



S.A.(MD).No.386 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 01.08.2024

DELIVERED ON : 25.10.2024

CORAM

THE HON'BLE MR.JUSTICE G.ILANGO VAN

S.A.(MD).No.386 of 2024
and C.M.P.(MD).No.9129 of 2024

R.Chinnammal ... Appellant/Respondent/Defendant

Vs.

G.Varatharajaperumal ... Respondent/Appellant/Plaintiff

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, to set aside the Judgment and Decree dated 20.12.2022 in A.S.No.26 of 2022 on the file of the II Additional District Court, Tiruchirappalli reversing the Judgment and Decree dated 22.12.2021 in O.S.No.715 of 2018 on the file of the Subordinate Court, Lalkudi.

For Appellant : Mr.H.Lakshmi Shankar

For Respondent : Mr.M.Muthu Geethayan



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JUDGMENT

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This appeal has been filed against the Judgment and Decree dated 20.12.2022 in A.S.No.26 of 2022 on the file of the II Additional District Court, Tiruchirappalli reversing the Judgment and Decree dated 22.12.2021 in O.S.No.715 of 2018 on the file of the Subordinate Court, Lalkudi.

2.The averments of the plaint in brief:

On 11.04.2014 the defendant's husband by name C.Ravi borrowed a sum of Rs.3,00,000/- from the plaintiff by depositing the title documents with intention to create equitable mortgage. The mortgage deed was registered and as per the mortgage deed Ravi undertook to pay 2% interest and the time was fixed as 2 years. In spite of repeated demands the defendant's husband Ravi did not pay the money either towards the principal amount or the interest. Ravi died without discharging the mortgage. The defendants are the only legal heirs of the deceased Ravi. Hence, the suit.

3.Statement was filed disputing the genuineness of the document.



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According to the defendant the mortgage deed is a fraudulent document.

There was no necessity for her husband namely Ravi to borrow money from the plaintiff by mortgaging the properties.

4.On the basis of the pleadings, the trial Court formulated two issues.

1. Whether the plaintiff is entitled for the preliminary decree as prayed for?
2. Whether the interest claimed by the plaintiff is correct?
3. To what other relief?

4.On the side of the plaintiff 3 witnesses were examined. One documents was marked. On the side of the defendant 1 witness was examined and no documents were marked.

5.At the conclusion of the trial process the suit was dismissed stating that Ex.A1, the mortgage deed was not established as per law by examining any one of the attesting witnesses. Against which, the appeal was preferred. The appellate Court by the judgment and decree dated



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20.12.2022 in A.S.No.26 of 2022, allowed the appeal and decreed the suit as prayed for in the plaint. Against which, this second appeal is preferred by the defendant.

6.At the time of the admission, the following substantial question of law was framed.

- 1. Whether the First Appellate Court has misdirected itself in concluding that the mortgage deed is proved by mere identification of the photograph in the document ignoring that the execution of the document by the executant has not been proved in the manner known to law by examining an attesting witness as per the Section-68 of Indian Evidence Act?*
- 2. Whether the First Appellate Court is justified in overlooking the fact that the attesting witness PW3 only filed a proof affidavit and did not appear for cross-examination and did not identify the signature of the executant and his signature before the court and therefore, his proof affidavit has no evidentiary value?*
- 3. Whether the First Appellate Court is correct and justified in decreeing the suit when the cause of action pleaded in the plaint about there being equitable mortgage, has been disproved?*

7.The background facts: The original mortgagor namely Ravi, who is the husband of the defendant is no more. After the death of the original



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mortgagor, the the suit was filed by the mortgagee against the wife, seeking recovery of money and for preliminary decree of mortgage, since Ravi was dead on date of the plaint. None was available on either side to prove the mortgage. In fact the defendant contended that there was no necessity for her husband to mortgage the property or for obtaining loan amount. Since the mortgage was denied by the defendant the appellant herein, who is the plaintiff was duty bound to prove the mortgage by examining any one of the attesting witnesses. The finding of the trial Court is that when there is specific denial on the part of the respondent it is the duty of the appellant to prove the same. In spite of the examination of PW2, the mortgage and passing of the mortgage money was not established. No steps were taken by the plaintiff to send the document for Expert Examination over the signature issue. Apart from that it is also found that as per Section 68 of the Indian Evidence Act, the document ought to have been proved by examining any one of the attesting witnesses. PW1 was one of the attesting witness. He filed chief and affidavit and later failed to appear for cross examination. So his evidence was closed by the Court. So according to the trial Court, the plaintiff failed to prove Ex.A1 and so non suited.



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8. But, as mentioned above, the appellate Court reversed the finding and recorded a finding that there is no specific denial by the respondent/defendant during the course of trial with regard to the thumb impression. But, further he admits the photograph found in the mortgage deed. The scribe was examined as PW2. Except the scribe to prove the mortgage none appears. The non cross examination of PW3 does not affect the case of the plaintiff. Apart from that it is also stated that no steps were taken by the defendant to disprove the document. With those findings, it recorded reversal finding.

9. The learned counsel for the appellant would submit that Section 68 of the Indian Evidence Act has not been properly complied by the respondent, which has statutory obligation on the part of the plaintiff to examine any one of the attesting witnesses. When one of the attesting witnesses was examined in chief, but did not turn up for cross examination, his evidence cannot be considered at all. Simply because the photograph is admitted by the appellant, does not take away the legal obligation to prove the document. So the conclusion reached by the appellate Court is not valid under law. It must be interfered.



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10. Per contra, the learned counsel for the respondent would submit that Ex.A1 is neither a simple mortgage nor usufructuary mortgage. According to him, it is equitable mortgage created by deposit of title deeds. He is referring Section 58 (f) of the Transfer of Property Act extracted hereunder.

***“58. “Mortgage”, “mortgagor”, “mortgagee”,
“mortgage-money” and “mortgage-deed” defined.***

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.....

Mortgage by deposit of title-deeds.—

Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.”

11. To show that it is only a mortgage by depositing of title deeds, he relied upon the recitals. The relevant portion is extracted hereunder



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for better appreciation.

"2014ம் வருடம் ஏப்ரல் மாதம் 11 தேதி, திருச்சிராப்பள்ளி - 620 012, கிராப்பட்டி, ஸ்டேட் பேங்க் ஆபிசர்ஸ் சாலனி முதல் தெரு, கதவு நெ.2/3ல் வசிக்கும் திரு.கோபாலகிருஷ்ணன் அவர்கள் குமாரர் திரு.G.வரதராஜ பெருமாள் அவர்களுக்கு,

திருச்சிராப்பள்ளி மாவட்டம், மண்ணச்சநல்லூர் வட்டம், அழகிய மணவாளம் கிராமம், குடித்தெரு, கதவு நெ.1/43ல் வசிக்கும் P.சித்திரன் அவர்கள் குமாரர் திரு.C.ரவி (Railway P.F.No.060C000178) ஆகிய நான் எழுதிக் கொடுத்த ஈட்டுக்கடன் பத்திரம் என்னவென்றால்,

என்னால் கடந்த 23.09.1997 தேதியில் திரு.சுப்பிரமணிய வேளார் என்கிற துரைசாமி அவர்களிடமிருந்து இதனடியில் சொத்து விவரத்தில் விவரித்துள்ள காலி மனையை ஸ்ரீரங்கம் சார்பதிவாளர் அலுவலகத்தில் புக் 1 தொகுதி 2020 பக்கம் 131 முதல் 133 வரை பத்திர எண் 4516/1997 என்ற கிரைய ஆவணப்படி கிரையம் பெற்று, மேற்படி மனையில் என் சொந்த ஐவேஜைக் கொண்டு ஓட்டுவில்லை வீடு வகையறா சர்வடக்கமாக கட்டி, மேற்படி சொத்திற்கு என் பெயரில் வரிவிதிப்பு, மின் இணைப்பு ஏற்படுத்தி. மேற்படி சொத்தை யாதொரு வில்லங்கத்திற்கும் உட்படுத்தாமல் என் சுவாதீன அனுபவத்தில் வைத்து ஆண்டனுபவித்து வருகின்றேன்.

ஆக மேற்படி விவரப்படி எனக்கு சொந்தமானதும், இதனடியில் சொத்து விவரத்தில் விவரித்துள்ளதுமான சொத்தை நான் தங்களிடம்



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ஈடாக காட்டி, தங்களிடமிருந்து பெற்றுக் கொண்ட தொகை ரூ.3,00,000/- (ரூபாய் மூன்று லட்சம் மட்டும்).

மேற்படி விவரப்படி நான் தங்களிடமிருந்து பெற்றுள்ள கடன் தொகை ரூ.3,00,000/- (ரூபாய் மூன்று லட்சம் மட்டும்)க்கு நாளது தேதி முதல் 2 (இரண்டு) வருட கால கெடுவிற்கு மாதம் ஒன்றுக்கு ரூ.100/-க்கு வட்டி ரூ.2/-(ஒரு இரண்டு) வீதம் வட்டி கணக்கீட்டு அந்தந்த மாதம் முடிந்தவுடன் அடுத்து வரும் ஆங்கில மாதம் 10ம் தேதிக்குள் வட்டியும், மேற்படி கெடு முடிவில் அசல் கடனையும் திரும்ப செலுத்தி விட சம்மதிக்கிறேன். அப்படி செலுத்த தவறினால் பாக்கி நிற்கும் தொகைக்கு வட்டி சேர்த்து கொடுக்கவும் சம்மதிக்கிறேன்.

மேற்படி கெடு முடிவில் யாதொரு வட்டி அசல் பாக்கியில்லாமல் செலுத்தி இந்த ஈட்டுக்கடனை செல் வைத்து சகல ஆதரவுகளையும் வாபஸ் பெற்றுக் கொள்ள சம்மதிக்கிறேன். அப்படி செலுத்த வில்லையென்றால் தாங்கள் எடுக்கும் கோர்ட் நடவடிக்கைக்கு நாங்கள் உட்படுவேன் என்றும் மேலும் அதற்கான செலவுகளையும் நானே ஏற்றுக் கொள்ள சம்மதிக்கிறேன். இந்த ஈட்டுக்கடன் பத்திரத்திற்குக் கட்டுப்பட்ட சொத்தில் யாதொரு வில்லங்கமும் இல்லையென்று உறுதி கூறுகின்றேன். அப்படி ஏதேனும் இருந்து வெளிப்பட்டால் அதை தங்களுக்கு யாதொரு நஷ்டமும் ஏற்படாமல் தீர்த்துக் கொடுக்க சம்மதிக்கிறேன்.

இதற்கு ஆதரவாக கடந்த 23.09.1997 தேதிய பத்திர எண் 4516/1997 அசல் கிரைய ஆவணத்தையும் மற்றும் அதற்குண்டான இதர



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ஆதரவுகளையும் தங்கள் வசம் ஒப்படைத்து
விட்டேன். இந்தப்படிக்கு நான் மனப்பூர்வமாகச்
சம்மதித்து எழுதிக் கொடுத்த ஈட்டுக்கடன்
பத்திரம்."

12. So reading of the above said recitals shows that it is a document of mortgage by depositing of title deeds. Originally that mortgage was permitted only in three metropolitan cities namely Calcutta, Madras and Bombay. But, its powers were conferred upon the State Government concerned to issue notification specifying the areas, in which, the above said mortgage can be effected. In pursuance of the above said powers conferred by the State Government, the Government of Tamil Nadu has time to time issued notifications. According to him, mortgage by deposit of title documents need not be proved by examining any one of the attesting witnesses.

13. Some of the notifications are placed by the Registry before this Court. But, so far as this subject is concerned, it appears that the document was executed in Mannachanallur Sub Registrar jurisdiction. So whether notification was issued by the Government of Tamil Nadu in this regard is not clear on record. So it is for the parties to bring the



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concerned notification to the notice of the Court. The respondent has not produced any notification before this Court.

14.In view of the same, I am of the considered view that the matter may be remitted back to the trial Court for fresh consideration and to find out whether notification was issued by the Government of Tamil Nadu as per the powers conferred as per Section 58(f) of the Transfer of Property Act. For that purpose the decree and judgment of the trial Court as well as the appellate Court are set aside. The matter is remitted back to the trial court to decide this issue afresh. The parties are at liberty to lead further pleadings, evidences in oral and document, if they so desired. Considering the oldness of the matter, there shall be a direction to the trial Court to dispose of the present suit as early as possible.

15.With the above said directions, this second appeal stands disposed of. No cost. consequently, connected miscellaneous petition is closed.

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Index : Yes / No
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To

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- 1.The II Additional District Court, Tiruchirappalli.
- 2.The Subordinate Court, Lalkudi.
- 3.The Section Officer,
E.R.Section/V.R.Section,
Madurai Bench of Madras High Court, Madurai.



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