IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.12.2021
PRONOUNCED ON : 23.12.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.127 of 2010

Mr.M.Ramalingam ...Appellant/Plaintiff

Vs.

M.Subramani Udayar ...Respondent/Defendant

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Code of Civil Procedure, against the Judgment and decree dated 29.04.2009 made in A.S.No.12 of 2008 on the file of the learned District Judge, Thiruvannamalai, reversing the judgment and decree dated 08.11.2005 made in O.S.No.11 of 2004 on the file of the learned Subordinate Judge, Arni.

For Appellant : Mr.P.Seshadri

For Respondent : Mr.S.V.Karthikeyan

J U D G M E N T

This appeal is focused as against the Judgment and decree dated 29.04.2009 made in A.S.No.12 of 2008 on the file of the learned District Judge, Thiruvannamalai, reversing the judgment and decree dated 08.11.2005 made in O.S.No.11 of 2004 on the file of the learned Subordinate Judge, Arni.

2. For the sake of convenience, hereinafter the parties are referred to, as per their litigative status before the trial Court.

3. The laconic averments made in the plaint, are as follows:

On 12.02.1992, the defendant had borrowed a sum of Rs.50,000/- from the plaintiff and agreed to repay the same with interest at the rate of 24% per annum and in evidence of the said borrowal, the defendant had executed a registered simple mortgage deed in favour of the plaintiff. Despite repeated demands, the defendant has failed and neglected to pay any amount towards the mortgage debt. Hence, the suit.

4. The case of the defendant, as averred in the written statement, is as follows:

(i) It is false to state that the defendant had executed the suit mortgage deed dated 12.02.1992, as alleged in the plaint. The Mortgage Deed is a forged document and not supported by consideration. The defendant in fact approached the plaintiff to lend a sum of Rs.25,000/- to meet the marriage expenses of his daughter. Taking advantage of the same, the plaintiff coerced the defendant to put signature and thumb marks behind a stamp paper in which no recitals were incorporated. The plaintiff has also assured that he would retain the blank stamp papers as a security for the principal of Rs.25,000/- and return the same as soon as the said debt is discharged. The plaintiff falsely created the mortgage deed and got the same registered. In fact, the plaintiff failed to pay the assured sum of Rs.25,000/- also. The plaintiff has also got an empty promissory note in his favour. Coming to know of the fraudulent creation of the suit mortgage deed, the defendant demanded the plaintiff to return the same duly discharged. However, the plaintiff threatened that he would create a sale agreement or any other agreement of his choice and coerced the defendant, from not preferring a police complaint. The defendant is not liable to pay any interest as claimed in the plaint. Hence, the suit is liable for dismissal.

5. From the above averments, the learned Subordinate Judge, Arni, framed necessary issues and tried the suit. In support of the plaintiff's case, PW1 and PW2 were examined and two exhibits were marked as Ex.A1 and Ex.A2. On the side of the defendant, he examined himself as DW1 and marked six documents as Ex.B1 to Ex.B6

6. Having considered the materials placed before him, the learned Subordinate Judge, Arni, by judgment and decree dated 08.11.2005, came to the conclusion that the defendant is liable to pay Rs.1,03,910/-, along with interest. In the appeal preferred by the defendant in A.S.No.12 of 2008, the learned District Judge, Thiruvannamalai, reversed the findings arrived at by the trial Court and as such, the suit filed by the plaintiff was dismissed.

7. Feeling aggrieved over the findings arrived at by the lower appellate Court, the plaintiff is before this Court with

the present Second Appeal. When the second appeal is taken up for admission, this Court formulated the following substantial questions of law.

> "1. Whether the lower Appellate Court is right in holding that consideration has not passed contrary to the terms contained in the registered Mortgage deed?
>
> 2. Whether it is proper on the part of the lower Appellate Court to ignore the admission of the respondent in Ex.A2 reply notice with regard to the passing of consideration?"

8. Heard Mr.P.Seshadri, the learned counsel appearing on behalf of the appellant/plaintiff and Mr.S.V.Karthikeyan, the learned counsel appearing on behalf of the respondent/defendant and perused the materials available on record.

9. It is the case of the plaintiff that on 12.02.1992, the defendant borrowed a sum of Rs.50,000/- from the plaintiff as a loan and executed a simple mortgage deed and offered a house with vacant site at Ariyabath @Kalambur Village, as a security for repayment of the amount due. In the said mortgage deed, PW2 has signed as a witness. Now inspite of repeated adjournments, the defendant has not repaid the said amount.

10. On the other hand, it is the case of the defendant that during the relevant point of time, he approached the plaintiff to lend a sum of Rs.25,000/- to meet the marriage expenses of his daughter and the plaintiff after taking advantage of the critical financial difficulties having by the defendant, coerced the defendant to put signature and thumb marks behind a stamp paper in which no recitals were incorporated. It is agreed by the plaintiff that he would return the said stamp papers as soon as the loan is discharged. But the plaintiff has falsely created the suit mortgage deed and got the same registered, misrepresenting the same as security for the debt of Rs.25,000/- and therefore, the mortgage deed is a fabricated one.

11. The specific contention made by the learned counsel appearing for the appellant/plaintiff is that if a plea of forgery/fraud is taken by the defendant, it is for him to prove the same. Here it is a case, the defendant challenges the registered mortgage deed itself and the same is also accepted by the lower appellate Court by accepting the discrepancy found in the evidence given by PW2, who is the attestor in the said deed.

12. On the other hand, it is the contention raised by the learned counsel appearing for the respondent/defendant that the lower appellate Court after appreciating the evidence given by PW2 thoroughly, came to the conclusion that the plaintiff has not proved the fact that consideration has not been passed at the time of transaction, and therefore the claim made by the plaintiff is not proved.

13. On considering the submissions of the learned counsel on either side, it is not in dispute that the alleged mortgage deed dated 12.02.1992 was a registered one. In order to prove the execution, the plaintiff while at the time of giving evidence as PW1, gave evidence in support of his case. Supporting the evidence given by PW1, on Raja Gounder, the person who has signed as a witness in the mortgage deed was examined as PW2. Though in his chief examination, he has correctly narrated the case of the plaintiff in respect to the execution of the mortgage deed, in his cross examination, he has stated that except to stand as a witness, he does not know the reason why he signed as a witness in the mortgage deed. Further, he has stated that he does not know the details of the mortgage deed alleged to be executed by the defendant. Accordingly, the evidence given by PW2, in his cross examination had impeached the credibility of the evidence given in his chief examination.

14. In this regard, the learned counsel appearing for the appellant/plaintiff would contend that though, the evidence of PW2, is not in support of the case of the plaintiff, being the reason that the defendant took a plea that the plaintiff after misrepresenting the same, that for the loan of Rs.25,000/-, he prepared the mortgage deed, the burden is on him to prove his case. In order to prove the same, except the defendant, none have been examined on his side and therefore, it cannot be held that the plaintiff has not proved the transaction. Further he referred the judgment in Kuppuswami Chettiar, Vs. A.S.P.A.Arumugam Chettiar and another, reported in AIR 1967 SC 1395, wherein our Hon'ble Apex Court has held as follows:

> "His present plea that the deed was inducted by misrepresentation is an afterthought. In agreement with the High Court, we accept the testimony of the respondents' witnesses and we reject the evidence of the appellant and P.W. 2. The onus is upon the appellant to establish the plea of misrepresentation."

15. Learned counsel for the appellant/plaintiff, also relied on the judgment of Mysore High Court, in Muni Akhayyamma

Vs. Maistry Papaiah, reported in AIR 1956 Mysore 36, wherein it is held as follows:

> "If under the law or on facts, either admitted or proved, a presumption arises in favour of any party, the burden of proof will lie on the adverse party to rebut it. Thus where the plaintiff's case was that the defendant borrowed money and executed the suit hypothecation deed, it was a registered document admittedly bearing the signature of the defendant and the attestation of two witnesses and there was nothing suspicious on the face of the document to doubt these facts, but the defendant applied for the amendment of issue as to throw the burden on the plaintiff.

Held that under the circumstances, a presumption arose in favour of the plaintiff that the suit document had been validly executed and attested. If the defendant wanted to challenge the genuineness or validity of the execution and attestation he had to establish his contention. There was no justification for amending the issue so as to throw the burden of proof on the plaintiff."

16. Accordingly, in view of the above judgments, in the present situation, it is necessary to hold that the defendant is having the duty to prove his case as the alleged mortgage deed was a fabricated one. But, here it is a case, in order to prove the said plea, except the defendant, none have been examined on his side. Further, no documents have been produced on the side of the defendant to show that the alleged document was created by means of misrepresentation. Hence, the defendant fails in his duty to prove his case, as alleged by him.

17. Further, it is the contention raised by the learned counsel appearing for the appellant/plaintiff that in Ex.A2, which is an Advocate Notice, dated 25.11.1992 issued by the defendant he admitted the execution of mortgage deed. After admitting the same as a genuine, now disputing the contents of the said document, cannot be accepted.

18. In this regard, now, on going through Ex.A2, it is true in the said notice, the defendant admits the execution of the mortgage deed as the same was executed in favour of the plaintiff for the loan of Rs.50,000/-. Even assuming that the said notice is not a valid one, considering the fact that the

defendant has not proved the factum of misrepresentation and fraud, the failure on his part, would lead to a presumption that the alleged mortgage deed is a genuine one.

19. In otherwise, though the defendant established his case as the plaintiff is a money lender, having the habit to institute suits on various persons, after admitting the fact that the plaintiff is a money lender, the said stand taken by the defendant cannot be taken into account to disbelieve the case of the defendant. In fact, being the money lender, it is for him to institute the suit for recovery of dues. Accordingly, the lower appellate Court is not correct in holding that the consideration has not been passed contrary to the terms contained in the registered mortgage deed. Further, it is also not proper on the part of the lower appellate Court to ignore the admission of the respondent in Ex.A2, Reply Notice with regard to the passing of the consideration. Therefore, the substantial questions of law are answered as above.

20. In fine, the Second Appeal is allowed. The judgment and decree dated 29.04.2009 made in A.S.No.12 of 2008 on the file of the learned District Judge, Thiruvannamalai, is set aside. No Costs.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

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To

1.The District Judge, Thiruvannamalai.
2.The Subordinate Judge, Arni.

Copy to

The Section Officer
VR Section
High Court, Madras 104.

+2 Ccs to Mr.P.Seshadri, Advocate sr 69287

S.A.No.127 of 2010

AD(CO)
SP(23/02/2022)