IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 28.07.2021

PRONOUNCED ON : 06.08.2021

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

S.A.NO.794 OF 2007
AND
M.P.NO.1 OF 2007

1. Dakshinamurthy
2. Vairamammal
3. Saroja
4. Usharani
5. Devi
6. Suguna

... Appellants/Plaintiffs

..Vs..

Dhanabal (Died)
2. Muthalayal
3. Saraswathi
4. Gunasekaran
5. Venkatesan
6. Chandira
7. Arumugam
8. Balamurugan
9. Sasikala

...Respondents/
LR's of the Defendant

(R2 to R9 were brought on record as LRs of the deceased sole respondent vide order of court dated 26.02.2021 made in CMP.Nos.8721, 8731 & 8723 of 2019 in S.A.No.794 of 2007.

Prayer: Second Appeal filed under Section 100 of Code of Civil Procedure against the Judgment and Decree passed in A.S.No.9 of 2005 dated 27.09.2006 on the file of the Subordinate Judge, Chidambaram reversing the Judgment and Decree passed in O.S.No.391 of 1993 dated 08.04.2004 on the file of the Principal District Munsiff, Chidambaram.

For Appellants : Mr.K.Sukumaran
For Respondents 2 to 9 : Mr.A.Muthukumar

J U D G M E N T
(Heard through Video conferencing)

This second appeal has been filed challenging the reversal findings of the lower appellate court namely Sub Court, Chidambaram by its Judgment and Decree dated 27.09.2006 passed in A.S.No.9 of 2005 by which the suit filed by the Appellants in O.S.No.391 of 1993 before the Principal Munsif Court, Chidambaram has been dismissed by reversing the Judgment and Decree dated 08.04.2004 passed in favour of the Appellants/plaintiffs.

2. For the sake of convenience, the parties are described as per their litigative status in the suit O.S.No.391 of 1993.

3. The plaintiffs claim that they are the legal heirs of Krishnamoorthi Padayachi. Tamil selvan and Dhakshnamoorthy are his sons who are the first and second plaintiffs and another son of Krishnamoorthi Padayachi by name Paramanandham, predeceased Krishnamoorthi Padayachi leaving behind Vairam Ammal and Saroja as his legal heirs who are the plaintiffs 3 and 4 in the suit O.S.No.391 of 1993. During the pendency of the suit, the first plaintiff died leaving behind the fifth, sixth and seventh plaintiffs as his legal heirs. The defendant Dhanapal died pending the second appeal and his legal heirs are the 2^{nd} to 7^{th} respondents who were brought on record in this second appeal.

4. The suit was filed for redemption of a registered mortgage deed dated 11.05.1965 which was executed by Krishnamoorthy Padayachi in favour of the defendant Dhanapal in respect of the property measuring 0.09 cents out of 0.20 cents in R.S.No.35/27, Veeramudaya Natham Village, Sethiathope Sub Registration District which is the suit schedule property. A consequential relief of possession was also sought for. Under the usufructuary mortgage deed, Krishnamoorthy borrowed a sum of Rs.200/- from the defendant and handed over possession of the suit schedule property to the defendant by way of security. The suit for redemption of mortgage deed was filed by the plaintiffs since according to them, the defendant failed to redeem the mortgage, despite the plaintiffs readiness and willingness to discharge the loan. It is also their case that they had issued legal notices dated 02.04.1993 and 02.09.1993 to the defendant demanding the defendant to return the original mortgage deed with the discharge endorsement and put the plaintiffs in possession of the suit schedule property. According to them, since the defendant did not come forward with any response, the plaintiffs deposited Rs.200/- and sought for redemption of the suit schedule property in O.S.No.391 of 1993. According to the plaintiffs, the suit was filed within 30 years from the date of mortgage and hence, it is within the period of limitation as

prescribed under Article 61 of the Limitation Act.

5. The defendant Dhanabal filed written statement and additional written statement stating as follows:

(a) He has denied the execution of the mortgage deed dated 11.05.1965 by Krishnamoorthy Padayachi in his favour;

(b) He has denied the title of Krishnamoorthy Padayachi over the suit schedule property;

(c) The plaintiffs alone are not only the legal representatives of the deceased Krishnamoorthy Padayachi and without impleading all his legal representatives, the suit is liable to be dismissed;

(d) The defendant has been enjoying the suit property for more than 30 years and therefore, the suit is not maintainable;

(e) There is no relationship of mortgagor and mortgagee between the plaintiffs and the defendant.

6. Issues were framed by the trial court. The second plaintiff Dakshnamoorthy was examined as PW1 and the defendant Dhanapal was examined as DW1 before the trial court.

7. The trial court by its Judgment and decree dated 08.04.2004 in O.S.No.391 of 1993 decreed the suit as prayed for in favour of the plaintiffs. Aggrieved by the Judgment and decree dated 08.04.2004 passed in O.S.No.391 of 1993 by the Principal District Munsif Court, Chidambaram, the defendant filed an appeal before the Sub Court, Chidambaram in A.S.No.9 of 2005. By its Judgment and Decree dated 27.09.2006, the lower appellate court namely the Sub Court, Chidambaram reversed the findings of the trial court by dismissing the suit. The lower appellate court has proceeded to dismiss the suit on the following grounds:

(a) The defendant has specifically denied the execution of the mortgage deed dated 11.05.1965 (Ex.A1);

(b) Under section 59 of the Transfer of Property Act, a mortgage deed is required to be attested by at least two witnesses.

(c) Under section 68 of the Indian Evidence Act, if a document is required to be attested, it shall not be used as evidence unless and until atleast one attesting witness has been examined as a witness for the purpose of proving its execution.

(d) Section 69 of the Indian Evidence Act provides the procedure in case, the attesting witnesses are not found. Under this section, the execution can be proved by proving the attestation of one attesting witness at least in his hand writing and that, the signature of the person executing the document is in the handwriting of that person.

(e) The document is 30 years old. The Court may presume attestation and dispense with proof as per section 90 of the Indian Evidence Act. But this presumption is available only in respect of original deed, not in respect of a copy of the deed. In the suit, the plaintiffs have produced only the registration copy of the mortgage deed and not its original. Section 90 of the Indian Evidence Act will not apply to the registration copy of the mortgage deed and will apply only to the original.

(f) Plaintiffs have not given any notice to the defendants to produce the original document. On refusal to produce, the plaintiffs could have given secondary evidence without calling attesting witnesses. In such a case, execution and attestation are presumed by the Court under section 89 of the Indian Evidence Act. But this procedure has not been followed by the plaintiffs.

(g) Plaintiffs have failed to prove the execution and attestation of the alleged mortgage deed though the defendant has also not proved his title over the suit schedule property.

8. Aggrieved by the Judgment and decree dated 27.09.2006 passed by the lower appellate court in A.S.No.9 of 2005, this second appeal has been filed by the plaintiffs.

9. At the time of admission of this second appeal on 13.08.2007, this Court formulated the following substantial questions of law:

> “ a) Whether or not the Exhibit A.1, the mortgage deed, is duly executed and attested and the same has been proved by the Appellants/plaintiffs?
>
> b) Whether or not the production of certified copy of the mortgage deed is sufficient and admissible in evidence reflecting the case of the plaintiffs, in view of the provisions contained in Section 57(5) of the Registration Act and Section 65 (e) and (F) and Section 74 of the Indian Evidence Act?”

10. Learned counsel for the Appellants in support of the Appellants'/plaintiffs' case, has relied upon the following authorities:

(a) A single bench decision of the Madras High Court in the case of A.Sankaralingam vs. Arunachala Reddiar and others reported in 1993 1 MLJ 472;

Relying upon the said decision, the learned counsel for the

Appellants would submit that the usufructuary mortgage deed dated 11.05.1965 which has been marked as Ex.A1 has been admitted without objection by the defendant and therefore, the lower appellate court has erred in holding that Ex.A1 has not been proved. Relying upon the very same decision, he would also submit that under section 57(5) of the Registration Act, a certified copy from the registration office is admissible in evidence for the purpose of proving the contents of the Original document. Therefore according to him, Ex.A1, the certified copy of the registered mortgage deed is an admissible piece of evidence. But according to him, the lower appellate court has erroneously rejected the same on the ground that the original has not been filed.

(b) A decision of the Hon'ble Supreme Court in the case of Ishwar Dass Hain (dead) through LRS., vs. Sohan Lal (dead) by LRs., reported in AIR 2000 SC 426;

Relying upon the said decision, the learned counsel for the Appellants would submit that though in the written statement, the defendant has denied the execution of the Mortgage deed (Ex.A1), but having admitted the execution in his deposition (DW1), there was no necessity for the plaintiffs to examine the attesting witnesses as the mortgage deed dated 11.05.1965 EX.A1 stood proved by the production of the certified copy.

(c) A decision of the Hon'ble Supreme Court in the case of Iqbal Basith and others vs. N.Subbalakshmi and others reported in 2021 (2) CTC 104

Relying upon the said decision, the learned counsel for the Appellants would submit that the certified copy of the mortgage deed (Ex.A1) having been marked without any objection from the defendant and sufficient reasons having been given by the plaintiffs for not having produced the original and further, the said document is more than 30 years old, the lower appellate court has erred in rejecting the said document. According to the Appellants/plaintiffs, having discharged the burden of proving the document (Ex.A1), the onus lies on the defendant to disprove the same. Learned counsel for the Appellants also drew the attention of this Court to the findings of the trial court which has decreed the suit in favour of the plaintiffs and would submit that the trial court has rightly appreciated the evidence available on record and only thereafter has decreed the suit in favour of the plaintiffs.

11. Per contra learned counsel for the respondents drew the attention of this Court to the written statement filed by the defendant as well as the deposition of PW1 and DW1. He would submit that the lower appellate court has rightly appreciated

the evidence available on record and has rightly held that the plaintiffs have not proved the execution of the mortgage deed dated 11.05.1965. He drew the attention of this Court to the reasons given by the lower appellate court for reversing the findings of the trial court and would support the same. The learned counsel for the respondents relies upon the following authorities in support of his submissions:

(a) A decision of the Hon'ble Supreme Court in the case of Sri Lakni Baruan and Others vs. Sri Padma Kanta Kalita & Others reported in 1996 8 SCC 357.

Relying upon the said decision, he would submit that the lower appellate court has rightly rejected the mortgage deed (Ex.A1), eventhough it is more than 30 years old. He would submit that as per the aforesaid decision, the Court has discretion to refuse benefit of such presumption under section 90 of the Indian Evidence Act, when due execution of the documents appears to be doubtful. He would further submit that the defendant having categorically denied the execution of mortgage deed dated 11.05.1965 and the plaintiffs having filed only the certified copy of the said document, the lower appellate court was right in rejecting Ex.A1, Mortgage Deed. According to him, the presumption under section 90 of the Indian Evidence Act, 1872 is not available for a certified copy.

(b) A decision of the Hon'ble Supreme in the case of H.Siddiqui (Dead) by Lr vs. A.Ramalingam reported in (2011) 4 SCC 240.

Relying upon the said decision, the learned counsel for the respondents would submit that the secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. According to him, having not satisfied the said test, the lower appellate court has rightly rejected Ex.A1 mortgage deed dated 11.05.1965.

Discussion:

12. The document in dispute is a registered mortgage deed dated 11.05.1965 which has been marked as Ex.A1 before the trial court. The defendant denies the execution of the said document and further it is his case that it has not been proved in accordance with sections 68 and 69 of the Indian Evidence Act read with section 59 of the Transfer of Property Act which requires a mortgage deed to be attested by at least two witnesses. However, it is the case of the plaintiffs that the disputed document namely the registered mortgage deed dated 11.05.1965 marked as Ex.A1 is an ancient document being more than 30 years old and therefore, the court shall presume

attestation and dispense with proof as per section 90 of the Indian Evidence Act. It is also the case of the defendant that since notice to produce the mortgage deed dated 11.05.1965 (Ex.A1) was not given by the plaintiffs during the pendency of the suit, presumption under section 89 of the Transfer of Property Act as to the due execution of Ex.A1 cannot also be inferred.

13. The trial court in O.S.No.391 of 1993 has decreed the suit filed by the plaintiffs on 08.04.2004. However, the lower appellate court in its judgment dated 27.09.2006 in A.S.No.9 of 2005 filed by the defendant has reversed the findings of the trial court and allowed the appeal.

14. Section 90 of the Indian Evidence Act reads as follows:

> " 90. Presumption as to documents thirty years old.—Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.
> Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable."

15. Admittedly, the disputed document namely the mortgage deed dated 11.05.1965 marked as Ex.A1 in the suit was more than 30 years old, when it was marked as an exhibit before the trial court. There is no correlation between section 90 of the Indian Evidence Act and sections 68 and 69 of the Indian Evidence Act read with section 59 of the Transfer of Property Act. Section 90 of the Indian Evidence Act is an independent provision dealing with ancient documents (i.e., documents more than 30 years old) and is not subject to sections 68 and 69 of the Indian Evidence Act read with section 59 of the Transfer of Property Act. Sections 68 and 69 of the Indian Evidence Act and section 59 of the Transfer of Property Act lay down the normal rule for proof of documents and section 90 of the Indian Evidence Act is an exception to the normal which permits the courts to exercise its discretion to presume that the document which is thirty years

old has been duly executed and attested. The only condition that will have satisfied is that under section 90 of the Indian Evidence Act, the courts will have to exercise its powers judiciously and not arbitrarily.

16. In the case on hand, the plaintiffs have filed a certified copy of the mortgage deed dated 11.05.1965 which has been marked as Ex.A1 before the trial court. As seen from the evidence available on record, the defendant also seems to have not raised any objection while the said document was allowed to be marked as an exhibit before the trial court.

17. The certified copy marked as Ex.A1 pertains to the year 1965 and admittedly, it was marked as an exhibit only after 30 years. Infact, the explanation to section 90 of the Indian Evidence Act makes it clear that the documents are said to be in proper custody, if they are in the place in which, and under the care of the person with whom, they would naturally be. But no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. "The proper custody of a documents means it deposit with a person and in a place, where if authentic, it might naturally and reasonably be expected to be found and it does not create suspicion or fraud.

18. Section 57(5) of the Registration Act, 1908 also makes it clear that all copies given by the Registering officers under section 57 of the Registration Act shall be permissible for the purpose of proving the contents of the original document. In the case on hand, the plaintiffs have produced the certified copy of the disputed mortgage deed dated 11.05.1965 which has been marked as Ex.A1 obtained from the Registrar's office where the said document was executed and registered. It is not the case of the defendant that the mortgage deed dated 11.05.1965 (Ex.A1) is a fabricated and forged document. Excepting for making a bald denial of the execution of the mortgage deed dated 11.05.1965 (Ex.A1), the defendant has not let in any oral and documentary evidence before the trial court to show that it is a forged and fabricated document.

19. The explanation to section 90 of Indian Evidence Act makes it clear that if the custody of any document which is more than 30 years old is brought and placed before the court from a legitimate origin, the Court may presume that such a document has been duly executed and attested.

20.In the case on hand, the pre suit notices which were marked as Ex.A2 & Ex.A4 sent by the plaintiffs calling upon the defendant to redeem the mortgage and to return the original mortgage deed dated 11.05.1965 were duly acknowledged by the defendant.

21. Exercising the power under section 90 of the Indian Evidence Act, the trial court has presumed that the certified copy of the mortgage deed dated 11.05.1965 marked as Ex.A1 has been validly executed and attested and has granted the relief of redemption of mortgage and possession in favour of the plaintiffs. However, the lower appellate court by its judgment and decree dated 27.09.2006 in A.S.No.9 of 2005 has reversed the findings of the trial court by dismissing the suit.

22. As observed earlier, section 90 of the Indian Evidence Act stands independently of sections 68 and 69 of the Indian Evidence Act read with section 59 of the Transfer of Property Act. Section 90 of the Indian Evidence Act embodies the rule of necessity. The rule has been established for the sake of general convenience, founded on the great difficulty and often impossibility of proving handwriting after a long lapse of time.

23. In the case on hand, the certified copy of the mortgage deed (Ex.A1) which is more than 30 years old has been filed by the plaintiffs as a secondary evidence in lieu of the original and eventhough the defendant has denied the execution of such a document, it is not their case that such a document was not executed and registered before the Registrars office from where the plaintiff has obtained a certified copy. Ex.A1 has also been retrieved only from the proper custody of the Registrar's office. The trial court has considered all the aforementioned factors and has also considered the fact that the defendant did not raise any objection at the time of marking of Ex.A1 and only thereafter, has presumed its validity and proper attestation exercising its powers under section 90 of the Indian Evidence Act.

24. Further, the mortgage deed dated 11.05.1965 marked as Ex.A1 is a public document within the meaning of section 74(2) of the Indian Evidence Act. Section 76 of the Indian Evidence Act enables a public officer to give any person on demand, a copy of the public document on payment of the necessary charges. Section 77 of the Indian Evidence Act also makes it clear that the certified copies of public documents may be produced as proof of the contents of the public documents or parts of the public documents of which they purport to be copies. Section 74 to section 77 of the Indian Evidence Act which are the relevant sections referred to supra are extracted hereunder:

> "74.Public documents.—The following documents are public documents :—
>
> (1) Documents forming the acts, or records of the

acts-

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, or of a foreign country;

(2) Public records kept of private documents.

75.Private documents.—All other documents are private.

76.Certified copies of public documents.—Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

77.Proof of documents by production of certified copies.—Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies."

25. In the case on hand, the procedure adopted by the plaintiffs to get the certified copy of the mortgage deed (Ex.A1) has also not been questioned by the defendant. The defendant has also not pleaded that the certified copy of Ex.A1 was obtained improperly by not following the procedure contemplated law. It is also not his case that the mortgage deed Ex.A1 is not a public document coming within the purview of section 74 of the Indian Evidence Act. The plaintiffs have proved that the mortgage deed dated 11.05.1965 is a valid document. The trial court has rightly decreed the suit for redemption in favour of the plaintiffs as sections 68 and 69 of the Indian Evidence Act as well as section 59 of the Transfer of Property Act which the learned counsel for the defendant has relied upon before this Court has no bearing for the facts of the present case as those sections lays down the normal rule of evidence whereas section 90 of the Indian Evidence Act which stands independently on a different footing altogether is an exception to the normal rule of evidence which permits the courts by exercising its judicious discretion to admit any document which is 30 years old as a piece of evidence.

Admittedly, in the case on hand, the certified copy of the mortgage deed (Ex.A1) has been obtained from the proper custody of the Registering officer and it is also not in dispute that it is a public document coming within the purview of Section 74(2) of the Indian Evidence Act.

26. However, the lower appellate court has erroneously reversed the findings of the trial court by rejecting the mortgage deed dated 11.05.1965 (Ex.A1) on the ground that (a) the execution of the same has not been proved by the plaintiffs in accordance with sections 68 and 69 of the Indian Evidence Act and section 59 of the Transfer of Property Act and (b) presumption under section 90 of the Indian Evidence Act is applicable only for the original documents and not for a certified copy.

27. The decision relied upon by the learned counsel for the Appellants/plaintiffs in the case of A.Sankaralingam vs. Arunachala Reddiar and others reported in 1993 1 MLJ 472 supports the case of the plaintiffs. In the referred case also, the objection regarding the mode of proof of a document was not taken at the time of marking of the said document as an exhibit. Learned Single Judge of this Court in the said decision held that the objection regarding the mode of proof of a document has to be taken at the time when it is being exhibited and not at a later stage and also held that a piece of evidence even assuming not proved in proper manner which has been admitted without objection, it is not open to the opposite party to challenge it at a later stage. In the case on hand also, the certified copy of the mortgage deed (Ex.A1) was allowed to be marked as an exhibit by the plaintiffs as the defendant did not raise any objection when the said document was marked as an exhibit and only in the later stage of litigation, he has raised objection with regard to its marking.

28. The execution of the mortgage deed dated 11.05.1965 (Ex.A1) does not also appear to be doubtful in view of the fact that there is no evidence to show that the said document was not executed and registered before the concerned registrar office on 11.05.1965. The plaintiffs have also pleaded in their plaint as well as deposed before the trial court that they have not filed the original of Ex.A1 only due to the fact that despite issuing of notices to the defendant prior to the filing of the suit, the defendant failed to redeem the mortgage and return the original mortgage deed. Therefore, the plaintiffs have laid proper foundation in his pleading as well as through his deposition for admission of secondary evidence of Ex.A1 under section 63 of the Indian Evidence Act. Further, when the defendant has also not

pleaded or proved forgery or fabrication of the disputed document Ex.A1 by the plaintiffs, the presumption of its validity and execution under section 90 of the Indian Evidence Act by the trial court is a correct finding.

29. Section 57(5) of the Registration Act, 1908 also makes it clear that all certified copies issued by the Registering Officers pertaining to book numbers 1, 2, 3 & 4 shall be admissible for the purpose of proving the contents of the original document. In the case on hand, admittedly, the mortgage deed (Ex.A1) has been issued by the Registering Officer and it falls under one of the aforementioned book entries and therefore, the certified copy of the mortgage deed (Ex.A1) is admissible as a piece of evidence for the purpose of proving the contents of the original mortgage deed.

30. The decisions relied upon by the learned counsel for the respondents in the case of (a) Sri Lakni Baruan and Others vs. Sri Padma Kanta Kalita & Others reported in 1996 8 SCC 357 and (b) H.Siddiqui (Dead) by Lr vs. A.Ramalingam reported in (2011) 4 SCC 240 have no bearing for the facts of the instant case, since the plaintiffs have through their pleadings and oral and documentary evidence have been able to establish the fundamental evidence required for admission of secondary evidence of the mortgage deed dated 11.05.1965 marked as Ex.A1. Further, when due execution of the mortgage deed dated 11.05.1965 (Ex.A1) does not appear to be doubtful, the trial court has rightly exercised its discretion judiciously by holding the said document to be admissible in evidence.

31. The lower appellate court by total non application of mind to the difference between section 90 of the Indian Evidence Act which is independent of Sections 68 and 69 of the Indian Evidence Act and section 59 of the Transfer of Property Act has erroneously reversed the findings of the trial court and dismissed the suit by giving untenable reasons which on the face of it is not in accordance with law.

32. The decision of the Hon'ble Supreme court in the case of Ishwar Dass Hain (dead) through LRS., vs. Sohan Lal (dead) by LRs., reported in AIR 2000 SC 426 relied upon by the learned counsel for the Appellants/plaintiffs also supports the case of the plaintiffs. In that case also, the certified copy of the mortgage deed was filed by the plaintiffs and the defendant was called upon to file the original. Since the original was not produced, the Hon'ble Supreme Court held that when the execution of the mortgage deed has not been specifically denied by the mortgagee, it was not necessary for the plaintiffs to call the attestor into the witness box. The Hon'ble Supreme Court held that in such a case, a certified copy of the mortgage deed is

sufficient to prove the execution of the said deed. In the case on hand also, excepting for a bald denial of the execution of mortgage deed dated 11.05.1965 marked as Ex.A1 by the defendant, there is no specific denial made by the defendant in his written statement as required under Order 8 Rule 3 to Rule 5 of CPC. Order 8 Rule 3 to Rule 5 of CPC reads as follows:

> "3.Denial to be specific.- It shall not be sufficient for a defendant in his written statement to deny generally, he must do so specifically with each allegation of fact of which he does not admit the truth, except damages.
>
> 4.Evasive denial.- Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.
>
> 5.Specific denial.- (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability; Provided that the court may in its discretion require any fact so admitted to be proved otherwise than by such admission.
>
> (2) Where the defendant has not filed a pleading, it shall be lawful for the court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the court may, in its discretion, require any such fact to be proved.
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> (3) In exercising its discretion under the proviso to sub-rule (2), the court shall have due to the fact whether the defendant could have or has engaged a pleader.
>
> (4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced."

33. When there has been no specific denial as contemplated under Order VIII Rule 3 to Rule 5 of CPC, the trial court has rightly held that Ex.A1 mortgage deed is admissible in evidence. Any denial must be specific and explicit and cannot be a general denial which is the case of the defendant in the instant case. The defendant has also not pleaded that they have become the owner of the suit schedule property by adverse possession. The certified copy of the mortgage deed which is more than 30 years old and produced from proper custody with explanation for non-production of original, it shall be presumed that official acts were properly performed for the issuance of the certified copy. The plaintiffs have satisfied all the statutory requirements required for admissibility of secondary evidence under section 63 of the Indian Evidence Act for the purpose of getting the benefit of section 90 of the Indian Evidence Act which enables the court to presume that the mortgage deed (Ex.A1) was validly executed and attested.

34. The decision relied upon by the learned counsel for the Appellants/plaintiffs in the case of Iqbal Basith and others vs. N.Subbalakshmi and others reported in 2021 (2) CTC 104 applies to the facts of the instant case. In that case also, photocopies of documents over 30 years old were produced and marked as exhibit without objection and the genuineness of the same was questioned by the defendant, the Hon'ble Supreme Court held that the documents more than 30 years old produced from proper custody with an explanation for non-production of original, the presumption of the said document under section 90 of the Indian Evidence Act is valid.

35. Under this section, a presumption may be drawn in favour of document of thirty years old or what is known as Ancient Documents. Ordinarily whenever the execution of a document is required to be proved, rules relating to the proof of the execution of a document as provided under relevant provisions of Indian Evidence Act are required to be proved. But Section 90 of the Indian Evidence Act is an exception, where if the document to be proved is 30 years old and is produced from any custody which the court in the particular case considers proper, the general rules of evidence as found in sections 68 and 69 of the Indian Evidence Act and section 59 of the Transfer of Property Act will not apply.

36. The plaintiffs have deposited a sum of Rs.200/- which is the loan amount under the mortgage deed dated 11.05.1965 (Ex.A1) before the trial court. In the written statement, the defendant has denied the existence of the mortgage deed dated 11.05.1965 (Ex.A1). When the plaintiffs have been able to prove through oral and documentary evidence about the existence of the mortgage deed (Ex.A1) and when the defendant has not raised any

dispute as to the outstanding amount payable by the plaintiffs under the said mortgage deed, it has to be presumed that the sum of Rs.200/- deposited by the plaintiffs before the trial court is the amount borrowed under the mortgage deed is correct.

37. The doctrine of clog on redemption is one of the principles applicable for redemption of mortgage under section 60 of the Transfer of property Act. The doctrine of clog on redemption is based on the principle that once a mortgagee he is always a mortgagee. The said phrase means that the mortgagee would always be a mortgagee and never become an owner. He cannot transfer the property rights to the third party as he does not have the authority to pass on the benefits of the property. The phrase is a part of equity of fairness to ensure no exploitation by the mortgagee takes place. Accordingly, a mortgage deed establishes two things, one being the right of the creditor which is limited up to his interest and other being deducting the residuary interest of the creditor from it. In a mortgage deed, the right of redemption is always there and cannot be written of and unless the debtor fails to repay the amount. The right is equitable to right to redeem.

38. In the case on hand, admittedly, the plaintiffs are the legal heirs of the deceased Krishnamoorthy Padayachi, the mortgagor under the mortgage deed dated 11.05.1965(Ex.A1). Even though the defendant has contended that there are other legal heirs for the deceased krishnamoorthy padayachi, he has not pleaded in his written statement as to who are the other legal heirs. However, it has been the categorical stand of the plaintiffs that they are the only heirs of the deceased Krishnamoorthy padayachi. They discharged their burden of establishing that they are the only legal heirs of Krishnamoorthy Padayachi. Even though they have not filed the legal heirship certificate of Krishnamoorthy padayachi before the Trial court, the non filing of the same is immaterial in view of the fact that the defendant has not given the names of the other legal heirs if any for the deceased Krishnamoorthy Padayachi. It can be presumed from the material and evidence available on record that the plaintiffs are the only legal heirs of the deceased Krishnamoorthy Padayachi. Therefore this Court is of the considered view that as interested parties to the mortgaged property, the plaintiffs are entitled to file the suit for redemption.

39. For the foregoing reasons, the substantial questions of law formulated by this Court at the time of admission of this second appeal are answered in favour of the plaintiffs by holding that (a) Ex.A1 mortgage deed has been duly executed and attested and the same has been proved by the plaintiffs and (b) the certified copy of the mortgage deed is sufficient and

admissible in evidence under section 90 of the Indian Evidence Act as the plaintiffs have been able to prove that the mortgage deed has been duly executed and attested.

40. In the result, the second appeal is allowed and the judgment and decree of the lower appellate court in A.S.No. 9 of 2005 is hereby set aside and the judgment and decree dated 08.04.2004 passed by the trial court namely Principal District Court, Chidambaram in O.S.No.391 of 1993 is hereby confirmed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

nl

To

1. The Subordinate Judge, Chidambaram

2. The Principal District Munsiff, Chidambaram

Copy To

The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.A.Muthukumar, Advocate, S.R.No.38638

S.A.No.794 of 2007
and
M.P.No.1 of 2014

PA(CO)
PM/21/10/2021