



S.A.(MD)No.877 of 2010

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 04.04.2022

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.877 of 2010

1.Vasanthiammal

2.Vikaramathithan

... Appellants

Vs.

1.K.P.Ramadoss

2.Packiyathammal

3.Madasamy

4.Murugan

5.Bose @ Bojaranan

... Respondents

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree made in A.S.No.5 of 2000 on the file of the Additional District Court (Fast Track Court), Periyakulam, dated 18.06.2020, reversing the judgment and decree made in O.S.No.374 of 1995 on the file of the learned District Munsif Court, Periyakulam, dated 15.12.1999.

For Appellants : Mr.A.Arumugam,
For M/s.Ajmal Associates.

For Respondents : Mr.Y.Sasi Kumar,
For Mr.K.Appadurai for R1



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JUDGMENT

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The contesting defendants in O.S.No.374 of 1995 on the file of the District Munsif Court, Periyakulam are the appellants in this second appeal. The suit was filed for redemption of mortgage and for delivery of possession of the suit property. The defendants filed written statement controverting the plaint averments. Based on the divergent pleadings, the trial Court framed the necessary issues.

2.The first plaintiff examined himself as P.W.1 and one Madasamy was examined as P.W.2 and Exs.A1 to A9 were marked. The first defendant examined herself as D.W.1 and one Elangovan was examined as D.W.2 and Ex.B1 was marked.

3.After considering the evidence on record, the trial Court by judgment and decree dated 15.12.1999 decreed the suit as prayed for. Aggrieved by the same, the defendants filed A.S No.5 of 2000 before the Additional District Court, Periyakulam. By the impugned judgment and decree dated 18.06.2010, the first appellate Court confirmed the decision of the trial Court and dismissed the appeal. Challenging the same, this second appeal came to be filed.



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4.The second appeal was admitted on 04.02.2011 on the following substantial questions of law:-

“1.Whether the first appellate Court has committed an error in rejecting the application filed under Order 41, Rule 27 holding that the documents sought to be produced are inadmissible for want of registration, when the usufructuary mortgage dated 16.04.1958 is a registered document? and

2.Whether the Courts below have rendered a perverse finding that the mortgage under Ex.A1-Mortgage deed was given possession of the subject matter of mortgage for enjoyment of the same in lieu of interest?”

5.The case of the plaintiff is that the suit property originally belonged to one Pitchai Asariyar. The said Pitchai Asariyar had mortgaged the suit property in favour of one Murugadas vide registered document dated 10.07.1981. The mortgage money was Rs.5,000/-. Though the mortgagor was to pay interest, by a subsequent understanding between the parties, the mortgagee was allowed to take possession of the suit property in lieu of payment of interest. The said mortgagee/Murugadas passed away in the year 1988. The defendants 1 and 2 are his legal heirs. The said Pitchai Asariyar on behalf of himself and his minor children had sold the suit property in favour of the plaintiff on 16.12.1987. The plaintiff sent legal notice dated 12.11.1994, calling upon the defendants to



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accept the mortgage money of Rs.5,000/- and hand over the mortgaged property to him. The defendants 1 and 2 sent reply notice dated 28.11.1994 rejecting the demand. Thereupon, the plaintiff filed the said suit with the aforesaid reliefs.

6.The trial Court granted the decree for redemption of mortgage and also directed the appellants to hand over the portions which were in their possession to the plaintiff. The first appellate Court modified the judgment and decree passed by the trial Court and held that the entire suit property must be handed over by the defendants to the plaintiff.

7.The learned counsel for the appellants reiterated the contentions set out in the memorandum of grounds. He contended that when admittedly Ex.A1 is only a simple mortgage, the plaintiff cannot be allowed to file a suit for redemption of equitable mortgage along with delivery of possession. He placed reliance on the decision the Honourable Supreme Court reported in **(2008) 6 SCC 745 (Chandrakant Shankarrao Machale Vs. Parubai Bhairu Mohite)** and the decision of this Court made in **S.A.(MD)No.639 of 1998 (Dakshayani vs. B.Kuppuswamy), dated 26.08.2011** for registering a simple mortgage, one has to pay stamp duty payable in the case of bottomry bond but in the case of an usufructuary mortgage or a mortgage whereunder possession is handed over,



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the stamp duty payable is as in the case of conveyance (Article 40 of Schedule I of the Stamp Act, 1889). In this case, having paid duty for simple mortgage as the case of bottomry bond, if the plaintiff is permitted to treat it as if it is a usufructuary mortgage transaction, that would only amount to playing fraud on Stamp laws. Sections 91 and 92 of the Indian Evidence Act, would come into play. The parties cannot be allowed to adduce evidence contrary to the terms of the registered document. He called upon this Court to answer the substantial questions of law in favour of the appellants and set aside the impugned judgments and decrees and dismiss the suit.

8.Per contra, the learned counsel for the plaintiff/first respondent submitted that the case on hand would fall under Section 60 of the Transfer of Property Act, 1882. He pointed out that when the principal money has become due, the mortgagor has right to seek redemption of the mortgage and where the mortgagee is in possession of the mortgaged property to seek its delivery also. He also placed reliance on the following decisions:-

(i) Civil Appeal No.5198 of 2008 (Singal Ram (D) Thr. L.Rs Vs. Sheo Ram & Ors, dated 21.08.2014.

(ii) Kandula Venkiah Vs. Donga Pallaya And Nine Others reported in (1920) ILR 43 Mad 589



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(iii) S.A.Nos.958 and 959 of 2014 (Dharani Ammal Vs. Arayee), dated

23.01.2015

He submitted that the impugned judgment and decree do not call any interference.

9.I carefully considered the rival contentions and went through the evidence on record. Though Section 60(b) of the Transfer of Property Act, 1882, apparently favours the contention advanced by the learned counsel for the first respondent, a careful examination of said statutory provision can only be understood to mean that it would come into play only when mortgagee is in possession of the mortgaged property under the suit mortgage. In this case, the mortgage between Pitchai Asariyar and Murugadas was only a simple mortgage. Ex.A1 does not talk about delivery of possession. Therefore, the plaintiff cannot be allowed to now treat the transaction as if it is usufructuary mortgage. While the decree for redemption of mortgage has to be confirmed, that portion of decree whereunder the defendants are directed to hand over possession to the plaintiff has to be necessarily interfered with. I sustain both the contentions advanced by the learned counsel for the appellants. Permitting the plaintiff to adduce evidence to show that the transaction between the parties was an usufructuary mortgage would clearly attract the mischief that is sought



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to be prevented by Section 92 of the Indian Evidence Act. The parties having paid stamp duty as if the transaction is a simple mortgage cannot now be allowed to gain the fruits of usufructuary mortgagor. What the plaintiff ought to have done was to seek redemption of simple mortgage and recovery of possession on the strength of his title. He has not done so. The suit as framed cannot be said to be in order. The second substantial question of law is answered in favour of the appellants. It is not necessary to deal with the other substantial question of law. The impugned judgment and decree passed by the first appellate Court are modified as follows:-

- (i) The decree for redemption of the suit mortgage is sustained.
- (ii) The decree for delivery of possession of the suit property is set aside.
- (iii) The respondents herein are at liberty to workout their rights in the manner known to law. The period from the filing of the suit till the certified copy of the judgment and decree in this second appeal is made ready shall be excluded while computing limitation.

10.The second appeal is partly allowed accordingly. No costs.

04.04.2022

Index : Yes / No
Internet : Yes/ No
ias/skm



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To:

1. The Additional District Court,
Fast Track Court, Periyakulam.
2. The District Munsif Court,
Periyakulam.

Copy to:

The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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G.R.SWAMINATHAN, J.

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