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**(2004) 03 MAD CK 0216**  
**In the Madras High Court**  
**Case No : Second Appeal No. 1099 of 1993**

Indirani and Others

APPELLANT

Vs

Sundarammal and Others

RESPONDENT

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**Date of Decision :** 11-03-2004

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 100

**Citation :** (2004) 2 MLJ 333

**Hon'ble Judges :** M. Chockalingam, J

**Bench :** Single Bench

**Advocate :** Krishnaveni, for T.R. Rajaraman, for the Appellant; R. Subramanian, for the Respondent

**Final Decision :** Dismissed

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## Judgement

M. Chockalingam, J.—The plaintiffs, who lost the case before both the courts below in a suit for redemption of mortgage, are the appellants herein.

2. Necessary facts for the disposal of this appeal are as follows:

The plaintiff No.1 is the wife and the plaintiff Nos.2 to 5 are the children of one Subramani, who died about 11 years ago leaving the plaintiff to succeed his estate including the schedule mentioned immovable property, which was a residential house. It was the ancestral joint family property of the plaintiffs 2,3 and 4 and their father Subramani. On 11.10.1964, he executed a registered mortgage deed by conditional sale in favour of one Varadaraji Mandiri for Rs. 1500/-. The said Subramani had no right to deal with the same separately with Varadaraji Mandiri, since it is a family property. The dealings referred to above was for the family benefit or that of the minors. The plaintiffs 2,3 and 5 are not the parties to the transaction. The suit mentioned properties was mortgaged to Varadaraji Mandiri by mortgage by conditional sale on the said date. In lieu of the interest due, Varadaraji Mandiri was enjoying the schedule mentioned property. He was collecting Rs. 75/- per month by way of rent and living in the

suit premises and no interest was to be paid for the mortgage. After the death of Varadaraji Mandiri, the defendants, who are the legal representatives, are now in possession of the premises which is the subject matter of the mortgage. The plaintiffs need not pay even the principal to the mortgagee, legal representatives, who are the defendants herein. The plaintiffs are entitled for redemption without paying principal and interest. But, however, if the Court comes to a conclusion that the defendants are entitled, they are ready and willing to deposit the entire amount as per the mortgage, and hence, it was a suit one for redemption of mortgage.

3. The suit was resisted by the defendants inter-alia stating that the transaction entered into between the defendants and Varadaraji Mandiri would be binding on the plaintiffs and it was an absolute sale and not a mortgage by conditional sale as put forth by the plaintiffs; that the defendants were put in possession of the properties; that on the death of Varadaraji Mandiri, his heirs have actually got the possession and continued to be there, and thus, the suit was misconceived and was to be dismissed.

4. The trial court framed necessary issues, tried the suit and dismissed the same. An appeal filed by the plaintiffs was also met the same fate. Hence, this second appeal has been brought forth by the plaintiffs.

5. At the time of admission, the following substantial question of law was formulated by this Court for consideration:

"Whether the courts below were right in the view they took that Ex.A.1 is a sale with condition for repurchase and not mortgage by conditional sale?"

6. This Court has heard the learned counsel for the appellants and also the learned counsel for the respondents on those contentions.

7. After careful consideration of the rival submissions and the scrutiny of the available materials, this Court is of the considered view that this appeal carries no merit. The plaintiffs/appellants herein sought for redemption alleging that the husband of the first plaintiff executed a mortgage deed by a conditional sale in favour of one Varadaraji Mandiri on 11.10.1968, which was marked as Ex.A.1; that there was a stipulation that within a period of five years, they could redeem the mortgage; that the suit was filed in the year 1981 and it was well within the time, since it was a mortgage; and that the plaintiffs had right to get it redeemed. But, the suit was resisted by the defendants stating that it was an absolute sale and not one mortgage by conditional sale. Hence, the entire case rests upon the question whether Ex.A.1 was an absolute sale or mortgage by conditional sale.

8. Not only the scrutiny of the documents, but also many were the circumstances, which would clearly speak of the intention of the parties that it was entered into as one of sale and not of mortgage. It is not in dispute that the property originally belonged to one Subramani, the husband of the first plaintiff.

He entered into Ex.B.1 document on 11.10.1968. It is also true that there is a clear recital to the effect that within a period of five years, the consideration of Rs. 1500/- found therein as one of sale should be paid back and they should get the reconveyance deed. From the very reading of the document, it would be abundantly clear that the right that was given to the first party of the document was only the right of reconveyance and payment of the said sum should be made within a period of five years. Needless to say that the Court has to look into the intention of the parties at the time when they entered into the document and the intention could be found out from the surrounding circumstances attendant at the time of execution of the document apart from the nature of the recitals found thereon.

9. In order to find out Ex.B.1 was the mortgage deed by conditional sale, the law would require that the relationship of the parties should be one that of debtor and creditor. As rightly pointed out by the learned counsel for the respondents, no such relationship was found in the document, but there were directions for the payment of the earlier mortgages, which were pending at that time. In the absence of the relationship of the parties as debtor and creditor, it would be highly difficult to accept the case of the appellants/plaintiffs that the said document was one for mortgage by conditional sale. Thus, the case of the plaintiffs did not stand in the scrutiny of law. Even as per the document, the right of reconveyance was given to the husband of the first plaintiff that he should pay the consideration of Rs. 1500/- within a period of five years. Ex.B.1 document was entered in the year 1968, and thus the period was available till 10.10.1973, but the suit was filed in the year 1981. The reason for such a delay, according to the plaintiffs, was the death of the husband of the first plaintiff. This cannot be accepted even for the simple reason that the property was actually in the possession of the husband of the first defendant and thereafter in the hands of the defendants.

10. Had it been true that the mortgage by conditional sale and the plaintiffs were conscious of the said fact, they should have initiated proceedings at least by issuing notice, but they have not done so. It is true that the notice was issued by the plaintiff through the Lawyer under Ex.B.2 on 10.3.1979, which reads as follows:

"That on 11.10.1968 one Subramani husband of No.1 of my clients and father of Nos.2 to 4 of my clients sold undermentioned property to your father Varadaraji Mandiri."

From the very reading of the notice, it would be abundantly clear that the plaintiffs were conscious of the fact that Ex.B.1 was a sale and not one mortgage by conditional sale as averred in the plaint. When a query was made by this Court, the learned counsel for the appellants would submit that such a notice was not caused to be issued by the plaintiffs. It is pertinent to point out that notice was issued by the counsel. Now, such a reasoning cannot be accepted.

11. The yet another circumstance stood against the case of the plaintiffs is that stamp papers for Ex.B.1 document was purchased by Varadaraji Mandiri, the husband of the first defendant. Had it been intended to be one mortgage by conditional sale, the stamp papers, in the ordinary course, should have been purchased only by the said Subramani and not by the said Varadaraji Mandiri. It is evident that all the title deeds pertaining to the property were actually handed over at the time of execution. The said Varadaraji Mandiri was put in possession all along from the time of execution and on his death, the defendants continued to be in possession of the property. Under the stated circumstances, it is quite evident that it would be the intention of the parties that it was an absolute sale at the time of execution of Ex.B.1 document, and hence, both the courts below were perfectly correct in recording the finding that Ex.B.1 was only an absolute sale and not mortgage by conditional sale. This Court is unable to notice any merit in this second appeal.

12. In the result, this second appeal fails and the same is dismissed, leaving the parties to bear their costs.