

* HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

+ C.C.C.A. Nos.28 of 2010

% 14-11-2017

Mrs. M. Pratima Reddy

... Appellants/
Defendants

Vs.

\$ NICCO UCO Alliance Credit Ltd.
Kolkatta, rep.by its Managing Director,

... Respondents/
Plaintiffs

! Counsel for the appellants: Sri T. Rajendra Prasad

Counsel for the Respondents: Srinivas Chitluru

< Gist:

> Head Note:

? Cases referred:

¹ (1995) 4 SCC 153

² (2005) 7 SCC 791

³ (2007) 11 SCC 75

⁴ AIR 1992 SC 1740



**HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**

CCCA No.28 of 2010

Judgment (per Hon'ble Sri Justice D.V.S.S. Somayajulu):

This civil appeal arises out of the judgment and decree dated 24.10.2007 passed in O.S.No.594 of 2000 on the file of the XII Additional Chief Judge, City Civil Court at Hyderabad.

2. The suit O.S.No.594 of 2000 is filed by NICCO UCO Alliance Credit Ltd. against 7 defendants initially. Later, defendant No.8 is added as the legal heir of the deceased-defendant No.5 and defendants 9, 10 & 11 are added as legal heirs of the deceased-defendant No.3.

3. The suit is filed by the plaintiff, which is a non-banking financial company. According to the averments of the plaint, defendant No.1, which is a company incorporated under the Companies Act, has approached the plaintiff for financial assistance for purchase of 4 numbers of 1000 KVA diesel generator sets. Defendant No.1 is the borrower company, defendants 2, 3 & 4 are the guarantors for the financial facilities availed. The financial facilities were also secured by the equitable mortgage of plaint A, B & C schedule properties belonging to defendants 3, 5 & 6 respectively. Defendant No.7 is the supplier of the equipment. The property mortgaged is described as plaint A, B and C schedule.

4. Defendants 1, 2, 6, 9 and 10 filed detailed written statements denying the suit claim and raising, *inter alia* among other things, the following pleas:

- i) that the suit is barred by the provisions of Order II Rule-2 CPC as the plaintiff filed a suit C.S.No.640 of 1999 on the file of the original suit of Hon'ble High Court of Calcutta.
- ii) that defendant No.3 is not authorized to create a mortgage and that the property said to have been mortgaged is in fact belonging to DW.6 (Smt. G.Bujamma), the mother of defendant No.9 and that no mortgage is created.
- iii) The Court has no territorial jurisdiction.

5. Based on the pleadings, the lower Court initially framed two issues and later on framed 7 additional issues also. After hearing both the parties and after recording the evidence of 2 witnesses for the plaintiff and 6 witnesses for the defendants and after marking Exs.A.1 to A.32 (for plaintiff) and Exs.B.1 to B.17 (for the defendants), the lower Court passed a decree which is now impugned in the present appeal. The lower Court passed a preliminary decree entitling the plaintiff to recover the suit amount with costs and interest @ 6% p.a. and also held that the decree should first be satisfied by sale of mortgaged property only and if the said sale proceeds are insufficient, the lower Court granted decree against defendants 2, 6, 7, 9 & 10. The suit against defendant No.4

was dismissed as abated and the suit against defendant No.8 was dismissed as she has no personal liability.

6. Aggrieved by the said judgment and decree, the present appeal is filed by defendants 9, 10 & 11, who were the appellants herein.

7. Heard the learned counsels Sri T. Rajendra Prasad, for the appellants and Sri Srinivas Chitluru, for the contesting respondents.

8. The first and foremost contention that raised by Sri T. Rajendra Prasad, learned counsel for the appellants is that the Court at Hyderabad, wherein the suit was presented has no territorial jurisdiction at all (issue No.2). It is the argument of the learned counsel for the appellants that as per clause 22 of the lease agreement (Ex.A.1), it is the Court at Calcutta alone that has exclusive jurisdiction. He also states that the entire transaction took place at Calcutta and hence, the Hyderabad Court has no jurisdiction.

9. The learned counsel for the appellants also drew the attention of this Court to the judgment reported in **Angile Insulations v. Davy Ashmore India Ltd and another**¹ and contends that the suit is not maintainable in the Hyderabad Court. However, a reading of this judgment makes it clear that the suit in which the Hon'ble Supreme Court was dealing

¹ (1995) 4 SCC 153

was not a suit pertaining to enforcement of a mortgage and was a suit for recovery of money based on a contract. Therefore, this Court is of the opinion that the said judgment is not applicable to the facts of the case.

10. The reply of the learned counsel for the respondents, Sri Srinivas Chitluru is that this lease agreement (Ex.A.1) on the basis of which it is contended that the Hyderabad Court has no jurisdiction is between the plaintiff and defendant No.1 alone and that none of the other defendants are a party to the suit. In addition, it is also pointed out that the suit at Hyderabad is filed for recovery of money based on a mortgage of immovable property situated at Hyderabad. Therefore, the learned counsel submitted that the suit is maintainable at Hyderabad.

11. Besides, Section 16 (c) CPC makes it clear that all suits pertaining to a mortgage can only be instituted within the local jurisdiction of the Court in which the property is situated. In this case, admittedly, the mortgaged property is situated within the jurisdiction of the Court at Hyderabad and as such the contention of the learned counsel for the appellants is not tenable. The learned counsel for the respondents relied upon ***Harshad Chiman Lal Modi v. DLF Universal Ltd. and another***² which very clearly supports his contentions. The lower Court has also decided this issue

² (2005) 7 SCC 791

after the analysis of facts and law and held that it has the jurisdiction and for all the above reasons, this Court holds that the suit is instituted in the proper Court only.

12. The second important contention urged by the learned counsel for the appellants, Sri T. Rajendra Prasad is that the suit is barred by the provisions of Order II Rule 2 CPC as an earlier suit C.S.No.640 of 1999 was filed at Calcutta on the same cause of action. The contention of the learned counsel is that the petitioner was aware of the loan default/mortgage and that therefore, the cause of action for mortgage suit arose before the suit C.S.No.640 of 1999 was filed before the High Court of Calcutta. He also argued that an appropriate prayer was not made for filing a fresh suit when the earlier suit was withdrawn. The learned counsel for the respondents contended on the other hand that both the suits are not identical and are based on the different causes of action. He also pleaded that he withdrew the suit and got the liberty to file a fresh suit also.

13. It cannot be disputed that if the causes of action for the earlier suit and the later suit are identical and all the facts constituting the cause of action have arisen by the date of first suit, subsequent suit is barred since the plaintiff "ought" to have raised all these issues in the first suit itself.

14. However, a reading of the plaint O.S.No.640 of 1999 shows that it is filed by the plaintiff against the present defendant No.1 and 5 and others of whom defendant No.6 is a pro-forma defendant. The prayer in this suit is for recovery of money against Defendants 1 to 4 with interest and a claim for damages of Rs.3 crores against defendant No.5, a perpetual injunction against defendant No.1 from withdrawing any amount from the account No.795 of Andhra Bank, Raj Bhavan Road Branch, Hyderabad, a mandatory injunction directing defendant No.5 to transfer any amount already deposited etc.

15. The suit in Hyderabad in which impugned judgment is passed is, on the other hand, the pure and simple suit for recovery of money by sale of the mortgaged property. Therefore, it cannot be said that the provisions of Order II, Rule 2 CPC bar the second suit filed in Hyderabad, as the two suits are different.

16. In addition, the learned counsel for the respondents also drew the attention of this Court to the order dated 18.05.2005 passed in C.S.No.640 of 1999 by Sri Justice Girish Chandra Gupta wherein the learned single Judge permitted the plaintiff to withdraw the suit. The learned counsel for the respondents also drew the attention of this Court to Order XXXIV Rule 14 sub-clause (2) wherein it is clearly held that the suit for mortgage filed under Order

XXXIV Rule 2 CPC is not hit by the bar contained in Order II Rule 2 CPC. The counsel cited the judgment reported in **S. Nazeer Ahmed v. State Bank of Mysore and others**³ and relied on paras 9 to 12 which clearly support his submission. The Hon'ble Supreme Court clearly held that Order XXXIV Rule 14 read with Rule 15 clearly removes the bar if any contained by virtue of Order II Rule 2 CPC (para 14 of the judgment).

17. In view of the above reasons and Order XXXIV Rule 14 (1), this Court is of the opinion that there is no force in the contention of the learned counsel that the suit is barred by the provisions of Order II Rule 2 CPC. It is also clear that the present suit is different both in content and in form from the first suit C.S.No.640 of 1999. There is no identity in cause of action. For all these reasons, this Court holds that subsequent suit is not barred by law and is maintainable.

18. The other important defence raised by the appellants is that by the date of the mortgage pleaded by the plaintiff/respondent No.1, the mortgagors have already sold their properties to DW.6 and that consequently, there is no valid mortgage created by deposit of title deeds.

19. This is a plea which has far reaching consequences. According to the plaint averments, A-schedule property belongs to Defendant No.3, B-schedule property belongs to defendant No.5 and C-schedule property belongs to defendant

³ (2007) 11 SCC 75

No.6. As per the plaint averments and the evidence, defendant No.3 acquired the A-schedule property under registered sale deed dated 15.04.1986. He deposited the said title deed on 11.05.1999 along with Exs.A.9, A.10 and A.11. Ex.A.9 is the Encumbrance Certificate dated 25.03.1999 for the period from 23.03.1982 to 24.03.1999 and it shows only the transaction covered by Ex.A.8. Ex.A.10 is the notarized sworn affidavit of Sri M. Mohan Reddy (defendant No.3) wherein he clearly states on oath that he has purchased A-schedule property and that he is proposing to mortgage the same in favour of the plaintiff as a security. Ex.A.11 is a letter dated 11.05.1999 executed by defendant No.3 in favour of the plaintiff confirming the fact that on 11.05.1999 he has created a mortgage over the A-schedule property with an intention that the same shall be security for the lease finance of Rs.202 lakhs availed from the plaintiff.

20. Similarly, Ex.A.12 is a registered sale deed dated 15.04.1986 in favour of defendant No.5 which is deposited with the plaintiff with an intention to create a mortgage. Ex.A.13 is the encumbrance certificate No.528 of 1999 for the period from 23.03.1982 to 23.04.1999. It shows no encumbrances or other sales except Ex.A.12. Ex.A.14 is the power of attorney executed by G.J. Mohan Rao-defendant No.6 in favour of defendant No.3. This is the registered power of attorney by which defendant No.6 authorized defendant

No.3 to deposit his title deeds on his behalf for the finance of Rs.202 lakhs being availed from the plaintiff. In addition, defendant No.6 also executed a sworn affidavit dated 08.05.1999 confirming the fact that he has valid title and is proposing to mortgage the property as security being the finances availed. Defendant No.3 as the power of attorney holder for defendant No.6 executed a confirmatory letter dated 11.05.1999 confirming the deposit of title deeds. There is a similar set of documents marked as Exs.A.17 to A.20 for deposit of title deeds for C-schedule property by defendant No.6. Defendant No.6 also executed a power of attorney (Ex.A19) in favour of defendant No.3 wherein the loan transaction with plaintiff and the need to deposit the title deed as security for the loan of Rs.202 lakhs is also discussed. His agent is authorized to mortgage the property, as security for the finances being extended. It is thus clear that the three title deed dated 15.04.1986 were deposited on 11.05.1999 and confirmatory letters were also executed confirming the creation of the equitable mortgage.

21. In contra distinction to this, it is the contention of the defendants/appellants that by the date of creation of the mortgage on 11.05.1999 the said three items of property were already conveyed and sold by the said 3 three persons (mortgagors) in favour of DW.6 on 25.04.1994. The certified copies of these three sale deeds dated 25.04.1994 are marked

as Exs.B.10 to B.12. Therefore, the contention of the learned counsel for the appellants is that neither defendant No.3 nor others have any title to the property on the date on which the mortgage was created.

22. DW.6-Smt. G. Bujjamma the alleged owner of the A to C schedule properties was residing with the contesting defendant and she is the mother of defendant No.9. As pointed out by the learned counsel for the respondents, Smt. G. Bujjamma was examined as DW.6 but she did not choose to implead herself in the suit to protect her "interest" in the property. DW.6 also filed an appeal against the impugned judgment and decree dated 24.10.2007 in this Court. The said appeal was numbered as CCCA (SR) No.15691 of 2011. Along with the same, she filed a Miscellaneous Petition No.596 of 2013 to condone the delay of 1320 days in filing her appeal. This Court vide its order dated 23.07.2015 dismissed the application to condone the delay. While dismissing, it is noticed that no valid reasons are given to condone the delay and the affidavit is also silent as to how the petitioner came to know about passing of the impugned order. It is also noticed that she did not make any attempt to implead herself in the suit. Therefore, the application was dismissed and the appeal was also consequently rejected. No further steps were taken by DW.6 and order dated 23.07.2015 has attained the finality.

23. In addition to the above, it is important to note that if DW.6 was really owner of the property, she should have been in custody of the original documents viz., Exs.A.8, A.12 & Ex.A.17 sale deeds. In the evidence, only the certified copies were filed while the recital in the deed so that the originals are delivered to her. Her examination as DW.6 also does not clearly show that she is a genuine purchaser. In the affidavit in lieu of the chief examination, she states that she acquired the properties for valuable consideration under 3 sale deeds dated 25.04.1994. But in her cross-examination, she does not give any answer in support of the said sales. She is not even aware for which the suit is filed. She also states that since her son-in-law defendant No.3 did not refund some amount the suit is filed. She states that the property tax is paid by defendant No.3 on her instructions. She further states that the suit schedule property stands in her name in the municipal records but she did not produce the tax receipts to show her possession. She also admits that she does not know where the original sale deeds of Exs.B.10 to B.12. She also admits that she has taken all the link documents pertaining to the suit schedule property after registration of Exs.B.10 to B.12. She denies the suggestion that she did not pay the sale consideration of Exs.B.10 to B.12.

24. Exs.B.10 to B.12 are certified copies of sale deeds said to have been executed in favour of G. Bujjamma. The originals are not produced and no satisfactory explanation is given for marking the secondary evidence. These documents were marked through Mrs. Pratima Reddy (defendant No.9), who was examined as DW.4. On 10.09.2007 itself an objection was taken by the counsel for the plaintiff about the competence of DW.4 to mark these exhibits. The learned Judge received these documents after noting down the objections on 10.09.2007 and marked these documents subject to proof and relevancy. The learned counsel for the plaintiff also cross-examined the witnesses about the originals of Exs.B.10 to B.12; about the property tax being paid by DW.2 and also drew the attention of the witnesses to the fact that the encumbrance certificate filed namely Exs.A.9, A.13 and A.18 do not reflect the transactions supposedly covered by Exs.B.10 to B.12.

25. It is pertinent to note as pointed out by the learned counsel for respondents that despite the cross-examination, neither the tax receipts nor the originals were produced when G. Bujjamma was examined as DW.6 on 01.10.2007. After DW.4 was examined, DW.5 was also examined and the issues relating to Exs.B.10 to B.12 were raised in the chief and cross-examination. Question about the right/title of Mrs.Bujjamma were posed to this witness. It was also

suggested to the witness that Exs.B.10 to B.12 were sham documents created in the name of fictitious persons. Despite this sequence, DW.6, who was the last witness examined did not give any convincing reasons for failure to produce clinching evidence of her title/possession and to justify that these sale deeds ExsB.10 to B.12 were genuine. The lower Court also rightly observed that mere marking of the document is not proof of contents of the document. It is well settled law that when the proof of contents of the document is an issue the author of the document or the attester or a person connected with the execution of the document is to be examined to prove the contents of the same. Mere marking is not proof of contents. Thus, this Court is of the opinion that Exs.B.10 to B.12 are not validly proved.

26. In addition, an *ex facie* reading of these three documents Exs.B.10 to B.12 also does not inspire confidence and there are extrapolation and corrections in the documents which are not satisfactorily explained. For example, in Ex.B.10 sale deed document No.2309 of 1994 executed by G.J. Mohan Rao in favour of G. Bujamma, there are certain matters scored off in page-5 and the sale consideration is mentioned as Rs.8,50,000/-. The amounts supposedly receivable by them in page-7 are struck off and the receipt of a sum of Rs.2,50,000/- is acknowledged in page-7. In page-8 the sale consideration is mentioned as Rs.9,50,000/-, which

is supposedly received by the vendor as aforementioned. There are no details of the receipt of the money as stated in the sale deed. The same is the case with the other two sale deeds also. Critical and important aspects are scored out or blackened with ink. Thus, these three sale deeds do not inspire much confidence and the evidentiary value of these three sale deeds will have to be weighed against the exhibits Exs.A.8 to A.11 (A-schedule), Exs.A.12 to A.16 (B-schedule) and Exs.A.17 to A.20 (C-schedule) seen in the total perspective . The defendants 3, 5 and 6 executed the sworn affidavit and letters confirming the deposit of title deeds in May 1999 where they clearly averred and stated that they have a subsisting right and title to the property and that they are depositing the title deeds with an intention to create mortgage.

27. The lower Court also thoroughly analyzed the causes and in fact framed additional issue No.3 for this. The lower Court gave 12 reasons why these documents are not acceptable. The lower Court came to the conclusion that Exs.B.10 to B.12 are not valid executed documents and that therefore, the mortgators viz., defendants 3, 5 & 6 had valid title to the A, B & C schedule properties on the date of creation of the mortgage. This Court does not see any reason to disagree with the findings of the lower Court on this issue.

28. It is important to note that the appeal is filed only by Mrs. M.Pratima Reddy, M. Rohit Reddy and Mrs. Nitya Reddy, who are defendant Nos.9, 10 and 11 in the suit. The other defendants in the suit did not challenge the findings of the lower Court relating to them. Therefore, the issue whether defendant No.2 is a Director of the defendant No.1- company or not and whether defendant Nos.1 to 7 have personal liability or not is not really necessary for the purpose of decision in this appeal. Nevertheless, the evidence on record clearly establishes that defendant No.2 is a Director of the defendant No.1-company. Exs.13 and 14, which are the copies of the annual returns of the defendant No.1-company clearly show that defendant No.2 is a Director. In addition, Ex.A.31 is a cheque dated 11.07.1999 which was marked through D.W.1- K.Hanumanth Rao clearly shows that he is Director of the company.

29. The other issues are about the personal liability of the defendants. Learned counsel for the appellants has pointed out that there is a contradictory finding of the lower Court with regard to the liability of the present appeals. While deciding additional issue No.5, "whether defendant Nos.9 to 11 have got any personal liability", the lower Court clearly held that defendant Nos.9 to 11 are not liable to pay the debt as they are Directors of the company. However, in operative portion of the judgment, the Court decreed the suit against

defendant Nos.9 and 10 only holding that they are personally liable.

30. In view of the fact that defendant Nos.9 to 11 are the Directors of the company and are not the guarantors, they cannot be held to be personally liable on the basis of their status as Directors of the company. They were also brought on record as the legal representatives of defendant No.3. However, the Court came to a conclusion that defendants Nos.9 and 10 have misappropriated the money that was advanced to the company and were part of the fraud perpetrated by DW.3. The Court, therefore, came to a conclusion that defendant Nos.9 and 10 are liable to pay the suit debt.

31. This finding of the lower Court is challenged by the learned counsel for the appellants, who contends that defendant Nos. 9 and 10 cannot be made liable for the suit debt and that it runs contrary to the very concept of a limited company wherein the Directors liability is limited. The lower Court came to this conclusion that defendant Nos.9 and 10 are liable to pay the debt on the ground that they were part of the fraud perpetrated by defendant No.3. Fraud is a matter which has to be specifically pleaded as per order VI Rule 4 of C.P.C. There should also be a clear proof of the fraud. The plaint was initially filed in the year 2000 and defendant Nos.9 to 11 were impleaded as the legal heirs in the year 2006.

Neither in the original plaint nor in the amended plaint is there any pleading on the fraud supposedly perpetrated by the defendant Nos.9 to 11. A reading of para 22 of the plaint also makes it clear that the suit is filed for enforcement of the mortgage and for recovery of money against defendant Nos. 1 to 3 and 7 only due to the fraudulent misappropriation. There is no prayer for a personal decree on the ground of fraud perpetrated by defendant No.3 or his legal representatives defendant Nos.9 to 11. Directors of a company are liable for fraud on the basis of tort and not under the company law unless they sign a guarantee deed or the like. The plaintiffs should therefore plead and prove that defendant Nos.9 to 11 were part of the fraud supposedly perpetrated by defendant No.3. As there are no requisite details either in the plaint or in the evidence, a personal decree cannot be passed against defendant Nos.9 to 11. However, the estate of the deceased defendant No.3, if any, in the hands of defendant Nos.9 to 11, is definitely liable for the satisfaction of the debt, as defendant No.3 is a guarantor for the debt.

32. The defendant No.1-company and its assets are liable for the suit debt. Defendants Nos.2 and 4 as the guarantors are personally liable for the payment of the decretal amount and their liability as guarantors is coextensive with the liability of defendant No.1- borrower.

33. No personal decree can be passed against defendant Nos.6, 7 and 8 as they are not mortgagors or guarantors. As far as defendant Nos.9 to 11 are concerned, they are also not personally liable.

34. The last question that survives for consideration is, whether the finding of the lower Court in issue No.2 (b) is correct or not?

35. The lower Court while deciding issue 2 (b) held that the plaintiff has to execute the decree by selling the mortgaged property first and if the sale consideration is not sufficient, the plaintiff can proceed against the defendants personally. It is this finding that is assailed by learned counsel Sri Srinivas Chitluru for the respondents, who argued that he cannot be precluded from proceeding simultaneously against the property and also the guarantors.

36. The learned counsel for the respondents relied upon a judgment reported in ***State Bank of India v. M/s. Index Port Registered and others***⁴, wherein the Hon'ble Supreme Court held that if the decree in question is a composite decree wherein there is both a personal decree and a decree for sale of the property without any limitation on its execution, the decree holder, in principle, cannot be forced to first exhaust the remedy by way of execution of the mortgage decree alone.

⁴ AIR 1992 SC 1740

37. There is considerable force in the submission of the learned counsel for the respondents and hence this Court is of the opinion that the finding that the plaintiff has to first execute the decree and sell the mortgage property alone is not correct. The plaintiff is at liberty to proceed against the mortgaged property and also against the persons held personally liable to pay the suit debt and need not wait for the sale of the mortgaged property before proceeding against the guarantors etc.

38. In the result, the appeal is allowed in part and a preliminary decree is passed holding that:

- (a) the plaintiffs/respondents in the appeal are entitled to recover suit amount with costs and subsequent interest at 6% per annum from the date of suit till realization. Two months time is given for redemption.
- (b) the plaintiff can execute the decree without first having to proceed against the mortgaged property alone.
- (c) that the defendant Nos.2 and 4 are personally liable for the suit debt along with defendant No.1-company. Defendants 6, 7, 8, 9, 10 and 11 are not personally liable for the suit debt.
- (d) the assets of the defendant No.1-company are liable for the decretal amount. Similarly, the estate of the

deceased defendant No.3 in the hands of defendant Nos.

9 to 11 is liable for the same.

(e) The respondents are entitled to the costs throughout.

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

SURESH KUMAR KAIT, J

D.V.S.S. SOMAYAJULU, J

Date: 14.11.2017

Isn/klp

Note: L.R. Copy marked.

