



S.A.No.458 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 10.07.2023

Coram:

The Honourable Mr.Justice **A.D.JAGADISH CHANDIRA**

S.A.No.458 of 2023

E.Jayapal

.. Appellant

Vs.

1.Rajammal

2.Kumaresan

.. Respondents

Second Appeal filed under Section 100 C.P.C., against the judgment and decree dated 31.08.2021 made in A.S.No.12 of 2020 on the file of II Additional District Judge, Vellore @ Ranipet, confirming the judgment and decree dated 31.10.2019 made in O.S.No.28 of 2018 on the file of Subordinate Judge, Arakkonam.

For Appellant : Mr.K.Kannan



S.A.No.458 of 2023

WEB COPY

JUDGMENT

The plaintiff has filed the present second appeal challenging the correctness of the finding given by both the Courts below in disallowing a portion of his claim.

2. For the sake of convenience, the parties are referred to as they are arrayed in the original suit.

3.The case of the plaintiff is as under:-

The first defendant is the mother of the second defendant. The defendants are the family friend of the plaintiff. On 04.5.2009 the first defendant's husband viz., M.Gajendran had borrowed a sum of Rs.2,00,000/- from the plaintiff with interest at the rate of 24% per annum agreeing to repay the same on demand by offering his vacant land measuring 1564sq.ft., in T.S.No.477/1 under UDR Natham Survey No.541/10 in 87-Vadamabakkam Village, Vellore District, and had also executed registered equitable mortgage deed dated 04.5.2009 in Document bearing No.4749 of 2009 on the file of Sub-Registrar Office, Joint-II



S.A.No.458 of 2023

WEB COPY

Arakkonam Circle, Vellore District. The interest has been paid by the said Gajendran regularly. After the demise of the said Gajendran i.e., from 20.06.2009, his wife, the first defendant, has paid the interest from 04.05.2009 to 04.07.2011 and at that time, defendants 1 and 2 approached the plaintiff for the loan amount and borrowed a sum of Rs.2,00,000/- on 04.07.2011 by offering the very same vacant land already offered by her husband and had executed a registered equitable mortgage deed in favour of the plaintiff in Document bearing No.5025 of 2011. Thereafter, the defendants failed to pay interest. The plaintiff has sent a legal notice dated 14.06.2017 to the defendants. Even after receipt of the notice, the defendants have not paid either the principal amount or the interest, and hence, the plaintiff filed a suit in O.S.No.28 of 2018 seeking a direction to the defendants to pay a sum of Rs.4,00,000/- with interest at 24% per annum on Rs.9,92,000/- from the date of plaint till the date of realization and a further direction to the defendants to deposit the said amount within a period of six months.



S.A.No.458 of 2023

4.The defendants have filed the written statement contending that the first defendant's husband viz., Gajendran executed a mortgage deed No.4749/2009 on 04.05.2009, when he was alive, in favour of the plaintiff in respect of suit schedule property for a sum of Rs.2,00,000/- and her husband paid the interest at 3% i.e.,Rs.6,000/- for the said amount every month without fail. The first defendant's husband died on 20.06.2009 and after his demise, the plaintiff forced and threatened the first defendant. As the plaintiff mounted pressure on her to execute the fresh mortgage, she had executed a fresh mortgage deed No.5025/2011 on 04.07.2011 along with her minor son, the second defendant, as if she received a sum of Rs.2,00,000/- by mortgaging the suit property. But the first defendant has not received any amount from the plaintiff as alleged in the plaint and only her husband mortgaged the suit schedule property and availed a loan amount of Rs.2,00,000/- on 04.05.2009 for urgent family needs from the plaintiff and till his death, he paid the interest amount of Rs.6,000/- per month to the plaintiff. Even after demise of her husband, the first defendant paid the said interest regularly till the receipt of notice dated 14.06.2017 from the plaintiff. It is utter false to state that the defendants have to pay a sum of Rs.4,00,000/- along with interest. It is only the husband of the first



S.A.No.458 of 2023

defendant, who had borrowed a sum of Rs.2,00,000/- from the plaintiff by executing a mortgage deed on 04.05.2009 as stated above and in substitute of the earlier mortgage deed No.4749 of 2009, the plaintiff had obtained the fresh mortgage deed No.5025 of 2011 from the first defendant. Now the plaintiff has claimed the mortgage amount for both the mortgage deeds, which is violation and abuse of process of law and the plaintiff has not approached this Court with clean hands and he has filed the suit to grab the suit schedule property of the defendants by hook or crook and the claim of the plaintiff for recovery of both the mortgage money with interest from the defendants is not maintainable either in law or on facts and the plaintiff is not entitled to receive the amount as prayed for and the suit has been filed for unlawful gain and the same is liable to be dismissed with exemplary costs.

5.On the above pleadings, the Trial Court framed the following issues:-

- 1.Whether the plaintiff is entitled for recovery of a sum of Rs.4,00,000/- as prayed for?
- 2.To what other relief ?



S.A.No.458 of 2023

6. Before the Trial Court, the plaintiff had examined himself as PW1 and marked Exs.A1 to A4 in support of his case. On the side of defendants, the first defendant examined herself as DW1 and examined one Mani as DW2, but, did not produce any documentary proof.

7. On examination of the oral and documentary evidence, the Trial Court allowed the suit in part directing the defendants to pay the plaintiff a sum of Rs.3,10,950/- alone together with interest at the rate of 9% on the principal amount of Rs.2,00,000/- from the date of the plaint till the date of judgment and subsequently, at the rate of 6% on the principal amount till its realization, failing which the plaintiff may bring the suit property in public auction and by selling the suit property, recover the amount from and out of the sale proceedings. The said judgment and decree was confirmed by the first Appellate Court without any interference. Questioning the correctness of the judgment and decree made by both the Courts below, the appellant/plaintiff has filed the present second appeal.

8. Learned counsel appearing for the appellant would submit that both the courts below have failed to note that the earlier mortgage deed



S.A.No.458 of 2023

dated 04.05.2009 marked as Ex.A1 was executed by the husband of the first defendant and the mortgage deed dated 4.7.2011 marked as Ex.A1 was executed by the defendants themselves and hence, there is separate cause of action and an equitable mortgage deed executed by the defendants has got separate cause of action, but both the Courts below have arrived at a wrong conclusion that the second mortgage was a substitution of the first mortgage deed dated 04.05.2009 marked as Ex.A1. He would further submit that both the Courts below have failed to appreciate that the plea of force and threat alleged to have have been wielded by the plaintiff for getting the second mortgage deed executed, has been made for the first time only in the written statement, that too after lapse of seven years and had it been true, they would have lodged a complaint with the police and in such circumstances, the finding of both the Courts below that the second mortgage is the substitution of the first mortgage is not correct and hence, prayed for allowing the second appeal by decreeing the suit in its entirety.

9. Heard the learned counsel appearing for the appellant and perused the judgments of the Courts below in the light of the questions of law raised by the Appellant.



S.A.No.458 of 2023

WEB COPY

10. The appellant/plaintiff is aggrieved against the disallowed portion of his claim viz., recovery of money in respect of the second mortgage deed executed by the defendants in respect of one and the same property by mortgaging which, the husband of the first defendant had borrowed money just prior to his demise.

11. It is pertinent to note that the plaintiff filed the suit claiming the relief based on two mortgage deeds under Exs.A1 and A2. Ex.A1 dated 04.05.2009 was executed by the husband of the first defendant for valuable consideration of Rs.2,00,000/- agreeing to repay the said sum on demand with interest at the rate of 24% per annum and the said fact was admitted by the defendants in their written statement also. There is no dispute with regard to execution of the first mortgage deed, Ex.A1 by the husband of the first defendant having availed a loan of Rs.2,00,000/-. The plaintiff himself admits that interest for the said amount was paid by the first defendant from the date of loan viz., 4.5.2009 till 4.7.2011 and thereby, both the Trial Court has rightly decreed the suit only in respect of Ex.A1 mortgage deed and the said finding was also rightly confirmed by the appellate Court.



S.A.No.458 of 2023

WEB COPY

12. In respect of 2nd mortgage deed (Ex.A2) dated 04.07.2011 in Doc.No.5025 of 2011, which is claimed by the plaintiff to have been executed by defendants 1 and 2 for a valuable consideration, it is the duty of the plaintiff to prove the same. The specific case of the defendants in respect of second mortgage deed, Ex.A2 is concerned, after the demise of the husband of first defendant, the defendants were forced by the plaintiff to execute a fresh mortgage deed in respect of the same suit property without any amount having been received from the plaintiff as alleged in the plaint.

13. On perusal of Ex.A2, it is clear that there is no reference about Ex.A1, mortgage deed, but in the said document it is referred that the property has no encumbrance, which made the Courts to arrive at a conclusion that the plaintiff had suppressed the said fact in Ex.A2 mortgage deed. As per Section 68 of the Indian Evidence Act, a document is required to be attested and it shall not be used as evidence until at least one attesting witness has been examined for the purpose of proving its execution. The relevant section reads thus:

“68. Proof of execution of document required by law to



S.A.No.458 of 2023

be attested.—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 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]”

14. The Apex Court, while dealing with the case in ***Om Prakash (dead) through his legal representatives Vs. Shantidevi and others*** ((2015) 4 Supreme Court Cases 601), has considered the above provision and held that the appellant did not even attempt to prove the document in the manner known to law and dismissed the Civil Appeal.

15. In the case on hand, though Ex.A2 was attested by two attesting witnesses, none of them was examined before the trial Court to prove the same as per law. When the plaintiff has failed to examine any of the attesting witnesses in the manner known to law, he is not entitled to any



S.A.No.458 of 2023

claim in respect of such mortgage, which is mere violation and abuse of process of law and he cannot raise the claim that the second mortgage deed has got separate cause of action.

16. Having carefully analysed the materials available on record including the judgments of both the Courts below in the light of the decision of the Apex Court cited supra, this Court is of the view that both the Courts below have correctly disbelieved Ex.A2 and held that the second mortgage deed Ex.A2 could have been obtained as substitution for the first one, that Ex.A2 has not been proved by the plaintiff in accordance with law and rejected the claim made by the plaintiff based on Ex.A2 and as such this Court finds that no substantial question of law is involved in this second appeal requiring admission.

17. The Hon'ble Apex Court in ***Kirpa Ram (D) Tr.Lrs. vs Surender Deo Gaur (2020 Scc OnLine SC 935)*** has categorically held as under:-

"23. Sub-section (1) of Section 100 of the Code contemplates that an appeal shall lie to the High Court



WEB COPY



S.A.No.458 of 2023

if it is satisfied that the case involves a substantial question of law. The substantial question of law is required to be precisely stated in the memorandum of appeal. If the High Court is satisfied that such substantial question of law is involved, it is required to formulate that question. The appeal has to be heard on the question so formulated. However, the Court has the power to hear appeal on any other substantial question of law on satisfaction of the conditions laid down in the proviso of [Section 100](#) of the Code. Therefore, if the substantial question of law framed by the appellants are found to be arising in the case, only then the High Court is required to formulate the same for consideration. If no such question arises, it is not necessary for the High Court to frame any substantial question of law. The formulation of substantial question of law or re- formulation of the same in terms of the proviso arises only if there are some questions of law and not in the absence of any substantial question of law. The High Court is not obliged to frame substantial question of law, in case, it finds no error in the findings recorded by the First Appellate Court."



S.A.No.458 of 2023

18. In view of the above, no question of law much less substantial question of law arises for consideration. The Second Appeal fails and the same is dismissed at the admission stage itself. No costs. The connected Miscellaneous Petition is closed.

10.07.2023

raa

To

1. The Subordinate Judge,
Arakonam
2. II Additional District Judge,
Vellore @ Ranipet.
3. The Record Keeper,
V.R.Section, High Court,
Madras.



WEB COPY



S.A.No.458 of 2023

A.D.JAGADISH CHANDIRA,J.

raa

S.A.No.458 of 2023

10.07.2023