

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.07.2018

PRONOUNCED ON : 27.07.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.Nos.2148 & 2149 of 2004

S.A.No.2148 of 2004

1. R.Ethirajammal
2. R.Ramachandran Naidu ...Appellants/1-2 Respondents/
Plaintiffs

Vs.

1. Y.Kavitha
Rep.by her power agent
Y.V.S.Reddy
2. Y.V.S.Reddy ... Respondents/Appellants/
1 & 2 Defendants
3. Sri Raj & Co
Public Auctioners
7, Sunkurama chetty street,
Chennai - 1. ...3rd Respondent/3rd Respondent/
3rd Defendant

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree in A.S.No.136/1996 on the file of 8th Additional Judge, City Civil Court, Chennai dated 29.09.1998 in reversing the judgment and decree in O.S.No.224/1995 on the file of the 1st Assistant Judge, City Civil Court, Chennai dated 29.02.1996.

S. A.No.2149 of 2004

R.Ramachandran Naidu ...Appellant/
1st Respondent/Plaintiff

Vs.

1. Kanakamma
Rep.by her power agent
Y.V.S.Reddy

2. Y.V.S.Reddy .. 1 & 2 Respondents/Appellants/
1 & 2 Defendants
3. Sri Raj & Co, Public Auctioners
7, Sunkurama chetty street,
Chennai - 1. .. 3rd Respondents/2nd Respondent/
3rd Defendant

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree in A.S.No.135/1996 on the file of 8th Additional Judge, City Civil Court, Chennai dated 29.09.1998 in reversing the judgment and decree in O.S.No.225/1995 on the file of the 1st Assistant Judge, City Civil Court, Chennai dated 29.02.1996.
In both second appeals

For Appellants : Mr.V.Raghavachari
For Respondents : No appearance/set ex-parte
vide order dated 10.07.2018

COMMON JUDGMENT

Second appeal No. 2148 of 2004 is directed against the judgment and decree dated 29.09.1998, passed in A.S.No.136/1996, on the file of 8th Additional Judge, City Civil Court, Chennai, reversing the judgment and decree dated 29.02.1996, passed in O.S.No.224/1995, on the file of the 1st Assistant Judge, City Civil Court, Chennai.

2. Second appeal No. 2149 of 2004 is directed against the judgment and decree dated 29.09.1998, passed in A.S.No.135/1996, on the file of 8th Additional Judge, City Civil Court, Chennai, reversing the judgment and decree dated 29.02.1996, passed in O.S.No.225/1995 on the file of the 1st Assistant Judge, City Civil Court, Chennai.

3. The second appeals have been admitted on the following substantial questions of law:

1. Whether the mortgage dated 2.2.1982 is utterly barred by limitation or not?

2. Whether the auction sale dated 9.1.1995 is not in accordance with section 69 of the Transfer of Property Act or not?

3. For grant of injunction the circumstances on the date of the plaint is to be looked into and not the condition on the date of trial or not?

4. The appreciation of the oral and documentary evidence is not in the proper

perspective or not?

5. Whether the lower appellate Court is right in reversing the judgment of the trial Court in the absence of defendants 1 and 2 by not making themselves available before the court and tendering the best evidence?

6. Whether the evidence of DW1 is acceptable when he had alleged that the original document had not been received by defendants 1 and 2 at the time of mortgage transaction?

7. Whether the learned Judge ought not to have adverted the parent document being lodged in court in O.S. No.6106 of 1983?

8. Whether the discharge of Ex.A1 is not established by the endorsement on Ex.A5 and whether the findings of the lower appellate Court that the endorsement cannot be relied upon is per se reasonable?

9. Whether the lower appellate Court is right in overlooking Ex.B6 wherein the final amount had been tendered in 1990?

10. When the parent document had been returned to the mortgagor, does it not rise the presumption of discharge of document?

11. Whether the non-examination of defendants 1 and 2 is not fatal in the case of defendants?

12. Should not the lower appellate Court examine the conduct of the defendants 1 and 2 in the light of the inaction between 1990 and 1994 as one proving the discharge of the mortgage under Ex.A1?

4. The suits had been laid for the reliefs of declaration and permanent injunction.

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

6. Based on the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to decree the suits preferred by the appellants as prayed for. However, the first appellate Court, on an appreciation of the materials placed on record, was pleased to set-aside the judgment and decree of the trial Court and by way of allowing the appeals preferred by the respondents, dismissed

the suits laid by the appellants. Impugning the same, the present second appeals have been preferred.

7. The execution of the mortgage deeds involved in the matter is not in dispute. However, the appellants would plead that they have discharged the mortgage amount and hence, the mortgagee is not entitled to enforce the mortgage. However, as regards the plea of discharge of the mortgage amount by the appellants, as rightly determined by the first appellate Court, there is no acceptable material placed on record to buttress the same. If really, the mortgage amount had been repaid by the appellants, as rightly determined by the first appellate Court, the appellants would have insisted the mortgagee to return the original mortgage deeds and on the other hand, it is found that, even as per the case of the appellants, the mortgage deeds had not been returned back. Though the appellants would state that the mortgage deeds could not be returned at the time of the discharge as the same had been stated to be in the custody of the auctioneers, however, as rightly determined, if really the appellants had discharged the mortgage amount, they would not have waited for years together without claiming the return of the original mortgage deeds. Thus, it is found that the conduct of the appellants in not getting back the original mortgage deeds would only go to establish that they had not discharged the mortgage amount as put forth by them. If really, the amount had been repaid by the appellants, necessary proof would have been obtained from the mortgagee as regards such repayment. However, the appellants have not placed any material to sustain their plea of discharge of the mortgage.

8. However, the appellants would plead that the mortgagee, at the time of the discharge, returned back the original documents of title and on that footing, it is contended by the appellants that the mortgage due had been settled in full. However, the abovesaid case of the appellants is disputed by the respondents. It is their case that even at the time of the execution of the mortgage deeds, the original title deeds had not been entrusted as the same had been already pledged with the bank by the appellants for securing loan and therefore, it is their case that there is no question of the return of the original title deeds at the time of the alleged discharge. When the very factum of the discharge itself has not been established by the appellants with acceptable materials, their case that the mortgagee had returned the original title deeds to them, as such, cannot be believed and accepted. If really, as put forth by the appellants, the original title deeds had been returned at the time of the alleged discharge, nothing prevented the appellants from producing the original title deeds before the Court for the proper appreciation of their case. However, despite their plea that the original title deeds had been

returned back at the time of the alleged discharge, the appellants had not endeavoured to produce the same before the Courts below and no valid reason has been assigned for the same. No doubt, in the mortgage deeds there is a recital that on the discharge of the mortgage due, the mortgagee should return back the original title deeds and discharge the mortgage deed. However, when the plea of discharge itself has not been established, it is found that, as determined by the first appellate Court, the question of returning back the original title deeds would not arise. Further, as aboveseen, if really the appellants had discharged the mortgage dues as put forth by them, they would have endeavoured to produce the necessary proof from the mortgagee or the appellants would have endeavoured to obtain the original mortgage deeds from the mortgagee. From the conduct of the appellants in not retrieving the original mortgage deeds for years together would only go to expose that the plea of the appellants that they had discharged the mortgage is false. Further, when it is found that the suits had been laid by the appellants for the redemption of the mortgage on the footing that the mortgage deeds are not supported by the consideration as recited therein and however when the said pleas had been rejected by the Courts, despite the same, the case of the appellants that they had not endeavoured to get back the original mortgage deeds at the time of the alleged discharge as such cannot be readily accepted. It is thus found that on a cumulative analysis of the entire materials placed on record, the first appellate Court had rightly disbelieved the case of the appellants that the mortgage dues had been settled by them.

9. The contention has been put forth by the appellants that the properties mortgaged had been brought for sale by issuing notice by the auctioneers concerned without complying with the statutory requirements. However, when it is found that in the other litigation preferred by the appellants marked as Exs.B1 and B2, they have themselves admitted that still the mortgage dues have not been discharged and the amount remains to be paid, it is found that on a conjoint reading of the provisions contained in Section 69 of the Transfer of Property Act, it is found that when the amount is still in arrears under the mortgage deeds and remains unpaid for three months after becoming due, i.e. the interest amounting to not less than five hundred rupees, accordingly, it is found that the appellants cannot be allowed to contend that the mortgaged properties are being attempted to be brought to sale against the statutory provisions as put forth by them. It is further seen that the first endeavour of the mortgagee to bring the property mortgaged for sale could not be proceeded further. However, when it is found that the appellants had failed to establish their claim of discharge of the mortgage dues, as rightly determined by the first appellate Court, the endeavour of the mortgagee in

bringing the mortgaged properties for sale does not violate the provisions of Section 69 of the Transfer of Property Act as contended by the appellants and in such view of the matter, it is found that the abovesaid plea projected by the appellants had been rightly discountenanced by the first appellate Court. The appellants though would contend that the mortgage deeds involved in the matter are barred by limitation, they have not placed any material to hold that the mortgage deeds are barred by limitation. The first appellate Court, on an analysis of the materials placed on record, rightly found that the appellants had failed to establish the plea of discharge and also failed to establish that the properties are being brought to sale in contravention of the statutory provisions and also failed to establish that the mortgage deeds are barred by limitation. Accordingly, it is found that the judgment and decree of the first appellate Court rejecting the appellants case on the proper appreciation of the materials placed on record, both oral and documentary, as per law do not warrant any interference.

10. In the light of the above discussions, in my considered opinion, no substantial question of law is found to be involved in this second appeal. However, considering the reasons aforesaid, the substantial questions of law formulated in the second appeal are accordingly answered against the appellants.

11. In conclusion, both the second appeals fail and accordingly dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

sli
To

1. The 8th Additional Judge, City Civil Court, Chennai.
2. The 1st Assistant Judge, City Civil Court, Chennai.
3. The Section Officer, V.R. Section, High Court, Madras. (2 Copies)

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.50660

S.A.Nos.2148 & 2149 of 2004

CA(Co)
CS/03/09/18