



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.04.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.163 of 2012

WEB COPY

S.Selvaraj

... Appellant/Appellant/
Plaintiff

Vs.

Mary Charlet

... Respondent/Respondent/
Defendant

Prayer: Second appeal filed under Section 100 of C.P.C., to set aside the Judgment and Decree dated 22.10.2009 passed in A.S.No.61 of 2008 on the file of the Subordinate Judge, Padmanabhapuram, confirming the Judgment and Decree dated 13.12.2007 passed in O.S.No.375 of 2005 on the file of the Principal District Munsif, Padmanabhapuram and allow this second appeal.

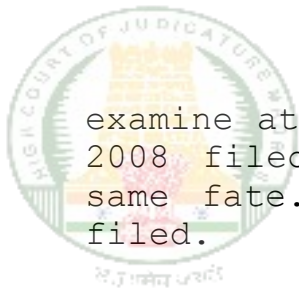
For Appellant : Ms.J.Anandhavalli

For Respondent : Mr.R.Nandakumar

J U D G M E N T

The unsuccessful plaintiff in O.S.No.375 of 2005 on the file of the Principal District Munsif Court, Padmanabhapuram, is the appellant in this second appeal.

2. The suit was filed for realising a sum of Rs.36,450/- with interest. It was instituted on the strength of Ex.A.1 mortgage deed dated 01.12.1993. According to the plaintiff, his brother Cyril borrowed a sum of Rs.15,000/- by mortgaging the suit property and executed the said mortgage deed. It was also duly registered. The defendant purchased the suit property from Cyril on 28.02.2001. Cyril passed away on 23.07.2002. According to the plaintiff, neither his brother nor the subsequent purchaser, namely, the defendant cleared the mortgage debt. That necessitated the institution of the aforesaid suit. The defendant filed written statement denying the suit claim. She also specifically denied the execution of the mortgage deed. The plaintiff examined himself as P.W.1 and marked Ex.A.1 to Ex.A.4. The defendant's husband Rajendran was examined as D.W.1 and Ex.B.1 and Ex.B.2 were marked. After considering the evidence on either side, by Judgment and Decree dated 13.12.2007, the trial Court dismissed the suit. The ground for dismissal of the suit was that the plaintiff failed to



examine atleast one of the attestors of the document. A.S.No.61 of 2008 filed before the Sub Court, Padmanabhapuram, also met the same fate. Questioning the same, this second appeal came to be filed.

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

"Whether the Judgment and Decree of the Courts below in dismissing the suit is sustainable in law for non-compliance of Section 68 of the Indian Evidence Act, ignoring the fact that the person disputing the document is incompetent to question the same?"

4. The learned counsel appearing for the appellant submitted that Ex.A.1 mortgage deed which is the sheet anchor of the suit is a registered document and its validity cannot be impeached. She contended that the defendant had notice of the mortgage and knowingly purchased the suit property. Ex.A.4 encumbrance certificate marked by the plaintiff contains the entry regarding mortgage. The foremost argument advanced by the learned counsel appearing for the appellant was that the Courts below erred in not taking note of the proviso to Section 68 of the Indian Evidence Act, 1872. According to her, it is only the mortgagor/ executant of Ex.A.1 who could have denied the execution. It is not open to the subsequent purchaser or a third party to the transaction to challenge or deny the execution of Ex.A.1. Reliance was placed on the decision reported in (2015) 8 SCC 615 (JAGDISH CHAND SHARMA V. NARAIN SINGH SAINI). Emphasis was placed on paragraph No.15.2 in which it was noted that the main proviso to Section 68 of the Indian Evidence Act, 1872 will be triggered only if the execution of the document is denied by the person who executed the same. The learned counsel called upon me to answer the substantial question of law in favour of the appellant, reverse the impugned Judgment and allow the second appeal.

5. Per contra the learned counsel appearing for the respondent submitted that the defendant was a *bonafide* purchaser for value without notice of the suit mortgage. In support of this defence, the defendant had marked Ex.B.2 encumbrance certificate in which the mortgage had not at all been reflected. In any event, when the defendant had challenged the execution of Ex.A.1, it was incumbent on the part of the plaintiff to call at least one of the attestors of the document to prove its execution. Since the plaintiff failed to do so, the trial Court rightly dismissed the suit. He would submit that the Courts below have correctly applied the principles of law and that the impugned Judgment does not call for any interference. He prayed for dismissal of the second

appeal.

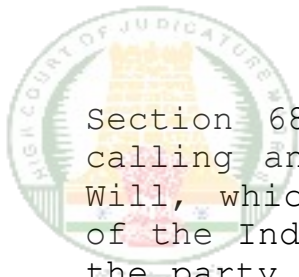


6. I carefully considered the rival contentions and the went through the evidence on record.

7. The suit is one for enforcing a mortgage. According to Section 59 of the Transfer of Property Act, 1882 where the principal money secured is 100 or upwards, a mortgage (other than a mortgage by deposit of title deeds) can be effected only by a registered instrument signed by the mortgagor and attested by atleast two witnesses. As per Section 68 of the Indian Evidence Act, 1872, if a document is required by law to be attested, it shall not be used as evidence until one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. But the proviso to Section 68 of the Act reads that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908(XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

8. In the case on hand, the execution of Ex.A.1 mortgage has been specifically denied by the defendant. In fact the first issue framed by the trial Court was whether on 01.12.1993 Cyril borrowed a sum of Rs.15,000/- from the plaintiff and as security executed the mortgage in respect of the suit property. The contention put forth by the learned counsel appearing for the appellant is that it is only the executant who is competent to deny the execution and that the plea of denial of execution cannot be put forth by the subsequent purchaser. In the decision reported in (2015) 8 SCC 615 (JAGDISH CHAND SHARMA V. NARAIN SINGH SAINI) that has been pressed into service, I am unable to notice any such proposition as claimed by the learned counsel appearing for the appellant.

9. The issue on hand is no longer *res integra*. In the decision reported in (1956) 69 L.W. 815 (Periakaruppa Moopan V. Adaikkala Mooppan and another), a learned Judge of the Madras High Court held that the denial of execution need not necessarily be by the person executing the document but by any one who is affected by the mortgage or against whom certain rights are claimed under the mortgage. The learned Judge noted that the very same view was taken by the other High Courts in the decisions reported in AIR 1925 All.56, AIR 1949 Nag. 149 and AIR 1932 All. 320. The Hon'ble Division Bench of the Kerala High Court in the decision reported in 1984 KLJ 627 (Vavil Kannan Nambiar V. Othayath Narayani Amma) had also taken the very same view. In Brij Raj Singh V. Sewak Ram ((1999) 4 SCC 331), the Supreme Court held that the Proviso to



Section 68 of the Evidence Act dispenses with the necessity of calling an attesting witness in proof of any document, except a Will, which has been registered in accordance with the provision of the Indian Registration Act when there is no specific denial by the party against whom the document is relied upon. Therefore, I have to necessarily reject the argument put forth by the learned counsel appearing for the appellant.

10. However, the fact that Ex.A.1 was allowed to be marked without any objection troubled my mind. It was because the Privy Council in the decision reported in (1962) 3 WLR 374 (Govindji Popatlal V. Nathoo Visandji) in an appeal arising from Kenya had held as follows:-

"The only other point argued before the Board was a contention by the defendant that the plaintiff had failed to prove the execution or attestation of the charge upon which his claim was founded by his failure to call one attesting witness. This contention was based on section 68 of the Indian Evidence Act which is in the following terms:-

"68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied."

It is to be observed that this point was not taken before the Supreme Court but only arose out of an additional ground of appeal lodged on the day on which the case came on for hearing before the Court of Appeal. The Court of Appeal allowed this additional ground of appeal to be argued, but they rejected it. Their Lordships consider that they were right in so doing.

If the appellant had objected under Section 68 to the admission of the charge when this document was tendered in evidence by the respondent, the learned Judge would then have had to consider whether the objection was well founded. If he had sustained the objection, the respondent would then have had an opportunity of complying with the terms of Section 68 by calling one of the attesting witnesses or by resort to Section 69. But no objection was taken by appellant's counsel and no cross examination was directed to the respondent. The case thereafter proceeded upon the footing that the charge had been validly executed and the appellant's argument before the trial Judge was principally directed to the point that the charge itself was not in proper form having regard to the terms of Section 46 of the



Registration of Titles Ordinance and that it could not therefore be registered. The appellant was therefore relying on the form of the charge in order to justify his objection to its validity and his argument involved the assumption that it was validly executed. This point was dealt with by the trial Judge adversely to the appellant, but there is no trace in his judgment or in the arguments of counsel that the execution of the charge was ever challenged. Their Lordships consider that where a case has been conducted before the trial Judge by both parties upon the footing that a document has been properly admitted in evidence, it is not open to a party on appeal to argue that owing to some defect in the proof the document ought not to have been admitted. The principles governing this matter were stated by this Board in *Gopal Das V. Sri Thakurji* AIR(30) 1943 Privy Council 83 at page 87 "Where the objection to be taken is not that the document is in itself inadmissible, but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof." The charge was not inadmissible, but could according to Section 68 and 69 be proved in a certain manner. The objection could only be to the mode of proof.

This principle was given effect to by Dawson Miller, C. J., in *Bajinath Singh V. Brijraj Kuar* AIR 1922 Patna 514 at pages 523-4 (disapproving of an earlier case of *Shib Chandra Singha V. Gour Chandra Pal* (1921) ILR 45 Calcutta 160 at 167). In the whole circumstances their Lordships are satisfied having regard to the conduct of the trial the appellant must be held to have waived any objection to the admissibility of the charge."

11. Of course unlike in the aforesaid case, the execution of the document had been specifically denied by the defendant. I wondered if because of her failure to object to the marking of Ex.A.1, the plea of non-execution can be said to have been waived. My mental oscillation was arrested by the decision of the Madras High Court reported in (1975) 2 MLJ 155 (*Rajammal V. Chinnathal*), which held as follows:-

" 5. Apart from the above, the language of Section 68 is clear and categorical and therefore once the execution of the document is denied by the alleged executant, the document cannot be admitted in evidence, unless one attesting witness atleast has been called for proving the execution of the document, if alive, and subject to process of the Court. In this case, there is no evidence to show that the attesting witnesses were not alive and in such circumstances, it is clear that the requirement of Section 68 of the Indian Evidence Act has not been complied with and that



therefore, Exhibit A-1 cannot be used in evidence. The suit being one on the mortgage, Exhibit A-1, and that mortgage document being inadmissible in evidence, it will have to be dismissed."

The Hon'ble Judge treated the issue as one pertaining to admissibility of the document itself and not merely one of mode of proof. Therefore, it is not possible for me to hold that the defendant by not opposing the marking of document at the time of trial had waived her plea of non-execution of Ex.A.1.

12. The defendant being the subsequent purchaser is entitled to deny the execution of the mortgage, as the document is sought to be used against her. Therefore, in view of Section 68 of the Indian Evidence Act, 1872, the appellant ought to have proved its execution only by calling atleast one of the attesting witnesses. It is not the case of the appellant that those witnesses are not alive. Therefore, the Courts below rightly applied Section 68 of the Indian Evidence Act and dismissed the suit. The substantial question of law is answered against the appellant.

13. This second appeal is dismissed. No costs.

Sd/-

Assistant Registrar (T&P)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

PMU

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The Subordinate Judge,
Padmanabhapuram.
2. The Principal District Munsif,
Padmanabhapuram.

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

+1 CC to M/s.J.ANANDHAVALLI, Advocate (SR-16664[F] dated
20/04/2021)

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19.04.2021

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