



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 31.08.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

A.S. (MD) No.78 of 2013

K.Rangan

... Appellant/6th Defendant

Vs.

1.N.Shivaraj

2.K.Sheela

3.Rathinambal

4.M.Rajendran

5.M.Marudappan

6.M.Natarajan

7.Devika Rani

... Respondents/Plaintiffs

... Respondents/Defendants 1 to 3

... Respondents/Defendants 4 & 5

Prayer: Appeal suit filed under Section 96 of C.P.C., to set aside the Judgment and Decree dated 12.12.2012 in O.S.No.51 of 2009 on the file of the I Additional District Judge, Tiruchirappalli and allow this appeal suit.

For Appellant : Mr.H.Arumugam,
for Mr.B.Jameel Arasu.

For R-1 & R-2 : Mr.R.Sundar

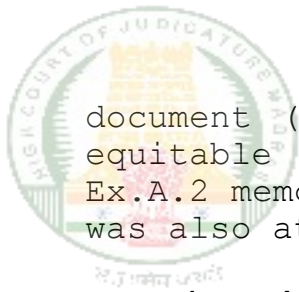
For R-3 to R-7 : Ms.J.Maria Roseline

J U D G M E N T

This appeal is directed against the judgment and decree dated 12.12.2012 made in O.S.No.51 of 2009 on the file of the I Additional District Judge(PCR) (FAC), Tiruchirappalli.

2.The sixth defendant in the suit is the appellant herein. The suit was filed by respondents 1 and 2 herein for passing preliminary mortgage decree declaring the amount due under the suit mortgage with interest and for directing the defendants to pay the said amount to the plaintiffs on or before the date to be fixed by the Court and in default to pass final decree for the sale of the suit property.

3.The case of the plaintiffs is that the deceased Muthuramalinga Rathinavelu Chettiar and his son M.Natarajan(4th defendant) approached the plaintiffs and borrowed a sum of Rs.6,50,000/- on 18.04.2005. They executed Ex.A.1 promissory note dated 18.04.2005 undertaking to repay the said amount with interest at 24% p.a. The promissory note was executed by the deceased Muthuramalinga Rathinavelu Chettiar and the fourth defendant M.Natarajan. It was attested by the other two sons, namely, defendants 2 and 3. Two days later, Muthuramalinga Rathinavelu Chettiar came to the plaintiffs' house and deposited the title



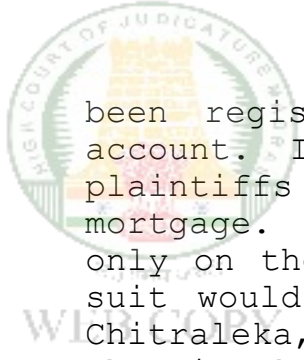
document (Ex.A.3 dated 26.07.1970) with an intention to create an equitable mortgage by deposit of title deeds. He also executed Ex.A.2 memorandum of deposit of title deeds dated 20.04.2005. Ex.A.2 was also attested by defendants 2 and 4.

4.Muthuramalinga Rathinavelu Chettiar subsequently passed away. His legal heirs instead of clearing the mortgage liability, sold the property in favour of the appellant herein on 07.11.2008 vide Ex.A.20 for a sum of Rs.9,25,000/-. The appellant had retained a sum of Rs.2,00,000/- and had paid the balance sale consideration. The retained amount was to be paid to the vendors, after the original title document said to have been missing is found out and handed over. The plaintiffs also stated that the deceased mortgagor had availed loans from other persons and one of the creditors, namely, Chitraleka filed I.P.No.4 of 2005. During the pendency of the insolvency petition, the sale in favour of the appellant took place. The insolvency petition was withdrawn on 11.11.2008 as not pressed. Though the plaintiffs had earlier got themselves impleaded in I.P.No.4 of 2005, their endeavour to revive the I.P. was not successful. Left with no other option, they filed O.S.No.51 of 2009 for enforcing the suit mortgage.

5.The appellant filed written statement controverting the plaint averments. His stand was that he was a *bona fide* purchaser for valuable consideration. His vendors had told him that the parent documents were missing and that they could not be found out. The appellant believed their words and entered into the transaction. The appellant would allege collusion between his vendors and the plaintiffs. The vendors who were shown as defendants 1 to 4 also filed written statement. They denied the suit transaction in its entirety.

6.Based on the rival pleadings, the Court below framed the necessary issues. The first plaintiff examined himself as P.W.1 and marked Ex.A.1 to Ex.A.21. The appellant examined himself as D.W.1 and marked Ex.B.1 to Ex.B.14. After a consideration of the evidence on record, the Court below passed preliminary decree and the defendants were directed to pay the plaintiffs the suit claim of Rs.11,17,675/- together with interest at 12% p.a. from the date of plaint till the date of realisation. Challenging the same, the purchaser /D6 filed this first appeal.

7.The learned counsel appearing for the appellant submitted that the collusion between the plaintiffs and the appellant's vendors is apparent. The borrowal had taken place on 18.04.2005. The plaintiffs had lent money on the strength of Ex.A.1 promissory note. It is improbable that the deceased borrower, namely, Muthuramalinga Rathinavelu Chettiar could have voluntarily come two days later on 20.04.2005 and deposited the original sale deed dated 26.07.1970 (Ex.A.3). In any event, Ex.A.2 memorandum of title deeds which was



been registered, the Court below could not have taken it into account. If Ex.A.2 is eschewed out of consideration, then the plaintiffs could not have filed the suit on the strength of mortgage. They could have sought recovery of the borrowed amount only on the strength of Ex.A.1 promissory note in which event, the suit would have been hit by limitation. He also pointed out that Chitraleka, one of the creditors of Muthuramalinga Rathinavelu Chettiar had filed an insolvency petition. It appears that the suit transaction had been created for the purpose of defeating the said insolvency petition. The insolvency petition was filed on 31.03.2005. The suit transactions are said to have taken place in the third week of April 2005. When the plaintiffs got themselves impleaded in the said I.P., the creditor Chitraleka had impeached the suit transaction as collusive. The collusive nature of the transaction is further evident from the fact that on 26.04.2005 itself, the plaintiffs issued a notice as if Muthuramalinga Rathinavelu Chettiar was attempting to alienate the mortgaged property. Interestingly, no reply was issued by the borrower. A second notice was also sent on 10.09.2008 and without formally responding to the same, intimation was given as if caveats have been filed by the borrowers. The purchaser genuinely believed that the title documents were missing and that is why, he retained a sum of Rs.2,00,000/- undertaking to pay the said amount, as and when the title documents are handed over to him. The learned counsel appearing for the appellant wanted this Court to see through the game sought to be played by the plaintiffs in collusion with the appellant's vendors. He pointed out that the appellant's vendors though filed written statement and also took part in the case of trial, did not enter the witness box. He emphasised that even if the suit transaction is assumed to be genuine, Ex.A.2 memorandum of deposit of title deeds requires compulsory registration and in as much as it has not been registered, it is inadmissible in evidence. Once the inadmissibility of Ex.A.2 is sustained, the suit has to necessarily fail. He called upon this Court to set aside the impugned judgment and decree and allow this appeal and dismiss the suit.

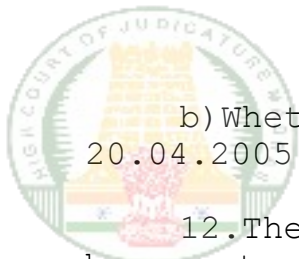
8.The learned counsel appearing for the appellant's vendors reiterated the stand set out in the written statement.

9.The learned counsel appearing for respondents 1 and 2/plaintiffs submitted that the impugned judgment is a well reasoned one and that it does not call for any interference.

10.I carefully considered the rival contentions and went through the evidence on record.

11.The points for consideration are as follows:-

a)Whether the plaintiffs have established that the mortgage was created by deposit of title deeds?



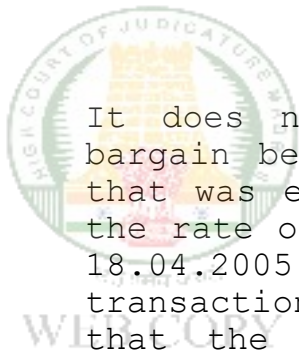
b)Whether Ex.A.2 memorandum of deposit of title deeds dated 20.04.2005 required registration?

12.The rival versions projected by the parties have already been set out. According to the plaintiffs, a sum of Rs.6,50,000/- was borrowed by Muthuramalinga Rathinavelu Chettiar and the fourth defendant on 18.04.2005. Ex.A.1 was attested by defendants 2 and 3 who are none other than the sons of Muthuramalinga Rathinavelu Chettiar. Muthuramalinga Rathinavelu Chettiar had passed away by the time the suit was filed. Even though the legal heirs of Muthuramalinga Rathinavelu Chettiar had filed written statement and also taken part in the trial, they kept away from the witness box. The Court below was therefore justified in drawing adverse inference against them. The first plaintiff was examined as P.W.1 and Ex.A.1 promissory note was also marked. Thus the plaintiffs clearly established that the deceased Muthuramalinga Rathinavelu Chettiar and his son fourth defendant Natarajan borrowed a sum of Rs.6,50,000/- on 18.04.2005. The only question that calls for determination is whether Ex.A.2 memorandum of deposit of title deeds requires registration.

13.The learned counsel appearing for the appellant relied on the decisions reported in AIR 1970 SC 659 (Deb Dutt Seal V. Raman Lal Phumra and others) and 2021-3-L.W.240 (Lakshmi Ammal V. The Catholic Syrian Bank Ltd., and others) for the proposition that when the document represents the bargain between the parties, it would require registration. In other words, where the document discloses creation of mortgage, it warrants registration. He also placed reliance on the decisions reported in AIR 1977 Andhra Pradesh 123 (Rachapudi Venkata Subba Rao V. Lingineni Lakshmiah Chowdary and others), AIR 1998 Ker 344 (Hubert Peyoli Vs. Santhavilasathu Kesavan) and AIR 1962 Madras 258 (Indersain V. Mohammed Raza Gowher and another) for the proposition that where a document warranting registration is not registered, it cannot be an admissible evidence to prove a valid equitable mortgage by deposit of title deeds.

14.There cannot be any quarrel with the propositions advanced by the learned counsel appearing for the appellant. The only question is whether by virtue of Ex.A.2 equitable mortgage was created or whether it is merely a record of an antecedent transaction. Ex.A.2 states that on 18.04.2005, Muthuramalinga Rathinavelu Chettiar and M.Natarajan have executed a promissory note in favour of the plaintiffs and had availed a loan of Rs.6,50,000/- undertaking to repay the same with interest at 24% p.a. It further recites that to secure the said transaction, Muthuramalinga Rathinavelu Chettiar had handed over the title document, E.B.receipt as well as the property tax receipt(Ex.A.3 and Ex.A.4). The expression employed in Ex.A.2 is as follows:-

“புரோ நோட்டிற்கு ஜாமீனாக இன்று நான் மனப்பூர்வமாக தங்களிடம் ஒப்படைத்துள்ளேன்.”



It does not employ the expression "ஒப்படைக்கிறேன்". The terms of bargain between the parties are set out in Ex.A.1 promissory note that was executed on 18.04.2005. The principal amount borrowed and the rate of interest are already found in the promissory note dated 18.04.2005. The deposit of title deeds was only to secure the said transaction. As a record thereof, Ex.A.2 was executed. It is true that the deposit of title deeds as well as the execution of memorandum of deposit of title deeds are on the same date. But that would not be determinative of the issue. One has to go by the terms of the document. If the memorandum of deposit of title deeds is a record of an event, it does not require registration even though the event recorded had taken place on the same date. In the case on hand, the borrowal took place two days earlier and to record the deposit of title deed, the memorandum of deposit of title deeds was also executed. I construe Ex.A.2 as an evidential document and not as a operative document. Therefore, Ex.A.2 does not require registration.

15.I am also not persuaded to hold that the appellant is a *bona fide* purchaser for consideration. The appellant knew that his vendors were facing insolvency proceedings. One of the creditors of Muthuramalinga Rathinavelu Chettiar had filed I.P.No.4 of 2005 and during its pendency, the sale in favour of the appellant had taken place. Soon after the sale transaction was concluded, I.P.No.4 of 2005 was also dismissed as not pressed. It is obvious that the claim of the creditor who filed I.P.No.4 of 2005 was settled and that is why it was dismissed as not pressed. Of course in the said I.P.No.4 of 2005, the suit transaction had been impeached. When no finding as regards the suit transaction was rendered in I.P. No.4 of 2005 on merits, on the strength of the pleadings made therein, I cannot come to any conclusion. The appellant as a prudent purchaser ought to have insisted on production of the original title documents. He could not have glibly believed the statement of his vendors that the title document was missing. If the appellant had given publication in any prominent newspaper having local circulation, then that might have reinforced his plea. He has not done so. The appellant who obviously had knowledge of the pendency of I.P.No.4 of 2005, could have issued notice to all the parties in I.P.No.4 of 2005. He had not shown due diligence. I, therefore, agree with the finding of the trial Court that the plaintiffs were entitled to enforce the suit mortgage.

16.However, I find considerable force in the contention of the learned counsel appearing for the appellant that award of interest at 12% p.a. is on the higher side. The learned counsel relied on the decision reported in AIR 1998 SC 1101 (N.M.Veerappa V. Canara Bank) and AIR 1969 SC 600 (Soli Pestonji Majoo V. Ganga Dhar Khemka) for the proposition that though Section 34 of C.P.C. is not applicable to mortgage transactions, Order 34 Rule 11 of C.P.C. will enable the Court to award interest at a lesser rate. Interest at 12% p.a. awarded to the plaintiffs is reduced to 6% p.a. The defendants



are directed to pay the plaintiffs the sum of Rs.12,23,219/- with interest on Rs.6,50,000/- @ 6% p.a. from the date of plaint till the date of realisation. The impugned judgement and decree of the Court below is modified to this extent. In all other respects, it is confirmed.

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17.The appellant is at liberty to proceed against his vendors for recovering the decretal amount which he has now been directed to pay. Of course the amount of Rs.2,00,000/- with interest at 12% p.a. will have to be deducted from such a claim. This appeal suit is partly allowed coupled with the aforesaid liberty to the appellant to proceed against his vendors. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

Note:In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1.The I Additional District Judge,
Tiruchirappalli.

Copy to:

The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1 CC to M/s.B.JAMEEL ARASU, Advocate (SR-27919[F] dated 02/09/2021)

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RS (28.09.2021) 6P 5C