BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.04.2022

CORAM:

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN**

S.A.(MD)No.620 of 2010
and
M.P.(MD)No.1 of 2010

1.Chellammal
2.M.Alice Jeyaseli
3.Minor Rosling Jebakumari
4.Minor Vijay Martin ... Appellants/Respondents/Defendants

(Minors 3 & 4 appellants through the 1st appellant)

**-Vs-**

Thangam Finance Company
Tirunelveli through its Managing Partner
Mr.Soma Sundaram
S/o.Sethuramalingam
Office at 27, Cross Street,
South Bala Bagya Nagar,
Tirunelveli Junction. ... Respondent/Appellant/Plaintiff

**PRAYER**: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed in A.S.No.8 of 2006 on the file of the I Additional Subordinate Judge, Tirunelveli, dated 27.02.2007 reversing the judgment and decree passed in O.S.No.473 of 2004 on the file of the II Additional District Munsif Court, Tirunelveli, dated 21.10.2005.

For Appellants : Mr.S.Meenakshi Sundaram, Senior Counsel for Mr.T.Selvan
For Respondent : No appearance

**JUDGMENT**

The defendants in O.S.No.473 of 2004 on the file of the II Additional District Munsif Court, Tirunelveli are the appellants in this second appeal.

2.The suit was filed for directing the defendants to pay a sum of Rs.85,462/- with interest at 36% p.a. and in default, order sale of the schedule property through court and adjust the sale proceeds towards the decree. The plaintiff prayed for passing a personal decree in the event of the sale proceeds being insufficient to satisfy the decree. The suit was filed on the basis that the suit property had been mortgaged by depositing the tile deeds. The case of the plaintiff was that the mortgage by deposit of the title deeds took place on 26.05.1995. The plaintiff had advanced a sum of Rs.80,000/- on the strength of the said equitable mortgage. The loan was repayable in 20 installments. But only a sum of Rs.24,700/- was paid. The rest remained unpaid. Thiru.Martin who was given loan passed away on 29.05.1995. The defendants have given an undertaking to discharge the debt in three years. They did not however do so. The plaintiff therefore issued notice dated 16.05.2003 calling upon the defendants to settle the mortgage dues. The defendant sent a reply dated 24.05.2003 repudiating their liability. In these circumstances, the suit came to be laid on 13.10.2003. The defendants filed written statement controverting the plaint averments. Based on the divergent pleadings, the trial court framed the necessary issues. On the side of the plaintiffs, three witnesses were examined. Ex.A1 to Ex.A11 were marked. The defendants 1 & 2 examined themselves as D.W.1 & D.W.2. Ex.B1 to Ex.B7 were marked. After considering the evidence on record, the trial court by judgment and decree dated 21.10.2005 dismissed the suit. Aggrieved by the same, the plaintiff filed A.S.No.8 of 2006 before the I Additional Sub Court, Tirunelveli. By the impugned judgment and decree dated 27.02.2007, the first appellate court reversed the decision of the trial court and directed the defendants to pay a sum of Rs.95,261/- with interest at 36% per annum from the date of suit claim till the date of realization. In the event of default, the property was ordered to be sold so as to satisfy the decree. In other words, the suit was decreed by the impugned judgment and decree as prayed for. Aggrieved by the same, the second appeal came to be filed. The second appeal was admitted on 20.07.2010 on the following substantial questions of law:-

> "(i) Whether the first appellate court had erred in arriving at the conclusion regarding the execution of A.1, A.2 and A.4 without comparing the signatures of documents of contemporary period?
>
> (ii) Whether the first appellate court had erred in coming to the conclusion regarding the signature found in Ex.A1, A.2 and A.4 without getting expert opinion?
>
> (iii) Whether the first appellate court had erred in coming to the conclusion regarding creating of equitable mortgage when respondents have not satisfied legal requirement under Section 58 of T.P.Act?
>
> (iv) Whether the first appellate court is correct in coming to the conclusion respondent had got legal status to institute suit as per Ex.A9?"

Though the respondent had been served and its name is printed in the cause list, no counsel had entered appearance. The respondent was therefore set exparte and the matter was heard on merits.

3.The learned Senior Counsel appearing for the appellants reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellants and set aside the impugned judgment and decree and restore the decision of the trial court. Since the respondent had been set exparte and remained un-represented, I carefully went through the evidence on record and independently scrutinized the same.

4.As already noted, the case of the respondent is that the defendants mortgaged the suit property by deposit of the title deeds. There is no dispute that the suit property belongs to Chellammal and her son Mariappan. Ex.B1 dated 29.07.1983 is the sale deed executed by one Joseph Rajbathar in their favour. Of-course, the original document was marked by the plaintiff as Ex.A8. Ex.B1 is only a certified copy.

5.The specific defence of the defendants is that they had not signed in Ex.A1 or Ex.A2. P.W.1 had also admitted in the cross-examination that it was Martin, the husband of the first defendant and father of the second defendant, who had availed loan from the plaintiff firm. When the defendants had denied their signatures, the plaintiff must have taken steps to send the disputed signatures for the opinion of the hand writing expert. In this case, the plaintiff did not take any such step. It is quite possible that Thiru.Martin could have handed over Ex.A8 at the time of availing loan from the plaintiff firm. But then, mere deposit of a title document cannot create an equitable mortgage. It is the person in whose name the document stands, who can create the mortgage. In this case, that has not been done. Therefore, the trial court rightly came to the conclusion that by handing over the title document belonging to the defendants, Thiru.Martin could have created an equitable mortgage on the suit property. The first appellate court failed to come to grips with this reasoning. The first appellate court chose to compare the signature found in the vakalat and in the written statement and gave a finding that signatures found in Ex.A1 & Ex.A2 are that of the defendants. Such an approach has been deprecated in many decisions. Of-course, under Section 73 of the Indian Evidence Act, the Court can compare the disputed signature with an admitted signature with its naked eye. But then, the disputed signature must be compared with the admitted signature in a contemporaneous document.

6.In the case on hand, the suit was filed only in 2004. Ex.A1 & Ex.A2 are of the year 1995. Therefore, the approach adopted by the first appellate Court cannot be said to be correct. That apart, the first appellate court had misconstrued Section 58(f) of the

Transfer of Property Act. I answer the substantial questions of law in favour of the appellants. The impugned judgment and decree are set aside. The decision of the trial court is restored. The second appeal is allowed. No cost. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

To

1.The I Additional Subordinate Judge,
Tirunelveli.

2.The II Additional District Munsif,
Tirunelveli.

Copy To
The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1 CC to M/s.T.SELVAM, Advocate ( SR-19603[F] dated 20/04/2022 )

Judgment made in
S.A.(MD)No.620 of 2010
19.04.2022

RS (07.06.2022) 4P-6C