**Kottiah Vs. Koteeswara Rao**

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**SooperKanoon Citation** : sooperkanoon.com/927625

**Court** : Chennai

**Decided On :** Jun-14-2012

**Judge** : V.Periya Karuppiah, J.

**Acts** : Code of Civil Procedure,(CPC) 1908 - Section 100

**Appeal No.** : Second Appeal No.317 of 2001

**Appellant** : Kottiah

**Respondent** : Koteeswara Rao

**Advocate for Def.** : Mr.Cenchurama Reddy, Adv

**Advocate for Pet/Ap.** : Mr.S.Subbiah, Adv.

**Judgement** :

Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree dated 06.07.2000 made in A.S.No.113 of 1998 on the file of the IV Additional City Civil Judge, Madras, reversing the judgment and decree dated 17.03.1997 made in O.S.No.3913 of 1995 on the file of the XII Assistant City Civil Judge, Madras.

## JUDGMENT

1. This appeal is directed against the judgment and decree passed by first appellate court in A.S.No.113 of 1998 and in Cross Objection No.1353 of 1999 dated 06.07.2000 in reversing the judgment and preliminary decree passed by the trial court in O.S.No.3913 of 1995 dated 17.03.1997 in passing a preliminary decree for redemption in the suit.

2. The appellants were the plaintiffs and the respondents were the defendants before the trial court.

3. The case of the plaintiffs before the trial court as stated in the plaint would be as follows:-

(a) The first plaintiff is the absolute owner of the schedule mentioned property. The first defendant is the professional money lender. For purchase of cows and buffaloes, the plaintiffs borrowed a sum of Rs.25,000/- agreeing to repay the same with interest at the rate of 24% p.a., from the first defendant by mortgaging the schedule mentioned property. So far, the plaintiffs paid Rs.12,000/- towards principal amount and Rs.10,890/- towards interest. The first defendant was making endorsement in two different diaries in respect of payment made by the plaintiffs towards principal and interest. But the first defendant was not issuing any receipts.

(b) During the first week of March 1993, the first plaintiff went to first defendant's house and offered him the balance of mortgage amount with interest and requested him to discharge them. The first defendant informed the first plaintiff that the mortgage amount, according to the mortgage deed, was Rs.35,000/- and not Rs.25,000/- and the rate of interest was at 36% p.a., and not 24% p.a. When it was questioned by the first plaintiff, the first defendant stated that if the amount was not paid as he demanded, he would bring the mortgaged property for public auction.

(c) Suddenly, the first defendant caused issuance of notice dated 10.06.1993 through second defendant. Hence, both the plaintiffs 1 & 2 went to first defendant and once again requested him, but he was adamant and stating that he was interested only in their property. Therefore, when the first defendant sought to bring the property by public auction on 14.07.1993, the plaintiffs filed a suit in

O.S.No.5289 of 1993 along with an application in I.A.No.10867 of 1993 on the file of the III Assistant Judge, City Civil Court, Madras for injunction to restrain the defendants from selling the suit property by bringing it in public auction and the said suit is pending. The matter was ultimately taken to the High Court, Madras in CRP.No.569 of 1994. Pending Proceedings, the plaintiffs have paid a sum of Rs.20,000/- on different occasions. In the above CRP., the High Court also was pleased to make an order for further payment of Rs.15,000/-. Due to unavoidable circumstances, the plaintiffs could not make the payment. The plaintiffs are ready to pay a sum of Rs.15,000/- as directed by the High Court of Judicature at Madras, subject to the liability to pay the amount on the suit mortgage deed.

(d) Again, the first defendant hastened to bring the property for sale in public auction on 12.06.1995. The plaintiffs are bound and liable to pay a sum of Rs.43,635/-, but the plaintiffs without prejudice and also as per the directions of the High Court have paid a sum of Rs.52,890/- in all, thus making an excess payment of Rs.9255/-. Hence, the entire mortgage money has fully and sufficiently been paid and discharged. As the correct money payable for the suit mortgage deed is under dispute, the plaintiffs are obliged to file this suit for redemption.

4. The objections of the first defendant stated in the written statement filed by him would be as follows:-

The plaintiffs borrowed from the first defendant a sum of Rs.35,000/- on 19.02.1988 and as a security for the due repayment of the said amount with interest at the rate of 24% per annum, they mortgaged the schedule mentioned property. The plaintiffs have even admitted that the first defendant advanced them a sum of Rs.35,000/- even in their reply notice dated 03.07.1993. The plaintiffs have not been paying any amount either towards the principal or interest. The first defendant issued a lawyer's notice on 27.06.1990 to the plaintiffs demanding them to pay a sum of Rs.55,300/- due by them with respect to the above mortgage. The same was duly acknowledged by them, but they neither gave a reply nor disputed the debt due to the first defendant. They promised to return the amount. Since they were making false promises, the first defendant lost all hopes in their promises and consequently, after issuing a lawyer's notice on 08.02.1993, he was constrained to advertise the bringing of the suit property for sale through the second defendant. The plaintiffs herein have not issued any reply notice to the notice dated 08.02.1993. But, they sent a reply dated 03.07.1993 to the auction notice of Sri Raj & Co., the second defendant herein. The plaintiffs would have given a reply notice to lawyer's notice dated 08.02.1993, if they had really paid the first defendant a sum of Rs.12,000/- towards principal and a sum of Rs.10,890/- towards interest as alleged by them. It is false to state that the earlier suit filed by the plaintiffs in O.S.No.5289 of 1993 is pending. The plaintiffs have deliberately withdrawn the earlier suit despite directions from the Hon'ble High Court to the trial Court to dispose of the above suit immediately. The plaintiffs have paid only a sum of Rs.30,000/- during the pendency of CRP.No.569 of 1995. The present suit is barred by res judicata, as the averments in the plaint filed by the plaintiffs in O.S.No.5289 of 1993 are repeated in the plaint filed in the present suit. The earlier suit was for permanent injunction and the present suit is for redemption. The plaintiffs cannot ask for redemption without paying the amount due to the first defendant. The plaintiffs are liable to pay a sum of Rs.63,200/- as on 09.09.1995. The present suit is filed by the plaintiffs with a view to evade the payment of money due to the first defendant. Hence, the suit may be dismissed with exemplary costs.

5. The second defendant remained ex parte in the suit.

6. The trial court had framed necessary issues and entered trial. After appraising the evidence adduced on either side, the trial court had passed a preliminary decree with a direction either to pay a sum of Rs.15,000/- with the first defendant or to deposit the same before the Court within 60 days from the date of the decree without costs. Aggrieved against the said judgment and preliminary decree, the first defendant preferred an appeal before the first appellate court in A.S.No.113 of 1998 challenging the same. However, the plaintiffs have raised a cross objection in Cross.Obj.No.1353 of 1999 challenging the direction to pay Rs.15,000/-, but requested to order redemption without any payment. After hearing both sides, the first appellate court had allowed the appeal filed by the first defendant, but no finding has been given in the Cross Objection filed by the plaintiffs.

7. Aggrieved by the judgment and decree passed by the first appellate court, the plaintiffs have preferred the present Second Appeal challenging the judgment and decree passed by the first appellate court.

8. On admission, this Court had formulated the following substantial questions of law for consideration in this appeal:-

1) Whether the court below is correct in not drawing the inference against the first respondent when he withheld the important documents in his possession which can throw lightly on the facts as issue ?

2) Whether the mortgagee is in a position to render an account of all the amounts received by him from the mortgagee on whom the onus of proof lies, with regard to the payment of mortgage money ?

3) When the mortgagee standing in a position to render the accounts for the moneys received by him towards the mortgage debt, whether the withholding the account books be not sufficient proof to show that his case was not reliable, and thay an inference be not drawn against the mortgagee and

4) Whether the lower Appellate Court can dismiss a suit for redemption without determining the mortgage money, under Order XXXIV Rule 7 of the Code of Civil Procedure, and without passing a preliminary decree ?

9. Heard Mr.S.Subbiah, learned counsel for the appellants / plaintiffs and Mr.Chenchurama Reddy, learned counsel for the first respondent / first defendant. No appearance for the second respondent.

10. The learned counsel for the appellants / plaintiffs would submit in his argument that the trial court had come to a conclusion of decreeing the suit and a preliminary decree was passed with a direction either to pay a sum of Rs.15,000/- to the first respondent or to deposit the same into Court within a period of 60 days from the date of the decree, after appraising the evidence recorded by it. He would further submit that the appeal preferred by the first defendant against the said judgment and preliminary decree of the trial court was not considered by the first appellate court and the first appellate court did not pursue the evidence adduced by both

parties in order to come to a finding as to whether no amount is due or if any amount is due what would be the money payable by the mortgagors (plaintiffs) in order to pass a preliminary decree for redemption in the suit or to order redemption without payment when all the moneys were found paid and discharged by the plaintiffs, but the first appellate court had simply allowed the appeal without passing any orders in the Cross Objection preferred by the plaintiffs and thereby set aside the judgment and preliminary decree passed by the trial court. He would also submit that by allowing the appeal, the suit filed by the plaintiffs was consequently dismissed before the trial court filed for redemption of mortgage, which would be against the provisions of Order 34 CPC. He would also submit that the first appellate court should go into the question of calculation with the help of evidence adduced before the trial court and to give a finding on facts as to whether the amount reached by the trial court for the grant of redemption of the mortgage is correct or any other further sum to be paid or no amount need be paid for passing a redemption decree. He would also submit that the first appellate court had grossly failed to dismiss the redemption suit by allowing the appeal and therefore, it has to be interfered and set aside. He would also submit that the plaintiffs, who are entitled to deduct the sums paid by them during the subsistence of the mortgage which were endorsed in a pocket note book should also have been given credit to, apart from the payment of Rs.35,000/- on various occasions, i.e., on 12.07.1993 a sum of Rs.5,000/-, on 12.06.1995 a sum of Rs.10,000/-, on 16.06.1995 a sum of Rs.3,000/-, on 22.06.1995 a sum of Rs.2,000/- and on 24.04.1997 a sum of Rs.15,000/- deposited as per the direction in the preliminary decree into Court. He would also submit that those amounts should have been deducted from the amount actually liable to be paid, if any. He would also submit that the contractual rate of interest at 24% p.a., even if calculated, it would not come to the calculation submitted by the first respondent in the calculation memo. He would further submit that the said sums paid or deposited by the plaintiffs were only as per the direction of the trial court or High Court in CRP.No.569 of 1994. He would, therefore, submit that the judgment and decree passed by the first appellate court is quite contrary to law and facts and therefore, it has to be interfered and set aside and a correct calculation may be made on the basis of the evidence adduced on either side. If there is any outstanding amount payable by the plaintiffs towards suit mortgage, the plaintiffs are ready to either pay or deposit within the time to be fixed and if there is no liability to repay any amount to the first defendant, a suitable redemption decree on foreclosure may be passed and thereby, the appeal may be allowed.

11. The learned counsel for the first respondent would submit in his argument that the claim of the plaintiffs that there was no amount payable to the first defendant on the foot of the mortgage was found to be not correct by the first appellate court and therefore, the appeal filed by the first defendant was allowed by the first appellate court. He would also submit that the trial court had not followed any proper procedure to calculate the mortgage money to be paid by the plaintiffs to the first respondent and had indulged in fixing the outstanding money on guessing and therefore, the first appellate court was not happy with the judgment of the trial court and therefore, the entire judgment and decree of the trial Court were set aside. He would also submit that the first appellate court should also calculate the interest and to arrive at a conclusion to pass a decree, but it allowed the appeal with an implied finding that the claim of the plaintiffs that no amount need be paid to the first respondent / mortgagee towards the mortgage amount. He would also submit that the first appellate court having found that the appeal was to be allowed and the claim of the plaintiffs were not sustainable, it could have been impliedly understood that the cross objection was dismissed. He would, therefore, submit that the first appellate court had correctly analysed the issue and rejected the claim of the plaintiffs, but had failed to found that the plaintiffs ought to have paid the entire mortgage money and the interest amount payable till date after deducting the admitted payments with costs. He would also submit a calculation memo in order to enable the court to correctly calculate the amount payable by the plaintiffs to the first defendant for passing a redemption decree. He would, therefore, submit that suitable orders may be passed to ascertain the correct amount outstanding to pay for the mortgaged debt by the plaintiffs to the first defendant and the suit may be ordered accordingly.

12. I have given anxious consideration to the arguments advanced on either side.

13. The trial court as well as the the first appellate court have discussed the facts based upon evidence and had come to the conclusion that the amounts said to have been paid by the plaintiffs towards the discharge of mortgage debt was not correct. The mortgage executed by the plaintiffs on 19.02.1988 for a sum of Rs.35,000/- with interest at 24% p.a was admitted by both parties. The payments said to have been made by the plaintiffs daily towards interest which was said to have been endorsed in a pocket note book, was not established. However, the payments of Rs.35,000/- made on various dates by the plaintiffs on the directions of the Court, was admitted. Therefore, the said sum of Rs.35,000/- has to be deducted from out of the total liability payable by the plaintiffs to the first defendant in respect of the mortgage debt. As already pointed out, the other payments said to have been made by the plaintiffs as seen from the evidence cannot be relied upon since both the courts below, have come to the conclusion on facts that no such amount had been paid. Therefore, the outstanding amount would be the principal amount with simple interest at 24% p.a., less Rs.35,000/- paid by the plaintiffs as per the orders of the trial court and by the orders of this court made in CRP.No.569 of 1994. The calculation memo filed by the appellants as well as the first respondent are not in accordance with the admitted payments made by the parties as aforesaid.

14. Therefore, it has become necessary for this Court to ascertain as to whether any money is payable by the plaintiffs to the first defendant and if it is so, what would be the correct amount. Since the trial Court as well as the first appellate Court did not come to a correct conclusion regarding the outstanding money or in reaching to a decision for decreeing the suit for redemption, this Court has to necessarily indulge in finding a correct fact so as to render justice. Accordingly, the interest calculation has to be made on and from 19.02.1988, the date of mortgage to ascertain the interest amount on Rs.35,000/- at 24% p.a. Whenever the money is/were paid by the plaintiffs to the first defendant or on depositing it before the Court, those moneys were to be deducted out of interest first and if there is any residue in payment, it should be adjusted with the principal and a calculation has been made in that manner so as to reach the correct outstanding money.

15. The interest payable on the principal sum of Rs.35,000/- at 24% p.a. is Rs.700/- per month. When the said interest is calculated from 19.02.1988 to 12.07.1993, it comes to Rs.45,336/- after deducting the sum of Rs.5,000/- paid on 12.07.1993, the outstanding interest payable will be Rs.40,336/-. The interest from 12.07.1993 to 12.06.1995 when a sum of Rs.10,000/- paid, the interest on Rs.35,000/- principal would be Rs.16,100/- and the total money payable as on 12.06.1995 would be Rs.56,436/- and after deduction of Rs.10,000/- it is arrived at Rs.46,436/-. The interest payable from 12.06.1995 to 16.06.1995 and the interest payable from 16.06.1995 to 22.06.1995 and the interest payable from 22.06.1995 to 24.04.1997 are if calculated and added with subsequent interest payable till the end of June 2012 is calculated, the total comes to Rs.1,34,820/- and when it is added with the outstanding money already calculated at Rs.46,436/- would be arrived at Rs.1,81,256/- and out of this amount, the payment made on 16.06.1995 for Rs.3000/-, on 22.06.1995 for Rs.2000/- and on 24.04.1997 for Rs.15,000/- have to be deducted and after deduction, it would come to Rs.1,61,256/-, which is towards the interest payable up to the end of June 2012. With this interest amount, the principle Rs.35,000/- if added, the total liability at the end of June 2012 payable by the plaintiff to the first defendant would be Rs.1,96,256/-. This would be the amount payable by the plaintiffs to the first defendant for the return of mortgage executed by the plaintiffs in favour of the first defendant on 19.02.1988 in respect of the mortgaged properties. The first appellate court did not venture into such calculation or to ascertain the correct money payable by the plaintiffs, who want to redeem the mortgage, but had simply allowed the appeal by holding that the trial court's judgment was purely on guessing. If really the trial Court was not correct in arriving to a correct conclusion, the first appellate court being the fact finding Court, has to correct the errors committed by the trial Court and to pass a decree of redemption. According to Order 34 Rule 7 CPC, the Court ought to have given a finding in accordance with the said provisions. The order passed by the first appellate Court in allowing the appeal would dismiss the claim of the plaintiffs, which would mean no order has been passed in the redemption suit. Apart from that, the first appellate Court did not give a finding in the Cross Objection filed by the plaintiffs. In such circumstances, I could see that the judgment and decree passed by the first appellate Court cannot be considered as made in accordance

with law. It ought to have ventured into the correction of the trial Court's judgment and to give a finding on the outstanding money payable by the plaintiffs. Since the finding of the trial Court that the plaintiffs were only liable to pay a sum of Rs.15,000/- towards the mortgage ought to have been set aside and the correct money payable by the plaintiffs should have been substituted in the place. But it was not done by the first appellate court. Therefore, I find the questions of law in this appeal are to be decided against the first respondent.

16. However, on ascertaining the said sum of Rs.1,96,256/- till the end of June 2012, it has become necessary for this Court to alter the finding of the trial Court by setting aside the judgment and decree passed by the first appellate Court. The time for payment of the said sum of Rs.1,96,256/- with proportionate costs in the suit could be extended till the end of 31st July 2012, to which the plaintiffs are liable to pay a total sum of Rs.1,96,956/- (Rs.1,96,256/- plus Rs.700/-), in default to pay the said sum, the plaintiffs to pay interest at 24% p.a., on the principal amount till it is paid. On such payment of the entire money payable as aforesaid by the plaintiffs to the first defendant within such time, the first defendant is directed to return all the title deeds and the mortgage deed with an endorsement of discharge over the mortgage deed.

17. With the aforesaid directions, the appeal is partly allowed and a preliminary decree for redemption is passed accordingly in the suit filed by the plaintiffs before the trial Court in O.S.No.3913 of 1995 with proportionate costs. Time for said payment is till 31st July 2012. No costs in this appeal.