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S.A.No.409 of 2023
and C.M.P.No.12576 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.06.2023

CORAM:

THE HONOURABLE MRS. JUSTICE R. HEMALATHA

S.A.No.409 of 2023
and
C.M.P.No.12576 of 2023

V.Poongodi

..Appellant

vs.

1.P.Shanthi
2.Karuneegar Aanmeega Trust,
Rep. by its Founder Trustee
G.Narayanan

..Respondents

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the decree and judgment dated 23.12.2022 in A.S.No.7 of 2018 on the file of the Principal Sub Court, Chengalpattu @ Kancheepuram District, upholding the decree and judgment dated 15.12.2017 in O.S.No.57 of 2007 on the file of the District Munsif cum Judicial Magistrate, Thirukazhukundram.

For Appellant : Mr.D.Ramesh Kumar



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JUDGMENT

The first defendant who failed before both the Courts below had filed the present second appeal. The respondents/plaintiffs filed the suit in O.S.No.57 of 2007 on the file of the District Munsif cum Judicial Magistrate, Thirukazhukundram, for redemption of mortgage.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present second appeal would also be indicated.

3. The case of the plaintiff in nutshell is as follows:

The plaintiff and her husband T.V.Panchaksharam had borrowed a sum of Rs.1,00,000/- from the defendant and executed a registered simple mortgage (Ex.A1) on 27.03.2003 through which the suit property, which was a portion of the super structure constructed by late T.V.Panchaksharam (husband of the first plaintiff), was mortgaged. The plaintiff's husband entered into a lease agreement with the second defendant in respect of the suit property belonging to them and he was also paying rents to the second defendant. Even though the mortgage was



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a simple mortgage, the first defendant was orally permitted to occupy the property mortgaged by the plaintiff's husband in lieu of interest for the amount borrowed under the mortgage. Since T.V.Panchaksharam was indisposed, he could not discharge the mortgage loan and ultimately he died on 04.07.2004, leaving behind the plaintiff and his two minor sons to succeed to his estate. The plaintiff, as one of the legal heirs of the deceased T.V.Panchaksharam, is entitled to redeem the mortgage. Though the plaintiff approached the first defendant on several occasions and offered to pay the entire principal sum of Rs.1,00,000/- towards discharge of the mortgage loan, the first defendant refused to receive the same and thereafter, the plaintiff issued a legal notice (Ex.A5) to the first defendant and the first defendant after receiving the said notice sent a reply notice dated 23.06.2007 (Ex.A6) which, according to the plaintiff, contained false allegations. The plaintiff also sent a rejoinder dated 05.07.2007 (Ex.A7) to the first defendant. Since the first defendant did not come forward to receive the mortgage loan amount, she was constrained to file the present suit for redemption of mortgage.



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4. The suit was resisted by the first defendant on the following

grounds:

- i. It is true that the plaintiff's husband T.V.Panchaksharam borrowed a sum of Rs.1,00,000/- from the first defendant and executed a simple mortgage deed dated 27.03.2003 (Ex.A1) and the rate of interest was fixed at 24% per annum.
- ii. The plaintiff's husband never paid any interest towards mortgage loan. The contention of the plaintiff in her plaint that though the document is only a simple mortgage, the first defendant was orally permitted to occupy the property mortgaged by her husband in lieu of interest for the amount borrowed under the mortgage deed is totally false.
- iii. The plaintiff's husband was badly in need of money and therefore he sold the portion of the property to the first defendant for a valuable consideration and the first defendant is in possession of the same. Since a portion of the suit property belongs to the second defendant, the sale deed could not be registered.
- iv. The allegations in the plaint that the plaintiff approached the



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defendant on several occasions and offered to pay the entire principal amount is totally false. The first defendant is not bound to deliver the possession of the suit property to the plaintiff, since the mortgage is a simple mortgage and the plaintiff has to pay interest amount towards the said mortgage amount. He therefore prayed for dismissal of the suit.

5. The second defendant remained absent through out the proceedings and therefore, he was set *ex parte*.

6. On the basis of the above pleadings, the trial Court Judge framed the following issues :

- i. "Whether the plaintiff is entitled for the relief of preliminary decree to direct the first defendant to redeem the mortgage and return the mortgage deed dully cancelled and deliver the possession by receiving the principal amount as prayed for ?
- ii. To what other reliefs ?"



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7. In the trial Court, the plaintiff examined herself and marked Ex.A1 to Ex.A10. The first defendant examined herself as DW1 and marked Ex.B1 & Ex.B2.

8. After full contest, the learned District Munsif cum Judicial Magistrate, Thirukazhukundram, decreed the suit in favour of the plaintiff vide his decree and judgment dated 15.12.2017 on the following grounds:

- i. The evidence adduced on both sides including the mortgage deed (Ex.A1) clearly shows that the plaintiff's husband T.V.Panchaksharam borrowed a sum of Rs.1,00,000/- and executed a simple mortgage deed (Ex.A1) in favour of the first defendant on 27.03.2003. This fact was also admitted by the first defendant.
- ii. The first defendant filed an unregistered sale deed before the trial Court and the same was marked as Ex.B1. There are no pleadings with regard to the alleged sale deed in the written statement filed by the first defendant. Moreover, reply notice dated 23.06.2007 (Ex.A6) does not also mention the exact date of purchase of the suit property by the second defendant. Hence, the alleged sale transactions between T.V.Panchaksharam and the



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second defendant cannot be accepted.

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iii. Ex.B1 is an unregistered instrument and therefore, it has also been filed after a lapse of ten years from the institution of the suit and therefore, the same cannot be accepted for any purpose.

iv. The first defendant as DW1 during the course of cross examination admitted that she was a tenant in the suit property and was paying rents to late T.V.Panchaksharam. Thereafter, she continues to be in possession of the suit property. Thus, it is seen that though the mortgage deed is a simple mortgage, the conduct of the parties shows that it is not a simple mortgage but an usufructuary mortgage. The plaintiff is, thus, entitled for redemption of mortgage.

9. Aggrieved over the decree and judgement passed by the trial Court, the first defendant filed an appeal in A.S.No.7 of 2018 before the Principal Sub Court, Chengalpattu. The learned Principal Subordinate Judge, Chengalpattu, after analysing the oral and documentary evidence adduced on both sides upheld the findings recorded by the trial Court and dismissed the appeal filed by the first defendant vide her decree and



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judgement dated 23.12.2022.

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10. Now the present second appeal is filed.

11. The substantial questions of law raised in the memorandum of grounds of appeal is extracted hereunder :

- i. "Whether the Courts below rightly held that the land of the suit schedule property belongs to the 2nd respondent/2nd defendant and the superstructure alone belongs to the 1st respondent/plaintiff's husband. For the reason only the 1st respondent/plaintiff's husband executed unregistered sale deed in favour of the appellant/1st defendant was not considered by the learned trial Court?
- ii. Whether the Courts below rightly considered Ex.B1 unregistered sale deed and Ex.B2 property tax in the name of appellant/1st defendant which clearly proved that the appellant/1st defendant purchased the suit property, based on the above Ex.B1 she paid the property tax in her name?
- iii. Whether the Courts below rightly considered the 4th defendant who abused his official powers and obtained patta in the name of his



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relatives in respect of the suit property?

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iv. Whether the trial Court below framed the issues in respect of Ex.B1 and B2?"

12. Mr.D.Ramesh Kumar, learned counsel for the appellant contended that the first defendant in her written statement had clearly indicated the date of execution of the sale deed. The trial Court had wrongly found that there is no pleading in this regard in the written statement. He would also contend that the first defendant was in occupation of the property since 2001, as a purchaser of the suit property based on Ex.B1 sale deed. He would therefore, contend that the findings of both the Courts below are perverse.

13. It is an admitted fact that the plaintiff's husband T.V.Panchaksharam borrowed a sum of Rs.1,00,000/- from the first defendant on 27.03.2003 and executed a registered simple mortgage deed in her favour. A copy of the mortgage deed was marked as Ex.A1. The first defendant was already a tenant in the suit property of T.V.Panchaksharam and she continued to be in possession of the same. The contention of the first defendant is that on the date of the mortgage



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deed itself a sale deed was executed by late T.V.Panchaksharam in favour of the first defendant. In order to substantiate the same, an unregistered sale deed dated 27.03.2003 (Ex.B1) was pressed into service. When the defendant claims title through the said unregistered sale deed it is not known as to how the trial Court marked the same as an exhibit especially when it is totally inadmissible in evidence. However, both the Courts below had analysed this particular document (Ex.B1) and concurrently held that no credence can be attached to Ex.B1 for the following reasons :

- (a) Ex.B1 is an unregistered sale deed.
- (b) There is no mention about the sale deed either in the mortgage deed or in the reply notice (Ex.A6).
- (c) The relationship of the plaintiff's husband T.V.Panchaksharam and the defendants are only a landlord - tenant and thus the defendants are put in possession of a portion of the suit property which was also mortgaged. Therefore, the contention of the defendant is that he was put in possession of the suit property on the basis of the sale deed cannot be accepted.

The first Appellate Court had also observed thus :

11. It is relevant to determine the character of Possession



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with the hands of first Defendant. Two rival pleadings regarding the character of Possession before this Court. The perusal of Ex A5 Legal Notice, Ex A7 Reply Notice caused by Plaintiff and Plaintiff would speak that the Property described in the Schedule of Mortgage Deed Possessed by first defendant is only under permissive occupation in lieu of Interest for the Amount borrowed. The Reply Notice of first defendant Ex A6 and Written Statement of First Defendant denied said allegations as to permissive occupation and put forth that their possession with reference to Mortgaged property is based on Unregistered Sale Instrument executed by Plaintiff's husband Panchaksharam as the land belongs to Karuneegar Aanmeega Trust. The Ex B1 and Ex B2 are relied on.

12. The First Defendant claims that Plaintiff's husband executed unregistered sale deed. The Ex B1 is unregistered Instrument . On Scanning of said unregistered Sale Instrument, it comprises of three pages . The first page is Rs. 20/- Indian Non Judicial Stamp paper purchased from S. Mohan Kumar Stamp Vendor at Thangasalai , Chennai in the name of Poongodi on 27.03.2003 . The vendor is Panchakshram and purchaser is Poonkodi. The second and third page are scribed in Green paper . There are two witnesses. It is noteworthy to state that both instruments i.e.



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Ex A1 and Ex B1 are born on 27.03.2003. The Consideration mentioned in Ex B1 is for a sum of Rs. 1,00,000/-. The essentials of sale contemplated is it can be effected only by a registered instrument if it is of the value of Rs. 100/- (Rupees one hundred only) or upwards . Admittedly, the instrument is unregistered one for the property which is more than the value of Rs. 100/- (Rupees one hundred only). Therefore the Sale is affected by want of Registration.

13. It is significant to decide about Evidentiary value of unregistered Instrument of Sale dated 27-03-2003 which is marked as Ex B1. The unregistered instrument affecting immovable property and required by the Transfer of Property Act to be registered may be received as Evidence for collateral transaction. The nature of possession and purchaser obtained a lien by the passing of consideration can be determined. It is necessary to scrutiny the evidence of Dw1. The oral testimony of Dw1 says that she resides in suit property as a tenant for monthly rent since 2001 and paid the Rent till the date of execution of Mortgage Deed dated 27.03.2003. Neither Plaintiff nor her husband did not pay any amount after execution of Ex A1. Further Dw1 did not receive any amount towards interest for Mortgage loan and did not caused any notice of demand to Plaintiff's husband till life time and thereafter to Plaintiff as to payment of



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interest pursuant to Mortgage loan. There is no demand as to Rent or Interest with respect to suit property. On analyzing the oral evidence of Dw1, the factum that the possession of suit property prior to Mortgage Deed dated 27.03.2003 and payment of Rent till the day of execution of Mortgage Deed is an admitted fact. Under these circumstances the Possession of first defendant cannot be construed as based upon either Mortgage Deed or unregistered Instrument of Sale. It is clear and lucid that the first defendant resides in the property since 2001 as a Tenant. The relationship of Plaintiff's husband with first defendant is only as a Landlord and Tenant with reference to Possession of suit property. Therefore, the contention of Defendant regarding possession on the basis of Sale deed is not acceptable.

14. The Plaintiff claim that the Monthly rent is not received from the date of execution of Mortgage deed dated 27.03.2003 as it is only an adjustment. The said adjustment is towards payment of interest. Once the Dw1 speaks in her evidence that payment of Rent is made till execution of Mortgage deed and not thereafter then this Court can construe the nonpayment of monthly rent was towards the Adjustment in payment of interest for the secured loan under contract of Mortgage. Admittedly the possession can be termed only as adjustment as there is no recitals regarding



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possession in the Mortgage Deed. The outstanding feature of the Simple Mortgage is that Possession is not delivered to the Mortgagee but remains with the Mortgagor. The Possession of first defendant since 2001 which is prior to Ex A1 and Ex B1 remains in the same character as a permissive occupation . The Character of Possession does not changed by execution of Ex A1 and Ex B1. Above all the testimonies are obvious to conclude that delivery of Possession is not effected pursuant to Mortgage Deed or Unregistered Instrument. Therefore the Evidences are sufficient and satisfactory to conclude that the possession of first defendant is only as a permissive occupation. There is no evidences to prove contra."

14. All the above observations of the First Appellate Court are based on sound principles of law and I do not find any infirmity in the decree and judgment passed by both the Courts below. In the circumstances, the second appeal fails and therefore, is dismissed. In fact there are no substantial questions of law involved in the present second appeal.



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15. In the result,

- i. the Second Appeal is dismissed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.
- ii. the decree and judgment dated 23.12.2022 in A.S.No.7 of 2018 on the file of the Principal Sub Court, Chengalpattu @ Kancheepuram District and the decree and judgment dated 15.12.2017 in O.S.No.57 of 2007 on the file of the District Munsif cum Judicial Magistrate, Thirukazhukundram, are upheld.

22.06.2023

mtl

Index : Yes/No

Speaking / Non-speaking order



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R.HEMALATHA, J.

mtl

To

1. The Principal Sub Court, Chengalpattu @ Kancheepuram District
2. The District Munsif cum Judicial Magistrate, Thirukazhukundram.
3. The Section Officer, VR Section, High Court, Madras.

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