THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.914 of 2013

JUDGMENT:

This appeal is filed by the defendant, under Section 100 CPC, assailing the judgment and decree dated 06.11.2012 passed in A.S.No.120 of 2008 on the file of III Additional District Court, Bhimavaram, wherein and whereby the decree and judgment dated 03.03.2008 passed in O.S.No.57 of 2001 on the file of Senior Civil Judge Court, at Bhimavaram, passing preliminary decree in favour of the plaintiff for Rs.2,40,000/- with future interest at 12% per annum on the principal amount, and granting three months time for redemption, was confirmed.

2. Heard the learned counsel for the appellant and perused the record.

3. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.

4. The facts leading to filing of the second appeal are briefly as follows: The case of the plaintiff is that on 02.08.1995 the defendant borrowed an amount of Rs.1,00,000/- from her to discharge the family debts and executed a mortgage deed in favour of the plaintiff as a security to repay the loan amount. As per the terms of the mortgage deed, the defendant agreed to repay the amount within three years from the date of borrowal at Rs.33,335/- i.e., 1/3rd of the amount with interest at 24% per annum in three yearly instalments. The defendant failed to repay

the amount. Having no other alternative, the plaintiff filed the suit for recovery of the amount.

5. The defendant filed written statement denying all the averments made in the plaint including execution of mortgage deed in favour of the plaintiff on 02.08.1995. The boundaries as mentioned in the plaint are not correct. The defendant is the owner of an extent of Ac.1.85 cents but not Ac.2.00 cents as alleged in the plaint schedule. It is further submitted that there were money transactions between Kopparthi Pattabhi Ramaiah, who is the husband of the plaintiff and the defendant since 1973. During the year 1995, the husband of the plaintiff called the defendant to Akividu and obtained the signatures of the defendant and his two sons namely Nagaraju and Surya on some blank promissory notes, blank N.J.Stamps jointly and individually as if the defendant owe an amount of Rs.50,000/- to the husband of the plaintiff. The defendant supplied fish and prawn to the husband of plaintiff through his father-in-law by name Babe Suranna of Pedimirripalli village to a tune of Rs.2,00,000/-. The defendant and his father-in-law demanded the husband of the plaintiff to return Rs.1,50,000/- after adjusting the alleged Rs.50,000/- owe by the defendant. The defendant and his father-in-law demanded the husband of the plaintiff through elders to return the outstanding amount and also blank papers. The husband of the plaintiff got issued a legal notice through plaintiff and filed the present suit and also another suit O.S.No.139 of 2001 through his firm servant with an intention to knock away the property. The defendant is also entitled to the benefit of Ac.7/77, 45/97, 2/1990 and 4/1938. The plaintiff played fraud on the defendant and

obtained a mortgage deed and hence the suit is liable to be dismissed.

6. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether the plaintiff is entitled for preliminary decree for recovery of suit amount of Rs.2,40,000/- with costs, as prayed for?
2. Whether the defendant is entitled for the benefits of Acts 7/77, 45/87 and 2/90 as contended by him?
3. Whether the suit document is fabricated and obtained fraudulently as contended by the defendant?
4. Whether the interest claimed by the plaintiff is penal and usurious?
5. Whether the suit is bad for non-joinder of parties?
6. Whether valuation of the suit and court fee paid are not correct?
7. Whether the cause of action mentioned in the plaint are not correct? And
8. To what relief?

7. Before the trial Court, on behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs.A1 to A4 were marked. On behalf of the defendant, D.W.1 was examined and Ex.B1 was marked.

8. Basing on the oral, documentary evidence and other material available on record, the trial Court passed a preliminary decree in favour of the plaintiff for Rs.2,40,000/- with simple interest at 12% per annum on the principal amount by granting three months time for redemption. Feeling aggrieved by the judgment and decree of the trial Court, the defendant preferred A.S.No.120 of 2008 on the file of III Additional District Court (Fast Track), Bhimavaram. The first appellate Court after considering the oral and documentary

evidence available on record, dismissed the appeal. Hence, the present second appeal.

9. The questions of law urged by the learned counsel for the appellant are as follows:

1. Whether Ex.A1 mortgage deed is not legally enforceable as the same is not supported by consideration?
2. Whether the findings recorded by the Courts below are perverse and liable to be set aside?

POINT No.1:

10. It is the case of the plaintiff that the defendant borrowed an amount of Rs.1,00,000/- on 02.08.1995 from her and executed a mortgage deed. Ex.A1 is the registered mortgage deed executed by the defendant in favour of the plaintiff. Before filing of the suit, the plaintiff got issued a notice dated 19.03.1999. Ex.A2 is the office copy of the legal notice. Ex.A3 is the postal acknowledgment. The defendant issued reply notice on 29.03.1999 under Ex.A4. Ex.B1 is the 'D-Form' patta.

11. As per the findings recorded by the Courts below, the defendant executed a registered mortgage deed Ex.A1, in favour of the plaintiff. The crucial question that falls for consideration is whether the defendant executed Ex.A1 mortgage deed in favour of the plaintiff or not? To prove the case, the plaintiff examined herself as P.W.1. P.W.2 is the attestor of Ex.A1. P.W.3's evidence was eschewed by the trial Court.

12. As seen from the testimony of P.W.1, the defendant executed Ex.A1 mortgage deed. As per the testimony of D.W.1, the plaintiff

played fraud and obtained Ex.A1. It is a settled principle of law that the burden of proof lies on the person, who pleads that the opposite party played fraud and obtained a document. Except the self-served testimony of D.W.1, there is no other evidence much less cogent and convincing evidence to establish that the plaintiff obtained Ex.A1 by playing fraud on the defendant. Mere taking of a plea in the written statement that itself would not amount to proof of the stand taken by the defendant. Absolutely, there is no material on record to establish that the plaintiff obtained Ex.A1 by playing fraud.

13. The predominant contention of the learned counsel for the appellant is that Ex.A1 mortgage deed is not supported by consideration. To substantiate the argument, he has drawn the attention of this Court to the decision in **John Tinson & Co. Pvt. Ltd. V. Surjeet Malhan**[1]. As per the principle enunciated in the case cited supra, a contract without consideration is a void one in view of Section 25(1) of Indian Contract Act. If one of the parties to the proceedings pleads that document in question is not supported by consideration, the burden of proof lies on such party.

14. Learned counsel for the appellant placed much reliance on the testimony of P.W.2 in order to prove the above said fact. Across the bar, learned counsel for the appellant supplied the certified copy of testimony of P.W.2. This Court carefully perused the testimony of P.W.2. P.W.2 in the cross-examination denied the suggestion that he voluntarily given chief-examination affidavit. Learned counsel for the plaintiff with the permission of the Court,

[1] (1997) 9 SCC 651

cross-examined P.W.2. A perusal of testimony of P.W.2 clearly reveals that he has taken one stand in his chief-examination and another stand in the cross-examination and re-examination. In the cross-examination, he stated that the defendant informed him that he repaid the amount covered under the mortgage deed. He further deposed that the plaintiff told to him that she received the amount covered under the mortgage deed. By putting several suggestions to P.W.2, the defendant himself is admitting the execution of the mortgage deed in favour of the plaintiff. Ex.A1 is the registered document. Unless and until a contrary is proved, the Court can place reliance on the registered document. If the testimony of a witness is contrary to the recitals of registered document, much weight cannot be attached to his testimony. Admittedly, P.W.2 is one of the attestors of Ex.A1.

15. In order to appreciate the contention of the defendant, it is not out of place to extract relevant portion of cross-examination of P.W.2.

> "The Sub Registrar after reading over the contents in Ex.A.1and the defendant having admitted the contents, the Sub Registrar registered the document."

The testimony of P.W.2 clinchingly establishes that Sub-Registrar read over the contents of Ex.A1 to the defendant, who in turn admitted the recitals of it as true and correct. Thereafter only, the Sub-Registrar registered Ex.A1 document. As per the recitals of Ex.A1 registered mortgage deed, the plaintiff paid an amount of Rs.1,00,000/- to the defendant. The defendant having admitted the receipt of Rs.1,00,000/- from the plaintiff before the Sub-Registrar is precluded to take the plea that Ex.A1 is not supported by consideration. Absolutely there is no material on record to establish that Ex.A1 mortgage deed is not supported by consideration. Incidentally learned counsel for the appellant submitted that the defendant mortgaged the joint family property. There is no plea in the plaint that it is a joint family property. The trial Court has not framed issue on this aspect. The defendant has not taken any steps to frame an issue on this aspect. Without pleading and without framing an issue, the appellant is not entitled to urge all these aspects in the second appeal. It is the contention of the defendant that the mortgaged property is an assigned land. Normally, the Sub-Registrar will verify the document, thereafter he will register the document. Even assuming but not conceding that the defendant mortgaged assigned land, the ultimate loser is the plaintiff. The trial Court as well as the first appellate Court negatived the contention of the defendant that the defendant mortgaged assigned land.

16. In order to press in service Act 4 of 1938, there must be a specific pleading in the plaint that the defendant is an agriculturist by profession. A person who is doing business is not entitled for scaling down the interest. The pleadings in the written statement coupled with testimony of defendant as D.W.1 clearly reveal that the defendant had supplied prawns to the plaintiff. This clearly indicates that the defendant has been carrying prawns business. A person, who is carrying on the business, is not entitled for scaling down the interest. The Courts below considered the scope of Act 4 of 1938 in the light of the oral and documentary evidence available on record and rightly arrived at a conclusion that the

defendant is not entitled for scaling down of interest. The Courts below have assigned reasons much less cogent and valid reasons to its findings. I am fully endorsing with the findings recorded by the Courts below.

POINT No.2:

17. If the findings recorded by the Courts below are based on no evidence or based on evidence, which is not legally admissible, those findings can be termed as perverse. As observed earlier, Ex.A1 is the registered mortgage deed. Basing on the oral and documentary evidence available on record, the trial Court and first appellate Court arrived at a conclusion that the defendant executed Ex.A1 mortgage deed in favour of the plaintiff. The findings recorded by the Courts below are based on evidence much less legally admissible evidence. In the light of the foregoing discussion, I am unable to accede to the contention of the learned counsel for the appellant that the findings recorded by the Courts below are perverse and liable to be set aside while exercising the jurisdiction under Section 100 CPC.

18. In order to appreciate the contentions raised by the learned counsel, this Court is placing reliance on the judgment in **Municipal Committee, Hoshiarpur v. Punjab Seb**[2], wherein, while dealing with the scope of Section 100 CPC, the Hon'ble Apex Court held at paragraph No.16 as follows:

> 16. … … A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a

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[2] (2010) 13 SCC 216

> substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC. ... ...

19. Having regard to the facts and circumstances of the case, there is no question of law much less substantial question of law involved in this appeal. Hence, the second appeal is liable to be dismissed.

20. Accordingly, the Second Appeal is dismissed. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

T.SUNIL CHOWDARY, J

16.11.2018
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