IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.09.2018

CORAM

THE HON'BLE MR. JUSTICE R.SUBRAMANIAN

S.A.Nos.374 & 375 of 2008
and
M.P.Nos.1 & 1 of 2008

J.Mahalakshmi
...Appellant (in both the/Appeal) Plaintiff

vs.

N.Narasimhan
...Respondent in S.A.No.374/ of 2008
1st Defendant

T.K.Subramani ...Respondent in S.A.No.375 of 2008
1st Defendant

Second Appeals filed under section 100 C.P.C. praying to set aside the judgment and decree in A.S.Nos.630 and 629 of 2006 dated 25.07.2007 on the file of VII Additional Judge of City Civil Court, Madras. Preferred against the Judgment and Decree dated:27/02/2006 in OS.No.5367/01, 5366/01 on the file of the VI Assistant Judge,City Civil Court, Chennai.

For Appellant : Mr.B.Thanikachalam

For Respondents : Mrs.S.L.Kalavathy

COMMON J U D G M E N T

These two appeals are at the instance of the plaintiff in O.S.Nos. 5367 and 5366 of 2001. Both the suits were filed by the plaintiff for redemption of two mortgages dated 23.09.1989 executed by the plaintiff in favour of T.K.Subramanian, first defendant in O.S.No.5366 of 2001 and the mortgage dated 01.06.1990 executed by the plaintiff in favour of the first defendant in O.S.5367 of 2001 (M.Narasimhan).

2. While the mortgage dated 23.09.1989 is for the sum of Rs.50,000/-, the mortgage dated 01.06.1990 is for the sum of Rs.75,000/-. The plaintiff while admitting the execution of the documents would contend that the documents were not supported by the consideration. According to her, she borrowed moneys from the defendants 1 to 4 in the suit and had been repaying the same in installments and when she attempted to sell the property to discharge the debt, the defendant coerced her to execute the mortgage deeds. It is also her contention that she had paid the various amounts to the credit of the mortgages which have not been properly accounted for by the mortgagees. She would also rely upon the discharge of two other mortgagees made by her in favour of the third defendant in O.S. No.5366 of 2001. According to her, all the four mortgages were discharged by the payment of Rs.1,70,000/- but the defendants however did not issue receipts for the suit mortgages. Thus, the plaintiff sought for a decree for redemption claiming that she has discharged the entire amount due under the mortgages. She also claimed the benefits under the Dedt Relief Act 38 of 1972.

3. The suits were resisted by the defendants therein contending that the claim of the plaintiff that all the four mortgages executed by her form a part of the single transaction is false. They would also claim that no amount was paid by the plaintiff for discharging the suit mortgages. According to the defendants, the suit properties which were the subject matter of the mortgage was sold in public auction exercising the power of private sale under section 69 of the Transfer Property Act.

4. Before the Trial Court the plaintiff examined herself as P.W.1 and examined one Smt.Santha as P.W.2. On the side of the defendants one C.Thanigavel has examined as D.W.1. Exhibits A1 to A12 were marked on side of the plaintiff and exhibits B1 to B7 were marked on the side of the defendants.

5. The learned Sixth Assistant Judge, City Civil Court, Chennai who tried the suit rejected the claim of the plaintiff that she is entitled to the benefits of the Dedt Relief Act 38 of 1972. The learned Trial Judge also disbelieved the plea of the discharge made by the plaintiff. The learned Trial Court Judge concluded that the claim of the defendants that the property was sold in public auction under section 69 of the Transfer of Property Act was not established. He also found that the statement of accounts filed by the defendants have not been proved by examining the proper person. The Trial Court however drew adverse inference against defendants since they did not examine themselves as witnesses. Therefore, the learned Trial Court Judge concluded that the plaintiff has discharged the mortgages as evidenced by exhibits A4 and A5. On the said conclusion, the learned Trial Court Judge decreed the suits as prayed for.

6. Aggrievied the first defendant in both the suits filed in A.S.Nos.629 and 630 of 2006 on the file of the 7th Additional City Civil Court, Chennai. The learned Appellate Judge concurred with the findings of the Trial Court, with reference to the claim of the plaintiff based on Act 38 of 1972 . The learned Appellate Judge also concluded that the claim of the defendants that the property had been sold in public auction has not been established. However, on the question of discharge pleaded by the plaintiff the learned Appellate Judge concluded that the trial Court was not right in drawing adverse inference against the defendants in a suit for redemption.

7. According to the Appellate Judge, it is for the plaintiff to show appropriate discharge. He would also conclude that the exhibits A4 and A5 discharge receipts would only show that the two mortgages executed by the plaintiff in favour of Sri Muruga Finance namely, the third defendant in O.S.No.5366 of 2001 and the second defendant in O.S.No.5367 of 2001 were discharged. The learned Appellate Judge concluded that the Trial Court was in error in concluding that the suit mortgages were discharged by exhibits A4 and A5.

8. On the said findings, the learned Appellate Judge dismissed the suit in its entirety. Aggrieved the plaintiff has come forward with the present second appeal. At the time of admission, the following questions of law were framed by this Court:

"1.Whether the lower Court is correct holding that no person other that usufructuary mortgagor is entitled to rendition of account ?

2. Whether the lower Court after finding against the appellant, had not discharged the mortgage is correct in dismissing the suit without giving an opportunity to the appellant to redeem the mortgage will not amount to clog of rights of redemption of the appellant?" (sic)

9. Heard Mr.B.Thanikachalam, learned counsel for the Appellant and heard Mrs.S.L.Kalavathy, learned Counsel for the defendants.

10. Mr.B.Thanikachalam learned counsel appearing for the appellant would vehemently contend that the Appellate Court was not right in dismissing the suit for redemption in its entirety. He would also draw my attention to the judgment of G.Rajasuria, J., of this Court in N.Chandrasekaran Vs. Puraswalkam Santhatha Sanga Nidhi Limited, reported in (2009) 5 MLJ 413, in support of his contention that the suit for redemption may not be dismissed based on the differences in

quantum alone. It was further held that after passing a preliminary decree the quantum has to be determined in final decree proceedings. While doing so this Court had observed as follows :

> "Be that as it may, the law has to be applied in stricto sensu. A bare perusal of Form 7 prescribed under Order 34 Rule 7 of the Code of Civil Procedure would exemplify and demonstrate, express and expatiate that based on the differences in quantum alone, the suit for redemption cannot be dismissed. After passing a preliminary decree, the quantum has to be probed into by the Commissioner appointed. However, I make it clear that before passing preliminary decree as per the said Form 7, the legal issues should be decided only by the Judge and not by Commissioner. But, both the Courts beow misdirected themselves and dismissed the suit."

11. There is no quarrel about the proposition of law laid down by the learned Judge in the above said decision. The plaintiff came to Court with specific plea that she has discharged the entire amount due under the decree. The defendants would contend that the plaintiff has not paid any money towards the mortgages. The defendants also produced the statement of accounts in the form of exhibits B6 and B7. The trial Court as well as the appellate Court have rejected the said documents. The execution of the mortgages is admitted by the plaintiff. However, Mr.B.Thanikachalam would vehemently contend that the mortgages are not supported by the consideration. Unfortunately, the same is not the case of the plaintiff herself. The plaintiff would only contend that all the mortgages were discharged by paying the sum of Rs,1,70,000/- and though the discharge receipts were executed only for two mortgages they should be taken as discharge receipts for all the four mortgages.

12. Mr.B.Thanikachalam would rely evidence P.W.2 who deposed that the settlement was for all the four mortgages and the payment was in discharge of all the four mortgages. P.W.2 in chief examination affidavit filed by her would state that all the four mortgages were discharged and all the four mortgage deeds were returned to the plaintiff, the defendants have taken back two deeds promising to return them for executing the discharge receipts. This version of P.W.2 is wholly unbelievable. It will be pertinent to point out that P.W.2 in cross examination has stated that she does not know anything except having signed as witness in the two discharge receipts. Therefore the evidence of P.W.2 does not support the case of the

plaintiff. Drawing my attention to the evidence of D.W.1, Mr.B.Thanikachalam would submit that D.W.1 has deposed that there was no consideration in the mortgage deeds. I do not find any such admission in the cross examination of D.W.1 and D.W.1 has stated that money was paid to the plaintiff in installments and when the plaintiff wanted to sell her house to pay the dues, the defendants get the mortgages executed by the plaintiff. Therefore I do not think that the claim of the plaintiff that the mortgages are not supported by the consideration or that mortgages were discharged as evidenced by exhibits A3 and A4 can be countenanced in view of findings of the lower Appellate Court that the plaintiff has not established that she has discharged the mortgages. In any event the plaintiff's suit cannot be dismissed as a whole. Order 34 prescribes the procedure for disposal of the suits on mortgage. Order 34 Rule 7 provides for a preliminary decree in a suit for redemption. Order 34 rule 7 reads as follows:

> "Preliminary decree is redemption suit— (1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree—
> (a) ordering that an account be taken of what was due to the defendant at the date of such decree for—
> (i) principal and interest on the mortgage,
> (ii) the costs of suit, if any, awarded to him, and
> (iii) other costs, charges and expenses properly incurred by him up to the date, in respect of his mortgage security,
> together with interest thereon; or
> (b) declaring the amount so at that date; and
> (c) directing—
> (i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses and provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints
> all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created
> by the defendant or any person claiming under him where

the defendant claims by derived title, by those under whom he claims, and shall also, if necessary put the plaintiff in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges expenses and interest, the defendant shall be entitled to apply for a final decree—

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgage property be, sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at anytime before the passing of a final decree for foreclosure or sale, as the case may be, extend due in respect of subsequent costs, charges, expenses and interest."

13. The accounting part has to be done only at the time of final decree. While deciding the suit for redemption before the preliminary decree stage and Court is called upon to decide as to whether the plaintiff has a right of redemption or not.

14. If the Court decides that the plaintiff is entitled to redemption, then all other questions regarding the amount that is payable by the plaintiff has to be relegated to the final decree proceedings. A reading of Rule 7 of Order 34 would show that the Court, in suit for redemption at the stage of preliminary decree can only order accounts to be taken at the date of such decree for determining the amount due under the mortgage and other costs and charges properly incurred by him up to the date of the decree. In view of the above the questions of law framed are answered in favour of the appellant.

15. The second appeal is allowed, the judgment and decree of the Lower Appellate Court is set aside and there will be preliminary decree for redemption in favour of the plaintiff.

16. The defendants have claimed interest of 30% for the mortgages. Section 34 of the Code of Civil Procedure empowers the Court to fix the interest payable for the mortgage. Since the debt is secured by the mortgage, I find that the payment of

interest at 12% would be reasonable. Therefore, the quantum of interest is fixed 12% from the date of mortgage till the date of the suit and 6% from the date of suit till the date of payment. There would be a preliminary decree for redemption in favour of the plaintiff, in terms of Order 34 Rule 7 of the Code of Civil Procedure, the interest payable by the plaintiff is fixed at 12% from the date of mortgage till date of suit and 6% thereafter till the date of payment. The amount due and payable under the mortgages is to be decided after taking accounts by appointment of a Commissioner or otherwise in appropriate proceedings. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1.The VII Additional Judge of City Civil Court,
Madras.

2.The VI Assistant Judge,
City Civil Court, Chennai

+2cc to Mr.B.Thanikachalam, Advocate, S.R.No.63768 & 63769

+2cc to Mr.S.L.Kalavathy, Advocate, S.R.No.63709 & 63710

S.A.Nos.374 & 375 of 2008
and
M.P.Nos.1 & 1 of 2008

RGI(CO)
GSP(14/12/2018)