



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 26.02.2024	Pronounced on: 08.03.2024
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THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.787 of 2017

and

C.M.P.Nos.19674 of 2017 & 2451 of 2018

Shri Kaliyaperumal

...Appellant

Vs.

1.Lakshmi
2.Rathina Singam
3.Chandra Mohan

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure to set aside the Judgment and Decree dated 20.01.2017 in A.S. No.16 of 2015 on the file of the learned Subordinate Judge, Mannargudi confirming the Judgment and Decree dated 20.03.2015 in O.S. No.88 of 2014 on the file of the learned District Munsif, Mannargudi.

For Appellant : Mr.R.Selvakumar

For Respondents : Mr.K.M.Subramaniam

JUDGMENT

The defendant in a suit for redemption of mortgage is the appellant.



2. The parties are described as per their litigative status before the trial Court.

3. The admitted facts are as hereunder:

4. The plaintiffs filed a suit for recovery of possession of a mortgaged property. It is the case of the plaintiffs that they had earlier filed a suit in O.S. No. 186 of 2008 and pending the suit, an Application was taken out, seeking leave of the Court under Order 23 Rule 1 CPC, to file a fresh suit on the same cause of action, as the plaintiffs felt that the pleading in the earlier suit was incomplete.

5. The said Application for leave to file a fresh suit on the same cause of action was finally decided by this Court in C.R.P. No.1214 of 2010 and this Court, by order dated 22.11.2013, permitted the plaintiffs to withdraw the said suit and thereafter, the second suit in O.S. No.88 of 2014 came to be filed on 09.06.2014 and was subsequently re-presented on 16.06.2014. The case of the plaintiffs is that though the sum of Rs.3,000/- had been borrowed from the defendants, the same was repaid and therefore, the



plaintiffs were entitled to recover possession of the mortgaged property from the defendants.

6. Per contra, the defendant filed a written statement stating that the suit was barred by limitation and further, it was also not correct to state that the plaintiffs have repaid the entire amount due and payable to the defendant, under the said mortgage. The defendant therefore, prayed for dismissal of the suit.

7. Both the trial Court as well as the First Appellate Court, in view of the leave granted by this Court in CRP. No.1214 of 2010 dated 22.11.2013, proceeded to decree the suit and directed the defendant to hand over possession of the suit property to the plaintiffs. Aggrieved by the concurrent findings of the Courts below, the defendant filed the present Second Appeal.

8. The above Second Appeal was admitted on 08.12.2017, on the following substantial questions of law:

' a. Whether grant of permission under Order 23 Rule 1 C.P.C as pleaded in the plaint in O.S. No.88 of 2014, to file fresh suit on the same cause of action (as that of O.S. No.186 of 2008) would not



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prohibit/prevent the respondents herein from filing a fresh suit (O.S. No.88 of 2014) on a totally different cause of action?

b. Whether the suit filed by the plaintiffs are not barred by Law of Limitation, as the cause of action in O.S. No.186 of 2008 and O.S. No.88 of 2014 are totally different?

c. Whether the law of adverse possession and consequential adversary title against the hostile owner would not be applicable in case of mortgagee/adverse possessor, though the limitation for redemption of mortgage stand lapsed?

d. Whether the Courts below are right in shifting the burden of proof of death of the first plaintiff, on to the defendant?'

9. The short point to be decided is as to whether the second suit filed by the plaintiffs in O.S. No.88 of 2014 was maintainable and not barred by the law of limitation. Section 61(a) of the Limitation Act, 1963 deals with limitation for recovery of possession based on redemption of mortgage or recovery of possession based on mortgage. The limitation period prescribed under the said Article is 30 years from the date on which the right to redemption accrues.

10. The learned counsel for the appellant would state that despite this Court in Revision proceedings granting liberty to file a fresh suit to the plaintiffs, it would not entitle the plaintiffs to get over the law of limitation and necessarily, the second suit should be shown to be filed within the period of limitation prescribed by law and otherwise, the suit was liable to



be dismissed and unfortunately, the Courts below have been carried away only by the liberty granted by this Court in revision proceedings and decreed the suit based on the same.

11. The learned counsel for the respondents/plaintiffs would submit that the cause of action on which the suit is filed is the same and the suit is not barred by limitation, especially when there was a delay in getting the copies of the Revision order, where this Court permitted the plaintiff to file another suit on the same cause of action. He would also take me through the mortgage deed that has been marked before the trial Court to fortify his contention that even in the mortgage, three years time period has been fixed for repayment and therefore, the limitation would have to be counted only from the expiry of the said three years period and not from the date of mortgage. He would therefore, pray that the concurrent findings of the Courts below do not require any interference and the Second Appeal is to be dismissed.

12. I have carefully considered the rival contentions advanced by the learned counsel on either side.



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13. Admittedly, the earlier suit was filed for the very same relief of recovery of possession and there being no specific pleading about the mortgage, it was withdrawn and this Court in Revision granted liberty to file a fresh suit on the same cause of action. Subsequently, a suit in O.S. No.88 of 2014 has been filed on 09.06.2014. The mortgage deed is dated 09.02.1981. I am in agreement with the arguments of the learned counsel for the respondents that in view of the three years period fixed under the mortgage deed dated 09.02.1981, the starting point of limitation is only on the expiry of three years and not the date of mortgage. Thus, the starting point of limitation for the plaintiff is 08.02.1994. Even calculating limitation period provided is 30 years, based on redemption, the plaintiff ought to have filed the suit on or before 07.02.2014. However, the suit has been admittedly filed only on 09.06.2014 and subsequently, re-presented on 16.06.2014. This is clearly outside the limitation period of thirty years provided under the Limitation Act, 1963.

14. The learned counsel for the respondents would submit that the suit is in time in view of the liberty granted by this Court in the Civil



Revision Petition and on the ground of limitation, the plaintiff cannot be shut out of Court, without any remedy.

15. Per contra, Mr.R.Selvakumar, learned counsel for the appellant would take me through Order 23 Rule 2 CPC, which clearly stipulates that the granting of leave to file a fresh suit on the same cause of action would not extend the period of limitation for the plaintiff. In other words, the suit being filed after withdrawing the earlier suit should be filed within the original period of limitation which was available to the plaintiff and liberty granted in the earlier suit cannot be taken advantage of by the plaintiff.

16. In view of the specific mandate under Order 23 Rule 2 CPC, I am unable to agree with the submissions of the learned counsel for the respondents. As rightly contended by the learned counsel for the appellant, the suit has not been filed within the period of 30 years and therefore, it is clearly barred by law of limitation and the plaintiff has to be necessarily non suited.

17. Unfortunately, the Courts below have misconstrued the liberty



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granted by this Court in Revision Proceedings and have held that suit was maintainable and not barred by limitation and I am constrained to interfere with the concurrent findings of the Courts below and answer the substantial questions of law in favour of the appellant.

18. In the result, the Second Appeal is allowed and Judgment and Decree of the Courts below are set aside. Consequently, connected Miscellaneous Petitions are closed. No costs.

08.03.2024

Index : Yes/No
Internet : Yes/No
Neutral Citation : Yes/No.
Speaking order/Non-speaking order
rkp

To
1. The Subordinate Judge, Mannargudi.
2. The District Munsif, Mannargudi.

P.B.BALAJI, J,



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