BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Dated : 26.04.2021
CORAM
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
SA(MD)No.579 of 2011
and
MP(MD)No.1 of 2011

Lakshmi Ammal ... 3rd defendant/appellant/respondent No.3

Vs.

1.The Catholic Syrian Bank Ltd.,
rep.by through its President,
Branch Manager and Principal Officer,
Sri.Choko George Veerampully Office
at No.94, West Masi Street,
Madurai - 1. ...Plaintiff/1st respondent/appellant

2.M/s.Prakash Wines,
Rep.by its Proprietor,
A.Suresh Babu

3.A.P.Arunachalam ...Defendants 1 & 2, Respondents 2 & 3 / Respondents 1 & 2
(R2 & R3 are given up. Memo recorded
USR No.2383 of 2012, dated 25.07.2012
vide order dated 01.08.2012 made in
SA(MD)No.579 of 2011)

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 03.01.2005 made in A.S No.177 of 2004 on the file of the Principal District Court, Madurai reversing the judgment and decree dated 01.03.2004 made in O.S No.590 of 1993 on the file of the I Additional Sub Court, Madurai.

For Appellant : Mr.G.S.Asok Adithyan

For Respondent : Mr.R.Pandivel for R1

R2 & R3 - Given up

JUDGEMENT

The third defendant in O.S No.590 of 1993 on the file of the I Additional Sub Court, Madurai is the appellant in this second appeal while Catholic Syrian Bank Ltd., is the plaintiff in the suit. The case of the plaintiff is that the first defendant Prakash Wines represented by its Proprietor Suresh Babu applied for loan to the plaintiff bank. The plaintiff bank agreed to grant over draft account facility to the limit of one lakh. The first defendant executed a hypothecation deed hypothecating the goods in favour of the plaintiff bank on the same date. The second defendant A.P.Arunachalam stood as the guarantor for the transaction. Ex.A1 dated 22.07.1989 pro note was executed in favour of the second defendant A.P.Arunasalam who in turn made it over by making an endorsement in favour of the bank. A.P.Arunachalam had already availed loan from the bank and he had mortgaged the suit property in favour of the bank. He had also deposited the original title deeds with the bank. The second defendant executed Ex.A7 22.07.1989 in favour of the bank stating that the title deeds deposited in respect of the account of Aruna Wines may be taken as deposited for the equitable mortgage for the said transaction also. The second defendant executed a renewal letter on 28.01.1992 vide Ex.A10. Since the suit account remained unsettled, the bank issued Ex.A8 notice dated 02.09.1992. Ex.A9 reply was received on 07.09.1992. Since the demand set out in the notice was not complied with, the respondent bank filed O.S No.590 of 1993 for directing the defendants (borrower and guarantor) to pay the principal sum of Rs.1,48,868.30/- with interest and in the event of failure to do so, the court was requested to pass the preliminary decree for sale of the mortgaged property. But then, it turned out that the appellant Lakshmi Ammal had exchanged the mortgaged property vide Ex.B3 dated 04.12.1991. Therefore, the appellant was impleaded by filing I.A No.22 of 1996 as the third defendant vide order dated 08.01.1996. The principal borrower as well as the guarantor namely, Prakash Wines and A.P.Arunachalam remained exparte. The appellant filed written statement raising very many legal grounds. Based on the same, the trial court framed the necessary issues. One of the issues framed by the trial court was whether the suit was liable to be dismissed for breach of Section 67 A of the Transfer of Property Act, 1882. The bank official was examined as PW.1 and Exs.A1 to A11 were marked. On the side of the defendant, a witness was examined. Exs.B1 to B4 were also marked.

2.The learned Trial Judge noted that A.P.Arunachalam had executed two deeds of mortgage in favour of the plaintiff bank. Section 67 A of the Transfer of Property Act, 1882 mandates that if a mortgagee holds two or more mortgages executed by the same mortgagor in the absence of a contract to the contrary, he is obliged to sue on all the mortgages in respect of which the mortgage-money has become due. The trial court noted that apart from the present suit, namely, O.S No.590 of 1993, the bank had also filed O.S No.784 of 1993. In the said O.S No.784 of 1993, A.P.Arunachalam figured as the proprietor of Aruna Wines as the first defendant. The trial court came to the conclusion that filing of two separate suits even though the mortgaged property as well as the mortgagor were one was improper and dismissed the suit by judgment and decree dated 01.03.2004.

3.Aggrieved by the same, the plaintiff bank filed A.S No.177 of 2004 before the Principal District Judge, Madurai. The first appellate court came to the conclusion that failure to follow the procedure contemplated under Section 67 A of the Transfer of Property Act, 1882 cannot result in the penal consequence as envisaged by the trial court. In that view of the matter, the judgment and decree passed by the trial court was set aside and by judgment and decree dated 03.01.2005, the appeal was allowed and preliminary decree was passed as prayed for. Questioning the same, this second appeal came to be filed. The second appeal was admitted on the following substantial questions of law.

> *"1.Whether the suits in O.S No.590 of 1993 and 784 of 1993 filed by the first respondent herein are hit by Section 67-A of the Transfer of Property Act especially when the appellant has raised objections in both the suits for filing two separate suits in respect of alleged two different mortgages with regard to the property ?*
>
> *2.Can a mortgage by deposit of title deeds be created by delivering xerox copies of the original documents of title deeds pertaining to the immovable property ?*
>
> *3.Whether the judgment of the lower appellate court is in accordance with the mandatory requirements under Order 41 Rule 31 of Code of Civil Procedure Code ? and*
>
> *4.Has not the lower appellate court erred in law in not considering that the 3rd respondent who exchanged the suit property in favour of the appellant, has to be discharged from his liability as a guarantor since the 2nd respondent himself executed Ex.A10 without knowledge of the 3rd respondent acknowledging his debts of his own ?"*

4.The foremost contention advanced by the learned counsel appearing for the appellant was that the trial court was justified in invoking Section 67 A of the Transfer of Property Act, 1882 for non-suiting the plaintiff bank. He would draw inspiration from Order 2 Rule 2 of CPC. The very purpose and object of Section 67 A of the Transfer of Property Act, 1882, was to consolidate all the mortgages in a single proceeding. Law always disfavors multiplicity of proceedings. In the case on hand, the bank had not obtained leave for filing the present suit on the strength of Ex.A1 alone. His further contention is that the suit had been laid on the strength of Ex.A7. Ex.A7 requires registration. He drew my attention to the decision of the Division Bench of the Madras High Court reported in ***1972-85-LW 251 (Modern Housing Construction and Properties Limited vs. The Alagappa Textiles (Cochin) Ltd.).***

5.The learned counsel for the appellant submits that since a compulsorily registerable document had not been registered, it was clearly not admissible in evidence. Merely because the said document came to be marked, that would not mean that this Court ought to look into the same. If an inadmissible document had been erroneously marked in evidence, the same will have to be eschewed when the defect pointed out. The other major contention is that the suit itself is not maintainable because though it purports to have been laid on the strength of the deposit of title deeds, the original title deeds have not been filed in the court. He would strongly contend that on the strength of photocopies of the original title deeds, mortgage by deposit of title deeds cannot be created. He also submitted that the appellant is an innocent lady who went by the words of Arunachalam (D2) that the original documents have been misplaced. Since the transaction had not been registered, the appellant did not have the opportunity to know that there was prior encumbrance.

6.The appellant's counsel drew my attention to the plea taken by the appellant that the mortgage has not been validly executed. He submitted that all the four substantial questions of law framed in this second appeal may be answered in favour of the appellant and the second appeal itself may be allowed.

7.Per contra, the learned counsel for the respondent submitted that the impugned judgment passed by the first appellate court does not warrant any interference and pressed for dismissal of the second appeal.

8.I carefully considered the rival contentions and went through the evidence on record. The suit filed by the plaintiff bank had suffered dismissal before the trial court on account of not having complied with the procedure set out in Section 67A of the Transfer of Property Act, 1882. There is no doubt that A.P.Arunachalam had created two mortgage deeds with the plaintiff bank. The bank instead of filing a single suit on the strength of both the mortgages had chosen to file two separate suits, namely, O.S No.590 of 1993 and O.S No.784 of 1993.

9.The question is whether for having breached the mandate set out in Section 67 A of the Transfer of Property Act, the suit filed by the bank deserves to be dismissed. As rightly pointed out by the learned counsel appearing for the respondent bank, though a clear mandate has been set out in Section 67 A of the Transfer of Property Act, the consequence of failure to adhere to the mandate has not been set out in the provision. The distinction between a mandatory provision and a directory provision is well known. It has been held in more than one decision that if the consequence of the breach have not been set out, then that provision should be construed as directory and not as mandatory. In as much as Section 67 A of the Act does not prescribe or set out the consequence in case of failure to adhere to the mandate, it is only a directory provision. It at all, the consequence can only fall on the subsequent suit and definitely not on the first suit filed by the mortgagee. That apart, the defence can be taken only by the mortgagor and not by the subsequent purchaser. In the case on hand, the mortgagor had chosen to remain exparte.

10.There is yet another impediment for the appellant. The appellant had rightly filed Transfer O.P No.59 of 1997 before the Principal District Judge, Madurai. Vide order dated 06.11.2000, the learned Principal District Judge, Madurai had allowed the O.P and directed transfer of O.S No.784 of 1993 from the file of the III Additional Sub Judge to the file of the I Additional Sub Judge, Madurai to be tried along with O.S No.590 of 1993. The order dated 06.11.2000 is not quite clear. The order states that the earlier suit should be tried along with the subsequent suit. In the very same order, it was stated that two separate orders to be passed after trying the suits simultaneously. Whatever be the legal effect of the said order, the fact remains that the two suits were ordered to be taken up together for disposal. The appellant herein did not apply for rejection of plaint. Therefore, I sustain the approach of the first appellate court for having come to the conclusion that O.S No.590 of 1993 cannot be said to be bad or not maintainable for having violated the mandate set out in Section 67 A of the Act. I answer the first substantial question of law against the appellant.

11.The other major issue that calls for my consideration is whether Ex.A7 requires registration. As rightly pointed out by the learned counsel on either side, if Ex.A7 represents the bargain between the parties, then, it certainly would require registration. Otherwise, it may not require registration.

12.The learned counsel for the bank would draw my attention to the decision reported in ***1998 2 LW. 251 (Ponnuswamy vs. V.Santhammal and Ors.)*** The Hon'ble Judge had held that if the memorandum does not contain the terms of the bargain between the parties, then, it would not require registration. As rightly pointed out by the learned counsel for the respondent bank, Ex.A7 merely states that the documents already deposited in respect of the account of the Aruna Wines may be taken as deposited towards equitable mortgage for Prakash Wines account. It does not incorporate any terms and conditions. Even the rate of interest has not been mentioned. Ex.A7 does not represent bargain between the parties. Therefore, it does not require registration.

13.The next question is whether by depositing Xerox copies of title deeds, equitable mortgage can be created. Again, it depends on the intention of the parties and the attendant circumstances. Of course, it is only Arunachalam who would have been competent to speak on the issue. The appellant who had taken over the property by exchange cannot impeach on the genuineness of the transaction. Arunachalam had chosen to remain exparte. The trial court had categorically had given a finding that the appellant is not a bonafide purchaser. Since the original documents in respect of the property were already lying with the bank in respect of the loan availed by Aruna Wines, I hold that even by depositing a photocopy of the title deed, a mortgage can be created. This question of law is also answered against the appellant. Merely because after execution of exchange deed in favour of the appellant, Arunachalam had made an endorsement of renewal, it would not mean that the appellant stands discharged. Therefore, the third and fourth substantial questions of law also are answered against the appellant. I do not find any merit in this second appeal. It stands dismissed. Connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(T & P)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

skm

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 Principal District Judge, Madurai.
2.The I Additional Sub Judge, Madurai.

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The Record Keeper, V.R.Section,
Madurai Bench of the Madras High Court, Madurai.(2 copies)

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and
MP(MD)No.1 of 2011
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NA(CO)
TR(08.06.2021) 6P 5C