



WEB COPY



C.R.P.No.3348 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04..11..2024

Coram

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Civil Revision Petition No.3348 of 2024

T.Ramesh

..... Petitioner

-Versus-

E.Purushothaman

..... Respondent

Petition filed under Article 227 of the Constitution of India, praying to set aside the order dated 05.06.2024 made in E.P.No.84 of 2020 in Tr.O.P.No.07 of 2008 on the file of the learned Principal Subordinate Judge, Kancheepuram, Kancheepuram District, and allow this civil revision petition.

For Petitioner : *Mr.M.R.Jothimanian*

For Respondent : *Mr.P.Muthusamy*

ORDER

This revision challenges the order dated 05.06.2024 passed by the learned Principal Subordinate Judge, Kancheepuram dismissing the execution petition in E.P.No.84 of 2020 filed by the petitioner thereby refusing to enforce



C.R.P.No.3348 of 2024

the order passed in Tr.O.P.No.07 of 2008 on the file of the learned Principal Subordinate Judge, Kancheepuram, Kancheepuram District.

2. The brief facts leading to the filing of the present revision petition are as follows: The petitioner had executed a simple mortgage in favour of the respondent for Rs.2,00,000/- on 11.11.2005 which was registered under Doc.No.3261 of 2005. It was agreed by the petitioner under the mortgage deed to repay the said mortgage amount with interest @ 18.5 per annum. It was further agreed by the petitioner to repay the amount within a period of two years. After the period of two years, the petitioner requested the respondent to receive the mortgage amount and return the document. However, the same has not been acceded to by the respondent, which resulted in issuing a legal notice by the petitioner through his counsel on 12.12.2007.

3. Despite such legal notice, the respondent has not received the amount. Therefore, the petitioner filed an original petition in Tr.O.P.No.07 of 2008 on the file of the learned Principal Subordinate Judge, Kancheepuram, invoking Section 83 of the Transfer of Property Act, 1882, seeking the following reliefs:

(i) permission to deposit the mortgage amount with interest due and payable under the mortgage deed;



WEB COPY



C.R.P.No.3348 of 2024

(ii) a direction to the respondent/mortgagee to deliver the petitioner/mortgagor the original simple mortgage deed dated 11.11.2005 duly cancelled and the petition B-Schedule mentioned documents of title;

(iii) a direction to the respondent/mortgagee to execute an acknowledgement in writing that any right in derogation of the mortgagor's interest transferred to the respondent/mortgagee in pursuance of the said mortgage deed dated 11.11.2005 is extinguished i.e., the simple mortgage deed is fully discharged.

4. The petitioner/mortgagor had also deposited a sum of Rs.2,77,100/- being the amount due and payable under the mortgage. Despite notice being properly served on the respondent, the respondent did not appear before the court and therefore, he was set *ex parte* and the learned Subordinate Judge, Kancheepuram had allowed the petition by order dated 11.04.2008. As the said order has not been implemented, the petitioner initiated an execution proceedings in E.P.No.84 of 2020 on the file of the learned Principal Subordinate Judge, Kancheepuram.

5. In the execution proceedings also, the respondent/mortgagee remained *ex parte*. The learned Principal Subordinate Judge had however, dismissed the



C.R.P.No.3348 of 2024

execution petition mainly on the ground that, originally there was no relief sought for the execution of an acknowledgement receipt by the court in full discharge of the mortgage amount in the event the respondent/mortgagee failed to execute such a receipt. The learned Principal Subordinate Judge was of the view that without specific relief being asked for in the original petition, the execution petition is not maintainable. And further, the mortgagee has not expressed his willingness to accept the mortgage amount. Hence, placing reliance upon the order of the learned single Judge of Madurai Bench of this court dated 25.10.2019 in the case of Ponnachi Ammal v. Saraswathi Ammal [C.R.P.(PD) (MD) No.1468 of 2012], the learned Principal Subordinate Judge, Kancheepuram dismissed the Execution Petition in E.P.No.84 of 2020 by order dated 05.06.2024. Hence, this revision.

6. Heard Mr.M.R.Jothimanian, learned counsel for the civil revision petitioner and Mr.P.Muthusamy, learned counsel for the respondent.

7. The learned counsel for the petitioner would submit that it was only a simple mortgage. There is no dispute between the parties with regard to the mortgage amount and the interest payable under the simple mortgage. When the respondent had failed to appear before the court below and contest the



C.R.P.No.3348 of 2024

original petition, there was a deemed willingness to receive the mortgage amount. When the court below had passed an order directing the respondent to return the original title deed and also execute an acknowledgement of receipt for the mortgage amount after receiving the mortgage amount deposited together with interest into the court below, the executing court ought not to have dismissed the execution petition.

8. Per contra, the learned counsel appearing for the respondent would contend that an order passed under Section 83 of the Transfer of Property Act cannot be put against the respondent/mortgagee. To invoke Section 83 of the Transfer of Property Act, the mortgagee ought to have expressed his willingness to accept the money so deposited in full discharge of the mortgage amount. Only upon his willingness, the order could be passed directing the mortgagee to accept the amount so deposited in full discharge of dues payable under the mortgage. otherwise, the court has no obligation to enter upon any inquiry, and no such inquiry is contemplated under Section 83 of the Transfer of Property Act, 1882.

9. The learned counsel for the respondent/mortgagee, in support of his contentions, placed reliance heavily upon the order of this court in Ponnachi



C.R.P.No.3348 of 2024

Ammal v. Saraswathi Ammal [C.R.P.(PD) (MD) No.1468 of 2012].

WEB COPY

10. I have considered the rival submissions and perused the available materials carefully.

11. The fact that there was a simple mortgage deed executed by the petitioner in favour of the respondent is not in dispute. A copy of the registered simple mortgage deed dated 11.11.2005 is annexed in the typed set of papers, which would indicate that the petitioner executed a simple mortgage deed for Rs.2,00,000/- agreeing to repay the same with interest @ 18% per annum. It was agreed between the parties that the mortgage amount should be returned within a period of two years from the date of execution of the simple mortgage deed. The petitioner sent a legal notice after two years of the mortgage expressing his intention to repay the mortgage amount with interest; the same was however not accepted by the respondent/mortgagee. In those circumstances, the petitioner/mortgagor filed an original petition under Section 83 of the Transfer of Property Act, 1882. In that proceedings, the respondent/mortgagee remained *ex parte* despite service of notice. Therefore, that petition was allowed *ex parte* as prayed for in favour of the petitioner/mortgagor on 11.04.2008. The prayers sought in the said original



C.R.P.No.3348 of 2024

petition are as under:-

WEB COPY

“10. The petitioner/mortgagor therefore prays that this Hon'ble court may be pleased to

(1) Permit the petitioner/mortgagor to deposit Rs.2,77,100/- being the amount due on the simple mortgage deed dated 11.11.2005 to the credit of the respondent/mortgagee in to court towards the full discharge of the said Mortgage;

(2) direct the respondent/mortgage to deliver the petitioner/mortgagor, the original simple mortgage deed dated 11.11.2005 duly cancelled and the petition B schedule mentioned documents of title;

(3) direct the respondent/mortgagee to execute an acknowledgement in writing that any right in derogation of the mortgagor's interest transferred to the respondent/mortgagee in pursuance of the said mortgage deed dated 11.11.2005 is extinguished i.e., the simple mortgage deed dated 11.11.2005 is fully discharged;

(4) award the costs of this petition; and

(5) pass such or other orders as may be deemed fit in the circumstances of the case”

12. As the order in favour of the petitioner/mortgagor had not been complied with, execution proceedings came to be initiated by the



C.R.P.No.3348 of 2024

petitioner/mortgagor. The court below had however dismissed the original petition filed under Section 83 of the Transfer of Property Act, 1882 mainly on the ground that there was no relief sought in the main petition that the court should execute an acknowledgement/receipt for the mortgage amount. The order is mainly based on the order of this court in **Ponnachi Ammal v. Saraswathi Ammal** [C.R.P.(PD) (MD) No.1468 of 2012].

13. As far as the first ground of dismissal is concerned, this court is of the view that the executing court has not applied its mind and dismissed the execution petition in a callous manner. The very relief in the original petition in Tr.O.P.No.07 of 2008 would make it clear that the prayer was not only for a direction to the respondent/mortgagee to deliver the petitioner/mortgagor, the original simple mortgage deed dated 11.11.2005 by duly cancelling it but also for a direction to execute an acknowledgement in writing accepting the full discharge of mortgage dues . Therefore, the finding of the trial court that there was no prayer sought for by the petitioner/mortgagor to execute the acknowledgement/receipt is nothing but a clear non application of mind.

14. Be that as it may, the other ground of dismissal to non-suit the petitioner/mortgagor was by following the order of this court in C.R.P.(PD) (MD) No.1468 of 2012 [cited supra].



C.R.P.No.3348 of 2024

15. It is relevant to note that in the case of **Ponnachi Ammal** [cited **supra**], this court has held that once the application has been filed under Section 83 of the Transfer of Property Act, 1882, for deposit of amount, if the mortgagee does not accept the deposit of the amount into the court and does not signify his willingness to accept the same towards full discharge of the amount due under the mortgage, then the court has no obligation to enter upon an enquiry and no such enquiry is contemplated under Section 83 of the Transfer of Property Act, 1882. Therefore, it is for the mortgagor to work out his remedy for redemption of mortgage. The above view was taken following the judgement of this court in the case of **N.Govindaswami v. R.Bakkim** [1983 (2) MLJ 207].

16. On a perusal of the above judgement this court is of the view that the executing court in fact failed to understand the legal position. The above judgement relates to the dispute between the parties wherein the mortgagee did not agree for the deposit as towards full discharge of the amount. Only on such a scenario, the aforesaid order of this court came to be passed. It is useful to extract the provisions of Section 83 of the Transfer of Property Act, 1882 which reads as under:-



WEB COPY



C.R.P.No.3348 of 2024

“83. Power to deposit in court money due on mortgage.—

“At any time after the principal money payable in respect of any mortgage has become due and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Right to money deposited by mortgagor.—The court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed and all documents in his possession or power relating to the mortgaged property, apply for and receive the money, and the mortgage-deed, and all such other documents so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Where the mortgagee is in possession of the mortgaged property, the court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such



C.R.P.No.3348 of 2024

third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgement in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished.”

17. The above provision would make it clear that at any time after the principal money becomes due and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any court in which he might have instituted such suit to the account of the mortgagee, the amount remaining due on the mortgage. On such application, the court shall cause written notice of the deposit to be served on the mortgagee. The mortgagee, if he was willing to accept the money so deposited in full discharge of such amount, and on the deposit of the same into the court, he has to deliver all the documents, including the mortgage deed, in his possession. In the case of usufructuary mortgage, redelivery of the mortgage property is to be ordered. No doubt the willingness of the mortgagee to accept the money so deposited in full discharge of the mortgage is necessary to invoke the provision under Section 83 of the Transfer of Property Act, 1882 for any direction to the mortgagee to comply.



C.R.P.No.3348 of 2024

18. Whereas in the instant case, despite notice having been served on the respondent/mortgagee, he has failed to appear either in person or through counsel, and therefore, he was set *ex parte*. If once a party has consciously absented himself and remained *ex parte* in the proceedings, it shall be held that the amount so deposited by the mortgagor is fully accepted as full discharge of the mortgage money. The mortgage was only for Rs.2,00,000/- (Rupees Two Lakhs only) and the interest that was agreed to be paid as per the terms of the mortgage was 18% per annum on Rs.2,00,000/-.The amount was sought to be repaid by the petitioner/mortgagor after two years of the mortgage. When the respondent/mortgagee had purposely absented himself and remained *ex parte*, now he cannot contend before this court that there was no willingness on his part towards the full discharge of the mortgage money.

19. It is relevant to note that even in the execution proceedings, the respondent/mortgagee remained *ex parte* and on 28.11.2023, he was set *ex parte*. This fact would clearly indicate that the respondent/mortgagee, for reasons best known to him, had not chosen to contest the matter. At any rate, when the mortgage money was deposited as per the terms of the contract and when the respondent/mortgagee had failed to appear before the court pursuant to the notice and had chosen to remain *ex parte* and he allowed the original



C.R.P.No.3348 of 2024

petition to be ordered ex parte against him, it has to be held that there was willingness on his part to accept the deposit towards full discharge of the mortgage amount. Therefore, the conclusion arrived at by the executing court to reject the claim of the petitioner/mortgagor relying upon the order of this court in **Ponnachi Ammal v. Saraswathi Ammal** is nothing but a clear non-application of law. The execution court, having misunderstood the law on the subject, mechanically dismissed the execution petition.

20. Therefore, this court is of the view that once the mortgage amount is deposited and the order passed under Section 83 of the Transfer of Property Act has not been challenged for many years, the respondent/mortgagee cannot contend in the execution proceedings that the order is not binding on him. The very intendment of Section 83 of the Transfer of Property Act, 1882 is to ensure that the mortgaged properties are released to the mortgagor without driving him to file a suit for redemption. Only two ingredients are required under Section 83 of the Transfer of Property Act, 1882, viz., deposit of the amount into the court and prayer to the institution, where the mortgagee expresses his willingness in unequivocal terms. To express his willingness or unwillingness, he has to appear before the court and take a stand as to willingness or unwillingness. When a notice is already served, he cannot avoid



C.R.P.No.3348 of 2024

the proceedings and allow the proceedings to go ex parte and contend that there is no willingness. As long as he has avoided the proceedings of the court and remained absent, it has to be presumed that he had not disputed the amount deposited towards the full discharge of the mortgage money and interest. When the mortgagee purposefully avoided the proceedings, it has to be presumed that there is a deemed willingness. Hence, the order of the executing court impugned in this revision is liable to be set aside, and the executing court shall proceed with the execution proceedings further.

In the result, the civil revision petition is allowed and the order dated 05.06.2024 passed in E.P.No.84 of 2020 in Tr.O.P.No.07 of 2008 is set aside. The learned Principal Subordinate Judge, Kancheepuram is directed to dispose of the Execution Petition on merits and in accordance with law within a period of two months from the date of receipt of a copy of this order. No costs.

Index : yes / no
Neutral Citation : yes / no
Speaking / Non Speaking Order
kmk

04..11..2024

To

1.The Principal Subordinate Judge,Kancheepuram, Kancheepuram District.



WEB COPY



C.R.P.No.3348 of 2024