



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :
24.03.2021

Pronounced on:
31.03.2021

CORAM:

THE HONOURABLE Ms. JUSTICE R.N.MANJULA

S.A.No.386 of 2010
and
M.P.No.1 of 2010

Parvathathammal ...Plaintiff/ Appellant /Appellant

Vs.

Muthulakshmi ...Defendant/ Respondent/ Respondent

PRAYER: This Second Appeal is filed under Section 100 of C.P.C, against the judgment and decree passed in A.S.No.37 of 2008 dated 14.09.2009 on the file of the Court of District Judge, Nagapattinam confirming the judgment and Decree passed in O.S.No.68 of 2006 dated 02.01.2008 on the file of the Court of Principal Sub Ordinate Judge, Mayiladuthurai.

For Appellant : Mr.A.Muthukumar

For Respondent : No Appearance

JUDGMENT

This second appeal has been preferred against the judgment and decree passed in A.S.No.37 of 2008 dated 14.09.2009 on the file of the Court of District Judge, Nagapattinam confirming the judgment and Decree passed in O.S.No.68 of 2006 dated 02.01.2008 on the file of the Court of Principal Sub Ordinate Judge, Mayiladuthurai.



The defendant approached the plaintiff's son, Kandhan for a loan of Rs.50,000/- At that time, Kandhan insisted that the defendant should execute a sale agreement and only then he would give a loan of Rs.50,000/-. On believing the words of the Kandhan this agreement was prepared. But the intention of the agreement is only to give this as a security for the loan. In fact the son of the plaintiff has lent only a sum of Rs. 35,000/- and not Rs. 50,000/-. It is false to state that there was a mortgage in favour of one Kaliyaperumal and the plaintiff's son discharged the same. When the defendant approached Kandhan for loan, Kandhan told him that if he delivers the title deeds, he would try to get him loan from a bank. Only in view of that the defendant has given the title deeds. But no bank loan was arranged for the defendant as promised by Kandhan. The suit has been filed just in order to grab the property of the defendant who is a single woman. The plaintiff was never in possession of the suit property and the defendant alone is possession. Hence the plaintiff is not entitled to get any relief as prayed for.

6. During trial, on the side of the plaintiff three witnesses were examined as P.W.1 to P.W.3 and Exs.A1 to A11 were marked. On the side of the defendant two witnesses were examined as D.W.1 & D.W.2 and no document was marked.

7. After trial, the trial Court has decreed the suit for the alternate prayer of the plaintiff and decreed the suit for a sum of Rs. 62,000/- with subsequent interest. The plaintiff has filed the First Appeal before the District Court, Nagapatinam. The first Appellate Court dismissed the appeal and confirmed the judgement of the trial Court. Aggrieved over that the plaintiff has filed this Second Appeal and the Second Appeal has been admitted on the following substantial questions of law:

"1.Whether the Courts below have committed an error in law in accepting the contentions of the respondent that the suit agreement was not intended to be acted upon and was



WEB COPY

obtained only as a guarantee for discharging the loan advanced by the son of the respondent?

2. Whether the Courts below erred in law in decreeing only a part of the advance covered by the suit agreement and the endorsements thereon?"

8. The fact that the sale agreement was entered into between the plaintiff's son Kandhan and the defendant was not denied. But the contention of the defendant was that the sale agreement was executed only as a security for the loan amount availed by the defendant from the son of the appellant /plaintiff. The proposed purchaser by name Kandhan is no more and hence the suit has been filed by his legal heir, his mother Parvathathammal. The sale agreement has been marked as Ex.A1. As per the terms of the sale agreement, the suit property was agreed to be sold for a sale consideration of Rs. 1,66,240/-. The sale advance is Rs. 62,000/- and the time for completing the sale is 3 months. The other son of the plaintiff alone was examined as PW.1.

9. The Appellant/plaintiff has claimed that after paying the advance amount of Rs. 62,000/-, subsequent payments have been made to the son of the defendant. The son of the defendant was examined as D.W.2 and he has denied the said fact. Since the sale agreement has been entered with the defendant any subsequent payment towards the sale consideration ought to have been paid to the defendant only. In the sale agreement Ex.A1, 5 endorsements were found and out of this 3 endorsements have been marked as Exs.A9, A10 & A11. No document is produced to show that the proposed vendor has given power to her son to receive the part sale consideration from the proposed purchaser.

10. The other son of the plaintiff, P.W.1 himself has stated in the evidence that there is a slight difference in the alleged signature of the defendant's son in Exs.A9, A10 & A11 endorsements. But the admitted signatures of the



defendants son Senthil is found in his evidence (D.W.2). The comparison of the signatures of Senthil with his admitted signatures with Exs.A9, A10 & A11 would show that the signatures in the endorsements are not identical. P.W.1 could not offer any explanation as to the difference in the signatures found in Exs.A9, A10 & A11 and why the signatures were not obtained from the defendant who alone is the party to the agreement. Since the signatures found in Exs.A9 to 11 do not tally with the signatures of Senthil (D.W.2), even on the bare eyes examination, it is correct for the Courts below to reject the claim of the plaintiff on the basis of these endorsements.

11. The plaintiff has also claimed that the mortgage loan due to one Kaliyaperumal was also discharged. The said mortgage dated 18.08.2001 (Ex.A2) is an unregistered one. The receipt dated 10.10.2003 also not a registered one. It is submitted by the learned counsel for the appellant that even though the mortgage deed is not a registered one, it can be considered as an agreement for loan. In support of his above said contention he relied on the judgement reported in 2002 (1) L.W. 613 [P.Joseph Vs. M.T.Santiago]. In the said judgement of the Single bench of this court, has observed as follows:

"2. Plaintiff filed a suit for recovery of money by sale of the mortgaged property. The mortgage that is sought to be enforced was unregistered and consequently plaintiff could not get a decree, as if there is a valid mortgage. Plaintiff therefore wanted to amend the plaint seeking personal decree against the defendant and making use of the unregistered mortgage deed as an agreement of loan.

.....

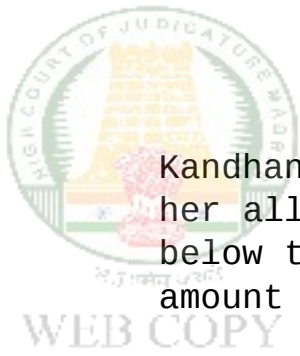
4..... Since the mortgage deed is unregistered, at the most it could be said that plaintiff can not enforce, as if it is a mortgage. But it could be taken as an agreement of loan, and the loan could be



proved on the basis of admission in the document itself. "

12. Though it is true that an unregistered mortgage can be considered as an agreement of loan as per the above judgement, that could be so only between the parties to the mortgage and not against 3rd parties. The plaintiff is a 3rd party who is not connected with the transaction shown in Ex.A2. PW.3, Kaliyan has been examined as a witness on the side of the plaintiff. In fact in the plaint, the mortgagee's name is shown as Kaliyaperumal not as Kaliyan. But in Ex.A2, the mortgagee is referred as Kaliyan. The said Kaliyan has been examined as P.W.3 and he has stated in his evidence that his daily wage is Rs. 80 per day and he has no other income and that he was working as a coolie in a timber depot of the relative of PW1. He has also stated that he has deposed evidence as how he was requested to. While P.W.1 has stated in his evidence that Kandhan has paid the mortgage amount of Rs.40,000/- to Kailyan, PW3 Kaliyan has stated that he has received money from one Gopal and Sigamani and he has again stated that he has received money from Kandhan. If the plaintiff's son/ proposed purchaser had taken the risk of paying money to any 3rd parties without the consent or knowledge of the vendor that will not amount to a payment made on behalf of the vendor. So far as the defendant D.W.1 is concerned it is alleged that the said Kaliyan (PW.3) is a total stranger. The plaintiff did not prove that the transaction in Ex.A2 would bind the defendant and the discharge of the same was done by the plaintiff's son only with the consent and knowledge of the defendant.

13. In fact the defendant has denied her signatures in Ex.A2. Even if her alleged signature in Ex.A2 is presumed to be true, the mortgage deed being an unregistered one, it cannot be admitted in evidence. Even a bare eye comparative examination of the signatures of the defendant in Ex.A1 and Ex.A2 also shows that the signatures of the defendant are not identical or acceptable. Since the evidence on record does not prove the subsequent payments made by the deceased



Kandhan towards the sale consideration by way of discharging her alleged mortgage debt etc., it is correct for the Courts below to limit the liability only with regard to the advance amount paid by the deceased on date of Ex.A1 sale agreement.

14. It is submitted by the learned counsel for the appellant that in a suit for specific performance if the defendant omitted to give reply to the pre suit notice, an adverse inference can be drawn against the defendant. He cited the decision reported in 2007 (4) MLJ 442 [Rajeswari and others Vs. K.M.Kumarasamy and others], in support of his contention. In the said case a Single Bench of this Court has held as under:

"14. After analysing the decision cited by the learned Counsel for the respondent/plaintiff, the following points are unearthed out of it.

- 1) In a case of defence of money dealing by the vendor, it is for the vendor to prove the transaction as one of money dealing by some modes.
- 2) Failure to prove the discharge of money dealing, an adverse inference has to be drawn against the vendor.
- 3) Not sending any reply to the notice of the agreement holder an adverse inference has to be drawn against the vendor.
- 4) Even if there is any discrepancy in the date of purchase of the stamp paper, i.e. prior to date of the sale transaction, it will not affect the agreement of sale transaction.
- 5) The defence theory is hit by Section 92 of the Indian Evidence Act, unless there are circumstances which would prove that equity will suffer by enforcing the agreement for sale."

15. Just because the defendant omitted to send a reply to the notice it cannot be presumed that the plaintiff has proved his entitlement of decree for specific



performance. In the agreement itself, the purchaser has not affixed his signature. The endorsements in Exs. A9 to A11 did not contain the signatures of the vendor. The alleged signatures of defendant's son in Exs.A9 to A11 are also different from that of his admitted signatures available on record. The Court cannot close its eyes without appreciating the above improbabilities of the holistic evidence of the plaintiff and proceed to take an adverse presumption on the basis of failure to send reply to the pre-suit notice alone and decide the suit in favour of the plaintiff.

16. The Courts below have correctly appreciated the evidence available on record and denied the relief for specific performance. The decree for specific performance is a discretionary one basing on the principles of the equity. The plaintiff who has filed the suit for specific performance has got a duty to prove that he is eligible to get a decree. The differences in the signatures found in the Exs.A9 to A11 and Ex.A2 would also render them unacceptable. The Courts below have chosen to grant the alternate relief for recovery of the advance amount with interest. Since the plaintiff has failed to prove the payments other than the advance, it is correct for the lower Court to limit the decree to that of the advance amount paid on 15.04.2003. Thus, the substantial questions of law are answered against the appellant.

17. It is further submitted by the learned counsel for the appellant that a charge can be created on the suit property for the decree amount. But that ground was not raised in this second appeal. It is submitted by the learned counsel for the appellant that it is only a substantial question of law and hence it can be raised at any time. Dealing of any new questions of law if results in any additional relief to the Appellant, the respondent should not be put to surprise. And further he can not be precluded to make his defence on that point. Hence the submission of the learned counsel for the Appellant on this score could not be accepted.



In the result the Second Appeal is dismissed and the Judgment and the decree of the First Appellate Court is confirmed. No costs. The connected Miscellaneous Petitions if any are also closed.

Sd/-
Assistant Registrar(AD-IV)

//True Copy//

Sub Assistant Registrar

jrs

To

1. The District Judge,
Nagapattinam
2. The Principal Sub Ordinate Judge,
Mayiladuthurai.
3. The Section Officer,
V.R.Section, High Court, Madras.

+1cc to Mr.A.Muthukumar, Advocate, S.R.No.21400

S.A.No.386 of 2010

PM(CO)
SB(06/09/2021)