
(2014) 04 MAD CK 0020
In the Madras High Court
Case No : C.S. No. 336 of 2007

Krishna Ponnuswamy

APPELLANT

Vs

Dr. Punitha Anand

RESPONDENT

Date of Decision : 28-04-2014

Acts Referred:

Citation : (2015) 1 MadWN(Civil) 10

Hon'ble Judges : K.K. Sasidharan, J.

Bench : Single Bench

Advocate : R. Subramaniam, Advocate, for the Plaintiffs; P.T. Asha for Sarvabhauman Associates, for the Defendant Nos. 6 to 10

Final Decision : Dismissed

Judgement

K.K. Sasidharan, J.—The Plaintiffs originally filed a Suit against the Defendants praying for a Judgment and Decree directing them to pay a sum of Rs.27,35,000/- with interest at 12% per annum. The Suit was compromised between the Plaintiffs and Defendants 1 to 5 for a sum of Rs.20 lakhs and as such the present claim is only for the remaining principal amount of Rs.5 lakhs. The Plaintiffs wanted Defendants 6 to 10 to pay the balance amount of Rs.5 lakhs with interest.

The facts:

2. The Plaintiffs are stated to be the relatives of Thiru K. Kalimuthu, who was a Member of the Legislative Assembly of Tamil Nadu and later its Speaker. According to the Plaintiffs, Thiru Kalimuthu was in financial difficulties in connection with the Management, of his Petrol Bunk at Madurai besides the marriage of his daughter Mrs. Amudhra Prasanna. In order to meet certain other financial commitments, Thiru Kalimuthu approached the Plaintiffs in May 2006 to provide him a loan of Rs.25 lakhs. The Second Plaintiff transferred a sum of Rs.20 lakhs to the account of First Plaintiff and thereafter, she took three Demand Drafts for a total sum of Rs.20 lakhs—Rs.9 lakhs—two DDs and Rs.2 lakhs—

one D.D.) in the name of Thiru Kalimuthu. After receiving the Demand Drafts dated 29th May 2006, a Demand Promissory Note was executed by Thiru Kalimuthu on the very same day agreeing to pay interest at 12% per annum.

3. Subsequently and more particularly, a few days prior to the marriage of the Eighth Defendant, Thiru Kalimuthu approached the Second Plaintiff once again for a hand-loan of Rs.5 lakhs, to meet the expenditure in performing the marriage. The Second Plaintiff mobilized the amount and paid the same to him, Thiru Kalimuthu, on receipt of the amount, issued a Cheque bearing No. 174376 dated 20 August 2006 for a sum of Rs.5 lakhs and requested the Second Plaintiff to present the Cheque after a period of two months. Therefore, in total, Thiru Kalimuthu received a sum of Rs.25 lakhs. Subsequently, Thiru Kalimuthu died and he is survived by the Defendants. Even though the Plaintiffs called upon the Legal Heirs of the deceased borrower and more particularly, the First Defendant herein to pay the amount, they have shown an indifferent attitude resulting in filing the Suit.

4. The Plaintiffs along with the Suit filed an Interlocutory Application for attachment before Judgment invoking Order 38, Rule 5 of the Code of Civil Procedure. This Court passed an Order dated 11th August 2009 attaching the property shown in the Petition Schedule before Judgment.

5. Subsequently Defendants 1 to 5, who are the children of deceased Kalimuthu through his first marriage, settled the matter with the Plaintiffs resulting in passing a Decree for a sum of Rs.20 lakhs in full quit. The Plaintiffs reserved their right to proceed against Defendants 6 to 10 for the balance amount.

6. The Sixth Defendant filed a Written Statement contesting the claim made by the Plaintiffs. According to the Sixth Defendant, the marriage of his daughter was performed with the funds provided by her close relatives. There was no occasion for late K. Kalimuthu to borrow a sum of Rs.5 lakhs from the Plaintiffs in connection with the marriage. The Sixth Defendant disputed the claim made by the Plaintiffs with regard to acquisition of property in her name or the name of her children. According to the Sixth Defendant the property shown as Item No.3 in the Application for attachment was purchased by the Ninth Defendant. The property shown as Item No.4 was purchased by her brother and subsequently it was settled in her favour. In short, the Sixth Defendant denied the receipt of a loan for a sum of Rs.5 lakhs from the Plaintiffs by her deceased husband or the devolution of property left by Thiru Kalimuthu so as to make the Legal Representatives liable for the alleged debt.

The issues:

7. This Court taking into account the contentions taken by Defendants 6 to 9 framed the following issues:

(i) Whether the Defendants 6 to 10 are left with any property of the deceased Kalimuthu for the Plaintiffs to proceed against them ?

(ii) Whether the Defendants 6 to 10 are liable to answer the Suit claim ?

8. Since the Suit was settled in part subsequently and the present claim of the Plaintiffs is only in respect to the second loan of Rs.5 lakhs, the following Additional Issue is framed (in) Whether the Plaintiffs have given a hand loan of Rs.5 lakhs to the deceased Kalimuthu on 20th August 2006 ?

Evidence:

9. The Plaintiffs were examined as PWs 1 & 2. The Plaintiffs have also examined PW3, who is the husband of PW1. The Plaintiffs have marked Exs.P1 to P9 on their side

10. The Sixth Defendant was examined as DWI and Exs.D1 to D6 were marked on their side.

Submissions:

11. The learned Counsel for the Plaintiffs contended that it is not open to Defendants 6 to 10 to take up a plea regarding non-availability of the property left by deceased Kalimuthu on account of the Order passed by this Court dated 11th August 2009 in Application No. 3523 of 2007 holding that the Petition Schedule property belonged to the deceased and it devolved on the Defendants. According to the learned Counsel, the question as to whether the deceased left any property to be inherited by the Defendants should be decided only at the time of execution. The Plaintiffs having proved the loan Rs.25 lakhs given to deceased Kalimuthu and having received a sum of Rs.20 lakhs from Defendants 1 to 5 are entitled to a Decree for the balance amount of Rs.5 lakhs with interest against Defendants 6 to 10. The learned Counsel further contended that the Cheque given by the deceased Kalimuthu was not presented before the Bank and photocopy of it was marked as Ex. P6. The learned Counsel contended that Defendants 1 to 5 have compromised the matter which is also an indication that there is no serious dispute with regard to the loan taken by deceased Kalimuthu. The learned Counsel therefore wanted a Decree against Defendants 6 to 10 in respect of the second loan amount of Rs.5 lakhs with interest,

12. The learned Counsel for Defendants 6 to 10 by placing reliance on the pleadings and evidence contended that the Plaintiffs have setup a false case of a hand loan of Rs.5 lakhs. According to the learned Counsel, the Plaintiffs have not clarified a serious doubt as to why the Cheque was not presented before the Bank after a period of two months. The learned Counsel contended that the Plaintiffs have not produced the original Cheque before this Court. Similarly, they have not produced the Bank Accounts to prove as to whether the amount was repaid by the deceased. It was further contended that the Plaintiffs have taken inconsistent stand in their pleadings and evidence. They have given different explanations with regard to the hand loan of Rs.5 lakhs at different stages and as such the case put up by the Plaintiffs cannot be believed. The learned Counsel with reference to the Order dated 11th August 2009 in Application No.3523 of

2007 contended that Attachment before Judgment ordered by this Court would not amount to a Decree disentitling the Defendants 6 to 10 from contesting the claim made by the Plaintiffs on merits.

Factual Analysis is:

13. The Plaintiffs in their Plaint and more particularly in Paragraph 4 contended that the Second Plaintiff has agreed to provide a loan of Rs.25 lakh is to the deceased Kalimuthu to meet his family expenditure. However, they have paid only a sum of Rs.20 lakhs. Those payments were all made by Demand Drafts. There is no issue with regard to the payment of a sum of Rs.20 lakhs, in view of the settlement made by the Plaintiffs with Defendants 1 to 5. We are now concerned only with the remaining amount of Rs.5 lakhs.

14. The Plaintiff contended that deceased Kalimuthu fixed the marriage of his daughter on 10th September 2006. A few days prior to the marriage, Thiru Kalimuthu once again approached the Second Plaintiff for a hand loan of Rs.5 lakhs to meet the marriage expenditure. The Second Plaintiff mobilized the funds and paid the said amount. Thiru Kalimuthu in acknowledgment of the receipt of a sum of Rs.5 lakhs, issued a Cheque for the said amount on 20th August 2006 and requested the Second Plaintiff to present it after a period of two months. Since there are no documents to substantiate the contention regarding providing hand loan of Rs.5 lakhs, we have to see the pleadings as well as the available documents besides the oral evidence.

15. PW2 in his evidence deposed that a sum of Rs.20 lakhs was given to Thiru Kalimuthu to meet his daughter's marriage expenditure as well as to meet the Petrol Bunk expenses of his son. The witness deposed that he has no knowledge about the date of marriage in spite of the fact that in the Plaint he has come up with a contention that the marriage was on 10th September 2006. PW2 further stated that he has not shown this amount in Iris account or in the income Tax Returns. This statement was made after admitting that he is an Income Tax Assessee. The learned Counsel for the Plaintiffs has put a specific question to PW2 that "he has encashed the Cheque and that was the reason why he has not produced the original of the Cheque". PW2 answered the said question by saying that he can produce the original Cheque. However, the fact remains that the Cheque has not been produced before the Court.

16. The Plaintiffs have stated that they have agreed to provide a loan of Rs.25 lakhs to deceased Kalimuthu to meet his family expenditure. However, they have paid only a sum of Rs.20 lakhs. The said amount was paid by way of transfer from the account of the Second Plaintiff to the First Plaintiff. Thereafter, the first Plaintiff has taken three Demand Drafts, two for a sum of Rs.9 lakhs each and last one for a sum of Rs.2 lakhs. Therefore, it is evident that a sum of Rs.20 Lakh is was paid by way of Demand Drafts. Even thereafter the Plaintiffs have obtained Promissory Note from deceased Kalimuthu marked as Ex.P5. This would make the position very clear that the Plaintiffs wanted sufficient security for the

loan advanced to Thiru Kalimuthu in spite of the fact that the loan was given by way of Demand Drafts However, when it comes to the further loan of Rs.5 lakhs, the Plaintiffs have come up with a case that it was a hand loan without any document to prove the transaction.

17. The Second Plaintiff has stated that a Cheque for a sum of Rs.5 lakhs was given on 20 August 2006 with an understanding that it would be presented after a period of two months. The Plaintiff is silent as to why the cheque was not presented even after a period of two months PW2 has also not given any explanation with respect to the said doubt. In case the Cheque was not presented, PW2 should have produced the original before this Court to substantiate his contention PW2 is an Income Tax Assessee. He has paid a amount of Rs.5 lakh in cash However, he has not recorded the said transaction in his returns. PW2 in his evidence deposed that he got this sum of Rs.5 Lakh by selling his Ayanavaram property. In fact, PW2 deposed that he did not know where the Cheque is. It was only thereafter he has given another answer that he can produce the original Cheque Even though a specific question was put to PW2 that he has already presented the Cheque and encashed it, the witness failed to produce the Bank Accounts to substantiate his contention that the Cheque was not presented.

18. The Plaintiffs have stated that the Second Plaintiff has agreed to provide a loan of Rs. 25 lakhs to the deceased in May 2006. In case they have agreed to provide the loan of Rs.25 Lakh is, there was no need for Thiru Kalimuthu to ask for another loan of Rs.5 Lakh Lakhs few days prior to the marriage of his daughter. The Plaintiff is silent as to why a sum of Rs.20 Lakh Lakhs alone was paid in spite of the Agreement entered into by the Plaintiffs with the deceased to provide a loan of Rs.25 lakhs. The extra care shown by the Plaintiffs to obtain documents evidencing receipt of loan amount of Rs.20 lakhs and the absence of documents to show the payment of a sum of Rs.5 lakhs given by way of hand loan, throws suspicion on the second transaction. The Plaintiffs miserably failed to prove that deceased Kalimuthu has taken a hand loan from them The third issue is therefore answered against the Plaintiffs.

19. The next issue relates to the property left by deceased Kalimuthu so as to enable the Plaintiffs to proceed against Defendants 6 to 10.

20. Even though there is no need to answer this issue in view of my finding that the Plaintiffs miserably failed to prove the payment of a sum of Rs.5 lakhs to deceased Kalimuthu, still, venture to consider this issue in view of the contention taken by the learned Counsel for the Plaintiff on the basis of the Order passed by this Court in Application No.3523 of 2007.

21. There is no dispute that the Plaintiffs moved this Court with an Application under Order 38, Rule 5 of the Code of Civil Procedure for Attachment of the property before Judgment. This Court having found that the Petrol Bunk business is a family business allowed the said Application. The learned Judge has clearly

stated that the opinion is prima facie in nature. The Plaintiffs have not adduced any evidence in Application No.3523 of 2007 to arrive at a definite finding with regard to the ownership of the property shown in the Schedule.

22. The Plaintiffs are now relying on the Order dated 11th August 2009 in Application No.3523 of 2007 in C.S. No 336 of 2007 to shut the defense taken by Defendants 6 to 10.

23. The attachment of property in execution of the Decree is the Rule. Attachment before Judgment is an exception. Order 38, Rule 5, gives right to the Plaintiffs to move the Trial Court at any stage of the Suit, in case the Defendant, with a view to obstruct or to delay the execution of the Decree that may be passed against him, is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. In case the Plaintiff is in a position to produce prima facie materials, it is within the jurisdiction of the Court to pass an Order calling upon the Defendants to furnish Security with an indication that in case Security is not given, the property would be attached.

24. The question, therefore, is as to whether the Order passed by this Court dated 11th August 2009 invoking Order 38, Rule 5 of the Code of Civil Procedure would stand in the way of the Defendants at a later stage of the Suit to contend that the attached properties were not originally owned by She deceased.

25. The issue raised in the Suit is no more res-integra view of the decision of the Supreme Court in S. Noordeen v. V.S. Thiru Venkita Reddiar, 1996 (3) SCC 289. The Supreme Court very clearly held that Attachment before Judgment does not create any right, title or interest on the Plaintiffs but it disables the Judgment debtor to create any encumbrance on the property. It was further held that Attachment before Judgment is an encumbrance preventing the owner of the property to create encumbrance, sale or create charge thereon. Therefore, the Order passed in an Application under Order 38, Rule 5, is not an authoritative pronouncement on title.

26. The learned Counsel for the Plaintiffs placed reliance on two Judgments in support of his contention that the Order passed by this Court in an Application under Order 38, Rule 5 of the Code of Civil Procedure is conclusive in nature. I do not propose to consider those Judgments in detail in view of the authoritative pronouncement made by the Honourable Supreme Court in S. Noordeen v. V.S. Thiru Venkita Reddiar, 1996(3) SCC 289.

27. The fact that this Court earlier found a prima facie case with respect to two items of property shown in the Schedule to the Application, would not go to show that Defendants 6 to 10, who own the said property are precluded from contending that they have not received any property from the deceased and it was their self-acquired property.

28. The Plaintiffs have not produced any acceptable materials to show that the

properties in question were purchased by the deceased Kalimuthu in the name of the Sixth Defendant. In fact, the Sixth Defendant has produced Ex.D4, Settlement Deed dated in support of her contention that her brother executed a Settlement Deed in her favour. This would make the position very clear that the property was not owned by Thiru Kalimuthu. In any case, there are no documents before this Court to support the claim made by the Plaintiffs that the property was purchased only by Thiru Kalimuthu and the Sixth Defendant was only a name lender.

29. The Plaintiffs in the Plaint simply stated that the Defendants being the beneficiary to the estate of the deceased are bound to pay the outstanding amount. They have not stated in so many words that properties were purchased by the deceased Kalimuthu in the name of his wife. In fact, in the Interlocutory Application for Attachment before Judgment, the Plaintiffs have stated that deceased Kalimuthu purchased the property in the name of his first wife Nirmala Kalimuthu. The Plaintiffs have not stated anywhere that deceased Kalimuthu purchased the property in the name of his second wife Sixth Defendant) or the children born in the said wedlock. The Order passed by this Court dated 11th August 2009 in Application No. 3523 of 2007 should be construed as an Order pertaining to the property owned by Mrs. Nirmala Kalimuthu. The Issues 1 & 2 are therefore answered against, the Plaintiffs.

30. Since the Plaintiffs failed to prove either the payment of Rs.5 laid is as a hand loan or the contention regarding the property obtained by Defendants 6 to 10 from deceased Kalimuthu, the Suit is liable to be dismissed. The issues are answered against the Plaintiffs.

31. In the result, the Suit is dismissed. No costs.