IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.01.2020

Date of Verdict : 29.01.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1516 of 1997

1.Jayammal @ Leelammal

2.T.S.Rajalakshmi

3.T.S.Andal

4.T.S.Vedha ...Appellants/Appellants/Plaintiffs 2 to 5

Vs.

P.V.Ponniah Pillai ...Respondent/Respondent/Defendant

Prayer :-
This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 09.01.1997, in A.S.No.60 of 1996 on the file of the Subordinate Judge, Hosur, confirming the decree and judgment dated 10.02.1995 in O.S.No.102 of 1981 on the file of the District Munsif, Hosur.

For Appellants : Mr.V.Srikanth

For Respondent : Notice served - No Appearance

JUDGMENT

This second appeal is directed as against the judgment and decree dated 09.01.1997, in A.S.No.60 of 1996 on the file of the Subordinate Judge, Hosur, confirming the decree and judgment dated 10.02.1995 in O.S.No.102 of 1981 on the file of the District Munsiff, Hosur.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. The case of the plaintiffs in brief is as follows :-
3.1. The first defendant was the Managing Partner of M/s.Parasakthi Chit Funds, Bangalore. The first plaintiff was a subscriber to 2 chits. The chits conducted by the first

defendant attained loss and the firm was closed from September 1966. At the time of giving the chit amount, the first defendant asked to the first plaintiff to furnish collateral security for the chit subscribed by the first plaintiff, in which the sale deed for Rs.5,000/- executed in favour of chit fund. The sale deed dated 10.03.1966 came into existence and the first plaintiff executed a demand pro note for Rs.5,000/- also on 16.03.1966 in favour of the defendants as collateral security for the second chit. Then, the defendants executed an agreement dated 16.03.1966 to reconvey the property if the sale amount is paid within 40 months. This condition makes it clear that the sale deed and the pro note were executed only as collateral security. In fact, no possession of the suit property was ever given to the defendants. Thereafter, a receiver was appointed in O.S.No.369 of 1971 by the learned District Munsif, Hosur and he is in possession of the suit schedule property. The two chits together were of the value of Rs.10,000/-, in which the first plaintiff only paid a sum of Rs.4,880/-, but the sale deed for Rs.5,000/- and pronote for Rs.5,000/- were executed without any consideration. The first plaintiff had paid a sum of Rs.2067.50/- towards both the chits as per the passbook and chits. The amount really due to the defendants only Rs.2,812.50/- on 10.03.1966 and 16.03.1966, when the above said sale deed and pronote were executed. The chit fund of the defendants stopped its business from September 1966. If it were continued, the first plaintiff would have had the benefit of defendants.

3.2 The first plaintiff was ready and willing to pay the monthly subscription. Since the chit fund became defunct, the agreement to reconvey was not extended from time to time. Thus, the sale deed and the pro note and the agreement to reconvey together constitute a mortgage by conditional sale. The second defendant has extended time for repayment from time to time. Therefore, the plaintiffs calculated the interest at the rate of 6 1/2 % per annum for the principal amount Rs.2,812.50/- along with interest from 16.03.1966 to 14.09.1978 i.e. Rs.2,190/- totalling to Rs.5,002.50/- has been deposited before the trial court payable to the defendants for the first defendant reconveying the mortgage property to the plaintiffs. Therefore, they also caused legal notice claiming redemption of mortgage and it was returned. Hence, the suit.

4. The first defendant resisted the plaintiffs' case and filed written statement stating that the address mentioned in the plaint for plaintiffs 1 and 2 are incorrect and their age are also incorrect. The first defendant was the Managing Partner of M/s.Parasakthi Chit Funds, Bangalore. It is also true that the first plaintiff was a subscriber for two chits 38 and 39, but he did not take those two chits. The first

plaintiff was a subscriber to another chit No.40, which he has taken for Rs.2,230/- on 04.06.1966. At the time of giving the chit amount, the first plaintiff was asked to furnish collateral security for the chit in NDACJSF823. A sale deed for Rs.5,000/- should be executed in favour of the chit fund. The first plaintiff has not taken the chit at the time of sale deed and he executed pro note for a sum of Rs.5,000/- on 16.03.1966 in favour of the defendants. The first plaintiff received a sum of Rs.5,000/- in cash from the defendants. The defendants also executed an agreement dated 16.03.1966 to reconvey the property, if the sale amount is not paid within 40 months. The suit properties were the subject matter in O.S.No.369 of 1971 before the District Munsif Court, Hosur. In fact, the first plaintiff was impleaded as the seventh defendant in the said suit and also filed written statement. He has not paid the sale amount of the suit properties.

4.1 Further, the first defendant also was a party to the said suit as the eighth defendant and filed written statement to allot his 1/5 share of the properties purchased from the plaintiffs as per the sale deed. The suit in O.S.No.369 of 1971 was decreed and the receiver still continues to be in possession of the property. The first defendant has also filed objection to draw his 1/5 share amount deposited by the receiver and the Court has also permitted the same and thus, he is not in active possession of the suit property. The first plaintiff having been failed in the said suit, now has come forward with the present suit and it is clearly barred by res judicata and therefore, the plaintiffs are not entitled to seek any relief as prayed for and sought for dismissal of the suit.

5. In support of the plaintiffs' case, P.W.1 and P.W.2 were examined and ten documents were marked as Ex.A.1 to Ex.A.10. On the side of the defendants D.W.1 was examined and Ex.B.1 to Ex.B.7 were marked. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court dismissed the suit and directed to deposit Rs.5,000/- made by the first plaintiff to be payable to his legal heirs, namely plaintiffs 2 to 5. Aggrieved over the judgment and decree of the trial Court, the plaintiffs preferred an appeal suit in A.S.No.60 of 1996 before the Subordinate Judge, Hosur. The first appellate Court on appreciating the materials placed on records, dismissed the appeal by confirming the judgement and decree passed by the trial Court. Challenging the same, the plaintiffs have come forward with the present second appeal.

6. At the time of admission of the second appeal, the following substantial questions of law were framed :-

a) Whether the lower appellate court

erred in finding that a reading of Ex.A.1, A.11 and B.6 do not constitute a mortgage?

b) Whether the courts below erred in holding that the provisions of Section 58-C of the Transfer of Property Act were not applicable to the suit transaction?

7. The learned counsel appearing for the plaintiffs submitted that a reading of Ex.A.1 agreement for reconveyance, Ex.A.11, sale deed and Ex.B.6, evidence for borrowal will constitute a mortgage, in respect of which the plaintiffs are entitled to seek redemption. The document was executed in favour of the first defendant to describe himself as purchaser and the document though styled as a sale deed, it is only a security in respect of future instalments payable to the Chit Fund Company. The document Ex.A.1, Ex.A.11 and Ex.B.6 have to be taken as mortgage under the provisions of Section 58(C) of the Transfer of Property Act. It is nothing but mortgage by conditional sale. Further he submitted that Ex.A.11 was the document executed only by way of collateral security for the chit transaction and that the documents have to be read together, which would clearly show that there was no conveyance of the property in favour of the defendants and as such mortgage has to be redempted on the presumption of amounts due. Further Ex.A.6 and Ex.A.8 clearly established that the plaintiffs are in possession and enjoyment of the suit property and the defendants were never put up in possession of the suit property. The time is not the essence of the contract as the agreement was extended from time to time by the defendants.

8. To support of his contention, the learned counsel appearing for the plaintiffs relied upon the following judgments :-

(i) S.Chattanatha Karayalar Vs. The Central Bank of India and Ors. reported in AIR 1965 SC 1856.

(ii) Indira Kaur and Ors. Vs. Sheo Lal Kapoor reported in AIR 1988 SC 1074.

9. Heard, Mr.V.Srikanth, the learned counsel appearing for the plaintiffs. Though notice was served to the respondent, no one appeared on behalf of him.

10. This Court considered the rival submissions made by the learned counsel for the plaintiffs.

11. The first plaintiff was a subscriber to 2 chit transactions with the defendants. The first plaintiff executed a sale deed for a sum of Rs.5,000/- in favour of Chit Fund Company on 10.03.1966 at the time of taking chit amount as collateral security. On 16.03.1996, he also executed pronote on

demand for a sum of Rs.5,000/- in favour of the defendants as collateral security for the second chit. On the same day, the defendants also executed an agreement to reconvey the property if the sale amount is paid within 40 months as such this condition made clear that the sale deed and pro note executed by the first plaintiff were only for the purpose of collateral security. According to the plaintiffs, a sum of Rs.4,880/- only was paid by the defendants out of total chit fund amount of Rs.10,000/-. Therefore, the pronote was executed for a sum of Rs.5,000/- without any consideration.

12. The agreement was marked as Ex.A.1. In the Ex.A.1, there is a recital that the first plaintiff has requested the defendants to execute deed of reconveyance within a period of 40 months from the date of agreement, for which the defendants also agreed to executed a deed of reconveyance provided the first plaintiff discharges the amount due on demand pro note within a period of three years from the date and further pay Rs.5,000/- within a period of 40 months from the date of agreement. Ex.A.2 is the passbook issued by the defendants to the first plaintiff in respect of chit transaction No.823. It reveals that the first plaintiff paid chit amount and also revealed that for the amount taken by the first plaintiff, the sale deed as well as the agreement were executed between them. Though the first plaintiff claimed that the agreement as well as the sale deed and pronote were executed as collateral security, but all the documents have to be treated as mortgage. The sale deed was not produced before the trial court. Therefore, while pendency of the appeal suit, the plaintiffs filed I.A.No.268 of 1996 to receive the sale deed as additional document. The original sale deed was in the custody of the defendants and as such the plaintiffs could not produce the sale deed executed by them in favour of the defendants before the trial court. As such, they obtained certified copy and produced before the appellate court by way of additional evidence.

13. In fact, the trial court concluded that non production of the sale deed is the fatal to the case of the plaintiffs and dismissed the suit filed by the plaintiffs. Therefore, the first appellate court allowed the application and received the sale deed executed by the plaintiffs as Ex.A.11. Though the first appellate court allowed to mark the sale deed as Ex.A.11 concluded that the said sale deed was not executed for the chit transaction. After verifying Ex.B.6 pronote executed by the first plaintiff in favour of the defendants, further concluded that the sale deed as well as the pronote and the agreement executed by the defendants are not connected with the chit transaction as mentioned by the plaintiffs.

14. In this regard, the learned counsel for the plaintiffs cited the judgment of the Hon'ble Supreme Court of India in the case of S.Chattanatha Karayalar Vs. The Central Bank of India and Ors. reported in AIR 1965 SC 1856, wherein it is held as follows:

> “6.The first question presented for determination in this case is whether the status of the 3rd defendant in regard to the transaction of overdraft account is that of a surety or of a co-obligant. It was argued by Mr. Desai on behalf of the appellant that the High Court has misconstrued the contents of Exs. A and B in holding that the 3rd defendant has undertaken the liability as a co-obligant. It was submitted that there was an integrated transaction constituted by the various documents---Exs. A, B and G executed between the parties on the same day and the legal effect of the documents was to confer on the 3rd defendant the status of a surety and not of a co-obligant. In our opinion, the argument put forward on behalf of the appellant is well-rounded and must be accepted as correct. It is true that in the promissory note--Ex. B all the three defendants have "jointly and severally promised to pay the Central Bank of India Ltd. or order a sum of Rs. 4 lakhs only together with interest on such sum from this date", but the transaction between the parties is contained not merely in the promissory note--Ex. B--but also in the letter of continuity dated November 26, 1946--Ex. A which was sent by the defendants to the plaintiff-bank along with promissory note--Ex. B on the same date. There is another document executed by defendant No. 1 on November 26, 1946---Ex. G-Hypothecation agreement. The principle is well-established that if the transaction is contained in more than one document between the same parties they must be read and interpreted together and they have the same legal effect for all purposes as if they are one document. In Manks v. Whiteley,(1) Moulton, L.J. stated:
>
> "Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to

make equities apply to the parties they must be equities arising out of the transaction as a whole."

7.It should be noted in the present case that the promissory note--Ex. B--was enclosed by the defendants along with the letter of continuity--Ex. A before sending it to the plaintiff-bank. In the letter-Ex. A it is clearly stated that the promissory note Ex. B was given to the plaintiff-bank "as security for the repayment of any overdraft to the extent of Rs. 4,00,000". It is further stated in Ex. A that "the said promissory note is to be a security to you for the repayment of the ultimate balance or sum remaining unpaid on the overdraft". In the hypothecation agreement--Ex. G it is stated that the plaintiff-bank has agreed to open a cash Credit account to the extent of Rs. 4 lakhs at the request of the Cashew Products Corporation Ltd., Quilon. According to para 15 of the hypothecation agreement it operates as a security for the balance due to the plaintiff bank on the Cash Credit account. Para 12 of the hypothecation agreement states that if the net sum realised be insufficient to cover the balance due to the plaintiff-bank, defendant No. 1 should pay the balance of the account on production of a statement of account made out from the books of the bank as provided in the 14th Clause. Under this Clause defendant No. 1 agreed to accept as conclusive proof of the correctness of any sum claimed to be due from it to the bank a statement of account made out from the books of the Bank and signed by the Accountant or other duly authorised officer of the Bank without the production of any other document. if the language of the promissory note---Ex. B is interpreted in the context of Exs. A & G it is manifest that the status of the 3rd defendant with regard to the transaction was that of a surety and not of a coobligant. This conclusion is supported by letters---Exs. AF dated November 27, 1947, AM dated December 17, 1947 in which the Chief Agent of the plaintiff-bank has addressed defendant No. 3 as the "guarantor". There are similar letters of the plaintiff- bank, namely, Exs. CE dated December 28, 1947, CG dated January 13, .1948, AS dated February 23, 1949, V dated October 21, 1949,dated' December 16, 1949, IV dated January 12, 1950 and 'O' dated March 29, 1950 in which defendant No. 3 is referred to either as a "guarantor" or as having furnished a guarantee for the loan. Our concluded opinion, therefore, is that the status of the 3rd defendant with regard to the overdraft account was that of a surety and not co-obligant and the finding of the High Court on this issue is not correct.

15. The Hon'ble Supreme Court of India has cited the judgment reported in the case of Manks Vs. Whitely reported in 1912 (1) Ch 735, wherein it is held that where several deeds form one part of transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. In the case on hand, admittedly the first plaintiff had chit transaction with the defendants. Accordingly, while taking the chit amount, he executed pronote as well as the sale deed. It is seen from the agreement Ex.A.1, there is a specific clause as mentioned above, the defendants agreed to execute a deed of reconveyance on payment of remaining amount within a period of 40 months. According to the first plaintiff, there was some loss and as such the chit fund company was closed and he could not repay the amount. However they filed the suit and also deposited the balance amount as per their calculation for redemption of mortgage. Therefore, Ex.A.1, Ex.A.11 and Ex.B.6 revealed that all the documents have been executed by the first plaintiff for the chit transaction.

16. Though the first appellate court allowed the plaintiffs to mark the sale deed as Ex.A.11, the first appellate court failed to consider the same as it was executed as mortgage by conditional sale. All the documents Ex.A.1, Ex.A.11 and Ex.B.6 clearly constitute a mortgage between the first plaintiff and the defendants. It is also relevant to extract the provisions under Section 58 of the Transfer of Property Act as follows:

> "Mortgage by conditional sale (c) where the mortgagor ostensibly sells the mortgaged property:
>
> On condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale, provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

17. Therefore, Ex.A.11 can be construed as mortgage by conditional sale. When the said document is construed as mortgage by conditional sale, the parties to the said proceedings can be given opportunity to prove the same. When

the first appellate court allowed the application filed by the plaintiffs and also received the document and marked as Ex.A.11, the first appellate ought to have remanded the matter to the trial court for fresh trial.

18. In view of the above discussions, this Court finds valid reasons to interfere with the reasonings and findings rendered by the courts below as such this Court is of the considered opinion that all the substantial questions of law are answered accordingly in favour of the plaintiffs. As such, the judgments and decree dated 10.02.1995 passed in O.S.No.102 of 1981 on the file of the District Munsiff, Hosur are set aside, and the matter is remanded to the trial court for fresh consideration. Accordingly, the trial court viz., District Munsif Court, Hosur is directed to try the suit and let in evidence only with regard to Ex.A.11 and dispose of the suit within a period of three months from the date of receipt of entire bundle. The Registry is directed to send back all connected bundle to the trial court forthwith.

19. Accordingly, the second appeal stands allowed with costs.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To
1. The Subordinate Judge,
   Hosur.

2. The District Munsif,
   Hosur.

3. The Section Officer,
   V.R. Section,
   Madras High Court,
   Chennai.

S.A.No.1516 of 1997

RSK(CO)
SP(09/11/2020)