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S.Ganesan Vs. A.Ponsamy ... Appellant in Both Appeals

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Court : Chennai

Decided On : Nov-17-2014

Judge : P.Devadass

Appellant : S.Ganesan

Respondent : A.Ponsamy ... Appellant in Both Appeals

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

17. 11.2014 CORAM THE HONOURABLE MR.JUSTICE P.DEVADASS SECOND APPEAL (MD) Nos.248 of 2011 and SECOND APPEAL (MD) Nos.249 of 2011 and M.P.(MD) No.1 of 2011 in S.A.(MD) No.248 of 2011 S.Ganesan ... Appellant in both appeals -vs- A.Ponsamy ... Appellant in both appeals COMMON PRAYER Second Appeals are filed under Section 100 of the Code of Civil Procedure, against the Judgments and Decrees, dated 17.06.2010, passed in A.S.Nos.84 and 85 of 2008, on the file of the learned Subordinate Judge, Valliyoor, confirming the Judgments and Decrees, dated 25.06.2007, passed in O.S.Nos.161 and 125 of 2006, on the file of the learned Principal District Munsif, Valliyoor. !For Appellant : Mr.S.Meenakshisundaram ^For Defendant : Mr.H.Arumugam :COMMON

JUDGMENT
Plaintiff in O.S.No.125 of 2006 (redemption suit) is defendant in O.S.No.161 of 2006, which has been filed by the defendant in O.S.No.125 of 2006, for recovery

of money due under Ex.A.1, Mortgage Bond.

2. For our convenient sake and to avoid confusion, we will describe the parties as mortgagor and mortgagee.

3. Plaintiff in O.S.No.125 of 2006 is the appellant herein. The two suits came to be filed by the parties under the following circumstances.

4. On 28.04.1997, under Ex.A.1 Mortgage Bond, Ganesan (D.W.1) borrowed Rs.30,000/- at 24% interest p.a. from Ponsamy (P.W.1) and as a security he has mortgaged his property and the entire mortgage money has to be repaid within three years.

5. The gist of the case of the mortgagor/plaintiff in O.S.No.125 of 2006 is that he has discharged the mortgage bond by paying the amount under Ex.B.1 cancellation deed dated 05.05.2003. Under the circumstances, he has filed the redemption suit in O.S.No.125 of 2006.

6. The said suit has been resisted by the mortgagee by filing his written statement that no amount as pleaded by the plaintiff has been paid. He disputed Ex.B.1.

7. Subsequently, the defendant in O.S.No.125 of 2006 filed O.S.No.161 of 2006 for recovery of the amount due under Ex.A.1 Mortgage Bond.

8. The said suit has been resisted by the defendant/mortgagor, the plaint pleadings in O.S.No.125 of 2006 has become written statement of the defendant in O.S.No.161 of 2006.

9. Thus, actually, it is Ex.B.1 vs. Ex.A.1. If Ex.B.1 is established, the mortgagor succeeds. O.S.No.161 of 2006 will go away. If it is otherwise, the mortgagor will fail, his redemption suit in O.S.No.125 of 2006 will fail.

10. The trial Court tried both the suits. Issues were framed. Common evidence was recorded in O.S.No.161 of 2006. Mortgagee Ponsamy examined himself as P.W.1 and exhibited Exs.A.1 to A.4, while the Mortgagor Ganesan examined himself as D.W.1, Ganapathy and Oosikattan as D.Ws.2 and 3 and also marked Exs.B.1 to B.3.

11. When Ex.B.1 was introduced in evidence by D.W.1, it was objected by mortgagee. So, it was marked subject to objection. But, the trial Court has not at all adverted to the objection. It has fully concentrated on the question of genuineness of Ex.B.1. The trial Court appreciated the oral and documentary evidence and came to the conclusion that Ex.B.1 has not been proved and thus decreed the suit in O.S.No.161 of 2006 and dismissed the suit in O.S.No.125 of 2006.

12. In the circumstances, mortgagor went to the next Court/Sub Court, Valliyoor by way of A.S.Nos.84 and 85 of 2008.

13. In the first appellate Court, it was almost redoing. Ultimately, the first appellate Court dismissed both the appeals. It is pertinent to note that the first appellate Court also not diverted its attention as to the objection raised by the mortgagee during trial with reference to Ex.B.1.

14. Having lost in both the Courts below, now the mortgagor is before us.

15. According to the learned counsel for the appellant /mortgagor, payments have been made in three installments. That has been clearly spoken to by D.Ws.1 to 3. The execution of Ex.B.1 for the payment so far made also has been spoken to by D.Ws.1 to 3.

16. The learned counsel for the appellant also submitted that in Ex.B.1, there is signature of mortgagee Ponsamy. In as much as the mortgagor has let in evidence as to the execution of Ex.B.1, it is incumbent upon the mortgagee to prove that the signature in Ex.B.1 is not of him and he should have taken steps for comparison of the disputed signature in Ex.B.1 with his admitted signature. But, he did not do so. In this connection, the learned counsel for the petitioner cited SINGA MUTHU VS. GOVINDAMMAL (2004 (2) M.L.J.

161) and THIRUVENGADACHARI VS. NAGARAJAN (2007(1) CTC577.

17. On the other hand, the learned counsel for the respondent/mortgagee would contend that Ex.A.1 is a registered Mortgage Bond. As per Section 17(1)(b) of the Registration Act, 1908, it is a document required to be compulsorily registered. In

such circumstances, as per Section 17(1)(c) of the said Act, discharge of such registered document also has to be only by way of another registered document. He would also urge that as per Section 49 of the said Act, the consequences of such non registration is that such a document cannot be received in evidence at all.

18. The other limb of argument of the learned counsel for the respondent is that the very genuineness of Ex.B.1 has not been proved by the mortgagor. The learned counsel would read the plaint pleadings in O.S.No.125 of 2006, pleadings in written statement in O.S.No.161 of 2006 and the reply notice of the mortgagor Ex.A.4 (Ex.B.3) and would submit that the specific plea of the mortgagor is that the Mortgage Bond has been discharged by a single payment. Further, when such is the plea, now, he cannot be permitted to let in evidence that the payments were made under three installments. De hors such plea, adducing of evidence should not be permitted. He would also read the evidence of D.Ws.2 and 3 and would emphasize that they are not telling the truth. According to the learned counsel the respondent, actually D.W.1 misdirected himself by producing D.Ws.2 and 3.

19. The learned counsel for the respondent would also submit that with regard to the genuineness of Ex.B.1, the trial Court as well as the first appellate Court rendered the finding that the discharge pleaded is not established. In such circumstances, under Section 100 C.P.C., this Court will not disturb the concurrent findings of the Court below, unless it is perverse and there is manifest error. In this connection, he would cite VEERAYEE AMMAL VS. SEENI AMMAL (2002 (1) SCC134.

19. In reply, the learned counsel for the appellant would read paragraph No.5 of the plaint in O.S.No.125 of 2006 and would submit that though money has been received under the receipt with promise to execute the cancellation deed by the mortgagee, however, he did not do so. To show it a collateral purpose, namely, the amount has been paid to the mortgagee, Ex.B.1 has been let in. The rigor of Section 49 of the Indian Evidence Act has been completely diluted for the purpose of looking into an unregistered document for a collateral purpose.

20. I have anxiously considered the rival submissions, perused the case records, impugned judgments and the decisions cited at the bar.

21. Admittedly, on 28.04.1997, for the receipt of a loan of Rs.30,000/- under Ex.A.1, the mortgagor had mortgaged his property. The interest is at 24% per annum and the redumption period is 3 three years. To collect the amount due under Ex.A.1, the mortgagee issued Ex.A.2 (=Ex.B.2) suit notice. It has been replied by the mortgagor under Ex.A.4 (=Ex.B.3). The mortgagor did not deny his execution of Ex.A.1. Thus, the onus of proving the mortgage by the plaintiff in O.S.No.161 of 2006 is over.

22. The specific case of the mortgagor is that under Ex.B.1 the entire mortgage money has been paid and the mortgage debt has been completely wiped out. The mortgagee denies it. In the circumstances, the onus is upon the mortgagor to prove his plea of discharge.

23. As per Section 17(1) of the Indian Registration Act, 1908, if a right has been created under a document falling under Section 17(1)(b) it has to be registered. Ex.A.1 falls under this category. It was registered. If such a right, title, interest is to be extinguished to put an end to it, as per Section 17(1)(c) of the said Act, it must also be by a way of a registered document. Section 49 of the Act speaks about the consequences of non registration of a document which is required to be registered under Section 17 of the Act. As per that the causality of such non-registration is that such an unregistered document cannot be received in evidence. However, there are certain exemptions to it. They are agreements falling under Specific Relief Act, 1877 or the equity of part-purposes under Section 53-A, Transfer of Property Act, 1882 or anything as evidence of a collateral transaction/purpose.

24. Now, in this case, the learned counsel for the appellant would submit that for a collateral purpose, namely, to show the payment of money to discharge Ex.A.1 mortgage bond alone Ex.B.1 has been pressed into service.

25. Now, in this case Ex.A.1 is a registered Mortgage Bond. As per the language of the law contained in Section 17(1)(c), the right to sue, right to claim under Ex.A.1 could be extinguished only by way of a registered document. Admittedly,

Ex.B.1 is not registered. It's heading is that it is a cancellation deed of the mortgage bond. It's substance is also same. A plea of discharge is the basis upon which the mortgagor has filed the redemption suit in O.S.No.125 of 2006. For this, in the suit the mortgagor is placing his reliance solely on Ex.B.1. It is as against Ex.A.1. In his suit in O.S.No.125 of 2006, Ex.B.1 is the base document. Thus, he enforces Ex.B.1 by way of a complete answer to the claim of money made by the mortgagee under Ex.A.1, mortgage bond. In such circumstances, it is not looking at Ex.B.1 for a collateral purpose. It is out and out to extinguish the mortgage debt under Ex.A.1. Therefore, Ex.B.1 falls under Section 17(1)(c) of the Registration Act, 1908. Therefore, it ought to have been registered, but not registered, so, it cannot be received in evidence at all.

26. However, this aspect has not been adverted to at all by both the Courts below. They have completely concentrated on the genuineness of Ex.B.1. Actually, they have failed to catch the main point.

27. Earlier, during the course of trial, as and when objection has been taken as to the admissibility of a document, either on account of Section 49 of the Registration Act, or on account of some other point, Courts started giving a ruling on those points, either sustaining or overruling it, enabling the parties to take the matter in Civil Revision Petition to the High Court and ultimately the main lis will be put in a cold storage. Subsequently, the higher Courts having aware of this bottleneck spoiling the trial of the suit itself directed the trial Courts to note down the objection as to the admissibility of a document in evidence and relegate their ruling thereon to the last stage of the trial, namely, judgment. Thus it has avoided unnecessary delay in conducting the trial of the suit.

28. The same thing has been adopted when Ex.B.1 was introduced in evidence, when the mortgagee objected to it. However, in the trial Court's judgment, there was no ruling as to whether the objection was sustained or overruled. This is not correct way of dealing with the matter. This aspect also missed the attention of the first appellate Court also. Had they did did it this case could have been decided on the legal principal itself. Be as it may.

29. For the sake of completeness we will also consider the arguments of both as to the genuineness of Ex.B.1.

30. The crux of the plea of the mortgagor both in his plaint in O.S.No.125 of 2006 and in his written statement in O.S.No.161 of 2006 and in his reply notice Ex.A.4 to the mortgage's suit notice Ex.A.2 is that Ex.B.1 mortgage has been discharged at one payment. As per the plaint pleadings in the redemption suit in O.S.No.125 of 2006, discharge of the mortgage is the core subject.

31. As against his plea in O.S.No.125 of 2006 and in O.S.No.161 of 2006 in his evidence the mortgagor says that the discharge was by way of three installments. On the side of the mortgagor, this is a vital and material aspect in this case. But, this material aspect has not been pleaded by the mortgagor in his pleadings. Not pleading of such material fact is fatal to the mortgagor (See Order 6, Rule 2 C.P.C.). He says only for the first time in evidence. He takes the mortgage by surprise. This cannot be done. This is against rules of pleading.

32. It has been contended by the Mortgagor that in the facts and circumstances, the mortgagee has to prove that the signature in Ex.B.1 is not of him, he should have taken steps to examine his disputed signature in Ex.B.1 to be compared with his admitted signature by an expert.

33. Our answer to the argument is very simple. It is an invitation to a person to prove the negative. That cannot be done by the mortgagee. Prooving his signature is the headache of the mortgagor, it is not the headache of the mortgagee.

34. D.W.3 has been examined to speak about the last payment, namely, Rs.7,000/-, he simply washed off his hands with regard to 1st and 2nd payment. If we closely examine the evidence of D.Ws.1 to 3, there are lot of inconsistencies. They are building a new case in evidence with regard to the plea of discharge. Further, even towards the 1st installment of payment of Rs.35,000/- was said to be made within one month of the creation of the mortgage as against the principal of Rs.30,000/- + interest Rs.600/-. It completely goes against the version of the discharge pleaded by the mortgagor because if it is so, why he should make further payments as second and 3rd installments.

35. As regards the factual aspects on evidence both by the trial court as well as the first appellate Court have recorded concurrent findings that the discharge pleaded is not true. There is no perversity or manifest error in it nor misreading of the evidence adduced. In such a situation, under Section 100 C.P.C., this Court will not disturb such concurrent findings (See VEERAYEE AMMAL VS. SEENI AMMAL (2002 (1) SCC134.

36. In winding up our discussion on the pleading, evidence, the legal position involved in this case we are to support the judgment of the Courts below also for other P.DEVADASS, J sj reasons also. Absolutely, there is no merit in these two second appeals.

37. In the result, these two Second Appeals fails and are dismissed. The decrees and judgments of the trial Court and the first appellate Court are upheld also for other reasons. However, the parties are left to bear their respective costs in the Second Appeal. Consequently, connected M.P.(MD) No.1 of 2011 in S.A.(MD) No.248 of 2011 is also dismissed. 17.11.2014 Internet : Yes Index : Yes sj To 1.The Principal District Judge, Tirunelveli. 2.The Subordinate Judge, Valliyoor. 3.The Principal District Munsif, Valliyoor. SECOND APPEAL (MD) Nos.248 and 249 of 2011

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