IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.03.2019

PRONOUNCED ON: 28.03.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN
S.A.No.1453 of 2005

Mannathi Udayar ... Appellant/Defendant

Vs.

S.R.Iniyakutty @ Periathambi Udayar
... Respondent/Plaintiff

Prayer:
Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree passed in A.S.No.17 of 1999 dated 31.12.2003 on the Court of Subordinate Judge, Attur, Salem District reversing the judgment and decree passed in O.S.No.311 of 1996 dated 18.09.1998 by the Court of District Munsif, Attur, Salem District.

For Appellant : Mr.P.Ganapathy

For Respondent: No appearance
Set exparte
Vide order dated 04.03.2019

J U D G M E N T

Challenge in this Second Appeal is made to the judgment and decree dated 31.12.2003 passed in A.S.No.17 of 1999 on the file of the Subordinate Court, Attur, Salem District reversing the judgment and decree dated 18.09.1998 passed in O.S.No.311 of 1996 on the file of the District Munsif Court, Attur, Salem District.

2. For the sake of convenience, the parties are referred to as per the rankings in the trial court.

3. Suit for recovery of money.

4. The case of the plaintiff in brief is that the defendant borrowed a sum of Rs.10,000/- from him on 06.03.1973 and executed a simple mortgage deed on the same date in his favour in respect of the property described in the plaint schedule as the security for the due payment of the principal with interest as recited in the mortgage deed and on 19.02.1974, the defendant has paid a sum of Rs.625/- towards interest due on the mortgage loan and again on 02.02.1984, the defendant has paid Rs.500/- towards the interest and made necessary endorsements on the reverse side of the mortgage deed for the abovesaid payments and thereafter, despite repeated demands and the issuance of legal notice on 04.09.1992, the defendant had neither repaid any amount to the plaintiff nor issued any reply and accordingly, seeking the amount due to the plaintiff under the mortgage deed, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5. The defendant resisted the plaintiff's suit contending that the case of the plaintiff that he had borrowed a sum of Rs.10,000/- from him on 06.03.1973 and executed the suit mortgage deed is false and also denied the payment of Rs.625/- and Rs.500/- towards interest on the dates mentioned in the plaint and the endorsements qua the same on the reverse side of the mortgage deed and according to the defendant, the suit mortgage deed is a created one and no amount had been borrowed by him from the plaintiff and he had not executed the suit mortgage deed and to the notice sent by the plaintiff, he has sent a reply on 06.09.1992 containing true facts and the endorsements of repayment as alleged in the plaint are also false and therefore contended that there is no cause of action for the plaintiff to institute the suit and the suit is liable to be dismissed.

6. In support of the plaintiff's case, P.Ws.1 and 2 were examined. Exs.A1 to A5 were marked. On the side of the defendant, no oral and documentary evidence has been adduced. Based on the materials placed on record and the submissions made, the trial court was pleased to dismiss the plaintiff's suit. Aggrieved over the same, the plaintiff has preferred the first appeal. It is found that the plaintiff has examined as P.W.3 in the first appellate court and the first appellate court, based on the materials available on record and the submissions made was pleased to set aside the judgment and decree of the trial court and by

way of allowing the appeal preferred by the plaintiff, decreed the suit as prayed for in favour of the plaintiff. Impugning the same, the present second appeal has been laid.

7. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration.

> 1. When a document is required to be attested by atleast two witnesses under section 59 of the Transfer of Property Act, there in the absence of such attestation, is such a document enforceable in law?
>
> 2.Assuming that the document in question stands attested by two witnesses as required by law, yet, the failure to examine even one of these attesting witnesses would vitiate the document itself?

8. The suit has been laid by the plaintiff based on the mortgage deed. According to the plaintiff the defendant borrowed a sum of Rs.10,000/- from him on 06.03.1973 and executed the mortgage deed in respect of the suit property promising to repay the borrowed sum with interest as recited in the mortgage deed. The abovesaid mortgage deed has been marked as Ex.A1. Further according to the plaintiff, for the borrowed sum, the defendant paid Rs.625/- towards interest on 19.02.1974 and Rs.500/- on 02.02.1984 and endorsed the abovesaid repayments on the back side of the mortgage deed which endorsements had come to be marked as Exs.A2 and A3. Further according to the plaintiff, apart from the abovesaid payments, the defendant has not paid any amount towards the principal sum or towards interest despite several demands and also the issuance of legal notice which has come to be marked as Ex.A4 and according to the plaintiff, despite the receipt of the legal notice, the acknowledgment card received from the defendant marked as Ex.A5 and further according to the plaintiff, the defendant has not paid any amount and hence he has been necessitated to lay the suit for the recovery of the amount due to him under the mortgage deed.

9. In the written statement, the defendant has pleaded that the suit mortgage deed is a created document and that he has not borrowed any sum from the plaintiff based on the same and also not paid any payments towards interest as alleged in the plaint and not made any endorsements with

reference to the same as putforth in the plaint and further according to the defendant, to the legal notice sent by the plaintiff, he has sent a reply containing true facts and therefore contended that the suit is liable to be dismissed.

10. In the light of the abovesaid defence projected by the defendant that the suit mortgage deed Ex.A1 is a created document and that he not borrowed any amount from the plaintiff, on the basis of the same, as alleged in the plaint, it is for the plaintiff to establish that Ex.A1 mortgage deed had been executed by the defendant in his favour for the borrowal of the sum of Rs.10,000/- from him on 06.03.1973 as putforth in the plaint. To sustain the abovesaid plea of the plaintiff, the plaintiff has examined P.W.3, the scribe of the mortgage deed Ex.A1. The scribe examined as P.W.3 has deposed that the defendant had borrowed Rs.10,000/- from the plaintiff during 1973 and executed Ex.A1 mortgage deed in his favour and that the abovesaid mortgage deed had been written only by him and also deposed about the execution of the said document by the defendant by putting his signature and the attestation of the same by the attestors Angamuthu and Muthaiyan and also deposed about the registration of the abovesaid mortgage deed and therefore, the scribe P.W.3 having tendered evidence as regards the execution of the mortgage deed by the defendant in favour of the plaintiff for the borrowal of the suit sum from the plaintiff on 06.03.1973 and when his evidence is not shown to be unworthy of acceptance or unconvincing and on the other hand, as assessed by the first appellate court rightly, when the evidence of P.W.3 is found to be inspiring, trustworthy and acceptable in all aspects and accordingly, it is found that the first appellate court based on the evidence of the scribe P.W.3, has come to the conclusion that the defendant had borrowed the suit sum from the plaintiff and executed the mortgage deed Ex.A1 in favour of the plaintiff as pleaded in the plaint. In this second appeal also, no valid reason has been projected by the defendant's counsel to hold that the first appellate court has erred in placing reliance upon the evidence of P.W.3, the scribe, for accepting the plaintiff's case as regards the execution of the mortgage deed by the defendant in favour of the plaintiff for the borrowal of the suit sum on 06.03.1973 from the plaintiff.

11. It is mainly putforth by the defendant's counsel that inasmuch as the defendant had disputed the execution of the suit mortgage deed Ex.A1 and alleged that it is a created document, in such view of the matter, according to him, the plaintiff should have examined the

attestors to the mortgage deed for sustaining his case and according to him without the examination of the attestors to the mortgage deed as required by law, the plaintiff is not entitled to rely upon the evidence of scribe P.W.3 for upholding the case and further according to him, the first appellate court without considering the abovesaid legal aspects of the matter, erred in upholding the plaintiff's case based on the evidence of the scribe P.W.3.

12.The abvoesaid contention, however, does not merit acceptance. To establish the endorsement of the repayment of Rs.500/- by the defendant on 02.02.1984, the plaintiff has examined the scribe, who had written the said endorsement as P.W.2 and he has deposed clearly that the defendant paid a sum of Rs.500/- towards interest for the borrowed sum and endorsed the same on the reverse side of the mortgage deed and that it is he who had written the said endorsement and the same has been signed by one Chellamuthu and during the course of his evidence, P.W.2 has clearly deposed that the attestors to the mortgage deed namely Muthaiya Udayar, S/o, Dharmalinga Udaiyar and Angamuthu, S/o, Mottaiyavannan had died. The abovesaid evidence adduced by P.W.2 has not been challenged by the defendant during the course of his cross examination. In addition to that, no material has been putforth by the defendant that the statement adduced by P.W.2 that both the attestors of the mortgage deed Ex.A1 had died is false and not true.

13. Therefore, as could be seen from the evidence of P.W.2, both the attestors of Ex.A1 mortgage deed having died, the plaintiff had become incapacitated in examining the attestors to establish the truth of Ex.A1 mortgage deed. Furthermore, the defendant has also not come forward with any evidence either through him or through other independent witness to hold that the attestors to the mortgage deed are still alive. Insofar as this case is concerned, the defendant for the reasons best known to him, has not entered into the witness box. In such view of the matter, in the light of the positive evidence adduced by P.W.2 that both the attestors of Ex.A1 had died and when there is no contra evidence to the abovesaid plea put forth by P.W.2, in such view of the matter, it is found that the plaintiff is necessitated to examine only the scribe of the mortgage deed as P.W.3 for establishing the truth and validity of Ex.A1 mortgage deed as per law as P.W.3 is the person who is acquainted with the signatures of the attestors, inasmuch as, it is he who had written the said document as the scribe. Accordingly, as above seen, P.W.3 during the course of his evidence has clearly deposed about

the borrowal of the said sum from the plaintiff by the defendant on 06.03.1973 and the execution of the mortgage deed by the defendant in favour of the plaintiff by putting his signature in the deed and also deposed about the attestation of the same by Muthaiyan and Angamuthu and also deposed about the writing of the mortgage deed on his part. In view of the abovesaid factors, the first appellate Court had correctly held that the plaintiff is unable to examine the attestors to prove the execution of the mortgage deed by the defendant as per law and left with no other alternative, the plaintiff is necessitated to invoke section 69 of the Indian Evidence Act for examining the person who is acquainted with the signature of the attestors to the mortgage deed and accordingly chose to examine the scribe P.W.3, who has testified that it is only the defendant, who had executed the mortgage deed for the borrowal received by him from the plaintiff as recited in the mortgage deed and the same had been attested by the attestors Angamuthu and Muthaiyan in his presence. Therefore, from the evidence of P.W.3, it is seen that as rightly determined by the first appellate court, the plaintiff has established the execution of the mortgage deed Ex.A1 by the defendant for the borrowal of the suit sum from the plaintiff on 06.03.1973.

14. Other than having taken the plea that the mortgage deed is a created document and that he has not executed the same in the written statement, to substantiate the abovesaid plea, the defendant has not chosen to enter into the witness box and testify about the defence projected by him on the abovesaid lines. No valid reason has been offered by the defendant to show as to why he has not chosen to enter into witness box. If the defendant had come forward to subject himself for cross examination, it is found that the plaintiff would have had the opportunity to cross examine the defendant with reference to his defence claim by confronting him with the mortgage deed executed by him and the signatures contained in the same and the endorsements made by him in the deed marked as Exs.A2 and A3. But the plaintiff has been deprived of the said opportunity on account of the failure of the defendant to enter into the witness box to depose about his defence version. No doubt, as rightly putforth by the defendant, it is not incumbent on his part to establish the case of the plaintiff and it is only the plaintiff who has to prove his case by acceptable and convincing evidence. When the plaintiff has come forward with the case that both the attestors of Ex.A1 mortgage deed had expired and when there is no contra evidence to the same on the part of the defendant and the said factors had also not been challenged

by the defendant as abovenoted and when the scribe examined as P.W.3 has clearly deposed about the execution of the mortgage deed by the defendant as well as the attestation of the attestors in his presence, in such view of the matter, atleast to challenge the abovesaid evidence adduced by the plaintiff in the matter, the defendant should have entered into the witness box to deny the same in specific as putforth in the written statement. Mere plea in the written statement would not constitute evidence on the part of the defendant, unless and until the defendant comes forward to state about his case by adducing evidence. As rightly found, his plea in the written statement cannot be taken as such for holding that the entire burden is only upon the plaintiff to establish his case. No doubt, the burden is only upon the plaintiff to establish his case. However, considering the facts and circumstances at hand, when the plaintiff is unable to buttress his case by examining the attestors on account of their death and also endeavored to establish his case by examining the scribe of the mortgage deed and the scribe has also tendered evidence in an acceptable manner, deposing about the execution of the mortgage deed by the defendant and the attestation of the attestors concerned and even thereafter, when the defendant throws a challenge to the abovesaid evidence projected by the plaintiff, in such view of the matter, the duty is also cast upon the defendant to come forward with the defence in open by entering into the witness box and withstand the cross examination to be made by the plaintiff as regards the case put forth by him as well as the defence projected by the defendant. The plaintiff having been denied the said opportunity, in such view of the matter, in my considered opinion, the failure of the defendant in entering into the witness box, on the facts and circumstances of the case at hand, is fatal to his defence.

15. In addition to that, as abovenoted, before instituting the suit, the plaintiff has issued a legal notice calling upon the defendant to pay the amount due to him based upon the mortgage deed. In the said notice, the plaintiff has clearly averred about the borrowal of the suit sum by the defendant and the execution of the mortgage deed by him in favour of the plaintiff offering the suit property as security and also the repayment of amounts towards interest on different dates and the endorsement made by the defendant with reference to the same on the reverse side of the mortgage deed and when the issuance of the legal notice by the plaintiff marked as Ex.A4 has not been controverted by the defendant, it is thus found that

despite the same, the defendant has not chosen to sent a reply to the legal notice challenging the case put forth by the plaintiff. Though the defendant in his written statement would claim that he has given a reply to the legal notice sent by the plaintiff on 16.09.1992 and also adduced evidence that the same had been refused to be received by the plaintiff's advocate, however to sustain his abovesaid defence, on that aspect, the defendant has not endeavored to mark the returned cover or the copy of the reply notice alleged to have been sent by him to the plaintiff's counsel or the plaintiff. Though, it is found that an attempt had been made by the defendant to mark the returned cover in the first appellate court, the first appellate court for the acceptable and convincing reasons, had chosen not to entertain the said document and in my considered opinion, there is no reason to warrant any interference to the same. Therefore, as the matter stands today, no reply has been issued by the defendant to the legal notice issued by the plaintiff through his counsel and accordingly it is seen that inasmuch as the defendant had received the suit sum from the plaintiff and executed the mortgage deed in evidence of the borrowal of the suit sum and also paid certain amount towards interest and made endorsements on the backside of the mortgage deed as averred by the plaintiff, unable to controvert or repudiate the same, it is found that the defendant has not chosen to sent a reply and accordingly had also not endeavored to mark the same alleged to have been sent by him in the trial court and also his endeavors to mark the same in the first appellate court ended in vein. As against the rejection of the abovesaid reply notice on the part of the first appellate court, no specific challenge has been putforth by the defendant in the grounds projected in the second appeal and it thus found that inasmuch as, the first appellate court has refused to receive the alleged additional evidence sought to be projected by the defendant on sound reasons, no challenge has been made to the same by the defendant in the grounds projected by him in the second appeal. In toto, the non-issuance of the reply by the defendant to the legal notice of the plaintiff is fatal to his case and on that factor also it is seen that as rightly determined by the first appellate court, inasmuch as, the defendant has no cause to resist the claim putforth by the plaintiff in the legal notice, he had not chosen to controvert the same by sending a valid reply notice. On that count also, it is seen that the plaintiff has sustained his case and as well as abovenoted, also sustained his case through the evidence of the scribe examined as P.W.3.

16. In addition to that to substantiate his case, the plaintiff has examined himself as P.W.1 and tendered evidence clearly that the defendant borrowed the suit sum from him on 06.03.1973 and executed the suit mortgage deed Ex.A1 and paid two installments towards interest in various dates and endorsed the same on the reverse side of the mortgage deed marked as Exs.A2 and A3 and even after several demands and the issuance of legal notice, he has not come forward to repay the borrowed amount. Despite cross examination, nothing has been elucidated from the plaintiff examined as P.W.1 to discard his evidence in any manner. Therefore, the plaintiff through his evidence as well as the evidence of the scribe P.W.3 has clearly established about the borrowal of the suit amount by the defendant from him and the execution of the mortgage deed Ex.A1 and the repayments made by the defendant and the endorsements marked as Exs.A2 and A3 made by the defendant and also by giving plausible reasons as to why he has not been able to examine the attestors to the mortgage deed, in all, it is found that the case has been established by the plaintiff without any ambiguity or doubt and also as per law and in such view of the matter, the contention putforth by the defendant that the plaintiff's suit should fail on account of his failure to examine the attestors to the mortgage deed as required by law, as such, cannot be accepted particularly, as above discussed, in the light of the facts and circumstances of the case at hand.

17. Materials placed on record go to show that the plaintiff had also endeavored to compare the signatures of the defendant in Ex.A1 as well as Exs.A2 and A3 with his admitted signatures by an expert, however, the abovesaid endeavor could not succeed as the defendant had not come forward with any of his admitted signatures made by him during the contemporaneous period i.e, on the date of Ex.A1 mortgage deed or the date of the endorsement marked as Exs.A2 and A3. Thus it is found that the plaintiff has been endeavoring to establish the truth and validity of the mortgage deed Ex.A1 as well as the endorsement of repayment marked as Exs.A2 and A3 in all possible manner available to him under law and only on account of the factors, inasmuch as the attestors had died, he had been unable to examine them to substantiate his case, however had chosen to examine the scribe of Ex.A1 as P.W.3 to sustain his case as per law and in such view of the matter, the first appellate court is found to be fully justified in accepting the case of the plaintiff based on the oral and documentary evidence projected by the plaintiff in the matter.

18. Considering the factors that the defendant has not sent any reply repudiating the case of the plaintiff projected in the legal notice marked as Ex.A2 and also the defendant having not come forward to enter into the witness box to adduce any evidence with reference to the defence version in any manner and thereby not come forward to deny his signatures in Ex.A1 as well as in Exs.A2 and A3 in open by tendering evidence and subjecting himself to cross examination with reference to the same on the part of the plaintiff, in such view of the matter, the plaintiff having established the truth and validity of Ex.A1 by examining himself as well as examining the scribe of the document and also offering plausible explanation as to why he had been unable to examine the attestors to the mortgage deed and also having come forward to examine the scribe of Ex.A3 endorsement and when the plaintiff is not required to examine the attestor to the endorsement marked as Ex.A3 as per law and the same could be established by the plaintiff through any other evidence as required by law and not necessarily to be established only by examining the attestors as provided under the Indian Evidence Act, in such view of the matter, when the evidence of P.W.2 with reference to the same has not shown to be unacceptable by the defendant, despite cross-examining him, in such view of the matter, the plaintiff having established the endorsements marked as Exs.A2 and A3 as abovenoted, the same having also not been controverted by the defendant by sending a reply notice and thereby when it is seen that the defendant has acknowledged his liability to pay the suit amount to the plaintiff by making Exs.A2 and A3 endorsements, the suit laid by the plaintiff is found to be not barred by limitation as sought to be projected by the defendant and in such view of the matter, the contention of the defendant that the suit is barred by limitation on account of the failure of the plaintiff to establish the genuineness of the endorsements marked as Exs.A2 and A3, as such, cannot be countenanced.

19. In the light of the abovesaid discussions, no valid reason has been projected by the defendant to warrant any interference to the judgment and decree of the first appellate court in upholding the plaintiff's case. The substantial questions of law formulated in the second appeal are accordingly answered against the defendant and in favour of the plaintiff.

20. In conclusion, the second appeal fails and is accordingly dismissed. No costs. Consequently, connected miscellaneous petition, if any is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

mfa

To

1. The Subordinate Judge,
   Sub Court,
   Attur, Salem District.

2. The District Munsif,
   District Munsif Court,
   Attur, Salem District.

Copy to

The Section Officer,
VR Section,
High Court,
Chennai.

S.A.No.1453 of 2005

A.SK(26/08/2019)