P. Ragothaman Vs A.B. Govardhan

Court: MADRAS HIGH COURT

Date of Decision: Feb. 22, 2017

Acts Referred: Civil Procedure Code, 1908 (CPC) - Order 34 Rule 1

Citation: (2017) 3 CTC 777 : (2017) 3 MLJ 522

Hon'ble Judges: Mr. K.K. Sasidharan and Mr. V. Parthiban, JJ.

Bench: Division Bench

Advocate: Mr. R. Thiagarajan, Advocate, for the Appellant; No Appearance, for the Respondent

Final Decision: Disposed Off

Judgement

K.K. Sasidharan, J. - The civil suit filed by the respondent, praying for a mortgage decree was decreed by the learned single Judge with interest

at the rate of 36% per annum. Feeling aggrieved by the judgment and decree, dated 1 April 2010 in C.S.No.701 of 2005, the defendant is before

us.

Background Facts:

2. The respondent laid the suit against the appellant on the ground that he borrowed a sum of Rs.10 lakhs after executing 4 Promissory Notes.

Subsequently also, the appellant borrowed money on various occasions. However, there was no follow up action to discharge the loan. The

cheques issued by the appellant was dishonoured and the same resulted in initiating proceedings under Section 138 of the Negotiable Instruments

Act. The respondent filed the suit on the strength of the agreement, dated 24 June 2000.

3. The suit was contested by the appellant by filing written statement. The appellant disputed the mortgage, stated to have been executed by him.

The appellant contended that for the very same amount, the respondent filed C.C.No.7806 of 2001 before the V Metropolitan Magistrate,

Egmore, Chennai and as such, he is not entitled to file a civil suit for recovery of money.

4. The learned single Judge decreed the suit on the strength of the document dated 24.06.2000 marked as Ex.P1. According to the learned Judge,

Ex.P1 was executed by the appellant voluntarily and as such, the respondent is entitled to a mortgage decree.

Submissions by Appellant:

5. The learned counsel for the appellant contended that the respondent compelled the appellant to execute Ex.P1. It was not a document

evidencing mortgage. Ex.P1 was only a Memorandum of Settlement. Therefore, it cannot be said that there was a valid mortgage. The learned

counsel further contended that even if Ex.P1 is considered as a Mortgage Deed, still, the respondent is not entitled to interest at the rate of 36%.

According to the learned counsel, Ex.P1 does not contain any direction for payment of interest. This aspect was not considered by the learned

single Judge and as such, the decree is liable to be set aside.

6. None appeared on behalf of the respondent.

Point for consideration

7 (i) Whether there was a valid mortgage created by the appellant in favour of the respondent to give him cause of action for filing a suit for the

grant of a mortgage decree?

(ii) Whether the interest awarded by the Trial Court is correct? Discussion

8. The respondent filed the civil suit in C.S.No.701 of 2005 on the strength of Ex.P1. Ex.P1 proceeds as if there was a settlement in the presence

of the villagers and the appellant voluntarily executed the document. The evidence of the appellant as D.W.1 was taken note of by the learned

single Judge to arrive at a finding that the appellant voluntarily executed a mortgage, as per Ex.P1 and as such, he is bound by the said document.

9. Since the suit is on the strength of a mortgage deed, it is necessary to consider whether Ex.P1 was executed as a mortgage or it was only an

admission of liability.

9a) The plaint averments if taken as a whole would not prove that there was a mortgage executed by the appellant for a sum of Rs.11 lakhs. The

plaint proceeds as if there were several financial transactions between the respondent and the appellant covered by cheques, promissory notes and

mortgage. The plaint averments are self- contradictory, vague and does not make out a clear case of mortgage. Even according to the respondent,

documents were given only as security, meaning thereby, there was no mortgage with respect to the agreement dated 24 June 2000. We are not

concerned with other transactions and mortgages, if any. Since the respondent has taken up a specific contention that a mortgage was created on

24 June 2000, pursuant to the agreement in Ex.P1, the other mortgages or the related transactions are irrelevant for deciding the lis. Except the

agreement dated 24 June 2000, which is in the nature of an undertaking to pay the amount, there is nothing on record to prove the mortgage. The

agreement dated 24 June 2000 cannot be construed to be a mortgage of property. In any case, the plaint averments are not sufficient to arrive at a

conclusion that there was a valid mortgage entitling the respondent to sue for a mortgage decree.

10. We have perused the evidence of P.W.1 and D.W.1. The appellant in his evidence very clearly stated that he was threatened and forced to

execute the document dated 24 June 2000. It is true that there was no supporting evidence adduced by him to show as to how he was threatened

and forced to execute Ex.P1. It was his further evidence that the parent document was handed over to the respondent on the same day. The

recitals of the document marked as Ex.P1 and duly extracted in the judgment does not contain any clear admission that a mortgage was created on

the property. The document proceeds as if the appellant agreed to pay a sum of Rs.11 lakhs in full and final settlement. There is nothing to show

that a mortgage was created. Even in the evidence given by the respondent as P.W.1, it was his case that the parent document was handed over

only as a security. Such being the evidence on record, the learned single Judge was not correct in giving a finding that mortgage was created and

the title deed was given in furtherance of the mortgage. We are therefore of the view that there is no evidence adduced by the respondent to show

that a mortgage deed was executed by the appellant and as such, he is entitled to a mortgage decree. The first point is therefore decided against

the respondent.

11. The learned single Judge awarded interest at the rate of 36% on Rs.11 lakhs till the date of realisation. There was no stipulation to pay interest

in Ex.P1. Even then, the learned Trial Judge decreed the suit as prayed for, without making an attempt to consider as to whether the respondent

was entitled to interest at the rate of 36% prior to the institution of the suit, during the currency of the suit and after the decree.

12. The Supreme Court in N.M. Veerappa v. Canara Bank and others [(1998) 2 SCC 317] considered the question regarding payment of

interest under Order 34, Rule 11 CPC. The Supreme Court indicated the correct rate of interest in a mortgage suit. The Supreme Court observed

thus:

18. From the aforesaid rulings the following principles can be summarised. (a) Before 1929, it was obligatory for the Court to direct the contract

rate of interest to be paid by the mortgagor on the sum adjudged in the preliminary decree, from the date of suit till the date fixed for payment as

per Order 34, Rule 2 (c)(i) or Order 34, Rule 4 (1) or Order 34, Rule 7 (c)(i), respectively in suits for foreclosure, sale or redemption. (b) But

after the 1929 Amendment, because of the words used in the main part of Order 34, Rule 11 , namely that ""the Court may order payment of

interest"" it is no longer obligatory on the part of the Court while passing preliminary decree to require payment at the contract rate of interest from

date of suit till the date fixed in the preliminary decree for payment of the amount. It has been so held in Jaigobind case [AIR 1940 FC 20 : 44

CWN 21] by the Privy Council and by this Court in S.P. Majoo case [(1969) 1 SCC 220 : (1969) 3 SCR 33] that the new provision gives a

certain amount of discretion to the Court so far as pendente lite interest is concerned and subsequent interest is concerned. (c) It is no longer

obligatory to award the contractual rate after date of suit and up to the date fixed for redemption as above stated even though there was no

question of the contractual rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. (d) Even if the

Court otherwise wants to award interest, the position after the 1929 and 1956 Amendments is that the Court has discretion to fix interest from

date of suit under Order 34, Rule 11 (a)(i) up to date fixed for payment in the preliminary decree, the same rate agreed in the contract, or, if no

rate is so fixed, such rate as the Court deems reasonable - on the principal amount found or declared due on the mortgagor is concerned. (e) The

Court has also power to award from the date of suit under Order 34, Rule 11 (a)(iii) a rate of interest on costs, charges and expenses as per the

contract rate or failing such rate, at a rate not exceeding 6%. This is the position of the discretionary power of the Court, from the date of suit up to

the date fixed in the preliminary decree as the date for payment. (f) Again under Order 34, Rule 11 (b) so far as the period after the date fixed for

payment is concerned, the Court, even if it wants to exercise its discretion to award interest up to date of realisation or actual payment, on the

aggregate sums specified in clause (a) of Order 34, Rule 11 , could award interest at such rate as it deemed reasonable.

13. In the subject case, there was no agreement to pay interest at the rate of 36%. The respondent was therefore not entitled to claim interest at

the rate of 36%. Since we have already arrived at a finding that the respondent is not entitled to a mortgage decree, the second point is now only

academic. However, we answered the said issue only to correct the fundamental mistake in awarding interest at the rate of 36% without there

being an agreement to pay such an exorbitant rate of interest. The second point is answered against the respondent.

14. The respondent miserably failed to plead and prove that there was a mortgage executed by the appellant thereby enabling him to file a

mortgage suit. The suit was not filed for a personal decree. It was a simple mortgage suit filed under Order 34, Rule 1 of the Code of Civil

Procedure to grant a preliminary mortgage decree for recovery of the amount with interest. There was absolutely no prayer for the grant of a

personal decree against the appellant. The respondent has not paid court fee also for the grant of personal decree against the appellant. In view of

our finding that there was no mortgage, the decree passed by the learned single Judge is liable to be set aside.

15. In the result, the decree dated 1 April 2010 is set aside. The civil suit in C.S.No.701 of 2005 is dismissed.

16. In the up shot, we allow the intra court appeal. No costs. Consequently, connected miscellaneous petitions are closed.