BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.07.2024

CORAM

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

S.A.No.162 of 2003

1.Sukumara Pillai
2.Bharathi Amma
3.Lalitha Amma (Died)
4.K.S.Santhakumari Amma (Died)
5.Suntiha Kumari
6.Srikantan Nair
7.Bhuvanendra Kumar (Died)
8.Lalitha Kumari
9.Maheswaran
10.Premakumari
11.Radhamma
12.Pushkala
13.Raghuvaran
14.Renuka Devi
15.Sathi Kumari ...Appellants

-Vs-

1.Padmanabhan
2.Meenakshi
3.Mathevan Pillai
4.Subhandra Amma
5.Padmavathi Amma
6.Rajamma
7.Sadasivam Pillai
8.Haridhasan

9.Nagappan
10.Ramachandran
11.Janardhanan Nair
12.Bhagavathi Amma
13.Ramadevi
14.Jayadevi
15.Krishnan Nair
16.Sreedharan Nair
17.Bhuavaneswari
18.Vasudhevan Nair
19.Sankaranarayanan Pillai (Died)
20.Sarada Amma
21.Rajeswari
22.Rajendran
23.Jayakumari
24.Prabha
25.Sivakumari
26.Pramila
27.Prasanna Kumari
28.Sindhu Prasannakumari ... Respondents

(Appellants 12 16 were brought on record as legal representatives of the deceased third appellant vide order of this Court, dated 19.07.2010 made in M.P.(MD)No.1 of 2009)

(Respondents 27 and 28 were brought on record as legal representatives of the deceased 19th respondent vide order of this Court, dated 14.06.2024 made in C.M.P.(MD)Nos.6461, 6463 and 6464 of 2024)

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 04.06.2002 made by the learned Subordinate Judge, Kuzhithurai in A.S.No.49 of 1996 on his file confirming the final order and decreetal order, dated 12.08.1995 made by the learned Additional District Munsif of Kuzhithurai in I.A.No.1230 of 1992 in O.S.No.1460 of 1969.

For Appellants	:Mr.K.N.Thambi
For R16	:Mr.P.Thirumahilmaran
For R1, R2, R27 and R28	:No Appearance
R3 to R15, R17, R18 and R22 to R26	:Dispensed with
R19	:Died

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JUDGMENT

The plaintiffs in a suit for redemption of usufructuary mortgage are the appellants. The plaintiffs obtained a preliminary decree for redemption of usufructuary mortgage and the same was confirmed by this Court in a Second Appeal. Thereafter, the appellants/plaintiffs filed I.A.No.1230 of 1992 for passing of final decree. The said petition was dismissed by the trial Court on the ground that it was barred by limitation. Aggrieved by the same, the appellant preferred first appeal in A.S.No.49 of 1996. The first appellate Court also affirmed the findings of the trial Court. Aggrieved by the same, the appellants are before this Court.

2.At the time of admission, this Court formulated the following substantial questions of law by order, dated 07.03.2003:

> *“(a)When will the cause of action for filing the final decree application in a suit for redemption would accrue taking into account the pendency of the second appeal before this Court, namely, S.A.No.856 of 1981 till 21.07.1989?*
>
> *(b)If the cause of action arises on the disposal of the second appeal, would the time granted by the Lower Appellate Court while granting the preliminary decree for redemption have any relevance and whether it is capable of being extended on the final decree application being filed?”*

3.Elaborating the substantial questions of law formulated at the time of admission, the learned Counsel for the appellants submitted that the Second Appeal preferred as against the preliminary decree was disposed of by this Court on 21.07.1989. Thereafter, the appellants deposited the mortgage debt, as directed in the preliminary decree on 23.03.1992 and filed the present application for passing of final decree. The learned Counsel further submitted that in case of usufructuary mortgage, the limitation for filing final decree application will start ticking only on deposit of the mortgage debt. In the case on hand, the amount was deposited on 23.03.1992 and the final decree application was filed on 31.03.1992 well within the limitation period. The learned Counsel further submitted that the Courts below by taking into consideration the date of preliminary decree, as the starting for limitation, committed a serious error in dismissing the final decree application. In support of his contentions, the learned Counsel for the appellants relied on the following judgments:

(1)The judgment of the Hon'ble Apex Court in ***K.Parameswaran Pillai (Dead) vs K.Sumathi @ Jesis jessie Jacquiline and another***, reported in ***AIR 1994 SC 191***.

(2)Unreported judgment of this Court in ***Mercy Rajam vs- Vareethal (died) and others*** in ***S.A.No.1318 of 2003***, dated 28.10.2018.

4.The learned Counsel for the 19th respondent submitted that the preliminary decree was passed in favour of the appellants on 23.04.1981 with a direction to the appellants to pay a sum of Rs.45,000.63/-. However, the appellants failed to deposit the said amount within reasonable time and the said amount was deposited only on 23.03.1992. The learned Counsel further submitted that the mortgage was of the year 1921 and 30 years time for redemption got expired long back on 11.09.1951. In such circumstances, the limitation for redeeming the property got expired and the deposit made by the appellants after 41 years is not acceptable.

5.It is not in dispute that challenging the preliminary decree passed by the Courts below, a Second Appeal was filed in S.A.No.856 of 1981 and the same was dismissed on 21.07.1989. The deposit was made by the appellants on 23.03.1992 well within the period of three years. As far as the limitation for filing final decree application in a suit for redemption of usufructuary mortgage is concerned, the said point was considered by the Hon'ble Apex Court in ***K.Parameswaran Pillai (Dead) vs K.Sumathi @ Jesis jessie Jacquiline and another*** reported in ***AIR 1994 SC 191.*** The relevant observation of the Hon'ble Apex Court in this regard is as follows:

> *"**6.**In the case of usufructuary mortgage clause (a) of sub-rule (3) of Rule 8 expressly excludes the right to the mortgagee to apply for foreclosure or sale or redemption. Necessary consequence is that so long as the right subsists, though there is delay in compliance of the condition imposed in the preliminary decree, the right of redemption to the mortgagor is not lost. It will be barred only on expiry of the period of limitation prescribed under the Limitation Act. The reasons are obvious. Order 34 Rule 8(3) does not give any right to the mortgagee but the right is given only to the mortgagor, to seek redemption of the usufructuary mortgage in a decree under Rule 8(3) of Order 34. The mortgagee, having been in possession and enjoyment of the hypotheca is not disabled by the preliminary decree. On the other hand the liability continues to subsist against the mortgagor. Therefore, it is up to the mortgagor to redeem the mortgage. Till then his liability under the mortgage continues to run on the estate. It is, therefore, clear that the limitation to file an application under Order 34 Rule 8(1) to pass a final decree for redemption, other than the preliminary decree for redemption of usufructuary mortgage, starts running and continues to run its course from the date of expiry of the period fixed in the preliminary decree, unless it is stayed or suspended or the time prescribed in the preliminary decree is extended by an order of the court. In its absence on expiry of the limitation of three years from the date fixed in the preliminary decree expired under Article 137 of the Schedule to Limitation Act, 1963 (Article 181 of Schedule I of Old Act), the plaintiff is debarred to enforce the right to pass the final decree. But in the case of preliminary decree for redemption of usufructuary mortgage no limitation begins to run until deposit is made though there is a conditional preliminary decree and default was committed by the mortgagor for compliance thereof."*
>
> (Emphasis supplied by this Court)

6.In ***Singh Ram (Dead) through legal representatives vs Shero Ram and another***, reported in ***(2014) 9 SCC 185***, while considering the special right of usufructuary mortgage under Section 62 of the Transfer of Property Act, 1882, the Hon'ble Apex Court observed as follows:

> *"**11.**It will be appropriate to refer to the statutory provisions of the TP Act and the Limitation Act:*
>
> ***11.1.TP Act**.—*
>
> *"**58.'Mortgage', 'mortgagor', 'mortgagee', 'mortgage money' and 'mortgage deed' defined**.—(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.*
>
> *The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage money, and the instrument (if any) by which the transfer is effected is called a mortgage deed.*
>
> *(b) **Simple mortgage**.—Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.*
>
> *(c) **Mortgage by conditional sale**.—Where, the mortgagor ostensibly sells the mortgaged property—*
>
> *on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or*
>
> *on condition that on such payment being made the sale shall become void, or*
>
> *on condition that on such payment being made the buyer shall transfer the property to the seller,*

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) ***Usufructuary mortgage****.—Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.*

(e) ***English mortgage****.—Where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage money as agreed, the transaction is called an English mortgage.*

(f) ***Mortgage by deposit of title-deeds****.—Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.*

(g) ***Anomalous mortgage****.—A mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.*

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***60.Right of mortgagor to redeem**.—At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage money, to require the mortgagee (a) to deliver to the mortgagor the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:*

Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a court.

***

***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 authorised 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 hereinafter provided."

***11.2.Limitation Act**.—*

*“**61.** By a mortgagor—*

(a) To redeem or recover possession of immovable property mortgaged;	*Thirty years*	*When the right to redeem or to recover possession accrues.*

* * *”

(emphasis supplied)

***12.** A perusal of the above provisions shows that Article 61 refers to the right to redeem or recover possession. While right of mortgagor to redeem is dealt with under Section 60 of the TP 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 the provisions of Sections 58, 60 and 62 of the TP Act read with Article 61 of the Schedule to the Limitation Act. Usufructuary mortgage cannot be treated on a par with any other mortgage, as doing so will defeat the Scheme of Section 62 of the TP 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 TP 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 TP 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 [Ram Kishan v. Sheo Ram, AIR 2008 P&H 77 : (2008) 64 AIC 352] 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 TP Act.*

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***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 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. 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."*

(Emphasis supplied by this Court)

7.In ***Kuttan Narayanan vs Benny Sasi***, reported in ***2013 (3) KLT 51 = CDJ 2013 Ker HC 2011***, the Kerala High Court, while dealing with similar situation, after referring to **K.Parameswaran Pillai** case cited supra, observed as follows:

".....The right of a usufructuary mortgagor to deposit the mortgage price after passing of the preliminary decree when beyond the time fixed by the court under such decree cannot be tested or examined with reference to the period of limitation to sue for redeeming the mortgaged property. His right to redeem the property once approve under the preliminary decree time has been fixed by the court to make such deposit, on its default would not debar him from moving for passing final decree depositing the mortgage price fixed. For making the deposit of mortgage price

after passing of the preliminary decree in the case of a usufructuary mortgagor time fixed under such decree for deposit has been defaulted would not debar his right to redeem the property. Since a usufructuary mortgagee has no right to seek for foreclosure or sale of the mortgaged property before passing of the final decree, the right of the mortgagor to deposit mortgage price, after passing of preliminary decree, continues, but, however the application for passing the final decree has to be moved within three yeas from such deposit."

8.Therefore, in the light of the decisions cited above, it is clear that in case of usufructuary mortgage, the limitation for filing final decree application will start running only on deposit of the amount specified in the preliminary decree. In the case on hand, it is not in dispute that deposit was made by the appellants on 23.03.1992 and the final decree application was filed on 31.03.1992. Therefore, the application for passing of final decree is filed well within the limitation period from the date of deposit of the amount. The law laid down in the above mentioned cases is squarely applicable to the facts of the present case and therefore, I hold that the final decree application filed by the appellants is not barred by limitation.

9.Accordingly, the substantial questions of law framed at the time of admission are answered in favour of the appellants and against the respondents. The Second Appeal is allowed by setting aside the judgment and decree passed by the Courts below and final decree application in I.A.No.1230 of 1992 is allowed and the final decree is passed as prayed for. No costs.

10.07.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes / No

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To

1.The Subordinate Judge, Kuzhithurai.

2.The Additional District Munsif, Kuzhithurai.

3.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

S.SOUNTHAR, J.

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S.A.No.162 of 2003

10.07.2024