IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.10.2022

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR
AND
THE HONOURABLE MRS. JUSTICE N. MALA

A.S.No.214 of 2013
and
M.P.No.1 of 2013

R.Babu Singh ... Appellant

Vs.

1.A.R.Paranthaman

2.The Development Credit Bank
No.61, Nungambakkam High Road,
Chennai – 600 034. ... Respondents

Prayer : Appeal Suit filed under Section 96 of Code of Civil Procedure against the judgment and decree, dated 18.12.2012, in O.S.No.54 of 2010 on the file of the II Additional District Court, Tiruvallur at Poonamallee.

For Appellant	:	Mr.S.Sethuraman
For R1	:	M/s.T.Mathi

J U D G M E N T

(Judgment was delivered by **S.S. SUNDAR, J.**)

The 1st defendant in the suit in O.S.No.54 of 2010 before the II Additional District Court, Tiruvallur at Poonamallee, is the appellant in the above appeal.

2.The 1st respondent/plaintiff filed the suit in O.S.No.54 of 2010 for recovery of a sum of Rs.48,61,334/- with interest due on a mortgage deed, dated 20.05.2009, executed by the 1st defendant in favour of the plaintiff and for consequential reliefs. In effect, the suit is for passing a preliminary decree for recovery of money due on the mortgage and for a personal decree against the 1st defendant, directing the 1st defendant to pay the balance amount, in case the money realised is less than the decretal amount.

3.The case of the plaintiff in the plaint is that the 1st defendant borrowed a sum of Rs.40,00,000/- on 20.05.2009 from the plaintiff and created a simple mortgage by executing a deed of mortgage, dated

20.05.2009, and agreed to pay interest @ 2% per month. Stating that the 1st defendant neglected to pay the amount due, despite a notice dated 05.04.2010 to the 1st defendant asking him to pay the outstanding amount to the plaintiff, the suit was laid.

4.The suit was contested by the 1st defendant, specifically denying the averment that the 1st defendant executed a mortgage deed after receiving a sum of Rs.40,00,000/- on 20.05.2009. A peculiar case was pleaded in the written statement by the 1st defendant, stating that there was a problem in the house of the plaintiff regarding money transaction and that the plaintiff approached the 1st defendant and requested him to execute the alleged suit mortgage deed without any payment, only to show the plaintiff and his family members that a huge sum is paid to the 1st defendant. In effect, the pleading of the 1st defendant would only reveal that the case of the 1st defendant is that the suit mortgage is a sham and nominal transaction without any consideration. In the written statement, it is stated by the 1st defendant that he had surplus money in his hands at the time of mortgage and there was no necessity for the 1st defendant to borrow such money. The

1st defendant also disputed the financial capacity of the plaintiff to advance such a huge amount as per the mortgage.

5.The trial Court framed necessary issues. Before the trial Court, the plaintiff examined himself as P.W.1 and examined two other persons, who are the attestors of the document Ex.A1-mortgage deed. The plaintiff marked Exs.A1 to A26 to substantiate his case. The appellant/1st defendant examined himself as D.W.2 and D.W.1 was examined by the 2nd defendant Bank. On behalf of the defendants, Exs.B1 to B7 were produced.

6.After holding that the document Ex.A1-mortgage deed is proved by the plaintiff, the trial Court was unable to accept the case of the 1st defendant that there was no consideration for Ex.A1-mortgage deed. The case of the appellant/1st defendant that the mortgage deed was executed by the 1st defendant at the request of the plaintiff, who was his long time friend, without receiving any consideration, was not accepted by the trial Court by giving cogent reasons. The trial Court specifically found that there are clear variations between the pleadings and the evidence. Since the execution of mortgage deed-Ex.A1 was proved by examining not only the plaintiff but also the two attestors, the trial Court accepted the case of the plaintiff that he had advanced a sum of Rs.40,00,000/- to the 1st defendant on the basis of the mortgage under Ex.A1. On the analysis of facts admitted and the evidence adduced, the trial Court came to the conclusion that the 1st defendant is liable to pay the mortgage money due under Ex.A1 with agreed interest. Considering the fact that the property under Ex.A1 was subject to prior mortgage in favour of the 2nd defendant Bank, the trial Court also granted a personal decree against the 1st defendant to realise the balance amount available after the 2nd defendant realising the loan which was due on the prior mortgage in favour of the 2nd defendant.

7.Aggrieved by the judgment and decree of the trial Court, the 1st defendant has filed the above appeal.

8.Learned counsel appearing for the appellant/1st defendant submitted that there is no concrete proof established by the plaintiff to establish payment of money under Ex.A1-mortgage deed. The learned counsel submitted that the plaintiff has not produced Income Tax Returns and other statutory documents to prove his financial capacity to advance such a huge amount to the 1st defendant, even though the 1st defendant has specifically denied passing of consideration under Ex.A1. The learned counsel also submitted that, in the evidence, the 1st defendant has disclosed the availability of huge funds with the 1st defendant at the time of mortgage. Pointing out that the property which is the subject matter of the suit was earlier mortgaged in favour of the 2nd defendant, the learned counsel submitted that the possibility of the second mortgage in favour of the plaintiff has not been considered by the trial Court, even though a specific issue is raised by the 1st defendant.

9.Considering the pleadings, evidence, findings of the trial Court and the submissions of the learned counsel appearing for the appellant, this Court is of the view that the following issues are to be determined for the disposal of this appeal :

i. *Whether the suit mortgage under Ex.A1 and passing of consideration is proved by the plaintiff/1st respondent ?*

ii. *Whether the suit mortgage under Ex.A1 was executed at the instance of the plaintiff to solve some family issues faced by the plaintiff ?*

iii. *Whether the plaintiff has proved his financial capacity and means to advance the loan as per Ex.A1 ?*

10.From the admitted case, it is seen that the suit property was mortgaged in favour of the 2nd defendant by the 1st defendant earlier and the 2nd defendant Bank had also initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). Therefore, the plaintiff has been granted a limited relief by treating the plaintiff as a second mortgagee for the amount that may be available after realising the dues of the 2nd defendant on the basis of the previous mortgage in the pending proceedings.

11.On Issue Nos.1 and 2, the trial Court has given specific finding as to the genuineness of the mortgage deed under Ex.A1. The document Ex.A1 is a simple mortgage deed with usual clauses which are found in any mortgage deed, either in favour of an individual or in favour of a Bank. The attestors of the document Ex.A1 were examined as witnesses. As a matter of fact, the execution of Ex.A1 is not in dispute. Therefore, examination of attestors of the document is also not necessary in this case.

12.The plaintiff has proved the document Ex.A1 and the signature of the 1st defendant in the document Ex.A1 is not in dispute. P.W.2 and P.W.3, who are the attestors of the document Ex.A1, have also been examined to prove that the mortgage deed was duly executed by the 1st defendant.

13.While it is open to the 1st defendant to plead that the mortgage deed was never intended to be acted upon, there is a specific bar under Section 92 of the Evidence Act to set up a plea contrary to the terms of the mortgage deed. In other words, the 1st defendant has denied the transaction, even though execution of Ex.A1-mortgage deed is not disputed. When the suit on mortgage is contested on the ground that the mortgage deed is sham and nominal without passing of consideration, the burden lies on the appellant to prove by cogent evidence.

14.The plaintiff and the defendant are admittedly friends. The reason stated by the 1st defendant in the written statement regarding the purpose for which the mortgage under Ex.A1 was executed is that the plaintiff wanted the transaction to be recorded to get rid of some problems faced by the plaintiff in his family. Quite contrary to the stand taken by the 1st defendant in the written statement, the suggestion put to the plaintiff during cross-examination on behalf of the 1st defendant is otherwise and it is seen from the evidence of P.W.1 as extracted below :

> "1ம் எதிர்வாதி அவர் சகோதர சகோதரிகளை ஏமாற்ற என்னிடம் கடன் வாங்கியதுபோல எ1ஐ என் துணைக்கொண்டு சிருஷ்டி செய்வதற்கு நான் துணை போனேன் என்றும் அதன் கீழ் எந்த பணபரிவர்த்தனையும் நடைப்பெறவில்லை என்றும் அதனால் வழக்கு தள்ளுபடி செய்ய வேண்டும் என்றும் சொல்வது சரியல்ல."

15.From the suggestion that was put to the plaintiff, the 1st defendant has exposed himself. The reason stated by the 1st defendant in the written statement is therefore quite contrary to the stand taken by the 1st defendant at the time of trial. This inconsistency is fatal to the case, where the 1st defendant, admitted the execution of Ex.A1.

16.First of all, this Court is unable to accept the case of the 1st defendant. It is admitted that the plaintiff and the 1st defendant are friends and there must be a reason for the plaintiff to file a suit for recovery of huge amount, if the mortgage is not supported by consideration and it was at the instance of the plaintiff to solve his family issues. No attempt is made by the appellant/1st defendant to explain why he would agree to execute a mortgage deed admitting borrowal of a huge sum of Rs.40,00,000/- without receiving even a single pie under the document.

17.The reason given by the 1st defendant in the written statement to execute Ex.A1 cannot be accepted in view of the suggestion that was put to P.W.1 as regards the purpose for which the document Ex.A1 was required by the 1st defendant. Having suggested to the plaintiff that Ex.A1 was executed to help the 1st defendant to make his family members to believe that the 1st defendant is indebted to plaintiff, the case of the 1st defendant in the written statement is proved to be false.

18.The 1st defendant is not an illiterate and therefore, the plea of *non est factum* that the transaction was not the one which was intended by the parties, though permissible, the burden lies on the 1st defendant to prove the same. This Court is unable to find any convincing evidence in this case. In view of the glaring contradictions between the pleadings and evidence, this Court is unable to accept the plea of the 1st defendant.

19.The 1st defendant is also a business man and the nature of evidence given by the 1st defendant indicates that he has admitted some payments to the plaintiff. A suggestion was put to P.W.1 whether he received Rs.12,56,399/- by way of cheque, as if the 1st defendant has paid substantial amount. This should be understood in the present context that the 1st defendant has paid some amounts towards repayment of the amount which was earlier advanced to the 1st defendant. The suggestion put to P.W.1 would only show that the 1st defendant was trying to establish several payments made to the plaintiff towards discharge of the loan. Learned counsel for the appellant did not refer to any document or evidence to substantiate the stand taken by the 1st defendant in his written statement.

20.The case of the 1st defendant as a whole is false, as there are several contradictions and variations between the pleadings and evidence. Learned counsel appearing for the appellant/1st defendant is unable to explain before this Court such contradictions. All these material contradictions would only suggest that the case of the 1st defendant is false. Having regard to the nature of the plea, this Court is unable to accept the case of the 1st defendant that the mortgage deed was executed without receipt of any money.

21.From the evidence, P.W.1 is also a business man and the documents produced by the plaintiff would show that he is a man of means and there is no difficulty for him to mobilize such huge amount to advance to the 1st defendant. Therefore, this Court is unable to find favour with the appellant/1st defendant as regards the means. The trial Court has also rendered a finding about the means of the plaintiff.

22.Learned counsel appearing for the appellant is unable to demonstrate before this Court that the documents marked on the side of the 1st defendant would show that the 1st defendant had surplus in his hands and there was no necessity for the 1st defendant to borrow money from the plaintiff. On the contrary, the appellant admitted that he could not repay the money to the 2nd defendant Bank.

23.One of the grounds raised by the appellant is that the original deed was not handed over to the plaintiff at the time of borrowing the amount. It is admitted even in the pleading that the suit property itself was earlier mortgaged in favour of the 2nd defendant Bank and mortgage in favour of the 2nd defendant Bank was by deposit of title deeds. Therefore, this Court is unable to give any importance to this point.

24.The trial Court has applied its mind and has given specific findings with regard to the genuineness of the transaction and passing of consideration after whole analysis of the case. This Court has no compelling reason to interfere with the findings of the trial Court on facts. In the absence of any material evidence or document to believe the story of the 1st defendant/appellant, this Court is unable to interfere with the judgment and decree of the trial Court.

25.Accordingly, this appeal is dismissed as devoid of any merit. The judgment and decree of the trial Court in O.S.No.54 of 2010, dated 18.12.2012, is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

(S.S.S.R., J.) (N.M., J.)
19.10.2022

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Internet : Yes
Index : Yes / No

To

The II Additional District Judge,
Tiruvallur at Poonamallee.

S.S. SUNDAR, J.
and
N. MALA, J.

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A.S.No.214 of 2013

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