



S.A.(MD)No.579 of 2008

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.06.2024

CORAM

THE HONOURABLE MR.JUSTICE **S.SOUNTHAR**

S.A.(MD)No.579 of 2008
and
C.M.P(MD)No.6564 of 2024

Saroja

...Appellant

-Vs-

Thiagarajan

... Respondent

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree, dated 15.02.2007 passed by the learned Principal Subordinate Judge, Nagercoil in A.S.No.132 of 2004 in confirming the judgment and decree of the I Additional District Munsif, Nagercoil, dated 28.01.2004 in O.S.No.156 of 2001.

For Appellant : Mr.S.Ramesh
For Respondent : Mr.M.P.Senthil



S.A.(MD)No.579 of 2008

WEB COPY

JUDGMENT

The third defendant, who is the daughter of the plaintiff and who was transposed as appellant in the first appeal in the place of the deceased plaintiff, is the appellant herein. The suit is for declaration of title and possession of the plaintiff over the suit property and for consequential injunction restraining the defendants from interfering with the plaintiff's possession over the suit property. The suit was dismissed by the trial Court and the findings of the trial Court were affirmed by the first appellate Court. Aggrieved by the concurrent findings, the appellant has come by way of this Second Appeal.

2. According to the plaintiff, the suit property originally belonged to one Sudalaimadan Nadar and after his death, the property was inherited by his three sons, namely, Kuttikan Nadar, Thangiah Nadar and Chelliah Nadar. The said three persons have mortgaged the suit property in favour of the plaintiff, Chellamma Nadachi under usufructuary mortgage deed, Ex-A1, dated 23.11.1945. Thus, the plaintiff has been in possession and enjoyment of the property from the date of mortgage. Subsequently, the first defendant in the



S.A.(MD)No.579 of 2008

WEB COPY

suit Thanka Nadachi, wife of Chelliah Nadar attempted to interfere with the plaintiff's possession and hence, a suit was laid against the first defendant in O.S.No.218 of 1991 and an *ex parte* decree for injunction was passed in favour of the plaintiff. It was claimed by the plaintiff that the mortgage was not redeemed by the mortgagors or their legal representatives. It was also claimed that the time limit for redeeming the mortgage expired on 22.11.1155 (Travancore era), ie., on 22.11.1980 and therefore, the right to redeem the property got extinguished. In view of the fact that the right of the defendants to redeem the suit property got extinguished, the plaintiff sought for declaration of title and for consequential injunction.

3.The defendants 1 and 3 remained *ex parte* and the suit was resisted by the second defendant, Thiyagarajan. The second defendant contended that the plaintiff was never in possession of the suit property. He claimed that he purchased the northern nine cents of the suit property from the first defendant under a registered sale deed, dated 23.02.2000 marked as Ex-B4 and has been in possession and enjoyment of the said portion. It was also claimed that his vendor, first defendant, got absolute right over 1/3 portion of the suit property



S.A.(MD)No.579 of 2008

by virtue of a gift deed executed in her favour by her children after the death of the first defendant's husband, Chelliah Nadar. It was also claimed that the mortgage deed referred to in the plaint was not at all given effect to and acted upon.

4.It was further claimed by the second defendant that the third defendant, daughter of plaintiff, purchased 2/3 of the suit property on the southern side from Kuttikan Nadar and Thangaiah Nadar by way of a registered sale deed, dated 11.02.1980. It was also claimed by the second defendant that the recitals in the sale deed executed in favour of the third defendant that the subject matter of the sale in her favour was delivered to her would falsify the case of the plaintiff that she had been in possession and enjoyment of the suit property. It was also claimed that the first defendant filed a suit for bare injunction against the third defendant, Saroja in O.S.No. 340 of 1990 and obtained an injunction in respect of northern nine cents of the suit property. Hence, denying the title and possession of Chellama Nadachi over the suit property, the second defendant sought for dismissal of the suit.



S.A.(MD)No.579 of 2008

WEB COPY

5. Before the trial Court, the power agent of the plaintiff was examined as PW-1 and the second defendant was examined as DW-1. On behalf of the plaintiff, ten documents were marked as Ex-A1 to Ex-A10 and on behalf of the defendants, nine documents were marked as Ex-B1 to Ex-B9.

6. On appreciation of oral and documentary evidence available on record, the trial Court came to the conclusion that the usufructuary mortgage pleaded by the plaintiff was sham and nominal one and possession was not delivered to the plaintiff under the said mortgage and dismissed the suit. Aggrieved by the same, the plaintiff, Chellamma Nadachi, filed an appeal in A.S.No.132 of 2004. Pending first appeal, the plaintiff died and her legal representative, namely, the third defendant in the suit, was transposed as the plaintiff/appellant. The first appellate Court affirmed the findings of the trial Court and dismissed the appeal. Aggrieved by the concurrent findings, the appellant is before this Court.

7. The learned Counsel for the appellant submitted that under Ex-A1, usufructuary mortgage deed, the time for redeeming the mortgage was fixed



S.A.(MD)No.579 of 2008

WEB COPY

as five years. Therefore, the limitation for redeeming the mortgage would start on expiry of five years. In such circumstances, 35 years period was over on 22.11.1980 and the present suit has been filed by the plaintiff well after the expiry of limitation for redeeming the mortgage by original mortgagors. He submitted that when the right to redeem the mortgage is extinguished by operation of law of limitation, the mortgagee is entitled to seek declaration of her title. The learned Counsel further submitted that the Courts below, without taking into consideration the material evidence available on record, erroneously came to the conclusion that Ex-A1, mortgage deed, is a sham and nominal document and possession was not delivered to the plaintiff under Ex-A1 and the said finding is vitiated by non-consideration of material evidence available on record.

8.The learned Counsel for the first respondent on the other hand submitted that the plaintiff's own daughter, the third defendant, Saroja, purchased 2/3 of the suit property on the southern side from two of the original mortgagors, Kuttikan Nadar and Thangaiah Nadar and the recitals in the said document clearly proved that the property was delivered to the



S.A.(MD)No.579 of 2008

WEB COPY

transferee, namely, Saroja. In such circumstances, the contention of the plaintiff that the suit property was under her possession was rightly disbelieved by the Courts below. The learned Counsel further submitted that the findings rendered by the Courts below with regard to the nature of transaction under Ex-A1 is based on proper appreciation of evidence available on record and the same requires no interference from this Court.

9.The plaintiff claiming right under a mortgage deed executed by Kuttikan Nadar and Thangaiah Nadar and the first defendant's husband, Chelliah Nadar under Ex-A1, dated 23.11.1945. It is the contention of the plaintiff that as per recitals in Ex-A1, the mortgage was executed for a period of five years and on expiry of five years period, the limitation for redeeming the mortgage start running. It is his further contention that since the original mortgagors failed to redeem the usufructuary mortgage, the mortgagee's right got crystallised into an absolute title and hence, the suit for declaration of title and injunction filed by the plaintiff is maintainable.



S.A.(MD)No.579 of 2008

WEB COPY 10. Article 61A of the Limitation Act reads as follows:

“ Article 61.-

"61.	By a mortgagor-		
(a)	(a) to redeem or recover possession of immovable property mortgaged;	Thirty years.	When the right to redeem or to recover possession accrues.

11.A reading of the above provision would make it clear that the mortgagor has got 30 years time to redeem the property from the date, on which the right to redeem the property accrues to him. The right to redeem the property will accrue to the mortgagor in case of usufructuary mortgage on payment of the mortgage debt. In the case on hand, there is no evidence available on record to suggest that the mortgage debt was paid to the mortgagee by the original mortgagors. In such circumstances, the limitation for redeeming the property will never start running without payment of mortgage debt by the mortgagor. Therefore, till the mortgage debt is paid and the right to redeem the property get extinguished by elapse of 30 years, the mortgagee will remain as a mortgagee. Therefore, the plaintiff, who claims right under Ex-A1, as a mortgagee, is not entitled to maintain a suit for declaration of title. In this regard, it would be appropriate to refer the



S.A.(MD)No.579 of 2008

WEB COPY

observation made by the Hon'ble Apex Court in ***Sing Ram (Dead) and through legal representatives vs Sheo Ram and others*** reported in (2014) 9 SCC 185. The relevant observation of the Hon'ble Apex Court is as follows:

“22.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 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. 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.”

12.In the light of the law settled by the Hon'ble Apex Court in the above mentioned case law, the plaintiff, being usufructuary mortgagee, is not entitled to maintain a suit for declaration of title, when she remains as a mortgagee of the property.

13.Even on facts, the Courts below, based on the evidence available on record, came to the conclusion that Ex-A1, mortgage deed, was not acted upon and possession was not delivered to the plaintiff, Chellamma Nadachi. The findings rendered by the Courts below are supported by recitals found in



S.A.(MD)No.579 of 2008

WEB COPY

Ex-B6, dated 11.07.1980. Ex-B6 is a sale deed executed by two of the three original mortgagors, namely, Kuttikan Nadar and Thangaiah Nadar in favour of the third defendant, Saroja, who happens to be the daughter of the plaintiff. The recitals in the document would suggest that the subject matter of the sale in favour of the third defendant, namely, 2/3 of the suit property on the southern side, was delivered to the third defendant on the date of sale. The recitals in Ex-B6 falsify the case of the plaintiff that she has been in possession and enjoyment of the suit property, as a mortgagee.

14. The Courts below also found that both the plaintiff and the third defendant have been living under a same roof and the third defendant purchased 2/3 of the suit property from the two of the mortgagors and obtained delivery of the property. In such circumstances, the Courts below rightly came to the conclusion that Ex-A1 was not acted upon and possession was not delivered to the plaintiff. The said factual finding by the Courts below requires no interference, as the same is on proper appreciation of documentary evidence available on record.



S.A.(MD)No.579 of 2008

WEB COPY

15.The learned Counsel also submitted that under Ex-B6, the third defendant purchased 2/3 of the suit property from the original mortgagors and based on the recitals in Ex-B6, the plaintiff was non-suited and in such circumstances, when the third defendant was transposed as appellant in the place of original plaintiff, as her legal heir, the Court below ought to have granted declaration in favour of the third defendant, who has been transposed in the place of the plaintiff.

16.It is seen from the records that the original plaintiff Chellamma Nadachi filed a first appeal and pending the said appeal, she died and her daughter, the third defendant, was transposed as appellant in the first appeal. When the third defendant was transposed as appellant in the place of deceased plaintiff in her capacity as legal representative, the third defendant is not entitled to claim right under her own title document. When she persecutes the appeal, as the legal representative of the deceased plaintiff, she can only claim title under the deceased plaintiff and she cannot canvass her own right under a sale deed executed in her favour. In the present Second Appeal, this Court is only concerned with the right of the appellant in her capacity as legal



S.A.(MD)No.579 of 2008

WEB COPY

representative of the deceased plaintiff and the Court cannot adjudicate her own individual right under Ex-B6. However, the dismissal of the Second Appeal will not come in the way of the appellant/third defendant from working out her remedies by way of separate suit claiming right under her own title.

17.The appellant filed a petition to receive additional evidence in C.M.P.(MD)No.6564 of 2024 to mark the certified copy of the judgment passed in C.C.No.334 of 2006 on the file of the Judicial Magistrate Court No.I, Nagercoil. It is the submission of the learned Counsel for the appellant that in a criminal case filed against the second defendant, Thiagarajan, with regard to the impersonation committed by him under Ex-B4, dated 23.02.2000, the criminal Court found that the second defendant impersonated the power agent of first defendant, namely, Balaiah Nadar, and got Ex-B4 executed. The said finding of the criminal Court will impeach the validity of Ex-B4 and also the title of the second defendant to the extent of 1/3 share in the suit property.



S.A.(MD)No.579 of 2008

WEB COPY 18.The learned Counsel for the respondent submitted that challenging the judgment passed in C.C.No.334 of 2006, an appeal has been filed in C.A.No.66 of 2010 on the file of the Sessions Court, Kanyakumari at Nagercoil.

19.When the judgment produced by the appellant by way of additional evidence is challenged in an appeal, the findings in that judgment has not attained finality. In such circumstances, this Court is not in a position to rely on the findings rendered in the said judgement. Therefore, admission of judgment in C.C.No.334 of 2006, as additional evidence, will not help the Court to decide the controversies involved in this Second Appeal. Therefore, the additional evidence sought to be raised by the appellant will not have any impact on the final outcome of the Second Appeal and accordingly, the Civil Miscellaneous Petition is dismissed.



S.A.(MD)No.579 of 2008

WEB COPY

20. With these observations, the Second Appeal is dismissed by confirming the findings rendered by the Courts below. No costs.

NCC : Yes / No
Index : Yes / No
cmr

19.06.2024

To

1. The Principal Subordinate Judge, Nagercoil.
2. The I Additional District Munsif, Nagercoil.
3. The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



S.A.(MD)No.579 of 2008

S.SOUNTHAR, J.

cmr

S.A.(MD)No.579 of 2008

19.06.2024