

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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SECOND APPEAL No.1165 of 1999

JUDGMENT:-

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This Second Appeal, under Section 100 of the Code of Civil Procedure ('the Code' for brevity) was originally filed by the unsuccessful defendants 1 and 2 assailing the decree and judgment dated 08.07.1999 of the learned District Judge, Krishna at Machilipatnam, passed in A.S.No.107 of 1992, whereby, the learned District Judge, while allowing the said appeal, had set aside the decree and judgment dated 22.07.1992 of the learned I Additional District Munsif, Machilipatnam, passed in O.S.No.444 of 2009 and had decreed the said suit filed by the sole plaintiff/respondent herein against defendants 1 and 2 for recovery of principal sum of Rs.10,000/- with interest and costs on the foot of a registered mortgage deed.

1.1. Be it noted that during the pendency of the second appeal, the first defendant/first appellant had died and the third appellant is brought on record, being the Legal Representative of the deceased first appellant/1st defendant.

2. I have heard the submissions of the learned counsel for the appellants 2 and 3 and the learned counsel for the respondent/plaintiff. I have perused the material record.

3. The parties in this appeal will hereinafter be referred to as the defendants 1 and 2 and the plaintiff for convenience and clarity.

4. At the time of admission of this second appeal, this Court had taken note of the substantial questions of law, which are mentioned in ground no.15 and the same are as follows:-

- 1. Whether the LAC erred in reversing the decree of trial Court when the suit document Ex.A.1 itself is found to be nominal and not supported by the consideration in the circumstances proved by the defendants.**

2. Whether the suit mortgage Ex.A.1 is void transaction under the provisions of Transfer of Properties Act, particularly in the absence of any evidence let in by the plaintiff to prove the consideration for the debt.
Vide: 1930 Nagpur 166 at 169; 1970 Madras 492 (495DB); 1950 Madras 146 (150); 1964 Rajasthan 72.
3. Whether the lower appellate Court erred in reversing the decree and judgment of the trial Court merely on doubtful nature of defendants version and on presumptions as being conclusive though rebuttable according to law.
4. Whether the LAC erred in relying upon the contents of written statement instead of considering the cumulative effect of the pleadings and the material evidence on record to arrive at a just conclusion in the interest of justice particularly in India pleading should be considered liberally.
5. Whether the LAC erred in non-considering the material evidence on record and erred in reversing the decree and judgment of the trial Court.
[Reproduced verbatim]

5. The facts that lead to filing of this appeal by the unsuccessful defendants, in brief, are as follows:-

The plaintiff filed the suit for recovery with costs and interest Rs.10,000/- advanced under exhibit A - the registered mortgage deed dated 04.03.1985 executed by the defendants 1 and 2 the said mortgage transaction. According to the plaintiff and the contents of the said mortgage deed under exhibit A1, the defendants 1 and 2 together had borrowed the said sum from the plaintiff for the purpose of effecting repairs to their house and that subsequently, they had failed to discharge the mortgage debt and that, therefore, the plaintiff is constrained to file the suit for recovery of the money due under the mortgage transaction under exhibit A1. On the other hand, the common defence of the defendants 1 and 2, as stated in the written statement of the first defendant, in brief, is this: 'The plaintiff's father by name Nageswar Rao did business under the name 'Sri Gold Covering Works' at Kadapa. The 2nd defendant's husband by name Mangayya, worked as Manager of the said Sri Gold Covering Works. The plaintiff is one of the partners of the said firm. At the time of such appointment, the father of the plaintiff had obtained one pronote from the said Mangayya, the husband of the 2nd defendant, for Rs.5,000/- and another pronote for the like sum from

Panchaparvala Venkata Subba Rao as security. Later on, it was learnt that the said pronotes were seized by the Income Tax people. Then he had pressed Mangayya to get the security bond executed by the defendants 1 and 2. Then, Mangaiah without appraising the circumstances and disclosing the contents of the document persuaded the defendants 1 and 2 and exercised undue influence over them and had made them to execute the mortgage deed in favour of the plaintiff. Mangaiah and the defendants were utterly deceived by the plaintiff and his father. They had only believed that it was only a security bond for the service of Mangayya as Manager of the said shop. The plaintiff had obtained the signatures and thumb impressions of the defendants on some blank stamp papers. Later on, Mangayya gave up his service in the said shop as the water did not suit him. It was learnt that due to the laches of the staff there was misappropriation of funds in the business of the plaintiff at Kadapa. There is no necessity for the defendants 1 and 2 to borrow the amount for making improvements of their house. On account of confidence in the father of the plaintiff, the defendants 1 and 2 had never insisted for the return of the document as it is a nominal document.'

5.1 Having regard to the above pleadings, the trial Court had framed the following issues:-

- 1. Whether the suit mortgage deed executed by the defendants is nominal and not intended to enforce under law?**
- 2. Whether the interest is usurious?**
- 3. To what relief.**

At trial, the plaintiff and an attester of the exhibit A1 mortgage deed were examined as PWs1 and 2 and exhibit A1 alone was marked. Defendants 1 and 2 were examined as DWs 1 and 2 and no documents were exhibited on their side.

5.2 On merits, the trial Court dismissed the suit of the plaintiff. The first appeal in A.S.No.107 of 1992, preferred by the plaintiff, was allowed by the Court below and the suit was decreed granting a preliminary decree. Therefore, the aggrieved defendants 1 and 2 had preferred this appeal. As already noted, since the first appellant died, the third appellant was brought

on record.

6. Now, the substantial questions of law are taken up.

7.1 The defendants are not disputing the execution of exhibit A1, the registered mortgage deed. Their only defence is that the consideration of Rs.10,000/- or any part thereof was not received by them. In their defence, which is adverted to supra, they had stated the circumstances under which the said deed has come to be executed. Therefore, the initial onus of proof and the legal burden are on the defendants and it is for them to prove their defence.

7.2 The sum and substance of the contentions of the learned counsel for the appellants (2nd defendant and 3rd appellant) is that the evidence on record sufficiently established the defence; and, that the trial Court had rightly appreciated the pleaded defence and the evidence in support thereof; but, the Court below had erred in appreciating the defence and the evidence; and, that the Court below had erred in relying upon the contents of the written statement instead of considering the cumulative effect of the defence pleaded and the material evidence on record; and, that the Court below had not arrived at a just and correct conclusion; and, that the evidence was not properly appreciated; and that material evidence was ignored.

7.3 On the other hand, the learned counsel for the plaintiff would contend that the learned district Judge had accurately considered the pleadings and the evidence adduced and had arrived at a just decision in the matter; and, that the plaintiff by examining himself and the attestor of exhibit A1 had proved the passing of the consideration; and, that though the initial onus of proof, which was on the defendants was not discharged the plaintiff by adducinf evidence of required standars had proved his pleaded case; and, that the defendants had failed to prove their defence; and, that there is no consistency in the defence; and, that the defence pleaded was not spoken to by DWs 1 and 2; and, that on the other hand they had deposed what is not pleaded in their defence; and that the evidence given without a foundation in

the pleading and which is contrary to the pleaded defence is of no avail to the defendants; and, that the material witness, who was said to have pressurized the defendants and made them to allegedly execute exhibit A1 was not examined though he was no other than the husband of the 2nd defendant; and, that the trial Court had erroneously considered the evidence without reference to the pleadings ignoring the fundamental principle that any amount of evidence without a foundation in the pleadings need not be looked into; and, that the trial Court had wrongly appreciated the evidence by casting the onus on the plaintiff; and, that the judgment of the Court below is based on pleadings and material evidence; and, that the well reasoned findings of the Court below do not call for any interference; and, that there is no question of law much less substantial question of law involved in the second appeal; and, that the second appeal is devoid of merit and is liable to be dismissed.

7.4 I have gone through the pleadings and the evidence and I have noted the submissions of both the sides.

7.5 Before advertng to the evidence, it is necessary to first take note of the relevant defence of the defendants, which is as follows: 'The plaintiff's father by name Nageswar Rao did business under the name 'Sri Gold Covering Works' at Kadapa. The second defendant's husband by name Mangayya, worked as Manager of the said Sri Gold Covering Works. The plaintiff is one of the partners of the said firm. At the time of such appointment of Mangayya as the Manager of the said Sri Gold Covering Works, the father of the plaintiff had obtained one pronote for Rs.5,000/- from the said Mangayya, the husband of the 2nd defendant and another pronote for the like sum from Panchaparvala Venkata Subba Rao as security. Later on, it was learnt that the said pronotes were seized by the Income Tax people. At that time he had pressed Mangayya to get security bond executed by the defendants. Then, Mangaiah without appraising the circumstances and disclosing the contents of the document persuaded and exercised undue influence over the defendants and had made them to execute the bond/deed in favour of the plaintiff. Mangaiah and the defendants 1 and 2 were utterly deceived by the

plaintiff and his father. They had only believed that it was only a security bond for the service of Mangayya as Manager of the said shop. The plaintiff had obtained the signatures and thumb impressions of the defendants on some blank stamp papers. Later on, Mangayya gave up his service in the said shop as the water did not suit him.'

7.6 Now the relevant evidence needs examination in juxtaposition with above said defence pleaded by the defendants. A plain reading of the defence would show that after the promissory notes executed by Mangayya, the Manger and Panchaparvala Venkata Subba Rao as security were seized by the Income Tax people, the husband of the 2nd defendant without appraising the circumstances and disclosing the contents of the document persuaded and exercised undue influence over the defendants and had made them to execute the deed in favour of the plaintiff and that they had only believed that it was only a security bond for the service of Mangayya as Manager of the said shop and that later on, Mangayya gave up his service in the said shop as the water did not suit him and that out of confidence they did not insist on the return of the mortgage deed which is nominally executed and which is not supported by any consideration. Therefore, the evidence that was adduced to the effect that after the services were given up the Mortgage deed was obtained cannot be countenanced as the said evidence is quite contrary to the defence which would show that the exhibit A1 deed was executed as security bond while Mangayya was in service. The said defence pleaded also would show that it was Mangayya, the husband of the 2nd defendant had persuaded the defendants to execute the deed. Therefore, the defence that the plaintiff and his father deceived them cannot be countenanced. The husband of the 2nd defendant ought not to have pressurized or unduly influenced the defendants to execute the deed, without the payment of the consideration there unwer. If really the deed was executed as a security bond, the defendants or Mangayya ought to have taken return of the bond on Mangayya discontinuing his services in the shop of the father of the plaintiff; but, they did not take return of the bond. If the defence that exhibit A1 was obtained after Mangayya had left the service

were to be true, then there must be some reason for the plaintiff to obtain the exhibit A1 deed; but, no explanation is forth coming to explain as to what was the need for the plaintiff to obtain the registered mortgage deed from the defendants without paying the consideration there under after Mangayya had left the service. Further, the non-examination of Mangayya, the husband of the 2nd defendant, in the facts and circumstances of the case is fatal to the defence. This is more so when the plaintiff had examined himself and also the attesor of exhibit A1 and had proved the passing of consideration. It is also the defence that the plaintiff had obtained the signatures and thumb impressions of the defendants on some blank stamped papers. These defences would show that the defendants are bent upon avoiding the payment of the suit debt due under exhibit A1, a registered mortgage deed. Though unsupported by defence, evidence was adduced to the effect that no repairs were affected to the house during the relevant period and that therefore there was no necessity to borrow money. If the loan advanced is not utilized for the purpose mentioned in the loan document there cannot be an inference that the loan was not advanced as the utilization of the loan amount would be within the dominion of the loanee.

7.7 There is one more aspect, which was rightly adverted to by the Court below. The first aspect of the defence is that in the first instance two pronotes for Rs.5,000/- each were obtained from Mangayya and the surety and that when the same were seized by Income tax people, the exhibit A1- mortgage deed was obtained by the plaintiff. However, DW2, the second defendant, who is the wife of Mangayya had deposed as under:

“At the time of appointment, Ch.Nageswara Rao obtained one pronote from my husband for Rs.5,000/- or Rs.6,000/- and from one Panchaparvala Venkata Subba Rao as a surety to my husband for the like sum of a pronote because he recommended my husband for that job. While so during the raid by Income Tax officials, the pronotes executed by my husband and Venkata Subba Rao were taken away by them and seized by them in or about 1983. In 1985, Ch.Nageswara Rao obtained pronotes for Rs.6,000/- each from myself and DW1 and at the same time we were also directed to execute a mortgage deed as a security for my husband. Accordingly, we executed Ex.A1 as security but we did not receive any consideration under Ex.A-1.”

[reproduced verbatim]

But, DW1 did not state in her evidence that a pronote of Rs.6,000/- was obtained from her and that another such promissory note was also obtained from DW2. Thus, there is no consistency in the defence of the defendants 1 and 2 and the pleaded defence is not translated into evidence and the evidence adduced is not supported by the foundation in the pleading. Therefore, on an application of test preponderance of probabilities, this court finds that the case of the plaintiff is having acceptable merit.

7.8 Thus, on an analytical and harmonious consideration of the pleadings and the evidence brought on record would lay bare that the Court below had accurately considered the pleadings and had properly appreciated the evidence and that on the other hand the trial Court had erroneously considered certain portions of the evidence only in isolation and gave importance to inconsistent versions of the DWs 1 and 2 without examining the entire evidence in the light of the pleaded defence and had, therefore, erred in holding that the plaintiff had failed to prove his case when in fact the evidence on record is not sufficient to believe the defence and hold that the defendants had sufficiently discharged the initial onus of proof and the legal burden which is upon them. A mere consideration of the evidence *de hors* the pleadings, as was done by the trial court, is impermissible. Therefore, this Court is of the considered view that the very approach of the trial Court is erroneous and called for interference by the Court below, which is the final Court of fact. In the light of the facts peculiar to the case the decision in

Shasidhar and others v. Smt. Ashwini Uma Mathad and another^[1] relied upon by the appellants in support of the contentions that the Court below had not properly appreciated the evidence and had not dealt with all the submissions is not helpful to advance the case of the appellants any further. The Court below had neither ignored the pleadings nor the material evidence and, therefore, it cannot be said that there is non consideration submissions and evidence. The Court below had also neither misinterpreted the pleadings nor the evidence. The Court below had adverted to all the material aspects and considered the facts and the evidence from the correct

standpoint and had decided correctly the core issues involved in the matter.

8. Viewed thus, this Court finds that there is no merit in the second appeal and that there is no substance in the questions raised in the second appeal.

9. In the result, the second appeal is dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SEETHARAMA MURTI, J

17th June, 2015
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[\[1\]](#) AIR 2015 SUPREME COURT 1139