IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.04.2015

CORAM

THE HONOURABLE MS. JUSTICE R.MALA

S.A.No.1225 of 2006

1.Keerthy

2.K.Vijayalakshmi .. Appellants/Appellants/ Defendants

Vs

Bank of Baroda,
Pondicherry Branch,
Rep. by its Branch Manager,
Vellala Street, Pondicherry-1... Respondent/Respondent/ Plaintiff

Prayer: Second appeal filed under Section 100 of CPC against the Judgment and Decree dated 26.02.2006 in A.S.No.7 of 2006 on the file of the Principal District Court, Cuddalore, confirming the Judgment and Decree dated 22.09.2005 in O.S.No.66 of 2004 on the file of the Principal Subordinate Court, Cuddalore.

For Appellants : Ms.J.Starli
for Mr.V.Raghavachari

For Respondent : Mr.S.Mohan

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 26.02.2006 in A.S.No.7 of 2006 on the file of the Principal District Court, Cuddalore, confirming the Judgment and Decree dated 22.09.2005 in O.S.No.66 of 2004 on the file of the Principal Subordinate Court, Cuddalore.

2.The averments made in the plaint are as follows:-

The first defendant availed a Demand Loan (BKCC) to the limit of Rs.2,25,000/- on 24.12.1999 from the plaintiff bank for the agricultural purpose of cultivating paddy and tapioca. On the same day, the first defendant executed a Demand promissory note in favour of the plaintiff Bank for Rs.2,25,000/- agreeing to repay the same on demand with interest @ 16% per annum plus interest tax as applicable. He has also executed a letter of continuing security, agreeing for repayment of the loan in one annual installment with interest @ 16% per annum, charges, etc. The second defendant who is the wife of the first defendant stood as guarantor for the loan availed by him and both of them jointly executed an Agreement of Hypothecation of Crop-cum-Guarantee in favour of the plaintiff Bank. The first defendant had further secured the loan by extending equitable mortgage which was already created by him in connection with two other Term Loans availed by him on 19.11.1997. The defendants have further acknowledged their liability towards the plaintiff bank by a letter of acknowledgment of debt dated 05.08.2002 and thereafter they have not chosen to regularize the account despite a reminder sent by the plaintiff bank on 08.08.2003. The plaintiff bank has also issued a lawyers notice on 31.05.2004 calling upon the defendants to repay the amount due to the bank. So, as per the statement of accounts the defendants are jointly and severally liable to pay a sum of Rs.3,35,120/- as on 31.05.2004 to the plaintiff bank. The defendants received the notice but did not sent any reply. Hence, the plaintiff was constrained to file a suit for recovery of money.

3.The gist and essence of written statement filed by the defendants are as follows:

The defendants deny each and every allegations contained in the plaint. They have stated that they have not availed any loan on 24.12.1999. They further submitted that on 31.05.2004 the plaintiff bank issued a lawyers notice calling upon them to repay the alleged amount due to the bank under the alleged two loans and for which a suitable reply was sent by them. The defendants submitted that they never created any equitable mortgage and there is no any extension of the alleged equitable mortgage by any of the defendants. It is further submitted that the first defendant is suffering with CVA-Right Facio Brachial Monoparesis Global Dysphasia Predominantly expressive systemic hypertension and having a prolonged medical treatment and during the month of July and August 2002 he was under medical treatment as inpatient and taking advantage of his illness, the plaintiff bank officials have created several documents against the defendants without any basis. It is further submitted that the letter of acknowledgment of debt dated 05.08.2002 is also a forged one and the first defendant has neither executed nor signed. Hence, he prayed for dismissal of the suit.

4.The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1, D.W.1 and Exs.A1 to A14, decreed the suit. Aggrieved against the judgment and decree of the trial court, the defendants preferred an appeal in A.S.No.7 of 2006 on the file of the Principal District Court, Cuddalore.

5.The learned First Appellate Court has considered the argument advanced on either side and framed necessary point for consideration and confirmed the Judgment and Decree passed by the Trial Court and dismissed the appeal. Against the Decree and Judgment of the first Appellate Court, the present second appeal has been preferred by the defendants.

6.At the time of admission of the above second appeal, the following substantial questions of law were framed for consideration.

> "1.Whether the courts below are justified in allowing documents to be marked in evidence that are not even the subject matter of pleadings and proof?
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> 2.When the plaintiff had admitted that there is no cause of action based on Ex.A1 and that the said loan transaction had been discharged, whether the courts below are justified in decreeing the suit presuming the existence of second loan?"

7.Challenging the concurrent judgment and decree of both the Court below, the learned counsel for the appellants/defendants would submit that they have not given any acknowledgment of debt and the suit is barred by limitation. She would also submit that to prove Ex.A9/letter of acknowledgment of debt, no attestor has been examined. She would further submit that in the judgment of the First Appellate Court itself it has been mentioned that the appellants/defendants has paid a sum of Rs.1,25,000/- on 31.10.2001 and Rs.1,28,000/- on 06.11.2001, which was not given credit to. She further submitted that the appellants/defendants have not deposited any title deeds and created equitable mortgage. She would also submit that during the pendency of the appeal, the Central Government has implemented a scheme, namely, Agricultural Debt Waiver and Debt Relief Scheme, 2008 and as per that Scheme, since they possess agricultural land less than 5 acres, they are entitled to waiver of loan amount. But even though the appellants given an application that has not been considered. Hence, she prayed for setting aside the judgment and decree passed by both the Courts below.

8.Refuting the same, the learned counsel appearing for the respondents would submit that the execution of Ex.A1/Promissory Note and Ex.A9/letter of acknowledgment of debt has been admitted by D.W.1. The first defendant who denied the signature has not been examined before this Court and that factum was rightly considered by the First Appellate Court. So, the execution of Ex.A9 has been proved. Further, the appellants/defendants have deposited the title deeds and created equitable mortgage. Hence, the suit can be filed within 12 years, but here the suit has been filed within 3 years from the date of execution of Ex.A9 and so, the suit is not barred by limitation. He further submitted that the Central Government implemented the scheme, namely, Agricultural Debt Waiver and Debt Relief Scheme, 2008, only for the year 2008 alone and at that time, the appellants have not approached the bank for waiver. So, the scheme will not be applicable to them. Hence, he prayed for dismissal of the appeal.

9.Considered the rival submissions made on both sides and also perused the typed set of papers.

10.In the written statement, the defendants/appellants have denied the execution of mortgage deed, promissory note and acknowledgment of debt. But whereas the person competent is the first defendant and he has not appeared before the Court and examined himself as witness, only the power agent alone appeared and examined as D.W.1 and no reason has been assigned as to why he was not examined before the Court. The non-examination of the first defendant, who is the executant of the document, namely, Ex.A1 and Ex.A9, is fatal to the case of the property. Further D.W.1 who is the power of agent of the first defendant in his cross examination has fairly conceded that the signature in Ex.A1 and Ex.A9 belongs to the first defendant. In such circumstances, the arguments advanced by the learned counsel appearing for the appellants that to prove Ex.A1 and Ex.A9 no attestor has not been examined does not merit acceptance. So, I am of the view that the respondent herein has proved that Ex.A1 and Ex.A9 are true and genuine documents.

11.It is pertinent to note that even though the appellants/defendants raised the plea of limitation, once Ex.A9 is held as true and genuine and it was executed by the defendants on 05.08.2002, the suit filed by the plaintiff was on 21.06.2004 i.e. within 3 years from the date of execution of Ex.A9. Hence, the suit is not barred by limitation. Furthermore, the appellants/defendants have deposited the title deeds and created equitable mortgage and the suit was filed by the plaintiff on 21.06.2004 i.e. within 12 years from the date of creation of equitable mortgage. Hence, the suit is not barred by limitation.

12.The learned counsel appearing for the appellants would mainly focusing upon the scheme, viz., Agricultural Debt Waiver and Debt Relief Scheme, 2008 implemented by the Central Government and submit that since the appellants possess agricultural less than 5 acres, they are entitled to waiver of loan and the appellants approached the concerned bank for availing the waiver benefit of the scheme. But according to the learned counsel appearing for the respondent the scheme implemented by the Central Government, viz., Agricultural Debt Waiver and Debt Relief Scheme, 2008 has been implemented only for one year. Considering the same, I am of the view that the arguments advanced by the learned counsel appearing for the appellants that they are entitled for waiver of the loan as per Agricultural Debt Waiver and Debt Relief Scheme, 2008 does not merit acceptance.

13.It is also pertinent to note that even though the appellants herein have filed the statement of accounts and pleaded discharged, they have not filed any scrap of document to prove the discharge. It is well settled dictum of the Hon'ble Apex Court that the person who pleaded discharge has to prove the same. But here except Ipse Dixit of D.W.1, who is the power agent of the first defendant no evidence has been shown that the appellants/defendants pleaded discharge. Furthermore as per Ex.A9/letter of Acknowledgment of debt given by the appellants/defendants on 05.08.2002, they are liable to pay a sum of Rs.2,47,990/- and the suit has been filed on 21.06.2004. In such circumstances I am of the view that both the Courts below have considered all the aspects in proper perspective and came to the correct conclusion. So, the decree and judgment passed by both the Courts below does not warrant any interference and the same are hereby confirmed. The second appeal is liable to be dismissed and it is hereby dismissed.

14.In fine,

- Second appeal is dismissed with cost.
- The decree and judgment passed by both the Courts below are hereby confirmed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

cse

To

1.The Principal District Court,
Cuddalore.

2.The Principal Subordinate Court,
Cuddalore.

3.The Record Keeper,
V.R.Section, High Court, Chennai.

1 cc to Mr.V. Raghavachari, Advocate, sr. 24017
1 cc to Mr.S.Pandurangan, Advocate, sR. 23761

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TEJ (CO)
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