IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.10.2021
Delivered on : 02.11.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.361 of 2018
&
C.M.P.Nos.9220 & 9221 of 2018

P.A.Muruganandham (Deceased)

1.M.Latha

2.A.M.Adhishwaran

3.A.M.Nageshwari

Rep. by their power of attorney A.Pasupathy ...Appellants/
Plaintiff's 2 to 4

Vs

Kasthurikamalam ...Respondent/Defendant

Prayer: Appeal filed under Section 96 of the CPC read with Order XLI Rule 1 of the CPC against the Judgement and Decree in O.S.No.7859 of 2012 dated 14.11.2017 passed by the learned XV Additional Judge, City Civil Court, Chennai.

For Appellants :Mr.J.Balachandar
for M/s.N.Parameswari

For Respondent :No Appearance

JUDGMENT

The plaintiffs are the appellants before this Court challenging the dismissal of their suit for recovery of a sum of Rs.16,47,000/- together with interest at the rate of 12% per annum on a sum of Rs.12,20,000/- from the date of the plaint till the date of realisation.

2. The above suit was instituted on the file of the XV Additional Judge, City Civil Court, Chennai as O.S.No.7859 of 2012. The facts preeceding the filing of the above Appeal Suit is herein below narrated for morefully appreciating the Appeal on hand. The parties are referred to in the same litigative status as before the Trial Court.

Plaintiff's case:

3. The suit has been instituted on behalf of the plaintiff by his power agent. Pending the suit, the plaintiff had passed away and his legal heirs were brought on record, who were also represented by the very same power agent. It was the case of the plaintiff that in the year 2009, the defendant's husband who was well known to the power agent had approached him with a request to arrange for a loan as the same was required to meet certain family commitments and the marriage of her daughter. The power agent who knew the plaintiff had introduced the defendant and her husband to the plaintiff and on several dates the defendant had borrowed money from the plaintiff and apart from executing the promissory note as well as a loan bond, the defendant had also mortgaged her property situate at Korattur with the plaintiff.

4. Since the defendant was not able to repay the loan amount she had offered to sell her property to the plaintiff for a sum of Rs.13,00,000/- and had received a further sum of Rs.6,30,000/-. Thereafter, the sale could not go through as the defendant was unable to sell the same for personal reason. Therefore, she had paid a part of the amount borrowed by her. Thereafter, on 20.12.2009, the defendant had executed a simple loan bond giving all these details and requesting two years time to repay the said sum.

5. The plaintiff was not satisfied with the loan bond and therefore he called upon the defendant to execute promissory note for the total amount that she had borrowed from him. Therefore, on 30.12.2009, the defendant had executed a promissory note for a total sum of Rs.12,20,000/- agreeing to pay interest for every month on the principal amount. The said promissory note was executed in the presence of the witnesses at the plaintiff's premisses.

6. It is the case of the plaintiff that he had received a month's interest i.e., December 2009 and from January 2010 there was no payment of interest despite repeated requests. Therefore, the plaintiff had issued a notice dated 03.12.2012 to the

defendant, which was however returned with an endorsement "Door Locked Addressee out of India". Therefore, the plaintiff had come forward with the above suit.

Written statement:

7. The defendant, on entering appearance, had filed a written statement inter alia denying the borrowal of the sum of Rs.12,20,000/- on 30.12.2009 and the execution of the promissory note, evidencing the said borrowal. It is her case that in the year 2002, the defendant had money transactions with the plaintiff. On 12.05.2002, she had borrowed a sum of Rs.2,00,000/- which was repayable with interest at the rate of 2 ½ % per month, within a period of one year. As a security for the above loan, she had executed a simple mortgage in respect of her property situate at Korattur. The mortgage was unregistered one. While borrowing the said amount the defendant had executed blank promissory notes, blank stamp papers and blank cheques and handed over the same to the plaintiff.

8. It is the defendant's case that she had settled the said loan and when she had requested the plaintiff to return the said documents, the plaintiff had responded that they were misplaced and that he will not take any action using these blank documents. The defendant believed the assurance given by the plaintiff and therefore did not press for the return of the documents.

9. The defendant would also submit that along with the aforesaid document she had also given as security a original general power of attorney, which was executed by her vendor in her favour in respect of property adjacent to her property at Korattur. After the loan amount was paid, in the month of June 2004, when the defendant had got the sale deed registered in favour of one Mohanraj, the plaintiff had returned the original power of attorney to her. This would clearly indicate that the defendant had repaid the entire loan amount. The mortgage deed dated 12.05.2002 was cancelled by the plaintiff. In fact, the money due from the defendant to the plaintiff was settled by the said Mohanraj in favour of the plaintiff or his mother Hamsaveni.

10. After the year 2002, the defendant has not borrowed any amount from the plaintiff and the suit promissory note is a rank fabrication, which has been created using the blank signed promissory notes executed and handed over by the defendant to the plaintiff. The loan bond dated 20.12.2002 and the promissory note dated 30.12.2009, which the plaintiff claims has been executed by the defendant has been witnessed by the very same

witnesses which by itself would show that the documents is a fabricated one. The defendant had also questioned the authority of the power agent to file the above suit especially since he had no personal knowledge.

11. The defendant would also submit that the fabrication of the documents by the plaintiff is clearly evident from the fact that the cheque for Rs,3,50,000/- which the defendant had issued in favour of the plaintiff and which he had claimed has been dishonoured does not contain the bankers endorsement to that effect. Therefore, it is clearly evident that the sole intent of the plaintiff is to somehow grab the property of the defendant.

12. Pending the suit, the plaintiff had passed away and his legal heirs have been brought on record. They are also represented by the very same Power of Attorney. Subsequent to the amended plaint filed by them additional written statement was filed by the defendant reiterating the contents of the earlier written statement. The plaintiffs had filed reply statement which contained more details than the original plaint and an attempt to fill up the lacunae in the original plaint.

13. In the said reply, the plaintiff would contend that in response to a legal notice dated 08.06.2005 calling upon the defendant and her husband to clear the outstanding, the defendant had come forward to clear the promissory note dated 10.09.2002 by paying a sum of Rs.50,000/- and request the plaintiff to wait for a few months to enable them to clear an entire outstanding. The plaintiff waited patiently to receive the balance amount and the defendant had executed a loan bond dated 20.12.2009 undertaking to pay the sum of Rs.2,10,000/- due under the promissory note and returned the defendant's amount under the sale agreement of a sum of Rs,6,30,000/- along with compensation of Rs.30,000/-.

14. The plaintiffs would submit that the defendant thereafter approached them to reduce the interest and it is in this background the suit promissory note came to be executed. None of these pleadings find place in the original plaint filed by the deceased plaintiff.

Trial Court:

15. The learned XV Additional Judge, City Civil Court, Chennai had framed the following issue:

"Whether the plaintiff is entitled to recover the sum of Rs.16,47,000/- together with interest at 12% per annum on Rs.12,20,000/- from the date of the plaint till the date of realisation?"

16. The power agent of the plaintiff has examined himself as P.W.1 and one V.Neelakandan as P.W.2. Ex.A.1 to Ex.A.15 were marked on the side of the plaintiffs. However, the defendant who had filed a written statement and an additional written statement did not stepped into the witness box during Trial. There is nothing to show that the defendants had objected to the Power Agent adducing evidence.

17. The learned Judge taking into account the entire evidence both oral and documentary came to the conclusion that the deceased plaintiff had taken advantage of the defendant when they had approached him for a loan in order to tide over their financial crisis. He compelled them into giving several signed blank documents which has been misused by the plaintiff with the active connivance of the power agent.

18. The learned Judge has also found fault with the fact that the principal has not stepped into the box to adduce evidence and it was only the power agent who did not have personal knowledge about several of the averments contained in the plaint adduced evidence on their behalf.

19. The learned Judge observed that the plaintiff had not come to Court with clean hands and had also failed to prove the borrowal. Therefore, the suit came to be dismissed.

20. Challenging the said Judgement and Decree, the appellants are before this Court.

Point for consideration:

21. The points for consideration which arise for consideration before this Court are as follows:

"(a) Whether the Judgement and Decree of the Trial Court non suiting the plaintiff is correct in law?

(b) Whether the Power Agent is competent to adduce evidence on behalf of the plaintiff?"

Submissions:

22. Mr.J.Balachadar, learned counsel appearing on behalf of the learned counsel for the plaintiffs would strenuously contend that the defendant despite filing their written statement had failed to adduce evidence in support of their case and had not taken steps to substantiate their defense by letting in oral and documentary evidence. He would submit that the plaintiff has proved the execution of the document since it is not the case of the defendant that she had not executed the power of attorney.

In fact, though she originally denied the execution she later modified by saying that her signatures in blank documents could have been manipulated to create the promissory note. Therefore, once the execution has been proved onus is on the defendant to prove the non passing of consideration. This onus has not been discharged by the defendant. Therefore, the Court below was wrong in dismissing the suit.

23. Further, the execution of the promissory note the passing of consideration has been spoken to by P.W.2, who is a witness to Ex.A.1, promissory note. He would therefore pray that the appeal be allowed and the order passed by the learned XV Additional Judge, City Civil Court, Chennai in O.S.No.7859 of 2012 be reversed.

Discussion:

24. The plaintiff has come forward with the suit for recovery stating that from the year 2002, the defendant has been borrowing money from the plaintiff and since the said amount due towards these loans had not been settled the plaintiff had got the loan bond executed on 20.12.2009 which was once again reiterated in the suit promissory note dated 30.12.2009 executed by the defendant in favour of the deceased plaintiff. Therefore, the plaintiff's case is that promissory note had been executed by the defendant in favour of the plaintiff.

25. Further, a reading of Ex.A.1 would indicate that on the said date i.e., on 30.12.2009, a sum of Rs.12,20,000/- has been paid in cash by the plaintiff to the defendant. However, as a post script the promissory note contains a statement that it is being executed for all the money that is advanced from 2002. No details or split up of the amounts have been provided therein. Since the former clause clearly prescribes that the sum of Rs.12,20,000/- has been paid by the plaintiff to the defendant in cash on the said date, it is clearly evident that consideration is stated to have passed under Ex.A.1. However P.W.1, would depose that no amounts were paid under Ex.A.1, Promissory note. That apart, if it is the case of the plaintiff that the amounts were due under the promissory note executed in the year 2002, then the suit is barred by limitation.

26. Further, it is the case of the power agent as P.W.1 that in the year 2002 a sum of Rs.4,60,000/- had been paid in four instalments. Thereafter, in the year 2004, a sale agreement was entered into and an advance of Rs.4,60,000/- had been paid in four instalments. No documents have been filed in support of the

same. However, Ex.A.9, promissory note alone has been filed, which is for a sum of Rs.2,00,000/-. This promissory note has been admitted by the defendant who has also contended that the amounts due under this promissory note had been repaid by her which is evidenced from reading of Ex.A.11 dated 10.09.2002, which is the cancelled promissory note.

27. Therefore, the plaintiff has not been able to prove the contentions that sum of Rs.4,60,000/- had been paid to the defendant. To a question as to whether Rs.12,20,000/- was paid under the promissory note, the witness replies that he does not know and he does not state that no amounts had been paid. He would further submit that the interest had been noted in a book and that book was with the defendant. None of these statement have been pleaded in the plaint.

28. Therefore, the evidence of P.W.1 does not in any fashion advance the case of the plaintiff or prove the contents of the plaint. P.W.2, who is the witness to Ex.A.1, appears to be a witness who has been procured by the power agent as he claims to have executed all the documents from the year 2002 till the year 2009. In fact, a perusal of his evidence would reveal that he has not spoken from his personal knowledge but was only recounting what the power agent had stated to him.

29. Therefore, the finding of the Trial Court that the plaintiff had not proved his case is correct on a perusal of an evidence, both documentary and oral. Therefore, the point for the consideration (a) is held against the plaintiffs / appellants.

30. It is seen from the evidence that the principals had not got into the witness box to satisfy their case but it is only the power agent who does not have any personal knowledge has entered the box. In the Judgement of the Hon'ble Supreme Court reported as 2005 (2) SCC 217 - Janki Vashdeo Bhojwani & Anr vs Indusind Bank Ltd. & Ors, the Hon'ble Supreme Court had observed as follows:

"15. Apart from what has been stated, this Court in the case of Vidhyadhar v. Manikrao observed at SCC pp. 583-84, para 17 that

"17. where a party to the suit does not appear in 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".

16. In civil dispute the conduct of the parties is material. The appellants have not approached the Court with clean

hands. From the conduct of the parties it is apparent that it was a ploy to salvage the property from sale in the execution of Decree.

17. On the question of power of attorney, the High Courts have divergent views. In the case of Shambhu Dutt Shastri v. State of Rajasthan, it was held that a general power-of-attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with the approval in the case of Ram Prasad v. Hari Narain. It was held that the word "acts" used in Rule 2 of Order III of the CPC does not include the act of power of attorney holder to appear as a witness on behalf of a party. Power of attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of the CPC.

19. In the case of Dr.Pradeep Mohanbay v. Minguel Carlos Dias, the Goa Bench of the Bombay High Court held that a power of attorney can file a complaint under Section 138 but cannot depose on behalf of the complainant. He can only appear as a witness.

20. However, in the case of Humberto Luis v. Floriano Armando Luis on which the reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in order III Rule 2 of CPC cannot be construed to disentitle the power of attorney holder to depose on behalf of his principal. The High Court further held that the word "act" appearing in order III Rule 2 of CPC takes within its sweep "depose". We are unable to agree with this view taken by the Bombay High Court in Floriano Armando.

21. We hold that the view taken by the Rajasthan High Court in the case of Shambhu Dutt Shastri followed and reiterated in the case of Ram Prasad is the correct view. The view taken in the case of Floriano Armando Luis cannot be said to have laid down a correct law and is accordingly overruled.”

In the light of the above Judgement, point (b) is also held against the plaintiffs.

31. The appeal therefore stands dismissed confirming the Judgement and Decree of the XV Additional Judge, City Civil Court, Chennai in O.S.No.7859 of 2012. Consequently, connected Civil Miscellaneous Petitions are also closed. No costs.

Sd/-
Assistant Registrar(I)

// True Copy //

Sub Assistant Registrar

kan

To

The XV Additional Judge,
City Civil Court, Chennai.

Copy to: The Section Officer,
V.R.Section, High Court,
Madras.

+1cc to M/s.N.Parameswari, Advocate SR.No.57249

A.S.No.361 of 2018

SR(CO)
CB(05/01/2022)