

(1933) 02 MAD CK 0033
In the Madras High Court

Subramania Mudali

APPELLANT

Vs

Semalai Goundan

RESPONDENT

Date of Decision : 24-02-1933

Acts Referred:

Transfer of Property Act, 1882 — Section 83

Citation : AIR 1934 Mad 97 : 147 Ind. Cas. 1062

Hon'ble Judges : Bardswell, J

Bench : Division Bench

Judgement

Bardswell, J.—This appeal is by the defendant in the suit. On 9th March 1917, the plaintiff, on behalf of himself and his minor son sold the lands in suit to the defendant for Rs. 2,800. On, the same day the defendant executed a counter agreement to the plaintiff by the terms of which the property was to be sold back to the plaintiff on his paying for it Rs. 2,800 of his own money. The plaintiff's case is that within the period of seven years he tendered Rs. 2,800 to the defendant and that, after the defendant had refused to receive it, he deposited the money in the Court of the District Munsif of Dharapuram on 14th February 1924, u/s 83, T.P. Act, treating the transaction of 9th March 1917 as a mortgage by conditional sale. This deposit was well within the seven years period. His petition u/s 83 was dismissed on the ground that it was not a case of mortgage by conditional sale, but that it was one of out and out sale to which that section did not apply. The plaintiff then brought the suit with which we are now concerned in which he set up that it was a case of mortgage by conditional sale and prayed that the defendant might be ordered to accept the deposited amount and execute a sale deed reconveying the properties. Alternatively it was prayed that specific performance might be given of the arrangement entered into at the time of the execution by the plaintiff of his sale deed, the result of which would be that he would obtain the same relief. A prayer for mesne profits was subjoined to the first main prayer, but no such prayer follows on the prayer for specific performance.

2. The trial Court and the first appellate Court have both found that there was no mortgage but an out and out sale, but they have both agreed that the plaintiff should be given a decree for specific performance. The first Court has also awarded to the plaintiff mesne profits at the rate of Rs. 350 a year from the date of the decree to that of obtaining possession. The lower appellate Court has confirmed the first Court's decree as to mesne profits also, stating that no question as to them has been raised before it. On this second appeal the discussion has been as to whether mesne profits should have been allowed and, if so, whether the rate at which they have been allowed is not excessive. An affidavit has been filed by the learned advocate, now deceased who appeared for the defendant on first appeal stating that he argued that the mesne profits allowed by the lower Court were arbitrary and excessive. On the other side it is represented, not that there was no argument on the point at all, but that the point was not much pressed. In these circumstances I have allowed the question of mesne profits to be argued on this second appeal.

3. One point taken for the appellant-defendant is that there was no proper tender by the plaintiff of the Rs. 2,800 required for the repurchase by him of the property. It is argued that the only tender was that made by depositing the money u/s 83, and that that deposit should be disregarded as it was made on the footing that there had been a mortgage while it has been held that there was no mortgage. Both Courts however have held that there was a tender made previous to the deposit in the month of May 1923. Here is a concurrent finding of fact and I cannot concede to the argument that that finding was not in accordance with the pleadings. Though the plaintiff did not assert that there had been any tender in the month of May, it did set up that the plaintiff made several demands on the defendant to receive the money. And the fact that the money was deposited in Court adds credibility to the oral evidence that the tender had already been made previously. Even the deposit itself should, in my opinion, be regarded as a valid tender as it has been found to be by the two Courts below. It may be that on technical grounds the defendant could refuse to receive the money, but the fact that the plaintiff or his legal advisers took a mistaken view as to how the arrangement was to be viewed in terms of strict legal phraseology does not in any way affect its terms, under which the plaintiff could buy back the property on a payment within seven years of Rs. 2,800 of his own money. It has been found by both Courts that the money deposited was the plaintiff's own money. The decision, to which I have been referred in *Berners v. Fleming* (1925) 1 Ch 264, seems to me to help the case of the plaintiff in this connexion.

4. Another point taken is that when the plaintiff's petition for the receipt of the money u/s 83 had been dismissed, he should have drawn the money out of Court and not have allowed it to remain there. I think however that he was well advised in keeping the money in Court. Though on his petition it had been found that there was not a mortgage by conditional sale he could not be sure that the same view would be taken when the matter came to a suit.

5. Then it is argued that the plaintiff was not entitled to mesne profits in that he had not prayed for any as a corollary to his alternative prayer for specific performance. It is true, as already pointed out, that a prayer for mesne profits was attached only to the prayer for the relief to be ordered of the redemption of the mortgage amount. But it seems to have been taken in both the Courts below that mesne profits were prayed for in the event either of the suit being treated as a redemption suit or a suit for specific performance. I do not think that in these circumstances the appellant-defendant can be allowed now to contend that the plaintiff was not asking for mesne profits in the event of his being granted a decree for specific performance. It is clear from para. 3, Section 19, Specific Relief Act, that compensation can be given for breach of the contract on the granting of such a decree. This is certainly a case in which such compensation should be given. The plaintiff has actually been kept out of the property till 15th December 1929 owing to the defendant's improperly refusing to accept the money that was tendered to him. On the other hand the defendant is not entitled to any compensation in the way of interest for his not having the use of the Rs. 2,800, as it was due to his own improper action that the money was not received by him : *Harendra Lal v. Maharani Dasi* (1901) 28 Cal 557.

6. What remains to be considered is what is the amount that should be allowed by way of mesne profits. Plaintiff claimed them at the rate of Rs. 450 a year, and he has been allowed them at the rate of Rs. 350 a year. The plaintiff is not objecting that this is too low a rate, but the defendant contends that it is excessive. The evidence on either side as to the value of the mesne profits is clearly on the record and I have not thought it worth while to protract this litigation further by calling for a finding as to their amount from the first appellate Court. The trial Court has dealt with this subject in para. 18 of its judgment, and in allowing Rs. 350 a year has taken a mean between the estimates on one side and the other, and it has also considered the fact that in 1920, under Ex. B. 10 acres of this suit lands out of a total of 15i acres were let out for three years at a rent of Rs. 300 a year. There seems no reason to quarrel with the rate of Rs. 350 a year in normal years, but there is a question whether so much should be allowed for the first two years after the suit was filed, that is, from 25th April 1924. All the witnesses for the plaintiff, when giving evidence in February 1926 have admitted that for the previous two or three years rain was very scarce in the village, though plaintiff in his own evidence restricts the scarcity to two items out of nine.

7. The defendant as D.W. 1 has said that no crops had been raised in the previous three years owing to lack of rain, and he has not been cross-examined as to that statement. No doubt however he is a prejudiced witness and that, I take it, is why the District Munsif has remarked that there was no reliable evidence that crops in the plaint lands have failed since the date of suit. What he says as to complete failure is not supported by the only other defence witness, Still seeing what the plaintiff's evidence sets out as to the three years before February 1926, I think it may be safely inferred that crops were not normal for

the first two years after suit. In estimating what the probable outturn would have been it has to be remembered that 6i acres are garden lands under three wells. Wells do not easily dry up and there is nothing to show that these wells did so. The evidence indicates that the garden lands are the most productive of the suit lands. I think that it will be sufficient to allow Rs, 200 a year as mesne profits for the first two years after suit and Rs. 350 thereafter. With this modification the appeal is dismissed. The appellant must bear the costs of the respondent-plaintiff.