BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 07.07.2025

CORAM

THE HON'BLE MR.JUSTICE **G.ARUL MURUGAN**

S.A.(MD)No.129 of 2025
and
C.M.P.(MD)No.4506 of 2025

K.Mahamayee ... Appellant/Appellant/Defendant

vs

S.Muniyandi ...Respondent/Respondent/Plaintiff

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 12.07.2024 made in A.S.No.36 of 2023, on the file of the learned II Additional Sub Judge, Madurai, confirming the impugned judgment and decree, dated 12.06.2023 made in O.S.No.75 of 2017, on the file of the learned District Munsif Judge, Madurai Taluk.

For Appellant : Mr.K.Muthu Ganesa Pandian

For Respondent : Mr.D.Senthil

JUDGMENT

The defendant is before this Court on appeal.

2. The Second Appeal is filed challenging the judgment and decree, dated 12.07.2024, made in A.S.No.36 of 2023, on the file of II Additional Subordinate Court, Madurai, confirming the judgment and decree, dated 12.06.2023 made in O.S.No.75 of 2017, on the file of the District Munsif Court, Madurai.

3. For the sake of convenience, the parties are referred to as per the litigative status before the trial Court.

4. It is the case of the plaintiff that he is the absolute owner of the suit property. Originally the suit property belonged to one Seshaiyer. Later he had executed a power of attorney in favour of one Venkatasubramanian through a registered power of attorney deed dated 09.12.1995. Thereafter, he had borrowed a sum of Rs.50,000/- from the defendant on 24.01.1996

and executed an unregistered simple mortgage in favour of the defendant. The period of redemption was fixed as five years in Ex.A.2. On the same day, an agreement was also entered into with the defendant in Ex.A.3, whereby the defendant was put in possession of the suit property and in lieu of interest mentioned in the mortgage deed, the defendant can be in occupation and run a business, particularly the hotel in the name and style of "Ganesh Hotel".

5. It is the further case of the plaintiff that he had purchased the suit property from the original owner Seshaiyer, represented by the power of attorney Venkatasubramanian, through a registered sale deed dated 14.02.1996 in Ex.A.1. After purchase of the suit property, the plaintiff got the revenue records mutated in his favour and in fact, even in the sale deed in Ex.A.1, the sale was on condition that the plaintiff should redeem the mortgage. Thereafter, the plaintiff had informed his purchase to the defendant and after the completion of the mortgage period, he wanted to pay the mortgage money, but, however the defendant requested to allow her in the possession of the property by receiving a part payment of Rs.20,000/- on

24.01.2003, for which an acknowledgement was also executed in Ex.A.4. Since the mortgage period is over and the building is in dilapidated condition, the plaintiff wanted to demolish and reconstruct the suit property, therefore, had approached the defendant to hand over the vacant possession, after receiving the balance mortgage money of Rs.30,000/-. However, since the defendant refused, the plaintiff had issued a legal notice on 02.05.2017 for which a reply was issued on 06.06.2017. Hence, the plaintiff had filed the suit for recovery of possession on redemption. In the suit, the plaintiff had deposited the balance mortgage money of Rs.30,000/-.

6. The defendant resisted the suit by filing a written statement by admitting that Seshaiyer was the owner of the suit property and a power of attorney was executed in favour of one Venkatasubramanian and based on which, a mortgage was entered into with the defendant on 24.01.1996 for a sum of Rs.50,000/- and thereafter, an agreement was entered into on the same day, by which the defendant was allowed to enjoy the usurps and be in possession till the mortgage money is paid and the property is redeemed. However, the defendant disputed that after the purchase of the suit property

by the plaintiff, he had paid a sum of Rs.20,000/- on 24.01.2003 for which an acknowledgement was issued.

7. It is the contention of the defendant that the defendant was prepared to purchase the suit property and the plaintiff had also promised that he will get the sale deed executed by the original owner Seshaiyer in favour of the defendant, but however the plaintiff had *malafidely* purchased the suit property and had defrauded the defendant. The defendant had also contended that the suit is barred by limitation as the time to redeem the property, had already been lapsed.

8. An additional written statement has also been filed by the defendant by contending that even though the mortgagor and the mortgagee relationship got cancelled, in view of the payment of mortgage amount, the same moment, the landlord and the tenant relationship gets revived and therefore, the plaintiff could only evict the defendant from the suit property after terminating the tenancy and by instituting appropriate proceedings for eviction and sought for dismissal of the suit.

9. During trial, the plaintiff examined himself as P.W.1 and one Karuppiah as P.W.2 and marked exhibits .A.1 to A.15. On the side of the defendant, she examined herself as D.W.1 and examined one Isakki Krishnan as D.W.2 and marked exhibits B.1 to B.4.

10. The trial Court, after analysing the evidences both oral and documentary, came to the conclusion that the plaintiff had established his title by way of purchase in Ex.A.1 and thereafter the mortgage and the usufructuary interest created in Exs.A.2 and A.3 having been also established and further the receipt issued by the defendant on receiving the part payment of the mortgage amount of Rs.20,000/- in Ex.A.4 was also proved by the plaintiff on examining their witnesses and the defendant's contention that the suit is barred by limitation may not be accepted and as such, had decreed the suit. On appeal, the lower appellate Court also by finding that the suit has been instituted within the prescribed period of limitation and further the document executed by the defendant in Ex.A.4 also having been proved, dismissed the appeal confirming the judgment and decree of the trial Court. Assailing the concurrent finding of fact, the defendant had preferred the above Second Appeal.

11. The learned Counsel appearing for the appellant argued that the defendant's husband had been running a hotel in the suit property right from the year 1977 and even though a mortgage was entered into in Ex.A.2 in the year 1996 and also the defendant was allowed the usufruct by a separate deed executed on the same day in Ex.A.3, even though the Courts below have come to the conclusion that the plaintiff is entitled to redeem the mortgage, but still even on allowing the plaintiff to redeem, the defendant is entitled to be in possession of the suit property, as the landlord and tenant relationship would get revived immediately on the cancellation of the mortgagor and mortgagee relationship.

12. It is the vehement contention of the learned Counsel that the defendant had been in enjoyment of the suit property as a tenant and any right created through mortgage is only for a limited purpose and the discharge of mortgage or otherwise would not affect the original right created under the tenancy and therefore, the judgment and decree of the Courts below without analysing the legal aspect in proper perspective are perverse and sought for intereference of this Court.

13. In this regard, the learned Counsel for the appellant also relied on the decision of the Hon'ble Supreme Court in the case of ***Cheriyan Sosamma and Others Vs. Sundaressan Pillai Saraswathy Amma and Others*** reported in ***(1999)3 SCC 251*** and would contend that in the absence of surrender of leasehold rights at the time of execution of mortgage, the mortgagor cannot obtain delivery of physical possession and there cannot be implied surrender, unless there is an intention to that effect.

14. Mr.D.Senthil, learned Counsel appearing for the respondent argued that the plaintiff had purchased the suit property in Ex.A.1 and in fact the sale itself was subject to redemption of mortgage of the suit property from the defendant. It is his further contention that the defendant had not been in the enjoyment of the suit property as a tenant, but however the documents in Exs.A.1 to A.3 would categorically make it clear that the defendant was in possession of the suit property pursuant to the mortgage executed in Ex.A.2 and the defendant was allowed to remain in possession till the property was redeemed.

15. The learned Counsel for the respondent further contended that the defendant having been in possession in pursuant to the right granted in Ex.A.3, cannot now turn around and claim any benefit as a tenant, when no such tenancy was subsisting even at an earlier point of time, after the sale of suit property to the plaintiff or atleast after the usufructuary mortgage was executed in favour of the defendant in Exs.A.2 and A.3 and as such, the Courts below have rightly appreciated the documents and had rendered a finding based on the materials available, which need no intereference in the above Second Appeal.

16. Heard the rival submissions and perused the materials available on record.

17. Admittedly, the suit property in S.No.433/1 of Avaniyapuram Village, Madurai South Taluk originally belonged to Seshaiyer. The original owner had also admittedly executed a power of attorney in favour of one Venkatasubramanian on 09.12.1995 to deal with in respect of the suit property. In view of the power executed, Venkatasubramanian representing

Seshaiyer had executed a mortgage deed in favour of the defendant on 24.01.1996 in Ex.A.2 for a mortgage amount of Rs.50,000/-. On the same day, a further agreement had also been executed in favour of the defendant in Ex.A.3. As per the agreement, the defendant was put in possession of the suit property and she was allowed to enjoy the usufruct and run a business in the suit property without paying any rent. Usufructuary mortgage can be created as per Section 58 of the Transfer of Property Act. In an usufructuary mortgage, the mortgagor, on receipt of the mortgage amount, creates a mortgage in favour of the mortgagee whereby the mortgagee is put in possession of the property and the mortgagee is allowed to enjoy the usufruct and the benefits thereon in lieu of interest to be paid on the mortgage amount till the mortgage amount is repaid to the mortgagee. As such, in view of the understanding arrived at in Ex.A.3, admittedly the usufructuary mortgage has been entered into by the power holder Venkatasubramanian representing the owner Seshaiyer in favour of the defendant.

18. After executing the mortgage in favour of the defendant, Seshaiyer represented by his power of attorney Venkatasubramanian had

executed a registered sale deed dated 14.02.1996 in Ex.A.1 in favour of the plaintiff for valuable consideration. As per the recitals found in the sale deed, the plaintiff has to repay the mortgage amount to the defendant herein and redeem the property from the mortgage. Pursuant to the sale executed in favour of the plaintiff, the plaintiff had mutated the revenue records in his favour and he has filed the documents in Exs.A.13 and A.14. The plaintiff, since he wanted to reconstruct the property, as the property was in a dilapidated condition, has approached the defendant to hand over the suit property. The defendant, who had in the meantime been running the business, had requested the plaintiff to allow her to be in possession for some time and had received a sum of Rs.20,000/- towards part payment of return of mortgage amount and had also executed an acknowledgement in Ex.A.4. Thereafter, after the mortgage period was over and the plaintiff wanted to develop the property and the request made to the defendant to hand over the possession had been refused, issued legal notice in Ex.A.5, for which, the defendant issued a reply notice in Ex.A.7.

19. It is the vehement contention of the learned Counsel for the appellant that though a mortgage was created in favour of the defendant in

Exs.A.2 and A.3, the defendant had been in possession of the suit property as a tenant and the plaintiff is only entitled to redeem the property by paying the mortgage amount as covered under Ex.A.2. Even then only the mortgagor and mortgagee relationship would get terminated, but however the landlord and the tenant relationship would get revived and therefore, the plaintiff would be entitled for recovering the possession of the suit property from the defendant only after due cancellation of the tenancy and on initiating appropriate proceedings for eviction. In this regard, the learned Counsel had relied on the aforesaid decision wherein the Hon'ble Supreme Court held that on redemption of the mortgage, there cannot be an automatic delivery of actual or physical possession of the suit property, as there cannot be a merger of the interest of lessee with that of the mortgage. It is held that in the absence of surrender of leasehold right at the time of execution of mortgage, the mortgagor cannot obtain the delivery of possession and the implied surrender of the lessee's right would depend on the intention of the parties at the time of execution of the mortgage.

20. Paragraph No.13 of the aforesaid decision is extracted hereunder:

"Hence, the contention of the learned counsel for the respondents that as the mortgage deed provides that the possession of the property is handed over to the mortgagee, wife of the lessee, impliedly lease hold rights are surrendered is, in our view, without any substance. The High Court arrived at the conclusion that whether Mr. Cherian was an actual party to the mortgage transaction, was not much material as it was impossible in the circumstances to contend that transaction was entered into behind the back of Mr. Cherian; Mr. Cherian and his wife were living together and reasonable inference in the circumstances would be to conclude that the transaction was really entered into by Mr. Cherian himself though in the name of his wife. Hence, the lease prior to the suit transaction in favour of Cherian would not survive. We agree with the finding that husband and wife, that is, lessee and mortgagee, were living together. As quoted above in the mortgage deed, it is mentioned that the properties were entrusted for pattom to Abraham Cherian and at present were in her possession, enjoyment and occupation. Therefore, it is apparent that lessee and the mortgagee were the same persons. However, there is no question of drawing any inference that husband of mortgagee surrendered his tenancy rights at the time of mortgage. As stated earlier, by mere execution of the usufructuary mortgage, there is no merger of pre-existing tenancy rights unless there is express or implied

surrender. In the facts of the present case, there is no question of implied surrender of lease hold rights by the deceased Abraham Cherian. Further, there is no question of drawing any inference that deceased lessee has surrendered the lease hold rights as it would be totally inconsistent with the recitals and terms of the mortgage deeds. There was no necessity of providing in all the aforesaid three documents that there was a lease arrangement with regard to the mortgage property and that mortgagee was required to pay a rent of Rs. 120 per year. On the contrary, mortgage deeds expressly saved the tenancy rights."

21. In view of the aforesaid dictum of the Hon'ble Supreme Court, it has to be first ascertained the intention of the party ie., the defendant at the time of the execution of the mortgage deed in Exs.A.2 and A.3. A close look of the two documents in Exs.A.2 and A.3 reveals that the defendant, in no uncertain terms or by clear recitals, had entered into agreement with the original owner in Ex.A.3, wherein it is stated that they had executed a mortgage deed (Ex.A.2) on receipt of Rs.50,000/- . In view of the mortgage granted in Ex.A.2 and Ex.A.3, the defendant herein was entitled to retain the possession of the suit property from that date to a period of 5 years and be in possession and enjoyment of the suit property and on completion of the

period and on payment of the mortgage amount, the defendant will hand over the possession of the suit property to the mortgagor. There is also a default clause that in the event of mortgagor not retuning the mortgage amount, then the defendant will be entitled to further be in possession of the suit property on the same terms. In view of this document Ex.A.3, the mortgagee will be entitled to enjoy the usufruct from the suit property. From the above documents executed in Ex.A3, the real intention of the parties is evident. The defendant had been allowed to be in possession of the suit property for the period of five years only in view of the mortgage created and enjoy the usufruct for such period. On completion of the period and on payment of the mortgage amount, it has been specifically agreed that the defendant shall hand over the possession of the suit property to the owner. The document nowhere reveals that the defendant is holding the possession of the suit property as a tenant and during the tenancy, in view of the understanding created in Ex.A.3, the defendant was allowed to convert the possession into usufructuary right wherein she was allowed to be in possession of the suit property without payment of rent and on completion of the said period, the mortgage would get terminated, but the tenancy will continue and the defendant will retain possession by payment of rents to the owner. In the absence of any such averments and the defendant categorically entered into Ex.A.3 by stating that the possession is completely in view of the mortgage in Exs.A.2 and A.3 and on completion of the said period, the possession will be handed over, the intention as observed by the Hon'ble Supreme Court is very clear that the defendant is enjoying the suit property only as a mortgagee in view of the usufructuary mortgage created and no such tenancy was in subsistence and the tenancy was not continued or would get restored on cancellation of the mortgage created in Ex.A.2.

22. In view of the above narrations it is clear that the argument of the appellant that the landlord and tenant relationship would automatically get restored on cancellation of the mortgagor and mortgagee relationship, cannot be accepted. Further even from the written statement filed by the defendant, it could be seen that the defendant had only contended that the plaintiff promised that he will get the suit property conveyed in her favour, but however the plaintiff had defrauded the same. The defendant had also further only defended the suit stating that the suit is barred by limitation. Only in the additional written statement filed, the defendant sought to

contend that the landlord and tenant relationship would get revived on the terminatin of mortgagee and mortgagor relationship.

23. As referred earlier, the plaintiff on filing the sale deed in Ex.A.1, had established his title and the mortgage created in favour of the defendant in Ex.A.2 and Ex.A.3 gets transferred to the plaintiff and the plaintiff has substituted himself as mortgagor in the place of original owner. Therefore, as the owner, he had approached the defendant for recovery of the suit property from mortgage. From the documents filed in Ex.A.4, it has also been established by the plaintiff that the defendant had received the part amount of Rs.20,000/- towards the discharge of the mortgage and even though the defendant had disputed the said document, the plaintiff had duly examined the witnesses in Ex.A.4 and proved the receipt of the amount by the defendant. It is also seen that the plaintiff had also deposited the balance sum of Rs.30,000/- towards discharge of the entire mortgage amount to the defendant. The defendant, on her part, had not been able to establish her claim by any documentary or oral evidence that she has been in the tenancy or as a tenant prior to the execution of the mortgage amount and

in fact the tenancy was in subsistence and the understanding entered into between the parties in Exs.A.2 and A.3 were only for a limited purpose and the parties were having any other understanding that the tenancy would get restored. When the defendant has come up with such claim, the onus is on the defendant to prove that there had been any other transaction for the landlord and tenant relationship to revive. Dehors the documents executed in Exs.A.2 and A.3, in the absence of any other materials placed by the defendant and on the evidences and documents placed by the plaintiff, the Courts below have rightly analysed the facts and rendered the concurrent findings that the plaintiff is entitled to redeem the property by discharging the mortgage executed in favour of the defendant.

24. This Court does not find any illegality or perversity in the findings arrived at by the Courts below and the decision relied on by the learned Counsel for the appellant does not enure to the benfit of the appellant. No question of law, much less a substantial question of law arises for consideration in the Second Appeal.

25. Accordingly, the Second Appeal stands dismissed. However, there is no order as to costs. Consequently, the connected Civil Miscellaneous Petition is closed.

07.07.2025

Internet :Yes/No
Index :Yes/No
NCC :Yes/No
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To

1.The II Additional Sub Judge, Madurai,

2.The District Munsif Court, Madurai Taluk.

3. The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

<u>G.ARUL MURUGAN, J.</u>

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Judgment made in
S.A.(MD)No.129 of 2025

07.07.2025