BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	**11.12.2019**
Delivered on	**19.12.2019**

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal (MD)No.1273 of 2011

and

M.P.(MD)No.1 of 2014 and C.M.P.(MD)No.9812 of 2019

Ananthakrishnan : 4th defendant/4th Respondent/Appellant

Vs.

1.K.G.Rangasamy,
K.G.Ramasamy & Co.,
by its partner,
K.G.R.Sekar

2.K.G.R.Silks by its Partner,
K.G.R.Sekar

3.Sekar & Co., by its Managing Partner,
K.G.R.Sekar
[R-1 to R-3 firms partners died and substituted by K.G.R.Sekar, partner of Firms vide Court order dated 13.09.2019, made in C.M.P.(MD)Nos.4058 to 4060 of 2019]

4.Balaiyan
5.Rama Praba
6.Minor Giridharan,
rep. by his Guardian and
mother Vasanthi : Defendants 1 to 3/Respondents 1 to 3/ Respondents

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code praying to set aside the decree and judgment passed in A.S.No.16 of 2009 on the file of the First Additional District and Sessions Court, (P.C.R.) Thanjavur, dated 29.04.2011, reversing the decree and judgment passed in O.S.No.60 of 2000 on the file of the Additional Sub Court, Kumbakonam, dated 29.04.2009.

For Appellant : Mr.V.K.Vijayaragavan

For Respondents 1to3 : Mr.M.V.Santharaman

For Respondents 4&5 : No Relief sought for against them

For Respondent No.6 : Dismissed vide Court order dated 03.10.2018.

J U D G M E N T

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Aggrieved over the finding of the first Appellate Court allowing the appeal and decreeing the suit on the basis of the equitable mortgage said to have been created by the defendants 1 to 3, the present Second Appeal came to be filed by the fourth defendant in O.S.No.60 of 2000.

2. For the sake of convenience, the parties are referred to herein, as per their rank before the Trial Court.

3. The brief facts leading to the filing of the suit are as follows:

The plaintiffs are sister concern. The first plaintiff is the main firm. The plaintiffs 2 and 3 are sister concern. The defendants 1 to 3, for their family business and for welfare of the minor, borrowed a sum of Rs.2,00,000/- on 27.10.1997 and executed a cheque and also demand pronote. On behalf of the minor/third defendant, pronote was signed by his mother as the natural guardian. Besides, they also borrowed the amount on 09.07.1997, 09.10.1997 and 31.10.1997 and executed pronotes towards the security of the above amount. They also deposited the title deeds in favour of the plaintiffs on 30.10.1997 and created equitable mortgage in respect of Door No.82. They have also executed separate affidavits confirming the deposit of title deeds. As per the accounts maintained by the plaintiffs, the amounts are still due. During the second week of March, the defendants 1 to 3, with a view to defraud the plaintiffs without disclosing about the equitable mortgage in favour of the plaintiffs, have sold the property to the fourth defendant. Therefore, the sale is not binding upon the plaintiffs. Hence, the suit has been filed to pass a preliminary decree for recovery of money to the tune of Rs.4,70,309.14 and for fixing the time for payment, failing which, pass a final decree on the mortgaged property to bring it for sale to satisfy the decree.

4. The defendants 1 to 3 remained *exparte* before the Trial Court. The fourth defendant, the subsequent purchaser of the property, filed a written statement stating that the suit property was originally mortgaged with the State Bank of India. The loan amount has been discharged and the property has been purchased by the fourth defendant after verifying the encumbrances and subsequently, he got back all the original documents of the property. It is his contention that the second defendant's date of birth is 02.11.1982 as per the school records. At the time of purchase by the fourth defendant, since the second and third defendants were minors, out of sale consideration, Rs.50,000/- each had to be deposited in favour of the minors. The property was purchased in two sale deeds on 15.03.2000 and 16.03.2000 respectively. The consideration of the sale deed dated 15.03.2000

was Rs.4,25,000/- and for the sale deed dated 16.03.2000, the consideration was Rs.4,00,000/-, out of which, in each of the sale deed, a sum of Rs.50,000/- was deposited in favour of the minors separately and the rest of the consideration was received by the first defendant. The first defendant discharged the State Bank loan. It is his contention that the first defendant is very close relative of the first plaintiff's partner Thiru.K.G.Rangasamy. The said K.G.Rangasamy's wife is the first defendant's father-in-law's own sister. Therefore, the defendants 1 to 3 are colluding with the plaintiffs, with ulterior motive, after creating documents, with a view to harass the fourth defendant. It is also stated that the accounts maintained by the plaintiffs are denied and the alleged deposit of title deeds in favour of the plaintiffs is also denied. Admittedly, the original title deed, during the relevant time, was in the custody of the State Bank of India and hence, there could not be any deposit of title deeds and creation of equitable mortgage under law. The second and third defendants were minors at the relevant point of time. They could not legally deposit the title deeds and create equitable mortgage. The affidavits of defendants 1 to 3 are also procured with ulterior motive, containing false recitals, especially when the second defendant was a minor at the time of execution of the affidavit and her age has been intentionally and wrongly described as '19', after correcting the number '18'. Hence, it is the contention that all the documents have been created for the purpose of suit. None of the documents is valid and enforceable. A single suit, as framed for three different partnership firms, is not maintainable. The plaintiffs are three different entities. The suit filed by all the three entities is not maintainable and hence, he prayed for dismissal of the suit.

5. Based on the above pleadings, the Trial Court has framed the following issues:

> **"(i) Whether the plaintiffs are entitled for the relief as prayed for?; and**
> **(ii) To what relief?"**

6. On the side of the plaintiffs, four witnesses were examined as P.W.1 to P.W.4 and 32 documents were marked as Exs.A.1 to A.32. On the side of the defendants, D.W.1 to D.W.4 were examined and Exs.B.1 to B.19 were marked. Ex.X1 to Ex.X.26 were also marked.

7. The Trial Court, after considering the oral and documentary evidence, non-suited the plaintiffs on the ground that equitable mortgage cannot be created with a xerox copy of the title deeds and dismissed the suit. However, the first Appellate Court allowed the appeal holding that equitable mortgage created with copy of the documents is valid and decreed the suit. Aggrieved against the same, the present Second Appeal has been filed by the fourth defendant.

8. The Second Appeal is pending from 2011 onwards at the notice of motion stage.

9. I have heard the submissions made by Mr.V.K.Vijayaragavan, learned counsel appearing for the appellant/fourth defendant and Mr.M.V.Santharaman, learned counsel appearing for the respondents 1 to 3/plaintiffs and also considered the entire appeal on merits.

10. The Second Appeal is admitted on the following substantial questions of law:

> **"(i) Whether the first Appellate Court fell in error in mechanically relying the documents without proper appreciation of oral and documentary evidence?**
> **(ii) Whether the first Appellate Court fell in error in holding that the equitable mortgage is valid by mere xerox copy of the documents?**
> **(iii) Whether the finding of the first Appellate Court is legally sustainable without appreciating the evidence as to the execution of the alleged equitable mortgage?."**

11. The learned counsel appearing for the appellant/fourth defendant vehemently contended that the entire documents have been created only for the purpose of defeating the rights of the appellant herein, who is the *bona fide* purchaser of the property. It is his contention that admittedly, the property was already in mortgage with the State Bank of India. All the original documents were in the custody of the bank. Only in order to discharge the mortgage amount to the bank, the property was sold by the first defendant and the portion of the sale consideration were deposited in the name of the minors and loan has been discharged and all the original documents were handed over to the fourth defendant. The plaintiffs and the first defendant are close relatives. Only in order to defeat the rights of the fourth defendant, the so called equitable mortgage was created with a xerox copy of the title deed when the original document is already in the bank. The documents, affidavits and pronotes were created for the purpose of defeating the rights of the fourth defendant. Ex.A.2 and Ex.A.3-pronotes stated to have been executed by the defendants 1 to 3. Whereas, the defendants 2 and 3 were minors. Similarly, affidavit said to have been executed by the second defendant also clearly indicated that the document has been created with the help of the Advocate Clerk. At the relevant point of time, the second defendant was a minor and to prove the said fact, not only the school certificate but also the birth certificate have been filed. Hence, it is his contention that even assuming that any contract as alleged by the plaintiffs is true, the contract by the second and third defendants, being the minors at the relevant point of time, is void and unenforceable.

Therefore, the alleged equitable mortgage said to have been created by the defendants 1 to 3 is a created theory of the plaintiffs in order to grab the property of the *bona fide* purchaser. Mutation has taken place in the name of the plaintiffs. No pre-legal notice was issued by the plaintiffs and the defendants 1 to 3 conveniently remained *exparte* before the Courts below. That itself clearly probabilised the theory of collusion. Whereas, the first defendant has issued a pre-legal notice stating that the plaintiffs are making an attempt to create a document even much prior to the suit. Thereafter only, all the documents have been hurriedly created. Hence, it is the contention that the first Appellate Court has not appreciated the documents properly and ignored the Evidence Act, 1872 and the first Appellate Court has, in fact, erred in holding that the xerox copy is valid for creation of equitable mortgage. The first defendant, having issued the legal notice, has to protect the title of the fourth defendant. Whereas, he conveniently remained *exparte*. The plaintiffs were aware of the equitable mortgage with the State Bank of India. Therefore, they hurriedly created all the documents. It is his contention that the Courts below, being the Courts of facts, have failed to discover the truth in this matter as to the manner in which the documents were created. It is his further contention that if at all pronotes-Ex.A.7 and A.11 are proved, personal decree alone can be passed against the first defendant and not the mortgage decree. Hence, it is submitted that the entire judgment of the first Appellate Court is liable to be set aside.

12. Whereas, it is the contention of the learned counsel appearing for the respondents 1 to 3/plaintiffs that the first defendant himself admitted in his legal notice about the borrowal of the money. Though he has pleaded discharge, there is no evidence as to the discharge of the amount. Exs.A.2, A.3 and A.12-pronotes executed by the defendants 1 to 3 were signed not only on behalf of the minors but also the first defendant has signed the documents and Exs.A.15 to A.17 affidavits executed in front of the notary public, wherein, all of them had appeared before the notary public and confirmed the deposit of title deeds. Hence, it is the contention that even assuming that the second defendant was a minor, she herself represented to be a major and executed a mortgage. Only on such representation, amount is also advanced. Such representation on the part of the minor amounts to fraud.

13. It is the further contention that only the defendants 1 to 3 are competent to question the age of the second defendant. Whereas, the fourth defendant is a stranger to the family. He had no right to question the age of the second defendant. The evidence of P.W.1 to P.W.4 clearly established not only the execution of the pronotes but also equitable mortgage. The accounts filed by the plaintiffs also show that the defendants 1 to 3 are liable to pay the amount. The cheque issued by the first defendant was also

dishonoured, in respect of which, criminal prosecution is also launched. The Criminal Court has found the first defendant guilty. All these facts clearly proved the fact that the plaintiffs are entitled to decree and judgment. The Trial Court, on the other hand, has non-suited the plaintiffs only on the ground that xerox copy has been deposited as title deed, which is not valid in the eye of law. The Trial Court, in fact, has clearly held that all the documents have been executed by the defendants 1 to 3. The first Appellate Court has also confirmed the said finding. When the Courts below have concurrently held that the documents were executed legally by the defendants 1 to 3, the Second Appeal has to be dismissed. Hence, it is his further contention that there is no bar in law in creating mortgage with a copy of the document. What was seen is only an intention to create equitable mortgage. The affidavits given by the defendants 1 and 2 and also on behalf of the minor, make it clear that the defendants 1 to 3, in fact, had intended to create equitable mortgage and handed over the copy of the documents and other documents towards security of the money borrowed by them. It is also contended that as there is an act of minor herself signing as a major, there is estoppel against the second defendant. Hence, it is contended that the judgment of the first Appellate Court decreeing the suit does not require any interference.

14. In support of the submissions, the learned counsel has relied upon the following judgments:

(i) M**/s.M.A.V.R.Nataraja Nadar & Sons etc., & 2 others v. State Bank of India & 2 others** reported in **1993(1) LW 456**;

(ii) C.Rajagopal vs. State Bank of Travancore reported in **1994 T.L.N.J 317**; and

(iii) Raju Pillai & 4 others v. V.P.Paramasivam & 7 others reported in **1995(1) LW 518."**

15. The suit has been laid for recovery of money of a sum of Rs.4,70,309.14 on the deposit of title deed of mortgage over the suit property and for a preliminary decree, failing to pay the amount within the time fixed by this Court, to pass a final decree. It is the contention of the plaintiffs that they are sister concern. They advanced money to the defendants 1 to 3 for their family business on various dates ranging from 09.07.1997 till 31.10.1997 to the tune of Rs.4,00,000/-. The first defendant is the father and the second defendant is the daughter of the first defendant and the third defendant is the son of the first defendant. All executed pronotes and the third defendant is represented by mother, who signed the pronote on his behalf. Besides, with an intention to create security towards the above amount, they also deposited title deeds and also executed affidavits in this regard confirming the deposit of title deeds. The defendants 1 to 3 remained *exparte* before the Courts below. The fourth defendant, the purchaser of the property from the first defendant, denied the execution of equitable mortgage by the defendants 1 to 3 and his contention is that those

documents have been created only to non-suit the fourth defendant. According to him, he has purchased the property and the respective shares of the minors have been deposited with the bank. Only out of the remaining sale consideration, the loan amount payable to the State Bank of India was discharged by the first defendant and all the original documents were handed over to the fourth defendant. The first plaintiff is close relative of the first defendant. Therefore, it is contended that the fourth defendant is a *bona fide* purchaser and the suit is filed in collusion nature.

16. In fact, the Trial Court has held that the validity of the documents said to have been executed by the minors could be challenged only by the minors after attaining the majority. Having held so, the Trial Court, at the next paragraph, has held that this Court is not able to find any equitable mortgage legally created when there are three different debts existing separately in favour of three different plaintiffs and finally, held that equitable mortgage created with the xerox copy of the documents is not valid and also held that the fourth defendant is entitled to plead *bona fide* purchaser without any knowledge of equitable mortgage and finally, dismissed the suit.

17. The first Appellate Court, being the final Court of facts, framed six points for consideration. Though the first Appellate Court has framed points for consideration, the Court proceeded to decree the suit mainly finding fault with the judgment of the Trial Court. The first Appellate Court, in fact, has not appreciated the evidence with regard to the validity of the documents, whether the equitable mortgage has been created or the documents have been fabricated at a later point of time. The first Appellate Court is mainly finding fault with the judgment of the Trial Court and has not appreciated the evidence on the basis of the pleadings and evidence and held that the equitable mortgage can be created with a copy of the document and it is valid in law and decreed the suit simply. When the Courts below, being the Court of facts, especially, the first Appellate Court, being the final Court of facts, has not appreciated the evidence properly or erroneously recorded a finding, this Court, even in a Second Appeal, can interfere with such finding. When the facts and law are not properly appreciated, or erroneously considered by the Court below, this also gives rise to question of law. There is no bar for this Court to go into the matter once again to arrive at a just conclusion. The Trial Court and the first Appellate Court, being the Court of facts, have to take into account, to record that any fact is proved, the Trial Court or the first Appellate Court should have arrived at a conclusion after considering the entire matter before it. The word **'matter'** is a wide connotation. In this regard, it is useful to refer to the definition of **"proved"** under Section 3 of the Indian Evidence Act, 1872, as under:

> **"Proved".- A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."**

18. The word **'matters'** contained in the above definition clause is not confined to the evidence alone. The matter has a wide connotation, which includes presumption, inference and admissions, etc. When the Court finds a particular fact said to be proved, it has to take all relevant materials and legal presumption and inference, etc. Only if the Court has arrived at a proper conclusion, it can be said that there was appreciation of proper evidence by the Court below.

19. The plaintiffs claim to have obtained equitable mortgage in respect of the suit house on 30.10.1997 towards the security for the loan advanced under Exs.A.2, A.3, A.7, A.11 and A.12-pronotes.

20. In view of the above, the factual background has to be seen in this case.

21. It is an admitted fact that as per Ex.X.24 dated 20.03.1995, the suit property was mortgaged with the State Bank of India. D.W.4 is also examined in this regard. Similarly, under Exs.B.3 and B.4, on 15.03.2000 and 16.03.2000, the suit house was purchased by the fourth defendant. These documents also indicate that minor share has been deposited in the Lakshmi Vilas Bank. Exs.B.5 to B.9 are the original documents relating to the property, which were produced by the fourth defendant. These facts are not in dispute. It is the case of the plaintiffs that the first defendant along with minors borrowed the amount for family business on various dates and executed various pronotes. Ex.A.2-pronote dated 27.10.1997 shows as if it was executed in favour of one of the plaintiffs, namely the first plaintiff, by the defendants 1 to 3. No doubt, under Ex.A.27, the first defendant has admitted the transactions and he sought for return of blank papers and expressed his apprehension for misuse of papers by the plaintiffs. Though legal notice indicates that the first defendant has borrowed some amount and signed blank pronotes, what is relevant to be seen is that under Ex.A.2, the plaintiffs' case is that this document also executed by minors. On perusal of Ex.A2, it is seen that originally, the pronote was written as if the first defendant and his wife and one Rama Praba, the second defendant herein executed the pronote. The pronote has been written in a different ink. Later, the word **"minor Giridharan"** has been included in a different ink. Similarly, just in front of the minor's signature, the word **"on behalf of minor"** has been introduced in a different ink. Ex.A.3 also is similarly written in the name of minor Giridharan and on behalf of the minor, he

inserted a letter in a different ink, which can be seen in bare eyes. Whereas, originally, the pronote was written as if only the first defendant, his wife and the second defendant signed the document. Later part, the minor son name was included in different ink. Ex.A.7- pronote executed by the first defendant alone is in favour of the second plaintiff on 09.10.1997 and under Ex.A.11 the first defendant executed the pronote in favour of the third plaintiff on 09.07.1997. Ex.A.12-pronote dated 31.10.1997 is also written like Ex.A.2, wherein, originally, pronote was executed by the first defendant, second defendant and the wife of the first defendant Vasanthi. Thereafter, minor Giridharan name has been shown. It is also stated in Exs.A.2, A.3 and A.12 as if mother of the minor was signing on behalf of the minor Giridharan. The name of the minor was inserted in later part, which can be seen in bare eyes.

22. It is relevant to note that when the father was very much alive, there was no reason as to why mother should be shown as guardian of the minor Giridharan. As per the plaint, Giridharan is aged about 15 years. It creates a serious doubt about the execution of documents. The manner in which the minor Giridharan name was included later creates a serious doubt about the execution of the contract by the minors. It is also to be noted that though the second defendant said to have shown as a major and signed the pronotes in Exs.A.2, A.3 and A.12, it is curious to note that Ex.B.19- the birth certificate of the second defendant was filed to prove her age. The same clearly proves the fact that the second defendant was born only on 02.11.1982. Besides, Ex.X.16-Transfer Certificate issued by the school was filed. The same also reflects the date of birth of the second defendant as '02.11.1982'. The entries found in the school certificate and birth certificate are relevant to prove the age of the second defendant. A person from the School authorities who issued the Transfer Certificate is also examined on the side of the defendants as D.W.2. The Registrar of Birth and Death of Kumbakonam Municipality is also examined as D.W.3. In his evidence, he has clearly stated that the birth register maintained in their Municipality reflects the date of birth of the second defendant as '02.11.1982. Exs..X.17 to X.23 were also filed in this regard. D.W.2 is the teacher working in A.R.R. Matriculation School, where the second defendant studied. He has also deposed that in the school records, date of birth of the second defendant is mentioned as '02.11.1982'. Ex.X.16 is also filed.

23. It is relevant to note that all the entries reflected in birth and death registers are admissible in evidence for the purpose of proving birth and death under Section 76 of the Indian Evidence Act, 1872 and as per Section 17 of the Tamil Nadu Registration of Births and Deaths Act, 1969. Ex.B.19 is an extract of the birth certificate issued by the Municipality. This certainly comes under the purview of Section 76 of the Indian Evidence Act, 1872 as the certified copy of public documents. When the certified copy of the

birth extract is obtained from the proper authority, the Court has to necessarily presume that such copy is to be genuine as per Section 79 of the Indian Evidence Act, 1872. Section 79 reads as follows:

> **"79. Presumption as to genuineness of certified copies.- The Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government or of a State Government, or by any officer in the State of Jammu and Kashmir who is duly authorised thereto by the Central Government:**
>
> **Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.**
>
> **The Court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such paper."**

24. The above position makes it clear that the date of birth of the second defendant is only 02.11.1982. On the date of the alleged execution of the pronote, Exs.A.2, A.3 and A.12, she was a minor. These facts have not been taken into consideration by the Court below. Admittedly, the defendants 1 to 3 remained *exparte.* Therefore, the Court below cannot expect that only the defendants 1 to 3 alone can question the age of the second defendant. Whereas, the certified copy from the public office has been filed by the fourth defendant to prove that the minor could not have been executed the pronote and affidavit.

25. It is also relevant to note that it is the specific case of the fourth defendant that the first defendant is closely related to the first plaintiff. P.W.1, in his evidence, has also admitted that his sister is the mother-in-law of the first defendant and the first defendant's father Appu Chettiar is his uncle. It is also admitted in his evidence that the fourth defendant is from different community. Therefore, when the parties are closely related, the Court below ought to have considered all these aspects to rule out any possible collusion between the parties.

26. In view of the above discussion, the second and third defendants are, admittedly, minors. There was no reason as to why the mother was made as a guardian for the third defendant. When the parties to the contract were minors at the relevant point of time, such contract by minors is void and it cannot be enforced in the eye of law. Every person, who is of the age of majority according to the law to which he is subject, is competent to contract as per Section 11 of the Indian Contract Act, 1872. Therefore, any such contract

executed by the minors is certainly unenforceable and *void ab initio.* In this regard, a Division Bench of this Court in the judgment reported in **1982(2) MLJ 314 [P.Thangavelu v. R.Dhanalakshmi]** held that a contract by a minor is *void.* Thus, the mortgage executed by the minor either by himself or as guardian is also void.

27. In the above background, if the other relevant documents relied upon by the plaintiffs to prove their alleged equitable mortgage in their favour, are analyzed, Exs.A.15 to A.17 are the affidavits said to have been executed by the first defendant, his wife and the second defendant. Three individual affidavits of each of the persons have been filed to show that they intended to create equitable mortgage, hence, they deposited the title deeds. In Ex.A.15-affidavit said to have been executed by the first defendant on 31.10.1997, the paper was purchased on 10.09.1997 in the name of the first defendant. The affidavit was said to have been signed before the notary public one Tajudeen. The entire affidavit reads that on the next day after borrowal of the amount, he has handed over the documents with the plaintiffs' firm, namely the first plaintiff. There is no mentioning in the affidavit as to the nature of the documents handed over. The first page of affidavit has been typed in such a scramble manner without leaving the space at the bottom to sign. The signature, in fact, obtained at the bottom without any space. Ex.A.16 is also another affidavit said to have been given by the mother on behalf of the minor third defendant. The affidavit reads as if after borrowal of Rs.1,00,000/- and after executing the pronote, they handed over the original documents and receipts along with letter to the first plaintiff K.G.Rangasamy. The stamp paper is also dated 10.09.1997. Similarly, the second defendant said to have been executed the affidavit under Ex.A.17. In this also, stamp paper was purchased on 10.09.1997. The affidavit also reads as if after receiving Rs.1,00,000/- and executing the pronote, on the next day, the original documents and receipts along with a letter were handed over to the first plaintiff.

28. It is to be noted that if really the original documents and receipts were handed over, as contended in Exs.A.16 and A.17-affidavits, there was no reason as to why those original documents and receipts were not filed before the Court below by the plaintiffs. It is also relevant to note that the alleged letter given along with the documents stated in the affidavits has not seen the light of the day. This creates serious doubt about the affidavits and execution of the equitable mortgage. It is also relevant to note that it is the case of the plaintiffs that they advanced amount on 09.07.1997, 09.10.1997, 27.10.1997 and 31.10.1997 under Exs.A.2, A.3, A.7, A.11 and A.12. The affidavits read as if on the very next day, they handed over deposit of title deeds, whereas, it is pleaded in the plaint, the deposit of title deeds was created on 30.10.1997. This also creates serious doubt about the creation of

equitable mortgage. Further, it is also relevant to note that all the stamp papers filed in Exs.A.15, A.16 and A.17 were purchased on 10.09.1997 much prior to the alleged borrowal from the plaintiffs. This also creates a serious doubt about the execution of the documents. Exs.A.16 and A.17 specifically refer that the original documents and receipts were handed over along with letter, to the first plaintiff.

29. But, as discussed above, neither original nor the letter accompanying the deposit was produced by the plaintiffs. Admittedly, the original documents, at the relevant point of time, were in the custody of the State Bank of India. D.W.4, bank official, in this regard, has clearly spoken that the first defendant has availed the loan and created equitable mortgage in the year 1995. The evidence of D.W.4 clearly indicates that on 20.03.1995, original documents of the property were deposited with the bank. In this regard, Exs.X.22, 25 and 26 have been filed. Therefore, such being a position, making recitals as if originals were handed over to create deposit of title deeds in the year 1997 when the documents were already in the bank, is also created serious doubt. It is also to be noted that P.W.1, in his evidence, has also admitted that he is also aware of the previous equitable mortgage. Despite the fact, receiving such documents, contending that as if originals have been handed over to the plaintiffs, in fact, probabilise the defence theory that the documents have been created in a hurried manner.

30. P.W.3-Advocate Clerk of the so called notary public was examined to show that all the three documents, viz., Exs.A.15 to A.17 were executed in front of the notary public and he has produced register to show that the document is signed in front of the notary public and their thumb impression was also obtained. It is to be noted that P.W.3, according to him, though he was working with Tajudeen, notary public, after his death on 27.11.2000, he came out of the office. Such being the position, how the original ledger was produced before the Court is also doubtful. According to him, he took the notary ledger from another clerk working with the previous office without the notice of the advocate, who is in-charge of the office. These are all the facts which create serious doubt. Even assuming that the defendants 1 and 2 and the wife of the first defendant have executed such affidavits, the manner in which it is written and the manner in which it is referred as if the original documents were handed over, clearly indicate that the documents have been created either by the plaintiffs or with the collusion of the first defendant, who is admittedly relative of the first plaintiff. His very conduct in remaining absent, despite availing the bank loan amount, after the sale of property to the fourth defendant, without indemnifying the title, also cannot be altogether ignored. Further, one another aspect also cannot be ignored. Admittedly, the second defendant was minor as per the birth certificate and school certificate, as held above. In such view of the matter, any

affidavit given by the second defendant in law is also *non est*. Similarly, the affidavit said to have been given by the wife of the first defendant on behalf of the third defendant also cannot be given much importance. Admittedly, the first defendant, who is the natural guardian, is very much alive. There was no reason as to why wife who is not the natural guardian at the relevant point of time signed the affidavit on behalf of the minor. These are all the facts, which will probabilise the defence theory that the equitable mortgage theory set up by the plaintiffs is only in order to defeat the rights of the fourth defendant who purchased the property and sale consideration has been paid to discharge the mortgage loan with the bank and minors' interest is also protected by depositing their respective share in the bank. Thus, the contention of the fourth defendant is more probabilised and fortified by other circumstances also. As already indicated, P.W.1 himself admitted that he was aware of the existing mortgage with the bank. Such being the position, as a prudent man, normal conduct of the human being is to demand at least certified copy of the sale deed or certified copy of the birth certificate which are required for creating equitable mortgage. What was said to be relied as title deed in this case is xerox copy.

31. Ex.A.18 is only a xerox copy of the sale deed in favour of one Appu Chettiar, who is the father of the first defendant K.A.Balaiyan, who is said to have been deposited the title deed towards the security to the loan. Similarly, Ex.A.19 is the certified copy of the final decree in O.S.No.55 of 1989 to show that the suit property was allotted to the first defendant in a partition suit in the 'D' and 'F' schedule in the final decree proceedings. It is to be noted, for getting final decree, the certified copies were applied on 09.07.1997 and the certified copies were made ready on 10.07.1997 and the stamp has been filed in the name of one Mr.Rajendran and conveniently last page of the certified copy was removed, where normally endorsement will be there, which includes the name of person applied the copy application and when the copies are made ready and when the delivery was effected. The above endorsement pages conveniently removed from the certified copy. Ex.A.20 said to be the judgment of the final decree. In this also, stamp has been filed by the very same Rajendran. In this also, last page containing the endorsement was found missing. It is also curious to note that in Ex.A.20, the first page of the stamp was deposited in the name of Rajendran and in the remaining stamp papers, only copy stamp was filed and in Ex.A.20 also, certified copies were applied on 09.07.1997 and the last stamp paper was in the name of Mr.M.V.Santharaman, advocate. It is also relevant to note that in the above final decree proceedings, the said Advocate M.V.Santharaman appeared only for the plaintiff, by name Srinivasan. Whereas, the father of the first defendant herein and others were shown as the defendants. The copy application was obtained by the plaintiff Srinivasan through his counsel Mr.M.V.Santharaman. It is curious to note that the present plaint was filed by the very same

advocate Mr.M.V.Santharaman for the plaintiffs. These copy applications, namely certified copies of Exs.A.19 and A.20, were applied only on 09.07.1997. As already indicated, conveniently, last page where the endorsement clearly found in the certified copy is missing. When the plaintiffs' counsel himself is the counsel for the plaintiff in the previous suit, where the first defendant herein was one of the defendants, what was the reason for the plaintiff's counsel to obtain copy in his name and hand over to the defendant against whom he has conducted the case. This facts create a serious doubt about the handing over of these documents as security towards the loan. In fact, it is more probabilised the case of the fourth defendant that these documents and alleged equitable mortgage have been fabricated.

32. It is further to be noted that in Exs.A.19 and A.20 copies were applied on 09.07.1997 and the evidence of P.W.1, particularly, cross examination, also clearly indicates that ledger amount indicates the payment to the said advocate M.V.Santharaman. This evidence, in fact, clearly gives an inference that the certified copies were obtained by the advocate of the plaintiffs. From the Court records, it can be inferred that he already appeared in the previous partition suit and the entire theory of equitable mortgage has been created subsequently. Therefore, the alleged equitable mortgage projected by the plaintiffs is highly doubtful and it has not been established under law and it creates serious doubt about the entire transaction. It is also to be noted that only xerox copy of the title deed, namely sale deed is filed. It is the contention of the plaintiffs that equitable mortgage can be validly created under law.

33. Judgments cited by the plaintiffs in M**/s.M.A.V.R.Nataraja Nadar & Sons etc., & 2 others v. State Bank of India & 2 others** reported in **1993(1) LW 456**, when carefully seen, a Division Bench of this Court has held that in the absence of the original documents, registration copy can be produced with an intention to create an equitable mortgage. In the above case, this Court has held that when there is loss of original document, registration copy can be produced and there is no bar for creating equitable mortgage with registration copy. Under Paragraph No.26, the Division Bench has held as follows:

> **"At the same time, there may be cases where the original document is lost and there are no chances of that document being made use for any purpose. In the absence of the original deed of transfer the next best evidence of the owner's title to the property is a certified copy of that document. A certified copy in such cases may with sufficient safeguards be received as a document of title."**

34. A Division Bench of this Court in **C.Rajagopal vs. State Bank of Travancore** reported in **1994 T.L.N.J 317**, relying upon the judgments of various Courts and Full Bench decision of Rangoon High Court reported in **AIR 1938 Rangoon 148 (FB) [Chidambaram Chettiar v. Azia]**, wherein the Rangoon High Court has held that to create a valid mortgage, it is not necessary that the whole, or even the most material of the documents of title to the property should be deposited, that the documents deposited should show a complete or good title in the depositors and it is sufficient if the deeds deposited *bona fide* relate to the property or are material evidence of title and shown to have been deposited with the intention of creating security thereon, has held that copy of the documents can be used to create equitable mortgage.

35. Absolutely, there is no dispute with regard to those facts. What is sought to be projected in this case is Exs.A.19 and A.20-final decree proceedings relating to the title of property. But, as already discussed, Exs.A.19 and A.20 were, in fact, obtained by the plaintiffs' own lawyer and not by the defendants. As per the xerox copy of the title deed itself, it is to be noted that it is well settled that when the document is registered document, the xerox copy is not admissible as secondary evidence. So, only certified copy of a registered copy is to be admitted as secondary evidence in the absence of the original deed. This has been held in **Kalyan Singh v. Chhoti [AIR 1990 SC 396].** Thus, the xerox copy of the document is inadmissible in law and claiming right on the basis of such xerox copy, is also impermissible in law. Therefore, knowing very well that the property was already mortgaged with the State Bank of India and creating an equitable mortgage with xerox, such equitable mortgage cannot be valid in the eye of law. When the original is already available and certified copies also could be easily obtained, there was no reason as to why such document was not necessitated by the plaintiffs. This is also one of the reasons to doubt the entire transaction. Hence, this Court, on proper appreciation of the entire evidence available on record, is of the view that the so called equitable mortgage is a fabricated one and unenforceable in law and the conduct of the defendants 1 to 3 remaining *exparte* and taking note of the relationship of the parties, the possibility of collusion between the plaintiffs and the defendants 1 to 3 being the same community and the fourth defendant, namely the appellant herein is a third party *bona fide* purchaser, also cannot be ruled out. Though the evidence adduced on the side of the plaintiffs indicates that the first defendant was also prosecuted for criminal office under Negotiable Instruments Act, to rule out such collusion, but the fact remains that the so called equitable mortgage has not been established and the very nature of the documents is suffered from serious infirmities and there are doubts which are inherent in the very transaction itself. Further, the contract said to have been executed by the minors is also *void ab initio*.

36. From the above discussions, this Court holds that the preliminary decree passed for mortgage by the first Appellate Court is liable to be interfered with. As far as the pronotes are concerned, the first defendant is not contested the same. Whereas, legal notice Ex.A.27 issued by the first defendant itself indicates that he had a business relationship with the plaintiffs and handed over the pronotes and he has discharged the entire amount and expressed apprehension that the plaintiffs are creating the documents. Having pleaded the business transaction and discharge, having remained *exparte*, this Court holds that only the first defendant alone is liable under pronotes. Since this Court found that the other defendants were minors at the relevant point of time, such contract by the minors cannot be enforced against them. At any event, under Ex.A.27, the first defendant himself had admitted the business transaction. Therefore, it has to be presumed that the pronotes pleaded in the plaint are supported by consideration. In such view of the matter, the suit is decreed only against the first defendant and personal decree is passed against the first defendant alone. Accordingly. the substantial questions of law are answered and the Second Appeal is partly allowed. The judgment of the first Appellate Court passing the preliminary decree on mortgage is, hereby, set aside and personal decree is passed against the first defendant alone with cost. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar ()

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

SML

To

1. The First Additional District and Sessions Court,
   (P.C.R.) Thanjavur.

2. The Additional Sub Court, Kumbakonam.

3. The Record Keeper,(2 copies)
   V.R.Section,
   Madurai Bench of Madras High Court, Madurai.

+2 CC to Mr.T.R.SUBRAMANIAN, Advocate (SR-105801[F] dated 19/12/2019)

Judgment made in
Second Appeal (MD)No.1273 of 2011
19.12.2019

VB(07.02.2020) 16P 7C