
(2005) 10 MAD CK 0049

In the Madras High Court

Case No : C.R.P. (PD) No. 175 of 2005 and C.M.P. No. 1840 of 2005

Rajamani Ammal, Sairaj and Balaji

APPELLANT

Vs

Sivasakthi Benefit Fund Ltd.

RESPONDENT

Date of Decision : 17-10-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 1, Order 13 Rule 2, Order 13 Rule 4, Order 13 Rule 4(1), Order 13 Rule 6
Transfer of Property Act, 1882 — Section 59

Citation : (2005) 4 MLJ 650

Hon'ble Judges : P.D. Dinakaran, J

Bench : Single Bench

Advocate : K.M. Nalinishree, for the Appellant; Srinath Sridevan, for the Respondent

Judgement

P.D. Dinakaran, J.—This revision petition is directed against the order dated 16.11.2004 made in I.A. No. 189 of 2004 in O.S. No. 45 of 2004 on the file of District Court, Nagapattinam, refusing to reject the document marked as Ex.A-3 as inadmissible in evidence.

2. The revision petitioners are defendants in the suit laid by the respondent/plaintiff for recovery of a sum of Rs. 7,50,929/- by deposit of title deeds with the respondent/plaintiff and thereby creating a mortgage. Incidentally the respondent/plaintiff pleaded that a memorandum dated 18.2.1995 was reduced to writing between the parties as to the deposit of the said title deeds, pertaining to the immovable properties of the revision petitioners/defendants. Contending that the said memorandum dated 18.2.1995 was neither duly stamped nor registered, the revision petitioners/defendants sought to reject the said memorandum dated 18.2.1995 by filing I.A. No. 189 of 2004. The trial Court by the impugned order dated 16.11.2004 dismissed the said application, against which the present revision petition.

3. The core contention of the learned counsel for the petitioners/defendants is

that while deciding as to whether the memorandum dated 18.2.1995 could be rejected or not, the learned trial Judge had gone beyond the scope of the powers conferred on him under Order XIII Rule 6 read with Rule 4(1) of Code of Civil Procedure, which read as under,

"Order XIII

Rule 6. Endorsements on documents rejected as inadmissible in evidence-- Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of Rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

Rule 4. Endorsements on documents admitted in evidence-- (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:-

- (a) the number and title of the suit,
- (b) the name of the person producing the document,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted;

and the endorsement shall be signed or initialled by the Judge."

The learned counsel further submits that the recitals in the memorandum dated 18.2.1995 would show that the borrower has tendered his title deeds only as a security for the repayment of the loan amount borrowed by him on a promissory note and that the borrower, namely the revision petitioners executed Ex.A-3 confirming the transaction by deposit of title deeds and in addition to that he has stated that if the respondent/plaintiff wants any more better security, he is always ready to execute a legal mortgage and therefore the memorandum confirms only the past transaction and not the transaction done at the time of the execution of the said memorandum Ex.A-3 and that the trial Court ultimately held that the said memorandum is admissible in evidence. In other words, the contention of the learned counsel for the petitioners is that the learned trial Judge has decided the trial of the suit itself in the above interlocutory application and nothing is left to be decided in the trial and hence the revision petitioners are prejudiced.

4. Mr. Srinath Sridevan, learned counsel appearing for the respondent/plaintiff fairly submits that even though the revision petitioners/defendants are not entitled to seek for rejection of the document at this stage as held by the learned trial Judge, the finding as to the merits and admissibility of the memorandum, in law, is liable to be eschewed as the said findings admittedly exceeds the jurisdiction conferred on the learned trial Judge. Learned counsel placed reliance

on the decision reported in 2001 (2) CTC 391 (S. Mohammad Ali v. Basheer Ahmed), wherein it is held that the permission granted to produce the document under Order XIII Rule 2 of CPC cannot be construed to mean that the documents are automatically admissible in law and it is not permissible for the Court to decide as to its admissibility while exercising the powers conferred under Order 13 Rules 1 and 2 .

5. It is settled law that when a debtor deposits to the creditor the title deeds of his property with an intent to create a security, the law implies a contract between the parties to create a mortgage and no registered instrument is required u/s 59 of the Transfer of Property Act, as in other forms of the mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain and the document will be the sole evidence of its terms. In such a case, the deposit and the document both form integral part of the transaction and are essential ingredients in the creation of the mortgage (vide Rachpal Mahraj Vs. Bhagwandas Daruka and Others,). But however, such a contention cannot be gone into at this stage as agreed by the counsels on either side. Therefore, suffice it to make it clear that while the revision petitioners/defendants are not entitled to seek rejection of the memorandum dated 18.2.1995 solely for want of stamp duty and registration, no finding could be rendered at this stage as to the merits of the recitals in the memorandum dated 18.2.1995 as well as its admissibility in law, as such a finding, in my considered opinion, will amount to pre-conceived notion and will be pre-mature in nature.

6. In view of the above, suffice it to eschew the findings rendered by the learned trial Judge as to the merits of the recitals in the memorandum dated 18.2.1995 as well as its admissibility. The parties are at liberty to make their submissions before the trial Court both for substantiating the memorandum dated 18.2.1995 and objecting the same and the same shall be decided based on the evidence to be adduced.

7. The revision petition is ordered accordingly. No costs. Connected CMP is closed.