IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.07.2018

Pronounced on : 02.11.2018

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH

AND

THE HONOURABLE MR.JUSTICE C.SARAVANAN

A.S. No.35 of 2017

and

C.M.P. Nos.1473 and 9474 of 2017

Dr.Rathinasamy .. Appellant/Defendant

Vs.

1.Selvakumarasamy

2.Muthukumar .. Respondents/Plaintiffs

This Appeal Suit has been filed under Section 96 of Civil Procedure Code to set aside the judgment and decree dated 21.11.2013 made in O.S.No.433 of 2011 on the file of the V Additional District and Sessions Judge, Coimbatore.

For Appellant : Mr.R.Muralidharan for Mr.S.Gunalan

For Respondents : Mr.A.Kumana Raja

J U D G M E N T

(Order of the Court was made by C.SARAVANAN.J.,)

The above appeal has been filed against judgement and decree dated 21.11.2013 passed by the V Additional District and Sessions Judge, Coimbatore in O.S.No.433 of 2011.

2.By the said judgement and decree, the suit filed by the respondents/plaintiffs has been decreed as prayed for against the appellant/defendant.

3.The suit was filed by the respondents/plaintiffs against the appellant/defendant for a judgment and decree for an amount of Rs.27 lakhs allegedly paid by the respondents/plaintiffs to the appellant/defendant in two installments of Rs.10 lakhs vide Exhibit-A1 dated 31.12.2008 and Rs.17 lakhs vide Exhibit-A2 Deed dated 22.01.2009.

4.It was alleged that the appellant/respondent created an unregistered "Usufructuary Mortgage" of his agricultural land in favour of the respondents/plaintiffs vide Exhibits A1 and A2.

5.The appellant/defendant herein admits having received a sum of Rs. 5 lakhs only on 30.1.2009 but has denied having received Rs.27 under the respective documents. The appellant/defendant submits that Exhibit A1 and A2 were fabricated and back-dated with his signature after obtaining signatures and blank papers on 30.01.2009.

6.In the written statement, the appellant/defendant herein has submitted that though he had borrowed only a sum of Rs. 5 lakh, and that he had paid only a sum of Rs. 7500/- to the first defendant/plaintiff during first week of March 2009.

7.It was stated that the respondents/plaintiffs demanded interest at 30% per annum and since the appellant/defendant did not agree to pay the interest over and above 18%, the signatures obtained in blank stamp papers and green sheets were filled up fraudulently to make it seem as if the appellant/defendant borrowed a sum of Rs. 27 lakhs and had created an usufructuary mortgage in favour of them as per Exhibit A1 and A2.

8.The appellant/defendant has alleged that the respondents/plaintiffs insisted on the appellant/defendant giving pro-note/cheque coupled with signatures in blank green sheets and stamp papers as security for advancing a loan of Rs. 5 lakh on 30.1.2009 which he obliged which was later filled up and back-dated to make it seem as if the appellant/defendant had borrowed a sum of Rs. 27 lakhs and created a "Usufructuary Mortgage" of land in favour of the respondents/plaintiffs as per Exhibit A1 and A2.

9.The respondents/plaintiffs herein had earlier filed O.S. No.63 of 2009 before the Sub-Judge, Pollachi for a permanent injunction to restrain the appellant/defendant from interfering with the alleged peaceful possession of agricultural land.

10.They also filed I.A.No.225 of 2009 for a temporary injunction and secured an interim ex parte order against which a C.R.P. was filed.

11.On the date of the impugned judgement and decree, O.S.No.63of 2009 is pending before the Sub-Court at Pollachi.

12.Pursnant the order in CRP, the learned Sub-Judge, Pollachi dismissed I.A.No.225 of 2009 on 14.12.2009.

13.The respondents/plaintiffs herein also filed C.M.A.No.8 of 2010 before the District Court, Coimbatore, which also came to be dismissed eventually. Thereafter, the present suit came to be filed.

14.The impugned judgement and decree in O.S.No.433 of 2011has been contested on several grounds. It was stated that the suit was filed without obtaining the leave of the Court under Order 2 Rule 2 of Civil Procedure Code (CPC).

15.It is also contended that the plaint in O.S.No.433 of 2011 was filed without filing necessary application under Order 23 of the CPC and was therefore liable to be rejected under Order VII Rule 11 of CPC.

16.The respondents/plaintiffs filed 14 Exhibits vide Exhibits A1-14 and examined 4 witnesses namely respondent No.2/plaintiff No.2 as PW1, one Rajendran as PW2 who allegedly signed and allegedly witnessed the execution of Exhibit A-1 and A-2.

17.PW3 was also examined as one of the witnesses to Exhibit A2. PW 4 deposed evidence to show as if the respondents/plaintiffs sold coconut from the land in respect of which alleged usufructuary mortgage was created by the appellant/defendant in favour of them.

18.The appellant/defendant has denied his liability except to the extent of Rs.5 Lakh.

19.In the light of the above background, the lower court framed the following issues:-

i. Whether the transaction mentioned in the plaint is true, valid and binding on the defendant?

ii. Whether the defendant received Rs. 27 lakh on the basis of bogiam deed is true?

iii. Whether the plaintiff is entitled to the claim?

iv. To what other relief if the plaintiff is entitled?

20.The lower court has concluded that the cause of action in O.S.No.63 of 2009 was different from the present suit for recovery of money and therefore the suit was not barred under law.

21.The court has held that the receipt of Rs.27 lakhs stands proved and the documents were not obtained in blank green paper/stamp paper and that the evidence of PW 2 has not been impeached by the appellant/defendant by any credible evidence or during cross-examination.

22.Further, the lower Court has drawn adverse inference against the appellant/defendant for not taking any action against the respondents/plaintiffs regarding the alleged fraud committed by respondents/plaintiffs as soon as he became aware of the same.

23.The lower court has also considered the admission of the appellant/defendant-defendant that he borrowed a sum of Rs. 5 lakhs on 21.1.2009.

24.The lower court has held that the stamp papers for the respective transactions were purchased one day before the respective transactions and therefore the defence of the appellant/defendant-defendant that he signed all the documents on the same day was an improbability.

25.The lower court has refused to consider the objection that the respondents/plaintiffs have not proved that they have indeed paid the amounts and were in possession of the amounts as they were money lenders.

26.The lower Court has held that in absence of any credible contra-evidence, by the appellant/defendant, the suit was liable to be decreed by considering the fact that appellant/defendant was a doctor by profession and that he ought to have been aware of the consequences of signing in blank sheets/Stamp paper.

27.During cross-examination of P.W.1 (Respondent No.2/Plaintiff No.2), it was stated that Respondent No.1/Plaintiff No.1 sold his property in Kerala for Rs.10,00,000/- which money was lent on 31.12.2008 and acknowledged in EX-A1 and the balance amount of Rs.17,00,000/- was lent on 22.1.2009 after pledging the jewels with the relatives and acknowledged on EX-A2.

28.The lower court has tacitly accepted the respondents/plaintiffs explanation in the cross-examination that they had sold the property in Kerala for advancing a sum of Rs. 10 lakhs vide Exhibit-A1 and had later borrowed a sum of Rs.17 lakhs from their relatives to give loan to the appellant/defendant vide Exhibit-A2.

29.Heard Mr.P.Duraisamy & K.Kasirajan Advocate, the learned counsel for the Appellant/Defendant and Mr.S.Gunalan & A.Panneer Selvam Advocates, the learned counsel for the Respondents/Plaintiffs.

30.The learned counsel for the appellant/defendant submits that the appellant/defendant had merely borrowed a sum of Rs.5,00,000/- on 30.01.2009 and not Rs.27,00,000/- in two instalment of Rs.10,00,000/- and Rs.17,00,000/- as has been made out in fabricated and back dated Exhibit A1 and A2 dated 31.12.2008 and 22.01.2009.

31.It was submitted that these documents were fabricated on the strength of signatures obtained in blank papers and that the Lower Court has erred in holding that the signatures were affixed after understanding the content of these two documents by the appellant/defendant.

32.It was further submitted that, the Respondents/Plaintiffs have not proved the source of the money allegedly lent on 31.12.2008 and 22.1.2009 vide EX-A1 and EX-A2.

33.It was further submitted that P.W.1 has himself admitted that they are agriculturalist and were not in the business of money lending and were not income tax Assesses. The deposition of P.W.4PonKumar has been rightly disbelieved.

34.It is submitted that Exhibit A1 and A2 being unregistered and not properly stamped cannot be admitted in evidence except for collateral purpose.

35. It is submitted that Exhibit A1 and A2 cannot be relied upon as the alleged amount of Rs.10 lakhs plus Rs.17 lakhs cannot be considered as "collateral purpose" for the purpose of Section 49 of the Registration Act.

36. It was submitted that Exhibit A1 and A2 was indeed meant to prove the alleged receipt of money and creation of alleged usufructuary mortgage by an unregistered deed which legally impermissible in view of Section 49 of the Registration Act.

37. In this connection, learned counsel for the Appellant/ Defendant has relied on the following cases:

a) A.Manika Mudaliar Vs Murugesa Mudaliar 2012-2 L.W.28 wherein it was held that unregistered documents cannot be relied upon except for collateral purpose. It cannot be used for the purpose of passing of consideration which is not a collateral purpose.

b) S.Lakshmanan Vs. S.Palani 2012(1) Law Weekly 469 wherein it was held that an unregistered/unstamped document cannot be looked into for any purpose and neither oral evidence can be let in regarding its content.

c) Bajaj Auto Limited Vs Biharilal, AIR 1989 SC 1806 wherein it was held "If the document is inadmissible for non registration, all its terms are also inadmissible including dealing with landlord's permission to sublet."

d) Lakshmipathi Vs A.M.ChakrapaniReddiar, 2001 (1) LW257 wherein it was held that "By the simple device calling it collateral purpose, a party cannot use the unregistered document to bring about indirect effect.

e) K.B.Saha& Sons Pvt. Ltd Vs. Development Consultant Ltd (2009) 2 MLJ 526, wherein it was held by the Hon'ble Supreme Court as follows:-

> "If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in

evidence and to use a document for the purpose of proving an important clause would not mean using it for collateral purpose.”

38.It was submitted that, the Respondent/Plaintiff attempted to prove possession under an unregistered usufructuary mortgage deed and but failed in the earlier round.

39.It was submitted that since the appellant/defendant was in possession of the land all through question of usufructuary mortgage cannot be established.

40.It was submitted that Exhibit A1 and A2 cannot be used to prove the alleged money transaction as it is not a “collateral purpose” for the purpose of Section 49 of the Registration Act as he held by the Court in the decisions cited and on that sole ground alone the judgment and decree for recovery of money on the basis of an unregistered usufructuary mortgage deed is not sustainable.

41.In the light of the above, the learned counsel for the appellant/defendant submitted that the judgments in decree passed by the lower Court is liable to be set aside

42.Per contra, the learned counsel for the respondents/plaintiffs submitted that though the suit was decreed for a sum of Rs.32,50,000/- including interest of Rs.5,50,000/- with a cost of Rs.2,78,000/-, the appellant/defendant preferred the appeal in 2006 and brought up the appeal only in 2017 and intention of the Appellant/Defendant is only to drag on the proceedings.

43.The learned counsel for the respondents/plaintiffs submits that the appellant/defendant has not made out a case for interfering with the judgment in decree of the lower Court and submitted that the appeal filed by the appellant/defendant are liable to be dismissed.

44.The learned counsel for the appellant/defendant relied on the decision of the Court in Selvam Vs. Mohamed Gani, 2008(5) CTC 206, wherein it was held that proviso to Section 49 of the Registration Act permits unregistered documents to be produced as an evidence for collateral purpose for established payment of money for the unregistered usufructuary mortgage. The learned counsel also relied on the decision of the Court in K.Munusamy Vs. G.Krhishttappillai & other, 2014-SLW-S9.

45.The learned counsel for the respondents/plaintiffs submits that the defence that the documents were signed in blank cannot be countenanced in as much as neither in the written submission nor in the deposition, the appellant/defendant has stated that he has signed the papers in blank.

46.The learned counsel further submitted that the fact that the stamp papers bear the name of the appellant/defendant itself shows that the documents were indeed signed on the respective dates and on the date of their execution and not subsequently by backdating the agreement as was alleged.

47.In view of the above, the learned counsel for the respondent/plaintiff submitted that the appeal is liable to be dismissed with cost.

48.It was further submitted that the appellant/defendant has not denied the signature in Exhibit A1 dated 31.12.2008 and Exhibit A2 dated 22.1.2009 but has stated that signatures were obtained blank sheets at the time of advancing a sum of Rs.5 lakhs on 13.1.2009.

49.We have given our careful considerations to the submission made by the respective counsel for the appellant/defendant and the defendant.

50.We have also perused the plaint, written statement the documents and the evidence recorded before the lower court.

51.The Ex.A1- and 2 are merely certified copy of the original filed in O.S.No.63 of 2009 to prove that an alleged usufructuary which are both under-stamped and unregistered documents. It is on the strength of these two documents the suit claim was based.

52.Exhibit A.3 is the plaint in O.S.No.63 of 2009 filed before the Sub-Court, Pollachi. Both the suit arise out of the same bundle of facts. Former suit was filed even before the expiry of the three years period for a permanent injunction to restrain the appellant/defendant from interfering with the alleged peaceful possession of the agricultural land given to the respondents/plaintiffs by way of usufructuary mortgage.

53.The expression "usufructuary mortgage" is defined in Section 58 (d) of the Transfer of Property Act, 1882 as below:-

> "(d)Usufructuary mortgage.—Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee"

54.Usufructuary mortgage pre-supposes delivery of possession where mortgagor binds himself to deliver the possession of the mortgaged property.

55.The rights of an usufructuary mortgagor is provided in Section 62 of the Aforesaid Act. Same is reproduced below:-

> "62.Right of usufructuary mortgagor to recover possession.— In the case of an usufructuary mortgage, the mortgage or has a right to recover possession of the property together with the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee—
>
> (a) where the mortgagee is authorised to pay himself the mortgage money from the rents and profits of the property,— when such money is paid;
>
> (b) where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage money, when the term (if any) prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the mortgage money or the balance there of or deposits it in court hereinafter provided."

56.Thus, prima facie there was no usufructuary mortgage as there was no transfer of possession. However, whether such a mortgage was created or not has to be proved and established in O.S. No.63 of 2009.

57.In K. Parameswaran Pillai v. K. Sumathi, (1993) 4SCC 431, the Hon'ble Court held that "In the case of usufructuary mortgage, clause (a) of sub-rule (3) of Rule 8 of Order 34 expressly excludes the right to the mortgagee to apply for fore-closure or sale or redemption. The Court held as follows:-

> "Necessary consequence is that so long as the right subsists, though there is delay in compliance of the condition imposed in the preliminary decree, the right of redemption to the mortgagor is not lost.
>
> It will be barred only on expiry of the period of limitation prescribed under the Limitation Act. The reasons are obvious. Order 34 Rule 8(3) does not give any right to the mortgagee but the right is given only to the mortgagor, to seek redemption of the usufructuary mortgage in a decree under Rule8(3) of Order 34.
>
> The mortgagee, having been in possession and enjoyment of the hypothec is not disabled by the preliminary decree. On the other hand the liability continues to subsist against the mortgagor.
>
> Therefore, it is up to the mortgagor to redeem the mortgage. Till then his liability under the mortgage continues to run on the estate. It is, therefore, clear that the limitation to file an application under Order 34 Rule 8(1) to pass a final decree for redemption, other than the preliminary decree for redemption of usufructuary mortgage, starts running and continues to run its course from the date of expiry of the period fixed in the preliminary decree, unless it is stayed o rsuspended or the time prescribed in the preliminary decree is extended by an order of the court.
>
> In its absence on expiry of the limitation of three years from the date fixed in the preliminary decree expired under Article 137 of the Schedule to Limitation Act, 1963 (Article 181 of Schedule I of Old Act), the plaintiff is debarred to enforce the right to pass the final decree.
>
> But in the case of preliminary decree for redemption of usufructuary mortgage no limitation begins to run until deposit is made."

58.Keeping the above discussion we shall first deal with fundamental issue as to whether the respondent/plaintiff ought to have obtained leave under Order 2 Rule 2 of CPC as was submitted by the appellant/defendant.

59.In Sidramappa v. Rajashetty, (1970) 1 SCC 186 : AIR1970 SC 1059. The Hon'ble Supreme Court held as follows:-

> "The requirement of Order 2, Rule 2, Code of Civil Procedure is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. 'Cause of action' means the 'cause of action for which the suit was brought.' It cannot be said that the cause of action on which the present suit was brought is the same as that in the previous suit. Cause of action is a cause of action which gives occasion for and forms the foundation of the suit. If that cause of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings."

60.However, the Hon'ble Supreme Court in S.Nazeer Ahmed v. State Bank of Mysore, (2007) 11 SCC 75 held that in view of Order 34 Rule 14 of the CPC, filing of previous suit is not fatal to the subsequent suit. It further held as follows:-

> "14.Applying the test so laid down, it is not possible to come to the conclusion that the suit to enforce the equitable mortgage is hit by Order2 Rule 2 of the Code in view of the earlier suit for recovery of the mid-term loan, especially in the context of Order 34 Rule 14 of the Code. The two causes of action are different, though they might have been parts of the same transaction. Even otherwise, Order 34 Rule 14 read with Rule15 removes the bar if any that may be attracted by virtue of Order 2 Rule 2 of the Code. The decision of the Rangoon High Court in PyuMunicipality v. U.Tun Nyein [AIR 1933 Rang 158] relied on by learned counsel for the appellant/defendant does not enable him to successfully canvass for the position that the present suit was barred by Order 2 Rule 2 of the Code, as the said decision itself has pointed out the effect of Order 34 Rule 14 and in the light of what we have stated above."

61.Thus, the suit filed by the respondents/plaintiff was not barred under law.

62.Having held that the suit was not barred, the issue to be addressed is whether the respondents/plaintiffs were entitled the judgment and decree in their favour on the strength of certified copy of the Exhibit A1 and A2 which purports to create and under-stamped and unregistered usufructuary mortgage.

63.The Lower Court had held that the respondents/plaintiffs have proved that the an amount of Rs.27 Lakh was paid in two instalments to the appellant and the defendant.

64.The lower Court has held that the appellant/respondent has not taken a plea signature were indeed obtained in blank papers and in view of the deposition of P.W.2 whose statement which remained un-impeached execution of the document remains uncontroverted.

65.However, in the proof affidavit filed by the appellant/ defendant, he has clearly stated that the respondents/plaintiffs insisted on signing the blank papers as is evident from the following passage from the proof affidavit of appellant/defendant:

ஆனால் பூர்த்தி செய்யப்படாத வெற்றுத் தாள்கள் மற்றும் முத்திரைத் தாள்களில் என் கையெழுத்தை மட்டும் பெற்றுக் கொண்டு மேற்படி தொகையை கடனாக வழங்குவதற்கு வாதிகள் சம்மதித்தார்கள், தொகை எனக்கு அவசரமாகத் தேவைப்பட்டதால் வாதிகள் கேட்டுக் கொண்டபடி 31.12.2008 தேதியிட்ட ரூ.20./க்குண்டான பூர்த்தி செய்யப்படாத முத்திரைத் தாளிலும். 22.01.2009 தேதியிட்ட ரூ.50./க்குண்டான முத்திரைத் தாளிலும் மற்றும் நிறையபச்சைத் தாள்களிலும் நான் கையெழுத்து செய்துவாதிகளிடம் ஒப்படைத்து ரூ.5.00.000/ கடனாக பெற்றேன்,	The plaintiffs agreed to give me the above money only on signing the blank papers and blank stamp papers. As I was in urgent need of money, I signed on Rs.20/- blank stamp papers dated 31.12.2008 and Rs.50/- dated 22.01.2009 and on several blank green sheets and obtained loan amout of Rs.5,00,000/-, from the plaintiffs after handing over signed papers to him.

66.Simlarly, in para 6 of the written statement the appellant/ defendant has taken a categorical stand that signatures were obtained in blank. Therefore, the observation of the Learned Judge in para 11 of the impugned judgment that the appellant/defendant did not say either in the written statement or during the oral evidence that he signed in blank paper on which revenue stamps were affixed is not correct.

67.Respondent No.2/Plaintiff No.2 who has examined himself as PW1 has admitted he was not employed and both of the respondents/plaintiffs were not income tax assessee.

68.This raises serious doubts as to whether they had sufficient means to pay Rs.27 Lakh and could have arranged amount within a short period of 23 days. They have also not produced any oral or documentary evidence to establish they had sufficient means to lend a sum of Rs.25 lakhs. They have also not proved they had Rs.27 lakhs which they had allegedly lent to the appellant/defendant.

69.The respondents/plaintiffs have based both the suit only on the strength of the alleged deed of usufructuary mortgage vide Exhibit A1 and A2.

70.In our view, Exhibit A1 and A2 being unregistered/ understamped cannot be admitted in evidence under law in view of specific prohibition under Section 49 of the Registration Act.

71.Exhibit A1 and A2 being unregistered/understamped cannot also be used as an evidence to prove the payment of Rs. 27 Lakh. Use of Exhibits A1 and A2 to prove such payment is not a "collateral purpose" contemplated under Section 49 of the Act. It has indeed been relied for establishing "usufructuary mortgage" in O.S.No.63 of 2009 and for payment of money in O.S.No.443 of 2011 at the time of creation of alleged usufructuary mortgage.

72.In Bajaj Auto Ltd. v. Behari Lal Kohli [(1989) 4 SCC 39 : AIR 1989 SC 1806] it was observed that if a document is inadmissible for non-registration, all its terms are inadmissible including the one dealing with landlord's permission to his tenant to sub-let. It was also held if a decree purporting to create a lease is inadmissible in evidence for want of registration none of the terms of the lease can be admitted in evidence and that to use a document for the purpose of proving an important clause in the lease is not using it as a collateral purpose. In Rai Chand Jain v. Chandra Kanta Khosla

[(1991) 1 SCC 422 : AIR 1991 SC 744] the above view was reiterated.

73.In K.B. Saha& Sons (P) Ltd. v. Development Consultant Ltd., (2008) 8 SCC 564, the Court summarized the principles laid down in the various decisions of in the context of Section 49 of the Registration Act as follows:-

> "1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.
>
> 2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.
>
> 3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.
>
> 4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.
>
> 5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

74.In T. Bhaskar Rao v. T. Gabriel [AIR 1981 AP 175] it was held:

> "5. Section 35 of the Stamp Act mandates that an instrument chargeable with duty should be stamped so as to make it admissible in evidence. Proviso (a) to Section 35 of the Stamp Act enables a document to be received in evidence on payment of stamp duty and penalty if the document is chargeable, but not stamped or on payment of deficit duty and penalty, if it is insufficiently stamped. The bar against the admissibility of an instrument which is chargeable with stamp duty and is not stamped is of course absolute whatever be the nature of the purpose, be it for main or collateral purpose, unless the requirements of proviso (a) to Section 35 are complied with. It follows that if the requirements of proviso (a) to Section 35 are satisfied, then the document which is chargeable

with duty, but not stamped, can be received in evidence.”

75. It was further held as follows:-

“7. It is now well settled that there is no prohibition under Section 49 of the Registration Act, to receive an unregistered document in evidence for collateral purpose. But the document so tendered should be duly stamped or should comply with the requirements of Section 35 of the Stamp Act, if not stamped, as a document cannot be received in evidence even for collateral purpose unless it is duly stamped or duty and penalty are paid under Section 35 of the Stamp Act.”

76.In Sathish Chand Makhan and others Vs. Govardhan Das Byas and others (1984) 1 SCC 369, it was held that “the unregistered draft lease agreement Ex. B-2 was clearly inadmissible in evidence under Section 49 of the Registration Act, except for the collateral purpose of proving the nature and character of possession of the defendants. The documents Ex. B-2 was admissible under the proviso to Section 49 only for a collateral purpose of showing the nature and character of possession of the defendants. The proviso to Section 49 was held however not applicable inasmuch as the terms of a lease are not a "collateral purpose" within its meaning. It follows that the unregistered draft lease agreement Ex. B-2 was inadmissible in evidence to prove the transaction of lease. It was also ineffectual to create a valid lease for a renewed term of nine years for want of registration as required under Section 17(1)(d) of the Registration Act.

77.In Avinash Kumar Chaughan Vs. Vijay Krishna Mishra (2009) 2 SCC 532, it was held that Section 35 of the Stamp Act, rules out applicability of Section 49 of the Registration Act. It was held that “if all purposes for which the document is sought to be brought in evidence are excluded, we fail to see any reason as to how the document would be admissible for collateral purposes.”

78.The Hon’ble Supreme Court in Avinash Kumar Chaughan’s case supra drew inspiration from the decision of the Privy Council in Ram Rattan v. Parmananad, [AIR 1946 PC 51] wherein it was held:-

"That the words `for any purpose' in Section 35 of the Stamp Act should be given their natural meaning and

> effect and would include a "collateral purpose" and that an unstamped partition deed cannot be used to corroborate the oral evidence for the purpose of determining even the factum of partition as distinct from its terms."

79. In the above case, the Hon'ble Supreme Court also referred to several decisions of various High Courts, including the decision of the Hon'ble Andra Pradesh High Court in Sanjeeva Reddi Vs. Johanputra Reddi AIR 1972 AP 373, wherein it was held that "The effect of non-registration is that such a document shall not affect any immovable property covered by it or confer any power to adopt and it cannot be received as evidence of any transaction affecting such property or conferring such power. But there is no prohibition under Section 49 to receive such a document which requires registration to be used for a collateral purpose i.e. for an entirely different and independent matter. There the Court held that "there is a total and absolute bar as to the admission of an unstamped instrument whatever be the nature of the purpose or however foreign or independent the purpose may be for which it is sought to be used, unless there is compliance with the requirements of the provisos to Section 35. In other words if an unstamped instrument is admitted for a collateral purposes, it would amount to receiving such a document in evidence for a purpose which Section 35 prohibits."

80.In T. Bhaskar Rao v. T. Gabriel and others AIR 1981 AP 175, it was held as follows:

> "It is now well settled that there is no prohibition under Section 49 of the Registration Act, to receive an unregistered document in evidence for collateral purpose. But the document so tendered should be duly stamped or should comply with the requirements of Section 35 of the Stamp Act, if not stamped, as a document cannot be received in evidence even for collateral purpose unless it is duly stamped or duty and penalty are paid under Section 35 of the Stamp Act."

81. The suit has been decreed by the Lower Court on the strength of the certified copy of documents as Exhibits A1 and A2. Therefore, without the benefit of originals also the Court could not have concluded its execution in the manner in which it has been alleged by the respondents/plaintiffs.

82.Thus, the deposition of witness based on these documents vide Exhibits A1 and A2 cannot be independently relied to either prove the alleged usufructuary mortgage or transfer of money to the appellant/defendant.

83.In the facts of the case, it is to be noted that Rs.27 lakhs allegedly paid to the appellant/defendant and recorded in Exhibits A1 and A2 cannot be said to have been proved as neither Exhibits A1 and A2 can be admitted in evidence nor content of such document be proved by oral evidence as the document has been used for proving alleged money transaction which is not independent of the alleged usufructuary mortgage. Therefore its use is not for a collateral purpose under Section 49 of the Act.

84.It was indeed meant for proving creation of the alleged usufructuary mortgage and the alleged payment of money. Payment of money and creation of usufructuary mortgage are not independent of each other.

85.Money alleged to have been paid and alledgedly acknowledged as per Exhibits A1 and A2 are not independent of alleged usufructuary mortgage. Therefore, we cannot look into the said document. Therefore, content of Exhibits A1 and A2 also cannot be relied to prove the alleged payment of money.

86.Exhibits A1 and A2, in suit was not used for collateral purpose and therefore it was in admissible.

87.Further, the original of the documents were not available before the Court for it to conclude that they were not filled up later.

88.In our view, procedurally also there is gross irregularity committed by the Lower Court by taking up the trial in O.S.No.433 of 2011 even though earlier suit vide O.S. No.63 of 2009 was pending before the Sub-Court, Pollachi. Section 10 of C.P.C. stared at the Lower Court and yet it had shown undue alacrity in proceeding with the trial in O.S. No.433 of 2011 when indeed the trial before it ought to have been stayed under Section 10 of C.P.C.

89.In our view, the respondents/plaintiffs have in any event failed to prove their case by any other independent evidence of alleged payment of Rs.27 lakhs to the appellant/defendant or established by independent evidence to show that they had indeed sold properly in Kerala and pledged jewelleries to pay Rs.10 lakhs vide Exhibit A1 and Rs.17 lakhs vide Exhibit A2.

90.Therefore, we are of the view that the ends of justice will be met if the impugned judgment and decree is partially set aside to the extent of amount beyond Rs.5,00,000/- and interest thereon. Respondents/plaintiffs are entitled to for a judgment and decree for an amount of Rs.5,00,000/- as admitted by the appellant/defendant together with interest at 9% from the date of payment till the date of deposit of amount into Court. No costs. Consequently, connected civil miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

kkd/ia

To

1. The V Additional District and Sessions Judge,
Coimbatore.

2. The Section Officer,
VR Section, High Court,
Madras-104 (2 Copies)

+1cc to Mr.S.Gunalan, Advocate, S.R.No.75996

A.S. No.35 of 2017
and
C.M.P.Nos.1473 and 9474 of 2017

KJI(CO)
CS/25/01/2019