



S.A.No.601 of 2009

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.03.2023

CORAM:

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.601 of 2009

and

M.P.No.1 of 2009

Dravia Jesu

...Appellant

Vs.

Jayaraman

...Respondent

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 29.11.2007 and made in A.S.No.231 of 2006 on the file of the Principal District Judge at Puducherry reversing the judgment and decree dated 30.04.2001 made in O.S.No.81 of 1994 on the file of the Principal Sub-ordinate Court at Puducherry.

For Appellant : Mr.S.Mahimai Raj

For Respondent : Mr.R.Gowthama Narayanan

J U D G M E N T



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This is an appeal, which raises the vexed question yet again, whether the document under which, the parties are litigating before the Court, is a mortgage by conditional sale or a sale with a condition to re-purchase.

2.The relationship between the parties seem to have been cordial enough for the respondent to receive amounts from the appellant to repay his loans. The respondent was an employee of Anglo French Textiles, which had to be locked down some time in 1984. The respondent was living in the said house with his wife and two daughters and was mired in debt. At that time, he entered into an agreement of sale dated 03.12.1984, agreeing to alienate the property, in which he was residing for a sum of Rs.20,750/-. Even under the said document, the word that was used was “ஈரோட்டு கிரயப் பத்திர வடிவத்தில்”. It was agreed that the property will be sold in the form of ஈரோட்டு கிரயப் பத்திர வடிவத்தில். Subsequently, the parties had executed a document on 31.01.1985. The said document reads as “ஈரோட்டு கிரயப் பத்திரம்” with certain conditions, which are as follows:-



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“இன்று முதல் ஒன்பதாண்டு கெடுவரையில் இதனை நீங்கள் ஆண்டு அனுபவித்துக்கொண்டு வரிகளை நீங்களே கட்டி வரவேண்டியது.

மேற்கண்ட கெடுவுக்குள் நான் உங்களிடமிருந்து பெற்ற தொகை ரூ.35,000, ரூபாய் முப்பத்தையாயிரத்தையும் குறைக்காமல் கொடுத்துவிட்டு அழைக்கும்போது நீங்கள் வந்து என் செலவில் என் பேருக்கு மறுகிரயம் செய்து கொடுத்து விட வேண்டியது.

மேற்கண்ட கெடுவுக்குள் நான் மறுகிரயம் செய்து கொள்ளத் தவறினால் கெடு முடிந்த தேதியிலிருந்து, அதாவது 31-1-1994க்குப் பின், கீழ்க்கண்ட சொத்தை உங்கள் பேரால் பட்டா மாற்றி வரிகட்டிக்கொண்டு கிரய விதிகளின்படி அனைத்துரிமைகளோடும் ஆண்டு அனுபவித்துக் கொள்ள வேண்டியது.”

3.The Trial Court interpreted the document as a sale with a condition of re-purchase. The lower Appellate Court had taken opposite view. Against this reversing findings, the defendant in the suit has presented this appeal. At the time of admission, the following substantial questions of law were framed:-

“a.Whether the Lower Appellate Court has not committed error or law by reversing the well considered judgment of the trial court by holding that the appellant was only a mortgagee and not a purchaser of the suit property as per Ex.A1 (Ex.B2), dated 31.01.1985?

b.Whether the Lower Appellate Court has not erred in law by misconstruing the contents of the sale deed, i.e.Ex.A1 (Ex.B2) by



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holding that it was only a mortgage as against the borrowal of loan?”

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4.In this appeal, I am called upon to answer whether Ex.A1, which corresponds to Ex.B2, is a sale with condition of re-purchase or a mortgage by conditional sale.

5.Mr.S.Mahimai Raj, learned counsel appearing for the appellant would submit that reading of Ex.A1 / Ex.B2 would show that though it was titled as “ஈரொட்டு கிரயப் பத்திரம்”, it is a document of sale with a condition of re-purchase. He would state that the intention of the parties is clear from the evidence of D.W.2 and D.W.3, who were scribe in the attesting witness. They have stated that it was the intention of the parties to enter into a sale deed and not into a mortgage deed. He would very forcibly draw my attention to the pre-suit notice where under, it was stated that it was only a sale with a condition of re-purchase and not a mortgage. He would further submit that his clients have made an improvement of nearly Rs.1,00,000/- over the property, which no prudent person would have made, had it been only a mortgage with conditional sale. On this basis, Mr.S.Mahimai Raj would forcibly contend that the appeal has to be allowed



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and the judgment of the Trial Court has to be restored.

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6.Mr.R.Gowthama Narayanan, learned counsel appearing for the respondent/plaintiffs would contend that the document should be read only as a mortgage because the title to the property did not get transferred to the appellants, which would have been the case, had it been a sale. He would further contend that Section 58(c) of the Transfer of Property Act applies in full force to Ex.A1 and would invite the attention of this Court to forms of pleadings LIFCO's Documents-Drafting & Registration (in Tamil), in particular, at Page 157 to contend that the document is only a mortgage by conditional sale and not a sale with condition of re-purchase.

7.The learned counsel appearing for the respondent would rely upon the judgments of several Courts, which are as follows:-

i) **Dharmaji Shankar Shinde and Others Vs. Rajaram Shripad joshi (Dead through LRs and Others** reported in **AIR 2019 SC 2367.**

ii) **Afshar M.M.Tacki Vs. Dharamsey Tricamdas** reported in



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AIR 1947 Bombay 98.

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iii) **Chunchun Jha Vs. Ebadat Ali and Another** reported in **AIR**

1954 SC 345(1).

iv) **Srinivasaiah Vs. H.R.Channabasappa (Since Dead)** by his

legal representatives and Others reported in **(2017) 12 SCC 821.**

v) **Bhimrao Ramchandra Khalate (deceased) through legal**

representatives Vs. Nana Dinkar Yadav (Tanpura) and

Another reported in **(2021) 9 SCC 45.**

He would therefore, contend that the appeal deserves dismissal. He would further submit that the amounts due has been deposited by the respondent but he is unable to state whether it carries any interest. I have carefully considered the arguments of both sides.

8.The document is titled as “ஈரோட்டு கிரயப் பத்திரம்”. In “க்ரியாவின் தற்காலத் தமிழ் அகராதி” (Tamil to English Dictionary) “ஈரோட்டு” means that the document with “prevarication, ambiguous /uncertain”. Similarly, the Dictionary named Mousset Et Deputs, the French to Tamil Dictionary would also state as follows:-



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ஈரோட்டு, (id), incertitude, doute, equivoque:

WEB COPY ஈரோட்டாய் avec doute, - equivoque, d'une maniere incertaine.

“A sale cannot be **“equivoque, uncertain or ambiguous.”** I am referring to the French to Tamil Dictionary because the case arises from Puducherry. From the above, one can gather the practice of document writers.

9.Section 52 is very clear on the execution of the document. The title should pass from the Vendor to the Vendee. The very fact that the document says “ஈரோட்டு கிரயப் பத்திரம்” implies that the title is in quandary and possession had been handed over under the document. The title for any property cannot be in vaccum. In this particular case, the appellant does not get title to the property till the expiry of nine years. In such situation, one has to fix with whom the title lies. As seen from the document, the title would get confirmed in favour of the appellant, if and only the plaintiff does not pay the amount of Rs.35,000/- to the defendant on or before 31.01.1994.



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10.I am persuaded to hold that it is only a mortgage with conditional sale because the document does not have the requirements of transfer of property. Further more, I am not able to accept the arguments of the learned counsel appearing for the appellant that the document should be read a transfer as the word mortgage is not found in the document. This begs the very issue because Section 58(c) will apply only if there is an “Ostensible Sale”. It predicates that the mortgage is titled as a sale but the intention of the parties was not to transfer the title to property. The document under Ex.B1, which is the agreement would go to show that a sum of Rs.20,750/- is being paid, for which, the parties will enter into a sale in the format of “ஈரொட்டு கிரயப் பத்திர வடிவத்தில்”. This implies that even at the time of the agreement, the party wanted to enter into an agreement, which at best would ostensibly be a sale but not a sale. In pursuance of this agreement, the ஈரொட்டு கிரயப் பத்திரம் has been executed. I will not permit the parties to argue beyond what has been stated in the document because of the operation of Sections 91 and 92 of the Indian Evidence Act.



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11.No doubt, they can give evidence on the circumstances by which the document came into force. In this particular case, the evidence is in the form of Ex.B1, the agreement dated 31.12.1984, which also spoke about “an equivocal or incomplete deed”. The concept of an incomplete sale deed is unknown to the Transfer of Property Act. There is either a sale or there is no sale at all. Therefore, the intention I gathered from Ex.B1 and A1/B2 is that it was only a mortgage by conditional sale and not a sale with a conditional repurchase.

12.The learned appearing for the appellant would argue that the plaintiffs had purchased the property at Rs.5,670/- but the Ex.A1 was for Rs.35,000/- and therefore, this would show that the seven times amount paid by him as a sale consideration would indicate that it is a sale and not a mortgage. Here too, I am not able to agree with him for the simple reason that the valuation of the property under Ex.A1/B2 is Rs.40,000/- as per the Government valuation. It has been purchased for Rs.35,000/-. Apart from that, I have to take note of the fact that the original transaction of Rs.5,750/- was between the Housing Co-operative Society and the employees of AFT



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Workers' Union. The transfer by a Co-operative Society in favour of its members would obviously be not at a market value but would be at a value determined by the General Body of its members and the Managing Committee. In such circumstances, the General Body of its members would not want to purchase the property at market value. It is for that purpose, they have joined the Society. The idea of joining a Society is to fulfill the desire of owning a house, not at the market value but the value at which the Co-operative Society would allot in favour of its members.

13.In addition, there is a restriction in the allotment order, which says that no sale or alienation should take place for a period of ten years. This is also a ground for the value of the property being fixed not at the market value but at the value, which is affordable for the members of the Co-operative Society.

14.Apart from this, the learned counsel appearing for the appellant would argue that the sale under Ex.A1/B2 was entered into in the format mentioned only in order to get over the restriction in the allotment order. I



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have read the allotment order. The allotment order prohibits all kinds of alienations including mortgage and sale. If the argument of the learned counsel for the appellant is to be accepted, the very document under which he claims to have purchased the property would be hit by the said clause. It is only suicidal for the appellant. In any event, the agreement itself says that the nature of the document should be as a ஈரொட்டு கிரயப் பத்திர வடிவத்தில். The document have been written in a clear and categorical terms that it was not meant to be absolute transfer. Following **the judgment of the Supreme Court in Chunchun Jha Vs. Ebadat Ali and Another** reported in **AIR 1954 SC 345(1)**, I hold that it is only a mortgage by conditional sale and not a sale with a condition of re-purchase.

15.Mr.S.Mahimai Raj would argue that he has improved the property for over Rs.100,000/-. Hence, he is entitled for the same, if I were to hold it as a mortgage. Here again, I am unable to accept the contention because of Section 63-A of the Transfer of Property Act. Any improvement of a property, which is in possession of the mortgagee by him, on redemption, vests with the mortgagor. The exception to the rule is that if there is an



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agreement to the contrary, the mortgagor is liable to pay the mortgagee the cost of improvements.

16.In this particular case, Section 63(A)(ii) is inapplicable as there is no evidence to show the improvements were made to preserve the property from destruction or deterioration or to prevent the security that has been granted from becoming insufficient. In lack of such evidence in support of Section 63-A Sub-clause 2, I am constrained to hold that the appellant is not entitled to make any improvements over the property. I am in entire agreement with the view taken by the lower Appellate Court. I do not find any perversity or illegality with respect to the judgment, which requires my interference under Section 100 of C.P.C.

17.In fine, this Second Appeal is dismissed, the judgment and decree of the Principal District Judge, Puducherry in A.S.No.231 of 2006 dated 29.11.2007 in reversing the judgment and decree of the Principal Sub-ordinate Judge, Puducherry in O.S.No.81 of 1994 dated 30.04.2001 stands confirmed. This Second Appeal is therefore, dismissed. Considering the



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fact that the parties have agitated an interesting question of law, I am not imposing costs in the appeal. Consequently, connected miscellaneous petition is closed.

31.03.2023

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Internet: Yes/No

Index: Yes/No

Speaking/Non-speaking order

Nuetral Citation : Yes/No

To:-

- 1.The Principal District Court,
Puducherry.
- 2.The Principal Sub-ordinate Court,
Puducherry.



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V.LAKSHMINARAYANAN, J.

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