



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date: 21.02.2017

CORAM :

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

Appeal Suit (MD) No.121 of 2013

and

M.P.(MD) No.1 of 2013

Sakadevan

... Appellant/Plaintiff

-Vs-.

1.M.Sakkarai

2.S.Annamayil

... Respondents/Defendants

Prayer: Appeal Suit filed under Section 96 of the Code of Civil Procedure, against the judgment and decree insofar as not granting the interest as claimed by the appellant made in O.S.No.147 of 2008, 29.03.2012 on the file of the First Additional District Judge, Madurai.

For Appellant

: Mr.R.Devaraj

For Respondents

: Mr.S.Nates Raja

JUDGMENT

The plaintiff in the suit in O.S.No.147 of 2008 on the file of the First Additional District Judge, Madurai, is the appellant in the above appeal.

2.The plaintiff filed the suit in O.S.No.147 of 2008 for passing a preliminary decree in favour of the plaintiff, directing the defendants to pay the plaintiff a sum of Rs.10,55,200/- with subsequent interest at the rate of 27% per annum on Rs.4,00,000/-. The suit is to recover the mortgage money that was secured under a mortgage deed alleged to have been executed by the defendant in favour of the plaintiff on 05.09.2002.

3.The case of the plaintiff / appellant in brief are as follows:

3.1.The defendants borrowed an amount of Rs.4,00,000/- from the plaintiff on 05.09.2002 and executed a mortgage deed on the same day in respect of the suit property in favour of the plaintiff. As per the mortgage deed, the defendants agreed to pay interest at the rate of 27% per annum. Since the defendants did not pay either the principal or interest, the plaintiff sent a legal notice on 20.07.2007. However, the defendants sent a reply on 14.08.2007 stating that they are not liable to pay either the amount borrowed or the interest. It is also the case of the plaintiff that on the same day i.e., on 05.09.2002, the defendants borrowed an amount of Rs.2,00,000/- from one D.Suresh Kumar who is none other than the son of the



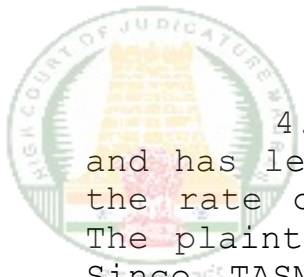
plaintiff's own brother by name P.Dharmar. The defendants executed a othi deed in respect of the same property in favour of the said Suresh Kumar and this deed is also registered on 06.09.2002. The said Suresh Kumar alone is in possession and enjoyment of the property in lieu of interest for the amount which was borrowed from the said D.Suresh Kumar. Since the plaintiff is not in possession and enjoyment of the suit property, nor put in possession in lie of the interest for the amount paid by the plaintiff to the defendants, the plaintiff is entitled to interest from the defendants for the amount borrowed from him.

4.The case of the defendants are as follows:

4.1.It is false to allege that on 05.09.2002, the defendants borrowed a sum of Rs.4,00,000/-. It is true that the second defendant executed a registered mortgage deed on 05.09.2002. However, it is false to allege that on that day a sum of Rs.4,00,000/- was paid to her. It is false to allege that the defendants agreed to pay interest at the rate of 24% per annum.

4.2.The defendant borrowed an amount of Rs.1,00,000/- on 18.07.2001 from the plaintiff which is repayable on or before 25.10.2001 at the rate of Rs.1,000/- per day. After deducting a sum of Rs.20,000/- towards interest, the first defendant was given only a sum of Rs.80,000/-. The first defendant has been regularly paying the daily thavanai at the rate of Rs.1,000/- per day upto 14.09.2001 totally a sum of Rs.59,000/-. Due to the loss suffered by the first defendant in his business, he could not pay the daily thavanai thereafter. Thereafter, the defendant has also borrowed a further sum of Rs.1,00,000/- on 27.07.2001. This time also the plaintiff after deducting the interest of Rs.20,000/-, the plaintiff paid only a sum of Rs.80,000/- to the first defendant. Even for the second loan, first defendant has paid a sum of Rs.16,000/-. For the balance of principal and interest along with penal interest, the plaintiff forced this defendant to execute a mortgage deed on 05.09.2002 as security for the repayment of the money which was paid in advance by the plaintiff as loan to the first defendant. The second defendant, who is an illiterate lady, signed the mortgage document, believing the words of the plaintiff. Hence, the plaintiff did not give the sum of Rs.4,00,000/- on 05.09.2002 as alleged by him. The mortgage deed is, therefore, not supported by any consideration as recited therein.

4.3.On 05.09.2002 itself the plaintiff gave a letter of undertaking stating that in lieu of interest, the plaintiff can occupy Door No.2, namely, the first floor of the building bearing Door No.13/B-1 and the shop of the southern side of the complex. In the said undertaking letter, the plaintiff was agreeing that he will not claim any interest for the loan amount from 05.09.2002.



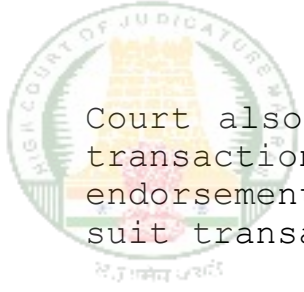
4.4.The plaintiff alone is in possession of the premises and has let it out to TASMAC. Even the rent from TASMAC only at the rate of Rs.6,000/- per month was received by the plaintiff. The plaintiff has been enjoying the rent for the past two years. Since TASMAC wine shop was shifted to some other place, the plaintiff leased out the portion for running a computer centre and now is receiving a sum of Rs.5,000/- per month as rent. The plaintiff has also received an advance amount of Rs.50,000/-. Though the plaintiff is not supposed to let out the building to any one, he is enjoying the property by letting it out to others. Since the plaintiff refused to hand over the possession of the property in which he was in occupation, the first defendant retained the above said amount payable by him. At the time of plaintiff vacating the portion in his possession, the first defendant is prepared to pay the money.

4.5.The allegations in paragraphs 9 of the plaint are all false and the plaintiff is making an attempt to separate the transaction between plaintiff and Suresh Kumar who is none other than the son of plaintiff's brother one Dharmar and the registered othi in favour of the said Suresh Kumar was also part of the same transaction and it was done only for the convenience as it was insisted by the plaintiff who was in dominant position.

5.Though the plaintiff filed a reply statement denying the allegations in the written statement, the first defendant filed an additional written statement specifically disputing the transaction namely the othi in favour of one Suresh Kumar and reiterated that the first defendant has nothing to do with the said Suresh Kumar.

6.The trial Court framed necessary issues. Since it was the main contention by the first defendant that the mortgage deed dated 05.09.2002 is not supported by monetary consideration and the said issue was framed as the first issue and decided in favour of the plaintiff holding that the defence taken by the defendants that the mortgage deed dated 05.09.2002 is not supported by consideration cannot be accepted, in view of the legal position on the interpretation of Section 92 of the Evidence Act. Since the first defendant is the signatory to the document Ex.A1 and the execution of this document and receipt of consideration had been admitted before the Sub Registrar at the time of registering document Ex.A1, the trial Court relying upon the evidence of P.W.2 accepted the case of the plaintiff regarding the receipt of Rs.4,00,000/- by executing the mortgage deed.

7.The contention of the first defendant that he received only a sum of Rs.1,00,000/- each on two occasions and that he was making the daily thavanai for some time as endorsed in the pocket note books marked as Exs.B2 and B3 were disbelieved. The trial



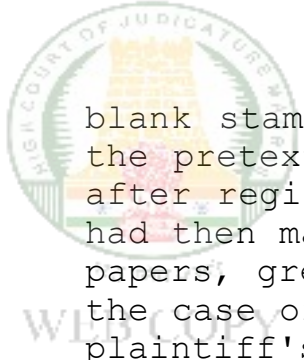
Court also found that the pocket note books were relating to the transaction with the plaintiff's brother one Dharmar and that the endorsement's in Exs.B2 and B3 are held to be not related to the suit transaction.

8.However, relying upon the document Ex.B1 and the admission of the plaintiff regarding his signature in the document Ex.B1, the trial Court held that the plaintiff is not entitled to interest for the mortgage amount. The trial Court has also found that the plaintiff is in possession of the property belonging to the first defendant and that his possession is only in lieu of interest payable for the money paid by the plaintiff to first defendant under Ex.A1 mortgage deed. Hence, though the suit was partly decreed by passing a preliminary decree directing the defendants to pay to the plaintiff a sum of Rs.4,00,000/-, the suit regarding interest was dismissed. Aggrieved by the judgment and decree of the trial Court, negating the claim for interest, the plaintiff has preferred the above appeal.

9.The learned counsel for the appellant vehemently argued that the plaintiff has proved Ex.A1 mortgage deed executed by the defendants and that the denial of interest based on collateral transaction is erroneous. The learned counsel for the appellant, after referring to Ex.A4, a *othi* deed which was executed by the defendants in favour of one Suresh Kumar contended that the possession of the property mortgaged is only with the mortgagee under Ex.A4 and that the plaintiff is not in possession of the property as contended by the plaintiff. According to the learned counsel for the appellant, the transaction between the defendants and the plaintiff's brother and his brother's son Suresh Kumar have nothing to do with the mortgage deed, executed by the defendants in favour of the plaintiff. The learned counsel for the appellant also made a legal submission that the trial Court failed to consider the document Ex.A4 while deciding the issue relating to the transaction under Ex.B1 and the enjoyment of the property by the plaintiff.

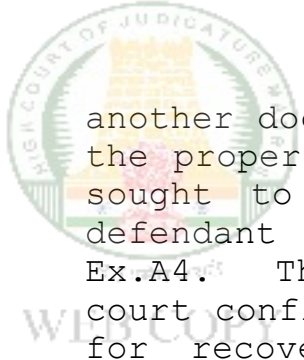
10.In this appeal, the mortgage deed under Ex.A1 is not in dispute. Since, the execution of the mortgage deed under Ex.A1 and the passing of consideration under Ex.A1 are found in favour of the plaintiff / appellant, the only issue that is relevant for this Court at this stage is whether the document Ex.B1 is executed by the plaintiff or not. The plaintiff has admitted his signature in the document Ex.A1. However, the plaintiff did not refer to this document in the plaint though this document Ex.B1 was specifically referred to in the reply notice. The allegation in the reply notice were not traversed and nothing was mentioned about the stand taken by the defendants in the reply notice in the

11.However, the plaintiff in the reply statement contended that the plaintiff's signature was obtained in some



blank stamp papers and green sheets by the document writer under the pretext that they were required to get back the mortgage deed after registration. It was further contended that the defendants had then made use of the plaintiff's signatures in the blank stamp papers, green sheets and other papers. The trial Court considered the case of the plaintiff in the reply statement and held that the plaintiff's case on Ex.B1 is unacceptable having regard to the nature of transactions. If really the defendant had the blank papers signed by the plaintiff they would have utilised the same for creating the document which would entitle them to plead discharge of the mortgage. It is also a fact that the defendants have pleaded Ex.B1, disclosing the contents of the document even in the reply notice which was filed as Ex.A3. However, the plaintiff has not chosen to deny the document in the plaint. Further, the specific case of defendant that the plaintiff is in enjoyment of the property, mortgaged is acceptable having regard to the evidence of the defendant's witnesses. If really the case of the plaintiff that the property is only in the enjoyment of his brother's son Suresh Kumar or with his brother, the plaintiff could have let in sufficient evidence to prove his case. The fact that the defendants are not in enjoyment of the mortgage property is not in dispute. The question whether the suit property was really in the enjoyment of the plaintiff or not could have been very easily clarified by the plaintiff by producing oral and documentary evidence or at least by examining his own brother's son. Even the document Ex.B1 gives an indication that the plaintiff has admitted his possession. It is to be seen that the document Ex.B1 also refers to the *othi* in favour of plaintiff's brother's son. The plaintiff himself has relied upon Section 92 of the Evidence Act to disprove the contentions of the defendants as against the recitals of the document Ex.A1. Hence, the oral evidence of plaintiff is inadmissible to contradict the contents of Ex.B1. The case of the plaintiff regarding the circumstances suggesting that the document Ex.A1 was manipulated by the defendants cannot be accepted and as it is quite improbable and incredible. The trial Court has come to the conclusion that after considering the issue in the light of pleadings and documents apart from the oral evidence of respective parties.

12. The learned counsel for the appellant relied upon a judgment of this Court in *M.K.Seetharama Naidu v. Poovammal and three others* reported in 2001 (1) CTC 100 for the proposition that the contents of registered instrument can be varied only by another registered instrument. The judgment referred to by the learned counsel is distinguishable on facts of the case. In that case, the document Ex.A1 is a simple mortgage. In a suit for redemption, by the mortgagor, the defence taken by the defendant mortgagee was that he was a lessee prior to the mortgage and that in case of redemption his possession as lessee can not be disturbed. The defendant also claimed right under City Tenant's Protection Act. In the course of trial, the plaintiff relied upon



another document Ex.A4 wherein the defendant has agreed to deliver the property when the plaintiff pay the principal amount. It was sought to be contended by the plaintiff that the tenancy of defendant is extinguished the moment the respondent executed Ex.A4. Though the trial Court decreed the suit, the appellate court confirmed the decree for redemption but negatived the prayer for recovery of possession holding that the defendant still entitled to continue in possession of the property as a lessee. While answering the substantial question of law, whether the tenancy of the respondent is extinguished the moment the respondent executed Ex.A4, this Court has held in para 11 as follows:

"11. Admittedly, the mortgage is a simple mortgage. The terms of Ex.A-1 are clear and unambiguous, that is to say that under the mortgage, the first defendant was not given possession of the property subject matter of the proceedings. He had possession of the property even earlier in his capacity as a tenant. So far as Ex.A-4 is concerned, it purports to vary the terms of Ex.A-1. The original of Ex.A-1 is a registered document. Under Section 92 of the Evidence Act, the terms of the mortgage which is a registered document, can be varied only by another registered instrument. When Ex.A-4 does not satisfy the requirement of Section 92 of the Evidence Act, it could not be looked into for the purpose of finding out whether there was variation of the terms of the mortgage. When that is the position, the lower Appellate Court was perfectly justified in granting a decree for redemption without granting the prayer of the plaintiff for recovery of possession in view of the fact that the plaintiff had admitted the tenancy of the first defendant and even according to the plaintiff, he became a tenant in the year 1965 long before the mortgage deed came into existence. Rightly has the lower Appellate Court found that the question whether the defendants would be entitled to the benefits of the City Tenants Protection Act, has to be decided in the contemplated separate proceedings by the plaintiff's legal representatives."

13. From the facts of the case, Ex.A1 is a registered mortgage deed. The mortgage is a simple mortgage. Hence, possession was not handed over to the defendant under Ex.A1. The document Ex.A4 is a document executed by the defendant to surrender possession upon receipt of principal. As a matter of fact, Ex.A4 is not for varying the terms of Ex.A1 mortgage. The question also was not regarding payment of interest but regarding possession. Law is also settled that unless there is extinguishment of lease by the terms of mortgage deed, there is no merger and that by redemption of mortgage, the tenancy right revives. In such circumstances, the observation of the learned judge that the document Ex.A4 purports to vary the terms of Ex.A1



is not appropriate. However, the legal position that a registered instrument which is required in law to be in writing or has been registered according to law can be varied only by another registered instrument can be inferred from proviso (4) of Section 92 of Indian Evidence Act. Section 92 of the Indian Evidence Act reads as follows:

"Section 92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).- Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2).- The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the decree of formality of the document.

Proviso (3).- The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).- The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).- Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.



Proviso (6).— Any fact may be proved which shows in what manner the language of a document is related to existing facts.

14. By referring to Section 92 of the Indian Evidence Act, it is the contention of the appellant that the defendant cannot rely upon the document Ex.B1 for the purpose of varying the terms of Ex.A4, othi deed executed by the defendant in favour of the plaintiff's brother's son. Ex.A4 is not a document between the plaintiff and the defendants. The plaintiff is not a party to the document, he cannot rely upon the recitals in Ex.A4 to invoke the benefit of Section 92 of the Indian Evidence Act. The words "as between the parties" found in Section 92 of the Indian Evidence Act makes it clear that Section 92 can be pressed into service only if one of the parties to the transaction is trying to let in oral evidence in order to vary or contradict the terms of the document reduced to be in writing or registered as against the person who is also a party to the document. Hence, the plaintiff cannot get the assistance of Section 92 of the Indian Evidence Act to stop the defendant to let in evidence to contradict the terms of Ex.A4. Further, in this case, the documents Ex.A2 and A4 were all executed on the same day. In Ex.B1, the plaintiff undertakes not to pay rent for a sum of Rs.4,00,000/- advance to the defendant under the mortgage. The plaintiff also admits in Ex.B1 that both the mortgages namely the one executed by the defendant in favour of the plaintiff and the other one executed by the plaintiff in favour of the plaintiff's brother's son are part of some transactions. In such circumstances, the case of the defendant is more probable. There is no legal infirmity in the judgment of the trial Court. Hence, this Court find no merit in this appeal and hence, it is dismissed. However, there is no order as to costs. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

/True Copy/

Sub-Assistant Registrar

To

1.The First Additional District Judge, Madurai

2.The Section Officer, Vernacular Records,

Madurai Bench of Madras High Court, Madurai.

+One cc to Mr.S.Natesh Raja, Advocate, SR.No.9361

+One cc to Mr.R.Devaraj, Advocate, SR.No.9818

SRM

RL/5C/8P/BS/22.3.2017

Judgment made in
Appeal Suit (MD) No.121 of 2013
21.02.2017