BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON 21.03.2024

DELIVERED ON 27.03.2024

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Rev.Appl.No.208/2022

Park Town Benefit Fund Ltd
rep.by its Managing Director
Having their registered office at
No.73-74 Arcot Road,
Kodambakkm
Chennai 600 024. ... Petitioner

Vs.

1.Mrs.Saroja Ramanathan
2.Mr.Harshed R.Patel
3.Mr.C.S.Krishnan ... Respondents

Prayer : Review application filed under Order 47 Rule 1 read with section 114 of IPC to review the order dated 01.10.2020 passed in OSA.No.232/2013 by this Court.

For Petitioner : Mr.M.L.Ganesh

For R1 : Mr.V.Raghavachari
Senior counsel for
Mr.Avinash Wadhwani

ORDER

S.S.SUNDAR, J.,

(1)The above review application is filed by the 1st defendant / Company in the suit in CS.No.909/2022 and the appellant in OSA.No.232/2013 seeking review of the judgment dated 01.10.2020 made in OSA.No.232/2013.

(2)Even though this Court is unable to find a ground to exercise its power of review under Order 47 Rule 1 of CPC, having regard to the unfortunate situation, the aged plaintiff in a suit for redemption is put to, this Court feel that it is necessary to record a few facts and the background of the case in order to expose the purpose of this litigation at the instance of a greedy mortgagee, the review applicant herein.

(3)Brief facts that are necessary for the disposal of this review application are as follows:-

(4)The 1st respondent availed a mortgage loan from the review applicant for Rs.50 lakhs by creating a simple mortgage on 14.11.1995 in respect of a valuable property measuring about 3 grounds in T.Nagar. The 1st respondent herein filed a suit in CS.No.909/2002 before this Court [Original Side] for redemption of mortgage dated 14.11.1995 in favour of the applicant with a consequential relief to pass final decree directing the 1st defendant / Company to execute the Deed of Cancellation of mortgage and to direct him to furnish the correct accounts for the various amounts paid towards the loan transaction. The review applicant is the 1st defendant/mortgagee in the suit.

(5)In the suit, it is the specific case of the plaintiff that out of the sum of Rs.50 lakhs mentioned in the Mortgage Deed, the 1st defendant had not paid a sum of Rs.11,09,180/- under the pretext of some deductions which were neither disclosed to the plaintiff nor authorised. Specific allegations are also made as to the unconscionable terms of the Mortgage Deed with which this Court is not concerned for the present.

(6)The 3rd defendant is the son of one Mr.K.S.C.Iyer. It is admitted that the said Mr.K.S.C.Iyer had also mortgaged one of his properties vide HL.No.19. Mr.K.S.C.Iyer sold the property mortgaged, in favour of the 2nd defendant in the suit and a sum of Rs.1 Crore which was payable by the 2nd defendant to Mr.K.S.C.Iyer was directed to be paid to the 1st defendant to discharge not only the amount payable by Mr.K.S.C.Iyer to the 1st defendant towards closure and discharge of the his mortgage loan vide HL.No.19, but also to discharge the suit mortgage executed by the plaintiff in favour of the 1st defendant.

(7)It is the specific case of the plaintiff that Mr.K.S.C.Iyer had no other liability towards the 1st defendant except the amount borrowed under HL.No.19. It is stated in the plaint that without disclosing the accounts, after adjusting the amount that was paid in excess of the mortgage loan obtained by Mr.K.S.C.Iyer, the 1st defendant had demanded a huge sum towards interest payable by the plaintiff. The 1st defendant issued notices threatening the plaintiff to bring the property for sale. It is also stated in the plaint that the plaintiff was forced to make some payments for which the 1st defendant did not issue any receipt. Since the 1st defendant posed a potential threat to bring the property for private sale, the plaintiff was constrained to file another suit in OS.No.5173/1999 on the file of the XVII Assistant City Civil Court, Chennai, for a declaration that the notice issued fixing the sale of mortgaged property by auction on 24.08.1999, is illegal, null and void and also for permanent injunction restraining the defendant therein from bringing the suit property to auction.

(8)It is also the specific case of the plaintiff that the suit was decreed exparte on 18.06.2002. Quite surprisingly, the 1st defendant appears to have issued a notice to the plaintiff fixing the date of auction on 26.12.2002 in utter disregard to the exparte decree granted in suit in OS.No.5173/1999. The plaintiff was also constrained to file a criminal complaint against the Directors of the 1st defendant Company. The plaintiff challenged some unauthorised deductions while disbursement of the mortgage loan and pleaded discharge of the mortgage loan with a caveat that assuming some amount is due, the same after adjusting the money which was paid by Mr.K.S.C.Iyer will be negligible.

(9)The suit was resisted by the 1st defendant / Company admitting only the receipt of a sum of Rs.80,50,802/- from Mr.K.S.C.Iyer as against the plea that a sum of Rs.1 Crore was paid at the instance of Mr.K.S.C.Iyer. It is further stated in the written stated that there was no surplus after adjustment of the mortgage loan of Mr.K.S.C.Iyer.

(10)During trial, despite specific issues are raised, the 1st defendant/Company did not produce the accounts either relating to the suit mortgage or relating to the mortgage loan availed by Mr.K.S.C.Iyer.

(11)The learned Single Judge of this Court, after framing issues, was unable to accept the contention that only a sum of Rs.80,50,802/- was paid at the instance of Mr.K.S.C.Iyer. After holding that a sum of Rs.1 Crore had been paid by Mr.K.S.C.Iyer to the 1st defendant / Company, the learned Single Judge observed that the 1st defendant / Company failed to produce the accounts of both the plaintiff as well as the mortgage loan of Mr.K.S.C.Iyer in HL.No.19 account, even though he was required to produce the accounts. Since the prayer in the suit was also for passing a final decree and to cancel the Mortgage Deed dated 14.11.1995, the learned Single Judge rightly held that only after ascertaining the mortage money by directing rendition of accounts, final decree could be passed. Therefore, with an observation that passing of final decree should be postponed as it depends upon the account to be taken, the learned Single Judge passed the following judgment:-

> ***"26. Issue No.9:***
>
> *In view of the discussion held above in the earlier issues, this Court is passing a preliminary decree for redemption of mortgage dated 14.11.1995 in respect of the suit property for rendition of accounts against the 1st defendant and thereby ordering that an account be taken of what was due to the 1st defendant at the date of such decree for (i) principal and interest on the mortgage, (ii) the costs of the suit, if any, awarded to him, and (iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with the interest thereon; in the light of the factual findings of this Court on the other issues. Accordingly, the preliminary decree is passed for rendition of accounts with costs. The plaintiff is at liberty to apply for appointment of a Commissioner for ascertaining the outstanding sum towards suit mortgage, if any, within three months from the date of receipt of a copy of this order. The said unmarked letter dated 25.05.1997*

written by K.S.C.Iyer shall be kept along with Court records, which shall be produced during the rendition of accounts before the Commissioner to be appointed. If the plaintiff fails to do so the Court shall suo-motu appoint a Commissioner for that purpose and to proceed further."

(12)In this case, further directions could have been issued. However, passing of final decree can be done only after ascertaining the mortgage money by rendition of accounts by petitioner as ordered in the preliminary decree. Subject to further direction, a preliminary decree has been passed for redemption of mortgage in respect of suit property and for rending of accounts by petitioner herein and for appointment of an Advocate Commissioner for ascertainment of outstanding sum towards suit mortgage. The preliminary decree in the suit in CS.No.909/2022 was challenged by the review applicant in OSA.No.232/2013. This Court confirmed the judgment and decree of the learned Single Judge and dismissed the Appeal finding that there is no merit in the appeal.

(13)From the judgment and decree, this Court is able to see that the applicant, has raised the following points while arguing the appeal:-

"9.The learned counsel appearing for the appellant/1st defendant would raise the following points for consideration:-

i. *The plaintiff, being the mortgagor having filed that suit for redemption of mortgage, has she discharged her burden in proving that the mortgage debt is discharged.*

ii. *In absence of the burden of proof being not discharged by the mortgagor can any adverse inference drawn against the mortgagee and seek for rendition of accounts by a preliminary decree.*

iii. *The defendants 2 and 3 are strangers to the loan transaction of the plaintiff with 1st defendant and are not necessary and proper parties. The suit is bad for misjoinder of parties.*

iv. *The plaintiff having already filed an earlier suit in OS.No.5173/1999 on the same mortgage debt and enforcement, is barred under Order II Rule 2 of CPC to institute a further suit on the same cause, which was available while the earlier suit* *was filed. The decision in OS.No.5173/1999 will also operate as res judicata and bar the present suit.*

v. *The Court could not have granted a preliminary decree in reference to an unmarked document and account arising thereto namely letter dated 25.05.1997 of Mr.K.S.C.Iyer to the appellant/1st defendant."*

(14)This Court specifically observed that only if the accounts of Mr.K.S.C.Iyer is produced and taken, the amount due can be ascertained and in the absence of statement of both accounts of the 1st respondent / plaintiff and Mr.K.S.C.Iyer, the Court cannot determine the amount payable if any by the 1st respondent herein and therefore, the preliminary decree for rendition of accounts cannot be faulted especially in view of the specific observation that it is the duty of the mortgagee/review applicant to give the statement of accounts relating to the mortgage availed by the plaintiff as well as Mr.K.S.C.Iyer.

(15)On the issue whether the suit is bad for non joinder of parties, the learned Single Judge held that defendants 2 and 3 are also proper parties in view of the specific pleadings. The other two grounds taken by the review applicant was that in view of the previous suit filed by the 1st respondent in OS.No.5193/1999 in relation to the same mortgage, the present suit is barred under Order II Rule 2 of CPC and that the judgment in OS.No.5193/1999 would operate as *res judicata* and bar the present suit. These two issues were also decided against the 1st defendant after holding that the suit for redemption is not barred by the previous suit as the cause of action for the two suits are entirely different.

(16)One of the issues raised by the appellant in OSA.No.232/2013 questioning the preliminary decree was by referring to an unmarked document namely, a letter dated 25.05.1997 of Mr.K.S.C.Iyer. It is to be noted that the letter dated 25.05.1997 was not marked in the suit proceedings. The contents of this letter, as seen from the judgment of the learned Single Judge while disposing of the suit gives an indication that it is to support the case of the review applicant / 1st defendant to show that Mr.K.S.C.Iyer had requested the mortgagee that a sum of Rs.1 Crore to be paid by the 2nd defendant should be first adjusted towards the outstanding towards the mortgage loan HL.No.19 and thereafter, to discharge the other debts of one SIC Group of Companies and PB Group of Companies and that the remaining amount alone should be credited to the loan of plaintiff/1st respondent herein. This letter is inadmissible in evidence. Further, this letter was not even pleaded by the review applicant in the written statement. It is well settled that no amount of evidence can be admitted without pleading. However, the learned Single Judge while disposing of the suit, directed the unmarked letter to be kept along with the Court records to be considered at the time of rendition of accounts before the Commissioner to be appointed.

(17)From the entire evidence of DW1, the authorised officer of the review applicant Company, this Court is unable to find a reference to such letter. However, DW1 who was examined on behalf of the applicant Company, has admitted that by a document marked as Ex.P4, Mr.K.S.C.Iyer had requested that the loan amount of the 1st respondent / plaintiff also to be closed. Therefore, the argument of the appellant before this Court while disposing of the appeal, has no substance and the rejection of such contention though was on different ground, does not affect the judgment.

(18)As against the dismissal of the Original Side Appeal, the review applicant / 1st defendant preferred a Special Leave Petition in SLP

[C].No.10511/2022. The Special Leave Petition was permitted to be withdrawn with liberty to file a review petition limited to the point raised by the petitioner before the Hon'ble Supreme Court that there is a transgression of Order 34 Rule 7[1][c][ii] of CPC. It is on the basis of the observations of the Hon'ble Supreme Court while dismissing the Special Leave Petition as withdrawn, the above Review Petition is filed.

(19)First of all, this Court is unable to find any grounds raised in the appeal touching Order 34 Rule 7[1][c][ii] of CPC.

(20)Quite contrary to the submissions that was made before the Hon'ble Supreme Court as seen from the judgment of the Hon'ble Supreme Court in the Special Leave Petition, the learned counsel for the review applicant submitted that the preliminary decree without declaring the amount due on the mortgage debt, is improper.

(21)It is interesting to note that the petitioner/review applicant has raised a few grounds on merits challenging the findings ignoring the scope of review indicated by Hon'ble Supreme Court. The fact that the review applicant has not produced the accounts before the Trial Court and he was not cooperating for rendition of accounts, is evident. It is to be noted that the application filed by the applicant for appointment of a Forensic Auditor in Appln.No.539/2022 in CS.No.909/2002 is pending and the applicant is asking time for appointment of Forensic Auditor by citing the pendency of this review application. This shows the ultimate intention of the review applicant is to drag on the proceedings. The Trial Court would have passed a decree ascertaining the amount, had the review applicant given the accounts of both the mortgage loans and how the sum of Rs.1 Crore which had been accepted by Court while passing the decree, was adjusted. The fact that the petitioner even now contends in this review that only a sum of Rs.80,50,802/- was deposited as full and final settlement of mortgage loan availed by Mr.K.S.C.Iyer falsifies the case of petitioner that there was no surplus.

(22)It is true that a preliminary decree has to be passed in terms of Order 34 Rule 7 of CPC which reads as follows:-

"***7. Preliminary decree in redemption suit.***

(1) *In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree-*

(a) *ordering that an account be taken of what was due to the defendant at the date of such decree for-*

(i) *principal and interest on the mortgage,*
(ii) *the costs of suit, if any, awarded to him, and*

(iii) *other costs, charges and expenses properly incurred by him up to the date, in respect of his mortgage-security, together with interest thereon; or*

(b) *declaring the amount so at that date; and*

(c) *directing-*

(i) *that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses and provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary put the plaintiff in possession of the property; and*

(ii) *that, if payment of the amount found or* *declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges expenses and interest, the defendant shall be entitled to apply for a final decree-*

(a) *in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgage property be, sold, or*

(b) *in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.*

(2) *The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure of sale, as the case may be, extend due in respect of subsequent costs, charges, expenses and interest."*

(23)In the present case, the plaintiff/1st respondent has come forward with the plea of discharge. While disposing of the suit for redemption, the Court can on the basis of evidence may declare the amount due on that date under the mortgage. If the amount due could not be ascertained, the same can be determined by ordering accounts before passing final decree. In every case, the amount due from the mortgagee can also be taken into consideration if such payments are agreed towards the discharge of mortgage. A specific plea of discharge based on substantial payment of Rs.1 Crore made by another mortgagee [i.e, Mr.K.S.C.Iyer], to discharge the existing mortgage loan availed by him and to appropriate the balance to discharge the mortgage loan availed by the plaintiff/1st respondent is considered by the learned Single Judge based on evidence. Since the mortgagee failed to produce the accounts during trial and the amount if any due to the review applicant/1st defendant, can be ascertained only by ordering accounts being taken, the learned Single Judge cannot be faulted for the judgment postponing final decree both at the instance of mortgagor and mortgagee.

(24)The decree under Order 34 Rule 7 of CPC is only a preliminary decree and hence, it is incapable of execution. Upon ascertainment of account, depends upon the outcome of accounting, the Court may pass an order or decree accepting the plea of discharge or by directing the plaintiff to make further payment of amount as may be found due within a stipulated time and to enable the defendant to file an application for final decree or for sale of property in case the plaintiff fails to pay the amount within time.

(25)It is to be seen that the Form of Preliminary Decree in a suit for redemption where accounts are directed to be taken is prescribed in Form No.7 and Form 7A in Appendix-D of the Code of Civil Procedure. Similarly, Forms No.7B and 7C specifies the format in which a decree in a redemption suit where the amount due is declared by the Court. Though a preliminary decree in a case where accounts are directed to be taken, are required to be in the format, the failure to give consequential directions even before taking accounts will not render the decree invalid and there is no provision under the Code of Civil Procedure to suggest such an extreme course especially when the preliminary decree is held to be valid.

(26)In a case where accounts are directed to be taken while passing a preliminary decree for redemption, the Court can always postpone further direction which would be depending upon the accounts being taken. When an application is filed by the plaintiff for accounts, the Court can issue further directions which are consequential and required in terms of Order 34 Rule 7 of CPC. It is to be noted that the Court may on good cause, being shown and upon terms to be fixed by the Court, can extend time fixed for payment of the mount found or declared under Sub-Rule [1] of Rule 7 of Order 34 of CPC before passing a final decree for foreclosure or sale.

(27)It is also to be noted that under Order 34 Rule 8 of CPC, the plaintiff is entitled to make payment into Court of all amounts due from him under sub-rule [1] of Rule 7, before a final decree debarring the plaintiff to redeem the mortgaged property is passed or before confirmation of sale, held in pursuance of a final decree. Even though Order 34 Rule 7 of CPC enable the mortgagee to file an application for final decree for sale of property in the event, the plaintiff fails to pay the amount fixed by Court within the time stipulated, a final decree to terminate the suit for redemption is only under Rule 8 of Order 34 of CPC. Therefore, this Court is unable to countenance the submissions of the learned counsel appearing for the review applicant that the judgment of this Court in OSA.No.232/2013 should be reviewed as there is transgression of Orde 34 Rule 7[1][c][ii] of CPC.

(28)Since the decree as such, is not invalid and the Court while passing the preliminary decree, has specifically postponed the final decree, taking note of the plea of discharge and the conduct of review applicant refusing to produce accounts of both mortgage loans, absolutely there is no illegality or irregularity in the order and no serious prejudice is caused to the review applicant herein who is the mortgagee and the 1st defendant in the suit for redemption. The contentions of the review applicant and the inconsistencies would only expose the review applicant's attempt to delay the redemption by refusing to submit the accounts and to harass the old lady / mortgagor, taking advantage of the exorbitant interest payable by the mortgagor. The 1st defendant / mortgageee is consciously delaying further proceedings. The application filed for appointment of Forensic Auditor will only enable the 1st defendant / review applicant to realise the money if it is still due on the mortgage at an early date. In the course of proceedings, this Court wanted the applicant to give his proposal if he has any for discharging the mortgage. Quite astonishingly, the review applicant has given a statement arriving at a sum of Rs.226.60 Crores [approx.] towards the mortgage liability without giving the accounts of other mortgage. The sum indicated is more than ten times the market value of the property. There is also no disclosure of the account of Mr.K.S.C.Iyer. The amount is calculated by charging compound interest just to indicate that the property does not worth for the plaintiff/1st respondent who is an old lady, and who has been waiting with the hope of getting the mortgage discharged for more than 20 years. Only on account of the conduct of this greedy mortgagee, the mortgagor is now under a great stress.

(29)Before filing the suit for redemption, the review applicant had made an attempt to bring the property for private sale despite an order of injunction in another suit filed by the plaintiff/1st respondent. Though the applicant gave an excuse at one point of time that the exparte decree under the previous suit was set aside, during trial accepted the existence of a valid decree in the previous suit. This also would show that the review applicant's intention is to grab the property from the mortgagor rather than permitting the mortgagor to redeem the property by showing the accounts and settle the issue at the earliest point of time.

(30)The conduct of the applicant would only show that he is more greedy and mischievous than Shylock and causing mental agony to the mortgagor by not lending any cooperation for disposal of the application for proper accounts being taken. The review application is therefore liable to be dismissed with exemplary costs.

(31)Accordingly, the Review Application is **dismissed with an exemplary cost of Rs.2,00,000/- [Rupees Two Lakhs Only] payable to the 1st respondent / plaintiff within a period of two weeks from today.** The application for appointment of Forensic Auditor that is pending before the learned Single Judge shall be disposed of within a period of four weeks from the date of receipt of a copy of this order. Depending upon the outcome of the application, it is open to the learned Judge to pass further orders in the form of preliminary decree in accordance with Order 34 Rule 7(1)(a) CPC, in the prescribed format. If the accounts are not submitted or the 1st defendant does not cooperate for the accounts being taken, it is open to the Court to draw adverse inference against applicant as may be permissible in law for passing appropriate orders after hearing both sides.

[SSSRJ] [PVJ]
27.03.2024

AP
Internet : Yes

To

The Managing Director
Park Town Benefit Fund Ltd
Having their registered office at
No.73-74 Arcot Road,
Kodambakkam, Chennai 600 024.

S.S. SUNDAR, J.,
and
P.VELMURUGAN, J.,

AP

Order in
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