

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28.08.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(NPD)No.3102 of 2012
and
M.P.No.1 of 2012**

1.B.Asaithambi

2.A.Malarvizhi

.. Petitioners

Vs.

1.Praveen Chordia

2.Pradeep Chorda

.. Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the Fair and decreetal order in C.M.P.No.1580 of 2010 in A.S.No.58 of 2009, dated 05.07.2012, on the file of the V Additional City Civil Judge, Chennai.

For Petitioners : Mr.G.Appavu

For Respondents : Mr.N.A.Nissar Ahmed

ORDER

The petitioners have filed this Civil Revision Petition to set aside the fair and decretal order of the V Additional Judge, City Civil Court, Chennai, dated 05.07.2012 in C.M.P.No.1580 of 2010 in A.S.No.58 of 2009.

2.The case of the revision petitioners is that they are the appellants in the appeal suit in A.S.No.58 of 2009 on the file of the Vth Additional Judge, City Civil Court, Chennai. The said appeal suit came to be filed as against the judgment and decree made in O.S.No.3358 of 2007 on the file of the XII Assistant City Civil Judge, Chennai. The said suit was filed by the revision petitioners/appellants/plaintiffs for redemption of mortgage deed executed in respect of the suit schedule of property in favour of the respondents/defendants, dated 03.03.2005 in document No.1142/2005 on the file of S.R.O, Kodambakkam.

3.The said suit was decreed and preliminarily decree was passed by the learned trial judge by an order and decree dated 27.03.2008 by holding that the mortgage deed dated 03.03.2005 is liable to be

redeemed on deposit of Rs.9,50,169/- and with interest at 6% per annum on Rs.5,25,000/- from the date of plaint till realization. Since the rate of interest at 6% per annum as arrived by the learned trial Judge was high, the revision petitioners filed the above appeal in A.S.No.58 of 2009 in so far as the awarding of 6% interest. In the mean time the respondents herein have also filed a cross appeal.

4. While pending appeal, the respondents herein came up with an interlocutory application in I.A.No.1580 of 2010 filed under Order 41 Rule 3, r/w Section 151 of CPC in A.S.No.58 of 2009 praying to dismiss the revision petitioner's appeal on the ground of non-payment of the proper Court fee and thereby sought the trial Court to hear the cross-objection alone, which was filed by the respondents herein. Though the revision petitioners/appellants have rightly valued the appeal suit and have paid the required Court fees, the above application came to be filed by the respondents with oblique and malafide intention. However, the learned appellate judge on erroneous approach, besides misconception of law and fact, arrived as if there was deficit Court fee of Rs.41,187/- required to be paid by the revision petitioners, has allowed the respondents application in I.A.No.1580 of 2010 on 05.07.2012 and thereby directed the revision petitioners to pay the

deficit Court fee sated above on or before 27.07.2012 failing which the appeal is liable to be dismissed. The said order is impugned herein.

5.I heard Mr.G.Appavu, learned counsel appearing for the petitioners and Mr.N.A.Nissar Ahmed, learned counsel appearing for the respondents and perused the entire records.

6.The learned counsel for the revision petitioners would submit that the above application seeking for the relief of dismissal of an appeal for non-payment of proper Court fee is neither maintainable in law nor on facts. The appeal was valued by the revision petitioners as that of the suit value, irrespective of the preliminary decree amount decided by the trial Court. The suit has been valued for the purpose of Court fee at Rs.2 lakhs and Court fee of Rs.15,002/- was paid under Section 33 (8) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955 and the suit has also valued for declaration at Rs.1,000/- and Court fee of Rs.75.50 was paid under Section 25(d) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955. Thus, the Court fee paid in the appeal is proper, as per the value arrived in the suit. When the very quantum of preliminary decree itself is sub-judice by way of appeal, the revision petitioners need not pay the Court fee on the

disputed quantum of preliminary decree. Furthermore the revision petitioners bonafidely have paid the required Court fee on the basis of the suit value.

7.The learned counsel for the revision petitioners would further submit that the appeal suit was placed before the office of the principal judge on 23.12.2009 and by an order of the learned judge dated 16.02.2009, the appeal suit was transferred to the appellate Court and the same was numbered. Thus when the appeal was admitted on the point of payment of Court fees, the respondents herein are estopped from forcing the revision petitioners to pay the Court fees or re-open a dispute with regard to Court fee, since it is governed by principle of res-judicata and the value has been already decided by the competent Court of law. However, the lower appellate Court has failed to appreciate the above facts and erred in allowing the respondent's application in I.A.No.1580 of 2010 which is warranted interference by this Court.

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8.Per contra, the learned counsel for the respondents would submit that the Court fee in the appeal on hand will be payable on 'ad-valorem' scale on the amount decreed, which the subject matter of the

appeal is in respect of the amount. The revision petitioners instead of valuing the appeal on the amount arrived at by the trial Court granting the preliminary decree, but vexatiously under valued the appeal on the basis of the Court fee valued in the plaint. Only on taking into the above factual and legal preposition, the learned lower appellate judge has rightly held that there is a deficit Court fee of Rs.41,187/- to be paid towards the appeal suit filed by the revision petitioner.

9. On perusal of the impugned order and the typed set of papers, it is seen that the preliminary decree has been granted by holding that the mortgage deed dated 03.03.2005 shall be redeemed on deposit of Rs.9,50,169/- with interest at 6% per annum on Rs.5,25,000/- from the date of plaint till the date of realization with costs.

10. Now the question arise before this Court is that in a appeal suit preferred against an order and decree made in a suit for redemption of mortgage, the Court fee will have to be paid on the 'ad valorem' scale with reference to the amount which is being disputed or on having basis upon the Suit value.

11. In this context it would be relevant to look into the decision of

this Court made in the matter of **T.G.Gopal pillai v. Viswanatha Iyar & another** reported in **A.I.R.(39) 1952 Madras 23(C.N.7)** holding as follows:

“2. Reliance was placed upon the decision in *Sekaran Vs Echaran*’, 20 Mad L Jour 121. I find, however, that very judgment at page 128 says that even in the case of an appeal, in suits for redemption if the right to redeem is not the subject matter of dispute in appeal taut only the amount which is being disputed in appeal, when Court-fee will have to be paid on the ‘ad valorem’ scale. That follows the decision in ‘Reference under Court- Fees Act, 1870, 29 Mad 367’. In this case if the appeal is looked at merely as an appeal against a decree for possession conditional on the payment of Rs. 18000 and the appeal is to get rid of the liability for the payment of Rs. 18000, then according to the decision in ‘*In re Porkodi Achi*’, 45 Mad 246 Court-fee will have to be paid on the ‘ad valorem’ scale with reference to the amount which is being disputed. But even on the footing that this matter arises in respect of a suit for redemption, as the right to redeem is being asserted by the plaintiff and is not being disputed by the defendant,

and the subject-matter of the appeal is only, with reference to the amount, even according to the decision in Sekaran Vs Echaran', 20 Mad L Jour 121 it would follow that Court-fee will be payable on the 'ad valorem' scale on the amount disputed."

ii) This Court like to emphasis yet another decision of this Court in the matter of **T.Kamalam & Ors v. The Purasawakam Permanent Fund Ltd Rep by its Managing Director**, reported in **CDJ 2014 MHC 6213** wherein it was held as follows:

"8.However, the learned counsel for the respondent made a meek attempt to contend that the relief sought for in the suit was for redemption of mortgage and the relief of redemption granted by the trial Court alone is sought to be challenged in the appeal; that the appeal filed against the quantification of the amount due under the mortgage cannot be termed an appeal against a money decree and that therefore, the valuation made in the appeal and the Court fee paid thereon were correct.

9. This Court is not in a position to countenance the above said argument. Section 33(8) of the Tamil Nadu Court Fees

and Suits Valuation Act, 1955, which was discussed above, makes it clear that the value of a suit for redemption shall be the amount due as per the statement in the plaint or 1/4th of the principal amount secured by the mortgage whichever is higher. It was subject to a modification that in case the Court finds a higher amount to be due, decree in favour of the mortgagor for redemption shall not be passed before the mortgagor /plaintiff pays the deficit Court fee taking the amount declared to be due as the value of the relief in the suit. Though the suit for redemption is for the enforcement of the right of the mortgagor to redeem the mortgage on discharge of mortgage debt, in a way it assumes the character of a suit for money so far as mortgagee is concerned as the decree contemplated in a suit for redemption is a preliminary decree for quantification of the amount due under the mortgage followed by a direction to pay the amount within a time to be fixed by the Court and a further direction that in case of default, the mortgagee shall be entitled to bring the property for sale. In Appendix D to the Code of Civil Procedure, Form Nos. 7A and 7C are provided for a

preliminary decree for redemption where on default of payment by mortgagor a decree for sale is passed. The form of final decree for sale in a suit for redemption on default of payment by mortgagor is found in Form No.7E. The said form will also give a clue that suit for redemption, wherein a preliminary decree is passed for redemption with a direction for sale of the mortgaged property in case of default in payment, should be taken as a money decree on the point of view of the mortgagee. When a mortgagee is claiming that the amount found by the trial Court to be due under the mortgage is not correct and a higher amount should have been found to be due, then the claim made in the appeal should be taken only as a claim for money to the extent disallowed by the trial Court. In this regard, in Pachayakkal and another vs Shanmughavelayudhasamy Gopanna reported in (1942) 2 MLJ 785, a learned Single Judge of this Court has made the following observations:

"The position seems clear (1) that if in an appeal against a decree in a suit brought for redemption the appeal relates only to the amount payable and not to the right of redemption, Court-fee must be paid ad valorem on the

amount claimed to be payable; (2) if the appeal purports to dispute both the right of redemption and the amount payable but in substance relates only to the amount payable, again Court-fee must be paid ad valorem on the amount claimed; but (3) if the right of redemption and the amount payable are disputed in appeal and both grounds are grounds in substance and not merely in form the Court-fee payable will be as for a suit under Section 7, Clause (ix) of the Court- Fees Act. It follows from the above that the petitioners have to pay Court-fee in respect of their appeals in proportion to the amounts they have claimed to be payable to them."

The said decision came to be rendered when the earlier Court fees Act, 1870 was in force. Section 7(ix) of the 1870 Court fees Act reads as follows:

" to redeem. - (ix) In suits against a mortgagee for the recovery of the property mortgaged".

to foreclose.- and in suits by a mortgagee to foreclose the mortgage, or, where the mortgage is made by conditional sale, to have the sale declared absolute according to the principal money expressed to be secured by the instrument

of mortgage."

10. Under the old Act suits for foreclosure and suits for redemption had to be valued and ad valorem Court fee should be paid on the Principal money secured under the mortgage. There is a deviation from the said Section in the new Act. Section 33(8) of the 1955 Act says that the value of the relief of redemption shall be valued at the amount stated to be due under the mortgage as per the statement found in the plaint or at one fourth of the Principal amount secured by the mortgage, whichever is higher. The schedule to the old Act says that the Court fee payable on the memorandum of appeal shall be on the amount or value of the subject matter in dispute. The subject matter in dispute in an appeal against a decree for redemption shall be the amount claimed by the mortgagee and disallowed by the Court unless the appeal is solely on the ground that irrespective of the amount due, the mortgagor has lost his right to redeem. If those principles are applied properly, then we can safely come to the conclusion that the amount in dispute in the appeal is the difference between the claim made by the respondent

herein/appellant(defendant) and the amount awarded by the trial Court which is Rs.9,41,481.21 (Rs.10,87,819.51 Rs.1,46,338.30). The same alone shall be the value of the subject matter of the appeal, so far as the relief of redemption is concerned. Since the relief of injunction granted by the trial Court is also challenged, notional value of Rs.1000/- was also added. Accordingly, the total value of the subject matter of the appeal works out to Rs.9,42,481.21 for which amount the respondent/appellant should have paid the Court fee.

11. The learned lower appellate Judge failed to properly appreciate the issue and committed an error in holding that the valuation of the subject matter of the appeal was correctly made and that the Court fee paid thereon was correct. The said finding of the lower appellate Court can be termed not only erroneous and infirm but also as an exercise of jurisdiction with material irregularity capable of being corrected by this Court in exercise of its power of superintendence over the subordinate Courts under Article 227 of the Constitution of India.

In the result, the revision petition is allowed the impugned

order of the learned XVII Additional Judge, City Civil Court, Chennai dated 21.12.2012 made in C.M.P.No.842 of 2010 is set aside and C.M.P.No.842 of 2010 is allowed in part. The value of the appeal is fixed at Rs. 9,42,481.21 (Rs.9,41,481.21 + Rs.1000/-) and Court fee shall be paid on the said amount. The respondent herein/appellant before the lower Appellate Court is directed to pay the deficit Court fee based on the said valuation. Time for payment of Court fee is four weeks from the date of receipt of a copy of this order."

12.In the light of the above legal propositions and the facts involved in the case, it is therefore needless to say that for the amount which is being disputed in the appeal, the Court fee should have been paid on such disputed amount of Rs.9,50,169/-. Furthermore the respondents /defendants have also paid the said Court fee and preferred the Cross Objection in No.450 of 2009. In view of the same, the finding of the Lower Appellate Court holding that the revision petitioner/ /appellants/ plaintiffs are liable to pay the deficit Court fee of Rs.41,187/- (Rs.56,262/- Minus Rs.15,075/-) is correct and the same hence does not require interference.

13.In the result:

(a) the Civil Revision Petition is dismissed by confirming the order passed in C.M.P.No.1580 of 2010 in A.S.No.58 of 2009, dated 05.07.2012, on the file of the V Additional City Civil Judge, Chennai;

(b) the revision petitioner is directed to pay the deficit Court fee before the lower Appellate Court based on the valuation arrived in CMP.No.1580 of 2010 in A.S.No.58 of 2009;

(c) the Court fee shall be paid in eight weeks from the date of receipt of a copy of this order;

(d) on payment of deficit Court fee within a stipulated period of time, the Appellate Court namely the V Additional City Civil Court, Chennai, is directed to dispose of the Appeal within a period of two months thereafter. Consequently connected miscellaneous petition is closed.

सत्यमेव जयते

28.08.2017

vs

Index:Yes

Speaking order

To

The V Additional City Civil Judge, Chennai.

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M.V.MURALIDARAN,J.

VS



**Pre-Delivery order made in
CRP(NPD).No.3102 of 2012
and
M.P.No.1 of 2012**

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