BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 28.02.2023

DELIVERED ON: 17.03.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.R.P.(NPD)(MD).No.1529 of 2012
and
MP(MD).No.1 of 2012

Veeri Ummal

2.M.Noojukkon (died)

3.M.Rassac

4.Abdul Vahid

5.M.Ali Mussain

6.Mustaffa

7.M.Sabiya Beevi

8.M.Noorjahan

9.M.Laila Beevi

10.M.Aysha Beevi

11.M.Syed Beevi

12.Laila Beevi

13.Shahila

14.Shaji

15.Jahubar Sha

16.Riyana Begam

17.J.Aathila Fathima (Minor)

18.J.Mohamed Arsad (Minor) ...Petitioners

(16th petitioner is appointed as Guardian of Minor 17th & 18th petitioners vide Court order dated 08.04.2022)

(Petitioners 12 to 18 are brought on record as legal heirs of deceased 2nd petitioner vide Court order dated 08.04.2022)

Vs

1.Rajendran Babu

2.Manumohan

3.Saroja

4.Rajam

5.Sunitha

6.Peerummal

7.K.Peerukan

8.Veera Badran (died)

9.V.Anantha Sekhar

10.V.Raja Sekhar

11.V.Kala Devi

(Respondents 9 to 11 are brought on record as legal heirs of the deceased 8th respondent vide Court order dated 17.06.2022)

PRAYER: Civil Revision Case is filed under Section 115 of C.P.C, to set aside the order and decreetal order dated 30.01.2012 on the file of the Principal District Munsif, Kuzhithurai made in I.A.No.153 of 2006 in O.S.No.419 of 1965.

For Petitioners	: Mr.K.N.Thambi
For R1 to R5	: Mr.T.Selvakumaran
For R9 to R 11	: No Appearance

ORDER

The defendants in a suit for redemption are the revision petitioners.

Factual Matrix

2.The ancestors of the respondents herein had filed O.S.No.419 of 1965 on the file of the Principal District Munsif Court, Kuzhithurai for the relief of redemption of mortgage and recovery of possession on payment of Rs.96.97. The said suit was decreed on 08.12.1982 and a preliminary decree was passed directing the plaintiffs therein to deposit the said sum of Rs.96.97 on or before 08.11.1982 or on any other date which is extended by the Court. The said decree was challenged by the defendants in A.S.No.68 of 1983 before the Sub Court, Kuzhithurai and the same was dismissed on 31.01.1984.

3.The defendants had filed S.A.No.1333 of 1984 before the High Court and the same was also dismissed on 02.02.2003.

4.The plaintiffs/decree holders in the redemption suit had filed I.A.No.153 of 2006 seeking to condone the delay in depositing the mortgage money. In the said application, the legal heirs of the plaintiff have contended that they were under the impression that the mortgage money was already deposited by way of lodgment schedule on 26.07.1966. However, the same could not be traced. At the time of final decree application, the decree holders were under the bonafide belief that the mortgage money has already been deposited. But in the counter, the defendants/judgement debtors have pointed out that the mortgage money has not been deposited. Only thereafter, the petitioners attempted to trace the correct date of deposit of the mortgage money on the basis of the lodgment schedule and they came to know that the mortgage money has not been deposited. Therefore, according to the decree holders, the delay is neither willful nor wanton and the same may be condoned.

5.The defendants/judgement debtors had filed a counter contending that the plaintiffs have misrepresented that they have already deposited the mortgage money and filed a final decree and managed to get it numbered also. Without verifying the same, the final decree application has also been numbered. They have further contended that the final decree application is barred by lapse of time.

6.The trial Court after considering the submissions on either side and after relying upon the judgements of the Hon'ble Supreme Court, arrived at a finding that the mortgage being a usufructuary mortgage, the right of redemption does not get extinguished due to default in deposit of the mortgage money within the time specified by the Court and proceeded to condone the delay in depositing the mortgage money. This order is under challenge in the revision petition.

7. Contentions of the learned counsel appearing for the revision petitioners are as follows:

(i). A perusal of the mortgage deed dated 13.03.1894 would clearly disclose that it is not an usufructuary mortgage, but it is Othi/Kuzhikanam and therefore, it is an anamalous mortgage. Hence, the findings of the trial Court that the the mortgage being usufructuary mortgage, there is no limitation for depositing the amount, is not legally sustainable.

(ii). Being an anamalous mortgage the plaintiffs/decree holders ought to have filed an application for passing of final decree within a period of 3 years from the date of payment of amount as fixed by the Court. Since the amount has not been deposited, the decree holders would not be entitled to file a final decree application, in view of the fact that it is barred under Section 137 of the Limitation Act.

(iii). The plaintiffs/decree holders have not approached the Court with clean hands. Though they have contended that the mortgage money has already been deposited on 26.07.1966, no proof has been placed before the Court for the same, but have prayed for condoning the delay in depositing the mortgage money before the Court. When the decree holder has not approached the Court with clean hands, the trial Court ought not to have condoned the delay.

(iv). The condone delay application does not specify the number of days of delay. Without mentioning the exact number of days and explaining the reasons for the delay, the application ought not to have been allowed by the trial Court.

(v).The final decree proceedings have already been numbered without even depositing the mortgage money and therefore, the present application seeking to deposit the mortgage money is not maintainable.

8.The learned counsel for the petitioners had relied upon the judgements of the Hon'ble Supreme Court reported ***in AIR 1966 SC 1937 (Kuchiyan Govinda Swami Vs. Kalliani Amma Lakshmi Amma (dead) and others)*** and ***AIR 1967 SC 876 (Cherumanalil Lakshmi and others Vs. Myliyil Kunninankandy Narayani (dead) and others)*** to contend that the Kuzhikanam will not amount to usufructuary mortgage as defined in the Transfer of Property Act. Therefore, the trial Court was not right in considering the said mortgage as a usufructuary mortgage and condoning the delay in depositing the mortgage money.

9. Contentions of the learned counsel for the respondents:

(i). The plea that it is not an usufructuary mortgage cannot be raised after passing of the preliminary decree.

(ii). The second appeal was disposed of by this Court only on 02.02.2003 and thereafter, the present application has been filed to condone the delay in depositing the mortgage money.

(iii).The mortgage being usufructuary mortgage in nature, there is no limitation for depositing the mortgage money and the right of the mortgagor to redeem the property would not get distinguished for non-payment of the mortgage money within a time specified in the trial Court decree.

(iv).The decree holders were under the impression that the mortgage money was deposited before the Court by way of lodgement schedule in the year 1966 itself, immediately after passing of the preliminary decree by the trial Court. Thereafter, the suit was taken up to the second appeal and the second appeal was disposed of only in the year 2003. Therefore, the decree holders were not able to trace the date of deposit of the mortgage money and therefore, they have filed the present application by way of abundant caution to condone the delay in depositing the mortgage money.

10.I have considered the submissions made on either side and perused the materials available on record.

11.The learned counsel for the revision petitioners had strenuously contended that a careful reading of the mortgage deed dated 13.03.1894 would show that it is not an usufructuary mortgage on the ground that it has been specifically mentioned as Othi and Kuzhikanam. According to the learned counsel for the revision petitioners, Kuzhikanam can never be considered to be an usufructuary mortgage as defined under the Transfer of Property Act. Therefore, the mortgage in question is only an anamalous mortgage. However, this Court is not able to accept the said contention because of the fact that the suit has been laid for redemption of usufructuary mortgage by the plaintiffs. A preliminary decree has also been passed on 08.10.1982 only on the ground that it is an usufructuary mortgage. It is not brought on record whether the plea that it is not an usufructuary mortgage, but only an anamalous mortgage was raised before the First Appellate Court or before the second Appellate Court. Therefore, this Court is of the opinion that the defendants/judgement debtors cannot dispute the type of mortgage after passing of the preliminary decree.

12.A perusal of the trial Court decree dated 08.10.1982 clearly points out that it is an usufructuary mortgage. The trial Judge while condoning the delay has also given a finding that it is an usufructuary mortgage.

13. Section 62 of the Transfer of Property Act, 1882 is extracted as follows:

62. Right of usufructuary mortgagor to recover possession.—

In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property [together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee]—

(a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid;

(b) where the mortgagee is authorised to pay himself from such rents and profits [or any part thereof a part only of the mortgage-money],—when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee [the mortgage-money or the balance thereof] or deposits it in Court as hereinafter provided."

14.The Hon'ble Supreme Court in a judgement reported ***in (2014) 9 SCC 185 (Singh Ram (dead) through legal representative Vs. Sheo Ram and others)*** in Paragraph No.22 has held as follows:

> *"22. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the T.P. Act to recover possession commences in the manner specified therein, i.e., when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly. "*

15.In view of the above said Section 62 of the Transfer of Property Act and the interpretation of the Hon'ble Supreme Court, it is clear that the right of the usufructuary mortgagor to recover possession commences only when the mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Until then, the limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. Therefore, the usufructuary mortgagor's right to file a final decree application is not governed by

Article 137 of the Limitation Act. Therefore, it is clear that the right of usufructuary mortgagor to redeem the property does not get extinguished due to non payment of the mortgage money within the time fixed by the Court.

16.Order 34 Rule 7 C.P.C deals with format of the preliminary decree to be passed in a redemption suit. The trial Court decree should fix a date within 6 months for the decree holder to deposit the mortgage money. If the plaintiffs fails to pay the said amount within the time fixed by the Court, the defendants shall be entitled to apply for a final decree. However, the mortgagee of an usufructuary mortgage would not be entitled to file an application for final decree either for sale of the property or to debar the plaintiffs from out right to redeem the property. Such a right to file a final decree application has been conferred upon the mortgagee only for other type of mortgages and not for the usufructuary mortgage.

17.While interpreting Order 34 Rule 8 C.P.C, the Hon'ble Supreme Court in a judgement reported ***in (1993) 4 SCC 431 (K.Parameswaran Pillai (dead) Vs. K.Sumathi alias Jesis Jessie Jacquiline and another)*** in Paragraph No.4 has held as follows:

"4...The resultant operation of the law would be that in the

case of usufructuary mortgage, the plaintiff need not make any application for extension of time fixed in the preliminary decree. The mortgagee/defendant has no right to make an application to foreclose the right of the plaintiff or sale of hypotheca declaring that the plaintiff has been debarred from making payment in Court or to proceed further. At any time before passing of final decree or confirmation of the sale held in pursuance of the final decree the plaintiff usufructuary mortgagor has been given right to make payment of the redemption money due under preliminary decree and the subsequent liability incurred thereon. The outer limit for making such payment is passing of the final decree or confirmation of the sale made in furtherance thereof. ....”

18.Therefore considering the fact that the mortgage in question is a usufructuary mortgage and the trial Court decree itself points out that the plaintiffs/decree holders have to deposit the amount before 08.11.1982 or within the time extended by the Court, the contention of the revision petitioners is not sustainable.

19.The learned counsel for the petitioners had contended that the application for passing of final decree has been made beyond a period of 3 years from the date fixed for payment of mortgage money and therefore, it is barred under Article 137 of the Limitation Act. The Hon'ble Supreme Court while interpreting Article 137 of the Limitation Act and its applicability to the usufructuary mortgage in a judgement reported ***in (1993) 4 SCC 431 (K.Parameswaran Pillai (dead) Vs. K.Sumathi alias Jesis Jessie Jacquiline and another)*** in Paragraph No.6 has held as follows:

> *"6.... It is, therefore, clear that the limitation to file an application under Order 34 Rule 8(1) to pass a final decree for redemption, other than the preliminary decree for redemption of usufructuary mortgage, starts running and continues to run its course from the date of expiry of the period fixed in the preliminary decree, unless it is stayed or suspended or the time prescribed in the preliminary decree is extended by an order of the Court. In its absence on expiry of the limitation of three years from the date fixed in the preliminary decree expired under Article 137 of the Schedule to Limitation Act, 1963 (Article 181 of Schedule I of Old Act), the plaintiff is debarred to enforce the right to pass the final decree. But in the case of preliminary decree for redemption of usufructuary mortgage no limitation begins to run until deposit is made though there is a conditional preliminary decree and default was committed by the mortgagor for compliance thereof.* "

20.A careful perusal of the Hon'ble Supreme Court Judgement will clearly disclose that in the case of preliminary decree for redemption of usufructuary mortgage no limitation begins to run until deposit is made though there is a conditional preliminary decree. Therefore, this Court is of the considered opinion that the filing of an application to condone the delay in depositing the mortgage money is superfluous and the mortgagor/ decree holder could have directly deposited the amount.

21.In view of the above said deliberations, there are no grounds to interfere in the order of condoning the delay for deposit of mortgage money in an usufructuary mortgage by the trial Court. There are no merit in the revision petition and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

17 .03.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To
1. The Principal District Munsif,
Kuzhithurai

2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

R.VIJAYAKUMAR, J

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Pre-delivery order made in

C.R.P.(NPD)(MD).No.1529 of 2012

and

MP(MD).No.1 of 2012

17.03.2023