BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 24/07/2024

CORAM

THE HON'BLE MR.JUSTICE G.ILANGOVAN

S.A.(MD).No.212 of 2023
and
CMP(MD)No.4566 of 2023

P.S.Muthuvel	:	Appellant/Appellant/ Plaintiff

Vs.

1.N.Vaiyapuri 2.V.Suthanthirakodi	:	Respondents 1 & 2/ Respondents 1 & 2/ Defendants 1 & 2
3.T.Rathinam 4.S.Sagunthala	:	Respondents 3 & 4/ Respondents 3 & 4/ Subsequent Purchasers

PRAYER:-Second Appeal filed under Section 100 of the Civil Procedure Code, to call for the records and set aside the decree and judgment, dated 17/12/2021 in A.S.No.8 of 2019 on the file of the Additional District Judge (Fast Track Court), Theni, by confirming the Judgment and Decree, dated 09/06/2016 made in O.S.No.204 of 2013 on the file of the Subordinate Judge, Theni.

For Appellant	:	Mr.J.Madhavan
For Respondents	:	Mr.C.Ganesh Kumar

J U D G M E N T

This second appeal has been filed against the decree and judgment, dated 17/12/2021 passed in A.S.No.8 of 2019 by the Additional District Judge (Fast Track Court), Theni, by confirming the Judgment and Decree, dated 09/06/2016 passed made in O.S.No.204 of 2013 by the Subordinate Judge, Theni.

2.**The brief averments made in the plaint are as follows**:- The suit property belongs to the plaintiff. He mortgaged the same to the first defendant for a sum of Rs.2,00,000/- on 19/11/2003 through a registered mortgage deed. The mortgage period was fixed at 3 years. Interest was paid upto 1-1/2 years. But later, due to the financial difficulties, he did not continue to pay interest. So, the first defendant demanded the plaintiff to execute a deed for the suit property by force and coercion. Considering his demand, he executed the sale agreement on 06/06/2007 for a sum of Rs.2,01,000/-. But in the sale agreement, no reference was made to the mortgage debt amount. The first defendant also took over the possession of the property on 06/06/2007. Sale agreement was executed for the purpose of ensuring the payment of the mortgage amount.

3.On the same day, another Power of Attorney was obtained from the plaintiff by exercising coercion and undue influence and fraud. At that time, the first defendant told the plaintiff that only for prompt repayment of the mortgage amount, these documents were obtained from him. Later, promised to hand over all those documents at the time of repayment of the mortgage amount.

4.By exercising the terms and agreement, the first defendant executed the sale deed in favour of the second defendant on 24/11/2008 for a sum of Rs.4,94,898/-. The sale deed itself is a void document and will not bind the plaintiff. Even in the sale deed, no reference was made to the mortgage deed, discharge, etc.

5.On coming to know about the fraudulent activity, the plaintiff returned from Tirupur and demanded the property by receiving the mortgage deed debt. But he was threatened and abused. So, he lodged a complaint on 02/07/2012 before the Superintendent of Police, Tirupur. At the time of enquiry, the defendants agreed to settle the issue through panchayat. But even in the panchayat, the defendants refused to hand over the possession after receiving the mortgage amount. So, the suit is laid for declaration that the sale deed, dated 24/11/2008 is null and void and not binding upon the plaintiff and for recovery of possession and declaring the mortgage deed is discharged and directing him to issue discharge receipt and endorsement; permanent injunction directing the first defendant not to encumber the property further; for future mesne profit. Along with the plaint, he has also filed the lodgement schedule for depositing the mortgage amount.

6.**The statement filed by the 1st defendant contains the following averments**:- The plaintiff borrowed a sum of Rs.2,00,000/- on 19/11/2003 and executed a mortgage deed. But the plaintiff failed to pay proper interest. When he was not able to pay the interest as well the principal amount, the plaintiff agreed to sell the property. In pursuance of the above said promise, the sale amount was fixed at Rs.2,00,000/- and the first defendant agreed to cancel the mortgage deed and the agreement, if the plaintiff pays the money within 3-1/2 months. The plaintiff received Rs.2,00,000/- I.e., advance amount and an agreement was entered. The plaintiff wantonly executed the Power of Attorney in favour of the second defendant and agreed that if he is unable to pay the money within 3-1/2 months, on the basis of the Power Deed, the sale may be executed in favour of the first defendant. The total amount that was agreed was Rs.4,00,000/-. The mortgage amount of Rs.20,00,000/- must be repaid by the plaintiff within 3-1/2 months period.

7.The plaintiff failed to repay the money within the time agreed and also informed that they may execute a sale deed. On that basis only, the sale was executed by the first defendant in favour of the second defendant. Sale consideration is the total amount of Rs.4,00,000/- with interest. Based upon that agreement only, possession was also handed over.

8.A police complaint given by the plaintiff was closed as 'Mistake of Fact'. No proper reply was sent by the plaintiff. After a lapse of six years from the date of sale deed, the suit is filed. The suit is barred by limitation and the suit framed as such is not maintainable.

9.On the basis of the pleadings, the following issues were framed by the trial court:-

(1)Whether the mortgage executed by the plaintiff on 19/11/2003 in favour of the first defendant is liable to be discharged?

(2)The sale deed obtained by the second defendant is valid under law or not?

(3)Whether the plaintiff is entitled to redeem the mortgage and get the receipt or not?

(4)The plaintiff is entitled for declaration as prayed for?

(5)Whether the plaintiff is entitled to mesne profit?

(6)Whether court fee paid by the plaintiff is correct or not?

(7)To other relief, the plaintiff is entitled to?

10.Before the trial court, on the side of the plaintiff, 2 witnesses were examined and 13 documents were marked. On the side of the defendants, 2 witnesses were examined and 7 documents were marked. Apart from that, Ex.X1 was marked.

11.At the conclusion of the trial process, the trial court dismissed the suit without any costs.

12.Against which, appeal was preferred before the appellate court namely Additional District Judge/Fast Track Court, Theni, in AS No.8 of 2019. It concurred with the judgment and decree of the trial court and dismissed the appeal.

13.Against which, this second appeal is preferred by the plaintiff as appellant.

14.At the time of admission, the following questions of law were framed:-

(a)Whether the Lower Appellate Court was right in holding that the suit is barred by limitation?

(b)Whether the Courts Below were right in holding that the mortgage has been redeemed by the sale agreement?

(c)Whether the Courts below failed to consider that the sale agreement and power of attorney executed by the plaintiff in favour of the husband and wife respectively for loan transaction can be valid in the eye of law?

(d)Whether the Courts below failed to consider the non-existence of 'consensus ad idem' and ' consideration' in the sale agreement and power of attorney?

(e)Whether the Courts below were correct in refusing to take adverse inference as held in 2002(3)MLJ 814 as the second defendant and the power agent did not adduce any evidence?

15.Heard both sides.

16.In the light of the pleadings in the preamble portion, the main point to be considered is whether the agreement that was allegedly entered between the plaintiff and the first defendant and the Power of Attorney executed by the plaintiff in favour of the second defendant and the sale executed by the second defendant in favour of the first defendant in-turn will amount to clog of redemption of mortgage. So, this is the major point to be decided. This is the main argument advanced by the plaintiff on that point.

17.The reason being that originally simple mortgage was entered between the plaintiff and the first defendant, which is admitted. Now, according to the defendants namely the respondents herein, when the plaintiff was unable to pay the interest and principal amount, he voluntarily came forward to execute a sale agreement intending to sell the property to the first defendant, on his failure to pay the money within 3-1/2 months and on the same day, a Power of Attorney was also executed by the plaintiff in favour of the second defendant on the same condition of his failure to return the money and redeem the mortgage.

18.So the question, which arises for consideration is whether the mortgage can be discharged by way of the sale agreement and the Power of Attorney, in turn, as mentioned above, whether these two documents can be construed as clog on redemption.

19.We will straightaway go the judgment of the Hon'ble Supreme Court on this point, so that we can get a clarity on that issue.

20.Before we go into the judgments cited by the appellant, by what way, the mortgage will come to end, as discussed in the judgment reported in ***Jayasingh Dnyanu Mhoprekar Vs. Krishna Babaji Patil [(1985)4 SCC 162].*** The relevant portion is extracted hereunder:-

> *"It is well settled that the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of right can be take place by a contract between the parties, by a merger or mortgage. A mortgage who has entered into possession of the property when the suit for redemption is filed unless he is able to show that the right of redemption has come to an end or that the suit is liable to be dismissed on some other valid ground. This flows from the legal principle which is*

> *applicable to all mortgages, namely 'Once a mortgage, always a mortgage."*

21.So from this observation of the Hon'ble Supreme Court, it is seen that a mortgage can come to an end by either act of the parties or by operation of law.

22.Here, according to the respondents, right to redeem the mortgage come to an end by way of entering into the sale agreement with the first defendant and Power of Attorney with the second defendant, dated 19/11/2003. Whether these documents can be considered to be valid. No doubt that this can be construed as 'act of parties'. But further enquiry has to be made in what manner and under what circumstance, the above said two documents came into existence. We can get further guidelines from the judgment of the Hon'ble Supreme Court in the judgment reported in ***Shivdev Singh and another Vs. Sucha Singh and another [(2000)4 SCC 326].*** The relevant para is extracted hereunder:-

> "*The reason then justifying the court's power to relieve a mortgagor from the effects of his bargain is its want of conscience. Putting it in more*

familiar language the court's jurisdiction to relieve the mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief.

We then have to see if there was anything unconscionable in the agreement that the mortgage would not be redeemed for eighty-five years. Is it oppressive? Was he forced to agree to it because of his difficulties? Now this question is essentially one of fact and has to be decided on the circumstances of each case. It would be wholly unprofitable in enquiring into this question to examine the large number of reported cases on the subject, for each turns on its own facts.”

23.This court is duty bound to make enquiry, under what circumstance, two documents came into existence. One of the circumstances that can be taken into account is further explained by the Hon'ble Supreme Court in ***Pomal Kanji Govindji Vs. Vrajlal Karsandas Purohit (1989) 1 SCC 458.*** The relevant portion is extracted hereunder:-

> *"Freedom of contract is permissible provided it does not lead to taking advantage of the oppressed or depressed people. The law must transform its to the social awareness. Poverty should not be unduly permitted to curtail one's right to borrow money on the ground of justice, equity and good conscience on just terms. If it does, it is bad. Whether it does or does not, must, however, depend upon the facts and the circumstances of each case.*
>
> *The doctrine "clog on equity of redemption" was held to be a rule of justice, equity and good conscience. It must be adopted to the reality of situation and the individuality of transaction. The court should take note of the time, the condition, the price spiral, the term bargain and the other obligations in the background of the financial conditions of the parties. After referring to various judgments of*

the High Courts in the country this Court held: (SCC pp 477-78, paras 26-27).

"26."Whether in the facts and the circumstances of these cases, the mortgage transaction amounted to clog on the equity of redemption, is a mixed question of law and fact. Courts do not look with favour at any clause or stipulation which clogs equity of redemption. A clog on the equity of redemption is unjust and unequitable. The principles of English law, as we have noticed from the decision referred to hereinbefore which have been accepted by this Court in this country, look with disfavour at clogs on the equity of redemption. Section 60 of the Transfer of Property Act, in India, also recognises the same position.

27.It is a right of the mortgagor on redemption, by reason of the very nature of the mortgage, to get back the subject of the mortgage and to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so or is prevented from redeeming the mortgage, such prevention is bad in law. If he is so *prevented, the equity of redemption is affected by that whether aptly or not, and it has always been termed as a clog. Such a clog is inequitable. The law does not countenance it. Bearing the aforesaid background in mind, each case has to be judged and decided in its own perspective. As has been observed by this Court that long term for redemption by itself, is not a clog on equity of redemption. Whether or not in a particular transaction there is a clog on the equity of redemption, depends primarily upon the period of redemption, the circumstances under which the mortgage was created, the economic and financial position of the mortgagor, and his relationship vis-à-vis him and the mortgagee, the economic and social conditions in a particular country at a particular point of time, custom, if any, prevalent in the community or the society in which the transaction takes place, and the totality of the circumstances under which a mortgage is created, namely, circumstances of the parties, the time, the situation, the clauses for redemption either for payment of interest or any other sum, the obligations of the mortgagee to* *construct or repair or maintain the mortgaged property in cases of usufructuary mortgage, to manage as a matter of prudent management, these factors must be correlated to each other and viewed in a comprehensive conspectus in the background of the facts and the circumstances of each case, to determine whether these are clogs on equity of redemption."*

24.So, in view of the categorical pronouncement of law by the Hon'ble Supreme Court, now we can take *prima facie* that these documents are nothing, but contract that was made to enter taking advantage by the financial position of the appellant. The reason for me making such an observation is that in those two documents, no reference is made to the mortgage. It is not even mentioned that since the appellant is not in a position to repay the money, the mortgage amount is treated as advance amount for sale agreement and within the time stipulated the appellant must execute a sale deed. It is the case of the first defendant that on the same day, the Power of Attorney was executed conferring upon the second defendant to sell the property to the first defendant. Even in that document, we find no reference to the mortgage. Normally to redeem the mortgage only, sale agreement will be entered or at least the character of the transaction will be changed to that to the agreement holder and the vendor. Here, absolutely we find no sufficient reference in these two documents.

25.In the written statement, it has been specifically stated that the appellant agreed to sell the property for Rs.6,00,000/- in total. Rs.4,00,000/- was paid in advance and Rs.2,00,000/- was adjusted towards mortgage amount. Absolutely, there is no documentary evidence to show the money transaction on the date of agreement and the power deed. If really, the appellant wanted to sell the property to the first defendant, in the event of his failure to redeem the mortgage money, he would have certainly made this recital in the document itself. He would not have intended to execute another deed or power of attorney in favour of the second defendant, execution of the power of attorney in favour of the second defendant had not arisen at all. In dubious manner these two documents came into existence clearly indicates that taking advantage the financial position of the appellant, these two documents have been obtained.

26.Even in the sale deed, no reference is made with regard to mortgage, redemption, etc. Even in the power of attorney, no right was conferred upon the second defendant to redeem the mortgage and then sell the same to the first defendant. All these recitals completely absent in those documents namely the power of attorney as well as the sale deed itself.

27.In the light of the above said observation of the Hon'ble Supreme Court, these two documents can be construed as only those documents creating clog on redemption and on equity of redemption.

28.In the light of the above said discussion, we will go further on the argument advanced on both sides.

29.Learned counsel appearing for the appellant would submit that along with the plaint, he deposited the entire mortgage amount into the trial court, for which he produced the challan also.

30.A report is called for from the trial court as to whether any amount was deposited. A report is submitted by the trial court stating that a sum of Rs.2,00,000/-

was deposited on 04/03/2014. Now the total amount available in the Fixed Deposit is Rs.3,79,511/- as on the date of the report.

31.He would submit that the power of attorney and sale agreement were executed only as a security for repayment of the loan. The right of subrogation is not available to the first defendant. He has pleaded *non east factum.*

*32.*With regard to these documents, he would further submit that before effecting the sale in favour of the first defendant by the second defendant, notice as contemplated under section 69(B) of the Transfer of Property Act was not issued. There is no evidence on record to show that consideration for the sale was passed from the hands of the first defendant to the hands of the second defendant. Limitation to redeem the mortgage is still available to them. Within the limitation, he filed the suit for redemption of mortgage. So, according to him, the suit is well laid, but the trial court as well as the first appellate court were wrong in their finding that the sale agreement is true and the transaction was also validly entered between the first defendant and the second defendant.

33.Per contra, the learned counsel appearing for the respondents would submit that the findings of the appellate court as well as the trial court would show that the sale deed executed by the second defendant in favour of the first defendant was well known to the appellant. Having known all these facts, he remained silent for several years. Thereafter, only he filed the suit for redemption. No coercion or force was exerted upon the appellant for executing these two documents. There is a clear finding on this aspect, which requires no reconsideration by this court.

34.We will go to the recitals in Ex.P1. Wherein it has been mentioned that a sum of Rs.2,00,000/- was borrowed as loan, the rate of interest is fixed at 2.5% per Rs.100/- and the period of mortgage was fixed at 3 years. Ex.P1 sale agreement reads that the total sale consideration is fixed at Rs.2,01,000/-. On the date of the sale agreement, Rs.2,00,000/- was paid as advance. Balance amount of Rs.1,000/- will be paid within 3-1/2 months. In that event, sale deed must be executed. This itself makes the position and circumstance very clear that it is nothing, but a security document obtained for the purpose of ensuing repayment of mortgage amount. If really, there was any intention on the part of the appellant herein to sell the property due to his inability to redeem the mortgage, as mentioned above, he would have specifically stated the mortgage amount, inability to pay the money, etc. facts.

35.Regarding the transaction on 02/07/2012, a police complaint was given by the appellant before the Superintendent of Police, Tirupur, upon which, summon was issued to the respondents and legal notice was issued on 05/11/2012 setting out the above said facts. So, the subsequent events also will give a clear indication as to the real intention of the parties.

36.Now we will go to the oral evidence of the parties.

37.As mentioned above, PW1 namely the plaintiff admits during the course of evidence that the sale effected in favour of the first defendant was brought to his knowledge in 2007. He lodged a complaint before the Police only in 2012. In the Police enquiry, they have advised to work out their remedy through civil process. So this has been pointed by the trial court as well as the first appellate court stating that the suit was not filed within the time, having known he remained silent for about five years.

38.But as mentioned above, these two documents namely the sale agreement as well as the power of attorney came into existence taking advantage of the financial position of the plaintiff. Circumstance under which those documents were obtained clearly indicates that these documents are nothing, but the documents create clog on redemption. So, these two documents cannot held to be valid and the right of the appellant to redeem the mortgage cannot be curtailed. The sale effected by the second defendant in favour of the first defendant is not valid under law in view of the above said discussion and findings.

39.The trial court as well as the first appellate court were carried away by the inaction on the part of the appellant for about five years in not taking steps to file the suit. As mentioned above, the suit is not barred by limitation for redemption. Since the possession is admitted by the first defendant, then no interest is payable by the plaintiff from the date of the possession.

Since the preliminary decree is passed, the statement of accounts can be taken during the final proceedings. So, the substantial question of law (a) is answered that the appellate court is not right in finding that the suit is barred by limitation.

40.Substantial question of law (b) is answered that the trial court and the appellate court was not right in holding that the mortgage has been redeemed by the sale agreement.

41.Substantial question of law [c] is answered that the power of attorney executed by the appellant in favour of the second defendant is only security for loan transaction. So, it is not valid under law as a document of power of attorney.

42.Substantial question of law (d) is answered that there was no intention on the part of the appellant to sell the property to the first defendant.

43.Substantial question of law (e) required no answer, since the power of attorney in favour of the second defendant, sale deed executed by him in favour of the first defendant is not valid under law. The omission on the part of the second defendant to lead evidence has no relevancy.

44.In view of the above said findings, I am of the considered view that the second appeal filed by the appellant is liable to be allowed.

45.In the result, this second appeal is **allowed** and the judgment and decree passed by the both the courts bellow are set aside. This court passed the following:-

> **(1)Preliminary decree for redemption of mortgage is passed as prayed for in the plaint.**
>
> **(2)In respect of the prayer of A and C sought for by the plaintiff in the plaint, the suit is decreed.**
>
> **(3)In respect of future mesne profits, it will be undertaken by separate proceedings under Order 20 Rule 12 CPC.**

(4)The appellant is entitled for costs through out the proceedings.

Consequently, connected Miscellaneous petition is closed.

24.07.2024

Index :Yes/No
Internet :Yes/No

TM/er

To

1.The Additional District Judge
(Fast Track Court), Theni,

2.The Subordinate Judge, Theni.

3.The Section Officer,
VR/ER Section
Madurai Bench of Madras High Court,
Madurai.

G.ILANGOVAN,J.

TM/er

S.A.(MD).No.212 of 2023

24.07.2024