



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.04.2021

CORAM

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.198 of 2008

R.K.Vasakar ... Appellant/Respondent/Petitioner

Vs.

B.Thirupathi Rayar ... Respondent/Appellant/Defendant

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.No.11 of 2006, on the file of the Sub Court, Uthamapalayam, dated 27.07.2006, and restore the fair and decreal order passed in I.A.No.401 of 2004 in O.S.No.370 of 2004 on the file of District Munsif Court, Uthamapalayam, dated 06.10.2005.

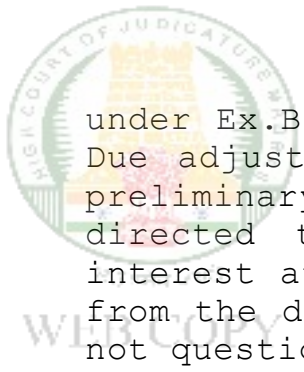
For Appellant : Mr.S.Madhavan

For Respondent : Mrs.J.Maria Roseline

JUDGEMENT

This second appeal arises out of final decree proceedings. The appellant was the plaintiff in O.S.No.2 of 1996 on the file of Sub Court, Periyakulam (For reasons which I am not able to decipher, it is referred to as O.S.No.370 of 2004 on the file of the District Munsif Court, Uthamapalayam).

2.The case of the appellant is that respondent/Thirupathi Rayar had borrowed a sum of Rs.21,000/- from him and to secure the transaction Ex.A.1/mortgage deed was executed on 29.01.1986 and registered on 30.01.1986 on the file Sub Registrar Office, Uthamapalayam. The case of the appellant is that mortgage debt was not at all discharged. Therefore, he filed O.S.No.2 of 1996 for recovery of the aforesaid amount with interest and in the event of failure to do so, to bring the mortgaged property to sale. The respondent contested the suit claim on the ground that the mortgage amount was repaid by way of payments made on two occasions namely., on 02.07.1987 and 25.01.1995 and that the plaintiff had issued two receipts namely., Ex.B.1 and Ex.B.2 evidencing the said payments. The learned Trial Judge partly accepted the defence of the respondent herein. The finding of the Trial Judge was that payment of sum of Rs.3,570/- on 02.07.1987



under Ex.B.1 was established. Ex.B2/receipt was held not proved. Due adjustment was made for the amount covered under Ex.B.1 and preliminary decree was passed on 16.08.2001 and the respondent was directed to pay a sum of Rs.78,409/- to the plaintiff with interest at the rate of 6% on the principal amount of Rs.30,000/- from the date of decree till date of payment. The respondent did not question the said preliminary decree.

3.The case of the appellant was that the respondent did not satisfy the preliminary decree. Therefore, he filed I.A.No.62 of 2002 before the Sub Court, Periyakulam for passing final decree. The said interlocutory application was transferred to the file of the District Munsif, Uthamapalayam and re-numbered as I.A.No.401 of 2004. Before the Trial Court, the appellant examined himself as P.W.1. The respondent examined not only himself but two other persons namely., Raja and Ganesan as defence witnesses and Ex.R.1/receipt dated 05.03.2002 was marked on the side of the respondent.

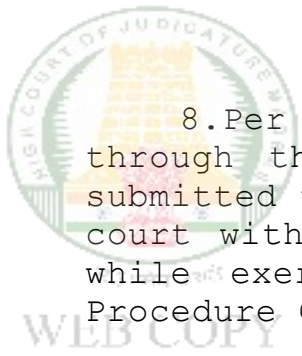
4.According to the respondent, the matter was settled out of Court in the presence of D.W.2 and D.W.3 upon payment of a sum of Rs.45,000/- to the appellant and that the appellant issued Ex.R.1/receipt. The Trial Court after considering the entire evidence on record rejected the stand of the respondent and passed final decree in consonance with the preliminary decree by judgment and decree dated 06.10.2005. Questioning the same, the respondent herein filed A.S.No.11 of 2006 before the Sub Court, Uthamapalayam. The First Appellate Court by judgment and decree dated 27.07.2006 set aside the final decree passed by the Trial Court and allowed the first appeal. Challenging the same, this second appeal came to filed by the appellant.

5.The second appeal was admitted on the following substantial question of law:

"Whether the findings of the first appellate Court pertaining to Ex.R1 are perverse on account of its misconstruction?"

6.Heard the learned counsel on either side on the aforesaid substantial question of law.

7.The learned counsel for the appellant reiterated all the contentions set out in the memorandum of grounds and submitted that this Court should answer the substantial question of law in favour of the appellant and set aside the judgment passed by the First Appellate Court and restore the final decree passed by the Trial Court.

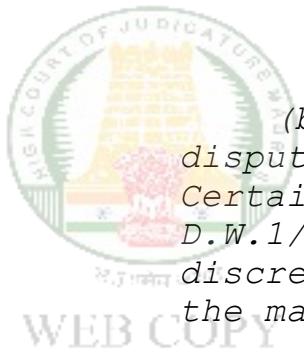


8.Per contra, the learned counsel for the respondent took me through the reasons assigned by the first appellate court and submitted that the finding of fact rendered by the first appellate court with regard to Ex.R.1 ought not to be upset by this Court while exercising its jurisdiction under Section 100 of Civil Procedure Code and she pressed for dismissal of the second appeal.

9.I carefully considered the rival contentions and went through the evidence on record. The respondent is the mortgagor and the appellant is the mortgage. The appellant had obtained a preliminary decree in his favour. Admittedly, the same was not challenged and it has become final. To enforce the preliminary decree, the appellant filed I.A.No.62 of 2002 before Sub Court, Periyakulam. (Re-numbered as I.A.No.401 of 2004 on the file of the District Munsif Court, Uthamapalayam). The stand of the respondent is that a sum of Rs.45,000/- was paid to the appellant and that the appellant had accepted the said amount from the respondent in the presence of D.W.2 and D.W.3 and that he issued Ex.R.1/receipt towards full satisfaction of his claims. Therefore, the only question that arises for consideration is whether Ex.R.1 is a true and genuine document. Since the appellant had denied having executed Ex.R.1, there can be no doubt that the burden of proof lay entirely on the respondent to prove that Ex.R.1 was executed by the appellant acknowledging discharge of the mortgage liability by the respondent. The respondent herein did not take any step for referring Ex.R.1 for the opinion of any handwriting expert. However, he examined D.W.2 and D.W.3, the witnesses who had attested Ex.R.1. The Trial Court came to the conclusion that there were discrepancies in their testimony and therefore, it went on to hold that Ex.R.1 has been fabricated by the respondent. The Trial Court proceeded to pass final decree as prayed for by the appellant.

10.To dislodge the findings of the Trial Court and allow the appeal filed by the respondent, the First Appellate Court has given the following reasons:-

(a) The appellant had been changing the manner and style of affixing his signature. In the judgment passed by the Sub Court, Periyakulam on 16.08.2001 while passing preliminary decree, it was observed that the appellant used to sign only as "K.Vasagar" and only later he started signing as "R.K.Vasagar". Therefore, it is not possible to compare the disputed signature in Ex.R.1 with the admitted signature of the appellant. Hence, the exercise of comparison undertaken by the Trial Court was not appropriate.



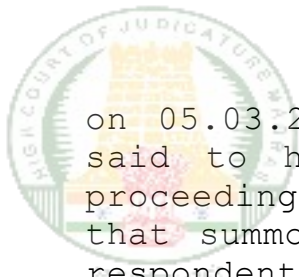
(b) D.W.2/Raja had taken initiative in resolving the dispute between the appellant and the respondent. Certain discrepancies were noticed between testimony of D.W.1/respondent and that of D.W.2/Raja. Such discrepancies are minor and they do not go to the root of the matter.

(c) D.W.2 and D.W.3 have spoken about the affixing of signature by the appellant in Ex.R.1. Non filing of Ex.R.1 along with the counter in I.A.No.62 of 2002 was a mistake committed by the counsel for the respondent and therefore, the respondent ought not to suffer for the same.

(d) Merely because one of the two receipts projected by the defendant in the preliminary decree proceedings came to be rejected, that cannot be a ground to reject Ex.R.1.

11.Now the only question that arises for my consideration is whether the findings of the first appellate court pertaining to Ex.R.1 are perverse on account of its misconstruction. I have already held that it was the respondent who was obliged to establish the genuineness of Ex.R.1. The question is whether this burden cast on the respondent has been discharged. The appellant had denied the signature attributed to him in Ex.R.1. Neither the appellant nor the respondent took any step for having the document referred for opinion of the handwriting expert. The Trial Court undertook the task of comparison and came to the conclusion that the signature found in Ex.R.1 is not that of the appellant. The First Appellate Court on the other hand came to the conclusion that the appellant was in the habit of changing the style of affixing his signature and that therefore, there was no acceptable document for comparing the disputed signature of the appellant found in Ex.R.1. It is primarily on this ground that the first appellate court chose to interfere with the decision of the Trial Court. Even, if this reason assigned by the first appellate court is accepted, still that cannot necessarily lead to the conclusion that the respondent had proved the issuance of Ex.R.1 by the appellant. When there is no acceptable document available for comparison, for the Court to come to the conclusion that the disputed signature is proved to be that of the executant whose signature it purports to be, the testimony of the witnesses must be unimpeachable.

12.The preliminary decree was passed against the respondent on 16.08.2001. The final decree petition was filed on 17.01.2002 before the Sub Court, Periyakulam by the appellant. The respondent would claim that the out of Court settlement took place



on 05.03.2002. In other words, the out of Court settlement is said to have taken place during pendency of the final decree proceedings. The learned counsel for the respondent would claim that summon in the final decree proceedings was received by the respondent much later and on 05.03.2002, the respondent did not have any knowledge of the institution of the final decree proceedings. The respondent had entered appearance in the final decree proceedings only on 22.06.2002. To test the veracity of the claim of the respondent, it is necessary to bear in mind the sequence of events from the beginning. The financial transaction between the parties had taken place in 1985-1986. The mortgage deeds were registered on 30.01.1986 and 02.07.1987 (Ex.A1 and Ex.A.3). The plaintiff issued suit notice on 04.01.1995 (Ex.A.4). The defendant sent reply on 06.01.1995 (Ex.A.5). In O.S.No.2 of 1996, the respondent herein filed written statement that on 25.01.1995, he paid a sum of Rs.67,000/- and the appellant issued Ex.B.2/receipt. It is this Ex.B2/receipt that was rejected as fabricated by the Trial Court. In other words, the respondent herein claimed that after the exchange of suit notices, he paid a sum of Rs.67,000/- towards discharge of the mortgage liability. The suit came to be filed only on 25.10.1995. If really on 25.01.1995 the entire mortgage debt had been discharged, certainly the respondent would have got the same duly registered so that the encumbrance of mortgage created against the mortgaged property is deleted. The adverse finding of the Trial Court as against Ex.B.2 dated 25.01.1995 projected by the respondent was not challenged by the respondent by filing a first appeal. This conduct of the respondent was taken note of by the learned Trial Judge while deciding the issue raised in the final decree proceedings. As already observed, the final decree petition was filed on 17.01.2002 and notice was issued on 29.01.2002, returnable by 18.03.2002. It is in this background, the respondent claims that on 05.03.2002, the out of Court settlement took place in the shop premises of D.W.2/Raja. Since the relationship between the parties suffered from trust deficit, the respondent could have paid the amount or arrived at settlement before the Court. He had not done so. The amount of Rs.45,000/- could have been paid through demand draft. More than anything else, he did not take any step for getting the discharge certificate duly registered. So long as the discharge certificate is not registered, the encumbrance of mortgage will continue to remain in registration records. More than anything else, the Trial Court had pointed out too many discrepancies between the testimony of D.W.1 on the one hand and the attesting witnesses on the other. D.W.2/Raja had deposed that on 05.03.2002, the figure of compromise amount was not discussed. He would also state that the respondent herein did not bring the amount in question and only after the compromise was finalized, he went out and brought it in about two hours. He also did not know as to how he sourced the said amount. The



respondent, on the other hand, would state that he had brought with him a sum of Rs.30,000/- and that his co-brother/Suresh brought the balance amount of Rs.15,000/- to the shop but D.W.2 would state that respondent left the shop premises and returned after two hours with the amount. D.W.3 also feigned ignorance. He stated that he did not enquire the appellant or the respondent regarding the details of the transaction. He also stated that he was not fully present during the talks. He did not know as to the terms on which the dispute was settled. All that he would state was that in white sheet, something like receipt was written and that he affixed his signature and that he did not know the contents of Ex.R.1. He would also state that he did not know as to the other signatories in Ex.R.1. He further admitted that he was not acquainted with the appellant earlier. The Trial Court has given solid reasons as to why the testimony of so-called attesting witnesses could not be believed. The trial court had the advantage of observing the demeanour of the witnesses. From the overall conduct of the respondent, I have no difficulty in coming to the conclusion that the findings of the First Appellate Court pertaining to Ex.R.1 are perverse and that Ex.R.1 has been totally misconstrued. The substantial question of law raised in this appeal is answered in favour of the appellant and against the respondent. The judgment and decree passed by the First Appellate Court is set aside and the judgment and decree passed by the Trial Court is restored and the second appeal is allowed. No costs.

Sd/-

Assistant Registrar (T&P)

// True Copy //

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Sub Assistant Registrar (CS)

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To:

1.The Judge, Sub Court,
Uthamapalayam.

2.The District Munsif,
Uthamapalayam.

3.The Record Keeper-2 copies
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mrs.J.MARIA ROSELINE, Advocate (SR-16547[F] dated
20/04/2021)

S.A. (MD) No.198 of 2008
19.04.2021

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