(2017) 02 MAD CK 0123

In the Madras High Court

Case No : S.A. Nos. 664 & 665 of 2011 M.P. Nos. 1 and 1 of 2011

K. Sivakumar APPELLANT

Vs

Y. Neeraja RESPONDENT

Date of Decision : 10-02-2017

Acts Referred:

Citation : (2017) 2 LW 679 : (2017) 3 MLJ 170

Hon'ble Judges : Mr. T. Ravindran, J.

Bench : Single Bench

Advocate : Mr. V. Raghavachari both SAs. for M/s. V.S. UJsha Rani, Advocates, for the Appellant; Mr. I. Abrar Mohammed Abdullah both Sas, for the Respondent

Final Decision : Allowed

Judgement

Mr. T.Ravindran, J.—Challenge in the second appeals are made by the plaintiff against the judgment and decree dated 22.04.2010 passed in A.S. No.719 of 2007 & 718 of 2007 respectively on the file of the Additional District & Sessions Court (FTC ? IV), Chennai, reversing the judgment and decree dated 23.07.2007 passed in O.S. No.7183 of 1998 on the file of the VI Asst. City Civil Court, Chennai.

2. The second appeals have been admitted and the following substantial question of law is formulated for consideration in this second appeals:-

" Whether the judgment and decree of the First Appellate Court in dismissing the suit filed by the plaintiff and decreeing the counter claim made by the defendant are based upon perverse findings and misdirected against the evidence on record."

3. The suit has been laid by the plaintiff on the basis of the mortgage.

4. Briefly stated, according to the plaintiff, the defendant, for commencing and carrying on business in consumer goods, approached the plaintiff for loan and accordingly, the plaintiff advanced loan to the defendant on various dates both

by way of cheque and cash and according to the plaintiff, totally, he had lent a sum of Rs.3,00,000/- to the defendant in the presence of her parents and inasmuch as the defendant, pursuant to the same, did not commence any business nor repaid the amount, the plaintiff demanded security for the repayment of the loan from the defendant and accordingly, the defendant on 15.02.1997 deposited with the plaintiff at Madras the sale deed of her property intending to create a mortgage by deposit of title deeds and inasmuch as the defendant did not pay the amount, even thereafter pursuant to the legal notice, according to the plaintiff, he has been necessitated to lay the suit.

5. The case of the defendant, in brief, is that on account of acquaintance with the plaintiff, the defendant has reposed the confidence on him and it is the plaintiff, who had persuaded the defendant to start a distributorship business in incense sticks and promise to take further steps with reference to the commencement of the said business by locating a premise etc., and it is the further case of the defendant that on 15.02.1997, the plaintiff came to her residence and persuaded her to sign undated blank cheques and also stamp paper and as the defendant had trust and faith on the plaintiff, she had signed the 10 rupees blank stamp paper and also issued blank cheque drawn on Canara Bank, Mowbrays Road Branch and the plaintiff left her house at 8.30a.m. and again at about 11.00 am, the plaintiff came to her residence and attempted to behave with her indecently and thereby, attempted to outrage her modesty and the same was stiffly resisted by the defendant and the defendant had taken the documents kept in the Almirah unlawfully and also encahsed the cheque drawn on Canara Bank, Mowbrays Road Branch, thereafter, making use of the defendant''s signature in the blank stamp paper, he had laid the suit falsely against the defendant. Further, it is the case of the defendant that she had suitably responded to the legal notice sent by the plaintiff by giving a detailed reply and thus, according to the defendant, she is entitled to get back the sale deed from the plaintiff and accordingly, made a counter claim with reference to the same in the written statement.

6. As rightly found by the trial court, it could be seen that the defendant has admitted her signature in the mortgage deed dated 15.02.1997 marked as Ex.A1. Now, according to the plaintiff, for the amounts secured by the defendant from the plaintiff as loan on various dates, the defendant had executed the document dated 15.02.1997 entrusting her title deed of the suit property with intent to create a mortgage by deposit of title deeds. As seen from the evidence of the defendant examined as DW1, she has admitted that the signature found in Ex.A1 is her signature and that apart, she has also admitted that she knew the contents of the document Ex.A1. In such view of the matter, as rightly found by the trial Court, the defendant having admitted the execution of Ex.A1 with contents thereof, it is for the defendant to establish that she had not executed Ex.A1 with intent to create a mortgage by deposit of title deeds in respect of her property.

7. As seen from the evidence adduced in the matter, the plaintiff and the defendant were having cordial relationship right from 1992 onwards till the alleged untoward incident put forth by the defendant. Accordingly, it could be seen that the defendant unable to suppress her signature in Ex.A1, has admitted, without any doubt that at the request of the plaintiff, she had signed the document. However, she would state that it had been obtained by the plaintiff for some other purpose i.e. for enabling the defendant to start a new incense sticks business. But when it is clearly admitted by the defendant that noting the contents of the same, she had signed the document, it is farfetched and unbelievable to accept the theory put forth by the defendant that the plaintiff has stealthily obtained her signature in Ex.A1 by projecting a false reason.

8. As rightly found by the trial court, there is no specific denial in the written statement of the amounts borrowed as pleaded by the plaintiff in the plaint. Therefore, it could be seen that accordingly, acknowledging the amounts borrowed from the plaintiff on various dates amounting to Rs.3,00,000/- reiterating the same and with intent to create security for the due repayment of the said amount as seen from Ex.A1, the defendant had handed over her title deed to the suit property thereby intending to create a mortgage by deposit of title deeds. Now, according to the defendant, on the same date i.e. 15.02.1997, the plaintiff came to her residence for the second time and behaved with her indecently and also attempted to outrage her modesty and illegally secured various documents from her custody without her consent. As pointed out by the trial court, if there is any element of truth in the above defence taken in the written statement or in the reply notice sent by the defendant marked as Ex.B1, the defendant would have endeavoured to lay necessary legal action against the plaintiff. It is found that before the institution of the suit, the plaintiff has sent a legal notice dated 03.04.1997 calling upon the defendant to pay the amount and also informing about the execution of Ex.A1 by her with intent to create a mortgage by deposit of title deeds. Though the defendant had acknowledged the receipt of the same, it is found that immediately, she had not responded and only on 21.06.1997, she had chosen to send a reply. Now, according to the defendant, with reference to the alleged incident, which took place between the plaintiff and her, at her residence on 15.02.1997 at about 11.00 am. as pleaded in the written statement, it is stated that the defendant has preferred a complaint, the document pertaining to the same dated 11.04.1997 and the copy of the FIR have been marked as Exs.B7 & B8. Ex. B8 is dated 11.07.1997. Therefore, it could be seen that now, according to the defendant, only on 11.4.1997 i.e. nearly 2 months after the alleged incident, the defendant has lodged the complaint against the plaintiff and further from Ex.B8, it could be seen that the defendant has sent a complaint. Therefore, even according to the defendant, only two months after the alleged incident, she had taken action against the plaintiff. That apart, she has not pleaded or established as to what further action had been taken against the plaintiff, pursuant to Exs.B7 & 8 other than marking the two documents. Nothing concrete has been pleaded or

established by the defendant to establish that lawful action had been instituted against the plaintiff with reference to the alleged incident. If really, such an incident had happened, according to the defendant, even if the police authorities had not taken further action, pursuant to Exs.B7 & 8, the defendant could have made an attempt to take other legal redressal available to her under Law. However, the defendant has not chosen to proceed further from Exs.B7 & 8. It is also not made clear that if really, such complaint and FIR marked as Exs.B7 & 8 had been lodged by the defendant with the police authorities. As regards the above case of the defendant, she has not endeavoured to examine any police authority in support of the same. It is therefore clear that the case of the defendant that the plaintiff had indecently behaved with her on 15.02.1997 and the same was resisted and the plaintiff had overpowered her and illegally taken the custody of her document etc as such cannot be believed and accepted sans proof and acceptable material. Exs.B7 & 8 would in any manner be useful to advance the defence of the defendant. Further, it is also found that only after the receipt of the legal notice dated 03.04.1997, it appears that the defendant had chosen to prefer the complaint Ex.B7 dated 11.04.1997 and FIR dated 11.07.1997 marked as Ex.B8. Therefore, in view of the above position, the case of the defendant that the plaintiff had illegally obtained the custody of her title deeds etc., and also indecently behaved with her with a view outrage her modesty etc., cannot be accepted in any manner.

9. It is the specific case of the plaintiff that he had lent various amounts to the defendant in the presence of her parents. Despite the above plea of the plaintiff, the defendant has not cared to examine her parents to controvert the case of the plaintiff. This aspect also belies the defence theory. Accordingly, it is found as pleaded by the plaintiff that inasmuch as the defendant had borrowed the loan amount from the plaintiff as put forth by him, it could be seen that the defendant has not taken any steps to controvert the same by placing evidence on her side.

10. It is argued by the defendant''s counsel that the plaintiff had subsequently encashed the cheque obtained from her drawn on Canara Bank, Mowbrays Road Branch and in this connection, the defendant placed reliance upon the copy of the cheque marked as Ex.B2.

However, the position remained as found by the trial court, if really, any cheque had been illegally obtained by the plaintiff from the defendant for a sum of Rs.80,000/- as pleaded, the defendant would have taken further follow up action informing the bank not to act upon the said cheque. That apart, as seen from the Pass Book entry with reference to the withdrawal of the amount under the alleged cheque is only under the caption "Self". Further, it is also found that the defendant has not endeavoured to examine the officials of the bank to sustain her case that it is only the plaintiff, who had withdrawn the amount under the alleged cheque. Be that as it may, as regards the issue involved in this case, whether the plaintiff had encashed the above said cheque or not, would not in any manner be material for the purpose of this case. Therefore, that aspect of the matter would not in any manner be helpful to sustain the defence theory of the defendant.

11. Therefore, the only question now remain is whether the defendant had executed Ex.A1 with intent to create a mortgage by deposit of title deeds. The defendant has not placed any material to show that the same had been stealthily obtained from her by the defendant on some other pretext. It is the specific case of the plaintiff that with intent to create a mortgage by deposit of title deeds, the document had been executed by the defendant in recognition of the loan received by her earlier on various dates with intent to create a security for the repayment of the loan amount. Such being the position, a perusal of Ex.A1 would go to show that the defendant had intended to create a mortgage deed by deposit of title deeds by offering the sale deed of her property as a security to the plaintiff.

12. Now, according to the defendant''s counsel, Ex.A1 requires registration as per law and Ex.A1 having not been registered, the same cannot be acted upon in any manner. Per contra, according to the plaintiff''s counsel, Ex.A1, considering the recitals found therein and the circumstances under which it was signed and given by the defendant and the loan transaction between the parties, does not require registration. With reference to the above said issue, the plaintiff''s counsel relied upon the decisions reported in AIR 1950 Supreme Court 272 (Rachpal Mahraj v. Bhagwandas Daruka and others), AIR 1993 Karnataka 359 (State Bank of Mysore v. M/s. S.M.Essence Distilleries Pvt. Ltd., and others), AIR 1999 MADRAS 441 (B.R. Shamala and B.R. Shyamala Devi and another v. Kundan S.Bhayani and others), and (1987 MLJ page 180) (H.G. Nanjappa v. M.F.C. Industries (P) Ltd., represented by its Director-in-Charge v. Sivaprasad, Commercial Road, Ootacamund). On the other hand, the defendant''s counsel placed reliance upon the decisions reported in 1971(1) Supreme Court Cases 874 (Veeramachineni Gangadhara Rao v. The Andhra Bank Ltd. And others) and 74 L.W.797(Indersain v. Mohammed Raza Gowher and another).

13. The crucial issue is whether the parties intended to reduce their bargain regarding the deposit of title deeds to the form of a document. However, a reading of Ex.A1 would go to show that the parties have not intended to reduce their bargain regarding the deposit of title deeds under Ex.A1. Further, it could be seen that the parties did not intend to do so and no express bargain is made or contemplated in Ex.A1 and it is clear that, with a view to give security to the plaintiff, the defendant had entrusted her title deed to the plaintiff under Ex.A1 for the due repayment of the amount. Therefore, when it is found that Ex.A1 clearly and plainly appears to be in the nature of a letter of acknowledging the fact that the defendant had deposited her title deed as security, which is made obvious because even according to the defendant, she had much earlier received the loan amount from the plaintiff and in such view of the matter, it could be seen that as outlined in the above said authorities, when Ex.A1 is found to be not a bargain of the transaction between the parties concerned i.e. the plaintiff and

the defendant but only the intention to create mortgage, it could be seen that the document Ex.A1 does not require registration. In such view of the matter, the contention of the defendant''s counsel that sans registration, Ex.A1 cannot be acted upon and therefore, the plaintiff''s case deserves rejection as such cannot be accepted. The authorities submitted by the defendant''s counsel, in fact, do not advance her case, in so far as the construction of Ex.A1 is found as discussed above.

14. In the light of the above discussions, it is found that the first appellate court, without properly appreciating the evidence on record and also based upon the findings and conclusions, which are nothing but perverse and erroneous, had dismissed the plaintiff''s suit and also decreed the counter claim made by the defendant. In such view of the matter, it is found that the judgment and decree of the first appellate court cannot be sustained in any manner. Accordingly, the substantial question of law involved in this second appeal is answered against the defendant and in favour of the plaintiff.

15. In conclusion, the judgment and decree dated 22.04.2010 made in A.S. No.719 of 2007 & 718 of 2007 on the file of the Additional District & Sessions Court (FTC ? IV), Chennai, are set aside and the judgment and decree dated 23.07.2007 passed in O.S. No.7183 of 1998 on the file of the VI Asst. City Civil Court, Chennai, are confirmed

16. Accordingly, the second appeals are allowed. No costs.

17. Consequently, connected miscellaneous petitions are closed.

