IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : **06.02.2017**

Judgment pronounced on : **02.03.2017**

CORAM

THE HONOURABLE MR.JUSTICE **C.V.KARTHIKEYAN**

C.S.No.164 of 2009

S.Madhan ... Plaintiff

Vs

K.Sacheedranadh Reddy ... Defendant

Prayer :Plaint filed under Order XXXVII Rule 1 of O.S. Rules read with Order VII Rule 1 of C.P.C, praying for the following judgment and decree:-

(a) Directing the Defendants to pay a sum of Rs.15,00,000/- being the Principal and Rs.20,90,000/- being interest, in all totaling to Rs.35,90,000/- (Rupees thirty five lakhs and ninety thousand only) as per the terms agreed together with.

(b) Further interest at 24% per annum on the amount of Rs.15,00,000/- from the date of the Plaint till the date of realization.

(c) Directing the sale of property morefully described in the schedule hereunder, in case the defendant fails to pay the suit claim for recovery of suit claim/deficit therein.

(d) Directing the defendant K.Sacheedranadth reddy to pay personally the deficit amount due in case the proceeds fail short of the amount due as above.

(e) Directing the defendant to pay the cost of the suit.

For Plaintiff : Mr.R.Thiagarajan for Mr.K.M.Srirangan

For Defendant : Mr.A.C.Chandrasekaran

J U D G M E N T

This suit has been filed under Order XXXVII Rule 1 of O.S. Rules read with Order VII Rule 1 of C.P.C. for a direction against the defendant to pay a sum of Rs.15,00,000/- towards principal and Rs.20,90,000/- towards interest totalling Rs. 35,90,000/- and further interest at 24% p.a. on Rs.15,00,000/- from date of plaint till date of realization and in failure for a direction for sale of the schedule mentioned property and for a personal decree against the defendant in case the sale proceeds falls short of the amount due and for cost.

2. In the plaint, it has been stated that the defendant approached the plaintiff for a loan of Rs.5,00,000/- on 05.08.2000 and agreed to repay the same at the rate 24% p.a. and created equitable mortgage of the Flat bearing Door No.2, Krishna Vihar Apartments, Ground Floor, No.132, 7th Main Road, Anna Nagar East, Chennai 600

040. Again on 09.01.2004, the plaintiff advanced a further sum of Rs.10,00,000/- together with interest at 24% p.a. on the request of the defendant. It was agreed that the interest shall be payable on or before 10th of every succeeding English calendar month. Equitable Mortgage was created by deposit of original title deed. The defendant agreed to repay the loan on or before 30.06.2004. A mortgage deed was also executed in this regard. The plaintiff demanded repayment of the money.

3. On 30.06.2004 the defendant acknowledging the loan amount executed promissory note for Rs.15,00,000/- undertaking to repay the same at 24% p.a. A cheque bearing No.129466 for Rs.15,00,000/- dated 06.08.2004 drawn on ABN Amro Bank, Haddows Road, Chennai 600 006 was also issued by the defendant. When it was presented for collection, it was returned with an endorsement "account closed". The plaintiff had filed C.C.No.27315 of 2004 on the file of V M.M. Court, Egmore, u/s. 138 N.I.Act, which is now pending before the IX M.M.Court, Saidapet. According to the statement of accounts, a outstanding balance of Rs.35,90,000/- is payable by defendant. The particulars of the mortgage had been given in the plaint which has been filed according to Form 84 of the Original

Side Rules. Claiming that the defendant is due and liable to pay the sum as mentioned in the plaint, this suit has been filed.

4. In the written statement, the defendant stated that the plaintiff had already taken steps on the basis of the cheque, which had been returned and the suit is therefore not maintainable. It had been further stated, that the defendant had paid the entire amount to the plaintiff, but the plaintiff did not issue receipts or return the documents. The defendant denied the liability to the suit claim. The rate of interest claimed has also been disputed. The defendant claimed that the suit is also barred by the law of limitation. The defendant therefore stated that the suit should be dismissed.

5. On perusal of the pleadings, this Court on 28.08.2015 framed the following issues:-

> *"1. Whether the plaintiff is entitled for Rs.35,90,000/- (Rupees thirty five lakhs and ninety thousand only) from the defendant?*
>
> *2. Whether the plaintiff is entitled for future interest at the rate of 24% per annum on the principal amount?*

3. Whether the plaintiff is entitled for any personal decree against the defendant?

4. To what relief the plaintiff is entitled to?"

6. To substantiate the claim, the plaintiff examined himself as P.W.1 and marked exhibits P1 to P7. Ex. P1 is the Mortgage Deed for deposit of title deed executed by the defendant dated 05.08.2000. Ex.P2 is the Mortgage deed for deposit of title deed executed by the defendant dated 09.01.2004. Ex.P.3 is the certified copy of the cheque and the memo issued by the Bank dated 06.08.2004. Ex.P5 is the Encumbrance Certificate dated 17.09.2008. Ex.P6 is the original Sale Deed dated 06.09.1999 registered as Document No.2647 of 1999 in the office of the Sub Registrar, Anna Nagar, handed over by the defendant at the time of creation of mortgage and Ex.P7 is the Original Plan of the schedule mentioned property. Scheduled mentioned property marked during cross examination of the defendant. During cross examination of P.W.1 the defendant marked Ex.D1 which is the certified copy of legal notice dated 19.08.2004 issued on behalf of the plaintiff before filing Criminal Case under Section 138 Negotiable Instrument Act. Ex.D.2 was also marked during the cross examination of P.W.1 which is the

certified copy of reply to Ex.D1 and also Ex.D3 which is the certified copy of the complaint filed before the Magistrate Court. The plaintiff also examined as P.W.2, Pratap K.Mituri, a Chartered Accountant, who knew both the plaintiff and the defendant and had signed as a witness in Wx.P1 and P2.

7. The defendant examined himself as D.W.1 and marked Ex.D4 which is the Bank cheque book of ABN Amro Bank, Ex.D5, an agreement for construction dated 05.10.1999 entered into between the defendant and Kareti Builders, Ex.D6, the rectification deed of Ex.D5 and Ex.D7 the assessment order of Chennai Corporation dated 07.07.1999.

8. Heard arguments advanced by Mr.R.Thiagarajan, learned counsel for the plaintiff and Mr.A.C.Chandrasekaran, learned counsel for the defendant.

9. Issue No.1: The suit has been filed under Order XXXVII Rule 1 of Original Side Rules read with Order VII Rule 1, Code of Civil Procedure and in accordance with Form 84 of the Original Side Rules. Order XXXVII of the Original Side Rules relate to mortgages and charges. According to Order XXXVII Rule 2 of Original Side Rules, the plaint should be in Form Nos.84 to 87 with variations as is necessary. Under Form 84, in a suit on mortgage for

personal decree and sale, the description of the mortgage property, the date of the mortgage, a description of encumbrance and the name of the owner must be given. The details of the amount advanced and the amount due towards principal and interest was also be given. In this case, the plaintiff has claimed that on 05.08.2000, the defendant had approached the plaintiff for a loan of Rs.5,00,000/- and agreed to repay the same at 24% p.a. and created a equitable mortgage of the suit property bearing Flat No.2, Krishna Vihar Apartments, Ground Floor, No.132, 7th Main Road, Anna Nagar East, Chennai 600040. The mortgage deed created on 05.08.2000 had been marked as Ex.P1, and it has been entered between the defendant and the plaintiff. The defendant had not disputed the execution of the mortgage deed.

10. In the written statement, it must be kept in mind, that the defendant has claimed that he had discharge the amount. When the defendant has claimed discharge, naturally it leads to an inference, that the execution of the mortgage deed and other documents has been admitted. The defendant in his written statement has repeatedly stated that he had discharged the amounts borrowed, but that the plaintiff did not issue receipts and did not return the original document given by the defendant. If that is the

stand of the defendant, then he should have let in evidence first, to establish discharge of the loan.

11. However, in this case the plaintiff had let in evidence first. Ex.P1 has been signed by the defendant and the amount of borrowal namely Rs.5,00,000/- is mentioned. The interest is also mentioned which is 24% p.a. The description of the property for which the title deed has been deposited has also been given. The defendant had agreed to repay the loan amount on or before 05.11.2000. In the schedule, the document namely sale deed bearing document No.2647 dated 06.09.1999 has also been mentioned. This sale deed has been marked as Ex.P6. In this connection the learned counsel for the plaintiff relied on ***[1973 (1) MLJ 334]*** in which the three essentials, which are required for equitable mortgage had been given. It had been stated in the said judgment as follows:

> *..... It would be seen from section 58 of the Transfer of property Act that three essentials are required for an equitable mortgage, namely (1) a debt, (2) deposit of title deeds and (3) the intention that the delivery of documents should be security for the debt. In order to create a valid mortgage, it is not necessary that the whole, or even the most material of the documents deposited should show a complete or good title in the*

depositor and it is sufficient if the deeds deposited bona-fied relate to the property or are material evidence of title and which are shown to have been deposited with the intention of creating a security thereon.

12. It has been further stated in the plaint, that the defendant again approached the plaintiff for a further loan of Rs.10,00,000/- and again created an equitable mortgage by deposit of title deed. This mortgage by deposit of title deed dated 09.01.2004 had been marked as Ex.P2. The signature in this documents has also not been disputed by the defendant. It is the contention of the learned counsel for the defendant that execution of the earlier mortgage had not been mentioned in Ex.P2. It is not necessary and each document will have to be seen on its own merits. Ex.P1 reflects advance of Rs.5,00,000/- and Ex.P2 reflects advance of Rs.10,00,000/-. In further confirmation that entire amount advanced was Rs.15,00,000/-, the plaintiff also marked Ex.P3 the promissory note executed by the defendant for a sum of Rs.15,00,000/- dated 30.06.2004.

13. To further substantiate, the plaintiff has also filed the certified copy of the cheque bearing No.129466 dated 06.08.2004 drawn on ABN Amro Bank for Rs.15,00,000/-

issued by the defendant to the plaintiff. The said cheque was marked as Ex.P4. When the cheque was presented for payment it was returned by the Bank on the ground "funds insufficient". The report memo issued by the Bank is also part of Ex.P4. All these documents clearly shows that the defendant had borrowed money. In fact there is no denial in the written statement. In the written statement, the prime thrust is on discharge. The defendant can plea discharge only when he accepts and admits execution of the documents as stated in the plaint.

14. In this case, it is very clear that the plaintiff has advanced a total sum of Rs.15,00,000/- at interest 24% p.a. and Ex.P1 and Ex.P2 substantiate that an equitable mortgage by deposit of title deed had been created by the defendant. The plaintiff has also produced the encumbrance certificate of the property which is marked as Ex.P5. The actual sale deed deposited by the defendant has been produced as Ex.P6 and the original plan relating to the defendant property has been produced as Ex.P7. The case of the defendant is that the defendant had not handed over Ex.D5 and D6 which are construction agreement dated 05.10.1999 and rectification deed dated 29.03.2000 and consequently, there was no intention to create mortgage.

15. I reject the stand. The actual title deed of the property is the sale deed which is marked as Ex.P6. Ex.P6 dated 06.09.1999 and registered as document No.2647 of 1999 is the document through which the defendant had purchased the suit schedule property. This shows that the crucial document relating to the title of the property had been handed over by the defendant to the plaintiff. Consequently, I hold that the mortgage deeds Ex.P1 and P2 are legally admissible documents. According to the learned counsel for the defendant Ex.P1 and Ex.P2 are unregistered documents. It has been stated that they should be registered. Again, I do not agree. The primary transaction is borrowal of money and as security there of the defendant had handed over Ex.P6 sale deed. While handing over Ex.P6, he had executed Ex.P1 confirming the same. In fact Mortgage can be created by simply handing over the title document.

16. On consideration of the evidence, I hold that the plaintiff has established that the defendant had borrowed a total sum of Rs.15,00,000/-. The defendant had not established his stand in the written statement that he has discharged the loan. P.W.2 has very clearly stated that he knows about the suit transaction and particularly about

the fact that the mortgage deed was duly signed and handed over by the defendant to the plaintiff. He also spoke about the handing over of Ex.P6. He was also a witness for Exhibits P1 and P2. He further stated that he personally witnessed the signing of documents. Though P.W.1 and P.W.2 were cross examined on behalf of the defendant, the facts of borrowal and deposit of title deeds had not been de-established by the defendant. In such circumstances, I hold that the plaintiff has made a strong case and consequently, Issue No.1 is answered in favour of the plaintiff and I hold that the plaintiff is entitled to Rs.35,90,000/- from the defendant being Principal of Rs.15,00,000/- and interest of Rs.20,90,000/- at the mutually agreed rate of 24% p.a. till filing of the suit. The plaintiff is entitled to the contractual interest of 24% p.a. as agreed by the parties. Consequently Issue No.1 is answer in favour of the plaintiff.

17. Issue No.2: Under Section 34 of C.P.C, from the date of the decree till the date of repayment, interest at the rate of 6% p.a. can be granted. Consequently, I hold that the plaintiff is entitled to future interest at the rate of 6% p.a. Issue No.2 is answered accordingly.

18. Issue No.3: A mortgage by deposit title deed

has been executed by the defendant. According to Order XXXVII Rule 1 of Original Side Rules and according to Form 84 of Original Side Rules, it has been stated that if the defendant fails to pay the amount as directed, the Court may direct the sale of the property and proceeds as follows:

> *.....on some date to be named by the Court, and in default that the said property may be sold, and the proceeds (after defraying thereout the expenses of the sale) applied in and towards the payment of the amount of the said principal, interest and costs;*

It has been further provided as follows:-

> *(b) that, if such proceeds shall not be sufficient for the payment in full of such amount, the defendant may be ordered to pay to the plaintiff the amount of the deficiency with interest thereon at the rate of six per cent per annum until realization; and*
>
> *(c) that for that purpose all proper directions may be given and accounts taken by the Court*

Consequently, I hold that the plaintiff is also entitled to a personal decree against the defendant, if the defendant does not pay the amount decreed by order of this Court and if the sale proceeds of the suit property does not satisfy the decreetal amount. Issue No.3 is answered accordingly.

19. Issue No.4: In the result the plaintiff is entitled for preliminary decree directing the defendant to pay a sum of Rs.35,90,000/- together with interest at the rate of 6% p.a. on Rs.15,00,000/- from the date of the suit till the date of realisation and also the cost of the suit. Three months time is granted for making payment. In default, the property namely, all that piece and parcel of the Flat bearing No.2, "krishna Vihar Apartments", Ground Floor, No.132, 7th Main Road, Anna Nagar East, Chennai 600 040, measuring 1095 sq. feet, undivided share in land out of two grounds four hundred and fifty square feet, comprised in T.S.No.250, Block -1C of Naduvakkarai Village, bearing Plot No.3326 bounded on the:-

North by : Plot No.3325
East by : Plot No.3336
South by : 48 feet road
West by : 30 feet road

may be sold, and the proceeds (after defraying thereout the expenses of the sale) applied in and towards the payment of the amount of the said principal, interest and costs and if such proceeds shall not be sufficient for the payment in full of such amount, the defendant may be ordered to pay to the plaintiff the amount of the deficiency with interest thereon at the rate of six per cent per annum until realization.

20. In the result, a preliminary decree as above is passed. The plaintiff is entitled for costs of the suit.

sd/-C.V.K.J

02.03.2017

//Certified to be a true copy//

Dated this the day of 2017
Rs./23.11.2017

COURT OFFICER

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