
(1990) 09 MAD CK 0037
In the Madras High Court

R. Ponnu Nadar and Others		APPELLANT
	Vs	
N. Bhagavathi Pillai and Others		RESPONDENT

Date of Decision : 13-09-1990

Acts Referred:

Citation : (1991) 55 MLJ 1

Hon'ble Judges : Srinivasan, J

Bench : Division Bench

Judgement

Srinivasan, J.—The defendants 2 to 7 in the suit are the appellants herein. The suit is one for redemption of two mortgages executed on

26.5.1113 M.E. and 24.5.1115 M.E. It is not in dispute that the plaintiffs are the successors in-title of the mortgagors and the defendants are the

successors-in-title of the mortgagees. The contention raised by the defendants, before the trial court was that the suit was not maintainable as it

was barred by res judicata by reason of the decision in O.S. No. 1587 of 1119 M.E. on the file of the Principal District Munsif, Kuzhithurai,

wherein the mortgage deeds were set aside and that the suit is barred by limitation. The trial court accepted the contention of the defendants and

dismissed the suit. On appeal the Additional Subordinate Judge, Kuzhithurai reversed the conclusion of the trial Court and granted a decree in

favour of the plaintiffs for redemption and recovery of possession though the claim for damages was negated.

2. In this second appeal, learned Counsel for the appellants raised a contention that the defendants were in possession as lessees and not as

mortgagees. Learned Counsel placed reliance on Ex. B1, dt. 9.10.1072 representing a marayapattam and kuzhikanam transaction executed by the

predecessor in title of the plaintiffs in favour of the predecessor-in-title of the defendants. According to learned Counsel, Exs. A1 and A2 are only

renewals of the transaction evidenced by Ex. B1 and the character of possession of the defendants as lessees never changed into that of

mortgagees. Hence it is submitted by learned Counsel that the suit for redemption of mortgages is not sustainable.

3. Learned Counsel for the respondents submits that the contention raised by the appellant's counsel was never put forward either in the trial Court

or in the lower appellate Court. He draws my attention to the written statement and submits that no plea has been raised that the defendants are in

possession as lessees and not mortgages. According to learned Counsel for the respondents, the question is not purely one of law but has to

depend upon the facts and circumstances and unless a plea has been raised in the trial court it should not be allowed to be raised for the first time

in a second appeal. It is also his case that even on the merits the contention has to fail as the conduct of the parties in the earlier proceedings and

the stand taken by them therein would clearly show that the defendants are in possessions only as mortgagees and not as lessees.

4. No doubt, to some extent the question raised by the appellants' counsel turns upon the interpretation of the documents, but, it cannot be treated

as a pure question of law. An interpretation of the documents will have to depend upon the facts and circumstances of the case; it may not always

turn upon the language used in the documents. The decision on the question will have to depend upon the conduct of the parties both prior and

after the execution of the relevant documents. Hence I accept the contention of learned Counsel for the respondents that the contention raised by

the appellants' counsel should not be allowed to be raised in the second appeal for the first time as it is not a pure question of law.

5. However, I do not propose to dispose of the appeal on that ground. I intent going through the relevant facts and circumstances as available on

record in this proceeding and give my finding on the contention raised by learned Counsel for the appellants.

6. Ex. B1 is admittedly a lease transaction. In chronology the next of the document that is relevant is Ex. A2. That is dated 26.5.1113 M.E. On a

reading of the document it is seen that a reference is made to the lease transaction of the year 1072 M.E. and the factum of possession with the

predecessors-in-title of the defendants in the said lease. Reliance is plead upon the following recitals found in Ex. A2:

Since you wanted your value of improvements to be recognised and wanted to renew the aforesaid lease and you threatened to file civil action to

establish the said rights and we agree to renew the document in your favour.

Learned Counsel for the appellants contends that the above passage clearly proves that Ex. A2 is only a renewal simpliciter of Ex. B1 and though

the parties call it an othi it is not a mortgage but it is only a lease in substance. Learned Counsel submits that the nomenclature given by the parties

in the document does not conclude the question. Learned Counsel places reliance on the circumstances that the parties, who were in possession

under Ex. A2 also. But, the document clearly states that the deed of othi is executed after adjusting the earlier amount of premium and value of

improvements against the consideration of 350 panams. In the beginning of the document also it is stated that the property is being mortgaged after

receiving 350 panams. The said consideration of 350 panams is adjusted as against the amount of premium payable under the lease and the value

of improvements. The mere fact that the document refers to a renewal of the lease would not conclusively show that the transaction represented by

Ex. A2 would amount to a lease.

7. This suit relates to both Ex. A. 1 and A. 2. Ex. A. 1 is a subsequent mortgage dt. 24.5.1115 M.E. whatever arguments was advanced by

learned Counsel for the appellants with reference to Ex. A. 2 would not apply in to Ex. A. 1. There is no reference here to the renewal of the lease.

While setting out the history of the property a reference is made to the lease of 1072 M.E. The other operative recitals do not show that the

document is a renewal of the lease as such. The consideration is 200 panams under which 112 1/2 panams are adjusted as against the value of

improvements while 62,1/2 panams therefore are reserved for redeeming the mortgage from Ooli Raman and Podiyan Lakshmanan. A sum of 25

panams is received in cash.

8. It is seen that neither in Ex. A1 nor in Ex. A2 any pattam or rent is reserved. Hence the argument that Exs. A1 and A2 would amount only to

renewals of the lease of the year 1072 M.E. cannot be accepted.

9. I do not rest my conclusion only on the above circumstances. The

following factors are also to be taken into account. In the year 1119 M.E. a suit was filed for setting aside the alienations effected by the plaintiffs' predecessors-in-title and recovery of properties. The defendants' predecessors-in-title were also parties to that suit. That was taken on file as O.S. No. 1587 of 1111 M.E. in the Court of the Additional District Munsif, Kuzhithurai. The appellants 1 to 4 herein were defendants 4 to 6 and 12 in that suit. The judgment in that suit is marked as Ex. B2. Issue 7 in that suit was, whether the mortgages in favour of defendants 4 to 6 are valid. The mortgages referred to in the issue are Exs. A1 and A2 herein.

Issue 10 was, Whether the plaintiff were entitled to recover the plaintiff properties with mesne profits. Issues 5, 7 and 10 were considered together and dealt with in paragraph 11 of the judgment as follows:

There cannot be any doubt that they as members of the tarwad can question alienation of the plaintiff scheduled properties executed by defendants 1 to 3 on whom the partition deed has been placed on by the right of management. They are expressly made liable for the loss occasioned by mismanagement. Exs. II and III are the mortgages impeached by the plaintiffs. Admittedly item 3 was outstanding on marayam lease under Ex. IV of 1972. The consideration for the mortgage is the value of improvements effected by the marayam lessee and the marayam already received under Ex. IV. The pressure brought to bear on defendants 1 to 3 are alleged threat of suit for money by the lessee. It is not known how far this is true.

Further we find a term of twelve years being granted under Ex. II which defendants 1 to 3 are not competent to give. So that the term of 12 years under Ex. II has it was a debt due from the members of the tarwad and to that extent Exs. II and III are to be upheld.

10. In para 13 of the judgment it was held that the possession of the alienees was not improper and the plaintiff was not entitled to recover the properties though the plaintiffs' was upheld. Ultimately the suit was decreed as follows:

The term granted under Exs. 2 and 3 mortgages are upheld only to the extent of the premium received under Ex. IV and the value of improvements effected as it stood at the time of the mortgages.

The mortgages referred to above are the mortgages in the present suit viz., Exs. A1 and A2. It is seen from the said judgment that no contention

was put forwarded by the defendants that the transactions under Exs. A1 and A2 were leases and the mortgages. The validity of the mortgages

was upheld and the terms presented therein for redemption were alone set aside.

11. The litigation went to the High Court of Travancore. The judgment in S.A. No. 366 of 1954 on the file of the High Court of Travancore-Cochin

is marked as Ex. B3. It is observed by the High Court that the courts below had held that so far as item 3 was concerned it was only a renewal of

the earlier mortgages that was given by defendants 1 to 3. Item 3 in that proceeding is the present suit property. It was also pointed out that the

plaintiffs in that suit were not entitled to recover possession of the properties as the defendants were in possession under earlier valid transactions.

12. There was another litigation between the parties in O.S. No. 218 of 1961 on the file of the Principal District Munsif, Kuzhithurai. The plaint in

that suit is marked as Ex. A4. The prayer in the suit was for a declaration of the mortgages and Kuzhikanam possession of the plaintiffs and for

injunction restraining the second defendant from entering into the suit property. The plaintiffs in that suit are defendants 1 to 4 herein. In para 10 of

the plaint it is stated that according to the mortgages referred to earlier in the plaint the plaintiffs were in exclusive possession of the suit property as

mortgagees and they had effected valuable improvement in the suit property. In para 12 it was stated that in O.S. No. 1587 of 1119 M.E. the

terms in the mortgage deeds were cancelled while the mortgages were upheld in other respects. It was stated categorically that the plaintiffs were in

possession of the suit property as mortgagees. Thus, the basis of that suit was only the mortgage and not the lease. The plaintiffs therein, who are

defendants 1 to 4 herein, asserted repeatedly that they were in possession as mortgagees. The judgment in the suit is marked as Ex. A3. In para 14

of the Judgment it is observed as follows:

I have also found that the mortgage in favour of the plaintiffs are valid and that the plaintiffs are in possession as mortgagees.... The question as to

whether the 2nd defendant has acquired the rights in the equity of redemption because of the award or whether the mortgagors of the plaintiff retain

the right of equity of redemption is not a matter that arises for consideration in the suit.... Hence on issue 5, I find that whatever right the 2nd

defendant may have with respect to the suit property because of the oodukoor

case, still, it is not open to him to challenge the rights of the plaintiffs as mortgagees of the suit property.

Ultimately the reliefs prayed for the plaintiffs were granted.

13. Thus it is seen that in both the earlier litigations between the parties the stand taken by the defendants herein was that they were in possession under the mortgages as mortgagees. The defendants never contended at any stage of any proceeding that they were lessees and they continued to be lessees even after the execution of Exs. A1 and A.2.

14. Taking those facts along with the circumstance that there is no plea in the written statement filed in this case that the defendants are lessees and not mortgagees, I hold that the contention put forward by learned Counsel for the appellants has no merits.

15. Learned Counsel for the appellants referred to the judgment of the Supreme Court in Sambangi Applaswamy Naidu and Others Vs. Behara

Venkataramanayya Patro and Others, , to the effect that there cannot be a merger of a mortgage and a lease. That judgment turned on the facts

and circumstances of the case. The Supreme Court observed that the respondents before them were not entitled to delivery of physical possession

on the redemption of the mortgage. They held that the only effect of the execution of usufructuary mortgage deeds in that case was that the lessee's

rights were kept in abeyance and they revived upon the redemption of mortgage [underlining is mine]. The conclusion of the Supreme Court was

really based upon the facts and circumstances which indicated that the parties did not intend to put an end to the lease transaction and they had

only suspended the terms of the lease during the period of the mortgage. On the other hand, in the present case there is no indication whatever in

Exs. A. 1 and A. 2 that the parties intended to keep the lease alive so that it could revive after the redemption of the mortgage. Id Learned

Counsel invited my attention to Raman v. Baskaran Panicker (1990) 2 K.L.T. 271. It was held in that case that even if a mortgage right and

leasehold rights vest in a person, there cannot be any fusion even where two transactions are in respect of the same property. That conclusion

again depends upon the facts and circumstances. It is not stated as a proposition of law that whenever a mortgage is executed in favour of a lessee,

the leasehold right will continue and in addition thereof the lessee will have the

mortgagee's right. In this case, it is already seen that the value of improvements effected by the defendants' predecessors in title were taken into account as forming consideration for the mortgage. There is nothing in the documents Exs. A. 1 and A. 2 to show that the lessees' rights also continued to exist in spite of the mortgages. Hence that Judgment will not apply.

17. Learned Counsel places reliance on the Judgment of Mohan, J., (as he then was) in *Ganapathia Pillai v. Maheswaran Pillai* 96 L.W. 165. The question before the learned Judge was whether kanom can be construed as a lease or a mortgage. The learned Judge points out that the question can be answered not only by an interpretation of the document but also by taking into account the conduct of the parties and thereby ascertaining the intention of the parties. Thus it is clear that the intention of the parties has to be ascertained from their conduct and the language of the document. I have already referred to the conduct of the parties in the prior litigations and the only inference therefrom is that it is a mortgage and not a lease. Learned Counsel for the appellants relies on the Full Bench Judgment of the Kerala High Court in *Krishnan Nair v. Srivaraman Namboodri* 1967 K.L.T. 78. The Full Bench held that there are two stages in the process of ascertaining whether a transaction may be a lease or a mortgage and that the first stage is to construe the document to effect the transaction in the light of the surrounding circumstances and if the document is found to be a lease, it would not be necessary to proceed to the second stage. According to the Full Bench, if the document is found to be a mortgage then the Court should find out whether the transaction is in substance other than that from the document it appears or purports to be so in truth a lease. The question depends upon the circumstances of the case. I have already referred to the circumstances present in this case to show that the transaction is only a mortgage and not a lease. Learned Counsel refers to *Kunhanmina Umma v. Paru Amma* 1971 K.L.T. 163. The Supreme Court had to find out whether a document was a lease or a mortgage. The Supreme Court held that the test to be as applied in determining whether the transaction is a tenancy or a mortgage is whether the purpose of the transaction is the enjoyment of the property by the transferee or whether it is intended to secure the repayment of debt by transfer

of interest in the property and in each case it manifestly depends entirely on the terms of the transaction. It is also held by the Supreme Court that the mere description of the deed will not be decisive of the essence of the transaction. Learned Counsel for the appellants submits that there is no debt involved in Exs. A. 1 and A. 2 and they cannot be treated as mortgages. I do not agree. The debt in the present case is the value of the improvements which is treated as consideration for the mortgages. In the judgment in O.S. No. 1587 of 1119 M.E. it is observed very clearly in para 11, which I have already extracted, that as regards the improvements it was a debt due from the members of the tarwad and to that extent the documents therein were upheld. That shows that there is an element of debt in the transactions in question.

18. Learned Counsel places reliance in *Oomadevi Antharjanam v. Padmanabharu Subromoniyam* 18 Tmvancore Law Journal 1920. The

circumstance referred to therein is that there was no surrender of possession by the parties who were already in possession. In that case the

defendants had not produced either the kanom deed or any of their other title deeds and they had no explanation for the failure to produce them.

Therefore, the court held that it was wrong to lay on the Jenmi the entire burden of proof regarding the terms of the kanom and in such a case the

kanom far was required to prove the possession of the kanom. That judgment has no application to the facts of the present case. Even if there is no

factual surrender of possession by the defendants' predecessors-in-title before the execution of Exs. A. 1 and A. 2 the character of the possession

of the parties to the transaction was converted from that of lessees to that of mortgagees by consent of parties. Both parties had agreed under Exs.

A. 1 and A. 2 that the persons already in possession as lessees would continue to be in possession as mortgagees.

19. In the result, the contention put forward by learned Counsel for the appellants is rejected.

20. No other contention has been urged before me. Hence the second appeal has to fail and it is hereby dismissed. There will be no order as to

costs.