



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.10.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.611 of 2018

Sengeni ...1st defendant/Appellant

Vs.

1.Vijayalakshmi ...Plaintiff/1st Respondent

2.Hamsabai ...2nd Defendant/2nd Respondent

PRAYER: Appeal Suit filed under Section 96 of the Code of Civil Procedure against the Judgment and Decree dated 08.06.2018 in O.S.No.128 of 2008 on the file of the learned Principal District Judge, Puducherry.

For Appellant : Mr.P. Dineshkumar
For Respondents : Mr.R.Thiagarajan for R1

Not ready in notice regarding R2

JUDGMENT

The unsuccessful 1st defendant in a suit for declaration and recovery of possession is the appellant before this Court. The parties are referred to in the same litigative status as in O.S.No.128 of 2008 on the file of the learned Principal District Judge, Pondicherry, which is the subject matter of the appeal before this Court.

2.It is necessary to briefly allude to the facts that have culminated in filing of the above Appeal:

The dispute revolves around the property which is hereinbelow described:

“புதுச்சேரி ரிடி. உழவர்கரை சப் ரிடி. உழவர்கரை நகராட்சியைச் சேர்ந்த கிராம எண்.38, காரம் ரெவினயூ கிராம லாஸ்பேட்டை, குறிஞ்சி நகர், எட்டாவது குறுக்கு வீதியில் ரீ.சர்வே.நெ.20.72ல் அடங்கிய கிழக்கு - மேற்கு 8 மீட்டர் தெற்கு - வடக்கு 12 மீட்டர் அதாவது 96 சதுர மீட்டர் அல்லது 1033 சதுர அடி அளவுள்ள 159ம் நெம்பர் மனை



அதிலடங்கிய தளம்போட்ட கல்வீடு, மேற்படி வீட்டில் உள்ள மின் சர்வீஸ், தண்ணீர் சர்வீஸ் உட்பட.

இதற்கு சக்குபந்தி வீதிக்கு தெற்கு, 140ம் நெம்பர் மனையில் உள்ள வீட்டிற்கு வடக்கு, 158ம் நெம்பர் மனையில் உள்ள வீட்டிற்கு கிழக்கு, 160ம் நெம்பர் மனையில் உள்ள வீட்டிற்கு மேற்கு இதற்குட்பட்டது.”

3.It is the case of the plaintiff that the property belonged to the 2nd defendant Mrs.Hamsabai who had purchased the same as a vacant site and thereafter, after obtaining necessary Planning Permission from the Chief Town Planner, Puducherry had constructed the building. The 2nd defendant had completed construction and handed over possession to the 1st defendant in January 1996 by receiving Rs.35,000/- as Possessory Mortgage money from the 1st defendant. As per the terms of the Possessory Mortgage Deed dated 14.01.1996 executed between the 1st and 2nd defendants, the 2nd defendant was to repay the Mortgage money on the expiry of three years and the 1st respondent had to re-deliver the property in a tenable condition.

4.The plaintiff has purchased the suit property from the 2nd defendant represented by her Power Agent under a registered Sale Deed dated 13.08.2008 for a valid consideration of Rs.8,75,000/-. As soon as the said purchase, the plaintiff had approached the 1st defendant in person on 15.08.2008 calling upon him to surrender possession after receiving the sum of Rs.35,000/-. The 1st defendant promised to vacate the premises within two months but however instead of surrendering possession had sent a Caveat to the Plaintiff which clearly indicated his intention of not vacating the premises. The Legal Notice dated 19.11.2008 was sent by the plaintiff to the 1st defendant calling upon him to vacate and hand over possession of the suit property within 15 days from the date of receipt of notice to the plaintiff.

5.The 1st defendant on receiving the said notice issued a reply dated 01.12.2008 putting forth vexatious and false allegations. The 2nd defendant by her reply dated 16.11.2008 acknowledged the Sale of the suit property to the plaintiff through her Power Agent and also stated that the 1st defendant had been inducted into possession by virtue of Agreement dated 14.01.1996 (Possessory Mortgage Deed). The plaintiff had contended that on the issue of the Legal Notice and the failure on the part of the 1st defendant to hand over possession, the possession turned into one of a trespasser and therefore, he was liable to pay the damages at the rate of Rs.5,000/- per month from the date of Legal Notice till the date of handing over the possession.



6.It appears that the 1st defendant had filed the suit O.S.No.1501 of 2008 on the file of the learned Principal District Munsif, Puducherry for a bare injunction. The plaintiff would also submit that they were ready to deposit the mortgage amount as soon as the 1st defendant surrendered his possession of the suit property. The 1st defendant had set up title over the suit property by stating that he had perfected title by adverse possession though his initial induction into the property was as a Mortgagee. The plaintiff therefore came forward with the suit for the relief stated supra.

7.The 1st defendant had filed his Written Statement denying the contentions in the Plaint except with reference to the purchase by the 2nd defendant and the construction of the building thereon. The 1st defendant would come forward with the contention that the said property had been orally sold by the 2nd defendant to the 1st defendant on 01.03.1996 after receiving a sum of Rs.5,75,000/-. It was his case that he had paid the sum of Rs.5,75,000/- and the title and possession was transferred to him. The defendant would also submit that when he had purchased the property the 2nd defendant informed him that the original title deed has lost and that he need not be perturbed since the 1st defendant was already in possession and enjoyment of the property. The 1st defendant would therefore submit that from 01.03.1996, he has been in open continuous and uninterrupted enjoyment of the property as its absolute owner to the knowledge of the others. He would also contend that the 2nd defendant had acquiesced to his title to the suit property. The 1st defendant went on to state that the Possessory Mortgage Deed dated 14.01.1996 was false and the fraudulent. The 1st defendant had therefore disowned the Possessory Mortgage Deed. He would submit that the suit was only an attempt to compel him to surrender possession and blackmail him on account of the connivance and collusion between the plaintiff and the 2nd defendant. He would further submit that the suit is barred by limitation. He therefore prayed for dismissal of the suit.

8.The learned Principal District Judge, Puducherry had framed the following issues:

1. Whether the plaintiff has validly purchased the suit property from the defendant under the Sale Deed dated 13.08.2008 and has derived valid title to the property under that sale?
2. Whether the oral sale pleaded by the first defendant is true?
3. Whether the 1st defendant has got valid title to



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the suit property following the oral sale dated 01.03.1996?

4. Whether the 1st defendant is in possession of the suit property only as an usufructutory mortgage and not as an owner of the suit property?
5. Whether the 1st defendant has acquired title to the suit property by way of adverse possession?
6. Whether the suit has been under valued and whether the Court fee paid is correct?
7. Whether the plaintiff is entitled to get the relief of declaration of title and consequential relief of possession of the suit property?
8. Whether the plaintiff is entitled to get future mesne profit, if so, at what rate?
9. To what relief the plaintiff is entitled to?"

9. The parties had gone to trial on the above issues. The plaintiff examined himself as PW1 and marked Ex.A.1 to Ex.A.12 in support her case. The 1st defendant examined himself as DW1 and one Vasanthan as DW2 and marked Ex.B1 to Ex.B11. The learned Principal District Judge, on an elaborate consideration of the documentary as well as oral evidence ultimately came to the conclusion that the oral sale pleaded by the 1st defendant was absolutely false as the same had not been proved and further, the 1st defendant had not been able to establish his title to the suit property by adverse possession. Since the plaintiff had stated that a sum of Rs.35,000/- is still due to the 1st defendant, the learned Judge decreed the suit and directed the plaintiff to deposit a sum of Rs.35,000/- within a period of two months. Challenging the said Judgment and Decree, the 1st defendant is before this Court.

10. Mr. P. Dineshkumar, learned counsel for the appellant/1st defendant would put forward a defence which was neither pleaded nor argued by the defendant before the trial Court. He would contend that the suit as framed was not maintainable since the plaintiff ought to have filed a suit for redemption and that too only after depositing the amount into the Court. He would draw the attention of this Court to the Paragraph 3 of the Plaint which reads as follows:

"3. It is humbly submitted that plaintiff came to the first defendant in person on 15.08.2008 and approached him to surrender possession of the suit property to her by receiving Rs.35,000/- (Rupees thirty five thousand only) mortgage money advanced



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by him to the second defendant under Document dated 14.01.1996. It is humbly submitted that the first defendant promised to vacate the premises within two months time i.e., by the end of October 2008, but instead of surrendering possession to the plaintiff he has sent a Caveat Petition through his counsel Thiru.D.Soundararajan. It is humbly submitted that the intention of the first defendant has come to light that he is not willing to surrender possession of the suit property and want to drag the plaintiff through Court of Law for seeking redressal."

11.The learned counsel for the appellant would submit that from the very pleadings, it is evident that the suit had been instituted only on the basis of the Mortgage Deed and therefore, considering the provisions of Sections 60, 62 and 83 of the Transfer of Property Act, the plaintiff ought to have deposited the amount i.e., the mortgage money and thereafter, instituted the suit for redemption and not one for declaration and recovery of possession. He would submit that there is no cause of action for filing of the suit.

12.In support of the above arguments, the learned counsel for the appellant would also rely on the following Judgments:

- (1) (2014) 9 SCC 185 [Singh Ram v. Sheo Ram]
at Paras 12, 21 and 22
- (2) (2017) 4 SCC 654 [Kathamani v. Nasreen Ahmed]
at Para 30
- (3) (2021) SCC Online SC 552 [SauravJain and another
v.A.N.P.Design and another] at Para 34

13.In support of his arguments that an issue regarding the maintainability of the suit can be raised at any time as the same was only a legal issue he would rely on the Judgment reported in AIR 1924 All 26 [Ahmad Ullah v. Abdul Rahim] and also the Judgment reported in AIR 1980 Pat 51 [Harbans Singh v. Ramdhari Mahton and others]. He would therefore contend that from a reading of the Plaint and the relief sought for, it is clearly evident that the suit was not maintainable and ought to have been dismissed.

14.Per contra, Mr.Thiagarajan, learned counsel for the plaintiff/1st respondent would submit that this plea is taken for the first time in appeal. Before the trial Court, the defence of the 1st defendant was that he had purchased the property from the 2nd defendant by way of an oral Sale by paying a sum of Rs.5,75,000/-. He would submit that from the date of the oral



sale, namely, on 01.03.1996, the 1st defendant had perfected title to the suit property. He would also submit that the next defence which was taken by the 1st defendant was the plea of adverse possession. In fact, the 1st defendant had denied the very Possessory Mortgage Deed as a false and fabricated one. Nowhere in the Written Statement has the defendant acknowledged the fact that he was put in possession of the property as a Mortgagee. On the contrary, it is their specific case that he is in possession of the property only as a Purchaser.

15.Points for Consideration:

“(1)Whether the 1st defendant who had refuted the possessory Mortgage Deed and contended that he was an owner of the suit property pursuant to an oral sale can take a contradictory stand in appeal?

(2)If so, whether the suit filed by the plaintiff has to be dismissed as not maintainable?”

16.Heard the learned counsels appearing on either side and perused the papers.

17.It is seen that prior to the institution of the suit, the plaintiff had issued a legal notice under Ex.A.8 dated 19.11.2005 in which she has in very clear terms stated that she had approached the 1st defendant with the Mortgage Money but however the defendant offered to vacate the premises and he had thereafter gone back on the assurance and the plaintiff had contended that the permission to remain in possession had been withdrawn. The plaintiff in the said notice has also mentioned about her tendering the mortgage money to the defendant. To the said notice, a reply has been issued on 01.12.2008 Ex.A.10, the 1st defendant has not only denied the Mortgage but went on to state that the Mortgage Deed was a fabricated one. The 1st defendant had, on the contrary, pleaded an oral Sale in his favour on 01.03.1996 for a total consideration of Rs.5,75,000/- and further that he had perfected title by adverse possession by remaining in open continuous and uninterrupted possession for well over the statutory period. In the light of the reply of the defendant claiming title to the property, the plaintiff sought for declaration of title to the property and for recovery of possession.

18.The arguments that have been advanced by the learned counsel for the appellant have been made for the first time before this Court and in total contradiction to the defence pleaded in the trial Court. The defendant in his Written Statement had categorically denied that he is a mortgagee and in



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possession of the property as an usufructutory mortgage. On the contrary, it is the case of the defendant that he has purchased the property and he is in possession of the same as a purchaser and he has also taken out the contradictory plea of adverse possession.

19.The Judgment relied upon by the learned counsel relates to the cases where in the mortgage had been accepted and the defence was only on the non compliance of the provisions of the Transfer of Property Act like Sections 60, 62 and 83.

20.In the Judgment in AIR 1924 All 26 [Ahmad Ullah v. Abdul Rahim] quoted by the defendant/appellant, the question before the Court was whether the making by a mortgage of a deposit under Section 83 of the Transfer of Property Act ipso facto extinguishes the mortgage although the mortgagee had refused to accept the deposit. The Learned Judges had answered that the suit for only a suit on mortgage would be maintainable. The learned Judges had also upheld the decision taken by the Lower Appellate Court by rejecting the Judgment of the learned Single Judge by holding that the suit for ejectment was not maintainable.

21.The facts of the instant case stand on a different footing as the defendant has denied the very mortgage and has categorically stated that he is not a Mortgagee but that he is the owner of the property vide the oral Sale. The other Judgments relied upon by the defendant would not be applicable to the facts of this case. In these circumstances, the suit framed is in order and the 1st Point for Consideration is answered against the defendant.

Considering the fact that the 1st Point for Consideration is answered in favour of the plaintiff, the 2nd Point for Consideration is also held against the defendant. Consequently, the Appeal Suit is dismissed and the 1st defendant is directed to vacate the premises within a period of two months from the date of receipt of a copy of this Judgment. There shall be no order as to costs.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR



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The Principal District Judge,
Puducherry.

Copy to

The Section Officer,
VR Section,
High Court, Madras.

+1cc to Mr.D.Ravichander, Advocate Sr.54138
+1cc to Mr.R.Thiagarajan, Advocate Sr.53962

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srg 30/12/2021