



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.03.2021

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A. (MD)No.385 of 2015 and
MP(MD) No.1 of 2015

C.Balasubramanian

...Appellant/Appellant/1st Defendant

Vs.

1.Samsun Najima
Maruthammal (Deceased)

... Respondent/Respondent/Plaintiff

2.Sornam
3.Ramalakshmi
4.Mariammal
5.Panjali
6.Muthumari

...Respondents 2 to 6/Respondents 2 to 6

PRAYER:- Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree passed by the learned Subordinate Judge, Ramanathapuram in A.S.No.37 of 2006 dated 18.02.2015, confirming the decree and judgment passed by the learned District Munsif cum Judicial Magistrate, Thiruvadanai in O.S.No.402/1995, dated 17.08.2004.

For Appellant	: Mrs.N.Krishnaveni Senior Counsel for Mr.Muruganantham
For R1	: Mr.J.Anandha Kumar
For R2,R3,R5 &R6	: No appearance

J U D G M E N T

The first defendant/mortgagee is on appeal against the decree for redemption granted by the trial Court and confirmed by the Appellate Court.

2.The plaintiff who is a subsequent purchaser from the second defendant, the owner of the property had sued for redemption of the mortgage executed by the second defendant during 1980, by way of registered instrument.

3.The suit was resisted by the first defendant alone raising various contentions. The mortgagor was impleaded as second defendant. Since the first defendant mortgagee claimed that the husband of the second defendant had settled the property in favour of the second defendant and her daughters also and that he had purchased the property from the daughters of the second defendant,



namely the defendants 2 to 7, they were impleaded as parties to the suit.

4.At trial, the plaintiff was examined as PW 1 and Exs.A1 to Ex.A10 were marked. The first defendant was examined as DW 1 and Kathiresan and Vaithayanathan were examined as DW 3 and DW 4. DW2 Rajagopal did not make himself available for cross examination. Exs.B1 to B5 were marked on the side of the defendants. The report of the Commissioner was marked as Ex.C1.

5.The trial Court, upon consideration of the evidence on record, concluded that the second defendant is the absolute owner of the property and the defendants 3 to 7 have no right over the property. Therefore, the purchase made by the first defendant from the defendants 3 to 7 was held invalid. The trial Court upheld the right of the plaintiff to redeem the mortgage as a purchaser from the second defendant. Upon such conclusion, the trial Court decreed the suit as prayed for. Aggrieved, the first defendant preferred an appeal in A.S.No.37 of 2006. The learned Appellate Judge concurred with the findings of the trial Court and confirmed the decree. Hence, this Second Appeal.

6.While admitting the Second Appeal, the following substantial questions of law have been framed

- i.Whether the finding of the courts below that the second defendant got absolute right over the suit property and other properties under Ex.A6, Settlement Deed is not perverse when the Settlement Deed was executed in favour of the second defendant and her daughters, the defendants 3 to 7?
- ii.When the gift deed is required to be attested by atleast two witness under Section 123 of Transfer of Property Act and the plaintiff is miserably failed to prove Ex.A6, gift deed, under which, he is claimign title over the suit schedule property, as required under Section 68 of Indian Evidence Act, whether the Courts below right in granting the decree as prayed for? And
- iii.Whether the decrees of the Courts below are not vitiated in view of the fact that the decree passed in the suit for redemption is not in terms of Order 34 Rule 7 of Civil Procedure Code?

7.I have heard Mrs.N.Krishnaveni, the learned senior counsel appearing for the appellant and Mr.J.Anandha Kumar, the learned counsel appearing for the first respondent.



8.Mrs.Krishnaveni, the learned Senior Counsel appearing for the appellant would vehemently contend that the Courts below were not right in granting a decree for redemption without complying with practice under Order 34 Rule 7 of Civil Procedure Code. She would also submit that the Courts below were not right in concluding that the defendants 2 to 7 do not have right over the property. The learned Senior Counsel would also term the findings of the Courts below on the title of the second defendant as perverse.

9.Contending contra, Mr.J.Anandhakumar, the learned counsel appearing for the first respondent/plaintiff would submit that even as per the settlement deed dated 06.05.1963 executed by Thondimuthu, the second defendant gets absolute title to the property under the said document, which is marked as Ex.A6. In view of the disposition made in the said instrument, the defendants 3 to 7, who are the daughters of the second defendant do not have any right over the property in order to enable them to convey the property to the first defendant under Ex.B4 dated 03.07.1995. He would also point out that the Sale Deed, dated 03.07.1995 has been executed only by the defendants 5,6 & 7. As regards the form of the decree, the learned counsel for the respondents would submit that since it is a usufructuary mortgage, no details are necessary. The Courts below were right in granting a final decree in terms of Order 34 Rule 8 of Civil Procedure Code.

10.I have considered the rival submissions. It is clear from Ex.A6, Settlement Deed that the second defendant is the absolute owner of the property. The claim of the first defendant that the predecessor in interest, namely Thondimuthu Aasari had settled the property on his wife and daughters has not been established by any tangible evidence. Therefore, under Ex.A6, the second defendant, namely, Maruthammal gets title to the property. In the light of the said documentary evidence offered by Ex.A6, which is a document, more than 30 years old, I do not think that the Courts below could be faulted for concluding that the second defendant is the absolute owner of the property. Once it is found that the second defendant is the absolute owner of the property, her right to mortgage the property cannot be doubted. Therefore, the Courts below were also right in concluding that the plaintiff is entitled to a decree for redemption. The questions of law 1 & 2 are answered against the appellant. This leaves us the third question of law relating to the form of the decree passed by the Courts below.

11.The provisions of Order 34 Rule 7 & 8 lays down procedure had to be adopted by the Court in passing preliminary and final decree in suit for redemption. As rightly pointed out by the learned senior counsel appearing for the appellant, the Honourable Supreme Court in **Jamila Begum (Dead) through legal representatives Vs. Shami Mohd, (Dead) through Legal Representatives and another,**



reported in 2019 2 SCC 727 has held that the Courts must follow the procedure prescribed under Order 34 Rule 7 & 8, while passing decrees of redemption.

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35. The High Court has not followed the provisions of the Code of Civil Procedure for passing decree for redemption of mortgage. Order 34 Rule 7 CPC stipulates that in a suit for redemption of mortgage, the Court shall prepare the preliminary decree in accordance with Order 34 Rule 7 CPC. The High Court has passed a decree for redemption of mortgage simpliciter without following the provisions of the Code of Civil Procedure. The High Court also erred in directing the delivery of possession of the suit property to Respondent 1 Plaintiff and the same cannot be sustained. The High Court could not have passed the decree for redemption without following the procedure laid down in Order 34 Rule 7 and 8 of the Code of Civil Procedure which lays down a detailed procedure for passing a preliminary decree and final decree in a suit for redemption which was not followed by the High Court.

12. I had an occasion to consider the form of the decree that should be passed in a suit for redemption in **J. Mahalakshmi Vs. N. Narasimhan, reported in Second Appeal Nos. 374 and 375 of 2008 dated 14.09.2018**. I had concluded that the decree for redemption must be in strict compliance in proviso to Order 34 Rule 7 & 8 of Civil Procedure Code.

13. A perusal of the decree passed by the trial Court as well as the first Appellate Court demonstrates that they are not in terms of Order 34 Rule 7 and 8 of Code of Civil Procedure. In a suit for redemption, the Court is bound to pass a preliminary decree either directing account for determination of the amount due under the mortgage or determining the amount due, and directing the plaintiff to deposit the amount within a particular date. Such course has not been adopted. The Courts below straightaway passed a final decree directing the plaintiff to deposit the amount due under mortgage and further directing the defendant to hand over the vacant possession of the property. This is not in conformity with the procedure prescribed under Order 34 Rule 7. To meet the ends of justice, I am of the opinion that the decree now passed by the Courts below can be treated as a preliminary decree, permitting the plaintiff to apply for a final decree, since it is admitted that the plaintiff had deposited the money due under mortgage as directed by the Courts below, within the time prescribed.



14.The third question of law is answered in favour of the appellant. The decree that has been passed by the Courts below will be treated as a preliminary decree. The fact that the plaintiff has deposited the amount to the credit of the suit within a time granted by the trial Court is also placed on record. Therefore, it is open to the plaintiff to seek a final decree for delivery of possession only. The Second Appeal is partly allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To

- 1.The District Munsif cum Judicial Magistrate, Thiruvadanai.
- 2.The Subordinate Court, Ramanathapuram.
- 3.The Section Officer,
V.R. Section
Madurai Bench of Madras High Court,
Madurai.

Judgment made in
S.A. (MD)No.385 of 2015 and
MP(MD) No.1 of 2015
Dated 03.03.2021

KM(CO)

TR(19.05.2021) 5P 5C