

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 08.11.2016

PRONOUNCED ON:10.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

CS.No.450 of 2010

F.Ashok Kumar
Plaintiff

Vs

S.Ayub Khan

Defendant

Prayer:- This Civil Suit is filed under Order IV Rule 1 of the Original Side Rules and Order 37 Rule 1 of Original Side Rules read with Order 34 Rule 15 of CPC and Order VII Rule 1 of CPC.

For Plaintiff : Mr.V.K.Elango

For Defendant : Mr.Shah & Shah
Defendant-Set Exparte

JUDGEMENT

This civil suit has been filed to pass a judgement and decree, against the Defendant:-

- a) directing the Defendant to pay the Plaintiff a sum of Rs.31,59,500/- (Rupees thirty one lakhs fifty nine thousand and five hundred only) with interest at 12% per annum on Rs.17,75,000/- from the date of the plaint till the date of realisation, failing which, directing the sale of the mortgaged property more fully described in the schedule and directing appropriation of the sale proceeds towards the decreed amount and if there is any deficit, pass a personal decree against the

Defendant for the deficit.

- b) granting permanent injunction restraining the Defendant from alienating or encumbering the suit property without settling the amounts due to the Plaintiff as claimed in this suit.
- c) directing the Defendant to pay the costs of the suit.

2. The case of the Plaintiff, in a nutshell, as set out in the plaint, is that the Defendant had borrowed a sum of Rs.17,75,000/- from the Plaintiff, by executing a promissory note, dated 24.02.2007, agreeing to repay the same with interest at 24% p.a. The Defendant is the lessor of the suit property viz. Plot No.4B, Old No.471, Anna Salai, Nandanam, Chennai-35 under the lease agreement dated 18.11.1999 for 50 years. The Defendant had also deposited the title deeds pertaining to the suit property with the Plaintiff as security for said borrowed amount under the said promissory note and also executed a letter dated 5.3.2007, admitting the borrowal and confirming the deposit of the said tile deeds as security. The Defendant had also executed a letter dated 27.2.2007, empowering the Plaintiff to collect the monthly rent of Rs.75,000/-, which is inclusive of interest of Rs.35,000/- and principal amount of Rs.40,000/-, from his tenant A.Pandian, who is running a hotel business in the suit property. The Defendant had also informed the tenant by letter dated

25.3.2007 about such authorisation given to the Plaintiff to collect the rent from him. However, the tenant did not pay the rent to the Plaintiff. The Defendant alone has been receiving the rent, but however, he did not pay any amount from the beginning. As on April 2010, the interest accrued was Rs.13,84,500/-. Further, the Defendant is attempting to alienate the suit property without paying the dues. There was an equitable mortgage created by the Defendant by depositing the title deeds with the Plaintiff and hence, the Plaintiff has got a charge over the suit property by way of equitable mortgage. In all, the Defendant is due and liable to pay a sum of Rs.31,59,500/-. In spite of several demands, since the Defendant did not come forward neither to pay the interest nor the principal amount, the Plaintiff had sent a legal notice dated 20.1.2010, for which there was no reply from the Defendant. In such circumstances, this civil suit has been filed for the reliefs as stated above.

3. After service of notice to the Defendant, the written statement had been filed by the Defendant only in the year 2013, denying the plaint averments, particularly, the borrowal of the amount and execution of the promissory note on the ground that it was a forged one, by using blank papers and playing fraud. In the written statement, it had

also been denied that the Plaintiff had a charge over the leasehold property of the Defendant on the ground that when the Defendant is the lessor of the suit property or in other words, he is not the owner of the suit property, the question of mortgaging the leased out property will not arise. It had also been alleged in the written statement that the title documents had been stolen by the Plaintiff and had been misused by the Plaintiff.

4. The Plaintiff had filed the proof affidavit for his chief examination and receipt of 11 documents as documentary evidence. In the Evidence, the Plaintiff had examined himself as PW.1 and marked Exs.P1 to P11 as documentary evidence. On the side of the Defendant, neither any document was filed nor any witness was examined.

5. This court heard the learned counsel for the Plaintiff and considered his submissions and also perused the materials placed on record.

6. Though the Defendant is represented by his counsel, the Defendant was set exparte by order dated 01.11.2016, on the ground that though the Plaintiff had let in evidence, the Defendant did not come forward to cross examine the witnesses of the Plaintiff in spite of sufficient opportunity granted to him.

7. The relief (a) sought for by the Plaintiff is in two folds, viz. one part is for recovery of money and another is for sale of the property in question and appropriation of the sale proceeds towards the amount due. The relief (b) is for permanent injunction, restraining the Defendant from alienating the suit property.

8. In so far as the part of the relief (a) relating to recovery of money is concerned, it is seen from the documentary evidence Ex.P1 to Ex.P11 and the oral evidence, particularly, Ex.P1 the promissory note dated 24.02.2007, the borrowal of the amount has been established. Further, though the Defendant had filed a written statement, denying the plaint averments, he did not come forward either to cross examine the Plaintiff's witness or to let in evidence to substantiate the averments made in the written statement. Hence, it can be held that the Plaintiff has proved the suit claim in respect of the said part of the relief (a) relating to recovery of money under Ex.P1 alone.

9. In so far as the other part of the relief (a) relating to sale of the property in question and appropriation of the sale proceeds towards the amount due and the relief (b) relating to permanent injunction, sought for based on the charge allegedly created over the suit

property by deposit of the title deeds are concerned, it is well settled that for enforcing a charge or lien created over the property under a mortgage, first of all, there must be a valid mortgage entered into between the parties. In the case on hand, there was no valid mortgage executed between the Plaintiff and the Defendant at all and there were only exchange of letters, which would not fall under the category of mortgage, as there was no consideration received by the mortgagee, the Plaintiff herein. Hence, the relationship of the mortgagor and the mortgagee between the Plaintiff and the Defendant is not subsisting at all. Further, since the Defendant is only the lessor of the suit property, the question of alienation and creating encumbrance over the suit property will also not arise. Even if there is any encumbrance by the Defendant, it is not for the Plaintiff to question the same and it is for the owner of the suit property. Consequently, permanent injunction restraining Defendant as prayed for under the relief (b) cannot be granted. Like wise, that part of the relief (a) relating to sale of the property in question and appropriation of the sale proceeds towards the amount due also cannot be granted.

10. In the result, considering the oral and documentary evidence, viz. Ex.P1 to Ex.P11 adduced by

PW.1, this Court is of the view that the plaintiff has proved the suit claim only in respect of the part of the relief (a) relating to recovery of money. Accordingly, in so far as the relief (b), seeking permanent injunction, is concerned, this civil suit is dismissed. With respect to the part of the relief (a) relating to sale of suit property and appropriation of the sale proceeds also, this civil suit is dismissed. In so far as the part of the relief (a), seeking recovery of money alone, is concerned, this civil suit is decreed with costs. Time for payment is three months.

sd/.C.V.K.J
10.11.2016

//Certified to be a true copy//

Dated this the day of 2017

R.s/21.04.2017

COURT OFFICER

सत्यमेव जयते

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

WEB COPY