



IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 12.04.2022
PRONOUNCING ORDERS ON : 18.04.2022

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CORAM:

THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH
Second Appeal No.369 of 2013
and MP No.1 of 2013

N.Chandran

..Defendant

..Vs..

N.Swaminathan

..Plaintiff

Prayer: Second Appeal filed Under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 19.12.2012 made in A.S.No.65 of 2012 on the file of the learned Principal Subordinate Judge and Appellate Authority, Coimbatore reversal of the Judgment and Decree dated 12.03.2012 made in O.S.No.1506 of 2006 on the file of the Third District Munsif, Coimbatore.

For Appellant : Mr.N.Manokaran

For Respondent : Mr.I.Abrar Md.Abdullah

J U D G M E N T

The defendant is the appellant in this Second Appeal.

2.The respondent/plaintiff filed the suit seeking for the relief of redemption of mortgage and for delivery of possession of the second item of the suit property.

3. The case of the plaintiff is that the suit property originally belonged to the father of the plaintiff. During his lifetime, he executed a Will dated 20.10.1994, marked as Ex.A1 in favour of his sons. He had four sons. The "C" schedule property was allotted in favour of the plaintiff and the "B" schedule property was allotted in favour of the defendant. "D"



schedule property was allotted in favour of another brother Paramasivam. The further case of the plaintiff is that the plaintiff and the defendant are doing business in the suit property. The said Paramasivam who was allotted the "D" schedule property, mortgaged the property in favour of the defendant on 15.9.2005. According to the plaintiff, 96 Sq.ft., was mortgaged in favour of the defendant and the remaining 64 Sq.ft., was encroached upon by the defendant.

4. The plaintiff has further stated that on 22.5.2006, he purchased the property belonging to Paramasivam for a valid consideration. The sale deed was marked as Ex.A3. The plaintiff was ready and willing to pay back the loan amount of Rs.75,000/- to the defendant and redeem the mortgage. That apart, the plaintiff also wanted the defendant to handover possession of 64 Sq.ft., which was encroached by him. Accordingly, a legal notice came to be issued on 17.6.2006, marked as Ex.A4. The defendant through reply notice dated 22.6.2006 marked as Ex.A5, refuted the claim made by the plaintiff. Hence, the suit came to be filed seeking for the relief of redemption of mortgage and for recovery of possession.

5. The defendant filed a written statement and took a stand that the sale deed of the plaintiff is a sham and nominal document. It was stated that the total mortgage amount was Rs.1,75,000/- and there was nothing in the sale deed about the existing mortgage over the suit property. The defendant also placed reliance upon the pleadings in the earlier suit filed in O.S.No. 1240 of 2006 wherein the said Paramasivam had specifically stated that the defendant was in permissive possession. Therefore, the defendant denied the allegation made by the plaintiff as if he had encroached into the property. Accordingly, the defendant sought for the dismissal of the suit.

6. The Trial Court after considering the facts and circumstances of the case and on appreciation of oral and documentary evidence, dismissed the suit through Judgment and Decree dated 12.3.2012. Aggrieved by the same, the plaintiff filed appeal in A.S. No. 65 of 2012 and the Lower Appellate Court through Judgment and Decree dated 19.12.2012, allowed the appeal and set aside the Judgment and Decree of the Trial Court. Accordingly, the suit was decreed. Aggrieved by the same, the defendant has filed this Second Appeal.

7. When the Second Appeal was admitted, the following substantial questions of law were framed:



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1) Whether the suit as framed is maintainable in law in the absence of any prayer for partition or declaration of title?

2) Whether the First Appellate Court is correct in law in decreeing the suit for possession after redemption of the alleged mortgage, in the absence of any legal evidence to prove the due execution and genuineness of Ex.A1 to Ex.A3?

3) Whether the First Appellate Court erred in law in accepting the sale made in favour of the plaintiff even before the period of redemption under Ex.A2, particularly when the said Ex.A2 is inadmissible and unreliable for any purpose?

8. Heard Mr.N.Manokaran, learned counsel for the appellant and Mr.I.Abrar Md.Abdullah, learned counsel for the respondent. This Court also carefully considered the materials available on record and the findings of both the Courts below.

9.The property originally belonged to one Nachimuthu and he executed a Will in favour of his four sons viz., Natarajan, Chandran, Swaminathan and Paramasivam. Swaminathan is the plaintiff in this case and he was given the "C" schedule property and Chandran is the defendant in this case and he was given the "B" schedule property. There is no dispute with respect to the relationship between the parties and the ownership over the property.

10. One of the son Paramasivam is stated to have executed a mortgage deed in favour of the defendant with respect to 96 Sq.ft., after receiving a sum of Rs.75,000/- from the defendant. Ex.A2 and Ex.A11 are the photocopies of the so called mortgage deed dated 15.9.2005. The original mortgage deed was not marked during trial. Ex.A15 is the certified copy of the mortgage deed dated 15.9.2005 which was marked during the pendency of the appeal.

11. The plaintiff is said to have purchased the property belonging to Paramasivam through a sale deed marked as Ex.A3. Upon purchasing the property from Paramasivam, the plaintiff had offered to redeem the mortgage by paying the mortgage amount to the defendant and the plaintiff had also sought for recovery of possession.



12. The Trial Court found that Ex.A2 is the photocopy of a document styled as nghf;fpa th;j;jkhd xg;ge;jk;/ Under this document, one of the son Paramasivam is said to have taken a sum of Rs.75,000/- from the defendant and had handed over an extent of 96 Sq.ft., in favour of the defendant. As per this document, the defendant is entitled to enjoy the property for two years in lieu of interest and run his business without paying

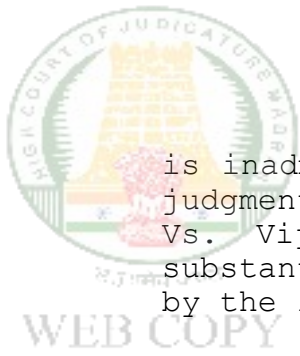
any rent. It was also left open to the said Paramasivam to repay back the entire amount of Rs.75,000/- and till then the agreement was to remain in force.

13. The Trial Court found that Ex.A2 is a document which is compulsorily registrable and hence it is not admissible in evidence. Accordingly, the relief of redemption of mortgage was denied. The Trial Court also rejected the relief of delivery of possession on the ground that the property has not been partitioned as per the Will executed by Nachimuthu and hence the plaintiff has to seek for the relief of partition and possession. The Trial Court accordingly, dismissed the suit.

14. The Lower Appellate Court took into consideration the fact that the defendant specifically admitted the execution of Ex.A1 Will and the same coming into operation on the demise of his father. Since the Will itself allotted specific properties to four sons, the Lower Appellate Court found that there is no requirement to seek for the partition of the suit property.

15. Insofar as the mortgage deed is concerned, the Lower Appellate Court found that the defendant had filed the original mortgage deed 15.9.2005 executed by Paramasivam in O.S. No. 1240 of 2006. The certified copy of the same was obtained and filed during the pendency of the appeal and it was marked as Ex.A15. Even the Appellate Court finds that it is an unregistered and insufficiently stamped document. However, since the defendant did not raise any objection at the time of marking Ex.A2 and Ex.A11, the Lower Appellate Court found that this document can be taken in evidence if the plaintiff pays the deficit stamp duty and penalty. Once this deficit stamp duty and penalty is paid, the Lower Appellate Court has given a finding that the document can be relied upon for collateral purposes under Section 49 of the Registration Act, 1908.

16. The learned counsel for the appellant submitted that Ex.A2 document is inadmissible in evidence and it cannot be looked into for any purpose. He further submitted that the mere marking of the document will not validate the document since it



is inadmissible in evidence. The learned counsel relied upon the judgment of the Hon'ble Supreme Court in Avinash Kumar Chauhan Vs. Vijay Krishna Mishra reported in (2009) 2 SCC 532 to substantiate his submission. The relevant portions relied upon by the learned counsel for the appellant are extracted hereunder:

"17. Parliament has, in Section 35 of the Act, advisedly used the words "for any purpose whatsoever". Thus, the purpose for which a document is sought to be admitted in evidence or the extent thereof would not be a relevant factor for not invoking the aforementioned provisions.

...

21. It is not in dispute that the possession of the property had been delivered in favour of the appellant. He has, thus, been exercising some right in or over the land in question. We are not concerned with the enforcement of the said agreement. Although the same was not registered, but registration of the document has nothing to do with the validity thereof as provided for under the provisions of the Registration Act, 1908.

22. We have noticed heretobefore that Section 33 of the Act casts a statutory obligation on all the authorities to impound a document. The court being an authority to receive a document in evidence is bound to give effect thereto. The unregistered deed of sale was an instrument which required payment of the stamp duty applicable to a deed of conveyance. Adequate stamp duty admittedly was not paid. The court, therefore, was empowered to pass an order in terms of Section 35 of the Act.

23. The contention of learned counsel for the appellant that the document was admissible for collateral purpose, in our opinion, is not correct. In Bondar Singh [(2003) 4 SCC 161] this Court was not concerned with the provisions of the Act. Only interpretation of the provisions of the Registration Act, 1908 was in question. It was opined : (SCC p. 163, para 5)

"5. The main question, as we have already noted, is the question of continuous possession of the plaintiffs over the suit lands. The sale deed dated 9-5-1931 by Fakir Chand, father of the defendants in favour of Tola Singh, the predecessor-in-interest of the plaintiffs, is an admitted document in the sense its execution is not in dispute. The only defence set up against the said document is that it is unstamped and



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unregistered and therefore it cannot convey title to the land in favour of the plaintiffs. Under the law a sale deed is required to be properly stamped and registered before it can convey title to the vendee. However, legal position is clear law that a document like the sale deed in the present case, even though not admissible in evidence, can be looked into for collateral purposes. In the present case the collateral purpose to be seen is the nature of possession of the plaintiffs over the suit land. The sale deed in question at least shows that initial possession of the plaintiffs over the suit land was not illegal or unauthorised."

24. In the present case, by reason of the statutory interdict, no transfer at all is permissible. Even transfer of possession is also not permissible. (See Pandey Oraon v. Ram Chander Sahu [1992 Supp (2) SCC 77] and Amrendra Pratap Singh v. Tej Bahadur Prajapati [(2004) 10 SCC 65] .) The Registration Act, 1908 provides for such a contingency in terms of the proviso appended to Section 49 thereof, which reads as under:

"49. Effect of non-registration of documents required to be registered.—No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall—

- (a) affect any immovable property comprised therein, or
 - (b) confer any power to adopt, or
 - (c) be received as evidence of any transaction affecting such property or conferring such power,
- unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (1 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument."

25. Section 35 of the Act, however, rules out applicability of such provision as it is categorically provided therein that a document of this nature shall not be admitted for any purpose whatsoever. If all purposes for which the document



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is sought to be brought in evidence are excluded, we fail to see any reason as to how the document would be admissible for collateral purposes.

26. The view we have taken finds support from the decision of the Privy Council in *Ram Rattan v. Parma Nand* [(1945-46) 73 IA 28 : AIR 1946 PC 51] wherein it was held : (AIR p. 52)

"[That] the words 'for any purpose' in Section 35 of the Stamp Act, should be given their natural meaning and effect and would include a collateral purpose [and that] an unstamped partition deed cannot be used to corroborate the oral evidence for the purposes of determining even the factum of partition as distinct from its terms."

The said decision has been followed in a large number of decisions by the said Court.

27. In *Bhaskarabhotla Padmanabhaiah v. B. Lakshminarayana* [AIR 1962 AP 132] it has been held : (AIR p. 134, para 9)

"9. In this case, the learned Subordinate Judge has observed that what the plaintiff was trying to prove was not the division in status but to show that the property was divided under the partition deed. In any case, the fact that the document is inadmissible due to want of being stamped is clear. For, in *Ram Rattan v. Parma Nand* [(1945-46) 73 IA 28 : AIR 1946 PC 51] Their Lordships of the Privy Council held that the words 'for any purpose' in Section 35 of the Stamp Act should be given their natural meaning and effect and would include a collateral purpose and that an unstamped partition deed cannot be used to corroborate the oral evidence for the purpose of determining even the factum of partition as distinct from its terms."

It was furthermore held : (*Bhaskarabhotla* case [AIR 1962 AP 132] , AIR p. 134, para 10)

"10. In the result, I agree with the learned Munsif Magistrate that the document is 'an instrument of partition' under Section 2(15) of the Stamp Act and it is not admissible in evidence because it is not stamped. But, I further hold that if the document becomes duly stamped, then it would be admissible in evidence to prove the division in status but not the terms of the partition."

28. In *Sanjeeva Reddi v. Johanputra Reddi* [AIR 1972 AP 373] it has been held : (AIR p. 375, para 9)



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"9. While considering the scope of Section 35 of the Stamp Act we cannot bring in the effect of non-registration of a document under Section 49 of the Registration Act. Section 17 of the Registration Act deals with documents, the registration of which is compulsory and Section 49 is concerned only with the effect of such non-registration of the documents which require to be registered by Section 17 or by any provision of the Transfer of Property Act. The effect of non-registration is that such a document shall not affect any immovable property covered by it or confer any power to adopt and it cannot be received as evidence of any transaction affecting such property or conferring such power. But there is no prohibition under Section 49 to receive such a document which requires registration to be used for a collateral purpose i.e. for an entirely different and independent matter. There is a total and absolute bar as to the admission of an unstamped instrument whatever be the nature of the purpose or however foreign or independent the purpose may be for which it is sought to be used, unless there is compliance with the requirements of the provisos to Section 35. In other words if an unstamped instrument is admitted for a collateral purpose, it would amount to receiving such a document in evidence for a purpose which Section 35 prohibits. There is nothing in B. Rangaiah v. B. Rangaswamy [(1970) 2 AnWR 181] which supports the contention of the petitioner. That was a case as pointed out by Kuppuswami, J., where there were two instruments though contained in one document, one a settlement in favour of the fourth defendant therein and the other a will. It was therefore held that part of the instrument which constitutes a will did not require any stamp and will be admissible in evidence for proving the bequest contained therein. It was for that reason that the learned Judge said that Section 35 of the Stamp Act has no application to a case where one of the separate instruments relating to one such matter would not at all be chargeable under the Act as in the case before him."

29. In T. Bhaskar Rao v. T. Gabriel [AIR 1981 AP 175] it has been held : (AIR p. 177, para 5)

"5. Section 35 of the Stamp Act mandates that an instrument chargeable with duty should be stamped so as to make it admissible in evidence. Proviso (a) to Section 35 of the Stamp Act enables a document to be received in evidence on payment of



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stamp duty and penalty if the document is chargeable, but not stamped or on payment of deficit duty and penalty, if it is insufficiently stamped. The bar against the admissibility of an instrument which is chargeable with stamp duty and is not stamped is of course absolute whatever be the nature of the purpose, be it for main or collateral purpose, unless the requirements of proviso (a) to Section 35 are complied with. It follows that if the requirements of proviso (a) to Section 35 are satisfied, then the document which is chargeable with duty, but not stamped, can be received in evidence."

It was further held : (Gabriel case [AIR 1981 AP 175] , AIR p. 177, para 7)

"7. It is now well settled that there is no prohibition under Section 49 of the Registration Act, to receive an unregistered document in evidence for collateral purpose. But the document so tendered should be duly stamped or should comply with the requirements of Section 35 of the Stamp Act, if not stamped, as a document cannot be received in evidence even for collateral purpose unless it is duly stamped or duty and penalty are paid under Section 35 of the Stamp Act."

(See also Firm Chuni Lal Tukki Mal v. Firm Mukat Lal Ram Chandra [AIR 1968 All 164] and Chandra Sekhar Misra v. Gobinda Chandra Das [AIR 1966 Ori 18] .)

17. The learned counsel for the appellant further submitted that the main relief that has been sought for by the plaintiff by relying upon Ex.A2 cannot be termed as "collateral purpose" and the Lower Appellate Court was wrong in placing reliance upon the document and applying Section 49 of the Registration Act, 1908.

18. The learned counsel for the appellant also submitted that the document ought to have been impounded by the Court below under Section 33 of the Indian Stamp Act, 1899 and instead the plaintiff is asked to pay the deficit stamp duty and penalty.

19. Per contra, the learned counsel for the respondent submitted that the defendant had admitted about the mortgage created by Paramasivam in his favour and the document was filed by him in the suit initiated in O.S.No.1240 of 2006. The defendant was also aware of the fact that the plaintiff had



purchased the suit property. The learned counsel further submitted that the Lower Appellate Court had given cogent reasons for granting the relief in favour of the plaintiff and there are no grounds to interfere with the same.

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20. In the considered view of this Court, even the defendant is relying upon the Will dated 20.10.1994 executed by his father and in the suit filed by him in O.S. No. 1240 of 2006, he also takes a specific stand that the Will has come into operation. As per the Will, four specific portions were given to the four sons of Nachimuthu. In view of the same, there is no requirement for any further partition of the property or to seek for declaration of title. The findings of the Lower Appellate Court in this regard is accordingly upheld. The first substantial question of law is answered accordingly.

21. It is true that Ex.A2 is an unregistered document. It is also insufficiently stamped. In the Judgment of the Hon'ble Supreme Court referred supra, it has been held that Section 35 of the Indian Stamp Act, 1899 completely bars a document from being admitted for any purpose if the document is unregistered and unstamped. Under such circumstances, even Section 49 of the Registration Act, 1908 will not come to the aid of such document being looked into for collateral purposes. Having held so, the Apex Court by taking note of the earlier judgments of the Hon'ble Supreme Court found that insufficiently stamped documents which are liable to be impounded under Section 33 of the Indian Stamp Act, 1899 can be received in evidence on payment of the stamp duty and penalty. In short, the bar against the admissibility of a document is absolute if it is an unstamped document. However, in cases of insufficiently stamped documents, the Court can always pass orders under Section 35 of the Indian Stamp Act, 1899 directing for the payment of the stamp duty with penalty and thereafter admit the document in evidence. Such a document which is compulsorily registrable and it remains to be an unregistered document, can be looked into for collateral purposes under Section 49 of the Registration Act, 1908.

22. The Lower Appellate Court has perfectly understood the scope of Section 35 of the Indian Stamp Act, 1899 and has rightly directed the payment of the deficit stamp duty and penalty by the plaintiff for Ex.A2 document. It is stated that the deficit stamp duty and penalty has also been paid by the plaintiff.

23. While considering Ex.A2 for collateral purposes, the Lower Appellate Court took into consideration the fact that the



original document was with the defendant and it was filed in his suit in O.S.No.1240 of 2006. Even the defendant did not dispute the availability of such a document and its genuineness. The sale of the property in favour of the plaintiff was also admitted by the defendant in the suit filed by him in O.S. No. 1240 of 2006. It must be borne in mind that the parties are closely related and the plaintiff and Paramasivam are none other than the brothers of the defendant. Therefore, the absence of any recital in the sale deed executed in favour of the plaintiff with respect to the pending mortgage, is of no significance. The plaintiff automatically gets into the shoes of Paramasivam after the sale deed was executed in his favour and whatever rights Paramasivam will have in the property, will enure in favour of the plaintiff.

24.The Lower Appellate Court took into consideration the fact that the defendant cannot claim a right over the suit property once the mortgage amount is repaid back. The defendant will be entitled to be in possession of the suit property only till the amount is repaid back to him. Curiously, the defendant took a stand in the suit filed by him as if he is a tenant in the suit property and he can be evicted only under due process of law. The defendant in his evidence had also admitted that he is possession of 64 Sq.ft., where he is running his shop and he has not made any payment to Paramasivam in this regard.

25. The Lower Appellate Court has given proper reasons for granting the relief of redemption of mortgage and for recovery of possession. This Court does not find any perversity in the reasons assigned by the Lower Appellate Court. The second and third substantial questions of law are answered accordingly, against the appellant.

26.In the result, this Court does not find any merits in this Second Appeal and there is no ground to interfere with the findings of the lower Appellate Court. All the substantial questions of law are answered against the appellant. Accordingly, the Second Appeal is dismissed. Considering the facts and circumstances of the case, there shall be no order as to costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

KP



To

1.The Principal Subordinate Judge and Appellate Authority,
Coimbatore.

2.The Third District Munsif, Coimbatore.

Copy to:

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

+1 cc to Mr.N.Manokaran, Advocate Sr.NO. 26258

Second Appeal No.369 of 2013

GPL (CO)

A.SK(28/04/2022)