IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.01.2025
DELIVERED ON : 29.04.2025

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AND
THE HON'BLE MR.JUSTICE P.DHANABAL

O.S.A.No.151 of 2024
and
C.M.P.Nos.18850 & 27104 of 2024

1.P.Abusa

2.M.A.Salim ... Appellants

Vs.

E.Velu,
Represented by his Power of Attorney,
M.Vasanthamoorthy. ... Respondent

Prayer : Original Side Appeal filed under Order XXXVI, Rule 11 of O.S Rules r/w Clause 15 of Letters Patent, to allow the appeal setting aside the judgment and decree, dated 11.03.2024 in C.S.No.469 of 2019 and dismissed the suit with costs of these defendants.

For Appellants : Mr.Perambulavil Radhakrishnan
For Respondent : Mr.Saravana Rengan

JUDGMENT

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P.DHANABAL, J.

This original side appeal has been preferred as against the decree and judgment passed by the learned Single Judge of this Court in C.S.No.469 of 2019, wherein, the respondent herein has filed a suit as against the appellants herein for recovery of money based on the mortgage and the same was allowed by passing a preliminary decree. Aggrieved by the same, the present original side appeal has been preferred by the defendants in the original suit.

2.The case of the plaintiff is as follows:

The defendants are engaged in the business of promoting CMDA approved plots, flats, villas in the name of M/s.Salim Builders, Civil Engineering Enterprises in and around Chennai. For the business purpose, the defendants approached the plaintiff to lend a money of Rs.6 Crores to discharge their loan with Kotak Mahindra Bank and also for the business developments. The defendants 1 and 2 are wife and husband and they are actively participating in the day to day affairs of the businesses. The defendants also offered to mortgage their property described in the schedule as security for the above said loan amount. The plaintiff also lent a loan to the tune of Rs.6 Crores on various dates and thereafter, the defendants also executed a registered deed of mortgage in favour of the plaintiff on 08.01.2018. The defendants admitted and acknowledged the above said borrowings of Rs.6 Crores in the mortgage deed and also agreed to repay the said amount after expiry of one year. The rate of interest was fixed at 24% per annum and the same has to be paid on or before 5th day of every consecutive English calendar month. Thereafter, the defendants wantonly and wilfully failed to repay the amount and violated the conditions of the mortgage deed. The defendants are liable to pay the principal amount of Rs.6 Crores and accrued interest of Rs.2,16,00,000/- from January 2018 to June 2019. In total, they are liable to pay a sum of Rs.8,16,00,000/- with future interest. Therefore, the plaintiff issued a legal notice on 17.04.2019. Even after receipt of notice, the defendants neither paid the amount nor issued reply. Therefore, the plaintiff filed the suit for recovery of money and for consequential reliefs.

3.The case of the defendants is as follows:

The plaintiff has not come to this Court with clean hands and suppressed the material facts. The plaintiff was a close associate of the second defendant and was in habit of lending money to the construction activities of the second defendant by way of unsecured loans right from December 2015 onwards. The plaintiff used to take post dated cheques and promissory notes from the second defendant for the loan lent by him. The second defendant is also in the habit of settling his dues every now and then. For want of higher working capital, the second defendant approached the plaintiff to lend a financial support to a tune of Rs.8 Crores. The second defendant already obtained loan from Kotak Mahindra Bank in respect of the first item of suit property and outstanding due is of Rs.1,82,61,541/-. The plaintiff offered to settle the bank loan out of the above said Rs.8 Crores. The plaintiff vide D.D.No.023166, dated 14.12.2017, paid Kotak Mahindra Bank and obtained the original documents of title deed from the Bank and thereafter, the plaintiff requested the second defendant to finalise the mortgage formalities and also promised to release the balance funds after deducting the payment made to the Kotak Mahindra Bank from Rs.8

Crores. However, the plaintiff thereafter was willing to fund only Rs.6,00,00,000/- instead Rs.8 Crores and to offer to pay the remaining amount of Rs.4,17,38,459/-. The second defendant had no other option but agreed to the revised proposal of the plaintiff as he was already in need of money for working capital. Thereafter, on 08.01.2018, the first defendant, as the owner of the property, executed necessary mortgage deed in favour of the plaintiff before the SRO, Virugampakkam. The clean understanding between the plaintiff and the second defendant was that the plaintiff would fund Rs.6 Crores only to clear the charge in favour of the Bank and for the business development of the second defendant. As against the balance Rs.4,17,38,459/-, the plaintiff released only a sum of Rs.1,62,50,000/- that too in four installments. The remaining amount of Rs.2,54,88,459/- was not released by the plaintiff and in good faith, the first defendant executed the mortgage deed for the entire amount of Rs.6 Crores. The defendants believed the plaintiff and never doubted his representations that balance amount of Rs.2,54,88,459/- would be released soon after execution of the mortgage. However, no payment was made thereafter. The plaintiff cannot take advantage of his own wrong and saddle the defendants with huge liability especially after having committed a breach of trust. The defendants received the legal notice, dated 17.04.2019, and sent a suitable reply on 05.12.2019, but the same reply was returned as "No such person is available". Therefore, on 26.12.2019, the reply was sent to the residence address of the Advocate and the same was acknowledged. Therefore, the suit is liable to be dismissed.

4.Based on the above said pleadings, the Trial Court has framed the following issues for trial:-

> *"1. Whether the plaintiff is entitled for the suit claim of Rs.8,16,00,000/- with interest @ 24% p.a. from the date of suit till realisation?*
>
> *2. Whether the plaintiff is entitled for costs?*
>
> *3. Whether the plaintiff is entitled to sell the property through Court in case of failure of the defendants to pay the said amount from the date fixed by the Court and the proceeds (after defraying thereout the expenses of the sale) applied in an towards the payment of the amount of the said principal, interest and costs?*
>
> *4. Whether the plaintiff is entitled if such proceeds*

shall not be sufficient for the payment in full of such amount, the defendants may be ordered to pay to the plaintiff the amount of the deficiency with interest thereon at the rate of 6% per annum until realisation?

5. Whether not the plaintiff released only a sum of Rs.3,45,11,541/- as against Rs.6,00,00,000/- agreed to be financed?

6. Whether the plaintiff was entitled to unilaterally adjust amount towards other loan transactions when the mortgage of Rs.6,00,00,000/- pertained only to release of charge of Kotak Mahindra Bank?

7. Whether the defendant is liable to pay interest as claimed by the plaintiff? If so, on what amount?

8. To what other reliefs is the plaintiff entitled to?"

5.Thereafter, before the Trial Court, on the side of the plaintiff, the plaintiff was examined as P.W.1 and he marked Exhibits P.1 to P.32. On the side of the defendants, second defendant was examined as D.W.1 and he marked Exhibits D.1 and D.2.

6.The Trial Court held that the written statement is contrary to the registered Mortgage Deed wherein the appellants have clearly admitted that they have received a sum of Rs.6 Crores in total. Very strangely, before Trial Court, a plea of discharge was raised at the time of arguments. After taking note of the fact that the plea of discharge was not raised in the entire written statement, the Trial Court refused to consider the same. The Trial Court also relied upon the evidence of D.W.2 wherein there was an admission that payment under Ex.D2-statement, is related to different transaction and is not in respect of suit mortgage. Therefore, the Trial Court decreed the suit and passed a preliminary decree directing the defendants to pay a sum of Rs.6 Crores with interest at the rate of 9% per annum from the date of mortgage till date of realisation. The plaintiff was given liberty to apply for final decree to bring the mortgage property for sale for realisation of the amount. In the event the sale of the property does not satisfy the decree amount, the plaintiff was given liberty to file appropriate application for recovery of the balance amount from the defendants/appellants. Aggrieved by the same, the present appeal has been preferred by the defendants.

7.During the pendency of this appeal, the appellants have filed petition to receive the additional evidence under Order 41 Rule 27 of CPC and Order 14 Rule 8 of O.S Rules.

8.The learned Counsel appearing for the appellants would submit that the second appellant is doing construction business and thereby, he used to borrow money from the respondent / plaintiff. While so, the appellants mortgaged the property of the first appellant for the amount of Rs.6 Crores. Initially, there was an understanding between the parties for an amount of Rs.8 Crores, but thereafter, the plaintiff was willing to lend only Rs.6 Crores. Out of the above said Rs.6 Crores, the plaintiff has settled a sum of Rs.1,82,61,541/- to the Kotak Mahindra Bank through demand draft, dated 20.12.2017, and thereafter, on various dates, the respondent / plaintiff paid a sum of Rs.1,13,77,459/-. However, they executed mortgage deed for Rs.6 Crores on 08.01.2018. The appellants believed the words of the plaintiff that he would pay the remaining amount of Rs.2,54,88,459/- after execution of mortgage deed, but he has not paid the remaining amount. Without paying the full amount of Rs.6 Crores, the plaintiff filed this suit, taking advantage of the mortgage executed by the appellants. Therefore, the Trial Court failed to consider the defence taken by the appellants and there are no documents to prove that entire amount was paid by the plaintiff and the defendants' side witness categorically stated that only part payment alone was made and not the full amount. P.W.1 also admitted during the cross-examination about the payments made to the defendants. Therefore, the Trial Court has failed to appreciate the evidence of the defendants' side and only based on the plaintiff's side evidence, decreed the suit. However, now the appellants filed a petition under Order 41 Rule 27 of CPC to receive the additional evidence by producing the documents of the sale deed, construction agreement, mortgage deed, statement of account of payment to the plaintiff and the complaint lodged against the defendants. Those documents are very essential to prove the defendants' side case. Therefore, the said documents have to be received as additional evidence. Hence, the appeal has to be allowed by setting aside the decree and judgment passed by the Trial Court. Learned counsel reiterated the ground that the entire mortgage loan is discharged. When this Court pointed out that there is no plea of discharge, learned counsel submitted that the additional documents which are sought to be produced as additional evidence at the appellate stage, would prove that the mortgage loan has been discharged.

9.The learned Counsel appearing for the respondent / plaintiff would submit that, in this case, the appellants / defendants have approached the respondent / plaintiff for borrowal of loan and the plaintiff also agreed to lend a sum of Rs.6 Crores as loan and the appellants / defendants executed a mortgage deed in favour of the plaintiff on 08.01.2018 and thereafter, they did not repay the money. The appellants agreed to pay 24% interest and committed default. The only defence taken by the appellants / defendants is that the plaintiff has not paid the entire money and paid only a part of the money. However, in order to prove the same, the defendants have not produced sufficient documents. Once the defendants have taken a plea that they have not received the entire amount after execution of document, when the document is a registered document, they have to prove their plea and cannot deny the receipt of amount. Therefore, the plea of receipt of only part payment without sufficient evidence, cannot be accepted. Moreover, the respondent / plaintiff has produced the original mortgage deed and the said mortgage deed is also admitted by the appellants / defendants. Therefore, they have to prove their case of partial consideration in the manner known to law. But, there is no material to prove the contention of the appellants / defendants. The Trial Court also, after perusing all the records, correctly decreed the suit. As far as the petition filed for reception of additional documents is concerned, the documents sought to be produced are in no way relevant to this case and the appellants / defendants have not stated any reasons to fulfill the conditions set out in Order 41, Rule 27 of CPC. Without valid grounds, they simply filed the petition to receive additional documents as evidence. Those documents are no way connected and relevant to decide issues in the present suit. Therefore, those documents cannot be received as evidence. Therefore, the appeal is filed only to delay the proceedings and the appeal is liable to be dismissed.

10. This Court had heard both sides and perused the materials available on record.

11. Upon hearing both sides and perusing the materials including the judgment of Trial Court, the following points arise for determination in this appeal :

1) Whether the petition for reception of additional *documents in C.M.P.No.27104 of 2024 can be allowed ?*

2) Whether the respondent/plaintiff paid the entire amount of Rs.6 Crores through the registered mortgage deed, dated 08.01.2018 ?

3) Whether the case of appellant that the entire mortgage debt had been discharged, can be considered in the absence of a specific plea in the written statement ?

Point No.(1) :

12. Before the Trial Court, the respondent / plaintiff has filed a suit for recovery of money based on the mortgage deed and the same was decreed in favour of the respondent / plaintiff. Challenging the said decree and judgment, the appellants / defendants have preferred this appeal. During the pendency of the appeal, the appellants have filed a petition to receive certain documents as additional evidence. According to the appellants, the documents mentioned in the petition are essential to prove their case. Those documents are sale deed, dated 10.01.2018, the construction agreement between Civil Engineering Contractors and M.A.Salim, dated 10.01.2018, mortgage deed between M.A.Salim and E.Velu, dated 12.01.2018, Statement of account from 11.01.2018 to 19.09.2018 and a complaint, dated

June 2019. On careful perusal of those documents, they are no way relevant to the transaction between the parties and already there are sufficient evidence available to decide the case effectively. All the documents are prior to the suit, however, the appellants have not produced those documents before the Trial Court and the appellants / petitioners also have not stated reasons for non production of those documents before the Trial Court. The suit is filed in the year 2019 and all the documents are prior to the suit and without assigning any reasons, now the petitioners want to produce documents as additional evidence without any relevancy. When additional evidence is adduced at the belated stage, the appellants have to satisfy the ingredients of Order 41 Rule 27 of CPC.

13. As pointed out above, the appellants have not given sufficient reasons, why these documents could not be produced before the Trial Court. In the affidavit, the appellants have stated that the documents had been located now without disclosing their relevance. Unless this Court is convinced that the additional documents are required, there is no scope for permitting the appellants to produce additional documents. In the present case, learned counsel for the appellants has not even convinced this Court about the relevance of the documents to substantiate the case of the appellants. Learned counsel for the appellants would urge that the additional documents are necessary to show that the Mortgage Deed is not supported by full consideration even though part of consideration is admitted. It is to be pointed out that the appellants admitted the consideration in the reply notice and the mortgage under which the 2nd defendant had borrowed money. He admitted his substantial liability when the mortgage deed was executed. When the appellants admit previous transactions between the plaintiff and the 2nd defendant, the accounts produced for payment of money may be in connection with the previous transactions between the parties. One important factum, which we need to point out is that the plea of discharge was not raised in the written statement. When there is no plea of discharge, proof of payment to discharge the mortgage, by additional evidence cannot be permitted at the appellate stage. It is well settled that no amount of evidence can be admitted without pleading. Hence, this Court finds no merit to allow the miscellaneous petition. **Accordingly, CMP.No.27104/2024 stands dismissed.**

Point No.(2) :

14. The plaintiff has filed the suit for the relief of recovery of money based on the registered mortgage deed, dated 08.01.2018. According to the plaintiff, he paid the mortgage amount of Rs.6 Crores to the appellants / defendants and thereafter, the defendants executed a mortgage deed and they agreed to pay interest at the rate of 24% per annum. The execution of mortgage deed is admitted by the appellants / defendants. While so, according to the appellants / defendants, though they executed a mortgage deed for Rs.6 Crores, the entire amount of Rs.6 Crores had not been paid by the respondent / plaintiff. Per contra, the plaintiff only paid a sum of Rs.1,82,61,541/- to the Kotak Mahindra Bank for adjusting the loan obtained by the appellants / defendants and that, on various dates, the plaintiff paid a sum of Rs.1,62,50,000/- on four installments. Once the appellants / defendants admitted the execution of mortgage deed, it is the duty of the appellants / defendants to prove that they have not received Rs.6 Crores and only received the part amount as alleged by them. In order to prove the same, no documents are filed by the appellants / defendants. During the examination, there was no oral or documentary evidence adduced by the appellants / defendants to substantiate the contention of the appellants / defendants that they have not received the entire amount and only received part amount.

15. It is well settled law that once the appellants / defendants executed mortgage deed by admitting the receipt of Rs.6 Crores, they cannot be permitted to take contra view as per Sections 91 and 92 of Indian Evidence Act. As per Section 91 of the Indian Evidence Act, 1872, *"When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions."* As per Section 92 of the Indian Evidence Act, 1872, *"When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted,* *as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms."*

16. To the suit notice dated 17.04.2019, the appellants claimed that they have sent a reply on 15.12.2019 stating the reason for the delay. However, it is seen that the reply was returned with an endorsement ***"no such person available"***. In response to the suit notice, the 2nd defendant in the reply notice has admitted a sum of Rs.3,45,11,551/- under the mortgage. However, it is stated that the 2nd appellant was promised that the balance payment of Rs.2,54,88,459/- when the 2nd defendant along with his wife execute and register the Mortgage Deed dated 08.01.2018. In the same reply, the 2nd appellant/2nd defendant admitted a sum of Rs.6,38,86,541/- as a sum due to the plaintiff. Therefore, while admitting a sum of Rs.3,45,11,551/- as net amount paid by plaintiff', a further sum of Rs.2,93,75,000/- was indicated as the amount due to the plaintiff on account of prior financial transactions. Even in the reply notice, it was the further case of the 2nd appellant that a sum of Rs.13,36,541/- should be deducted from the total amount payable to plaintiff. The final figure according to the

2nd appellant, in the reply notice, is Rs.6,25,50,000/-. But, it was thereafter the 2nd appellant refers to the further promise that the appellants would be paid a further sum of Rs.2,54,88,459/- towards working capital. Even in this reply, the defendants/appellants have admitted the total amount due is more than Rs.6 Crores without interest. The stand of appellants in the reply notice is unambiguous.

17. As pointed out earlier, the appellants are estopped from pleading a case contrary to the essential terms of the mortgage deed. Consideration shown in the mortgage deed cannot be ignored especially when the appellants have admitted the due execution of the mortgage. The surrounding circumstances also indicate that the appellants have not denied the transaction as a whole. Therefore, it can be presumed that the mortgage deed was executed for valid consideration. When the appellants have pleaded that they have not received the entire consideration as mentioned in the mortgage deed, the appellants could have let in evidence to substantiate their case at least as probable. The plaintiff respondent has produced enough evidence to prove his case. Therefore, **this Court has no hesitation to hold that the plaintiff proved that the appellants have received the**

entire amount of Rs.6 Crores by mortgaging the properties.

Point No. (3) :

18. Learned counsel for the appellants relied upon the additional documents apart from Ex.D2. He referred to the statement of accounts and submitted that the payment made to the plaintiff would demonstrate that the entire mortgage amount had been discharged. Plea of discharge was not raised in the written statement even though the plaintiff claimed a sum of Rs.8,16,00,000/- inclusive of interest at an exorbitant rate of 24% per annum. Learned counsel for the appellants then submitted that the findings of the Trial Court that the plea of discharge cannot be accepted without pleading, will lead to unjust enrichment. Similarly, relying on the additional documents which are sought to be produced by way of an application in CMP.No.27104/2024, the learned counsel submitted that the documents would indicate that the plaintiff has come forward with a false case. He also referred to Section 67A of Transfer of Property Act and submitted that the additional documents would show, how the present suit for recovery of money on mortgage has no cause of action and is not maintainable in the eye of law. Per contra, learned counsel for the respondent plaintiff submitted that the plea of discharge cannot be entertained without a pleading. Since additional documents are filed to show discharge of mortgage debt and to show that the entire amount as per the mortgage deed was not disbursed, the appellants ought to have filed all the documents before the trial Court which were available with them before the trial Court. It is well settled that no amount of evidence is admissible without a plea.

19. In ***AIR 1930 Privy Council 57 [1] [Siddik Mahomed Shah Vs. Mr.Saran and Others],*** the law laid down is that no amount of evidence can be looked into upon a plea which was never put forward in the pleadings. This principle was followed by the Hon'ble Supreme Court and this Court in several judgments. Recently, Hon'ble Supreme Court in the case of ***Mohan Hirachand Shah Vs. Geeta Kumarchand Shah and Others [2024 SCC Online SC 4077]*** considered the question whether evidence could be led beyond pleadings and held that no evidence could be led beyond pleadings. The law that no pleading can be admitted without evidence, has been reiterated by Hon'ble Apex Court and this Court in number of judgments and it is not necessary to cite those judgments in extenso.

20. On the admitted facts, there is no plea of discharge. The stand taken by the 2nd appellant in the reply indicates that the Mortgage Deed is supported by consideration as the appellants admitted their liability beyond Rs.6 Crores even at the time when the Mortgage Deed was executed. Therefore, no evidence can be permitted at the belated stage to prove the plea of discharge. **Hence, Point No.(3) is answered accordingly and against the appellants.** Therefore, this appeal has no merits and deserves to be dismissed.

21.In the result, this Original Side Appeal is dismissed by confirming the decree and judgment passed in C.S.No.469 of 2019, dated 11.03.2024, and C.M.P.No.27104 of 2024 also stands dismissed. There shall be no order as to costs. Consequently, C.M.P.No.18850 of 2024 stands closed.

(S.S.S.R.J.,) **(P.D.B.J.,)**

29.04.2025

NCC : Yes
Index : Yes
Internet : Yes
AP/MKN

S.S.SUNDAR, J.
and
P.DHANABAL, J.

AP/MKN

Pre-delivery judgment made in
O.S.A.No.151 of 2024

29.04.2025