

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
*FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH**

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE N. BALAYOGI

+ A.S.No.359 of 2018

% Date: 09-07-2018

Between:

Pallapothu Uma Maheswara Rao,
S/o. Rama Rao,
R/o. Satyanarayanapuram, Vijayawada.

..Petitioner

Vs.

Vankayala Rama Ratnam, W/o. Mallaiah,
R/o. D.No.6-10-38, Taynorpet,
Vijayawada – 520 009.

Respondent

! Counsel for the petitioner : Mr. V.S.R. Anjaneyulu

^ Counsel for respondent : -----

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> HEAD NOTE:

? Cases referred



THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
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JUDGMENT: (Per VRS,J.)

Aggrieved by the dismissal of a suit for recovery of money due on a mortgage, the plaintiff has come up with the above regular appeal under Section 86 C.P.C.

2. Heard Mr. V.S.R. Anjaneyulu, learned counsel appearing for the appellant.

3. The notices sent by this Court to the sole respondent, returned with the endorsement "no such person". Therefore substituted service was ordered by publication in one issue of Andhra Jyothi. Accordingly a publication was made in the Vijayawada edition of the newspaper on 13.06.2018. But, even thereafter, the respondent did not choose to appear.

4. In view of the limited nature of the grievance, the appeal itself was taken up by us for disposal.

5. The appellant filed the suit in O.S.No.416 of 2016 on the file of the IV Additional District Judge, Guntur, praying for a preliminary decree directing the respondent to pay a sum of Rs.45,75,664/- with subsequent interest at 18% p.a., and also for a final decree, if the decretal amount was not paid as per the preliminary decree. Though the suit summons was served on the respondent, he did not choose to appear. Therefore, he was set ex parte.

6. Thereafter, the appellant examined himself as PW.1 and filed (1) the promissory note dated 03.01.1998 as Ex.A.1; (2) the sale deed executed in favour of the defendant as Ex.A.2; and (3) a memorandum of deposit of title deeds executed by the defendant, as Ex.A.3.

7. By a very strange logic, the trial Court held that though as per Section 59 of the Transfer of Property Act, 1882 registration is not necessary for a

mortgage by deposit of title deeds, the document is compulsorily attestable and that since no attester was examined in accordance with Section 68 of the Indian Evidence Act, 1872 the mortgage is not proved. The Court also went on to hold that since mortgage is not proved, the claim for recovery of money was barred by limitation. Interestingly, the Court further held that the thumb impressions on Exs.A.1 and A.3 do not appear to be the same and that there is also no mention about whether it was the left thumb impression or right thumb impression and that therefore, the suit cannot be decreed as prayed for.

8. In the light of the manner in which the trial Court has dismissed the suit, we think that the following issues arise for consideration:-

1. Whether Ex.A.3-memorandum of deposit of title deeds require attestation, attracting Section 68 of the Indian Evidence Act, 1872?
2. Whether the manner in which Exs.A.1 and A.3 were compared by the Court below was right?

Issue No.1:

9. The first issue revolves around the question whether Ex.A.3 requires attestation so as to attract Section 68 of the Evidence Act or not.

10. Section 58(f) of the Transfer of Property Act, 1882 enables a person to create an equitable mortgage by delivering the title deeds to a creditor, with an intention to create a security thereon. Under Section 59 of the Act, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses, if the principal money sought to be secured by the mortgage is Rs.100/- or more. But this shall not apply to a mortgage by deposit of title deeds. Therefore, there is actually no requirement either of registration or of attestation. In fact, all that a memorandum of deposit of title deeds does is simply to record an event of the past. Not even a format is stipulated by law as to how a memorandum would be drawn up. When law does not require a memorandum of deposit of title deeds to be attested, the question

of invoking Section 68 of the Evidence Act does not arise. Therefore, issue No.1 has to be answered in favour of the appellant.

Issue No.2:

11. The second issue is as to the manner in which the Court below came to the conclusion that the thumb impressions in Exs.A.1 and A.3 do not tally and that there was no mention as to whether they were left thumb impressions or right thumb impressions.

12. While it is possible for a Court under Section 73 of the Evidence Act to compare a signature, a writing, or a seal in the document relied upon by a party with the one found in an admitted document, we do not know how it was possible for the Court to make a comparison of the thumb impressions. Thumb impressions can be compared only by experts and not by the naked eye. The non-mentioning of the words "left thumb" or "right thumb", is not really of any consequence. Therefore, we are of the considered view that the trial Court went completely overboard in arriving at such conclusions. Hence, Issue No.2 also deserves to be answered in favour of the appellants.

13. In view of our findings on issues 1 and 2, we could have allowed the appeal and granted the preliminary decree. But the respondent remained absent before the trial Court and was set ex parte. The notices could not be served on the respondent by this Court and service is complete only by way of paper publication. Therefore we are of the considered view that the matter can be remanded back to the trial Court so that the defendant is given one more opportunity.

14. Accordingly the appeal is allowed and the judgment and decree of the trial Court are set aside and the matter is remanded back to the trial Court for a fresh disposal. The trial Court shall once again serve summons on the respondent and give an opportunity to him to file a written statement. If he does not avail of the opportunity, the Court may proceed in accordance with law. In

view of the order of remand passed by us, the appellant shall be entitled to refund of the Court fee paid on this appeal. There shall be no order as to costs.

15. As a sequel, pending miscellaneous petitions, if any, shall stand closed.

JUSTICE V. RAMASUBRAMANIAN

JUSTICE N. BALAYOGI

9th July, 2018
Js.



THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
THE HON'BLE SRI JUSTICE N. BALAYOGI

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