

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.08.2018
PRONOUNCED ON : 11.09 .2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.261 of 2015
and
M.P.No.2 of 2015

S.Kumaravel ..Appellant/2nd Defendant

Vs.

1. H.N. Joons Begum
2. The Chintadripet
Permanent Fund Ltd.
rep. by its Managing Direcotr ..Respondents/Plaintiff &
1st Defendant

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 09.12.2013 passed in A.S.No.409 of 2011 on the file of VI Additional Judge, City Civil Court, Chennai, reversing the judgment and decree dated 10.06.2011 passed in O.S. No.6543 of 2008, on the file of VI Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.R.Loganathan
For R1 : Mr.R.Manickavel
For R2 : Mr.T.Thiagarajan

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 09.12.2013 passed in A.S.No.409 of 2011 on the file of VI Additional Judge, City Civil Court, Chennai, reversing the judgment and decree dated 10.06.2011 passed in O.S. No.6543 of 2008, on the file of VI Assistant Judge, City Civil Court, Chennai.

2. The second appeal has been admitted on the following substantial questions of law.

a) Was the appellant court right in reversing the well described judgment of trial court indicating the defendant made by the plaintiff in complying with the direction

of the trial court in this suit dealt with by the appellate Court?

b) Is nor the present suit not hit by the principles of Or.2 R.2 oc CPC in as much as the plaintiff did file the earlier suit for injunction when the cause already arisen for the relief of redemption?

3. Considering the scope of the issues involved between the parties lying in a narrow compass as regards the subject matter, I deem it unnecessary to dwell into the facts of the case in detail.

4. The second appeal is laid by the second defendant in the suit, who is found to be the auction purchaser.

5. The suit has been laid by the plaintiff for redemption of mortgage. On the materials placed on record, it is seen that only the mortgagee, the first defendant had contested the said suit by raising various pleas. It is found that the second defendant had failed to file a written statement in the suit and accordingly he has been set exparte and thus it is seen that the second defendant has not contested the reliefs sought for by the plaintiff as regards the redemption of mortgage.

6. Based on the materials placed on record, no doubt, the trial court was pleased to dismiss the plaintiff's suit, however, the first appellate court, on an appreciation of the materials placed on record, found that the plaintiff had paid a huge amount towards the repayment of loan amount and also ready to pay a substantial amount of the balance due, if any, accordingly noting that the suit for redemption of the mortgage laid by the plaintiff is not hit by the law of limitation and entitled to redeem the mortgage, accordingly granted the decree of redemption of mortgage sought for by the plaintiff in the matter by passing a preliminary decree in favour of the plaintiff. The first defendant who had contested the plaintiff, had not preferred any challenge to the judgment and decree of the first appellate court. On the other hand, it is only the second defendant who had failed to contest the plaintiff's suit before the trial court, had chosen to prefer the second appeal.

7. When it is found that the second defendant had not put forth any plea resisting the plaintiff's case by filing a written statement, accordingly, it is seen that it is not open to the second defendant to contend in this second appeal that the suit laid by the plaintiff is hit by Order 2 Rule 2 of CPC as if the plaintiff had failed to claim the right of redemption

in the earlier suit laid by him for the relief of permanent injunction. However, as rightly put forth by the plaintiff's counsel, when the second defendant had not even filed the written statement challenging the plaintiff's suit and in particular, not resisted that the suit laid by the plaintiff is barred under Order 2 Rule 2 of CPC, in the absence of pleading and materials placed by the second defendant with reference to the same and furthermore when even the first defendant, the mortgagee had not specifically pleaded in the written statement that the suit laid by the plaintiff is barred under Order 2 Rule 2 of CPC, it is seen that the substantial question of law formulated in the second appeal with reference to the same cannot be accepted in any manner and in such view of the matter, in my considered opinion, sans plea and materials placed by the second defendant that the plaintiff's suit is barred by Order 2 Rule 2 of CPC, to raise such a plea at the stage of second appeal cannot be acceded to and accordingly the above substantial question of law formulated in the second appeal, as such, has to be answered only against the second defendant.

8. The plaintiff's right of redemption of mortgage is not stated to be barred by limitation. As found by the first appellate court, it is seen that the substantial amount had been paid by the plaintiff towards the mortgage in time and the plaintiff has failed to pay certain amount in time as per the orders of the court below in the allied proceeding. Now, it is the case of the second defendant that he had purchased the suit property at the auction sale. However, when there is no material placed by the second defendant or the first defendant, as the case may be, that the property mortgaged has been brought for auction sale in consonance with the provisions of law, in particular, when there is no material placed on record worth acceptance that the plaintiff had been put on due notice about the auction sale by giving a valid notice as such and furthermore, when the second defendant or the first defendant, as the case may be, had not placed any material to hold safely that the suit property had been brought to auction sale in accordance with law and in terms of mortgage deed marked as Ex.A1, as determined by the first appellate court, when the plaintiff is entitled to redeem the mortgage within the time laid by law and the plaintiff had also paid substantial amount in connection with the same and only some balance amount is due on the part of the plaintiff, in such view of the matter, the first appellate court is found to be justified in setting aside the judgment and decree of the trial court and granting a preliminary decree in favour of the plaintiff as prayed for. Even the trial court is found to have dismissed the plaintiff's suit only on the premise that the plaintiff had failed to pay certain amount as directed by the court in the other proceeding laid by the plaintiff, but, when the plaintiff's suit for

redemption is found to be not out of time and accordingly, the plaintiff is entitled to redeem the mortgage on the payment of the amount due under the mortgage deed and when the defendants have failed to establish that the suit property had been brought for sale as per the terms contained in the mortgage deed and in accordance with law by following the procedures contemplated under law, in my opinion, the alleged purchase of the suit property by the second defendant at the auction sale, cannot, in any manner, refrain the plaintiff from seeking the redemption of mortgage as prayed for. Therefore, no interference is called for in the judgment and decree of the first appellate court reversing the judgment and decree of the trial court and granting the relief of redemption in favour of the plaintiff.

9. The counsel for the plaintiff, in support of his contentions, placed reliance upon the decision reported in (2003) 3 Supreme Court Cases 614 (Achal Das Durgaji Oswal (dead) through Lrs Vs. Ramvilas Gangabisan Heda (dead) through Lrs. and others). The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the case at the hand.

10.M.P.No.2 of 2015

Petition has been laid by the appellant for the reception of the sale deed executed by the first defendant in his favour pursuant to the auction sale and according to him, the appellate Court erred in holding that the abovesaid sale deed had not been placed on record and thereby, also erroneously set aside the judgment and decree of the trial Court, particularly, ignoring the evidence of DW1 as well as the written statement/pleas of the first defendant. The counsel for the respondent/plaintiff contended that the appellant having failed to place the abovesaid document before the Courts below is not entitled to seek the reception of the abovesaid document as additional evidence in the second appeal and according to him, inasmuch as the abovesaid application does not satisfy the requirements of Order 41 Rule 27 CPC and the said document is also not essential for the adjudication of the issues involved in the matter, according to him, the application is liable to be rejected.

11. It has not been explained by the appellant as to why he had not endeavoured to produce the sale deed before the Courts below. As abovenoted, the appellant having not filed the written statement in the suit, he has been set *ex parte*. In such view of the matter, if really, the property mortgaged had been brought to sale in accordance with the terms of the mortgage deed and in accordance with law and the appellant had duly and lawfully purchased the property at the auction sale, he would have endeavoured to produce the document of sale executed in his

favour pursuant to the auction sale at the earliest. Having failed to do so before the Courts below and without explaining in any manner as to why he had not endeavoured to produce the said sale deed before the Courts below, it is seen that the appellant in order to overcome the shortcomings of his defence has come forward with the petition for the reception of the additional evidence. When the application for the reception of the additional evidence is found to be not satisfying any one of the legal requirements of Order 41 Rule 27 CPC and when as already determined, the appellant as well as the mortgagee the first defendant had failed to establish that they had brought the mortgage property for sale in tune with the terms of the mortgage deed and as per the provisions of law, in such view of the matter, the prayer for the reception of the additional evidence sought for by the appellant cannot be entertained. Resultantly, the application is dismissed.

12. The substantial questions of law formulated in this second appeal are accordingly answered against the 2nd defendant/appellant and in favour of the plaintiff.

13. Resultantly, the second appeal is dismissed with costs. Consequently, M.P.No.2 of 2015 is also dismissed and connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

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To

1. The VI Additional Judge, City Civil Court, Chennai,
2. The VI Assistant Judge, City Civil Court, Chennai.
3. The Section Officer,
V.R.Section, High Court, Madras.

+ 1 cc to Mr. R. Manickavel, Advocate Sr.63723
+ 1 cc to Mr.R. Loganathan, Advocate Sr.63614
+ 1 cc to MR. T. Thiyaagrajan, Advocate Sr.63354

S. A.No.261 of 2015

SAI(CO)
EU(29/10/2018)