IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on 02.08.2021	Orders pronounced on 12.08.2021

Coram

THE HONOURABLE Mr. JUSTICE G.CHANDRASEKHARAN

C.R.P.(PD) Nos.134 of 2019 and 985 of 2021
and
C.M.P.Nos.1183 of 2019 and 7874 of 2021

1. S.Rajkumar
2. Varadharajan ... Petitioners in all petitions

Vs

1. N.S.Ziadduhin
2. S.Mani ... Respondents in all petitions

Civil Revision Petition (PD) No.134 of 2019 is filed under Article 227 of the Constitution of India, to set aside the order and decreetal order dated 04.12.2018 passed in I.A.No.132 of 2018 in O.S.No.20 of 2016 on the file of the Additional District Judge, Namakkal.

Civil Revision Petition (PD) No.985 of 2021 is filed under Article 227 of the Constitution of India, to set aside the order and decreetal order dated 23.02.2021 passed in I.A.No.2 of 2019 in O.S.No.20 of 2016 on the file of the Additional District Judge, Namakkal.

For Petitioners
in all petitions .. M/s.S.Venkatesan

For Respondents
in all petitions .. M/s.N.Kishorekumar

COMMON ORDER

Civil Revision Petition (PD) No.134 of 2019 is filed challenging the order passed by the learned Additional District Judge, Namakkal in I.A.No.132 of 2018 in O.S.No.20 of 2016.

2. Civil Revision Petition (PD) No.985 of 2021 is filed challenging the order passed in I.A.No.2 of 2019 in O.S.No.20 of 2016 by the learned Additional District Judge, Namakkal.

3. I.A.No.132 of 2018 was filed under Order VII Rule 11 CPC for the rejection of the plaint.

4. The case of the petitioners/defendants in brief is as follows:-

The suit was filed by the respondents/plaintiffs for recovery of a sum of Rs.42,28,494/- with interest on Rs.15,00,000/- at 18% per annum from the date of suit, failing payment for passing final decree for the sale of suit properties for recovery of the amount and other reliefs.

5. The case of the first respondent is that the petitioners borrowed a sum of Rs.6,36,000/- on 01.02.2004, Rs.12,80,000/- on 19.04.2007, Rs.2,00,000/- on 29.03.2008. Petitioners had executed a mortgage by deposit of title deeds for the loans borrowed and to be borrowed on 09.02.2004. It is further the case of the first respondent that the petitioners issued a cheque for Rs.14,80,000/- drawn on ICICI Bank, Namakkal for discharging the loan and that the cheque was subsequently dishonoured. First respondent assigned the debt in favour of the second respondent through a registered assignment deed on 03.02.2015 for a consideration of Rs.15,00,000/-.

6. The case of the petitioners is that they denied borrowing amounts, executing promissory note and executing mortgage by deposit of title deeds. Even assuming, without admitting, that a mortgage by deposit of title deeds was executed on 09.02.2004, it cannot be taken as a valid mortgage for the reason that the conditions requisite for executing/creating a mortgage by deposit of title deeds had not been followed. The mortgage by deposit of title deeds should be executed only through registered instrument and it cannot be executed through

unregistered document. Deposit of title deeds should have taken place prior to the agreement. Perusal of the agreement dated 09.02.2004 shows that the document of titles were deposited on the same day on which the alleged memorandum of agreement was executed. The alleged mortgage by deposit of title deeds dated 09.02.2004 is not legally admissible and permissible and therefore, this suit cannot be laid as a mortgage suit. It is alleged that the borrowings were made in 2004, 2008 and 2007. This case cannot be maintained as a mortgage suit. Therefore, the claim on the basis of the borrowings in 2004, 2008 and 2007 are barred by limitation. In the criminal complaint filed before magistrate's court for the dishonour of cheque, there is no mention about the mortgage deed dated 09.02.2004. Therefore, the suit is barred by limitation and is liable to be rejected.

7. The case of the petitioners in I.A.No.2 of 2019 is that the petitioners said to have borrowed a sum of Rs.6,36,000/- on 01.02.2004 from first respondent and executed the promissory note. It is the case the first petitioner borrowed a sum of Rs.12,84,000/- from first respondent on 19.04.2007 and executed a promissory note. It is alleged that the first petitioner again borrowed a sum of Rs.40,000/- in cash and Rs.1,60,000/-

through cheque from the first respondent and issued a cheque to the first respondent for Rs.14,80,000/-. This cheque was returned for the reason that there was no fund and the case in C.C.No.97 of 2005 is pending before the 19th Metropolitan Court. The petitioners denied the aforesaid borrowals. The first respondent said to have assigned the loan in favour of the second respondent/plaintiff on 03.02.2015 through a registered assignment deed for a consideration of Rs.15,00,000/-. After the assignment, the first respondent cannot make any claim against the petitioners/defendants. Further, first respondent was examined as PW.1. Second respondent can alone enter the witness box and give evidence in support of the suit claim. First plaintiff/respondent has no locus standi to implead him as plaintiff and give evidence as a party. Therefore, this petition is filed to exchew the chief evidence of PW.1, who is the first plaintff in O.S.No.20 of 2016.

8. Both the petitions were contested by the respondents on the ground that the suit was laid on the basis of mortgage by the deposit of title deeds, which was created on 09.02.2004. The suit was filed within 12 years period and well within the limitation. The claim and counter claim with regard to the borrowals cannot be gone into at this stage. This

contested and vexed issues can be decided only in a full fledged trial after examining the parties. The issue of limitation is a mixed question of facts and law and that can not be gone into now. With regard to examining the first respondent/plaintiff as PW.1, the entire loan transactions were only between the first plaintiff and the defendants. The second respondent/plaintiff entered into scene only after the execution of assignment in his favour. First respondent/plaintiff is the most competent person to speak about the loan transactions and the execution of mortgage by deposit of title deeds. Unless he is examined, it is difficult for the plaintiff to prove his case. His evidence is very much necessary for arriving at the right decision in this case. Therefore, the respondent prayed for dismissal of both the petitions.

9. Considering the materials produced before and the submissions made, the learned Additional District Judge, Namakkal, found that the suit was filed on the basis of mortgage by deposit of title deeds within a period of twelve years and the suit shall not be rejected under Order VII Rule 11 CPC on the ground of limitation and lack of cause of action and dismissed the petition for rejection of plaint. The petition for exchewing the evidence of PW.1 was also dismissed on the

ground that the misjoinder of parties is not a ground for defeating the claim; no prejudice shown to have been caused to the petitioners. No decree is sought in favour of first plaintiff. Stating these reasons, the learned Additional District Judge, Namakkal, dismissed the petition for eschewing the evidence of PW.1. Against the orders passed in I.A.No.132 of 2018 and I.A.No.2 of 2019, these Revision Petitions CRP Nos.134 of 2019 and 985 of 2021 have been filed before this Court.

10. Learned counsel for the petitioners submitted that first loan was said to have been received on 01.02.2004 and the promissory note was said to have been executed on the same day. The memorandum of title deeds was said to have been executed on 09.02.2004. The limitation for filing a suit on the basis of promissory note was three years. This suit is filed on the basis that there is a mortgage by way of deposit of title deeds. As already narrated certain conditions have to be satisfied for execution of mortgage by deposit of title deeds. The mortgage by deposit of title deeds should be followed by payment of loan. But some of the loans ie., the loan amounts of Rs.12,80,000/-, Rs.40,000/-, Rs.1,60,000/- said to have been borrowed subsequent to the alleged execution of deposit of title deeds on 09.02.2004. The alleged mortgage

by deposit of title deeds dated 09.02.2004 was not registered and therefore, it is not admissible in evidence. When it is not admissible in evidence, the case filed on the basis that there was a mortgage is also not maintainable. The suit is barred by limitation. The alleged assignment of loan through registered assignment deed dated 03.02.2015 is document created only for the purpose of the case. After executing this registered deed, the first respondent/plaintiff has no locus standi to give evidence in this case. However, learned trial Judge without considering these aspects in proper perspective, dismissed these petitions. Learned counsel for the petitioners prays for setting aside the orders passed by the learned trial Jude.

11. In response, learned counsel appearing for the respondents submitted that the defendants borrowed money, executed promissory note, they also produced their documents to create a mortgage by deposit of title deeds. The suit was not based on promissory note, but based on mortgage by deposit of title deeds. Therefore, the suit was filed in time. There is no question of this suit being hit by limitation. The disputed issues with regard to borrowal, execution of promissory note, execution of mortgage by deposit of title deeds have to be decided only in the trial.

On the face of the plaint averments, respondents have made out a case against the defendants for a trial on the basis of mortgage by deposit of title deeds. The petitioners have not filed this petition immediately after entering appearance. They waited till the time when the examination of witnesses was commenced and then filed the petition. First respondent/ plaintiff is a right person to speak about the loan transaction, execution of promissory note and the mortgage by deposit of title deeds. Therefore, he is impleaded as party and gave evidence. When the averments shows that the suit was filed as a mortgage suit, whatever issues raised by the petitioner have to be decided only during trial. There is no case made out for rejecting the plaint. On the other hand, the respondents made out a case for trial on the basis of mortgage of deposit of title deeds.

12. In reply, learned counsel for the petitioners submitted that in a Criminal Original Petition filed, this Court held that after execution of assignment deed by the first respondent/plaintiff in favour of the second respondent/plaintiff, he lost the right to continue the proceedings and the first respondent/plaintiff was directed to take appropriate steps to substitute the assignee in C.C.No.9705 of 2009. It shows that the first

respondent/plaintiff has no locus standi to give evidence.

13. Considered the rival submissions. It is seen from the plaint averments that the suit was filed for recovery of a sum of Rs.42,28,494/- with interest on Rs.15,00,000/- at 18% per annum from the date of suit till such deposit, failing such deposit to pass final decree for the sale of suit properties for the recovery of decree amount. The suit properties are situate in Namakkal Town and they belong to the defendants. The case as narrated in the plaint is that the petitioners/defendants borrowed a sum of Rs.6,48,000/- on 01.02.2004 from the first respondent/plaintiff and executed a promissory note. As a security for repayment, they had deposited a partition deed (second copy) and xerox copy of the release deed and created a mortgage over the property on 09.02.2004. The first petitioner/defendant had borrowed another sum of Rs.12,80,000/- from the first respondent/plaintiff on 19.02.2007 and executed a promissory note. Again on 29.03.2008, first petitioner/defendant borrowed Rs.40,000/- in cash and Rs.1,60,000/- by cheque from the first respondent/plaintiff and issued a cheque for Rs.14,80,000/- in discharge of prior loan of Rs.12,80,000/-, Rs.1,60,000/- and Rs.40,000/-. Cheque was issued on ICICI, Namakkal and that was returned as 'insufficient

fund'. Subsequently, first respondent/plaintiff issued notice to defendants on 03.02.2014 demanding the amount. First petitioner/ defendant replied through a notice dated 13.12.2004 and denied the borrowal and execution of promissory note. His reply was adopted by the second respondent. On 03.02.2015, first respondent/plaintiff assigned the mortgage by a registered deed to the second respondent/ plaintiff for a consideration of Rs.15,00,000/-. It is now claimed that the second respondent/plaintiff is entitled to recover the suit claim. Therefore, the suit came to be filed.

14. Contention of the petitioners is that the petitioners totally deny the loan transaction, execution of promissory note, mortgage by deposit of title deeds. It is alleged that the mortgage of deposit of title deeds has to be executed only through a registered instrument. However, this position is not correct. Mortgage of deposit of title deeds can be executed without registered instrument. In the State of Tamil Nadu, there is an amendment to the Registration Act, which makes it necessary that mortgage by deposit of title deeds should be registered. This amendment Act came into force only from 2014. The present case deals with mortgage by deposit of title deeds, which had come into existence

on 09.02.2004. Therefore, the contention of the learned counsel for the petitioners that the suit is not maintainable for the reason that mortgage by deposit of title deeds was not created through registered instruments cannot be accepted. It is seen from the case set out by the parties that the petitioners have totally denied the borrowal, execution of promissory note and mortgage by deposit of title deeds. These disputed and vexed questions have to be decided only in the trial. Technically the first respondent/plaintiff has no right over the suit claim after executing the registered assignment in favour of the second plaintiff seems that he is impleaded as first plaintiff only to safeguard the interest of the second plaintiff. It is stated in the plaint clearly that the second plaintiff is entitled for the suit claim. First plaintiff is the person, who knows personally about the loan transaction, execution of promissory note, mortgage by deposit of title deeds, issuance of cheque by the first defendant and therefore, he is the best person to give evidence in this case. Therefore, the prayer for the petitioner for eschewing his evidence cannot be entertained. The learned trial Judge has considered the matters and issues before him in the right perspective and rightly dismissed both the petitions and this Court finds no reason to interfere with the order of the learned Additional District Judge, Namakkal and accordingly confirm the orders. These Civil Revision Petitions are dismissed. No costs. Consequently, connected Civil Miscellaneous Petitions are closed. The learned trial Judge is directed to dispose the main case, without being influenced by any observations made in this order.

mra 12.08.2021

Index : Yes / No
Internet : Yes / No
Speaking order : Yes / No

To:

1. The Additional District Judge, Namakkal.

G.CHANDRASEKHARAN, J.

mra

common order in
C.R.P.(PD) Nos.134 of 2019 and 985 of 2021
and
C.M.P.Nos.1183 of 2019 and 7874 of 2021

12.08.2021