculturists and therefore entitled to the benefit. In the absence of such proof, the plaintiffs are not entitled to the benefits as per the following Judgements:

“(i) **1989 (2) LW 6 (DB)** - [Sri Venkatarman and Co. Vs. Indian Overseas Bank.]

(ii) **AIR 1942 Mad. 533** - [Pothukuchi Venkata Ramanayya and Others Vs.Daggubati Mallikharjanudu]

(iii) **2001 (3) CTC 1 (FB)** - [Manimekalai Ammal and Others Vs.Swamidurai Padayatchi and Others]



S.A.No. 987 of 2021

(iv) *AIR 1996 Mad. 339* - [Sambandam Vs.

Janakimmal]

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33. The learned counsel would further provide that in order to claim a benefit one has to make an application under Section 9 A of the Act, for determining the debt due. This Act was amended by Act 1950 with effect from 18.10.1950. Under the amended Act, to seek a benefit the mortgage deed should be completely discharged and the right of the plaintiffs to sue for redemption and recovery of possession should have accrued.

34. The learned counsel would further submit that under Article 61 of the Limitation Act, 1963 the suit ought to have been filed within 3 years from 01.01.1964 as per Section 30 of the Limitation Act or atleast 30 years from 18.10.1950, whereas, the suit has been filed on 27.09.2006 and therefore the same is barred. In support of this argument he would rely upon the following Judgements:

(i) *1994 Suppl. (2) SCC 524* - [Vaideswara Iyer

and Another Vs. Kamakshi Ammal and Others.



S.A.No. 987 of 2021

(ii) **1980 TNLJ 217 (DB)** - [Gnanakan Nadar Vs. Gnanammal and three others]

(iii) **2005 (4) LW 248 (DB)** - [Jaffer Khan @ Baba and Others Vs. Salima Bi and Others]

(iv) **2008 (5) MLJ 566** - [Singaram Vs. Leelavathi Achi]

(v) **2002 (3) MLJ 629** - [Lakshmi Ammal Vs. Thillai Natarajamurthi]

(vi) **2002 (2) CTC 717** - [Balammal Nadachi and others Vs. Selvanayagam @ Kumarachandrapurumal and Another]

35. The learned counsel would further submit that the plaintiffs have come forward with the contention that they are entitled to the benefits of the Tamil Nadu Agriculturists Debt Relief Act, 1938, whereas the Lower Appellate Court has referred to Section 8 (5) (a) of the Tamil Nadu Debt Relief Act, 1972, to hold that the mortgage deed has been wiped out. The 1972 Act does not have any application to the facts of the instant case and the plaintiffs would not come under the category of a debtor as set out in the 1972



Act. The 1972 Act is intended to provide relief to certain indebted persons in the state of Tamil Nadu and the persons who are covered under the Act has been set out in the preamble of the Act. Even the later Act i.e., the Tamil Nadu Debt Relief Act, 1976 does not apply to agriculturists since the said Act is intended to provide the relief to landlords, agricultural labourers, rural artisans and small farmers in the state of Tamil nadu.

36. The learned counsel would submit that therefore a reading of both the 1972 Act as well as the 1976 Act makes it clear that it does not apply to agriculturists. Further, under these Acts a debtor has to approach the authorities for claiming benefit of debt relief. There is no averment made by the plaintiffs that such an application has been moved by them. Earlier the Courts have held that Civil Court could go into the issue as to whether the benefits of Act was applicable in a suit filed by mortgagor or a mortgagee. He would rely upon the following Judgements:

(i) **1982 (2) MLJ 375** – [K.V.S.P. Subramanian
Chettiar Vs. R.D.O.,]

(ii) **2000 (1) CTC 412** - [Easwaramoorthy Velar



WEB COPY

S.A.No. 987 of 2021



Vs.Parvathammal]

37. However, this position has been reversed by the Hon'ble Supreme Court in the Judgement reported in **2001 (9) SCC 673** – *P.Nirathilingam Vs. Annaya Nadar*.

38. In this case, the Hon'ble Supreme Court after examining the scope of the enactment held that the debtor should approach the Tahsildar having Jurisdiction under Section 6 (1) of the Act. He would, in this regard, rely on the Judgement of the Constitution Bench reported in **2002 (3) SCC 533** – *Padma Sundara Rao Vs. State of Tamil Nadu*, to contend that once the language of the statutory provisions is plain and unambiguous, the Courts cannot read into the provisions as the primary rule of construction is that the intention of the legislation has to be deduced from the words used by the legislature itself. Therefore, he would submit that once the Act contemplated that in order to avail benefits of the Act, an application has to be made to the authorities then failure to do so would result in the benefits not being available to the party.



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39. As regards the issue of suit being barred under Article 61 (a) of the Limitation Act, it is the contention of the defendants that the plaintiffs have come to the Court stating that the mortgagee deeds stood discharged under Section 9 A (5) of the Act as is evidenced by Ex.A.4, the plaint and the proof affidavit filed in the instant suit. As per the provisions of the Act, the plaintiffs ought to have filed the suit within 7 years from 01.01.1964 under Section 30 of the Limitation Act 1963 or atleast 30 years from 18.10.1950, whereas the suit was filed only on 27.09.2006. If the original mortgage of the year 1918 is taken into account then the 30 year period expires on 1948. If the mortgage of the year 1924 is taken into consideration, the 30 years would end in the year 1954. The period of limitation would start ticking when the right to redeem or recovery of possession accrues, which is evident from a reading of Article 61 of the Limitation Act, 1963. He would rely upon the Judgement reported in **2002 (3) MLJ 629** - [*Lakshmi Ammal Vs.Thillai Natarajamurthi*], in support of this contention.

40. He would submit that the plaintiffs claim under Section 62 of the Transfer of Property Act has no application to the instant suit.



Section 30 of the Limitation Act provides that suit could be filed within 7 years from the date on which the 1963 Act came into force or before the expiry of the period prescribed by the old Act, whichever is earlier. Under the old Act, Article 148 provided limitation of 60 years. The 1963 Act had been brought into force on 01.01.1964. Therefore, 7 year period expired on 31.12.1971. The suit has not been filed within this period but has been filed only on 27.09.2006. Therefore, the suit is well beyond the period of limitation. In support of this contention, the following Judgements had been relied upon:

(i)**1994 Suppl. (2) SCC 524** - [Vaideswara Iyer and Another Vs. Kamakshi Ammal and Others.

(ii)**1980 TNLJ 217 (DB)** - [Gnanakan Nadar Vs. Gnanammal and three others]

(iii)**2005 (4) LW 248 (DB)** - [Jaffer Khan @ Baba and Others Vs. Salima Bi and Others]

(iv)**2008 (5) MLJ 566** - [Singaram Vs. Leelavathi Achi]

(v)**2002 (3) MLJ 629** - [Lakshmi Ammal Vs. Thillai Natarajamurthi]



(vi) **2002 (2) CTC 717** - [Balammal Nadachi and others Vs. Selvanayagam @ Kumarachandraperumal and Another]

41. The counsel would submit that the plaintiffs had not come to Court stating that the period during which they had been contesting the earlier proceedings had to be excluded and the benefit under Section 14 of the Limitation Act be provided to them. However, the Lower Appellate Judge has proceeded to confer the benefit of Section 14 of the Limitation Act, 1963, on the plaintiffs to hold that the suit filed in the year 2006 is within time. He would submit that to get the benefit of a provision there must be pleadings to this effect as provided under Order VII Rule 6 of the CPC. He would rely upon the Judgement of the Hon'ble Supreme Court reported in **2020 (15) SCC 1 – Babulal Vardharaji Gurjar Vs. Veer Gurjar Aluminium Industries Private Limited and another**, in support of this argument. The Hon'ble Supreme Court has held that where the parties seeks application of any particular provision for extension or enlarging the period of limitation then the facts are required to be pleaded and proved. He would rely upon the order in



C.M.A.No.35 of 1982 (Ex.B.2) in support of his argument to bring to the notice of this Court that the plaintiffs' petition for possession in O.P.No.39 of 1981 which was allowed had been reversed in appeal i.e., C.M.A.No.35 of 1982. The learned Judge while allowing the above Civil Miscellaneous Appeal had observed that the plaintiffs herein ought to file a suit for possession after paying requisite Court fees and that they cannot seek recovery by filing an original petition. This assumes significance since even in the earlier proceedings for possession in O.P.No.6 of 1981, the defendants herein had taken a defense that the remedy of the petitioners therein was only by way of civil suit. C.M.A.No.35 of 1982 was allowed by orders dated 29.01.1983, against this order there was no further appeal and no liberty or leave was granted in Ex.B.2 to file a fresh suit. In these circumstances, the present suit which is filed for the very same relief and on the very same cause of action 23 years later is also clearly barred under provisions of Order II Rule 2 of CPC.

42. The plaintiffs have not pleaded the benefits of the Tamil Nadu Debt Relief Act, 1972 or Section 14 of the Limitation Act, 1963. However, the Lower Appellate Court has proceeded to extend



the benefits of these Acts to the plaintiffs. Therefore, this finding has to necessarily be interfered with. The Lower Appellate Court has proceeded beyond the pleadings which is perverse and has to be set aside vide the Judgement reported in **2008 (17) SCC 491 – [Bachhaj Nahar Vs. Nilima Mandal and another) and 2015 (9) SCC 755 – [Nandkishore Lalbhai Mehta Vs. New Era Fabrics Private Limited and Others]**.

43. He would also detail the mode of calculating the limitation adopted by the Constitutional Courts in various cases. The learned counsel would in this regard refer to the following Judgements:

(i) **1994 Suppl. (2) SCC 524** - [Vaideswara Iyer and Another Vs. Kamakshi Ammal and Others.

(ii) **1980 TNLJ 217 (DB)** - [Gnanakan Nadar Vs. Gnanammal and three others]

(iii) **2005 (4) LW 248 (DB)** - [Jaffer Khan @ Baba and Others Vs. Salima Bi and Others]

(iv) **2008 (5) MLJ 566** - [Singaram Vs. Leelavathi Achi]

(v) **2002 (3) MLJ 629** - [Lakshmi Ammal



Vs.Thillai Natarajamurthi]

(vi)**2002 (2) CTC 717** - [Balammal Nadachi and others Vs. Selvanayagam @ Kumarachandrapurumal and Another]

(vii)**2014 (9) SCC 185 = 2015 (2) LW 1 (SC)** - [Singh Ram V Sheo Ram]

44. He would therefore submit that the plaintiffs have been very careless and has approached the Court belatedly and they are not entitled to the indulgence of the Court as set out in the Judgement of the Hon'ble Supreme Court reported in **2014 (4) SCC 108 – Chennai Metropolitan Water Supply and Sewerage Board and Others Vs. T.T.Murali Babu**. Therefore, he would pray that the Second Appeal be allowed.

Submissions of the learned counsel for respondents 1 to 12:

45. Per contra, Mr.C.R.Prasanan, learned counsel for respondents 1 to 12 would submit that the lower Appellate Court has rightly reversed the judgment and decree of the Courts below. He had, after narrating the facts, submitted the arguments on the basis of the substantial questions of law. Since the facts have been



extracted extensively in the foregoing paragraphs, I am only extracting the submissions made on the substantial questions of law.

The arguments with reference to the first substantial question of law is that the suit filed by plaintiffs is not barred by limitation. It is his contention that under Section 62 of the Transfer of Property Act, the time to seek redemption in the case of a usufructuary mortgage commences when the mortgage money is paid out or from the date of payment of the mortgage money out of usufructs or partly on payment or deposit by the mortgagor. Until then, the limitation as contemplated under Article 61 of the schedule to the Limitation Act 1963 does not commence. He would in this regard rely upon the judgment of a three-member Bench of the Hon'ble Supreme Court in **2014 (9) SCC 185 [Singh Ram V Sheo Ram]**, where the Hon'ble Supreme Court has held that in the case of usufructuary mortgages, the relevant section that has to be considered with reference to recovery of possession is Section 62 of the Transfer of Property Act and not Section 60. He would rely upon another judgment of this Court reported in **2023 (5) CTC 657 [Ghouse Baig and another Vs.Mahamuda Begum (died) and others]** where the above judgment of the Hon'ble Supreme Court has been followed. He



would also rely upon the judgment of the Hon'ble Supreme Court reported in **1994 Supp (2) SCC 524 [Vaideswara Iyer Vs.Kamakshi Ammal]** in support of his argument that Article 61(a) refers not only to a suit to redeem the mortgage but also to recover possession of the immovable property subject matter of the mortgage. Therefore, he would submit that the suit filed by the plaintiffs for declaration and recovery of possession is well within the period of limitation as contemplated under Article 61(a) of the Limitation Act. That apart, he would submit that it is the Article 61(a) that would apply to the facts of the instant case and not Article 65.

46. With reference to the second substantial question of law relating to exclusion of time under Section 14 of the Limitation Act and whether the plaintiffs are entitled to exclude the time taken to prosecute the earlier proceedings as exhibited in Exs.A4 to A7 under Article 14 of the Limitation Act, he would submit that Exs.A4 to A7 are the earlier legal proceedings that were contested by the predecessors of the plaintiffs and the predecessors of the defendants and the subject matter of these proceedings is the subject matter of the instant suit. Ex.A4 is a common judgement pronounced in



S.A.No. 987 of 2021

O.S.No.6 of 1981 and O.P.No.39 of 1981. O.P.No.39 of 1981 was filed by the predecessors of the plaintiffs for recovery of possession under section 83 of the Transfer of Property Act. O.S.No.6 of 1981 was filed by the predecessors of the defendants for specific performance of an alleged oral agreement of sale. By a common judgment dated 28.01.1982, O.P.No.39 of 1981 was allowed and O.S.No.6 of 1981 was dismissed. The dismissal of the suit was taken up to this Court and had ended in dismissal against the predecessors of the defendants. Against the order in O.P.No.39 of 1981, the predecessors of the defendants has filed C.M.A.No.35 of 1982. The appellate Court allowed the appeal stating that the remedy available to the petitioners was to approach the Civil Court and to seek possession after paying the necessary Court fees. The C.M.A has been allowed on a mere technical ground without going into the merits of the case. He would submit that period from 11.01.1977 upto 29.01.1993 i.e 16 years and 18 days had been spent for prosecuting these proceedings bonafidely and therefore, this period has to be excluded under Section 14 of the Limitation Act. In support of this contention, he would rely upon the judgment of the

Hon'ble Supreme Court reported in **2021(3) CTC 681** [Sesh Nath



S.A.No. 987 of 2021

Sing Vs.Baidyabati Sheoraphuli Cooperative Bank Limited], 2015

(7) SCC 58 [M.P.Steel Corporation Vs. Commissioner of Central Excise] and 2014 (2) MWN (Civil) 479 - [Thilagavathi Vs.V.Samiappan]. He would also rely upon the judgment in *Sesh Nath Sing Vs.Baidyabati Sheoraphuli Cooperative Bank Limited*, referred to supra to contend that the absence of a specific plea with reference to the exclusion of time is not fatal to a case. He would submit that in the instant case, the Appellate Court in C.M.A.No.35 of 1982 had observed that the possession could be taken only through a Civil Court after paying necessary Court fees. At that point in time, the suit filed by the mortgagees, namely, the defendants and the appeals were pending and therefore, the plaintiffs could not take steps for recovering possession. He would submit that it is the defendants 7 and 8, who are entitled to get possession as all the ancestors and the legal heirs are no more after dismissal of the second appeal in the year 2001. He would submit that his pleading can be construed as pleading seeking exclusion of time under Section 14 of the Limitation Act.

<https://www.mhc.tn.gov.in/judis> 47. The third substantial question of law framed by this Court



relates to the discharge of debt under the Tamil Nadu Debt Relief Act, 1982 especially when no application has been made to the Tahsildar having jurisdiction within the time prescribed to get the certificate of discharge. In answer to this question of law, the learned counsel would submit that the parties to the present suit clearly understood that what was pleaded was with reference to the entitlement of benefits under the provisions of Tamil Nadu Debt Relief Act, 1972. He would draw the attention of this Court to paragraph 14 of the written statement, where it was contended that mortgagors, namely the plaintiffs and their predecessors, are not entitled to any relief under the Tamil Nadu Agricultural Debt Relief Act, 1982 or the Debt Relief Act, 1976, since the mortgage debt was not 30 years old as on 01.03.1972 when the provisions of the Tamil Nadu Debt Relief Act, 1982, had come into force. It is also his contention that no pleading had been raised in the written statement by the defendants that neither the plaintiffs nor their predecessors are not debtors. Therefore, it can be safely presumed that the parties had accepted the fact that the plaintiffs and his predecessors-in-title were debtors. That apart, the mortgage was subsisting and the cause of action for redemption arose only as per the later clause of the



Mortgage Deed dated 01.09.1943 marked as Ex.B1 to the effect that

whenever and whichever date, the mortgage amount is paid, possession was to be handed over in the following Chithirai month.

Since the later clause prevails, the usufructuary mortgage is construed to be one without a time limit being fixed, and the mortgagors right under Section 62 of the Transfer of Property Act continues till the mortgage amount is paid for. The right to recover under this Section also commences in the manner specified therein.

He would once again press into service the judgment in ***Singh Ram***.

He would submit that the judgment in ***2006 (4) SCC 485 - [Prabhakaran and Others Vs.M.Azhagri Pillai (D) by Lrs and***

others] would apply to the facts of the case with regard to the ratio

laid down in respect of the fresh limitation period being available

under Section 18 of the Limitation Act on acknowledgment of right

or liability in respect of the mortgaged property. He would submit

that in the instant case, the original mortgage was of the year 1918

and in the year 1924, the mortgage was assigned to the said Rama

Gounder to the tune of a sum of Rs.300/- and he was put in

possession of the property. Thereafter, under Ex.B1(1943) a fresh

loan for Rs.250/- was given by Rama Gounder and in all a sum of



Rs.550/- was due under the mortgage deed. The recitals of the deed (Ex.B1) would make it clear that the mortgagee is liable to deliver back the possession when the mortgagor is ready to redeem the property. Further, no period is fixed for it. The learned counsel would further submit that the plaintiffs are right in invoking the provisions of the Debt Relief Act 1972 as the two conditions required to invoke the provisions subsist in the instant case, namely,

(1) Mortgage deed is subsisting and

(2) The possession of the mortgagee was well over 30 years.

The lower appellate Court has correctly come to the conclusion that they are entitled to the benefits under the Tamil Nadu Debt Relief Act, 1972 . The cause of action has arisen only when the provisions of the Tamil Nadu Debt Relief Act was in force and the mortgagee has been in possession of the property for more than 30 years from 1924. He would rely upon the judgement reported in **2005 (4) LW 248 - [Jaffer Khan @ Baba and others Vs.Salima Bi and Others]**, **2002 (3) MLJ 629 - [Lakshmi Ammal Vs.Thillai Natarajamurthi]** and **2018 (6) CTC 760 - [Abraham @ Daveed Nadar (died) and others Vs.Santhakumar]**. He would therefore submit that the debtors / mortgagors are entitled to get the benefits of the Tamil



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Nadu Debt Relief Act.

S.A.No. 987 of 2021



48. The argument with reference to the fourth substantial question of law as to whether a suit for redemption of mortgage and recovery of possession camouflaged as a suit for declaration and consequential relief of possession was maintainable. The learned counsel would submit that the plaintiffs have been constrained to seek the relief of declaration of title, especially since the defendants had set up a claim of adverse possession and therefore, the plaintiffs, being the legal representatives of the original mortgagors had to necessarily seek a declaration. As regards the relief of recovery of possession, the plaintiffs would submit that the mortgage debt was wiped off as per the Tamil Nadu Debt Relief Act, 1972 and that after discharge of the mortgage debt, the mortgagees are liable to surrender the possession to the plaintiffs. He would explain that the usufructuary mortgage debt was created as early as in the year 1918 once again, it was renewed by assigning the debt in the year 1924 and possession was handed over only in the year 1924. Thereafter,



in the year 1943, the mortgage was continued after a further sum of Rs.250/- was paid by the mortgagee to the mortgagor, thereby making a total sum of Rs.550/- payable by the mortgagors to the mortgagee. The recitals of Ex.B1 dated 01.09.1943 would clearly prove the same. As per the provisions of the Tamil Nadu Debt Relief Act, the usufructuary mortgage debt was fully wiped out and there was no necessity to pay the mortgage amount. From this point in time, the time for filing the suit for recovery of possession /redemption had set in.

49. The learned counsel would further submit that the contention of the defendants that 30 year period of possession of the mortgagees from the year 1924 would end in 1954 has not been raised by them in their written statement. In the written statement at paragraph 14 what had been stated is that the plaintiffs are not entitled to the benefits of the Tamil Nadu Debt Relief Act, 1972. Therefore, the defendants are entitled to contend that it is Act of 1938 that would apply. Likewise, 1976 Act would also not apply, as it was the 1972 Act that was in force at the relevant point in time when the cause of action had arisen. He would further submit that



the judgment and decree in S.A.No.163 of 1988 (earlier suit filed by the predecessors of the defendants) was pronounced on 06.07.2001.

Further, in the earlier proceedings, the defendants had taken a specific stand that they are the owners of the property from the date of the oral agreement, i.e on 19.01.1976 and they continued to be the owners till the disposal of the second appeal which was dismissed on 06.07.2001. He would summarize the arguments by stating that

a) The suit is well within the time as the debt got wiped off on 15.07.1972 and within a period of 30 years from this date since the limitation for filing the suit would end on 14.12.2002, whereas the suit has been filed on 27.09.2006.

b) That apart, the period for prosecuting proceedings, namely, O.P.No.39 of 1981 and O.S.No.6 of 1981 and the appeals there from would stand excluded as per Section 14 of the Limitation Act and

c) The defendants, having taken a stand that they were the owners by filing a suit for



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S.A.No. 987 of 2021

*specific performance in O.S.No.6 of 1981,
waived their entire rights as mortgagees.*

Therefore, he would submit that the appellate Court has rightly reversed the judgment and decree of the Courts below and no exception can be taken to the same.

Discussion:

50. In a nutshell, the facts placed for consideration of this Court is whether a suit for declaration and recovery of possession filed in the year in the year 2006 in respect of a mortgage originally created in the year 1918, assigned in the year 1924 and extended upon a further loan given in the year 1943 is within the period of limitation. Further, can the plaintiffs claim discharge of the mortgage debt under provisions of the Debt Relief Act and whether the period taken for prosecuting the earlier proceedings *inter se* between the predecessors of the plaintiffs and the predecessors of the defendants can be excluded when calculating the period of limitation. Since the facts have been dealt with extensively in the earlier paragraphs, I do not intend to dilate upon the same.

However, some dates and events that are necessary to appreciate the



S.A.No. 987 of 2021

legal issues raised in this appeal is herein below set out.

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1918 – Vedanda Pandithar and Sadasiva Kurukkal had executed a mortgage deed for Rs.225/- and Rs.75/- in favour of a third party under two registered documents.

1924 – (i) One Rama Gounder had got made over the aforesaid debts by way of two registered deeds after paying the total value of Rs.300/- to the original mortgagee. Rama Gounder was put in possession of the property.

1943 - Vedanda Pandithar obtained a further loan of Rs.250/- from Rama Gounder and Ex.B1-Mortgage deed for the total mortgage amount of Rs.550/- was executed. The recitals of Ex.B1 would read that the time for payment of the mortgage amount was within five years from the date of the mortgage, namely, 01.09.1948.

02.02.1976 – (i) The legal representatives of Vedantha Pandithar

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and Sadasiva Kurukkal sold the properties to one Ramasamy Gounder, S/o.Periya Rangana Gounder (1st item of suit property) under Ex.A1. The 2nd item of suit property was sold to another Ramasamy Gounder, S/o.Appaji Gounder under Ex.A2 and finally, the 3rd item of suit property was sold to one Karchi Gounder, S/o.Subbana Gounder under Ex.A3.

(ii) In the interregnum, the mortgagee, Rama Gounder died. The predecessors of the defendants claiming under Rama Gounder had filed a suit O.S.No.270 of 1977 which was later renumbered O.S.No.6 of 1981 on the file of the Subordinate Court, Tiruppur against 11 members for specific performance of an alleged oral agreement between Rama Gounder and the legal representatives of the original mortgagors.

(iii) O.P.No.39 of 1981 was filed by the purchasers from the legal representatives of the original mortgagors, who are the predecessors of the plaintiffs herein for recovery of possession under Section 83 of the Transfer of Property Act.



(iv) One of the issues framed in the suits was “ *whether the alleged debt is wiped off as per the provisions of Madras Agricultural Debt Relief Act*”.

(v) By a common judgment dated 28.01.1982, O.P.No.39 of 1981 was allowed and O.S.No.6 of 1981 was dismissed.

(vi) The fourth issue was answered in favour of the plaintiffs' predecessors that the entire debt was wiped out under the Tamil Nadu Agricultural Debt Relief Act (Amendment Act 1972). The learned Subordinate Judge had also observed that the defendants had not filed a reply to show that the predecessors of the plaintiffs are not entitled to the benefits of Tamil Nadu Agricultural Relief Act and therefore, there was no question of depositing the mortgage amount, as the entire mortgage debt was wiped out. The learned Judge observed that the predecessors of the plaintiffs are entitled for the relief of possession.

(vii) On 29.01.1983, C.M.A.No.35 of 1982 filed against the order passed in O.P.No.39 of 1981 was allowed and the appellate



S.A.No. 987 of 2021

Court held that a suit has to be filed after payment of Court fee for recovery of possession and possession cannot be obtained by filing a original petition. However, no order touching upon the merits of the appeal had been passed. The first appeal in A.S.No.41 of 1981 filed against the judgment and decree in O.S.No.6 of 1981 was dismissed. The copy of the order dated 29.01.1983 passed in C.M.A.No.35 of 1982 was marked as Ex.B2 and the judgment passed in A.S.No.41 of 1982 was marked as Ex.A5.

(viii) S.A.No.163 of 1988 was filed challenging the judgment and decree in A.S.No.41 of 1981 and the same was also dismissed on 06.07.2001. No appeal was preferred against the order in C.M.A.No.35 of 1982. The judgment passed in S.A.No.163 of 1988 was marked as Ex.A6.

25.04.2006 – Under Ex.A7, the plaintiffs and defendants 7 and 8 had issued a legal notice to the defendants 1 to 6 for recovery of possession.

05.05.2006 – Ex.A8-Reply notice by defendants 1 to 6



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27.09.2006 – The suit O.S.No.356 of 2006 (the present suit) filed before the District Munsif, Tiruppur for the reliefs claimed above.

51. The main fulcrum of the arguments of the appellants /defendants revolves around the issue of limitation and the entitlement of the plaintiffs to the Debt Relief Act.

52. With reference to the argument of the appellants/defendants regarding the entitlement of the plaintiffs to have the debt discharged under the Debt Relief Act, it would be appropriate to look into the pleadings and the judgment in the earlier proceedings. From a perusal of Ex.A4, the common judgment passed in O.S.No.6 of 1981 and O.P.No.39 of 1981 by the learned Subordinate Judge, Tiruppur, particularly from the extraction of the pleadings, it is seen that the predecessors of the plaintiffs herein had pleaded that the debt had been wiped out. The gist would read as follows:

*“Since more than 30 years have now elapsed
under the provisions of the Madras Agriculturist*



Debt Relief Act, the debt is deemed to be wiped out and the plaintiff are bound to surrender possession to the defendants 11 to 13.They hence filed separate O. P. for possession.”

53. O.P.No.39 of 1981 has been filed by the predecessors of the plaintiffs on the ground that they are entitled to possession since the mortgage debt has been wiped out under the provisions of Tamil Nadu Agriculturist Debt Relief Act, 1982 and the extract of the petition in Ex.A4 would highlight this fact. Further on the basis of these pleadings, the following issue has been framed as the 4th issue.

“Whether the alleged debt is wiped out as per the provisions of Madras Agriculturist Debt Relief Act? “

54. The finding with reference to this issue has been set out in paragraph 17 of Ex.A4 which reads as follows:

“17.It had been clearly stated in O. P. 39 of 81 that the petitioners, therein namely, defendants 11 to 13 Were entitled to get benefit



under Tamil Nadu agriculturists Relief Act. The plaintiff had not disputed the right of the defendants 11 to 18 under the Tamil Nadu Agriculturists Relief Act. Neither the plaintiffs had filed any reply statement nor placed any evidence to show that the defendant 11 to 18 would not be exempted from getting benefit under Tamil Nadu Agriculturists Relief Act. If that be so, when the plaintiffs and their predecessors had possessed the suit properties as the mortgagees for more than 30 years that is from 1-9-43 as admitted by the plaintiffs, the mortgage debt shall be deemed to have been wholly discharged with effect from the expiry of the 30 years namely on 1-9-73 under the above quoted Section 9(a) of the Act. Therefore it is clear that even on the date of filing of the suit in the year 1977, the plaintiffs could not claim any right of possession as mortgagees.”



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55. This suit which was filed by the predecessors of the defendants had been dismissed and the appeal and the second appeal filed by them were also dismissed thereby confirming the findings and the judgment in the suit O.S.No.6 of 1981. Therefore, even as early as on 28.01.1982, the learned Subordinate Judge, Tiruppur has held that the debt stood discharged with effect from 01.09.1973. In the light of the above, the 3rd substantial question of law pales into insignificance as the defendants are estopped for once again contesting the very same issue which has been decided against them in the earlier proceedings. It is also pertinent to note that in the appeal A.S.No.49 of 1982 challenging the judgment and decree in O.S.No.6 of 1981, the lower appellate Court had not only dismissed the appeal but had also imposed cost of Rs.200/- to be paid by the the predecessors of the defendants, who were the plaintiffs therein, to each of the predecessors of the plaintiffs herein who were arrayed as defendants 1 to 18. In the second appeal filed before this Court in S.A.No.163 of 1988, the only substantial question of law that had been framed was “*whether the lower appellate Court was in error in dismissing the suit for specific performance on the sole ground that there was no written agreement of sale without discussing or*



adverting to the oral and documentary evidence let in on the part of the appellants”.

56. The learned Judge in the judgment in O.S.No.6 of 1981 (Ex.A4) has also categorically held that the predecessors of the defendants cannot claim any right of possession as mortgagees since the debt has been wiped out. In that proceedings, the predecessors of the defendants had set up a plea that they were the agreement holders. They had given up their right as mortgagees. It is their plea that they had entered into an agreement of sale on 19.01.1976. In the light of this categoric finding in answer to an issue framed by the learned Judge, it does not lie in the mouth of the defendants to now argue afresh on whether the mortgage debt has been wiped out or not.

57. The mortgage which is the subject matter of this suit is an usufructuary mortgage. Chapter 4 of the Transfer of Property Act which consists of Section 58 to 98 deals with mortgages. Usufructuary mortgage has been defined under Section 58(d).

Section 60 deals with the right of a mortgagor to redeem. Section 61



discusses how the right of redemption can be exercised separately or simultaneously where the mortgagor has executed the mortgage in favour of the same mortgage in respect of any two or more mortgages. These two sections deals with mortgages of all kinds. However, Section 62, exclusively deals with the right of usufructuary mortgagor to recover possession. In the case of usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage deed and all the documents. Section 62 of the Transfer of the Property Act, would read as follows:

”62. Right of usufructuary mortgagor to recover possession.—In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,—

(a)where the mortgagee is authorized to pay himself the mortgage-money from the rents



and profits of the property,— when such money is paid;

(b)where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage-money,— when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage-money or the balance thereof or deposits it in Court as hereinafter provided.”

The language of the provisions of Sections 60 and 62 reads differently. Section 60 places emphasize on the term “*at any time after the principle money has become due*”. This is the right to redeem the mortgage. However, Section 62 confers the right on the mortgagor “*to recover possession when the money is paid or where a term is prescribed for the payment of mortgage money has expired and mortgagor pays or tenders to the mortgagee the mortgage money or the balance thereof or deposits it into Court*”. This distinction in language has been considered by the three member



Bench of the Hon'ble Supreme Court reported in **2014 9 SCC 185 -**

Singh Ram Vs. Sheo Ram. The learned Judges have carved out the distinction in Paragraph 12 as follows:

“12. A perusal of above provisions shows that Article 61 refers to right to redeem or recover possession. While right of mortgagor to redeem is dealt with Under Section 60 of the T.P. Act, the right of usufructuary mortgagor to recover possession is specially dealt with Under Section 62. Section 62 is applicable only to usufructuary mortgages and not to any other mortgage. The said right of usufructuary mortgagor though styled as 'right to recover possession' is for all purposes, right to redeem and to recover possession. Thus, while in case of any other mortgage, right to redeem is covered Under Section 60, in case of usufructuary mortgage, right to recover possession is dealt with Under Section 62 and commences on payment of mortgage money out of the usufructs or partly out of the usufructs and partly on payment or deposit by the



mortgagor. This distinction in a usufructuary mortgage and any other mortgage is clearly borne out from provisions of Sections 58, 60 and 62 of the T.P. Act read with Article 61 of the Schedule to the Limitation Act. Usufructuary mortgage cannot be treated at par with any other mortgage, as doing so will defeat the scheme of Section 62 of the T.P. Act and the equity. This right of the usufructuary mortgagor is not only an equitable right, it has statutory recognition Under Section 62 of the T.P. Act. There is no principle of law on which this right can be defeated. Any contrary view, which does not take into account the special right of usufructuary mortgagor Under Section 62 of the T.P. Act, has to be held to be erroneous on this ground or has to be limited to a mortgage other than a usufructuary mortgage. Accordingly, we uphold the view taken by the Full Bench that in case of usufructuary mortgage, mere expiry of a period of 30 years from the date of creation of the mortgage does not extinguish the



right of the mortgagor Under Section 62 of the T.P. Act.”

Article 61 of the Limitation Act provides both for the redemption under Section 60 and the recovery of possession under Section 62.

58. A reading of Section 61 of the Transfer of Property Act would clarify the position.

“61. Right to redeem separately or simultaneously

A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.”

This judgment had over ruled the judgment of a two judges bench in the case reported in **2006 (4) SCC 484 [Prabhakaran and Others. Vs.M.Azhagiri Pillai]**. In fact this judgement emanated from the reference made to the three-member Bench in view of or an



order passed by the two Judges Bench in the very same case owing to the divergent views taken in two judgments reported in **2006 (4) SCC 484 and 1985 (4) SCC 162**. The referral Bench had passed the following order:

"As it appears that observations made by this Court in Prabhakaran v. M. Azhagiri Pillai, in regard to the interpretation and/or application of Article 61 of the Schedule appended to the Limitation Act, 1963 are contrary to the principles laid down by this Court in a large number of decisions, including Jayasingh Dnyanu Mhoprekar v. Krishna Babaji Patil³ as also various decisions referred to by the Full Bench of the High Court, we are of the opinion that the matter should be heard by a larger Bench."

59. Ultimately, the Bench had answered as follows:

"In cases where distinction in usufructuary mortgagor's right under Section 62 of the TP Act has been noted, right to redeem has been held to continue



till the mortgage money is paid for which there is no time-limit while in other cases right to redeem has been held to accrue on the date of mortgage resulting in extinguishment of the right of redemption after 30 years.

We, thus, hold that special right of usufructuary mortgagor under Section 62 of the TP 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 the mortgagor. Until then, limitation does not start for the purposes of Article 61 of the Schedule to the Limitation Act.”.

60. This Court had an occasion to rely upon the aforesaid judgment in the judgment reported in **2023(5) CTC 657**. The judgment that has relied upon by the learned counsel for appellants / defendants ***Prabhakaran and Others. Vs.M.Azhagiri Pillai*** and Others has been over-ruled by the Hon'ble three-Member Bench in



S.A.No. 987 of 2021

2014(9)SCC 185. The defendants herein who are the legal representatives of the mortgagees have not claimed repayment of the mortgage amount since the debt had stood discharged on 01.01.1973. It appears that it is for this reason that the predecessors of the defendants had set up a plea of an oral agreement of sale to continue in possession. In the earlier proceedings, the Court had clearly held that the debt has stood discharged with effect from 01.01.1973. As rightly observed by the lower appellate Court, the period which has taken for contesting the earlier proceedings has to be excluded, since the predecessors of the defendants had challenged the judgment and decree passed in O.S.No.6 of 1981 right up to this Court and the proceedings had come to an end only on 06.07.2001 with the passing of the judgment in S.A.No.163 of 1988. The proceedings had commenced in the year 1981. Therefore, if the period taken for prosecuting the earlier Proceedings is excluded, the suit has been filed within a period of 13 years. In the judgment of the Ho'nble Supreme Court reported in **2015 (7) SCC 58 – M.P.Steel Corporation Vs. Commissioner of Central Excise**, the Hon'ble Supreme Court had observed in Paragraph No.49 as follows:



“49. The language of Section 14, construed in the light of the object for which the provision has been made, lends itself to such an interpretation. The object of Section 14 is that if its conditions are otherwise met, the Plaintiff/applicant should be put in the same position as he was when he started an abortive proceeding. What is necessary is the absence of negligence or inaction. So long as the Plaintiff or applicant is bonafide pursuing a legal remedy which turns out to be abortive, the time beginning from the date of the cause of action of an appellate proceeding is to be excluded if such appellate proceeding is from an order in an original proceeding instituted without jurisdiction or which has not resulted in an order on the merits of the case. If this were not so, anomalous results would follow. Take the case of a Plaintiff or applicant who has succeeded at the first stage of what turns out to be an abortive proceeding. Assume that, on a given state of facts, a Defendant-Appellant or other Appellant takes six months more than the



prescribed period for filing an appeal. The delay in filing the appeal is condoned. Under explanation (b) of Section 14, the Plaintiff or the applicant resisting such an appeal shall be deemed to be prosecuting a proceeding. If the six month period together with the original period for filing the appeal is not to be excluded Under Section 14, the Plaintiff/applicant would not get a hearing on merits for no fault of his, as he in the example given is not the Appellant. Clearly therefore, in such a case, the entire period of nine months ought to be excluded. If this is so for an appellate proceeding, it ought to be so for an original proceeding as well with this difference that the time already taken to file the original proceeding, i.e. the time prior to institution of the original proceeding cannot be excluded. Take a case where the limitation period for the original proceeding is six months. The Plaintiff/applicant files such a proceeding on the ninetieth day i.e. after three months are over. The said proceeding turns out to be abortive after it has



gone through a chequered career in the appeal courts. The same Plaintiff/applicant now files a fresh proceeding before a court of first instance having the necessary jurisdiction. So long as the said proceeding is filed within the remaining three month period, Section 14 will apply to exclude the entire time taken starting from the ninety first day till the final appeal is ultimately dismissed. This example also goes to show that the expression "the time during which the Plaintiff has been prosecuting with due diligence another civil proceeding" needs to be construed in a manner which advances the object sought to be achieved, thereby advancing the cause of justice."

The learned Judges had observed that Section 14 has to be liberally construed to advance the cause of justice. This is for the reason that the principle enshrined in Section 14 of the Limitation Act is that whenever a person *bonafide* prosecutes with due diligence another proceedings which proves to be abortive because it is without jurisdiction or others, no decision can be rendered on



merits. Since the time taken by a person for going ahead with the earlier proceedings should not be used against him in the subsequent proceedings for no fault of his. In the case on hand, in the earlier proceedings, the defendants herein had set up a plea that they were agreement holders in respect of the suit property and entitled to specific performance of the same. In short, the defendants were claiming title on the basis of the agreement of sale. The defense taken by the predecessors of the plaintiffs was that the debt has been discharged and that there was no oral agreement of sale. The plea that there was no oral agreement of sale has been upheld as also the plea of discharge of the mortgage debt. These findings had been taken up on appeal. Therefore, the plaintiffs had to necessarily wait for a decision in these proceedings before instituting a suit for possession. Further, the present suit has been filed only in keeping with the directions in C.M.A.No.35 of 1982. Though the Court had directed the plaintiffs to file the suit for recovery of possession, the same could not be filed till the disposal of the proceedings pursuant to the judgment and Decree in O.S.No.6 of 1981. Therefore, the plaintiffs are entitled to the benefits of Section 14 of the Act. The contention of the learned counsel for the appellants / defendants that



the lower appellate Court has exceeded its brief by passing the exclusion under Section 14 of the Limitation Act may not be correct.

In the plaint, in the instant suit, the plaintiffs have set out the earlier proceedings in detail in paragraphs 6 to 9 In fact, in paragraph 9, they have specifically stated as follows:

“9. Earlier the ancestor of the plaintiffs had filed a petition for possession in O.P.39/1981 and though the petition was allowed, on appeal in C.M.A.35/1982 the Appellant Court had held that Possession Could only be taken by way of suit. Since, the Civil Suit filed by the Mortgagees and the appeals thereon were pending no step were taken by the plaintiff for possession. As the appeal etc., were went against the Mortgagers the plaintiffs being the heir of the Purchasers of 2.2.1976 deeds along with Defendants 7 & 8 are entitled to get Possession.”

Therefore, there is also pleading for exclusion of time under

Section 14 of the Limitation Act, 1963. Accordingly, substantial



S.A.No. 987 of 2021

question of law Nos.1 and 2 are answered in favour of the plaintiffs.

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61. As regards the substantial question of law No.4, a reading of Section 62 of the Transfer of property Act would indicate that the relief which has to be claimed is one for recovery of possession. In the case on hand, the defendants have pleaded title to the property by setting up a plea of an oral agreement of sale in the earlier proceedings. Therefore, the present suit for declaration of title and recovery of possession is in tune both with the provisions of Section 62 as well as Section 34 of the Specific Relief Act. Therefore, substantial question of law No.4 is also answered In favour of the plaintiff.

62. In the light of the above discussions, the second appeal is dismissed with costs. Consequently, connected petition is closed.

11.03.2024



S.A.No. 987 of 2021

Index : Yes/No
Internet : Yes/No
Speaking Order / Non Speaking Order
kan/srn

To

1. The Sub Court, Avinashi
2. The District Munsif, Avinashi, Tiruppur.
3. The Section Officer, V.R.Section, High Court, Madras.

P.T. ASHA, J.

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S.A.No. 987 of 2021

Pre-Delivery Judgment in
S.A.No. 987 of 2021

11.03.2024