

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

A.S.No.1574 of 1998

JUDGMENT:

This appeal is filed by the plaintiff-bank against the judgment and decree dated 18-09-1997 passed in O.S.No.76 of 1991 by the Subordinate Judge, Kovur, Nellore District.

For the sake of convenience, the parties are referred to as the 'plaintiff-bank' and 'defendants' only.

Initially, the plaintiff-bank filed a mortgage suit against the defendants 1 to 6 for recovery of a sum of Rs.96,166.37 paise from defendants 1 to 6 and also for a preliminary decree for recovery of the sum due seeking liberty to file a final decree petition for the sale of mortgaged property etc. The case of the plaintiff-bank before the lower Court is that defendants 1 & 2 are arrack contractors. At their request, the plaintiff-bank provided a bank guarantee to the Excise Department on 01.10.1986 for a sum of Rs.1,09,355.52 paise. The defendants 3 to 6 are the guarantors for defendants 1 & 2. According to the plaintiff-bank, they have also deposited their title deeds with an intention to create a mortgage. As per the pleadings, the first mortgage created on 23.09.1985 which was extended on 08.05.1986 and the last mortgage extension was on 11.05.1987. The case of the plaintiff-bank is that based on the demand of the Excise Department, they had to pay the money and so the suit is filed for recovery of the sum paid to the Excise Department on

behalf of the defendants 1 & 2. They sought a decree against all the defendants.

The defendants entered appearance and contested the suit. The 1st defendant filed a written statement stating that the initial guarantee of 01.10.1986 is agreed but they strongly denied that 5th defendant stood as guarantor and executed a counter guarantee also. The transaction of 1986-87 was specifically denied. This defendant took the plea that taking advantage of an earlier deposit of title deeds, the plaintiff-bank created the documents for the so-called extension of the mortgage. The amount due was also denied.

The 2nd defendant filed a written statement with similar averments and denied the amounts demanded. He also denied the interest claim. The amount demanded has been strongly refuted by 2nd defendant.

The 5th defendant filed a separate written statement denying the mortgage particularly the last mortgage that is purportedly created. He strongly pleaded that his consent was never taken for the extension of the mortgage and that he never stood as guarantor for the suit loan. He states that he demanded the return of the title deeds also by the letter dated 23.03.1987.

The 6th defendant filed a separate written statement denying the transaction, denying the deposit of title deeds etc.

Basing on these pleadings, the following 14 issues were settled by the lower Court.

- i) Whether D5 stood as guarantor for D1 and D2 and deposited his title deeds with an intention to create equitable mortgage over the schedule mentioned properties and executed the counter guarantee in favour of the plaintiff on 1-10-86 and the plaintiff forged the signature of the D5 to claim security over the schedule mentioned property?
- ii) Whether the defendants are liable to pay a sum of Rs.96,166.37 ps. as per the statement of account, but only liable to pay Rs.17,520/- as on 1.10.87?
- iii) Whether the plaintiff suppressed the amounts taken and adjusted from the personal account of the 1st defendant?
- iv) Whether there is no joint privity of contract between the D1, D2 and the plaintiff?
- v) Whether the plaintiff is entitled to include Rs.6,735/- for which the plaintiff/bank furnished bank guarantee to the D2, in the account of 1st defendant?
- vi) Whether D2 is not liable to pay interest as per the statement of account?
- vii) Whether the counter guarantee executed by the defendants is invalid and does not bind D2?
- viii) Whether the plaintiff is entitled to adjust the Kalpatharu deposit of D2 towards the suit claim and whether such adjustment is invalid?
- ix) Whether the suit is bad for misjoinder of parties and causes of action?
- x) Whether the D2 is not liable to pay any amount?
- xi) Whether the D4 stood as guarantee for any of the defendants and did not deposit her title deeds and also did not execute any memo of deposit of title deeds in favour of the plaintiff and the memo of deposit of title deeds said to have been executed is materially altered and it is invalid?
- xii) Whether D6 has not stood as guarantor either for D1 or D2 and did not deposit title deeds and execute any memorandum of deposit of title deeds and whether there any material alteration and it is invalid?
- xiii) Whether the plaintiff demanded the defendants for payment of the debt?
- xiv) To what relief?

The parties went to trial. For the plaintiff-bank, one witness was examined as PW.1 and Exs.A.1 to A.19 were marked. For the defendants, two witnesses were examined as DWs.1 & 2 and Exs.B.1 7 B.2 were marked. After the trial and after hearing the arguments, the lower Court dismissed the suit filed by the plaintiff-bank. The present appeal is filed challenging the judgment and decree of the lower Court, dated 18.09.1997 passed in O.S.No.76 of 1991.

This Court has heard Sri V. Raghu, learned counsel for the appellant/plaintiff-bank, Sri P. Sridhar Reddy, learned counsel for the first respondent/2nd defendant, Sri M. Venkata Narayana, learned counsel for the respondents 4, 9 & 11/defendants 6, 11 & 13.

The learned counsel appearing for the appellant and the contesting respondents essentially advanced their arguments on the creation of the mortgage, the guarantees and also the amounts demanded. All the counsel concentrated on these fundamental aspects. This Court will also proceed to decide the matter in line with the arguments advanced by all the learned counsel.

The admitted fact is that there was an initial mortgage created for the loan. This is not really denied by the parties. The entire argument of the learned counsel for the appellant and the respondents was upon Ex.A.9 which is the extension of the mortgage pertaining to the suit transaction, dated 11.05.1987. The learned counsel for the respondents first

and foremost pointed out that PW.1, who is examined as the sole witness on behalf of the plaintiff-bank, did not have any personal knowledge of the transaction. The suit transaction pertains to the years 1986-87. The evidence of PW.1 clearly shows that he joined in the branch in 1990 and worked upto June, 1994. Therefore, the learned counsel argued that the witness is not competent to speak about the contents of the documents which are in issue. The learned counsel for the appellant/plaintiff-bank in reply argued that the plaintiff is an admitted borrower. He also argued that the initial mortgage and initial transaction are not denied and therefore, there was no need to examine the Officer or employee concerned with each of the documents.

While it is true that in any nationalized bank, officers are transferred and it is difficult to get a witness concerned with the every document, still the law on the subject is fairly clear. If the truth of the contents of a document itself is an issue, a person concerned with the document has to be examined (as per ***Ramji Dayawala and Sons (P) Ltd. v. Invest Import***¹). Mere marking of a document is not proof of the contents particularly with the same is denied (as per ***Sait Tarajee Khimchand v. Yelamarti Satyam***²).

The learned counsel for the respondents pointed out that the dispute in this case centres around Exs.A.5, A.7, A.9 & A.11. All these documents are purported to be the

¹ AIR 1981 SC 2085

² (1972) 4 SCC 562

documents evidencing the deposit of title deeds by the respective defendants. All these documents are dated 11.05.1987. It is the case of the appellant that on 08.05.1987 the defendants have approached the bank and extended the existing deposit. These documents are executed on 11.05.1987 confirming the deposit of title deeds/extensions made earlier on 08.05.1997. Therefore, the appellant contends that these documents disclose the 'intention' of the defendants to extend the mortgage. In reply thereto, the learned counsel for the defendants argued that these documents are inherently doubtful and contain many corrections/extra-polations. These documents in the words of the learned counsel for the respondents do not disclose the 'intention' that is necessary for creation of mortgage by deposit of title deeds.

The learned counsel points out that Exs.A.5, A.7, A.11 contain clear extra-polations and changes. There is a clear correction of the date on the top right side corner of the documents with the figures in two inks/pens. A very large part of the document is written on a carbon paper and what is filed in the court is a copy, as can be seen from the hand writing. It shows the carbon paper was used and the details were filled up. In one part of the document on the left top side, the address of the bank is written in ink in these three documents. The date 08.05.1987 in the preamble is in carbon and in deep blue colour whereas the other part of the

document is written in light blue. The learned counsel argued that two different carbon papers were used for preparing these documents. 08.05.1987 is the date in the body of the document and the correction in the top right corner of the date 11.05.1987 is in dark blue/violet carbon. Similarly, in the case of Ex.A.9, the earlier deposit was supposed to have been made on 29.09.1985 and the extension is supposed to have been deposited on 11.05.1987. According to the learned counsel, Ex.A.9 did not contain any details and he argues that there is no evidence to show that on 11.05.1987 the 5th defendant actually went to the bank. In the cross-examination, PW.1 admits that he is not aware if 5th defendant signed in Ex.A.9 or not. He also says that he did not obtain confirmation from his predecessor whether 5th defendant signed on Ex.A.9 or not. He also pointed out that the corrections in Exs.A.5, A.7 & A.11 are very similar indicating that they were all made at the same time. The appellant submits that the witness did not have any personal knowledge of the same. He pointed out that Ex.A.11 is neither a copy nor an original.

Further, the argument of the learned counsel for the respondents is that there is no documentary proof to show that the Excise Department in fact demanded the money and the respondents actually paid the same. The documents filed viz., Exs.A.1 to A.19 do not disclose that the Excise Department had in fact invoked the security and that

consequently, the plaintiff-bank paid the money. PW1 admits that the revocation/invoke from the Excise Department is not filed. The only document available is on Ex.A.19, which is the statement of account. The learned counsel for the respondents submits that when the statement of account is denied, the entries therein have to be proved. A certified copy of the statement of account even if duly certified under the Banker's Books Evidence Act, 1891 is not sufficient evidence to fasten liability. He relied upon **Chandradhar Goswami v. The Gauhati Bank Ltd.**³ for this proposition. He therefore, argues that neither the extension of mortgage of May 1987 nor the demand and payment is proved. Therefore, he argues that the suit was rightly dismissed by the lower Court.

This Court on an examination of the facts and the law highlighted by the learned counsel notices the following:

a) The essence of an equitable mortgage is the deposit of title deeds with an 'intention' to create a mortgage. The three essentials for creating a mortgage by deposit of title deeds are a) debt; b) deposit of title deeds; and c) intention that the deposit of title deeds is to create a security for the debt. Section 58 (b) of the Transfer of Property Act, 1882 and **K.J. Nathan v. S.V. Maruty Reddy**⁴ are relevant. The deposit should therefore be made by the owner of the property; with the intention that the property will be a security for the loan advanced. Mortgage by deposit of title deeds is a type of

³ AIR 1967 SC 1058

⁴ AIR 1965 SC 430

mortgage where the mere deposit of the title deed with an intention to create a mortgage is enough to make the mortgage enforceable. Hence, in the absence of a 'document' creating a mortgage; the intention to deposit becomes very important. This Court notices the case law wherein the Courts have held that in case of equitable mortgage documents showing sufficient title and not perfect title are enough if the intention is clear or if the 'intention' of the parties is manifested clearly (as per **M/s. Panwar Brothers v. Seth Laxmandas Goverdhan Das**⁵; and **Angu Pillai v. M.S.M. Kasiviswanathan Chettiar**⁶). In the case on hand, the extrapolations made in Exs.A.5, A.7, A.9 and A.11 do not inspire confidence at all. The corrections made on the documents, usage of carbon paper for filling up of the blanks in the documents and the documents in the carbon clearly shows that these documents are not trustworthy. If the defendants actually called upon the bank on 08.05.1987 or on other dates, there is no reason why the document should be filled up in the carbon and with so many corrections. Even in the oral evidence, this Court finds that PW.1 did not have personal knowledge about the corrections. He was not present on 11.05.1987 when the four documents evidencing the past deposits were supposedly signed by the defendants. Therefore, this Court holds that the 'intention' that was necessary to prove the deposit of title deeds has not been

⁵ 1970 APLJ (SN) 70

⁶ AIR 1974 Madras 16

proved in this case. The witness examined is not competent to speak about these disputed documents. A witness present on the said dates should have been examined. Failure to do so is in the opinion of this Court fatal to the appellant's case particularly in view of the defence in this case.

b) The original memorandum of deposit or the equitable mortgage register or such other documents should have been filed to support the contents of these four documents. In the absence of any such documents, this Court holds that Exs.A.5, A.7, A.9 and A.11 do not prove the extension of the mortgage nor do they prove the 'intention' of the owner to create a security.

c) There is also no reason forthcoming why the demand made by the Excise Department and the payment of the said sum has not been proved. As a public sector bank, the plaintiff would not have paid the money due unless and until the demand is made by the Excise Department. No document is filed to show the demand or the invocation of the guarantee as also the consequential payment.

d) There is a presumption under the provisions of the Banker's Books Evidence Act that the the copy of statement of account is true under Section 3 of Banker's Books Evidence Act. However, in the case hand, this Court notices that Ex.A.9 account copy is not certified at all let alone under the Banker's Books Evidence Act. In addition, the account copy marked as Ex.A.9, starts from 11.05.1987 and ends on

05.09.1989, whereas as per the pleaded case of the plaintiff, the initial mortgages were in September 1985 and the last transaction in 1989. Thus, this document is not a copy of the entire account. As noticed by the lower Court, the copy of the account merely shows the name of the first defendant only and not of the others.

The case law relied upon by the learned counsel for the respondents in **Chandradhar Goswami** (3 supra) squarely applies to the facts and circumstances of the case. The liability cannot be fastened by the borrowers/guarantors merely on the basis of the entries in the certified copy of the account. Evidence to support the entries is not filed. Further, in the absence of any proof to show the amount demanded by the Excise Department and also the payment of the demanded amount by the bank, pursuant to the said demand, this Court holds that the entries in Ex.A.19 are not sufficient to fasten liability on the respondents/defendants.

Therefore, this Court holds that neither the payment of the loan amount, nor the deposit of title deeds with an intention to create mortgage are proved in this case. This Court holds that the findings of the lower Court that there is no 'valid mortgage' created is correct. The Court notices that both on the basis of carbon copies of documents and with an uncertified copy of an account, no liability can be fastened on the defendants plus the oral evidence is also not supporting the appellants case. The lower Court also came to the

conclusion that the discrepancies in the evidence about the contents of the so-called documents evidencing deposit of title deeds and failure to prove the actual payment of the money to the Excise Department are correct.

As the learned counsel essentially concentrated on the two issues of the liability and on the security created to secure that liability, this Court also is concentrating on these two issues. Decision on these facts virtually decides the entire appeal. This Court therefore holds that the appellant/plaintiff-bank did not prove the due execution of the documents evidencing the deposit of title deeds or the liability incurred. Neither the actual loan amount paid or the alleged security created are proved. Therefore, this Court concurs with the findings of the lower Court and holds that the suit is rightly dismissed. There are no merits in the appeal.

In the result, the appeal is dismissed. The judgment and decree dated 18-09-1997 passed in O.S.No.76 of 1991 by the Subordinate Judge, Kovur, Nellore District, is confirmed in all respects. In the circumstances of the case, there shall be no order as to costs. As a sequel, miscellaneous Petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 27.04.2018
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