BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 26.07.2021
CORAM
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
A.S.(MD)No.181 of 2019
and
C.M.P.(MD)No.9393 of 2019

1.K.Pullammal
2.K.Balakrishnan
3.K.Ayyanar ... Appellants/Defendents 2 to 4

Vs.

1.Nagalakshmi ... 1st Respondent/Plaintiff
2.Krishnan (Died) ... 2nd Respondent/Defendant No.2

Prayer: Appeal Suit filed under Section 96 of Civil Procedure Code, to set aside the decree and judgment passed in O.S.No.57 of 2015 dated 17.07.2018 on the file of the VI Additional District Court, Madurai and to allow this appeal suit.

For Appellants : Mr.R.Selvaraj
For Respondent : Mr.P.Subbiah
For Mr.I.Sekar

JUDGEMENT

The defendants in O.S.No.57 of 2015 on the file of the VI Additional District Court, Madurai are the appellants in this appeal. The respondent herein namely., Nagalakshmi filed the said suit for directing one Krishnan to pay the plaintiff a sum of Rs.16,70,000/- with subsequent interest within the time frame to be fixed by the Court failing which, the plaintiff must be permitted to file a final decree application to bring the suit property for auction sale for adjusting the sale proceeds towards decreetal amount. The suit was filed on the strength of Ex.A1/mortgage deed dated 04.06.2012 executed by the said Krishnan. The said Krishnan had passed away on 04.10.2013 itself. When the factum of death of the defendant came to plaintiff's knowledge, I.A.No.31 of 2016 was filed and the cause title was amended and thereby, the appellants were made as defendants. According to the plaintiff, the deceased/Krishnan borrowed a sum of Rs.10,00,000/- from her on 04.06.2012 and executed Ex.A1/mortgage deed (Document No.4921 of 2012, on the file of Joint Sub Registrar Office, Madurai South). Since the mortgagor did not repay any amount either towards interest or towards principal, the suit for foreclosure came to be instituted.

2.The appellants herein filed their written statement controverting the plaint averments. According to them, the plaintiff's husband namely., Annamalai had money transaction with one Karusubramanian, who was related to them. Since the plaintiff's husband put immense pressure on the said Karusubramaninan, Krishnan was made to execute Ex.A1 as security. The defendants pleaded that there was no transaction whatsoever between the plaintiff and the said Krishnan. In any event, even before the demise of Krishnan on 30.09.2013, a sum of Rs.5,00,000/- was paid to Annamalai and thereafter, a further sum of Rs.2,00,000/- was paid on 08.11.2013. According to the defendants, the balance amount payable by them for liquidating the mortgage was only Rs.3,00,000/-. Based on the divergent pleadings, the trial court framed the necessary issues.

3.The plaintiff examined herself as P.W.1 and her husband/Annamalai was examined as P.W.2 and Exs.A1 to A3 were marked. On the side of the defendants, the third appellant herein namely., Ayyanar examined himself as D.W.1. Karusubramanian with whom P.W.2/Annamalai is said to have had transaction was examined as D.W.2. No documentary evidence was marked on the side of the defendants.

4.After a consideration of the evidence on record, the Court below passed preliminary decree dated 17.07.2018 directing the appellants herein to pay the plaintiff a sum of Rs.16,96,460/- with interest at the rate of 6% per annum on the principal amount of Rs.10,00,000/- from date of decree till date of payment. In the event of failure to do so, the plaintiff was given liberty to apply for final decree for bringing the property to sale. Aggrieved by the same, this appeal suit came to be filed.

5.The point that arises for consideration in this appeal suit are two fold:

> "*(a)Whether there was any financial transaction between the plaintiff/Nagalakshmi and the deceased Krishnan or whether Ex.A1 came to be executed in the circumstances pleaded by the defendants? and*
>
> *(b)Whether the defendants had paid a sum of Rs.7,00,000/- to the plaintiff's husband/Annamalai even before the institution of the suit towards the suit transaction?"*

6.The learned counsel appearing for the appellants reiterated all the contentions set out in the memorandum of grounds. He took me through the oral evidence adduced on either side. He pointed out that the plaintiff who was examined as P.W.1 is a mere pawn at the hands of her husband. It was P.W.2/Annamalai, who had transacted with Krishnan as well as D.W.2/Karusubramaninan. The plaintiff was a mere name lender. He also pointed out that the receipt of a sum of Rs.7,00,000/- had been admitted by P.W.2 and since admission is the best form of proof, no further evidence was required to be adduced by the defendants. He also pointed out that P.W.1 as well as P.W.2 are retired government servants and that therefore, they ought to have been income tax assessees. The transactions obviously should have been reflected in the annual income tax returns filed by them. In this case, the annual income tax returns have not been filed by P.W.1 or P.W.2. Therefore,he called upon this Court to draw adverse inference against the plaintiff. He also would point out that the plaintiff's husband/P.W.2 was working as mandate holder in the company run by D.W.2 and that he had filed criminal prosecution under Section 138 of Negotiable Instruments Act against Karusubramanian both in his name and in the name of his brother namely., Meenakshisundaram. The learned counsel called upon me to take a holistic view of the matter and come to the conclusion that the defendants have established their defence on balance of probabilities. He submitted that when granting interim order, this Court had imposed a condition that the defendants should deposit a sum of Rs.3,00,000/-. The defendants had complied with the said condition. According to them, they had already paid a sum of Rs.7,00,000/-. Therefore, nothing further remains to be paid by the defendants/appellants. He called upon this Court to modify the judgment passed by the trial court.

7.Per contra, the learned counsel appearing for the respondent submitted that the suit has been instituted on the strength a registered mortgage deed. The execution of Ex.A1 is not under dispute. Therefore, the appellants, who are legal heirs of the deceased Krishnan cannot controvert the averments set out in the mortgage deed. Permitting them to do so would run contrary to the statutory mandate set out in Section 92 of the Evidence Act. He would also state that the appellants are trying to confuse this Court by bringing in extraneous transactions. According to him, Karusubramanian had three fold transactions and one cannot be mixed with the other. As regards the receipt of sum of Rs.5,00,000/-, according to the learned counsel for the respondent, it represents the other transaction and that the appellants cannot claim the benefit of adjustment in respect of the suit transaction. He submitted that the trial court had correctly appreciated the evidence on record. According to him, the impugned judgment and decree do not call any inference.

8.I carefully considered the rival contentions and went through the evidence on record. It is true that the suit has been instituted on the basis of Ex.A1/mortgage deed executed by Krishnan, the wife of the first appellant and the father of the appellants 2 and 3. There is no dispute that Ex.A1 was executed only by the said Krishnan. Now the question is whether the defence putforth by the appellants has been established or not. It is well settled that standard of proof in a civil case is only "balance of probabilities" and it is not "proof beyond reasonable doubt". The defendants had taken a specific plea that the plaintiff's husband was working as an official in commercial tax department and that their relative Karusubramanian got acquainted with him and that they had financial transactions between them. The plaintiff's husband/P.W.2/Annamalai is said to have advanced a sum of Rs.10,00,000/- to the said Karusubramanian. Annalmalai was also functioning as a mandate holder in the company run by Karusubramanian. Since immense pressure was brought to bear on Karusubramanian to arrange security, to oblige his relative, Krishnan who is Karusubramanian's uncle executed Ex.A1.

9.I must observe at the very outset that this defence has been set out in the written statement itself. It is not a theory that has been introduced at the time of trial. The defendants have further pleaded that a sum of Rs.7,00,000/- was returned in two installments. The plaintiff did not file any reply statement. Of course, non filing of reply statement cannot be put against the plaintiff. As per the provisions of Civil Procedure Code to file any additional pleading, leave of the Court must be obtained. But it is significant to note that even though Krishnan had passed away well before the filing of suit, the suit was instituted only against the dead person. After the plaintiff became aware that Krishnan had passed away, she filed an interlocutory application and brought the appellants on record. The plaintiff examined herself as P.W.1. P.W.1 had worked as a nurse in a government hospital. P.W.1 in her deposition stated that she had not given loan to any other person. According to her, she advanced a sum of Rs.10,00,000/- as loan to the deceased/Krishnan alone. She feigned total ignorance about the transactions which her husband/Annamalai had with Karusubramanian. The plaintiff also stated that she is not a income tax assessee. A transaction of Rs.10,00,000/- ought to have been reflected in the income tax return. Non reflection of the suit transaction in the income tax returns of the plaintiff is a factor that has to be borne in mind by the Court. A reading of the deposition of P.W.1 clearly gives an impression that she was a mere name lender and that the transaction was one essentially involving her husband/Annamalai. It is inconceivable that a retired government servant, a woman, who on her admission is not engaged in the business of money lending would have given a sum of Rs.10,00,000/- to a person with whom she is not acquainted. As already pointed out, even the death of Krishnan was not within her knowledge. That is why, the suit was filed against the dead person. I am more than convinced that it is the plaintiff's husband/Annamalai, who was involved in the entire transaction and Ex.A1 was merely obtained in the name of his wife. In other words, the plaintiff is only a name lender at the instance of her husband and nothing more.

10.The plaintiff's husband/Annamalai was examined as P.W.2. He admitted that he had lent money to Karusubramanian, who is a relative of the defendants. He also admitted that two criminal cases under Section 138 of Negotiable Instruments Act were filed against the said Karusubramanian, one was in his name and the other was in the name of his brother namely., Meenakshisundaram. P.W.2 also admitted that he was working as a mandate holder in the company run by the said Karusubramanian. The learned counsel appearing for the appellants draws my attention to paragraph No.4 of the proof affidavit of P.W.2. Controverting the stand of the defendants that a sum of Rs.5,00,000/- was already paid for liquidating the mortgage deed, P.W.2 had simply denied the same. However, in the course of cross examination, P.W.2 admitted that a sum of Rs.5,00,000/- was in fact returned by the said Karusubramanian. However, P.W.2 claimed that Karusubramanian had borrowed a sum of Rs.13,00,000/- from him ie.. P.W.2. That apart, he also borrowed a sum of Rs.5,00,000/- from one of his friends. He had also taken a loan of Rs.10,00,000/-. Put together the total amount borrowed by Karusubramanian would come to Rs.28,00,000/-. Since a sum of Rs.5,00,000/- was already paid, Karusubramanian had to return the balance amount of Rs.23,00,000/- with interest. There is considerable merit in the contention of the learned counsel for the appellants that if really Karusubramanian had three transactions in all, certainly those details would have been specifically spelt out in the chief examination itself. But only in the cross examination, these aspects came to be elicited. The answers given by P.W.2 in the course of cross examination are a clear give-away of the real nature of the transaction. As rightly pointed out by the learned counsel appearing for the appellants, the so-called friend, who is said to have advanced a sum of Rs.5,00,000/- was not examined and those details are conspicuously absent.

11.Karusubramanian with whom P.W.2 had dealings was examined as D.W.2. Karusubramanian was prosecuted by P.W.2 in S.T.C.Nos.87 and 97 of 2015. P.W.2 while deposing in present civil case was confronted with the testimonies given in the criminal cases. He admitted that a sum of Rs.10,00,000/- was taken by Karusubramanian. He also stated that it was he who gave a sum of Rs.10,00,000/- and not his wife. This vital contradiction has been elicited from P.W.2, during the course of his cross examination. He had also admitted that only a sum of Rs.10,00,000/- was involved in the transaction between him and D.W.2/Karusubramanian.

12.It is true that Ex.A1 is a registered document. But then, the defendants have taken a categorical stand that no consideration passed under Ex.A1 and that it was executed only to oblige their relative Karusubramanian. Therefore, Section 92 of the Evidence Act will not come in the way of the defendants from establishing the true nature of transaction.

13.After a careful reading of the entire evidence on record, I am satisfied that the defendants have established that a sum of Rs.5,00,000/- has been returned. Even though there are stray lines indicating the return of a further sum of Rs.2,00,000/-, I am satisfied that on a balance of probabilities what has been established is only return of Rs.5,00,000/-. I am also satisfied that the defendants had proved that this amount was returned as early as on 30.09.2013. The mortgage was executed on 04.06.2012. The sum of Rs.5,00,000/- paid towards the suit transaction can only be adjusted initially against interest and only the balance amount can be adjusted against the principal. When a sum of Rs.5,00,000/- was paid on 30.09.2013, a sum of Rs.1,20,250/- would have got adjusted against the interest payable on the suit transaction. The balance amount of Rs.3,79,750/- would be adjusted against the principal amount. The plaintiff will be entitled to decree only for Rs.6,20,250/-. The trial court has rightly held that the plaintiff will be entitled to interest at the rate of 9% per annum. Therefore, the judgment and decree passed by the trial court is modified and the appellants are directed to pay the amount of Rs.6,20,250/- together with interest at the rate of 9% per annum with effect from 30.09.2013 till date of realization. The appeal suit is partly allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (AE)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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:

The VI Additional District Judge,
Madurai.

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

A.S.(MD)No.181 of 2019
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RS (03.09.2021) 6P 4C