(2013) 06 MAD CK 0018

In the Madras High Court

Case No : Appeal Suit No. 518 of 1999

Padamchand Jain and Another APPELLANT

Vs

P.K. Sundaram Mudaliar RESPONDENT

Date of Decision : 21-06-2013

Acts Referred:

Citation : (2013) 5 CTC 586 : (2013) 6 MLJ 180

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : K. Bajai Sundar, for the Appellant; P.C. Ramesh for S. Kanniah, for the Respondent

Final Decision : Allowed

Judgement

R.S. Ramanathan, J.—The plaintiffs in O.S. No. 205 of 1995 are the appellants herein. The plaintiffs filed a suit in O.S. No. 205 of 1995 on

the file of the Sub Court, Chengalpattu for recovery of money on the basis of simple mortgage and that suit was dismissed. Aggrieved by the same,

the present appeal is filed.

2. The case of the plaintiffs as seen in the plaint is as follows:

The defendant/respondent herein borrowed a sum of Rs. 1,50,000/- from the plaintiffs, executed a registered simple mortgage deed dated

30.6.1992 and agreed to repay the principal with interest at the rate of 36% p.a. Thereafter, the defendant failed to repay the mortgage amount,

despite notice dated 4.5.1995 issued by the plaintiffs and therefore, the suit was filed for the recovery of the mortgage amount.

3. The defendant/respondent herein filed a written statement stating that he executed a mortgage deed for Rs. 2,10,000/- in favour of the plaintiffs,

besides that the defendant handed over four lorries bearing Reg. Nos. TNT-7626, TMY 7992, TCW 9500, CTW 8789 to the plaintiffs for sale

and the plaintiffs/appellants also sold the said lorries. But, they did not account for the same and the plaintiffs are liable to pay the sale proceeds of

the lorries to the defendant/respondent.

4. The defendant/respondent further contended that the defendant settled all dues to the plaintiffs company, totaling a sum of Rs. 3,50,000/-, but

no receipt was given by the plaintiffs. The plaintiffs handed over only one lorry bearing No. TN 4 A 5269 to the defendant, however the plaintiffs

insisted that the defendant should pay a further sum of Rs. 50,000/- for discharge of the mortgage. The defendant issued a cheque for Rs. 50,000/-

on 29.3.1995 drawn on Canara Bank, Madras in favour of the first plaintiff and even after that the defendant did not discharge the mortgage. The

plaintiffs also gave a criminal complaint against the defendant and therefore, the defendant issued a notice dated 7.4.1995 to the plaintiffs for which

the first plaintiff sent a reply containing false allegations. The defendant also preferred a criminal complaint against P.C. Jain and Ramachandran

(Manager) before the learned VIII Magistrate, George Town in C.C. No. 7082 of 1996 for the offence of cheating, misappropriation and breach

of trust and the said case was pending. In any event, the defendant/respondent was not liable to pay any amount towards discharge of the

mortgage.

5. The trial Court has framed the following issues:

(i) Whether the defendant has repaid the suit claim to the plaintiffs as per the allegation made in para No. 4 of the written statement?

(ii) To what relief the plaintiffs are entitled to?

6. On the side of the plaintiffs, the first plaintiff examined himself as P.W. 1 and S. Ramachandran examined as P.W.2 and also marked four

documentary evidence Exhibits A-1 to A-4. On the side of the defendant, the defendant examined himself as D.W.1 and three documents marked

Exhibits B-1 to B-3.

7. The trial Court held that P.W.2-Ramachandran was employed as Manager in Ambuja Roadways and Srinivasa Transports. He did not account

for the amount and therefore, the sale proceeds of the four lorries were adjusted towards the mortgage amount and consequently, the mortgage has been duly discharged by the defendant. Therefore, the trial Court dismissed the suit. Aggrieved by the same, this appeal is filed by the plaintiffs.

8. It is submitted by the learned counsel for the appellants/plaintiffs that the trial Court, having framed the issue whether the defendant discharged

the mortgage amount as per the averments in para No. 4 of the written statement erred in placing the burden on the plaintiffs and dismissed the suit,

especially when the defendant failed to prove the entrustment of the lorries to the plaintiffs.

9. The learned counsel further submitted that the written statement filed by the defendant would make it clear that the entrustment of four lorries

with the plaintiffs has nothing to do with the suit claim and it was not the case of the defendant that the lorries were entrusted to the plaintiffs with an

understanding that the said lorries can be sold by the plaintiffs and appropriate the sale proceeds towards the discharge of the mortgage loan.

10. The learned counsel for the plaintiff/appellant further contended that the defendant specifically pleaded in paragraph No. 4 of the written

statement that he discharged the mortgage amount by paying a sum of Rs. 3,50,000/- and thereafter, the plaintiffs handed over one lorry bearing

Regn. No. TN 4 A 5269. However, the plaintiffs demanded Rs. 50,000/- for discharge of the mortgage amount over and above the amount

already paid and that was also paid by him through cheque. The mortgage amount has been discharged by the defendant and it was also proved by

documentary evidence and when the defendant having raised such a plea that he paid Rs. 3,50,000/- towards discharge of the mortgage, the

burden was on the defendants to prove the payment of Rs. 3,50,000/-. However, no evidence was let in and the defendants failed to prove the

payment of Rs. 3,50,000/- towards mortgage.

11. The learned counsel appearing for the appellants further submitted that P.W.2-Ramachandran, never admitted in his evidence that he was

working as Manager for the plaintiffs and the plaintiffs are P.C. Jain and K.L. Jain. According to the evidence of P.W.2, he was working as

Manager in the Ambuja Roadways and Srinivasa Transports and Prakash Chand Jain, Ashok Kumar Jain, Vimal Kumar Jain and Lalith Kumar

Jain were the partners of the Ambuja roadways and no suggestion was put to P.W.2 that the plaintiffs were also partners of Ambuja roadways.

P.W.2 also did not state that the plaintiffs were also partners of Ambuja roadways. P.W.2 also gave evidence that the defendant entrusted four

lorries to him for the purpose of sale of those lorries for the re-payment of hypothecation amount and he sold the lorries and discharged the

hypothecation and therefore, having regard to the evidence of P.W.2, the Court below erred in holding that the plaintiffs admitted that P.W.2 was

the Manager. He therefore submitted that the Court below erred in dismissing the suit filed by the plaintiffs.

12. The learned counsel for the respondent/defendant submitted that in the legal notice Exhibit B2, it was specifically stated about the entrustment

of lorry and the sale of the lorry without notice to the respondent/defendant. According to the defendant, the plaintiffs failed to give credit of the

sale proceeds raised by sale of lorries and for that purpose, he gave a complaint against the first plaintiff and Ramachandran-P.W.2. Therefore,

without adjusting the sale proceeds towards mortgage amount, it cannot be contended by the plaintiffs that the mortgage amount was not

discharged by the defendant by entrusting the lorries.

13. The learned counsel for the respondent further submitted that P.W.2 admitted that he was the Manager in which P.L. Jain and the first plaintiff

P.C. Jain were the partners. Therefore, considering the evidence of P.W.2, the Court below rightly held that P.W.2 was employed as Manager of

Ambuja roadways and Srinivasa Transports and the plaintiffs were the owners of the transport companies. He further submitted that in Exhibit B-

2-legal notice and A-4-criminal complaint, the defendant has stated in detail about the entrustment of lorries with the plaintiffs and Ramachandran

and the plaintiffs sold the lorries but did not account for the same. Therefore, the sale proceeds of the lorries have to be adjusted towards the

mortgage amount and the same was rightly observed by the Court below and the findings of the Court below need not be disturbed.

14. On the basis of the submission of both the counsel, the following point arises for consideration:

(i) Whether the Court below was right in holding that the defendant/respondent discharged the mortgage amount by entrusting the lorries with the

appellants/plaintiffs.

15. As stated supra and as rightly contended by the learned counsel for the

appellants that the Court below, having framed the issues whether the

defendant discharged the mortgage amount, as per the written statement in paragraph No. 4, ought to have placed the burden on the defendant.

But the trial Court, without properly appreciating Exhibits B-2, A-4 and the statement of the defendant, erred in holding that P.W.2 Ramachandran

was working as Manager under the plaintiffs company and that was admitted by the plaintiffs and the four lorries were entrusted with the plaintiffs

through Ramachandran towards discharge of the mortgage amount and by selling those four lorries, the mortgage amount was discharged.

16. As stated supra, in the written statement, it is specifically stated that the mortgage amount was discharged by the payment of Rs. 3,50,000/-

and one lorry bearing Regn. No. TN 4A 5269 was returned to the defendant. Further the plaintiffs demanded Rs. 50,000/-for the discharge of the

mortgage loan and that was also paid through cheque dated 29.3.1995 drawn on Canara bank. The trial Court held that the cheque given by the

defendant for Rs. 50,000/- was returned with an endorsement. Therefore, having specifically pleaded that he paid a sum of Rs. 3,50,000/-

towards mortgage loan and also paid another sum of Rs. 50,000/- towards mortgage amounts a duty is cast upon the defendant to prove the

discharge of the mortgage amount as claimed by him. Admittedly, no evidence was let in by the defendant to prove the payment of Rs. 3,50,000/-

towards mortgage amount.

17. On the other hand, the Court below proceeded on the basis that the four lorries were entrusted with the plaintiffs and Ramachandran by the

defendant and those four lorries were sold by the plaintiffs but the sale proceeds were not adjusted towards the mortgage amount and therefore,

the mortgage amount was discharged.

18. In para 3 of the written statement, it was stated that the defendant entrusted of four lorries and also pleaded that the plaintiff failed to account

for the sale proceeds. He never pleaded that the lorries were entrusted towards discharge of the mortgage amount and therefore, he was not liable

to pay the amount. He further pleaded that he repaid Rs. 3,50,000/- towards the mortgage amount. Therefore, the findings of the trial Court that

the defendant entrusted four lorries with the plaintiffs and the plaintiffs sold those four lorries, but did not account for the sale proceeds and therefore, the sale proceeds, were appropriated towards the mortgage amount, is without any evidence. Even assuming that the defendant

entrusted four lorries with the plaintiff for the purpose of sale, in the absence of any pleadings regarding adjustment of sale proceeds towards the

mortgage amount, the entrustment of four lorries can only be construed as a separate transaction and if the plaintiffs failed to account for the same,

the defendant ought to have proceeded against the plaintiffs for recovery of the amount, but he cannot claim any adjustment of the sale proceeds of

four lorries towards the mortgage amount, when he specifically pleaded that he repaid Rs. 3,50,000/- towards mortgage amount.

19. Notwithstanding the same, the defendant failed to prove the entrustment of four lorries with the plaintiffs, considering the evidence of P.W.2.

P.W.2 admitted in his evidence that four lorries were entrusted with him for sale to discharge the loan amount payable to the financiers and the

lorries were sold and the loan payable by the defendant towards the financiers was repaid.

20. In Exhibit B-2 is legal notice sent by the defendant and Exhibit A-4 is criminal complaint given by the defendant, wherein he only stated that the

plaintiffs were entrusted with four lorries and they sold the lorries but did not account for the same and therefore, the plaintiffs were guilty of

cheating and guilty of breach of trust and he never stated in Exhibits B-2 and A-4 that the lorries were entrusted towards the discharge of the

mortgage amount.

21. Therefore, considering the pleadings and the evidence adduced by the defendant and the plaintiffs, I hold that the defendant failed to discharge

the burden that the mortgage wad discharged by payment of Rs. 3,50,000/-. The defendant also failed to prove that the lorries were entrusted with

the plaintiffs and there was an agreement between him and the plaintiffs to adjust the sale proceeds of the lorries towards the mortgage amount.

Hence, the findings of the trial Court that the lorries were entrusted with the plaintiffs and the plaintiffs sold the lorries and sale proceeds were

adjusted towards the mortgage amount and therefore, the mortgage was discharged are erroneous. Hence, the point for consideration is answered

in favour of the appellants. In the result, the judgment and decree of the trial Court are set aside and the suit is decreed as prayed for. The appeal is allowed. There is no order as to costs.

