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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.01.2022

CORAM

THE HONOURABLE MR. JUSTICE RMT.TEEKAA RAMAN

S.A.No.793 of 2013

and

M.P.Nos.1 & 2 of 2013

D.Palanisamy,
S/o.Deivasigamani Mudaliar,
Thiruvalam Village and Post,
Katpadi Taluk,
Vellore District.

...Appellant/Respondent/Plaintiff

Vs.

1.Balakrishnan
S/o.Thangavelu Gounder

2.Salammal
W/o.Balakrishnan

Both are residing at
Kembarajapuram Village,
Thiruvalam (Via)
Katpadi Taluk,
Vellore District.

...1 & 2 Respondents/Appellants 1 & 2/Defendants 1 & 2

Prayer : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 01.03.2013 passed in A.S.No.6 of 2011 on the file of the I Addl. District and Sessions Court, Vellore in reversing the judgment and decree dated 30.12.2005 passed in O.S.No.409 of 1995 on the file of the Sub Court, Vellore.

For Appellant : Mr.P.Mani

J U D G M E N T

The Second Appeal has been filed against the judgment and decree dated 01.03.2013 passed in A.S.No.6 of 2011 on the file of the I Additional District and Sessions Court, Vellore, reversing the judgment and decree dated 30.12.2005 passed in O.S.No.409 of 1995 on the file of the Sub Court, Vellore.



2.The learned counsel for the Appellant/Plaintiff contended that the lower Appellate Court has committed a mistake in treating Ex.A1 as mortgage deed and held in the absence of registration, the same is inequitable and the suit claim is barred by limitation and also held that the terms of Ex.A1 reveal that it is a contingent contract.

3.For the sake of convenience, the parties are referred to as per the rank before the trial Court.

4.The Plaintiff/Appellant filed O.S.No.409 of 1995 before the Sub Court, Vellore, for the recovery of money due as per Ex.A1, a sum of Rs.1,37,450/-. The Respondents/Defendants, who are husband and wife filed separate written statement alleging that the suit claim is barred by limitation and the suit is based upon the agreement to mortgage the property and the suit is not maintainable and prayed for dismissal. The trial Court has decreed the suit and the Defendants preferred A.S.No.6 of 2011 and that was allowed. Aggrieved by the same, the plaintiff has filed the present second appeal. Notice of motion was ordered and today, the following substantial questions of law are framed:

- a)Whether Ex.A1 document is an agreement to repay and execute mortgage deed or a mortgage deed which require registration and stamp duty?
- b)Whether the suit is barred by limitation when the same has been filed within three years from the date of Ex.A2 endorsement of payment?
- c)Whether the present suit is not maintainable under Section 33 of the Indian Contract?

5.The learned counsel for the Respondents despite several adjournments, refused to argue and not appeared before this Court.

6.A perusal of recitals of Ex.A1 dated 27.02.1990 goes to show that Defendants/Respondents herein have agreed to pay the sum of Rs.75,000/- by either handing over the Decree in their favour in O.S.No.382 of 1988, O.S.No.130 of 1989 and O.S.No.131 of 1989, on the file of District Munsif Court, Gudiyatham, failing which, they agreed to repay the amount or agreed to execute the mortgage deed in respect of suit property. They also relied upon another mortgage deed to the tune of Rs.35,000/- and on realisation of said deed, they will pay the amount with additional clause as stated supra. As per Ex.A2 endorsement, on realisation of decreed amount in O.S.No.382 of



1988, O.S.No.130 of 1989, O.S.No.131 of 1989 & O.S.No.398 of 1990, they have paid Rs.35,000/-. Since the balance amount was not paid, hence the Suit.

7. On perusal of the recitals of Ex.A1, it is crystal clear that Ex.A1 is not a mortgage deed, it is only an agreement to execute the mortgage deed. Since it is an agreement to execute the mortgage deed, Ex.A1 does not create a security, which needs requisite registration and stamp duty. In fact Ex.A1 is an agreement to get the document creating security and therefore, Ex.A1 need not be registered and hence lower Appellate Court has committed an error in treating Ex.A1 as a mortgage deed. As if this document is creating an equitable mortgage and consequent finding of the lower Appellate Court, it requires registration is legally unsustainable in view of the clear recital in Ex.A1 itself. It remains to be stated that a condition stated in Ex.A1 agreement is that on receipt of the decreed amount in the three suits in which the Defendants herein are the Plaintiffs, filed for recovery of amount from some of his debtors, had agreed to pay the amount, till such time, the recovery proceedings are to be kept in abeyance. Furthermore, it is to be stated that after realisation of part of the decreed amount in the said suits, they have also paid Rs.35,000/- as evidenced from Ex.A2 endorsement made in Ex.A1 agreement of mortgage and hence, lower Appellate Court has not taken the evidence in the proper perspective.

8. The recitals and the contents stated in Ex.A1 agreement for mortgage that in the event of decreed amount in three suits referred therein, being not realised by the Defendants herein, who are the Plaintiffs in the suits, they have agreed to execute the mortgage. Therefore, it is not a contingent mortgage. It is only a time seeking, to refund the money borrowed. Since some of the suits filed by the Defendants are pending before the Court, an arrangement has been made to give the borrowers from the Plaintiff till the borrowers (Defendants herein) realise the amount from their debtors and an acknowledgement of liability has been executed, further, with an additional clause that in the event of amount could not be realised, they will execute the mortgage deed, towards debt of the Plaintiff and hence in view of the clear recital in inequitable terms regarding the nature of the transactions between the Plaintiff and Defendants, the same cannot be termed as a contingent contract and therefore, the lower Appellate Court has committed the error in treating the agreement as if it falls under Section 33 of the Indian Contract Act.



9.As to the execution of the Ex.A1 by the Defendants, the scribe of the document examined as PW2 and attestors of the same as PW3 & PW4, for the reasons recorded therein, the trial Court has rightly appreciated the manner of the execution of Ex.A1 and the same is legally acceptable. However, on erroneous consideration, it appears that the lower Appellate Court has reversed the well considered finding of the trial Court. In view of the discussion supra, the finding of the lower Appellate Court hereby stands vacated and that of the finding of the trial Court is restored and Ex.A1 is held to be sustainable in law and the same is only an agreement to execute the mortgage deed, does not require any registration and the terms of the agreement Ex.A1 are equitable in law and it is acknowledgement of liability by the Defendants and execution of the same is duly proved and nature of the document is duly corroborated by oral evidence of PW2, PW3 & PW4 and the evidence of these witnesses remained impeccable in the cross examination.

10.On the point of limitation, heard the learned counsel for the Appellant Ex.A1 agreement was executed on 27.02.1990, Ex.A2 endorsement was made on 01.08.1992. As per the lower Court records, Plaint was filed on 27.07.1995 within three years from the date of Ex.A2 endorsement. For the reasons discussed supra, this Court has held that Ex.A1 & Ex.A2 has been proved in the manner known to law. Consequently, the Suit being filed within three years is held to be maintainable and not barred by limitation.

11.Accordingly the finding rendered by the lower Appellate Court stands vacated and that of the trial Court is restored. Suit is held to be in time and hence all the three substantial questions of law are answered in affirmation in favour of the Appellant and adverse to the Respondents/Defendants. The Second Appeal is allowed, Judgment and decree passed in A.S.No.6 of 2011 is set aside and the judgment and decree passed in O.S.No.409 of 1995 dated 30.12.2005 is restored with costs to be payable by the Respondents. Consequently, connected Miscellaneous Petitions are closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar



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To

1.The I Additional District and Sessions Judge,
I Additional District and Sessions Court,
Vellore

2.The Subordinate Judge,
Sub Court,
Vellore.

Copy to

The Section Officer
VR Section
High Court, Madras 104.

+1 CC to Mr.P.Mani, Advocate sr 2966.

S.A.No.793 of 2013
and
M.P.Nos.1 & 2 of 2013

SRA(CO)
SP(23/03/2022)