BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 17.06.2019
CORAM:
THE HONOURABLE **MR.JUSTICE S.S.SUNDAR**

S.A.(MD)No.109 of 2019
and
C.M.P.(MD)No.2884 of 2019

Pandiammal (Died)
1.Muthupandi
2.S.Alagupandi
3.S.Ganagapandi ... Appellants/Respondents/Defendants

Vs.

S.Fathima Beevi ... Respondent/Appellant/Plaintiff

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the decree and judgment, dated 06.09.2017 passed in A.S.No.29 of 2011 on the file of the Principal District Court, Madurai, by reversing the decree and judgment, dated 05.04.2011 passed in O.S.No.67 of 2002 by the II Additional Subordinate Judge, Madurai.

For Appellants : Mr.M.A.Murthuza Ali
For Respondent : Mr.S.Muthalraj

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JUDGMENT

The above second appeal has been preferred by the defendants in the suit in O.S.No.67 of 2002, on the file of the II Additional Subordinate Court, Madurai.

2.The respondent in this Second Appeal filed the suit in O.S.No.67 of 2002 on the file of the Second Additional Sub Court, Madurai, to pass a preliminary decree directing the defendants to pay a sum of Rs.6,10,000/- together with subsequent interest from the date of plaint and in default, to direct the sale of the suit property and to pass a preliminary decree against the appellants and their other properties if the sale proceeds are insufficient to satisfy the decree amount.

3.It is the case of the respondent that the defendants borrowed money from the plaintiff to discharge their family expenses, house repairing expenses, for improvement of their business and to discharge the existing debt with Hindu Permanent Fund Limited. It is stated that the defendants borrowed a sum of Rs.2,50,000/- from the plaintiff and that on 21.05.1999 with an intention to secure the amount borrowed by them, the defendants executed a registered mortgage deed. According to the plaintiff, the property mortgaged originally belonged to one R.Santhanakrishnan and his brother R.Muniyasamy Naidu. It is also stated that by a partition deed dated 18.07.1974, the scheduled property was allotted to Mr.R.Santhanakrishnan and that the said R.Santhanakrishnan died intestate leaving behind the first defendant – his wife and defendants 2 to 4 who are his children.

4.It is the further case of the plaintiff that the defendants promised to repay the loan within two years from 21.05.1999 and agreed to pay interest at the rate of 24% p.a. and promised to pay interest at 30% per annum if he fail to repay the amount within two years. A suit notice was issued to the defendants. It is stated that the defendants sent a reply dated 12.12.2001 with false averments as if they received money only from one Mr.Ilampirai and that they had discharged the loan with Mr.Ilampirai. Since the passing of consideration was also disputed in the reply, the plaintiff stated that she was constrained to file the suit on mortgage. The appellants filed a written statement admitting that they have inherited the suit property which is the subject matter of the mortgage. However, the appellants specifically denied the borrowal and the passing of consideration under the registered mortgage deed dated 21.05.1999. It is the specific case of the appellants that they had borrowed a sum of Rs.90,000/- from one Mr.Ilampirai about five years back and another sum of Rs.30,000/- from the same person about 3½ years before filing of the written statement. It is the case of the appellants that the said Ilampirai had obtained the signatures of the defendants in blank papers, stamp papers as security for the loan. It is also stated that the said Ilampirai by force and undue influence had obtained the said mortgage deed on 21.05.1999 in the name of the plaintiff as a security. Stating that there is no creditor and debtor relationship between the plaintiff and defendants, it is further contended in the written statement that the defendants never received a sum of Rs.2,50,000/- from the plaintiff as alleged in the plaint. It is also mentioned in the written statement that the defendants/appellants had discharged the loan amount due to the said Ilampirai and that the creditor by name Ilampirai did not return the blank papers and the original mortgage deed under the pretext that the mortgage deed had been misplaced.

5.Before the trial Court, on behalf of the plaintiff, the plaintiff's husband was examined as P.W.1. P.W.2 and P.W.3 were examined to prove attestation of the original mortgage deed which was filed as Ex.A2. P.W.4 was also examined to prove the case of the plaintiff. Document Ex.A1 to A9 were marked on the side of the plaintiff. The third defendant was examined as D.W.1 and on the side of the defendants Ex.B1 and B2 were marked. The trial Court relying upon a judgment of the Hon'ble Supreme Court held that P.W.1 who is only the power agent of the plaintiff is not competent to speak about the mortgage in the present case where the validity of the mortgage and passing of consideration is specifically denied by the defendants. Since the plaintiff did not examine herself as a witness and subjected herself to be cross-examined by the defendants, the trial Court held that adverse inference should be drawn against the plaintiff. Since the trial Court pointed out some of the discrepancies in the evidence of P.W.1 and held that the plaintiff has not proved the transaction under Ex.A2 and that therefore, they are not entitled to the relief prayed for in the suit. Aggrieved by the judgment and decree of the trial Court, the plaintiff preferred an appeal in A.S.No.29 of 2011 on the file of the Principal District Court, Madurai. The appellate Court reversed the findings of the trial Court and held that the plaintiff is entitled to get a decree as prayed for. The appellate Court considered the evidence of P.W.1 to P.W.4 and the documents Ex.A2 and Ex.A6 to hold that the plaintiff has proved the loan transaction as pleaded by her in the plaint and the passing of consideration. Relying upon Section 120 of Evidence Act, the lower Appellate Court found that P.W.1 who is the husband of the plaintiff is competent to speak about the transaction especially when P.W.1 had personal knowledge about the borrowal and execution of Ex.A2 mortgage deed. Since execution of mortgage deed is admitted by the defendants and passing of consideration alone was disputed the lower appellate Court held that the burden of proof lies on the respondents/defendants by whom the mortgage deed came into existence. Though there is a discrepancy between the document Ex.B1 namely the complaint lodged by the plaintiff against the defendants and the pleading in the plaint, the lower appellate Court found that the suit on mortgage which is based on a registered mortgage deed cannot be thrown away merely because there are some discrepancies in the plaint averments and the document Ex.B1 regarding the non-disclosure of the mortgage to the Hindu Permanent Fund. After elaborately discussing the evidence both oral and documentary, the lower appellate Court held that the mortgage deed is proved and that the appellants are liable to pay a sum of Rs.4,10,000/- with subsequent interest at the rate of 6% per annum on the principal amount of Rs.2,50,000/- from the date of plaint. Accordingly, the preliminary decree was passed as prayed for by the plaintiff in the suit. Aggrieved by the judgment and decree of the lower appellate Court in A.S.No.29 of 2011, the above Second Appeal has been preferred by the defendants 2, 3 and 4.

6.In the memorandum of grounds, the appellants have raised the following substantial questions of law:

> *"1.Whether the view of the I Appellate Court that as respondent/plaintiff did not appear as witness and only her husband appeared as witness and hence her case was not proved is erroneous in law in view of Section 120 of Evidence Act, wherein, it has been provided that husband or wife of a party in any suit shall be competent witness?*

2.Whether a Power Agent can depose on behalf of his/her principal in respect of things, which happened prior to the execution of Power of Attorney or not?

3.Whether or not the I Appellate Court is right in concluding that the admission of borrowal from PW-2 is admission of consideration from the plaintiff, especially the amount and the person are different?

4.Is it no the duty of the plaintiff to examine herself, especially when the Mortgage Deed stands in her name and especially when she is able to come to the Court?

5.Whether or not the I appellate Court is right in not drawing any adverse inference in the light of the decision of the Supreme Court reported in AIR 199 SC 1441 and AIR 2005 SC 439, especially when the plaintiff has not examined herself to prove her claim?

6.Whether or not the I appellate Court is right in discarding the vital contradiction between Ex-B1 and Ex-A2?"

7.The learned Counsel for the appellants submitted that the plaintiff has not gone into witness box. However, the plaintiff's husband was examined as a witness. Even though the plaintiff's husband is the Power Agent of the plaintiff, it is submitted that he cannot depose on behalf of the plaintiff and that the evidence of P.W.1 as power agent is not admissible.

8.The learned Counsel for the appellants relied upon a judgment of the Honourable Supreme Court in the case of ***Janki Vashdeo Bhojwani and another vs Indusind Bank Limited and others***, reported in ***AIR 2005 SC 439***, wherein, it is held that Rule 1 and 2 of Order III CPC though empowers the holder of power of attorney to act on behalf of the principal, the word 'acts' employed in Order III Rule 1 and 2 CPC confines only in respect of 'acts' done by the power of attorney holder in exercise of power granted under the instrument. It is further held that a power of attorney cannot depose for the principal in respect of the matter about which only the principal had knowledge and in respect of which, the principal is liable to be cross examined. Since the power of attorney holder does not have personal knowledge of the matter as the principal, neither he can depose on such personal knowledge, nor he can be examined on those facts, which are within the personal knowledge of the principal. However, in this case, the husband deposed on behalf of the wife. Section 120 of Indian Evidence Act, 1872, permits either the husband or the wife to depose as a witness on behalf of their spouse. In this case, the husband acts as a power agent of the wife. However, the legal position is settled that either the husband or the wife can depose on behalf of their spouse, as permitted under Section 120 of Indian Evidence Act, 1872.

9.The learned Counsel for the appellants submitted that the husband is not even signed as a witness in the Mortgage deed, which was produced on behalf of the plaintiff to prove the mortgage. Referring to this facts, the learned Counsel for the appellants further submitted that the husband, who had no personal knowledge about the facts relating to the mortgage transaction, cannot be permitted to speak on behalf of the wife. Thirdly, the learned Counsel for the appellants submitted that the mortgage and the loan transaction happened long prior to the suit and that the husband, who is not a party to the transaction, cannot be permitted to depose on behalf of the wife.

10.This Court is not inclined to appreciate any of the arguments of the learned Counsel for the appellants. As rightly held by the lower Appellate Court the husband of the plaintiff in this case, has personal knowledge about the transaction and examined himself as P.W.1. He is also competent to speak on behalf of his wife under Section 120 of Indian Evidence Act, 1872. The relationship between the power of attorney and the principal is entirely different from the relationship between husband and wife. When the mortgage deed is proved by a registered document signed by parties, it is always open to the mortgagee to examine her husband to give full picture about the entire transaction as a person, who knew and well versed with the facts and as a person having interest as husband of a party to the transaction. It is in that sense, the privilege of the husband is different from the power of attorney, who is expected to act only as per authority. Even a power holder can be examined if he has personal knowledge about the transaction required to be proved.

11.It is not a case where, the mortgage and other transactions are proved to be shady or surrounded by suspicious circumstances. It is a case where, the wife has filed the suit for recovery of money due on a mortgage in favour of plaintiff. The transaction as such is expected to be proved in the manner known to law. In such circumstances, the question whether the husband can depose in the place of his wife has to be answered in favour of plaintiff and non-examination of plaintiff will have no consequences especially when the husband had personal knowledge and part of mortgage money was paid by him to advance mortgage loan.

12.In the course of evidence of PW-1, he has stated that the husband and wife gave money to the defendants and the mortgage was obtained in the name of the wife. During the cross examination of defendants, the evidence of PW-1 is also to the effect that the money was paid by him. The entire evidence that was recorded by PW-1 only suggest that he was always present along with the wife and that his evidence assume more importance to prove the transaction.

13.It appears that examination of husband in this case is very much required and necessary to prove the case of the plaintiff rather than examining the plaintiff. In such circumstances, this Court is unable to accept the submission of the appellants that the suit filed by the plaintiff is liable to be dismissed for non-examination of the wife.

14.The learned Counsel for the appellants relied upon the judgment of the Honourable Supreme Court in the case of ***Vidhyadhar vs Manikrao and another***, reported in ***AIR 1999 SC 1441***, wherein, it has been held as follows:

"14. Even while plaintiff was in the witness box, defendant No. 2 declined to cross examine the plaintiff which shows that defendant No. 2 after admitting the case of the plaintiff, had no interest in the litigation particularly as he had already transferred the property in favour of the plaintiff.

15. It was defendant No. 1 who contended that the sale deed, executed by defendant No. 2 in favour of the plaintiff, was fictitious and the whole transaction was a bogus transaction as only Rs. 500 were paid as sale consideration to defendant No. 2. He further claimed that payment of Rs. 4,500 to defendant No. 2 at his home before the registration of the deed was wholly incorrect. This plea was not supported by defendant No. 1 as he did not enter into the witness box. He did not state the facts pleaded in the written statement on oath in the Trial Court and avoided the witness box so that he may not be cross examined. This, by itself, is enough to reject the claim that the transaction of sale between defendant No. 2 and the plaintiff was a bogus transaction.

16. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v. Gurdial Singh and Anr. . This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh and Ors. AIR (1930) Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh AIR (1931) Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in Arjun

Singh v. Virender Nath and Anr. held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Bhagwan Dass v. Bhishan Chand and Ors. , drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box."

15.In a case of this nature, where, the husband has deposed on behalf of the wife about the transaction, in which he was present right through, the judgment of the Honourable Supreme Court above cited may not have any application. Only in a case where, a party to suit or proceeding does not enter witness box to tell his or her own case on oath and submit himself or herself to be cross examinationed by other side, the Court can draw adverse inference under Section 114 of the Indian Evidence Act. This is the position, which is reiterated by the Honourable Supreme Court. Yet another question raised by the appellant is about contradiction between Ex.A2 and Ex.B1. In the complaint, the plaintiff has alleged that the defendant has executed the mortgage under Ex.A2 without disclosing the prior mortgage in favour of M/s.Hindu Permanent Fund Ltd. In Ex.A2, it is stated that money was paid to discharge the loan. There is no contradiction. Even if there is contradiction, that is not material to render the mortgage invalid or unenforceable. In this matter, no other substantial questions of law arise for consideration especially when the findings of lower appellate Court are well founded and all the points have been considered. Hence, this Court has no other option, but to dismiss this appeal.

16.Accordingly, the second appeal is dismissed and the judgment and decree in A.S.No.29 of 2011, dated 06.09.2017, on the file of the Principal District Court, Madurai, reversing the decree and judgment, dated 05.04.2011 passed in O.S.No.67 of 2002 by the II Additional Subordinate Judge, Madurai, is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-I)

// True Copy //

Sub Assistant Registrar(CS)

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To

1.The Principal District Judge, Madurai.

2.The II Additional Subordinate Judge, Madurai.

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The Record Keeper,
V.R.Section,Madurai Bench of Madras High Court,
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+1CC TO MR.S.MUTHALRAJ, Advocate Sr. No.69587

S.A.(MD)No.109 of 2019
17.06.2019

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