(1974) 07 MAD CK 0008

In the Madras High Court

Case No : Letters Patent Appeal No. 86 of 1969

Esakki Palpu and Others APPELLANT

Vs

Cherian Kochan and Others RESPONDENT

Date of Decision : 24-07-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 1, 105(2)
Limitation Act, 1877 — Section 19
Limitation Act, 1963 — Section 18(1), 19, 3

Citation : (1975) ILR (Mad) 564

Hon'ble Judges : Varadarajan, J;Kailasam, J

Bench : Division Bench

Advocate : P. Ananthakrisna Nayar, for the Appellant; S. Padmanabhan, for the Respondent

Final Decision : Allowed

Judgement

Varadarajan, J.—The Appellants in this Letters Patent Appeal are the Plaintiffs in Original Suit No. 349 of 1956 on the file of the District

Munsif''s Court, Kuzhithurai. They filed that suit for declaration of their title to S. No. 293 which is the northern half of Naduvalaporayidom in

lekkom 455, the total extent of which is said to be 4 acres 29 cents. Their case was that the entire lekkom 455 originally belonged to Chemban

Mallan and Raman Narayanan. In the settlement the northern half belonging to Chemban Mallan became S. No. 293 and the southern half

belonging to Raman Narayanan became S. No. 294. The Appellants alleged that Chemban Mallan executed a vellola mortgage or othi over S.

No. 293 in favour of one Devi Badrakali for fanams 253. Devi Badrakali assigned that mortgage in favour of one Boothathan Ponnan Perumal, the

ancestor of Padmanabhan Ooli and Ponnan Cherian. Padmanabhan Ooli and

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Ponnan Cherian were in possession of S. No. 293. Chemban Mallan

executed a chora othi, which is an irredeemable mortgage amounting to a sale, in respect of S. No. 293 in favour of one Esakki Padmanabhan on

22-11-1050 M.E., and conveyed the Jenmom right in the land. Esakki Padmanabhan died leaving behind three sons, Esakki, Ummini and

Marthandam. The first Appellant is the son of Esakki and father of Appellants 2 and 3. The fourth Appellant is the son of Ummini. Appellants 5

and 6 are the sons of Marthandan. The first Respondent and the second Respondent''s father are the sons of Ponnan Cherian. Padmanabhan

Ooli''s half share in the mortgage right had been gifted to his sons under a gift deed and has devolved upon his grandsons, Respondents 3 and 4.

Respondents 1 to 4 were in possession of S. No. 293. Respondents 5 and 6 are the legal representatives of the first Respondent. Respondents 7

and 8 are the legal representatives of the second Respondent. The Appellants expressed their willingness to deposit Rs. 36.94 said to be due

under the othi and Rs. 7 on account of improvements effected to the property.

2. The second Respondent denied that there was any mortgage in favour of Devi Badrakali and contended that one Maya Konda Narayanan

executed a mortgage and kuzhikanam in favour of one Ponnan Perumalfor fanams 1100 on 11-8-1131 M.E. The extent of S. No. 293 is 2 acres 2

cents. After the death of Ponnan Perumal his sons Padmanabhan Ooli and Ponnan Cherian came into possession and after them, their legal

representatives Respondents 1 to 4 were in possession. Esakki Padmanabhan had no jenmam right in the property, and Original Suit No. 280 of

1957 M.E., filed by him against Padamnabhan Ooli and Ponnan Cherian on the basis of a chora othi has been dismissed.

3. The trial Court framed issues regarding the extent of S. No. 293 and other matters and found that the extent was 2 acres 4 cents according to

the settlement, 1 acre 2 cents according to the settlement register and 1 acre 7 cents on the land. Exhibit P-2, the statement of Padmanabhan Ooli

and Ponnan Perumal made on the settlement enquiry on 20-12-1079 M. E. in settlement case No. 119 of Kunnathur village is part of the

settlement records exhibit P-1. Padmanabhan Ooli has stated in his statement, dated 2-4-1069:

I agree to patta being issued to Kumaran Cheriyan for 294 as he is in enjoyment

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of the share of the thand aper holder Raman Narayanan. The one

half in 293 in the name of Chemban Mallan is enjoyed by me and Ponnan Perumal Cheriyan. On 11-8-1031 Chemban Mallan executed a vellodi

othi and kuzhikanam for 1100 fonams in the name of Ponnan Perumal who was my grandfather and father of Ponnan Perumal Cheriyan.

Accordingly Boothathan Ponnan Perumal was enjoying the property. On his death I and Ponnan Perumal are in enjoyment as heirs of Boothathan

Ponnan Perumal and are paying tax.... Since Chemban Mallan who is the thandaper holder of one half and who had executed the othi had no

direct heirs the jenmam right has devolved on me, Ponnan Perumal Cherian and others.... Apart from me and the persons mentioned in my

statement Chemban Mallan has no other heirs. Ponnan Perumal Cheriyan and I are the only heirs of Boothathan Ponnan Perumal.

A few days later, Ponnan Perumal Cheriyan made a statement on 6-4-1069 M.E. He stated:

As stated by Padmanabhan Ooli I have no objection to patta being issued to Kumaran Cheriyan for S. No. 294. Padmanabhan Ooli and I are in

enjoyment of the whole of S. No. 293 as per othi. I consent to patta being issued to persons mentioned in the statements of Padmanabhan Ooli

and Adichan Kutty as per the shares specified by them. I should be given patta for 1 /24 share in S. No. 293.

Ponnan Perumal Cheriyan has made another statement, dated 20-12-1079., M.E. thus;

Of the thandaper holder Chamban Mallan got document in respect of S. No. 293 for his one half share and Raman Narayanan got document in

respect of S. No. 294 and they enjoyed in specific plots. Our ancestor first got othi of Chemban Mallan''s share. Thandaper holder Chemaban

Mallan died. He is our agnate. Since he has no direct heirs we have obtained the jenmam right. This right of Chemban Mallan was sold by him to

Esakki Padmanabhan without consideration. We mutually fought mutation proceedings. Since he did not get any relief he filed a suit for recovery of

possession of the property. The suit was dismissed.... Therefore the purchaser has no manner of right over this property. Even now as per the othi

we two are in enjoyment of the property.... No one has got the right to recover possession of the property which is with us as per othi.

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4. The Appellants sought to rely upon the above statements of Padmanabhan Ooli and Ponnan Perumal Cheriyan for proving the mortgage and

that acknowledgment has been made by those two persons, saving limitation. The trial Court found that theperiod of limitation is 50 years under the

Travancore Limitation Act which was in force at that time, that the suit filed within 50 years from the date of Ponnan Preumal Cheriyan''s statement

made in 1079 M.E. corresponding to 1904 is within time and that the Appellants have title to 1 acre 7 cents, the extent of S. No. 293 and are

entitled to declaration and redemption as prayed for and granted a decree without costs.

5. The trial Court''s decree was confirmed by the District Court, Kanyakumari at Nagercoil in Appeal Suit No. 239 of 1959. Respondents 1 to 4

took the matter in appeal to this Court in Second Appeal Nos. 45 of 1960 and 1243 of 1962 in which the only question argued was one of

limitation. Veeraswami, j. as he then was, who disposed of those appeals accepted the contention of Respondents 1 to 4 that for purposes of

Section 19 of the Limitation Act or the corresponding provision in the Tranvancore Limitation Regulation the Appellants should prove not only that

there was an acknowledgment but that it was made within theperiod of limitation. The learned Judge observed that unless the date of the mortgage

is found it is not possible to say whether the acknowledgment in exhibit P-2 was at all an acknowledgment in law. Reliance was placed before the

learned Judge on Raman Raman v. Varki Sakaria 20 T.L.J 475 and it was contended that having regard to the fact that the mortgage was

executed at a time when no registration was required, it may be presumed that the acknowledgment was within time and that under the

circumstances it was for the Respondents (Defendants) to establish that the suit was out of time. The learned Judge repelled that contention and

observed that the burden is on the Appellants (Plaintiffs) to show that the acknowledgment, on which they rely, was made within theperiod of

limitation and for that purpose they should establish the date of the mortgage by direct or circumstantial evidence. In that view the learned Judge

remanded the appeals to the lower Court for fresh disposal on the point of limitation retaining the finding as to title.

6. After remand, learned Counsel for the appellants submitted before the learned District Judge that it was not possible for him to let in any

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evidence at this stage to prove the date of the mortgage having regard to the long lapse of time. The mortgage pleaded in the plaint is one for

fanams 253 by Chemban Mallan in favour of Devi Badrakalj, who is said to have assigned it to Boothathan Ponnan Perumal. But the mortgage

admitted in the written statement is one by Mayakonda Narayanan in favour of Ponnan Perumal for fanams 1100 on 11th August 1131 M.E,

Therefore the learned District Judge found that the mortgage acknowledged in exhibit P-2 is not the same as the one sought to be redeemed in the

plaint and that the date of the mortgage was not proved, and allowed the appeal with costs and dismissed the suit.

7. The Appellants came to this Court in Second Appeal No. 1265 of 1964 and filed Civil Miscellaneous Petition No. 2742 of 1966 for

amendment of the plaint regarding the amount for which the mortgage was executed by Chemban Mallan and the year of the mortgage. They

sought to say that the mortgage was executed in 1031 M.E, for fanams 1100. Alagiriswami, J., who heard the appeal and the petition dismissed

both of them. Hence this Letters Patent Appeal.

8. Admittedly, it has not been possible for the Appellants to prove the date of the mortgage which is said to have been executed at the time when

no registration was necessary having regard to the long lapse of time. That would conclude the matter against the Appellants, if it is not open to

them to dispute the correctness of the finding of the learned Judge who remanded the appeal that the appellants should prove the date of the

mortgage. The learned Counsel for the Appellants, drew our attention to Section 105(2) of the CPC and contended that having regard to the fact

that leave for appeal was asked for and refused by the learned Judge the Appellants are not precluded from disputing the correctness of the finding

that they should prove the date of the mortgage before they could rely upon the acknowledgment. That section reads:

105 (2). Notwithstanding anything contained in Sub-section (1) where any party aggrieved by an order of remand made after the commencement

of the code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness,

Having regard to the fact that leave was applied for by the Appellants and refused by the learned Judge, we are of the opinion that it is open to the

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Appellants to question the correctness of the finding that the date of the mortgage must be proved.

9. Section 18 (1) of the Limitation Act, 1963, which corresponds to Section 19 of the Old Limitation Act, reads:

Where, before the expiration of the prescribedperiod for a suit or application in respect of any property or right an acknowledgment of liability in

respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person

through whom he derives his title or liability, a freshperiod of limitation shall be computed from the time when the acknowledgment was so signed.

The learned Counsel for the Appellants relied upon the decisions in C. Ahamad Haji Vs. Mayan and Others, and Sivakasi Match Exporting Co. v.

Mohanlal ILR (1963) Mad. 1204 The first decision arose out of a suit for redemption of a kanam alleged to have been made in 1856. The

Plaintiffs sought to prove the mortgage by a copy of the original kychit executed in their favour. The District Munsif who tried the suit dismissed it

on the ground that the copy produced is a fabrication. He, however, held that the Devaswom is the owner of the properties and that they had been

demised on kanom to the predecessor in interest of Defendants 1 to 5 and 19. In coming to this conclusion he acted upon two documents of the

years 1888 and 1893. In those documents, the executants, some members of the toward, admitted that the Devaswom was the owner and that the

properties were demised to their family on kanom. Sitting with Madhavan Nair J., Venkatasubba Rao J. has observed in that decision:

The District Munsif was justified, on these admissions in finding that the Plaintiff Devaswom was at one time the owner of the property but he

observes that these admissions by themselves cannot avail the Plaintiffs, for it is their duty to show that a kanom answering to the mortgage alleged

in the plaint was created and, secondly, that it was subsisting on the date of the suit....Let us now take the second part first. u/s 19 of the Limitation

Act, an acknowledgment to be effective must be made before theperiod of limitation has expired. True, but it is necessarily implied in the admission

we have referred to that the mortgage acknowledges that the mortgage was then subsisting ; in other words that it was liable to be redeemed. This

is the plain effect of the admission, and we are supported to in this view by Dip Singh v. Girand Singh I.L.R.(1903) All. 313. On this point,

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therefore, we do not agree with the District Munsif, but this does not dispose of the case. It is not sufficient for the Plaintiff to show that there is a

subsisting mortgage. It is their duty to prove further the terms of that mortgage....

In the second decision Sivakasi Match Exporting Co. v. Mohanlal ILR (1963) Mad. 1204 it has been held that an acknowledgment need not

contain a promise to pay either in express terms or even in an implied way and what is necessary is that there should be an admission of the

subsisting liability and that even if such an admission was accompanied by a refusal to pay, its character as an acknowledgment would not be

altered.

10. But the learned Counsel for the Respondents invited our attention to the pleadings and contended that the mortgage admitted in the

acknowledgment in the settlement proceedings is not the one pleaded in the plaint. In Audiappa Chetty v. Devarajulu Naidu 21 M.L.J. 1024 ayling

and spencer JJ., have observed:

Section 19 of the Limitation Act is so worded as to suggest that where there is an acknowledgment of liability in respect of a right and it is sought

to use such acknowledgment for starting a freshperiod of limitation the right acknowledged must be of the same description as the right which is the

subject of the suit. Thus in a suit for balance due upon taking accounts an admission that accounts must be taken and settled would be a pertinent

acknowledgment, but it might be otherwise in a suit brought to recover a definite sum of money.

In Nilakanta Ayyar Vs. Thatha Pichaikaran and Others, a Bench of this Court has observed:

Section 19 will save limitation where before the expiration of the prescribedperiod an acknowledgment of liability has been made in writing.

Therefore, before that section can apply, the words used trust be wads which clearly indicate an acknowledgment of liability of the particular debt.

The Legislature has decided that time shall be a bar to a mortgage and has fixed theperiod. It may seem hard that a person shall be deprived of his

money because he has not filed a suit within a certain time, but this is the law and it is not for the Court to help him out of his difficulty by over

straining the meaning of the wards used.

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The Privy Council in AIR 1948 36 (Privy Council) has observed at page 38:

In Order VII Civil Procedue Code Rule 1 requires the - plaint to contain among other particulars the facts constituting the cause of action and

when it arose. Rule 6 requires that where the suit is instituted after the expiration of theperiod prescribed by the law of limitation, the plaint must

show the ground upon which exemption from such law is claimed. Rule 11 enacts that the plaint shall be rejected if the suit appears from the

statement in the plaint to be barred by any law. It is clear from these provisions that the burden rests in the first instance upon a Plaintiff to show

that his suit was not instituted after theperiod prescribed therefore by schedule I and accordingly is not required to be dismissed u/s 3. The

Appellant, therefore, has to show, as the learned Subordinate Judge held, that the mortgage on which his title is based was made on or after 27th

August, 1876. All that he does show is that the mortgage was in existence in the year 1885. The Appellant has argued that this is sufficient to shift

to the Respondents the burden of showing that the suit was not within time. No doubt, in some cases, the evidence may reach a point at which the

onus of proving a suit to be out of time rests upon the Defendant, and regard must always be had to the party in whose knowledge the relevant

facts may appear to be. But their Lordships agree with the courts in India in thinking that the fact that a mortgage existed in 1885 affords no ground

for presuming that it arose in or after 1876.

Having regard to this decision, it is not possible to accept the contention of the learned Counsel for the Appellants that the burden of proving that

the acknowledgment was not made within theperiod of limitation is on the Respondents. In Tilak Ram v. Nathu (1967) 2 S.C.J. 431 it is observed

that the statement made for the purpose of describing his own rights with nothing to show that the maker of the statements referred to the mortgage

with the intention of admitting his jural relationship with his mortgagors and, therefore, of their subsisting liability as the mortgages thereunder as

being redeemed cannot be availed of as acknowledgement of a subsisting jural relationship or of a subsisting right and a corresponding liability of

being redeemed.

11. There is no material on record to state that the burden of showing that the suit is not within time is on the Respondents.

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is for the Appellants to prove when the suit mortgage was executed and also that the acknowledgment relied upon by them is in respect of that

mortgage and that it has been made within theperiod of limitation which, according to the Travancore Limitation Act, was 50 years. First of all, the

Appellants have failed to prove the date of the mortgage. They have not mentioned even the date of the mortgage in the plaint and they sought to

allege by way of an amendment of the plaint, for which they filed Civil Miscellaneous Petition No. 2742 of 1966 during the pendency of Second

Appeal No. 1265 of 1964, that the mortgage was executed in 1031 ME. They further sought to allege that the mortgage was executed for 1100

fanams whereas their allegation in the plaint is that it was executed for 253 fanaras. The amendment has been rightly disallowed by the learned

Judge.

12. The mortgage mentioned in the plaint is one for 253 fanams in respect of S. No. 293 by Chemban Mallan, who was admittedly the owner of

that property in favour of one Devi Badrakali who is alleged to have assigned that mortgage in favour of Bootha than Ponnan Perumal. Even in the

amendment sought for in the said Civil Miscellaneous Petition No. 2742 of 1966 there was no change in the name of the mortgagee. Thus, the case

of the Appellants is that the mortgage was by Chemban Mallan over S. No. 293, about which there is no dispute, and in favour of Devi Badrakali

for 253 fanams. But the mortgage mentioned in the written statement of the second Respondent, which was adopted by the fourth Respondent, is

one by Mayakonda Narayanan in favour of Boothathan Ponnan Perumal in respect of S. No. 293 for 1100 fanams on 11-8-1131 M.E. A perusal

of exhibit P-2 shows that Esakki Padmanabhan maintained in his statement dated 22-7-1077 M.E., that the property was in the enjoyment of the

ancestor of Padmanabhan Ooli as per othi of Chemban Mallan. He had not made it clear in that statement about who the mortgagee of Chemban

Mallan was. Padmanabhan Ooli''s statement, dated 2-4-1069 was that on 11-8-1031 Chemban Mallan executed a vellode othi and kuzhikanom

for 1100 fanams in favour of Ponnan Perumal, who was his grandfather and father of Ponnan Perumal Cheriyan and that on the death of the

mortgagee, Ponnan Perumal Cheriyan and himself were in enjoyment of the property as heirs. He further stated that since Chemban Mallan, who

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had executed the othi had no direct heirs, the jenmam right had developed upon Ponnan Perumal Cheriyan and others as the heirs of Ponnan

Perumal. The subsequent statement, dated 20-12-1079 M.E, of Ponnan Perumal Cheriyan and Padmanahhan Ooli is that their ancestor first got

othi of Chemban Mallan''s share, that Chemban Mallan was their agnate who died without leaving any direct heirs and, therefore, they have

obtained the jenmam right and were in possession of the property as per the othi and that no other person has got the light to recover possession of

the property which was in their enjoyment as per the othi. Thus, the statement made before the settlement authorities by the predecessors-in-

interest of the Respondents is that the mortgage was executed by Chemban Mallan on 11-8-1031 M.E., in favour of Boothathan Ponnan Perumal

for 1100 fanams. But Esakki Padmanabhan, the predecessor of the Appellants had stated in his statement made on first thulam 1073 M. E. before

the settlement authorities that Chemban Mallan had not executed the othi in favour of Boothathan Perumal but had executed the othi only in favour

of Devi Badrakali and she had executed an othi Vayoli (assignment) in favour of Boothathan Ponnan Perumal and that the assignee''s heirs,

Padmanabhan Ooli and Ponnanperumal Cheriyan, are enjoying the property in pursuance of that assignment. Thus, the predecessors in-interest of

the Appellants has contended even then that the mortgage was by Chemban Mallan in favour of Devi Badrakali and not in favour of Boothathan

Ponnanperumal direct and that Devi Badrakali had assigned that mortgage in favour of Boothathan Ponnan Perumal. Therefore, it is clear that the

mortgage admitted in the settlement enquires was one dated 11-8-1031 M.E., for 1100 fanams by Chemban Mallan in favour of Boothathan

Ponnanperumal directly, whereas the mortgage mentioned in the plaint in the present suit as well as in the statement of the Appellant''s predeessor-

in-interest in the settlement enquires was one by Chemban Mallan in favour of Devi Badrakali for 253 fanams and that it was assigned by her in

favour of Boothathan Ponnanperumal. What had been acknowledged is not the same as what has been pleaded by the Appellants in their plaint.

Therefore, none of the statements of the predecessors-in-interest of the Respondents would amount to a valid acknowledgment u/s 18(1) of the

Limitation Act, 1963, corresponding to old Section 19. Consequently, we find that the Appellants have not established the date of the mortgage or

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that the alleged acknowledgment relating to the suit mortgage was made within theperiod of limitation and that the suit is in time. Therefore, we

agree with the learned Judge and dismiss the Letters Patent Appeal with costs.

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