

A

SELVI

v.

GOPALAKRISHNAN NAIR (D) THR. LRS. AND ORS.

(Civil Appeal No. 21834 of 2017)

B

MAY 15, 2018

[R. BANUMATHI AND L. NAGESWARA RAO, JJ.]

Mortgage – Redemption of – Suit for redeeming the mortgaged properties, filed by plaintiffs inter alia against Respondent-Defendant No.2 – Respondent resisted the suit inter alia contending that property in old Survey No.988 belongs to him– Trial court passed the final decree holding that the plaintiffs are entitled to redeem the suit property and that old Survey No.988 which the respondent claimed ownership of, cannot be exempted from the suit property – Respondent filed appeal, which was dismissed by First Appellate Court – High Court allowed the second appeal of respondent – On appeal, held: In view of the objections repeatedly filed by the respondent reiterating that old Survey No.988 should be excluded from the properties to be partitioned, the trial court ought to have held an enquiry and directed the parties to adduce evidence as to the right claimed by the respondent in old Survey No.988 – Though, the parties are fighting litigation for more than five decades, but in order to meet the ends of justice, judgment of High Court and the courts below are set aside and matter remitted to trial court for deciding it afresh – Directions issued – Code of Civil Procedure, 1908 – s.97.

F

Allowing the appeal, the Court

HELD: 1.1 An Advocate-Commissioner was appointed to measure the suit properties according to the boundaries contained in the documents filed in the suit and to locate the properties contained in the Survey numbers 990, 983-A and 988. Right from the beginning, while filing the written statement and also the objections filed to the Commissioner’s Report, the respondent-second defendant contended that old Survey No.988 (R.S. No.123/9) belongs to him. [Paras 9, 10] [515-F; 516-A-B]

H

1.2 The Commissioner filed its Preliminary Report on which the respondent filed detailed objections stating that the Commissioner, while locating Survey No.988, did not follow the boundary descriptions contained in the documents. Based on the objections filed by the respondent, the Advocate-Commissioner revisited the property and filed his Report noticing Survey No.988 falls within the description of the suit properties. [Paras 11, 12] [516-C-D; 517-B-C]

1.3 Appellant-third plaintiff filed detailed objections to the Commissioner's Report stating that Survey No.988 cannot be excluded from the properties to be partitioned. The Respondent also filed detailed objections to the Commissioner's Report. Considering the objections repeatedly filed by the respondent reiterating that Survey No.988 falls within the description of the suit properties and that should be excluded from the properties to be partitioned, the trial court ought to have held an enquiry and directed the parties to adduce evidence as to the right claimed by the respondent in old Survey No.988 (R.S. No.123/9) and what was the basis on which the possession of the respondent was upheld in the proceedings under Section 145 Cr.P.C. and in CRP No.45 of 1992. [Paras 13, 14] [517-E-F; 518-D]

1.4 As per Section 97, CPC, where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. Of course, the respondent did not file the appeal against the preliminary decree challenging its correctness. But as pointed out by the respondent, in the description of the suit properties, Survey No.988 was not shown. As pointed out by the High Court, in para No. (13) of the written statement, respondent clearly averred that he is the owner of the adjoining property in Survey No.988 in which the plaintiffs and the other defendants have no right and that the third defendant is residing in a building belonging to the respondent in the said Survey No.988 on rental basis. In spite of the objections raised by the respondent as to the boundaries and description of the suit properties and also claiming right in Survey No.988 stated to be falling within those boundaries, the plaintiffs did not amend the description of

A the suit properties by bringing in Survey No.988 in the suit property. It was in this context, in their written statement, the defendants have stated that “the defendants have no objections to surrender the mortgage right in respect of Plaintiff B Schedule items.....”. [Para 16] [518-G-H; 519-A-C]

B 1.5 Two Commissioners earlier appointed have inspected the suit properties and filed their Reports stating that the suit properties were not identifiable. Only when the Advocate-Commissioner inspected the suit property, he noticed that Survey No.988 was falling within the description of the boundaries stated in the Plaintiff. Since the description of the suit property did not contain Survey No.988, the fact that the respondent did not prefer appeal against the preliminary decree, cannot be put against the respondent. [Para 17] [519-D-E]

C 1.6 In view of the stand taken by the respondent that he is entitled to the adjoining property in Survey No.988 by virtue of the sale deed of the year 1951 and the consistent objections raised by him to the Commissioner’s Report, in the final decree proceedings, the trial court ought to have directed the parties to adduce evidence to enable the court to ascertain the truth as to the correct description of the suit property and also the right claimed by the respondent in Survey No.988. The parties are fighting litigation for more than five decades; but in order to meet the ends of justice, the impugned judgment of the High Court and the courts below are liable to be set aside and the matter be remitted to the trial court for deciding the matter afresh. It is made clear that after the matter is remitted to the trial court based on his affidavit, second plaintiff is not entitled to put forth any claim. It is also made clear that the locus of third plaintiff to pursue the matter also shall not be called for question nor be challenged. [Para 18, 19] [519-G-H; 520-G-H]

D CIVIL APPELLATE JURISDICTION: Civil Appeal No. 21834 of 2017.

E From the Judgment and Order dated 13.04.2006 of the High Court of Madras at Madurai Bench in S. A. No. 255 of 2005

F V. Prabhakar, Ms. Jyoti Parasher, N.J. Ram Chandar, Mrs. Revathy Raghavan, Advs. for the Appellant.

H

M. S. Ganesh, Sr. Adv., R. Ayyam Perumal, K. Seshachary, A
M. Gireesh Kumar, Ankur S. Kulkarni, Sriram P., Vijay Kumar, K. V.
Vijaykumar, Advs. for the Respondents.

The Judgment of the Court was delivered by

R. BANUMATHI, J. 1. This appeal arises out of the judgment B
dated 13.04.2006 passed by the High Court of Madras at Madurai Bench
in Second Appeal No.255 of 2005 in and by which the High Court set
aside the final decree passed by the trial court and affirmed by the First
Appellate Court by holding that the appellant/plaintiff cannot lay a claim
in respect of Survey No.988 which the first respondent/second defendant
claims entitled to. C

2. Brief facts as seen from the Plaint averments are as follows:-

The suit properties that is plaint A Schedule property and Plaint
B Schedule property belonged to Kali Pillai, Krishna Pillai and others of
Varukkapilavila Veedu, which was outstanding on a mortgage. On D
27.12.1088 M.E.(11.08.1913) Kali Pillai, Krishna Pillai, Champakakutty
Pillai alias Bhagvathi Pillai and Kalyani Pillai and Lakshmi Pillai
mortgaged the said properties to Kutti Bhagvathi for Rs.785/- (Rs.109.04).
The mortgage was an usufructuary with Kuzhikkanam for a period of
twelve years. While Kutti Bhagvathi was enjoying it, she assigned her
mortgage right to Eravi Pillai Parvathi Pillai from whom Parameswaran E
Pillai of Kavavilai got an assignment under deed No.1231 of 1107 and
came into possession. Parameswaran Pillai sub-mortgaged portion of
Plaint B Schedule property to Kesava Pillai Narayana Pillai which right
has become vested in the second Defendant. The fourth Defendant has
also right in the suit mortgage. The third Defendant has also right in the
suit mortgage. The third Defendant has leasehold right over some portion F
of B Schedule property under Parameswaran Pillai. The first Defendant
is in possession of A Schedule property as the heir of the deceased
assignee mortgagor Parameswaran Pillai. The mortgagors 1 and 2 died
and their right devolved on the legal heirs of mortgagors - Kalyani Pillai
and her mother Lakshmi Pillai. The first Plaintiff - Kalyani Pillai inherited G
the equity of redemption of the plaint property on the death of her mother
Lakshmi Pillai. The first Plaintiff is thus the mortgagor by derivative title
who is entitled to redeem the mortgage from Defendant Nos.1 to 4. In
so far as her mortgage rights, the first plaintiff-Kalyani Pillai executed
an agreement of sale on 27.12.1968 in favour of the second Plaintiff -

H

A Vasudevan Pillai with respect to the mortgage property and as such he has joined as the second Plaintiff. Suit Properties within the stated boundaries are said to be situated in respect of A Schedule property in Survey numbers 990 - extent of 85 cents and Survey No.983/12A - 1 acre and 35 cents; Survey No.983/13A - 5 acres 96 cents and Survey No.983/14A – 0.64 acres in respect of B schedule property.

B
3. The respondent-second defendant who is the main contesting defendant resisted the suit *inter-alia* contending that he is in possession of Survey No.983/14A for which the appellants/plaintiffs have no right of possession. The second defendant-Gopalakrishnan Nair *inter-alia* further pleaded that the property in old Survey No.988 belongs to him and the third defendant is residing in a building situated in Survey No.988 on rental basis.

C
4. The parties went for trial. Upon consideration of evidence, the trial court passed the preliminary decree for partition on 07.08.1976 holding that the plaintiffs-Kalyani Pillai and Vasudevan Pillai are entitled to redeem and recover possession of 7.40 acres from defendant Nos.1 to 4 by depositing of mortgage money of Rs.109.81Paise. The trial court passed the preliminary decree for partition to the said extent of 7.40 acres in the suit property to which the plaintiffs are entitled for partition and separate possession.

D
E
5. First plaintiff - Kalyani Pillai executed an agreement for sale on 27.12.1968 in favour of the second plaintiff-Vasudevan Pillai. The second plaintiff-Vasudevan Pillai assigned the above said agreement in favour of one Rajayyan on 05.08.1978 and the said Rajayyan assigned that agreement in favour of third plaintiff-Selvi, wife of Devaraj on 10.03.1983. In the final decree proceedings, third plaintiff-Selvi got herself impleaded in the suit by filing a separate petition. All the three plaintiffs filed final decree application in I.A. No.120 of 1985 in OS No.1516 of 1969. The trial court by its judgment dated 19.09.2001 passed the final decree for partition holding that Survey No.988 which the second defendant claims cannot be exempted from the suit property. In the final
F
G
H
decree, the trial court held that the appellant/plaintiff is entitled to the portion as “ABCDEFXVUTSRQKLMNOP” marked in Exhibit C.2, entitled to the possession and that the plaintiffs are entitled to redeem the suit property. The Court further directed that the legal heirs of third defendant-Krishna Pillai are entitled to get a sum of Rs.2,64,607.50 as development charges of the suit property.

6. Being aggrieved by the final decree, the second defendant Gopalakrishnan Nair preferred an appeal in AS No.6 of 2002 on the file of Sub-court, Kuzhithurai. The First Appellate Court dismissed the appeal *vide* its judgment dated 20.08.2004 holding that no appeal had been preferred from the preliminary decree dated 07.08.1976 by the second defendant and that he cannot challenge the correctness of the preliminary decree in the final decree proceedings. The First Appellate Court confirmed the final decree passed by the trial court and dismissed the appeal observing that Gopalakrishnan Nair cannot have any valid objection for the final decree in favour of the plaintiffs.

7. Being dissatisfied with the concurrent findings, the first respondent preferred appeal in SA No.255 of 2005 before Madras High Court at Madurai Bench. The High Court proceeded to hold that the first respondent/second defendant in his written statement raised a plea of ownership in respect of Survey No.988 and that by its order dated 27.04.1998, the trial court also directed exclusion of the property in Survey No.988. After referring to the order of the trial court dated 27.04.1998 and the Commissioner's Report, the High Court held that the suit property in the preliminary decree does not cover Survey No.988 and was removed from the ambit of the suit property by the trial court and on those findings, the High Court allowed the second appeal. The High Court held that the final decree will stand as it is, excluding Survey No.988. Being aggrieved, the appellant/plaintiff is before this Court.

8. We have heard the learned counsel for the parties at length and perused the impugned judgment and carefully considered the evidence and materials placed on record.

9. Right from the beginning, while filing the written statement and also the objections filed to the Commissioner's Report, the second defendant-Gopalakrishnan Nair has been contending that old Survey No.988 (R.S. No.123/9) belongs to him. In his objections filed in I.A. No.120 of 1985, the second defendant-Gopalakrishnan Nair raised the following objections:-

“.....R.S. No.123/9 which is old survey No.988 belongs to the second defendant. The title of the second defendant to R.S. No.123/9 was declared and the defendants 9 to 11 who are the LRs of the third defendant are restrained by injunction from disturbing the quiet and peaceful possession of the land and trees excluding the building and courtyard.....”

A 10. Mr. Raveendran Nair, Advocate-Commissioner was appointed to measure the suit properties according to the boundaries contained in the documents filed in the suit namely Exts. A.1, A.2, B.1, B.2 and to locate the properties contained in the Survey numbers 990, 983-A and 988. In the said order dated 27.04.1998, the trial court directed exclusion of Survey No.988 as seen from the following:-

B “.....Further, he is directed that after measuring and locating the suit properties viz., in Survey No.990 and 983-A and the second defendant’s property which is situated in Survey No.988, the Commissioner may allot the plaintiff’s share of 7 Acres 40 cents both in Survey No.990 and 983 or in any of the above two survey numbers....”

C 11. The Commissioner filed its Preliminary Report on 17.02.1999, for which the second defendant-Gopalakrishnan Nair filed detailed objections stating that the Commissioner, while locating Survey No.988, did not follow the boundary descriptions contained in the documents.

D Relevant portion of the objections filed by the second defendant-Gopalakrishnan Nair *inter alia* reads as under:-

“.....

E 4. The Commissioner did not locate the Plaintiff Schedule survey numbers i.e., Survey Nos.990 and 983 and the other Survey Number 988 as directed by this Hon’ble Court.

5. The Commissioner failed to understand that a partition is impossible in this suit without locating the plaintiff schedule survey numbers 990 and 983.

F 6. It is seen from the report of the Commissioner that he is more particular and interested in locating Survey No.988 alone just to confuse matters. The various documents filed by this Defendant relating to his title to Survey No.988 and ignored by the Commissioner. While locating Survey No.988, the Commissioner did not follow the descriptions contained in the ancient documents filed by this defendant before this Hon’ble Court. But he simply followed documents for bits of land brought into existence after the suit and registered in Kerala at the instance of the Plaintiff.

G 8. This Thottampara Nilam lies west of the road and comprised in Survey No.1025. The portion lies west of the road

H

also forms part of Survey No.988. The portions shown as Thottampara Nilam and Muriyaravilakam are also portions of Survey No.988. The Commissioner did not locate the southern limit of Survey No.988.....
.....”

12. Based on the objections filed by the second defendant, Mr. Raveendran Nair, Advocate-Commissioner revisited the property and filed his Report noticing Survey No.988 falls within the description of the suit properties. The relevant portion of the Report of the Commissioner dated 26.04.1999 reads as under:-

“...While the Hon’ble Court appointing me as Commissioner, it is specifically ordered to exclude old Survey No.988. Since it belongs to second defendant, when this plot is excluded from partition the share of the plaintiff will come in file No.123/5, 6, 535/1, 2, 535/4 and the Plot B, B1, B2 and B3.

The old survey number of the properties are 983/12, 13, 14 and 988 of Mancode Village. Out of the above survey numbers, the plaintiff is entitled on the basis of boundaries the plot shown A,B,C,D,E,F,G,H,I,J,K,L,M,N,O,P,A, is the plot having an area of 7 Acres 40 Cents.

.....”

13. Appellant-Selvi filed detailed objections to the Commissioner’s Report stating that Survey No.988 cannot be excluded from the properties to be partitioned. Second defendant-Gopalakrishnan Nair also filed detailed objections to the Commissioner’s Report on 04.11.1999, as under:-

“.....

4. The Commissioner has wrongly shown ‘B’ Schedule Property inclusive of the whole by Survey Nos.988 without identifying the suit properties i.e. Survey Nos.983A and 990. Old Survey No.988 correlates to R. Survey No.123/9 having an extent of 3 Acres 39 Cents in the exclusive property of this defendant which is not available to a partition. In this aspect, the Commissioner has not even taken note of the various documents filed by this defendant.

5. The Commissioner exceeded his authority in allotting the share of the plaintiff inclusive of the whole Survey No.988 while this

A Hon'ble Court specifically directed him to allot the share of the plaintiff in Survey Nos.983A and 990 or in any of the both.

B 6. Paragraphs 5 and 6 of the report of the Commissioner are mutually conflicting. Paragraph 6 of the report is totally in conflict with the plan showing the allotment. Plots B1 and B2 shown by the Commissioner in his plan explicitly come within Survey No.988. So, the allotment of the share of the plaintiff inclusive of Survey No.988 is totally against the spirit of the order of this Hon'ble Court dated 27.04.1999. Such an allotment totally deprives the exclusive right of this defendant over Survey No.988.

C”

D 14. Considering the objections repeatedly filed by the second defendant reiterating that Survey No.988 falls within the description of the suit properties and that should be excluded from the properties to be partitioned, the trial court ought to have held an enquiry and directed the parties to adduce evidence as to the right claimed by the second defendant in old Survey No.988 (R.S. No.123/9) and what was the basis on which the possession of the second defendant was upheld in the proceedings under Section 145 Cr.P.C. and in CRP No.45 of 1992.

E 15. Both the trial court and the First Appellate Court appear to have rejected the objections raised by the second defendant mainly on the following grounds:-

- F
- i. No appeal was preferred by the second defendant against the preliminary decree and therefore, second defendant cannot challenge the correctness of the preliminary decree in the final decree proceedings;
 - ii. Second defendant has not raised the plea regarding his claim of ownership in Survey No.988; and
 - iii. Application for passing final decree is pending for more than sixteen years

G 16. As per Section 97 CPC, where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. Of course, the second defendant has not filed the appeal against the

H

preliminary decree challenging its correctness. But as pointed out by the learned counsel for the second defendant, in the description of the suit properties, Survey No.988 has not been shown. As pointed out by the High Court, in para No. (13) of the written statement, second defendant has clearly averred that he is the owner of the adjoining property in Survey No.988 in which the plaintiffs and the other defendants have no right and that the third defendant is residing in a building belonging to the second defendant in the said Survey No.988 on rental basis. In spite of the objections raised by the second defendant as to the boundaries and description of the suit properties and also claiming right in Survey No.988 stated to be falling within those boundaries, the plaintiffs have not amended the description of the suit properties by bringing in Survey No.988 in the suit property. It is in this context, in their written statement, the defendants have stated that “the defendants have no objections to surrender the mortgage right in respect of Plaint B Schedule items.....”.

17. Be it noted that two Commissioners namely Mr. K. Ponniah and Mr. Ambrose earlier appointed have inspected the suit properties and filed their Reports stating that the suit properties are not identifiable. Only when Mr. Raveendran Nair, Advocate-Commissioner inspected the suit property, he has noticed that Survey No.988 is falling within the description of the boundaries stated in the Plaint. Since the description of the suit property did not contain Survey No.988, the fact that the second defendant did not prefer appeal against the preliminary decree, cannot be put against the second defendant. Though the High Court referred to the averments in the written statement as to the claim of second defendant in Survey No.988, the High Court did not go into the question as to the entitlement of second defendant and the confusion regarding the boundaries of the properties.

18. In view of the stand taken by the second defendant that he is entitled to the adjoining property in Survey No.988 by virtue of the sale deed of the year 1951 and the consistent objections raised by him to the Commissioner’s Report, in our view, in the final decree proceedings, the trial court ought to have directed the parties to adduce evidence to enable the court to ascertain the truth as to the correct description of the suit property and also the right claimed by the second defendant in Survey No.988. We are conscious that the parties are fighting litigation for more than five decades; but in order to meet the ends of justice, in

A our view, the impugned judgment of the High Court and the courts below are liable to be set aside and the matter be remitted to the trial court for deciding the matter afresh.

19. Before we close the matter, we feel it necessary to set at rest two issues. As pointed out earlier, Kalyani executed an agreement for sale on 27.12.1968 in favour of second plaintiff-Vasudevan Pillai. Second plaintiff assigned the aforesaid agreement on 05.08.1978 in favour of one Rajayyan and the said Rajayyan assigned the agreement in favour of third plaintiff-Selvi on 10.03.1983. As pointed out earlier, all the three plaintiffs filed final decree application in I.A. No.120 of 1985. After the disposal of the matter by the first appellate court and when the second appeal was pending before the High Court, second plaintiff Vasudevan Pillai filed an affidavit on 07.01.2013 before the trial court — District Munsiff Court, Kuzhithurai alleging that a fraud has been played on him and denying the right of third plaintiff-Selvi to pursue the final decree application. The said Vasudevan Pillai alleged that he has never filed final decree application and that his signature was forged and he has not assigned his right either in favour of Rajayyan or in favour of third plaintiff-Selvi. Though the parties have advanced lengthy arguments on the said averments in the affidavit filed by Vasudevan Pillai; it is to be pointed out that the affidavit of Vasudevan Pillai is clearly an afterthought. In the final decree application I.A. No.120 of 1985, all the three plaintiffs have signed. In the final decree stage, the third plaintiff-Selvi got herself impleaded based on the assignment of right in her favour by Rajayyan who in turn got the assignment from the second plaintiff-Vasudevan Pillai. The third plaintiff-Selvi was pursuing the final decree application. Though the final decree application was pending before the trial court for more than sixteen years and thereafter in the First Appellate Court, Vasudevan Pillai has not raised any objection nor made any grievance against the third plaintiff-Selvi. Only when the second appeal was pending before the High Court, the second plaintiff-Vasudevan Pillai has chosen to file an affidavit before the court denying assignment of the right and raising plea of forgery. In our view, the stand of Vasudevan Pillai is clearly an afterthought and no weight could be attached to the averments in the affidavit. We make it clear that after the matter is remitted to the trial court based on his affidavit, Vasudevan Pillai is not entitled to put forth any claim. We also make it clear that the *locus* of third plaintiff-Selvi to pursue the matter also shall not be called for question nor be challenged.

20. For the foregoing reasons, the impugned judgment of the High Court and the courts below are set aside and the appeal is allowed. The matter is remitted to the trial court for consideration of the application for final decree I.A. No.120 of 1985 in OS No. 1516 of 1969 afresh with the following directions:-

- (i) The plaintiffs and the second defendant are at liberty to adduce oral and documentary evidence to substantiate their objections filed to the Commissioner's Report;
- (ii) The trial court to decide upon the correct survey numbers falling within the description of the suit properties and whether the said suit property within the stated boundaries tally with the properties mortgaged;
- (iii) Tallying of boundaries of the properties with reference to documents, if necessary, by reference to revenue records.
- (iv) Entitlement of the second defendant-Gopalakrishnan Nair as to Survey No.988 with reference to his documents and also the proceedings before the Executive Magistrate and further revision thereon; and

Since parties are litigating the matter for more than five decades, we direct the trial court to expedite the hearing in the final decree proceedings and dispose the same in accordance with law. No cost.