

CASE NO.:
Appeal (civil) 1699-1700 of 1993

PETITIONER:
MADHAVAN PILLAI GOPINATHAN NAIR AND ANOTHER

Vs.

RESPONDENT:
SUOBTBHAERYSAN CHETTIAR KARTHIKAYAN AND

DATE OF JUDGMENT: 11/07/2002

BENCH:
D.P.MOHAPATRA, BRIJESH KUMAR.

JUDGMENT:

D.P.MOHAPATRA, J.

Having lost the case before the trial court, the single Judge and Division Bench of the High Court of Kerala, defendants 7 and 8 have filed these appeals assailing the judgment rendered by the Division Bench on 13.8.1992 in AFA No.44/1992 and 47/1992.

The suit OS No.246 of 1978 was instituted by respondents 1 and 2 herein alleging, inter alia, that they, the defendants 1 to 4 and mother of defendant no.5 are the children of late Muthammal wife of Subbayyan Chettiar. The parties belong to Thelunkcherry caste and are governed by Hindu Mitakshara Law. The suit property as described in the schedule to the plaint is 93 cents of land under survey No.86/7 in Niyamam village. It was the self-acquired property of Muthammal. She mortgaged the said property with one Velayudhan Pillai for Rs.2,000/- on 9.8.1956. It was stipulated in the mortgage deed that the mortgagee would not spend more than Rs.500/- for construction of a house on the mortgage property and he would not claim anything more than Rs.500/- towards value of the building constructed by him in the property, at the time of redemption. Muthammal died on 13.6.1962. On her death the property devolved on her seven children, the plaintiffs, defendants 1 to 4 and Leelammal, mother of 5th defendant. Leelammal died on 1.5.1979 and her rights devolved on her only daughter the 5th defendant. Shortly after the death of Muthammal, Subbayyan Chettiar father of the plaintiffs married one Pappammal on 24th November, 1962. Under the influence of his second wife Subbayyan Chettiar neglected the plaintiffs and their brothers and sisters and resided separately along with Pappammal and the 4 children begotten through her. Being neglected by their father the plaintiffs and their brothers and sisters were maintained by their uncle Venkitachalam Chettiar brother of Subbayyan Chettiar. Subbayyan Chettiar died on 6.1.1975. During his life time Subbayyan Chettiar claiming himself as guardian of the plaintiffs and his other

minor children through deceased Muthummam got executed a partition deed, on 19.9.1963 under which the plaint schedule property was partitioned amongst the children of Muthummam and Subbayyan Chettiar in equal shares. In the plaint it was alleged that the said partition deed was void and liable to be set aside for various reasons. It was the case of the plaintiffs that Subbayyan Chettiar was neither entitled to a share in the property of Muthummam nor was he entitled to represent the minor children of Muthummam after his second marriage. It was further alleged in the plaint that division of the property was not effected in an equitable manner and it was prejudicial to the interest of the minors. Subbayyan Chettiar and the 1st defendant Renkaswamy Chettiar who was the only major son at the time, sold 23 cents of property which was allotted to them under the partition deed to one Gopala Krishnan and he had redeemed that property (23 cents) on payment of a portion of the mortgage amount to the original mortgagee. It was the case of the plaintiffs that neither Subbayyan Chettiar nor the 1st defendant had any right to execute sale deed in favour of Gopala Krishnan and the said sale deed was not binding on the plaintiffs. On 1.9.1964 Subbayyan Chettiar as guardian of his minor children mortgaged the remaining 70 cents of property which was allotted to his minor children under the partition deed to one Krishnamurthy for a sum of Rs.5500/-, and the said Krishnamurthy redeemed the prior mortgage of the year 1956 executed by deceased Muthummam and obtained possession of the property. Again on 23.6.1965 Subbayyan Chettiar executed a Purakkadam document in favour of Krishnamurthy for a sum of Rs.2000. It was the case of the plaintiffs that the aforementioned mortgage deed and Purakkadam document were void and they were liable to be set aside for the reasons that Subbayyan Chettiar was incompetent to act as guardian of the minor; that there was no necessity for mortgaging the property and that there was no consideration for the mortgage deed and the Purakkadam document. It was further alleged by the plaintiffs that the consideration received for execution of these documents was not utilized for the benefit of the minors; though the original mortgagee had agreed that he would not be entitled to spend more than Rs.500 towards value of improvement, Subbayyan Chettiar had granted a sum of Rs.2,500/- towards value of improvement effected by the mortgagee; he had no authority to do so; Leelammal, mother of the 5th defendant was shown as a minor on the date of the mortgage deed and Purakkadam document even though she was a major then, and for executing the documents on behalf of the minors Subbayyan Chettiar had not obtained sanction from the Court. The properties covered under the mortgage deed and the Purakkadam document were subsequently transferred to defendants 6, 7 & 8 on different dates. On these allegations the plaintiffs sought the following reliefs :

"a) to set aside the partition deed No.5578 of 1963, the sale deed Nos.5579 and 6569 of 1963 created by Subbayyan Chettiar along with 1st defendant and also the simple mortgage created vide document no.3867 of 64 as well as subsequent mortgage vide document no.2873 of 65 created by Subbayyan Chettiar by declaring them to be invalid since they were created without

bona fides and also not for the necessity of the family and also because these documents are falsely created and therefore liable to be declared as not binding on the plaintiffs as well as the plaint schedule property.

b) The plaint schedule property may be partitioned by metes and bounds into 7 equal shares and 2/7th of the share allotted for the plaintiffs separately.

c) By permitting the plaintiffs to deposit the mortgage money as per document No.2452/56 mortgage representing their share and to get vacant possession from the defendants who are in possession.

d) In case it is found that the mortgage as per the documents No.2452 of 1956 cannot be split up, the plaintiffs may be permitted to deposit the entire mortgage money of Rs.2000/- along with the cost of improvements, if it is found to the maximum, as provided for in the documents and direct the defendants to put the plaintiffs in possession of the entire property.

e) From the date of depositing the cost of improvements to the date of vacating the property, Purakkadam Deed interest may be directed to be paid by the defendants.

f) All the cost of litigation may be recovered from the defendants and their property and paid to the defendants.

g) For granting the relief to the defendants, all necessary orders regarding injunction, receiver appointment etc., all that is found necessary by the courts also may kindly be granted."

The first defendant remained ex-parte. Defendants 2 to 5 filed joint written statement supporting the plaint and claiming partition and separate allotment of their 4/7th share of the plaint schedule property. Defendant no.6 took the plea that restrictions imposed in the original mortgage deed regarding value of the improvements on the mortgage property was invalid and the mortgagee was entitled to get the value of improvements under the provisions of the Kerala Compensation for Tenants Improvements Act, 1958. The said defendant generally denied the allegations made in the plaint.

Defendants 7 and 8, who were the main

contesting defendants in the suit, refuted the allegations made in the plaint, raised the plea of suit being barred by limitation and the plea of non-joinder of Leelammal's husband who was a necessary party in the suit. The said defendants also denied that Subbayyan Chettiar had neglected his children through Muthummam; that the mortgage deed and Purakkadam document were not supported by consideration; that the consideration received under these documents was not spent for the benefit of the minors etc.

On the pleadings of the parties the trial court framed the following seven issues :

"1. Whether the impugned documents are liable to be set aside for the reasons alleged ?

2 Whether the plaintiffs are entitled to get partition and redemption as prayed for ?

3 What, if any, is the value of improvements ?

4 Whether the suit is barred by limitation?

5 Whether the suit is bad for non-joinder of necessary parties?

6 Whether the documents are competent and supported by consideration and necessity?

7 Reliefs and costs ?"

Considering issue No.4 the trial court held that since the suit was filed within 8 years after the first plaintiff attained majority the suit was not barred by limitation. Under issue No.5 the trial court held that PW 4 husband of Leelammal was a necessary party to the suit and since he had not been made a party in the suit it was bad for non-joinder of necessary party. Considering issues 1 & 6 the trial court held that Ext. A3, partition deed, was not invalid and therefore Subbayyan Chettiar and the first defendant were quite competent to execute the sale deed in respect of properties allotted to them under the partition deed and that the plaintiffs were not entitled to have Exts. A-4 and A-5, sale deeds, set aside. The trial court further found that Ext. A-6, mortgage deed and Ext.A-7, Purakkadam document, were not competent and not supported by consideration and necessity; therefore the said documents were liable to be set aside. The issues were answered accordingly.

Under issue No.2 the trial court found that since the shares allotted to the plaintiffs under Ext. A3, partition deed, were not scheduled in the plaint and since the plaintiffs had not prayed for redemption of their shares as per Ext. A-3, partition deed, they were not entitled to redeem their shares in the same. Consequently, the trial court answered the issue no. 2

against the plaintiffs.

On the above findings the trial court decreed the suit in part declaring that Ext. A-6, mortgage deed, and Ext. A-7, Purakkadam document, were not supported by consideration and necessity and that they were not binding on the plaintiffs. Ext A-6, mortgage deed, and Ext.A-7, Purakkadam document, were set aside. The parties were directed to bear their own costs.

The judgment of the trial court was challenged by the contesting parties. Defendants 7 and 8 filed As No.238 of 1981 while the plaintiffs filed AS No.216 of 1981. Both the appeals were heard together and decided by the learned single Judge by the judgment dated 2.7. 1991 in which AS No.238/81 was dismissed and AS No.216 of 1981 was allowed and a preliminary decree for redemption was passed in favour of the plaintiffs. The plaintiffs were directed to deposit a sum of Rs.2500/- within a period of two months and on such deposit defendants 7 and 8 were directed to deliver possession of the properties described in schedules 2 to 7 of Ex.A-3, partition deed.

Against the said judgment the defendants 7 and 8 filed appeals AFA Nos.44/92 and 47/92 which were decided by the Division Bench on 13.8.1992. Both the appeals were dismissed. The judgment of the Division Bench is under challenge in the present appeals.

The learned counsel appearing for the parties before us reiterated the stand taken by the parties before the High Court. The finding of the trial court that A-6 -the mortgage deed and A-7 -the Purakkadam document were supported by necessity and/or consideration was confirmed by the learned single Judge on independent assessment and appreciation of the evidence on record. The Division Bench found no acceptable ground to interfere with the said finding. In view of the said concurrent findings of fact of the courts below no exception could be taken to the direction of the single Judge as confirmed by the Division Bench that the plaintiffs were entitled to redeem the original mortgage to the extent of 70 cents of land covered under the mortgaged deed and Purakkadam document on payment of mortgage amount. The contention raised on behalf of the appellants herein that unity of the mortgage was broken since one of the co-mortgagers was permitted to redeem a part of the mortgaged property on payment of proportionate mortgage amount was rightly rejected by the courts below. As noted earlier the entire 70 cents of suit property was covered under Ext. A-6, mortgage deed, and Ext. A-7, Purakkadam document, which were held to be invalid and not binding on the plaintiffs. In that view of the matter the question of breaking of unity of the mortgage does not arise. We are of the view that in the facts and circumstances of the case the contention was rightly rejected by the High Court.

In the result, the appeals being devoid of merit are dismissed with costs. Hearing fee is assessed at Rs.10,000/-.

JUDIS