IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.02.2017

PRONOUNCED ON : 10.03.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.878 of 2011

N.Muthapillai ... Appellant

Vs.

N.Dhanasekaran ... Respondent

Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree of the Court of Principal District Judge, Villupuram District and Villupuram, passed in A.S.No.2 of 2006 dated 12.07.2006 reversing the decree and judgment in O.S.No.186 of 1998 on the file of the Subordinate Judge, Kallakurichi, dated 31.03.2003.

For Appellant : Mr.S.Selvaraj
for M/s.S.Arunachalam Associates

For Respondent : Mrs.P.Kavitha Balakrishnan

JUDGMENT

Challenge in this second appeal is made by the plaintiff against the judgment and decree dated 12.07.2006 passed in A.S.No.2 of 2006 on the file of the Principal District Court, Villupuram, reversing the judgment and decree dated 31.03.2003 passed in O.S.No.186 of 1998 on the file of the Sub Court, Kallakurichi.

2. The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal.

> ***" Whether the lower appellate Court is right in holding that mortgage was discharged when the respondent failed to prove the same?"***

3. The suit has been laid by the plaintiff on mortgage.

4. It is admitted that the plaintiff and the defendant are brothers. The defendant has admitted the execution of the mortgage deed marked as Ex.A1. However, according to the defendant, under the mortgage deed, no consideration had passed and according to the defendant, in respect of the family properties, a partition was effected between the plaintiff, the defendant, another brother of the parties and their mother and in the said partition, the properties worth Rs.65,000/- was allotted to the defendant and the properties worth Rs.45,000 was allotted to the plaintiff and inasmuch as there is a difference in the value of the properties allotted, in order to equalise the same, according to the defendant, a mortgage deed was obtained by the plaintiff from the defendant and thereafter, according to the defendant, he has paid Rs.10,000/- towards the said

transaction and an endorsement, with reference to the same, has been made on the reverse side of the mortgage deed and the plaintiff, in order to make unlawful gain, had erased the said endorsement and laid the suit falsely. The further defence set forth by the defendant is that he had also paid another sum of Rs.13,800/- towards the above said transaction to the plaintiff and in evidence thereof, the plaintiff has issued a receipt acknowledging the said amount, it has been marked as Ex.B1 and further, according to the defendant, the plaintiff had obtained a settlement deed from his mother suppressing the true facts without the knowledge of the other brothers and therefore, to equalise the allotment of the properties, the plaintiff agreed to adjust the balance amount and thus, according to the defendant, he has discharged the mortgage deed as such and therefore, according to the defendant, the plaintiff has laid the suit without any cause of action and hence, the suit is liable to be dismissed.

5. Inasmuch as the defendant has admitted the execution of the mortgage deed and also pleaded discharge, as rightly held by the Courts below, it is found that the onus is upon the defendant to establish the plea of discharge put forth by him. As regards the case of the defendant that the properties valued more were allotted to him

and the properties of lesser value were allotted to the plaintiff in the family partition has been admitted by the plaintiff. However, according to the plaintiff, with reference to the same, another deed was obtained from the defendant. But, that deed has not seen the light of the day. On the other hand, it is the specific case of the defendant that only to equalise the value, the plaintiff has obtained the mortgage deed from him, which has been marked as Ex.A1.

6. Considering the evidence adduced by the parties in toto, it could be seen that as put forth by the defendant and also, as determined by the first appellate Court, it could be seen that only to equalise the value of the properties allotted to the parties during the partition, it could be seen that the mortgage deed had come to be executed. If according to the plaintiff, another deed, with reference to the same, had been obtained, it does not stand to reason as to why the plaintiff should feel shy in producing the said document in support of his case. The very fact that the plaintiff has suppressed the said document would only go to establish that as pleaded by the defendant, only the mortgage deed had come to be executed in adjusting the value of the properties allotted to the parties during the partition.

7. Now, according to the defendant, he has paid Rs.10,000/- to the plaintiff towards the above said transaction i.e. the mortgage deed and an endorsement had been made on the reverse side of the mortgage deed and the plaintiff had erased the same to make unlawful gain. A perusal of the mortgage deed would go to show that there is some obliteration made on the deed. Now, according to the plaintiff, due to water leakage from the roof, the document got damaged and therefore, he had erased the same. However, as rightly contended by the defendant, inasmuch as the endorsement of the payment of Rs.10,000/- has been made on the reverse side of the mortgage deed, it could be seen that the same had been erased by the plaintiff and to suppress the true facts, it could be seen that as rightly found by the first appellate Court, he has come forward with the case, as if the erasure was made on account of the water leakage on the document. As regards the payment of Rs.10,000/- the defendant has also examined one Jaganathan as DW3 and he has also deposed about the payment of Rs.10,000/- towards the above said transaction. Therefore, the facts, as discussed above, would only go to show that the defendant had paid Rs.10,000/- as pleaded by him and with reference to the same, an endorsement had been made on the reverse side of the mortgage deed and subsequently, the same had been erased by the plaintiff to make unlawful gain. Therefore, it

could be seen that on a consideration of the evidence adduced by the parties in the nature of preponderance of probabilities, the defendant has established the payment of Rs.10,000/- towards the mortgage transaction.

8. It is the further case of the defendant that he has paid Rs.13,800/- towards the mortgage transaction to the plaintiff on 17.12.1986 and obtained a receipt, which has been marked as Ex.B1. The attestor to the said receipt viz., Pannerselvam has been examined as DW2. DW2 has also deposed about the payment of Rs.13,800/- by the defendant to the plaintiff on 17.12.1986 and the acknowledgment of the same by the plaintiff under Ex.B1 receipt. Nothing has been culled out from the defendant as well as DW2 during the course of their cross examination to disbelieve their version with reference to the above said facts. The only plea that has been put forth is that there is no reference about the mortgage in Ex.B1. However, the document clearly recites that the amount has been paid only towards the partition effected between the parties and when it is found that the mortgage deed itself has come to be executed only in relation to the partition effected between the parties as regards the equalisation of the value of the properties, it could be seen that the defendant has established, beyond reasonable doubt,

the payment of Rs.13,800/- towards the mortgage transaction.

9. As regards the remaining amount, the defendant has deposed clearly and convincingly that the same had been paid and the plaintiff has also agreed to adjust the said amount as equivalent to the settlement deed that he had obtained from their mother in respect of the properties allotted to her under the partition.

10. In the light of the above discussion, it is found that the first appellate Court has rightly considered the evidence adduced by the parties in the right perspective and correctly determined, that the defendant has discharged the mortgage debt and that, the plaintiff had not come to the Court with clean hands and on the other hand, the plaintiff has suppressed material evidence as regards the mortgage transaction and laid the suit falsely. Nothing is made out to interfere with the findings of the first appellate Court as regards the discharge of the mortgage deed by the defendant. It is, therefore, found that the first appellate Court has rightly held that the mortgage debt had been discharged by the defendant. In such view of the matter, the substantial question of law formulated for consideration in this second appeal is answered in favour of the defendant and against the plaintiff.

In conclusion, the second appeal fails and accordingly, the same is dismissed. No costs.

Index : Yes/No 10.03.2017
Internet: Yes/No
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To

1. The Principal District Court, Villupuram.

2. The Sub Court, Kallakurichi.

T.RAVINDRAN,J.

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Pre-delivery Judgment in
S. A.No.878 of 2011

10.03.2017