

**(2005) 12 MAD CK 0070**

**Madras High Court**

**Case No:** S.A. No. 924 of 1995

Devaki and Another

APPELLANT

Vs

V.R. Kannappan

RESPONDENT

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**Date of Decision:** Dec. 16, 2005

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 58

**Hon'ble Judges:** K. Mohan Ram, J

**Bench:** Single Bench

**Advocate:** P.T. Asha, for the Appellant; V. Nicholas, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

@JUDGMENTTAG-ORDER

K. Mohan Ram, J.

The unsuccessful plaintiffs in O.S. No. 256 of 1984 on the file of the Third Additional District Munsif, Coimbatore who are appellants in A.S. No. 148 of 1991 on the file of the Second Additional Subordinate Court, Coimbatore, are the plaintiffs/appellants in the above appeal.

2. The case of the appellants is as follows:

The deceased first plaintiff was the owner of the suit property and he received a sum of Rs. 2,000 from the defendant as loan and executed Ex.A.3 dated 25.12.1968 and the plaintiffs claim this document to be a mortgage. It is also pleaded that as security for the repayment of the loan, the property was mortgaged and in lieu of interest possession was given to the defendant. Thereafter, another deed Ex.A-3, dated 3.3.1969 was executed by the defendant in favour of the plaintiffs agreeing to reconvey the suit property. If the plaintiffs repay the paid amounts within a period of 7 years the defendant should reconvey the property at his cost. It is the further case of the plaintiffs that they went to the defendant in the year 1978 and sought to

redeem the mortgage, but he refused to receive the amount and discharge the mortgage. It is further pleaded that in spite of notice issued by the plaintiffs, the defendant refused to receive the amount and discharge the mortgage. It is the further case of the plaintiffs that as per the provisions of the Tamil Nadu Act 13/80 the plaintiffs are "debtors" and as per relevant sections of such Act, such mortgage shall stand redeemed and the mortgaged property comes back to the plaintiffs. On the above said pleadings, the plaintiff seeks delivery of possession of the property and past and future mesne profits.

3. The suit was contested by the defendant by filing a written statement and an additional written statement contending that the plea of the plaintiff that a sum of Rs. 2,000 was received by the plaintiffs from the defendant as loan is false. The document executed by the plaintiffs is only a sale deed and the plaintiffs accepted the documents fully knowing the contents and the purport of the documents. It was also specifically denied that the document is not a mortgage deed and the possession was not given in lieu of interest. The amount was paid only as sale consideration for the property. The defendant pleaded that he was paying the kist and mutation of names has also taken place in the revenue records and the defendant is in possession and enjoyment of the property from the date of purchase on his own right. It is further pleaded that the suit is barred by limitation.

4. On the death of the first plaintiff, plaintiffs 2 and 3 impleaded themselves as legal heirs and they made a claim on the basis of the alleged Will dated 16.3.1988. The defendant has denied the execution of the Will and pleaded that the Will is a forged one.

5. On the above said pleadings the trial Court has framed the following issues:

(1) Whether the plaintiffs are entitled to get possession as prayed for ?

(2) Whether the plaintiffs are entitled to get past mesne profit at Rs. 1,200 ?

(3) Whether the plaintiffs are entitled to have future mesne profits at Rs. 400 p.m. ?

(4) To what relief ?

6. On the side of the plaintiffs, the first plaintiff has examined himself as P.W.I and another person was examined as P.W.2 and Exs. A-1 to A-12 were marked. On the side of the defendant, the defendant was examined as D.W.I and Exs.B-1 to B-10 were marked. On a careful consideration of the oral and documentary evidence let in the case, the Trial Court did not accept the case of the plaintiffs and held that Ex. A-3 is a sale deed and not a mortgage deed. Having held so, the Trial Court did not go into the other questions and dismissed the suit. The lower Appellate Court independently considered the oral and documentary evidence on record and confirmed the findings of the Trial Court. The aggrieved plaintiffs have filed above Second Appeal.

7. While admitting the above second appeal, the following substantial question of law has been formulated for consideration by this Court.

Whether Ex. A-3 is a mortgage deed or an outright sale deed?

8. It was vehemently contended by Mrs. P.T. Asha learned Counsel for the appellants that Ex. A-3 is only a mortgage and not a sale deed, in view of the execution of another deed Ex.A.4 wherein, the defendant had agreed to reconvey the property purchased by him to the plaintiff, if the sale consideration is repaid within a period of 7 years; whereas Mr. V.V. Nicholas, learned Counsel appearing for the respondent invited my attention to section 58(c) of the Transfer of Property Act and contended that Ex.A.3 cannot be deemed to be a mortgage since the condition is not embodied in Ex.A-3 whereas the clause as to reconveyance is contained in a separate document in Ex.A-4. Therefore according to the learned Counsel, the contention of the respondent has to be accepted.

9. If any document is to be considered as mortgage by conditional sale, the deed should contain any one of the three conditions as contemplated under the Act and the condition also should be embodied in the same document which effects or purports to effect the sale. In this case though the appellants contend that Exs.A-3 and A-4 are mortgages, in none of the documents any of the three conditions as contemplated u/s 58(c) of the Act does find a place. Moreover, the transaction is not by way of one document but by two independent documents. As such the plea of the appellants that it is only a mortgage by conditional sale is hit by the proviso to Section 58(c) of the Transfer of Property Act. There is nothing to show that there is a conditional sale as contemplated u/s 58(c) of the Act. The lower Appellate Court has relied upon the judgment of this Court reported in *Kasturi Venkata Subarao v. Bikkina Veeraswami* AIR 1946 Mad. 456 wherein it is held that--

Ostensible sale with a stipulation for repurchase shall not be regarded as a mortgage unless the stipulation is contained in the same document which effects the sale, the object of the amendment being to shut out an inquiry whether such a sale is a mortgage when the stipulation is contained in a separate document.

10. On a consideration of the recitals in Exs. A-3 and A-4 and the provisions contained in Section 58(c) of the Transfer Property Act, I entirely agree with the submissions made by the learned Counsel for the respondent and I am unable to agree with the contentions raised by the learned Counsel for the appellants. No condition is embodied in Ex.A-3 to treat it as a conditional sale, but it is only an outright sale deed and not a mortgage and the substantial question of law is answered accordingly.

11. The above second appeal fails and the same is dismissed. There will be no order as to costs.