(1974) 07 MAD CK 0002

In the Madras High Court

Case No : L.P. App. No. 86 of 1969

Esakki Palpu and others APPELLANT

Vs

Cherian Kochan (died) and others RESPONDENT

Date of Decision : 24-07-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 105(2)
Limitation Act, 1963 — Section 10, 18(1), 19, 3

Citation : AIR 1976 Mad 142

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

Bench : Division Bench

Advocate : P. Ananthakrishnan Nair, for the Appellant; S. Padmanabhan, for the Respondent

Judgement

Varadarajan, J.—The appellants in this Letters Patent Appeal are the plaintiffs in O.S. 349 of 1956 on the file of the District Munsif Court,

Kuzhithurai. They filed the 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 Nallan became S. No. 293 and the southern half belonging to Raman

Narayanan became S. No. 294. The appellants alleged that Chemban Nallan executed a vellola mortgage or othi over S. No. 293 in favour of one

Devi Badrakali for fanams 253. Devi Badrakali assigned the mortgage in favour of one Boothathan Ponnan Perumal, the ancestor of Padmanabhan

Ooli and Ponnan Cherian. Padmanabhan Ooli and Ponnan Cherian were in possession of S. No. 293. Chemban Malan 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 22nd November 1950

M.E. and conveyed the Jenmom right in the land. Esakki Padmanabhan died leaving behind three sons, Esakki, Ummini and Marthandan. The first

appellant is the son of Esakki and father of appellants 2 and 3. The 4th 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, reaper dents 3 and 4. Respondents 1 to 4 were

in possession of S. No. 293. Respondents 9 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. 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 Perumal for fanams 1100 on 11th

August 1131 M.E. The extent of S. No. 993 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 O.S. 280 of 1957 M.E. filed by him against Padmanabhan. Ooli and Ponnan Cherian on the has is of a chora oihi

has been dismissed.

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

to the settlement register and 1 acre 7 cents on the land, Ex.P. 2 the statement of Padmanabhan Ooli and Ponnan Perumal made on the settlement

enquiry on 20th December 1079 M.E. in settlement of case No. 119 of Kunnathur village is part of the settlement records Ex.P.1. Padmanabhan

Ooli has stated in his statement dated 2nd April 1069:

I agree to patta being issued to Kumarsn Cheriyan for 294 as he is in enjoyment of the share of the thandepar holder Raman Narayanan. The one

half in 293 in the name of Chemban Nallan is enjoyed by me and Ponnan

Perumal Cheriyan. On 11th August 1031 Chemban Nallan executed a

vollelodi othi and Kuzhikanam for 100 fanams 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 Bothanthan

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

direct heirs the jenmam right has devolved on me Ponnan Perumal Cheriyan and othersï¿½Apart from me and the persons mentioned in my

statement Chamban Nallan has no other heirs. Ponnan Perumal Cheriyan and I are the only hairs of Boothathan Ponnan Perumal.

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

As stated by Padmanabhan Ooli I have no objection to patta being issued to Kumaran Cherian for R.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 statement of Padmamnabhan Ooli

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

Ponnan Peruamal Cherian has made another statement dated 20th December 1079 M.E. thus.

Of the land thandaper holder Chemban Nallan got document in respect of S. No. 203 for his own half share and Raman Narayan got document in

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

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

Esakki Padmanabaan without consideration. We mutually fought mutation proceedings, since he did not get any relief be 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.

3. The appellants sought to rely upon the above statements of Padmanabhan Ooli and Ponnan Perumal Cherian for proving the mortgage and that

acknowledgment has been made by those two persons, saving limitation. The trial court found that the period 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 Perumal Cherian''s statement

made in 1079 ME, corresponding to 1904 is within time and that the appellants have title to one acre 7 cents, the extent of S. No. 294 and are

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

4. The trial court''s decree was confirmed by the District Court, Kanyakumari at Nagarcoil in A.S. 239 of 1959. Respondents 1 to 3 took the

matter in appeal to this Court in S.A. 45 of 1969 and 1243 of 1962 in which the only question argued was one of limitation. Veeraswami J. as he

then was, who disposed of these appeals, accepted the contention of respondents 1 to 4 that for purposes of S.19of the Limitation Act or the

corresponding provision in the Travancore Limitation Act Regulation the appellants should prove not only that there was an acknowledgment but

that it was made within the period 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 Ex. P. 2 was at all an acknowledgment in law. Reliance was placed before the learned Judge on Raman Raman v.

Varki Sankaria 20 Tr.L.J. 475 and it was contended that having regard to the fact that no 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 the period 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 appeal to the lower court for

fresh disposal on the point of limitation, retaining the finding as to title.

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

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 Badrakali, who is said to have assigned it to Boothathan Ponnan Perumal. But the mortgage

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

Therefore, the learned District Judge found that the mortgage acknowledged in Ex. P. 1 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.

6. The appellants came to the court in S.A. 1265 of 1964 and filed C.M.P. 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,

MB., for fanams 1100. Alagiriswami, J. who beard the appeal and the petition dismissed both of them, Hence this Letters Patent Appeal.

7. 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 S. 105(2)C.P.C. 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-S.(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, be 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

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

8. S. 18 (1) of the Limitation Act, 1963, which corresponds to S. 19of the old Limitation Act, reads:

Where, before the expiration of the prescribed period for a salt 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 be derives his title or liability, a fresh period 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 Ahmed Haji v. Mayan 57 M.L.J. 789 and Sivakasi Match Exporting Co. v.

Mohanlal ILR 1963 Mad. 1204 : 76 L.W. 247. The first decision arose out of a suit for redemption of a kanom 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 predeceesor-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 tarwad, 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, In these admissions, in finding that the plaintiff Devaswom was at one time the owner of the property. But be

observes that those 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. Under S. 10of the

Limitation Act, an acknowledgment to be effective must be made before the period 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 in this view by Dip Singh v. Girand Singh 26 All. 313. On this point,

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 ; 76 L.W. 247, 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.

9. But the learned counsel for the respondents invited our attention to the pleadings and contends that the mortgage admitted in the

acknowledgment in the settlement proceedings is not the one pleaded in the plaint. In Andiappa Chetti v. Devarajulu Naidu 21 M.L.J. 1024,

Ayling and Spencer, JJ. have observed :

S. 19of 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 fresh period 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 pertinent

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

In Official Assignee v. Natesa Achari A.I.R 1941 Mad. 892 Bench of this court has observedï¿½

S. 19will save limitation where before the expiration of the prescribed period, an acknowledgment of liability has been made in writing. Therefore,

before that section can apply, the words used must be words which clearly indicate an acknowledgment of liability of a particular debt. The

Legislature has decided that time shall be a bar to a mortgage and has fixed the period. It may seem bard that a person shall be deprived of his

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

overstraining the meaning of the words used.

The Privy Council in Md Akbar Khan v. Motal AIR 1948 P.C. 36 at 38 has observed at page 38ï¿½

In O.7 C.P.C. rule 1 requires the plaint to contain amongst 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 the period 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 the period prescribed there for by schedule I and accordingly is not required to be dismissed under 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 be

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 respondent 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 providing a suit

to be out of time rests upon the defendant, and regard mast 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.

10. 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 the period of limitation is on the respondents. In Tilkram v. Nathu 1967-2-S.C.J. 431 it is observed

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

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

as the mortgages thereunder as being redeemed cannot be availed of as acknowledgment 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. It 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 the period 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

amendment of the plaint, for which they filed C.M.P. 2742 of 1966, during the pendency of S.A. 1265 of 1964, that the mortgage was executed in

1031 M.E. 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 fanams. 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. 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 Boothathan Ponnan Perumal. Even in the

amendment sought for in the said C.M.P. 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 Nallan 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 Ponnanperumal in respect of S. No. 293 for 1100 fanams on 11th August 1131 M.E. A perusal of Ex. P. 2

shows that Esakki Padmanabhan maintained his statement dated 22nd July 1077 M.E. that the property was in the enjoyment of the ancestor of

Padmanabhan Ooli as per the 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 2nd April 1069 was that on 11th August 1031, Chemban Mallan executed a vollode othi and kuzhi

kanom 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

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

Perumal. The subsequent statement dated 20th December 1079 M.E. of Ponnan Perumal Cheriyan and Padmanabha Ooli is that their ancestor

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

obtained the jenmom right and were in possession of the property as per the othi and that so other person has got the right 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 Nallan on 11th August 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 1st Thulam 1073

M.E. before the settlement authorities that Chemban Nallan 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 a othi Vayoli (assignment) in favour of Bootbathan 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 appellant has contended even then that the mortgage was by Chemban Nallan 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 Ponnanperumal. Therefore, it is

clear that the mortgage admitted in the settlement enquiries was one dated 11th August 1031 M.E. for 1100 fanams by Chemban Nallan 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 predecessor-in-interest in the settlement enquiries was one by Chemban Nallan 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 under S. 18 (1) of the Limitation Act, 1963, corresponding to old S. 19. Consequently, we find that the appellants have not

established the date of the mortgage or that the alleged acknowledgment relating to the suit mortgage was made within the period of limitation and that the suit is in time. Therefore, we agree with the learned Judge and dismiss the Letters Patent appeal with costs.

