



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Judgment Reserved on : 05.06.2017
Judgment Pronounced on : 16.11.2017

CORAM :

THE HONOURABLE Mr. JUSTICE N. SESHASAYEE

S.A. (MD) No.90 of 2017
and CMP. (MD) No.1646 of 2017

R.Selva Ganesan ... Appellant/Appellant/Defendant

Vs.

Ramasamy Nadar (Died) ... Plaintiff
1.Subbulakshmi
2.Selvaraj
3.Anbuselvi ... Respondents/Respondents/LRs of the
deceased Plaintiff

Prayer: Second Appeal filed under Section 100 of the Code of the Civil Procedure against the Judgment and Decree dated 30.08.2016, made in A.S.No.1 of 2015 on the file of the Subordinate Court, Aruppukottai, confirming the judgment and decree dated 07.11.2014 made in O.S.No.183 of 2009 on the file of the District Munsif Court at Aruppukottai.

For Appellant : Mr.T.Lajapathi Roy
For Respondents : Mr.M.Rajarajan

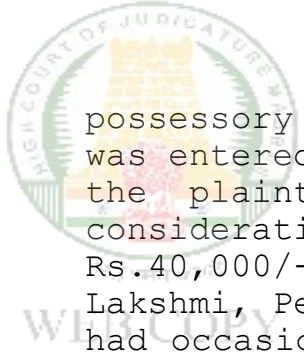
JUDGMENT

The defendant, in a suit for redemption of mortgage has come forward with this appeal. He has suffered successive decrees upholding plaintiff's right to claim redemption of the mortgage of the suit property both before the trial Court and the first appellate Court.

2. The brief facts are that, on 25.8.2006, the plaintiff to whom the suit property belonged has created a possessory mortgage in favour of the defendant on a mortgage debt of Rs.40,000/-. The duration of the Otti /possessory mortgage is fixed as 11 months. Prior to the expiry of the said 11 months on 07.6.2007, plaintiff's son Selvaraj wrote on behalf of the plaintiff, a letter to the defendant requesting the latter to state the date for discharging the "otti" and for recovery of the property. The defendant, however neither opted to reply, nor came forward to accept the mortgage money, hence the suit.

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3.1. In the written statement, the defendant had admitted the



possessory mortgage, but pleaded that on 10.8.2007, a sale agreement was entered into between the plaintiff and the defendant, whereunder the plaintiff agreed to sell the suit property for a total consideration of Rs.1,20,001/-, which included the mortgage debt of Rs.40,000/-, that the suit property was jointly owned by one Lakshmi, Pechiammal and the plaintiff, and the sale agreement itself had occasioned because there was a controversy among the said three in connection with the mortgage money. Further before the expiry of time stipulated for performing the obligation arising under the said agreement of sale, the plaintiff has laid the suit for redemption.

3.2. In his additional written statement, the defendant has contended that he had spent up to Rs.1,00,000/- for repairing and making improvements in the property and this has been undertaken only with the consent and knowledge of the plaintiff and that the plaintiff is liable to reimburse the value of improvement that the defendant has made.

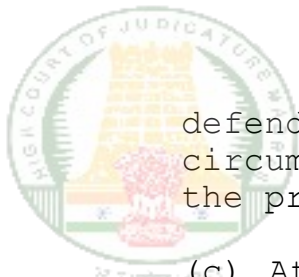
4. The trial Court decreed the suit and passed the preliminary decree for redemption. Before the trial Court, the defendant did not produce the agreement of sale that he pleaded in his written statement.

5. Challenging the said decree against him, the defendant preferred an appeal in A.S.No.1 of 2015 before Sub Court, Aruppukottai. Before the appellate Court, the appellant/defendant produced the sale agreement dated 03.08.2009, which is marked as Ext.B-1. The appellate Court ultimately concluded that the defendant has been enjoying the suit property only as a possessory mortgagee and not under a sale agreement.

6. Aggrieved by the decree of the first appellate Court, the defendant has come forward with the present appeal. When the matter came up for admission, after hearing the counsel for rival parties, this Court found that there exists adequate material for resolving the dispute through mediation, and also attempted one, but, it failed to give expected results.

7. Three points are canvassed by the appellant before this Court:

(a) P.W.1, the defendant has admitted the execution of Ext.B1, sale agreement and having admitted it, there is a merger of right which the appellant obtained both under Ext.A.1 mortgage deed and Ext.B-1, sale agreement, and as such the possession of the suit property in the hands of the defendant must be construed as possession in pursuant to part performance of sale agreement.



defendant would not have made as a reasonable man under circumstances, but for the fact, he is holding possession of the property pursuant to sale agreement.

(c) At any rate, the redemption must be conditioned upon the plaintiff paying the value of improvement.

8. Per contra, the learned counsel for the plaintiff/respondent had argued that the defendant has not filed any suit for specifically enforcing Ext.B1 agreement and more particularly has not pleaded that the right he has obtained under Ext.A1 has merged with Ext.B-1, sale agreement. At any rate, he is not entitled to the value of improvements for, under Sec.63-A of the Transfer of Property Act, the mortgagor will be under an obligation to pay the costs of improvements, only if the improvement is made to preserve the mortgaged property from destruction and not otherwise.

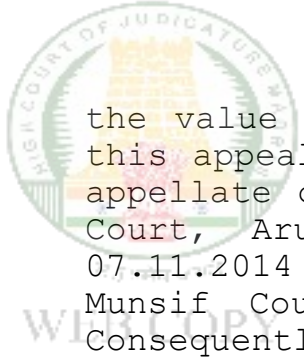
9. In the estimate of this Court this case does not rise any substantial question of law within the meaning of Sec.100 CPC. The reasons can be stated as below:

- Under Sec.63-A of the Transfer of Property Act, a mortgagee of a possessory mortgage is entitled to the value of improvements he has made only (i) if there is a contract to that effect; and (ii) if such improvement became necessary for the preservation of the mortgaged property, but not otherwise. This must be read in conjunction with Sec.72 of the Act.
- The defendant/appellant, through has introduced Ext.B-1 agreement of sale, it cannot be said that merely because he was in possession of the property as on the date of Ext.B-1, the sale agreement would automatically convert the character of his possession into one pursuant to the agreement of sale. In other words the character of his possession as a mortgagee would not get converted into possession under Sec.53-A of the Transfer of Property Act by mere factum of mortgagor and the mortgagee entering into a sale agreement. To expatiate it further, mere retention of possession on the date of sale agreement by the mortgagee may not be adequate to convert the character of possession from that of a mortgagee into one in pursuant to part performance of a contract of sale. There must be some act independent of mere retention of possession done in furtherance of contract of sale. See **Nanjegowda Vs Gangamma** [AIR 2011 SC 3774]; **Sardar Govinda Mahadiu Vs Devi Sahai** [AIR 1982 SC 989 : (1982)1 SCC 237]; and **DS Parvathamma Vs A Srinivasan** [(2003) 4 SCC 705]. There is nothing to indicate that he acted on the agreement of sale. Not even a suit for specific performance was instituted by him.

10. While the appellant is not entitled to value of improvements made, he is entitled to remove the same.

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11. In the end, subject to the right of the appellant to remove



the value of the improvements as indicated in paragraph 10 above, this appeal is dismissed and the judgment and decree of the first appellate court in A.S.No.1 of 2015 on the file of the Subordinate Court, Aruppukottai, confirming the judgment and decree dated 07.11.2014 made in O.S.No.183 of 2009 on the file of the District Munsif Court at Aruppukottai is hereby confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (W)

/True Copy/

Sub Assistant Registrar

To:

1. The Subordinate Judge,
Aruppukottai.
2. The District Munsif,
Aruppukottai.

DS/CM
TE/KKR/SAR-2 : 24/01/2018 : 4P/3C

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