

Yesudhas and Others Vs. Primala Regu

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Court : Chennai Madurai

Decided On : Nov-02-2016

Judge : S.S. Sundar

Appeal No. : Second Appeal (MD) No. 230 of 2015

Appellant : Yesudhas and Others

Respondent : Primala Regu

Judgement :

(Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, praying to set aside the judgment and decree of the Court of the First Additional Subordinate Judge, Nagercoil, dated 31.01.2012 in A.S.No.44 of 2011 reversing the Judgment and Decree of the Court of the Principal District Munsif, Nagercoil, dated 21.02.2011 in O.S.No.117 of 2004.)

1. The plaintiffs 2 to 5 in the suit in O.S.No.117 of 2004 (originally it was O.S.No.24 of 1997) on the file of the Principal District Munsif Court, Nagercoil, are the appellants in the second appeal. The appellants are the legal heirs of one C.Rajammal, who is the first plaintiff in the suit.

2. It was the case of the first plaintiff in the suit that the defendant borrowed a sum of Rs.50,000/- as loan on 12.03.1994 and had executed a Rekai acknowledging receipt of Rs.50,000/- in favour of the first plaintiff. It was the further case of the first plaintiff that the defendant had not paid either the principal or interest towards

repayment of loan. It was also the case of the first plaintiff that the defendant did not pay the amount despite several demands and that the defendant is liable to pay a sum of Rs.67,000/- as on the date of filing the suit and hence, the suit was filed for recovery of a sum of Rs.67,000/-.

3. The respondent / defendant filed a written statement denying the receipt of Rs.50,000/- from the first plaintiff and the liability to pay any amount to the first plaintiff. However, in the later part of the written statement, the respondent / defendant admitted that the first plaintiff and her daughter Sarojini had given a complaint to recover the amount from the defendant and that as a result, the defendant had paid a sum of Rs.29,000/- through her husband. Defendant also pleaded that an agreement was signed by plaintiff and her daughter on one side and defendant and her husband on the other side. Thus according to the defendant only a sum of Rs.21,000/- has to be repaid as per the said agreement. Thus, it was the definite case of the respondent / defendant that the alleged loan was partially discharged and that the respondent / defendant is liable to pay only a sum of Rs.21,000/-.

4. The trial Court after framing necessary issues found that the respondent / defendant is liable to pay the sum of Rs.50,000/- as received under Ex.A1, the document styled as Rekai, executed by the respondent / defendant in favour of the first plaintiff. Since the respondent / defendant has not chosen to examine herself as witness, the trial Court has drawn adverse inference against the respondent / defendant and found that the document Ex.A1 is proved. The trial Court also considered the case of the respondent / defendant regarding the repayment of certain amounts and held that the repayment pleaded by the respondent / defendant is with reference to some other transaction and that the respondent / defendant failed to prove the repayment of any amount towards the borrowal of Rs.50,000/- as acknowledged under Ex.A1. However, the trial Court was of the view that the plaintiffs are not entitled to any interest till the suit was filed, as the document Ex.A1 does not specify any interest. Therefore, the trial Court decreed the suit for recovery of a sum of Rs.50,000/- to the appellants / plaintiffs with simple interest at the rate of 6% per annum from the date of the suit.

5. Aggrieved by the judgment and decree of the trial Court, the respondent / defendant filed an appeal in A.S.No.44 of 2011 on the file of the First Additional Sub Court, Nagercoil. The appellate Court accepted the case of the plaintiffs and found that the document Ex.A1 is proved. However, the appellate Court found that the document Ex.A1 is not a promissory note to treat the same as a negotiable instrument. The lower appellate Court, further, found that the payment of amounts as pleaded by the respondent / defendant are not in connection with some other transaction but in relation to the suit transaction. Hence, after deducting a sum of Rs.29,000/-, which according to the lower appellate Court, the amounts paid by the respondent / defendant to the first plaintiff in connection with the loan transaction under Ex.A1, the appellate Court modified the decree by directing recovery of only a sum of Rs.21,000/- with interest at the rate of 6% per annum. Aggrieved by the modified decree of the lower appellate Court, the appellants / plaintiffs have preferred the above second appeal.

6. The learned counsel for the appellants / plaintiffs raised the following substantial questions of law:

(1) Having come to the conclusion that the respondent executed a Rekai in favour of the appellants mother namely, Rajammal, the first appellate Court should not dismiss the appeal?

(2) Whether the first appellate Court should accept the plea of the respondent when she did not enter into witness box and resisted the plea of appellants?

(3) Whether the respondent proved that she had repaid a sum of Rs.29,000/-?

7. The learned counsel for the appellants / plaintiffs further relied upon a judgment of this Court in the case of Thukkaram v. Shanthi Varadharajan reported in 2015 (2) CTC 139 and contended that non-examination of the respondent / defendant is fatal to the case of the respondent / defendant since the burden lies only on the defendant to prove payment. The learned counsel for the appellants / plaintiffs submitted that the lower appellate Court ought to have drawn adverse inference against defendant for conveniently avoiding the box despite the fact that she is the best person to deny the execution of Ex.A1 and to prove the actual payment to the

original plaintiff in connection with the transaction under Ex.A1. He also relied upon a judgment of this Court in the case of Kandavel and others v. Chidambara Padayachi (died) reported in 2005 (3) CTC 344 wherein this Court has held as follows:

24. In view of the above said provision of law, it is clear that the document under Ex.A-9 certainly falls under the category of secondary evidence admissible in evidence. Further, it is useful to refer to the conduct of the 3rd defendant in this case, as she has conveniently avoided the box for the simple reason that she would be confronted with Ex.A-9 in the cross-examination if she had examined herself as witness on the side of the defendants. Therefore in view of the provision under Section 114 of the Indian Evidence Act and the principle enunciated by the Supreme Court in the decision, Vidhyadhar v. Mankikrao and another, 1999 (3) L.W. 576, necessarily an adverse inference has to be drawn against the case set out by the 3rd defendant as she did not appear and state her own case on oath and subject herself to the cross examination by the plaintiff with reference to Ex.A-9 as she had initiated the said proceedings as evident by the said document.

8. The learned counsel for the appellants / plaintiffs then relied upon a judgment of this Court in the case of Sri Brahadambal Agency v. S.Ramasamy Chettiar reported in (2016) 3 MLJ 11. However, I am not able to match this judgment to any of the arguments advanced by the learned counsel for the appellants / plaintiffs in the course of hearing the appeal. The learned counsel for the appellants / plaintiffs then referred to the judgment of this Court in the case of Jayalakshmi and others v. Mohankumar and others reported (2015) 2 MLJ 154 and argued that in a case where the lower appellate Court had committed error in casting the burden of proof or misleading the evidence, this Court is competent to re-appreciate the evidence to correct the mistake of lower appellate Court. It is also open to this Court to interfere with the second appeal if findings of Courts below are perverse and unsupported by any evidence.

9. The learned counsel for the respondent / defendant also would advance his arguments mainly on the ground that the lower appellate Court has come to the correct conclusion based on the appreciation of evidence and the judgment of the

lower appellate Court and the findings are perfectly in order and that it is not open to this Court to interfere with the finding of fact while exercising the power under Section 100 C.P.C.

10. I have considered the respective arguments of both the learned counsels.

11. It is true that the first appellate Court has come to the conclusion that the payment of a sum of Rs.29,000/- are relating to the suit transaction and that the appellants / plaintiffs have not proved their case. It is to be noted that the suit was filed by C.Rajammal, first plaintiff. Since she died on 16.09.2001, during the pendency of the suit, the legal representatives of the first plaintiff was impleaded as plaintiffs 2 to 5 who are the appellants in the present second appeal. Though the first plaintiff was examined as P.W.1, she died before cross-examination. Since her evidence was not completed, it was not shown in the list of exhibits. However, the son of first plaintiff was examined as P.W.1. Despite a specific stand was taken by the appellants / plaintiffs, the respondent / defendant did not choose to examine her as a witness.

12. The main issue that arise for consideration before the lower appellate Court is relating to the payment that were made by the respondent / defendant, whether they were in connection with the suit transaction or with reference to some other earlier transaction. The trial Court has categorically found that the payments alleged by the respondent / defendant were in respect of some other transaction and that the respondent / defendant had failed to prove her case pleaded in the written statement. However, the lower appellate Court without even advertng to the scope of Section 114 of Indian Evidence Act, reversed the findings of the trial Court and held that the appellants / plaintiffs have not proved their case. The execution of the document Ex.A1 is not in dispute. Even though Ex.A1 is not a negotiable instrument, the Courts below have concurrently found that the document Ex.A1 is proved and that the respondent / defendant had borrowed a sum of Rs.50,000/-. It is to be seen that the burden lies only on the person who plead discharge of loan or payment of money. In the present case, except stating that the respondent / defendant had paid some amount, she has not let in any evidence. The document Exs.B1 and B2 do not show the repayment of any money

towards the money advanced to the respondent / defendant under Ex.A1. The repayment of a sum of Rs.29,000/- was accepted by appellate Court based on the admission of P.W.1. When it is the specific case of the appellants / plaintiffs that the payment acknowledged by the first plaintiff were in respect of a different transaction and the documents filed by the respondent / defendant is not clinching to support her case, the view expressed by the trial Court cannot be brushed aside.

13. The lower appellate Court ignoring the special circumstances namely the non-examination of respondent / defendant which is fatal to the case of the respondent / defendant, came to the conclusion that the appellants / plaintiffs have not proved their case. The defendant, though pleaded that there was a written agreement signed by parties to prove her case, she did not produce the document. When the question is with regard to the burden of proof, the failure to produce the best evidence or the conscious attempt to avoid witness box cannot be ignored and the Courts in such circumstances are expected to draw adverse inference against the party who had failed to produce the best evidence or avoided witness box. The defendant who has avoided witness box is the best person to speak about the real nature of transaction. The respondent / defendant in the present case has not come forward to state her own case on oath and subject herself to the cross examination by the plaintiffs with reference to the main issue as to whether the payment alleged by the respondent / defendant were only in respect of the loan transaction under Ex.A1 or with reference to some other transactions. It is pertinent to point out that no one was examined on the defendant's side.

14. Hence, the second question of law framed is answered in favour of the appellants / plaintiffs by holding that the lower appellate Court ought to have drawn adverse inference against the respondent / defendant to hold that the respondent / defendant had failed to prove the payment of Rs.29,000/- towards repayment of loan under Ex.A1. The defendant has neither produced the agreement pleaded in the written statement nor examined herself to speak about the repayment of money towards the transaction under Ex.A1. In such circumstances, the alleged agreement can be presumed to be against the case of defendant. In view of the fact that the second question of law is answered in favour of the appellants /

plaintiffs, the other question of law raised by the appellants / plaintiffs need not be answered separately. Hence, this Second Appeal is allowed and the judgment and decree of the lower appellate Court is set aside and the judgment and decree of the trial Court in O.S.No.117 of 2004 on the file of the Principal District Munsif Court, Nagercoil, is confirmed. However, there is no order as to costs.

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