
(1971) 11 MAD CK 0042
In the Madras High Court
Case No : Second Appeal No. 1284 of 1969

Arumugam Pillai

APPELLANT

Vs

Maruthakutti Gounder

RESPONDENT

Date of Decision : 18-11-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12
Transfer of Property Act, 1882 — Section 58, 62

Citation : AIR 1973 Mad 242 : (1972) 85 LW 543

Hon'ble Judges : Ismail, J

Bench : Single Bench

Judgement

Ismail, J.—The plaintiff in O. S. No. 628 of 1966 on the file of the District Munsif, Coimbatore, who lost before the Courts below is the appellant herein. Admittedly, the suit property belonged to the appellant. On 13-3-1961 the appellant executed a document styled as "Kattuvali Bogyam" for Rs. 4,000 and obtained this amount of Rs. 4,000 from the respondent and put the respondent in possession of the property. On the expiry of the period of five years stipulated in the document the appellant instituted the present suit for recovery of possession. The case of the respondent was that Ex. B-1 was a lease deed and therefore, under the provision of Madras Act 25 of 1955 he was entitled to remain in possession of the suit property and the appellant herein was not entitled to recover possession thereof from the respondent. The Courts below accepted this contention of the respondent and dismissed the suit instituted by the appellant. Hence the present second appeal filed by the plaintiff in the suit.

2. There was no oral evidence in this case and the matter has been argued before the Courts below only on the basis of the terms of Ex. B.1 as to whether it constituted an usufructuary mortgage for a period of five years or it constituted a lease. The document styles itself as "kattuvali bogyam" for Rs. 4,000/-. Having referred to the fact that the suit property belonged to the appellant by purchase under the registered document No. 378 of 1936 the document proceeds to state--

(original script in Tamil omitted)

The significant features to be noticed in this document are :

" (1) it has been styled as "kattuyali bogyam" for Rs. 4,000/- i.e., an usufructuary mortgage for Rs. 4,000/-.

(2) it is a register document and written on stamp paper of the value of Rs. 280/- ;

(3) the document refers to the amount of Rs. 4,000/- itself a "bogyathogai";

(4) the respondent was to enjoy the property for a period of 5 years for the bogyam amount of Rs. 4,000/- and as soon as the 5 years period expired, he will have to deliver possession of the property to the appellant;

(5) on the expiry of the period of 5 years the appellant had a right to enter upon the suit property without the permission of the respondent and take possession of the same with the crops, if any that may be standing thereon; and

(6) the respondent had no right to claim any interest in the suit property apart from the interest flowing from "kattuvali bogyam."

One thing that is definite and clear, having regard to the recitals in the document is that the document neither expressly nor by necessary implication refers to the relationship between the parties as "lessor and lessee" or the amount of Rs. 4,000/- as the premium plus rent or a rent for the period of 5 years. If the terms of the document alone are to be taken into account there could be no doubt, whatever, that the only construction possible is that the document is an usufructuary mortgage. No doubt, it has been held repeatedly that any nomenclature given to a document by the parties may be indicative of the intention of the parties but it is not conclusive or decisive of the character of the transaction. But, in this case all the terms of the document are only in conformity and consistent with the nomenclature and there is absolutely no divergence between one nomenclature and the terms. As a matter of fact. I find it extremely difficult to appreciate how this document could ever have been construed as a lease at all. The learned District Judge of Coimbatore in paragraph 10 of his judgment refers to the reasons which impelled him to come to the conclusion that the document in question is only a lease and not a mortgage. These reasons are--

1. the absence of any stipulation for interest;
2. the absence of the relationship of debtor and creditor between the parties;
3. the absence of lands being offered as security for any loan"
4. the absence of any stipulation for payment of the loan and redemption of the mortgage by the mortgagor; and
5. the absence of any stipulation for the mortgage to remain in possession of the

lands as long as the loan is not repaid.

I may mention immediately that the learned District Judge thoroughly misunderstood the terms of the document when he referred to these considerations being absent. As far as the first reason is concerned, it is not necessary that a deed of mortgage must always refer to a particular rate of interest. It is certainly open to the parties to agree that the income from the property accruing over a certain period will be sufficient to cover the principle as well as the interest. In the case of a usufructuary mortgage, when the mortgagor and mortgagee agree that the entire amount due by the mortgagor to the mortgagee should be recouped by the mortgagee by the enjoyment of the usufructs from the mortgaged property over a specified number of years the document may not refer to any interest payable on the principle even though an element of interest and its rate and the income from the property might have gone into their calculation, when the parties determined the number of years during which the mortgagee was authorized to remain in possession of the mortgaged property for the purpose of reimbursing himself. In this case the fact that there is no specific mention of interest and rate of interest cannot in any way prevent the document from being a mortgage. With regard to the second ground the relationship of debtor and creditor has to be inferred from the terms of the document and there is no requirement that the terms must themselves expressly state that the relationship of debtor and creditor is in existence between the parties. Implied in the stipulation that the respondent will remain in possession for a period of five years for the "bogyam amount" is the relationship of debtor and creditor between the appellant and the respondent. As far as the third reason is concerned. I have already referred to the fact that the terms themselves mentioned that the respondent should be in possession of the property for a period of five years for the "bogyam amount" of Rs. 4,000/-. With regard to the fourth reason in the case of an usufructuary mortgage the question of repayment of the loan and the redemption of the mortgage need not always arise because repayment of loan can be in the form of enjoyment of the income from the property by the mortgagee and the redemption can be in the form of delivery of possession of the property on the expiry of the period stipulated. As far as the fifth reason is concerned, it is thoroughly misconceived because the document expressly states that the respondent is entitled to remain in possession of the property for a period of five years for the "bogyam amount". In this context the learned District Judge though had referred to Section 58(d) of the Transfer of Property Act had not properly appreciated its effect as well as the effect of Section 62(a) of the Act, Section 58(d) states--

"Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage money and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage money or partly in lieu of interest or partly in payment

of the mortgage money the transaction is called an usufructuary mortgage and the mortgagee as usufructuary mortgagee."

From this definition, it clearly follows that the appropriation of the income from the property can be against interest as well as the principle and if the parties have agreed that by the appropriation for a specified number of years the principle as well as the interest would have been wiped out, it is not open to any Court to construe that the document is not a mortgage simply because there is no express reference to interest or a rate of interest. Section 62(a) is in tune with this definition of Section 58(d) and provides--

62. "In this case of 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 etc."

It may be seen that this provision does not refer to any interest at all and it merely refers to the mortgage money and, therefore, it is certainly open to the parties not to stipulate for interest separately and provide for the mortgage amount, as the total amount payable by the mortgagor being wiped out by the appropriation of income from the property itself. Therefore, looked at from the statutory provisions themselves. I am unable to hold that Ex. B-1 is anything other than a mortgage. The learned District Judge refers to the possibility of the document being considered as a "lease mortgage". I am unable to see what exactly the learned Judge meant by this expression. Apart from the positive features referred to above there are certain negative features as well which will militate against Ex. B-1, being a lease. I have referred to one fact, namely, that there is no single expression in Ex. B.1, connoting the relationship between the parties as "lessor and lessee" or denoting the transaction as a lease. Apart from this the document has been executed only by the appellant and it had not been executed by the respondent. If it is a lease either it will be executed by the lessor and the lessee or by the lessee alone and the question of the lessor along executing lease deed normally does not arise. Thirdly the fact that the document is written on stamp paper of the value of Rs. 280. at seven per cent, clearly shows that the sum of Rs. 4,000/- is the mortgage amount and the document itself is an usufructuary mortgage. On the other hand if the sum of Rs. 4,000/- is taken to be the premium plus rent or rent for five years the amount of stamp duty will be different. Having regard to all the features. I am clearly of the opinion that Ex. B.1 is only an usufructuary mortgage enabling the respondent herein to be in possession of the suit property for a period of five years and appropriate the income therefrom towards the amount due to him by way of mortgage money. It is really a matter of surprise to me as to how the Courts below could have construed Ex. B.1 as a lease at all and a perusal of the judgments go to show that they have simply assumed Ex. B.1 to be a lease deed

for which assumption there is no warrant either in law or in the terms of the document and then called upon the appellant to prove that it is a mortgage and not a lease. Consequently, on the expiry of the period of five years the respondent was bound to surrender possession of the property to the appellant in terms of the document and he could not have resisted the suit for possession instituted by the appellant herein.

3. Hence the second appeal is allowed and the judgments and decrees of the Courts below are set aside. The suit instituted by the appellant will stand decreed as prayed for.

4. The quantum of mesne profits will be determined in proceedings to be taken under Order 20, Rule 12, Civil P. C. No costs. No leave.

5. Appeal allowed.