IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.12.2023

PRONOUNCED ON : 08.01.2024

CORAM:

THE HON'BLE MR.JUSTICE **G.K.ILANTHIRAIYAN**

AS.No.200 of 2010 and
M.P.No.1 of 2010

1. Baghyam
2. L.Mohan Kumar ... Appellants

Vs.

1. M/s.Sri Gokulam Investments,
rep. by its Proprietor,
A.M.Gopalan,
"SREE GOKULAM TOWERS"
No.66, Arcot Road,
Kodambakkam,
Chennai-600 024.

2. R.Raphel Reddy ...Respondents

PRAYER: Appeal Suit is filed under Section 96 of CPC against the judgment and decree dated 13.04.2005 passed in O.S.No.3469 of 2002 on the file of the Additional District & Sessions Judge, Fast Track Court-IV, Chennai.

For Appellants : Mr.G.Ilangovan

For Respondent 1 : Mr.N.R.Anantha Rama Krishna
For Respondent 2 : Not ready in notice

JUDGMENT

The Appeal suit is filed against the judgment and decree dated 13.04.2005 passed in O.S.No.3469 of 2002 on the file of the Additional District & Sessions Judge, Fast Track Court-IV, Chennai.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

3. The Defendants 2 and 3 are the appellants herein. The plaintiff is the first respondent herein. The suit is filed for recovery of money. The case of the plaintiff is that the 'A' Schedule property owned by the defendants 2 and 3. The defendants 1 to 3 jointly borrowed a sum of Rs.7,00,000/- and jointly had executed a promissory note dated 14.03.2000. Thereby, they agreed to repay the principal with interest at the rate of 30% per annum. The defendants with an intention to create

security for the said loan, the 2nd and 3rd defendants have deposited the original title deed of the 'A' schedule property on 15.03.2000 with the plaintiff. The original documents deposited by 2nd and 3rd defendants are detailed in the 'B' schedule property. They had also executed necessary documents in favour of the plaintiff recording the deposit of title deeds detailed in 'B' schedule. Thereafter, the defendants had committed default in repayment of principal and interest. The defendants had paid only a sum of Rs.3,400/- on 18.02.2002 and failed to pay the remaining amount. Therefore, the plaintiff caused legal notice on 19.02.2002 and filed the suit.

4. The 1st defendant was set ex-parte. Resisting the case of the plaintiff, the defendants 2 and 3 filed written statement and stated that they denied the borrowal of Rs.7,00,000/- along with the 1st defendant. They never deposited their title deed as surety. They are residing in the 'A' Schedule of the suit property. They are labourers and they are servant maid of the first defendant. They derived the title by entered into a partition of their ancestral property. As per the partition deed, 'A' schedule

property was allotted in favour of the defendants 2 and 3 by partition deed dated 15.12.1998 vide Document No.3195/1998. In the year 1999, they requested the 1st defendant to assist them for getting patta in their name and also they needed assistance for mutation of revenue records in their favour, in which, the 1st defendant had obtained thumb impression of the 2nd defendant and signature of the 3rd defendant in some papers in the house of the 1st defendant. They believed that the 1st defendant signed those papers for getting patta and mutation of revenue records as per the partition deed, without suspecting the first defendant.

4.1. It is further stated by defendants 2 and 3 that in the year 2001, the first defendant had sustained loss in his business and he closed down his garment shop and he sold away his house situated at No.21, Gujji Naicken Street, Ayanavaram, Chennai and he had left Chennai. Before leaving his house, he instructed the defendants 2 and 3 to hand over the letters and other communications that would be addressed to them to a tailor at the next door of his garment shop at Purasaiwalkam. He also promised to arrange patta as per the partition deed. While being so, in the month of February 2002, they had received a postal cover. Without even opening the cover, they handed over the same to the tailor at Purasaiwalkam as instructed by the 1st defendant. In the month of February 2003, they received another cover. The defendants 2 and 3 handed over the same to a neighbour and he explained about the loan transaction and the present suit. Only then, they came to knowledge about the mischief done by the 1st defendant. They never deposited the original title deeds on 15.03.2000 with an intention to create security for the alleged loan transaction. They are illiterate and they are very poor. They have no other property other than the suit 'A' schedule property.

5. Based on the pleadings, the trial court had framed the following issues :

> "*1. Whether the plaintiff is entitled for the suit claim from the defendants?*
>
> *2. Whether the defendants 2 and 3 secured their 'A' schedule property for the suit claim?*

3. Whether the plaintiff is entitled for the suit claim?

4. To what relief is the plaintiff entitled?"

6. On the side of the plaintiff, examined P.W.1 and marked Ex.A.1 to Ex.A.11. On the side of the defendants, examined D.W.1 and marked Ex.B.1. After perusal of the oral and documentary evidence, the trial Court decreed the suit as prayed for. Aggrieved by the same, the defendants 2 and 3 preferred this appeal suit.

7. The learned counsel for the defendants 1 and 2 submitted that the plaintiff described itself as M/s.Sri Gokulam Investments, represented by its proprietor A.M.Gopalan. Order 30 rule 10 of CPC permits a suit is being filed against the proprietary concern in its trade name. No proprietary concern can maintain a suit as plaintiff. Therefore, the suit itself is not maintainable and liable to be rejected. The plaintiff had examined P.W.1, who is the power of attorney, was given power by the authorized signatory of the plaintiff. He deposed that the plaintiff is an incorporated company and also mentioned about Board of Directors.

Therefore, the plaintiff had no locus to file a suit. The plaintiff had not come out with a clear case as to the capacity in which the P.W.1 deposed as witness. They marked authorization letter as Ex.A1. It revealed that the authorization was signed by an authorized signatory which amounts an agent delegating power which is not permissible in law. The P.W.1 had no personal knowledge about the transaction between the plaintiff and the defendants. In fact, he categorically admitted that he did not know about the loan amount, whether the loan amount was given by cash or by cheque and that he did not know the relationship of the plaintiff and the 1st defendant. Therefore, he did not know personally about the execution of promissory note and document for deposit of title deed which were marked as Ex.A2 and A3. Except the promissory note, the plaintiff failed to produce any other documents to show that the defendants also borrowed money and they issued promissory note for valid consideration.

7.1. He further submitted that even as per the loan document, the defendants 2 and 3 stood as surety and they never borrowed any amount.

He further submitted that the plaintiff cannot blow hot and cold air in the same time, since the suit was filed for recovery of money on the promissory note. Whereas, they had taken specific stand that property was mortgaged by way of depositing the title deeds. Therefore, the deed of deposit of title deed mandates registration. Admittedly, the said document was not registered one with stamp duty. Insupport of his contention, he relied upon various judgments of Hon'ble Supreme Court of India and this Court.

8. Per contra, the learned counsel for the plaintiff submitted that the property was mortgaged by depositing the title deeds. Therefore, it does not require any registration. Whatever the ground raised before this court, the defendants never pleaded before the trial Court in respect of the locus of the plaintiff to institute the suit. The plaintiff is a proprietary chit and represented by its Managing Director. The plaintiff's authorized signatory had executed power of attorney in favour of P.W.1 who deposed on behalf of the plaintiff. Therefore, the plaintiff can very well maintained the suit. It is only a loan transaction and as such, the P.W.1 no need to have

personal knowledge about the loan transaction between the plaintiff and the defendants. He also relied upon the provision under section 58(f) of Transfer of Property Act. Accordingly, document for deposit of title deeds (Ex.A.3) does not require any registration.

8.1. He further submitted that the specific stand of the defendants 2 and 3 is that they had handed over all the original documents to the 1st defendant in order to get patta for the property which was allotted in favour of them by the partition deed dated 15.12.1998. In order to obtain patta, the 1st defendant obtained signatures and left thumb impression of Defendants 2 and 3. Those documents were misused by the 1st defendant and borrowed a loan to the tune of Rs.7,00,000/- from the plaintiff and also executed a deposit of title deeds. Whereas, on perusal of Ex.A5 i.e., partition deed contains copy of town survey register. Accordingly, after the partition deed, 'A' schedule property was transferred in the name of the defendants 2 and 3 and accordingly, mutated the revenue records. Therefore, there is absolutely no possibility for the 1st defendant to obtain signatures on 14.03.2000 and 15.03.2000 from the Defendants 2 and 3.

However, the plaintiff never admitted the letter written by the 1st defendant which was marked as Ex.B1. It was fabricated one, in order to defend the suit. He also pointed out that the signatures found in the Ex.B1 and in the promissory note which was marked as Ex.A2, even from the naked eye, the signature of the first defendant differs. Further, the defendants 2 and 3 also failed to prove that the said letter was duly received by the plaintiff. Therefore, the plaintiff categorically proved his case and the trial Court rightly decreed the suit.

9. Heard, the learned counsel appearing on either side and perused the materials place before this Court.

10. Having regard to the pleadings, evidence and the submissions made by the learned counsel appearing on either side, the following points arise for consideration in this appeal : -

i) Whether the plaintiff is entitled to have a decree for suit claim?

ii) Whether Ex.A3 is liable to be registered?

iii) When the plaintiff failed to enter into the witness box whether adverse inference can be drawn under section 141(g) of the Evidence Act?

iv) Whether the suit is filed by plaintiff on mortgage or recovery of money?

11. The plaintiff filed the suit with the following prayer

"*i) for a preliminary decree directing the Defendants to pay the plaintiff Rs.9,76,000/- along with interest at 24% per annum from the date of plaint till the date of realization failing which to pass a final decree for the sale of 'A' Schedule property for realization of suit claim on the date of sale.*

ii) in the event of the sale proceeds not being sufficient to satisfy the entire suit claim, to pass a personal decree against the Defendants for the balance amount.

iii) for the costs of the suit."

12. According to the plaintiff, the defendants 1 to 3 had borrowed a sum of Rs.7,00,000/- by executing promissory note and by depositing the

deposit of title deeds. The promissory note was marked as Ex.A2 and Deposit of title deeds marked as Ex.A3. On perusal of the Ex.A2 revealed that it was executed in favour of Sri Gokulam Investments namely the plaintiff. On perusal of Ex.A3 revealed that mortgage by depositing of the deposit of original title deed in favour of the proprietary concern Sri Gokulam Investments. Whereas on perusal of Ex.A1, the authorization letter issued in favour of P.W.1 revealed that the plaintiff is represented by its authorized signatory and thereby duly authorized the power of attorney holder to give evidence. Therefore, the plaintiff did not authorize the P.W.1 to depose on behalf of the plaintiff. Instead the authorized signatory of the plaintiff authorized the power of attorney of the plaintiff to depose.

13. On perusal of the deposition of P.W.1 revealed that he didn't know how the loan was availed by the defendants. He didn't know

whether the loan amount was given by cash or cheque and he didn't know the relationship between the plaintiff and the 1st defendant. Further, he deposed that he personally didn't know about the execution of Ex.A2 and A3. Therefore, he is only a hearsay evidence and he did not know personally about the loan transaction. The well known principle of pleadings is that no evidence should be allowed is contrary to it. In the case on hand, the pleadings were that the plaintiff was suing as proprietorship and not in individual capacity. Thus, the evidence let in by P.W.1 that the plaintiff sued in its individual capacity should not have been allowed. Further, the plaintiff failed to get into the witness box to prove its case. The plaintiff is the best person to give evidence as to the "interest" possessed by it in the institution and its failure to get into the witness box must in the circumstances go strongly against it. The bounden duty of a party personally knowing the facts and circumstances, to give evidence on his own behalf and to submit to cross-examination and his non appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of his case. However, the trial Court failed to draw adverse inference against the plaintiff.

14. On borrowal of Rs.7,00,000/-, the defendants executed promissory note (Ex.A.2). In support of the said promissory note, the defendants 2 and 3 had executed deposit of title deeds which was marked as Ex.A.3. On perusal of Ex.A3, it is titled as memorandum of deposit of title deeds, thereby they deposited Ex.A3 to A6. Therefore, it is nothing but mortage on deposit of title deeds. Hence, it mandates compulsory registration. Though, the learned counsel for the plaintiff vehemently contended that it is only recording the deposit of title deed, it is titled as memorandum of deposit of title deeds. Further, the suit itself filed for preliminary decree for sum of Rs.9,76,600/- with interest at the rate of 24% per annum against the suit 'A' schedule property. An instrument creating an interest in immovable property, depends on whether the parties intended to reduce their bargain regarding the deposit to the form of a document. If so, the document requires registration. If, on the other hand, its proper construction and the surrounding circumstances lead to conclusion that the parties did not intend to do so, there being no express bargain, the contract to create the mortgage arises by implication of the

law from the deposit itself with the requisite intention, and the document, being merely evidential does not require registration.

15. As held by the Hon'ble Supreme Court of India in the case of Rachpal vs Bhagwandas reported in AIR 37 1950 SC 272, the provision under section 58(f) of Transfer of Property Act with reference to Section 17 of Indian Evidence Act, 1908. When the debtor deposits with the creditor the title-deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required under Section.59 as in other forms of mortgage. It is clear from the Ex.A3 that the parties wanted to reduce the bargain into writing, in the said circumstance that the Ex.A2 was executed by deposit of title deeds created an equitable mortgage over the loan. It is being a self contained document creating rights/charges over the property makes it liable to be registered. Admittedly, Ex.A3 is unregistered one.

16. The learned counsel for the defendants 2 and 3 vehemently contended that no consideration was passed on the promissory note. The plaintiff did not advance any amount under the Ex.A2. Ex.A2 is not supported by any consideration as the plaintiff failed to establish that the consideration was passed on to the defendants 2 and 3 on the date of execution of Ex.A2. As regards the said contention, i.e., rule of presumption under section 118 of Negotiable Instruments Act, it is rightly rebutted the presumption by the defendants 2 and 3. Besides the plaintiff had failed to establish that it had paid a sum of Rs.7,00,000/- to the defendants 2 and 3. It is also evident from Ex.B1 a letter written by 1st defendant to the plaintiff and also copy to the first defendant. Accordingly, the first defendant only borrowed a sum of Rs.7,00,000/- from the plaintiff. Utilizing the circumstances of illiteracy of the defendants 2 and 3 by the documents which were produced and handed over by them for obtaining patta, the first defendant misused the same by depositing of title deeds as security for the loan borrowed by him. Therefore, the Ex.A2 is not supported by any consideration and as such defendants 2 and 3 are not liable for the suit claim.

17. Though, the learned counsel for the plaintiff submitted that Ex.P1 was addressed to the Branch Manager of Sri Gokulam Chits and Finance Company Ltd., and disputed the signature of D.W.1 and serving of the said letter, it is seen from the evidence and documents marked by the plaintiff revealed that the legal notice issued to the first defendant only for borrowal of loan to the tune of Rs.7,00,000/- for which the defendants 2 and 3 stood as sureties. It is also to be noted that no employer borrow loan along with his own servants. Admittedly, the 2nd defendant is a servant maid of 1st defendant and the 3rd defendant is the office boy of the 1st defendant. Therefore, it is not possible to borrow such a huge amount by the employer along with his own servants. Admittedly, the defendants 2 and 3 are illiterates and the 'A' schedule property was allotted in favour of them by the partition deed dated 15.12.1998. The first defendant helped for their partition and registration of partition deed. On the pretext of mutation of revenue records, the first defendant obtained signatures from the defendants 2 and 3 in the blank

stamp papers. Thereafter, the first defendant misused those documents and borrowed loan. Hence, the submission made by the learned counsel for the plaintiff cannot be countenanced and liable to be rejected.

18. Further, the learned counsel for the plaintiff contended that the grounds raised by the appellants before this court never raised before the trial Court by way of their written statement. The points raised by the defendants 2 and 3 cannot be pleaded before the trial Court in the written statement, since it arose only at the time of trial after the pleadings. Therefore, the judgments cited by the learned counsel for the plaintiff are not helpful to the case on hand and all the points are answered in favour of the defendants 2 and 3 and against the plaintiff.

19. In view of the above, the judgment and decree passed by the trial court is liable to be set aside. Accordingly, the judgement and decree

passed in O.S.No.3469 of 2002 dated 13.04.2005 on the file of the Additional District & Sessions Judge, Fast Track Court-IV, Chennai is set aside and this appeal suit is allowed. The trial Court is directed to return all the original parent deeds in respect of the suit property to the defendants 2 and 3 after receipt of records from this Court. No costs. Consequently, connected miscellaneous petition is closed.

08.01.2024

Index : Yes
Internet : Yes
Speaking order
gvn

To

The Additional District & Sessions Judge,
Fast Track Court-IV, Chennai

G.K.ILANTHIRAIYAN, J.

gvn

AS.No.200 of 2010 and
M.P.No.1 of 2010

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