IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.12.2019

CORAM :

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P. No.16867 OF 2011
and M.P.No.2 of 2011

S.M.M.Mohammed Ibrahim ... Petitioner

Versus

1. The Inspector General of Registration
   and Chief Controlling Revenue Authority,
   Santhome High Road,
   Chennai 600 028.

2. The District Registrar,
   District Court Campus,
   Cantonment,
   Trichy.

3. The Sub Registrar - I,
   District Court Campus,
   Cantonment,
   Trichy.

4. P.Jothimani ... Respondents

Writ Petition filed under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus calling for the entire records of the second respondent under Reference No.6875/A1/2007 including the order dated 14.05.2007 and the records of the first respondent under Reference No.29914/P1/2007 including the order dated 14.11.2008 and quash the same and direct the respondents to release the document registered by the petitioner on 01.03.2007 under pending documents No.17/2007 on the file of the third respondent.

For Petitioner : M/s.V.G.Suresh Kumar

For Respondent : Mr.P.P.Purushothaman
Govt. Advocate for R1 to R3

Mr.P.Godson Swaminath for R4

ORDER

The prayer in this writ petition is for the issuance of a Writ of Certiorarified Mandamus calling for the entire records of the second respondent under Reference No.6875/A1/2007 including the order dated 14.05.2007 and the records of the first respondent under Reference No.29914/P1/2007 including the order dated 14.11.2008 and quash the same and direct the respondents to release the document registered by the petitioner on 01.03.2007 under pending document No.17/2007 on the file of the third respondent.

2.It is the case of the petitioner that he entered into a lease agreement dated 01.03.2007 with the fourth respondent herein in respect to the property measuring a total extent of 12916Sq.ft of vacant land in SF.27/1, New Block No.17, New Ward K in K.Abhishekapuram Village, Trichy Taluk within the Trichy City Municipal Corporation limits. According to the petitioner under the lease agreement, the petitioner paid a sum of Rs.1.30 crores to the respondent on various dates for the purpose of constructing a shopping complex in the said land which was agreed to be leased out to the petitioner under the lease agreement dated 01.03.2007. Under the lease agreement, the sum of Rs.1.30 crores lent by the petitioner to the fourth respondent does not carry any interest. Under the lease agreement, the sum of Rs.1.30 crores lent by the petitioner to the fourth respondent will be adjusted by the fourth respondent from and out of the rental amount payable by the petitioner to the fourth respondent at the rate of Rs.98,485/- per month for a period of 132 months or 11 years. By such arrangement, the entire amount of Rs.1.30 crores received by the fourth respondent would be fully repaid to the petitioner. Under the lease agreement, the petitioner has also paid a sum of Rs.25 lakhs as advance to the fourth respondent and the said advance shall also not carry any interest. The lease agreement dated 01.03.2007 was presented before the Joint Sub Registrar - I, Office of the District Registrar, Trichy, the third respondent herein on 01.03.2007 for registration. However, without registering the document, the third respondent sent a notice to the petitioner and the fourth respondent alleging that the document is a lease cum mortgage. According to the third respondent, (a) the mortgage is for a sum of Rs.1.30 crores and (b) the lease with the advance is chargeable to stamp duty respectively at Rs.5,20,000/- and Rs.3,70,795 and the deficit stamp duty payable by the petitioner is Rs.6,49,996/-. On a reference made by the Joint Sub Registrar I, Trichy on the quantum of duty payable and the correct nature and scope of the document, the second respondent the District Registrar also confirmed that the deficit stamp duty payable by the petitioner is Rs.6,49,996/-. Aggrieved by the orders of the Joint Sub Registrar I and the District Registrar, the petitioner preferred a revision before the first respondent under Section 56(1) of the Indian Stamp Act.

3.The first respondent found that the sum of Rs.1.30 crores is to be treated as consideration for a mortgage as the property is already in possession of the petitioner who has taken the property on lease from the fourth respondent. According to the first respondent, since the ingredients necessary for the mortgage are present in the lease deed, the document will have to be treated both as a mortgage as well as lease and the petitioner is liable to pay the stamp duty under article 40(a) for mortgage and under article 35(a) for lease under the Stamp Act. Aggrieved by the impugned order dated 14.11.2008 passed by the first respondent this writ petition has been filed.

4.Counter affidavits have been filed by the respondents reiterating that the subject document is a lease cum mortgage and the petitioner will have to pay stamp duty both under article 35(a) for lease and under article 40(a) for mortgage under the Indian Stamp Act. They have reiterated that the recitals of the document reveals that the fourth respondent obtained loan to the tune of Rs.1.30 cores for the construction of the building on the leased land in addition to the advance of Rs.25 lakhs. According to them, the fourth respondent has transferred the interest of the property for availing loan from the petitioner and hence the subject document will have to be treated both as a lease as well as the mortgage. Therefore according to them the petitioner is liable to pay the deficit stamp duty as demanded.

5.Heard both side and perused the materials available on records.

6.The learned counsel for the petitioner drew the attention of this Court to various clauses found in the lease deed dated 01.03.2007 entered into between the petitioner and the fourth respondent. He pointed out that the property was not given as a security to the petitioner by the fourth respondent under the lease deed dated 01.03.2007. He pointed out that even the loan given by the petitioner to the fourth respondent amounting to Rs.1.30 cores was to be adjusted out of the monthly rentals payable by the petitioner to the fourth respondent. Further, he pointed out that there is no clause found in the agreement which stipulates that the subject property was given as a security by the fourth respondent to the petitioner to secure the loan amount. This being the case, according to him, the subject document cannot be treated as a mortgage and it can be treated only as a lease. According to him, having paid the entire stamp duty payable for the lease, the respondents ought to have returned the document. The learned counsel for the petitioner also drew the attention of this Court to the judgment of the Hon'ble Supreme Court in the case of Puzhakkal Kuttappu Vs C.Bhargavi and others reported in (1977) 1 SCC 17. Relying upon the said judgment, the learned counsel for the petitioner pointed out that the Hon'ble Supreme Court has categorically held that the document will have to be taken as a whole and when it lacks the most essential ingredients of a mortgage namely "Transfer of Property is made as a security for the debt", the document cannot be treated as a mortgage. Therefore according to him, the first and the second respondents have passed an erroneous order directing the petitioner to pay the deficit stamp duty treating the subject documents as a lease cum mortgage.

7.Per contra the learned Government Advocate appearing for the respondents 1 to 3 reiterated the contents of the counter affidavit filed by the third respondent in this writ petition and would submit that the fourth respondent having availed a loan from the petitioner to the extent of Rs.1.30 crores for the construction of a building in the leased land and in addition received advance of Rs.25 lakhs, the subject document will have to be treated only as a lease cum mortgage. Hence according to him, the petitioner is liable to pay the stamp duty for the mortgage also.

8.Admittedly, as seen from the lease deed, the most essential ingredient of a mortgage namely "the property was given as a security for the repayment of the loan" is not found. In fact, the amount of Rs.1.30 crores lent by the petitioner to the fourth respondent for the construction of a building in the same land has to be adjusted by the fourth respondent from and out of the monthly rentals payable by the petitioner to the fourth respondent under the lease deed. At the end of the lease period, the entire loan amount of Rs.1.30 crores paid by the petitioner to the fourth respondent will get adjusted. This being the case, it cannot be construed that the property was given as security by the fourth respondent to the petitioner for the repayment of the loan of Rs.1.30 crores utilised by the fourth respondent for the construction of the building. The Hon'ble Supreme Court in the case of Puzhakkal Kuttappu Vs C.Bhargavi and others cited supra has held as follows:-

> "9. The trial Court held the document to be a mortgage whereas the High court held it to be a lease. It is enough to point out that the trial Court was wrong in holding that the transferee was to utilise the amount of Rs.3-15-5 for paying the land revenue. On the other hand, the document stated that this amount of fixed rent was to be paid annually in

addition to the government revenue which the transferee was required to pay. This feature of payment of rent, in this case, tilts the balance in favour of construing the document as a lease, coupled with the fact that the essence of a mortgage being the transfer of immovable property as security for the debt is conspicuous by its absence in the detailed enumeration of the terms. Further, as stated earlier, there is no right to sell the property in case the debt is not repaid. There is also nothing to show that the enjoyment of the usufruct was intended to wipe out the debt in the long period of occupation.

...

11.There is another significant feature that while there was arrangement to pay a fixed annual “purappad” to the transferor, such a sum was not intended to be utilised towards reduction of the principal debt. It is therefore, not possible to say that the High Court is wrong in holding that the consideration of Rs.650 in the deed was intended as a premium for the lease. There is also no evidence whatsoever to indicate as to what the price of the land was to determine the proportion between the amount advanced and the value of the property. The document taken as a whole lacks the most essential ingredient of a mortgage, namely that the transfer of the property has to be made as a security for the debt.

...

14. Human transactions cannot be tied to textual definitions. They have to respond to variable requirements under different situations and often to the dictates of the party at an advantage in the bargain. Mortgages are not always simple, English or usufructuary or such other types as defined in the Transfer of Property Act. They are anomalous too and sometimes more anomalous than what is defined in the said Act. Even so, there is one most essential feature in a mortgage which is absent in a lease, that is, that the property transferred is a security for the repayment of debt in a mortgage whereas in a lease it is a transfer of a right to enjoy the property. We have seen that this essential feature of a mortgage is missing in the document in question. We are, therefore, unable to come to the conclusion that it is a mortgage and not a lease".

9.In the case on hand also, the absence of the clause that the immovable property is given as a security by the fourth respondent in favour of the petitioner under the lease deed is conspicuous by its absence. This being the case, the ratio laid down by the Hon'ble Supreme Court in the above cited case Puzhakkal Kuttappu Vs C.Bhargavi and others squarely applies to the facts of the instant case. The document has to be taken as a whole, and when it lacks the most essential ingredient for a mortgage namely transfer of property for the purpose of security towards the debt, the said document cannot be treated as a mortgage but it can be treated only as a lease.

10.For the foregoing reasons, this Court is of the considered view that both the first and second respondents have passed erroneous order demanding Rs.6,49,996/- on the ground that the lease deed dated 01.03.2007 entered into between the petitioner and the fourth respondent has to be treated as a mortgage attracting stamp duty under Article 40(a) of the Stamp Act. Accordingly, the impugned orders are hereby quashed and the respondents are directed to release the document to the petitioner within a period of eight weeks from the date of receipt of a copy of this order and the writ petition stands allowed. No costs. Consequently miscellaneous petition is also closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

dpq

To

1. The Inspector General of Registration
and Chief Controlling Revenue Authority,
Santhome High Road,
Chennai 600 028.

2. The District Registrar,
District Court Campus,
Cantonment,
Trichy.

3. The Sub Registrar - I,
District Court Campus,
Cantonment,
Trichy.

+1 CC to Mr.V. Suresh Kumar, Advocate sr 103400.
+1 CC to Mr.P.Godson Swaminath, Advocate sr 103822.

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PA(CO)
SP(04/02/2020)