BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 23.10.2025

Pronounced on : 23.01.2026

CORAM

THE HONOURABLE MR.JUSTICE P.VADAMALAI

A.S(MD)No.291 of 2021
and
C.M.P(MD)No.8765 of 2025

T.Rengarajan
S/o.N.Thirumalai Iyengar ... Appellant/Defendant

Vs.

M.Venkatesan
S/o.R.Muniyandi ...Respondent/Plaintiff

<u>**PRAYER :-**</u> This Appeal Suit is filed under Section 96 r/w 41, Rule 1 of CPC., to set aside the judgment and decree, dated 26.03.2019 passed in O.S.No.155 of 2015 on the file of the V Additional District Court, Madurai and dismissing the suit in entirety.

For Appellant : Mr.J.Barathan
For Respondent : Mr.V.Sasikumar

JUDGMENT

This Appeal is directed against the judgment and decree dated 26.03.2019 passed in O.S.No.155 of 2015 on the file of the learned Fifth Additional District Judge, Madurai.

2. The appellant is the defendant in O.S.No.155 of 2015 on the file of the learned Fifth Additional District Judge, Madurai. The respondent is the plaintiff in that suit. The respondent/plaintiff filed the suit for recovery of money based on the mortgage deed against the appellant/defendant. The appellant/defendant contested the suit. The suit was decreed by the trial Court.

3. For the sake of convenience, the parties are referred to as per their rank before the trial Court.

<u>4. The brief facts are as below:</u>

(a) The case of the plaintiff is that the defendant borrowed Rs.10,00,000/- (Rupees Ten lakhs only) from the plaintiff on 09.01.2013 and executed a registered mortgage deed bearing No.108/2013 in respect of the suit property in favour of the plaintiff, agreeing to repay the same with interest at 2% p.m. But the defendant has not repaid the loan amount in spite of several demands. The plaintiff issued a legal notice, dated 08.06.2015. The defendant received the notice, but he has not chosen to repay the loan amount and has also not sent any reply. Hence, the plaintiff has filed the suit.

(b) The case of the defendant is that the defendant neither borrowed a loan of Rs.10,00,000/- at any point of time nor executed the alleged mortgage deed, dated 09.01.2013, agreeing to repay with interest at the rate of 24% p.a. The defendant never signed the alleged mortgage deed in favour of the plaintiff. The alleged mortgage deed is fabricated and concocted document. The claim of interest is exorbitant and illegal, and the plaintiff is punishable under the provisions of the Tamil Nadu Prohibition of Charging Exorbitant Interest Act. The defendant is a retired teacher and he has no necessity to borrow huge amount. The defendant's friend one P.K.Balasubramanian, borrowed loan from the plaintiff, at the time, the plaintiff insisted him to produce any title deed. Only to help his friend, the defendant handed over his title deed to his friend, who in turn handed over the same to the plaintiff. Taking advantage of the possession title deed, the plaintiff forged the signature of the defendant and created the concocted mortgage deed. So, the said P.K.Balasubramanian is a necessary party. There is no cause of action for the suit. The plaintiff has falsely filed this vexatious suit.

5. The trial Court framed the following issues upon the pleadings of both parties.

> *(1) Whether the plaintiff is entitled to preliminary decree for mortgage to recover the plaint amount from the defendant?*
>
> *(2) Whether the suit mortgage deed is based on consideration?*
>
> *(3) Whether the interest is exorbitant?*
>
> *(4) To what other relief the plaintiff is entitled to?*

6. Before the trial Court, the plaintiff examined himself as P.W.1 and marked Ex.A.1 to Ex.A.3. On the defendant's side, the defendant entered into the witness box and examined himself as D.W.1, however, no exhibit was marked.

7. On appreciation of evidence and considering the arguments of both the parties, the trial Court partly decreed the suit and preliminary decree was passed, awarding interest at the rate of 9% from the date of borrowal till the date of judgment and thereafter at the rate of 6% till realization.

8. The judgment and decree of the trial Court is under challenge in this appeal.

9. The points for consideration in this appeal is:

Whether Ex.A.1 is proved by the plaintiff as required by Sec.68 of Evidence Act?

10. Point:

The learned counsel for the appellant/defendant has argued that the defendant is a retired teacher, and he had no necessity to borrow huge loan. Though the plaintiff pleaded that the defendant got loan of Rs.10,00,000/- and executed Ex.A.1 mortgage deed, the defendant specifically denied in his written statement that Ex.A.1 is fabricated and forged one. It is also specifically contended by the defendant that the execution and attestation of the mortgage deed are denied. If the pleadings so, the trial Court has to frame issue whether Ex.A.1 is concocted and forged one, but the trial Court has not framed any issue regarding fraud. The plaintiff stated that the wife and friend of the defendant as attesting witnesses. But he has not taken any steps to examine them as witness. As per Section 59 of the Transfer of Property Act, at the time of execution of registered document regarding immovable property, two witnesses have to attest the document. As per Section 68 of the Indian Evidence Act, at least one witness has to be examined to prove the same. According to Sections 59 and 3 of the Transfer of Property Act and Sections 58 and 59 of the Registration Act, the registered document has to be proved by producing and examining any one of the witnesses. But, in this case, the plaintiff has not examined any attesting witness, his evidence alone cannot be considered as proof in the absence of any attesting witness. The trial Court has observed that the counsel for the defendant put the question to PW1 that the plaintiff did not see when the defendant put his signature in Ex.A1 (பிரதிவாதி அடமானப் பத்திரத்தில் கையொப்பம் செய்த போது நானோ சாட்சிகளோ பார்க்கவில்லை என்று சொன்னாலும் சரியல்ல) and on that basis decreed the suit. It is settled law that suggestion cannot be taken into consideration to arrive at a legal conclusion. Therefore, the plaintiff failed to prove Ex.A.1 when the defendant specifically denied his signature. The trial Court erred in decreeing the suit and hence, prayed to allow the appeal.

11. In support of his argument, the learned counsel relied on the decision of the Division Bench of the Hon'ble Supreme Court rendered in **Thakkar Vrajlal Bhimjee /vs/ Thakkar Jamnadas Valjee & Anr.** case reported in **(1994) 4 Supreme Court Cases 723**.

> *"1. The only question of law that arises for consideration in this appeal is whether the mortgage deed was proved in accordance with law in absence of examination of any of the attesting witnesses.*
>
> *2. The High Court held that since the appellant, who was a guarantor, having admitted his signature on the mortgage deed and he having not Specifically denied in the written statement the execution of the document it was not necessary for the respondent-plaintiff to examine any attesting witness to prove the execution of the mortgage deed.*
>
> *3. In **Kunwar Surendra Bahadur Singh v. Thakur Behari Singh'**, it has been held that one of the essentials of mortgage deed is that each of the attesting witnesses must have signed the document in the presence of the executant. The Court held that if the provisions of Sections 58 and 59 of the Registration Act and Sections 3 and 59 of the Transfer of Property Act are read together, there was no escape from the conclusion that a mortgage deed was required to be proved by producing at least one of the*

attesting witnesses. In view of this decision the judgment of the High Court cannot be upheld. The observation of the High Court that there was no specific denial by the appellant in his written statement also does not appear to be correct as the appellant in paragraph 11 clearly stated that he did not admit the document dated 22-4-1958. There was thus a specific denial and as held by the Privy Council in absence of production of any attesting witness the document could not be deemed to have been proved in accordance with law.

4.In the result, this appeal succeeds and is allowed."

12. Per contra, the learned counsel for the plaintiff submitted that the defendant has received loan amount of Rs.10,00,000/- from the plaintiff and executed the registered mortgage deed on 09.01.2013. The wife of the defendant and his friend one Balasubramanian, attested the mortgage deed. The defendant has not denied in his evidence about the particulars of the attested witness of the deed. The plaintiff issued a legal notice on 08.06.2015 to the defendant, specifically mentioning about the borrowal of loan and execution of registered mortgage deed. The defendant received the same on 09.06.2015, but he has not sent any reply denying the same as contended in his written statement. The defendant has not lodged any police complaint regarding forgery or has not made any complaint before the District Registrar. Moreover, the photo of the defendant is affixed in the registered mortgage deed, the photo was admitted by him. The defendant consented for settlement during the proceedings of the suit. If the defendant has not obtained any loan, there is no necessity for settlement. The pleading and his oral evidence against the registered mortgage deed in respect of immovable property are inadmissible according to Sections 91 and 92 of the Indian Evidence Act. When the defendant pleaded forgery and fraud, the burden lies on the defendant to prove the same, but he has not chosen to substantiate his case. The trial Court has properly appreciated the evidence and correctly decreed the suit, so the appeal may be dismissed. In support of his arguments, the learned counsel for the plaintiff has relied on the following decisions:

1) (2000) 3 Supreme Court Cases 312 in Subhra Mukherjee and Anr. /v/ Bharat Coking Coal Ltd. and Ors. case.

2) 2025 (3) CTC 115 in Annaya Kocha Shetty (Dead) through LRs /v/ Laxmibai Narayan Satose case.

3) Judgment of Madurai Bench of Madras High Court in S.A(MD)No.222 of 2006, dated 07.09.2018.

13. The learned counsel for the appellant/defendant made reply argument that as per Section 101 of the Indian Evidence Act, the burden of proof is related only to positive fact and not for negative proof. As per Sections 102 and 103, the plaintiff is bound to prove his case and the law casts burden upon the plaintiff who comes to Court. Section 89 of CPC encourages the litigants to talk before mediation before the trial Court. The defendant has not agreed for mediation as he pleaded forgery. So, the appeal may be allowed.

14. Heard both and material records were perused. The plaintiff's case is that the defendant borrowed Rs.10,00,000/- from the plaintiff and executed Ex.A.1 registered mortgage deed in respect of his property. The defendant's specific case is that Ex.A.1 is forged and concocted one and that the plaintiff has not examined any one of attesting witness to prove Ex.A.1 which is fatal to his case. The rulings relied on by both side have been perused. The Hon'ble Supreme Court has clearly held in **Thakkar Vrajlal Bhimjee case** reported in **(1994) 4 Supreme Court Cases 723** as

> *"3. ....if the provisions of Sections 58 and 59 of the Registration Act and Sections 3 and 59 of the Transfer of Property Act are read together, there*

> *was no escape from the conclusion that a mortgage deed was required to be proved by producing at least one of the attesting witnesses."*

In this case, admittedly, the plaintiff has not examined any one of the attesting witnesses to prove the execution of Ex.A.1. The trial Court has held Ex.A.1 is proved based on the reply evidence of P.W.1 to a suggestion put by the defendant's side, "பிரதிவாதி அடமானப் பத்திரத்தில் கையொப்பம் செய்த போது நானோ சாட்சிகளோ பார்க்கவில்லை என்று சொன்னாலும் சரியல்ல". It is settled law that the suggestion put to a witness cannot be taken as evidence or admission, as rightly argued by the defendant's counsel.

15. The plaintiff mainly argued that the defendant has not sent any reply to his legal notice and also has not made police complaint or made complaint before the District Registrar, while the defendant alleges forgery. It is further contention that the burden cast upon the defendant to prove the forgery. The defendant's counsel made an effort to convince the Court that the Acts specifically mandated to prove the execution of mortgage and also the Indian Evidence Act provides the burden of proof only to positive facts, not to negative plea by relying on Sections 91, 92, 101, 102 and 103 of the Act.

16. The Sections 101, 102 and 103 of the Indian Evidence Act read thus:

> ***<u>Sec.101. Burden of proof</u>***. — *Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*
>
> ***<u>Sec.102. On whom burden of proof lies</u>***. — *The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*
>
> ***<u>Section.103. Burden of proof as to particular fact.</u>*** *—The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."*

17. It is a settled position of law that the burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it and that the burden of proving a fact always lying upon the person who asserts the facts. Until such burden is discharged, the other party is not required to be called upon to prove his case. Section 103 of the Evidence Act provides that the burden of proof of any particular fact lies on the person who wishes the Court to believe in its existence. A careful reading of the provisions of the Indian Evidence Act, it is clear that the burden of proof leads to only positive fact and not to negative fact. So, this Court accepts the arguments put forth by the defendant's side. It is the duty of the plaintiff who comes to court to prove his case and he cannot take advantage of weakness of the defendant's case.

18. In this case, the defendant has specifically denied the execution of mortgage deed in his written statements. As per Section 68 of the Indian Evidence Act, at least one attestor has to be examined. But the plaintiff has not examined any one of attesting witness to prove Ex.A.1 - Mortgage Deed. Even the plaintiff has not marked the title deed of the suit property when it is stated that the title deed was handed over to him while executing the mortgage deed. These facts are fatal to the plaintiff's case. Therefore, this Court holds that the plaintiff has not proved Ex.A.1 mortgage deed in the eye of law and accordingly the point is answered and hence, he is not entitled to decree on the basis unproved Ex.A.1.

19. For all these reasons, the judgment and decree of the trial Court is not sustainable in law and the same needs interference by way of this appeal. Thus, the appeal succeeds.

20. In the result, this Appeal Suit is allowed. The judgment and decree, dated 26.03.2019 passed in O.S.No.155 of 2015 on the file of the learned V Additional District Judge, Madurai, is set aside and the suit in O.S.No.155 of 2015 on the file of the V Additional District Court, Madurai, is dismissed. No costs. Consequently, the connected Civil Miscellaneous Petition is closed.

23.01.2026

NCC : Yes / No
Internet : Yes / No
Index : Yes / No
VSD

To

1.The V Additional District Court,
Madurai.

2.The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

P.VADAMALAI, J.

VSD

Pre-Delivery Judgment made in
A.S(MD)No.291 of 2021
and
C.M.P(MD)No.8765 of 2025

23.01.2026