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A.S.No.958 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 09.11.2022

Judgment Pronounced on : **24.11.2022**

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

A.S.No.958 of 2012
and M.P.No.1 of 2012 and C.M.P.No.20135 of 2021

1. S.Madheswaran
 2. M.Saravana Prakash
 3. Rajganesh
 4. M.Sivakama Sundari
- .. Appellants

Versus

P.R.Nagraj

.. Respondent

Prayer : Appeal Suit filed under Section 96 r/w Order 41 R 1 and 2 of Civil Procedure Code against the judgment and decree,dated 30.08.2011 in O.S.No.3 of 2010 on the file of the learned I Additional District Judge, Salem.

For Appellants : Mr.R.Ezhilarasan

For Respondent : Mr.R.Jayaprakash



A.S.No.958 of 2012

JUDGMENT

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A. The Appeal Suit :

This Appeal Suit is filed against the judgment and decree, dated 30.08.2011 in O.S.No.3 of 2010 passed by the learned I Additional District Judge, Salem, in and by which, the suit filed by the plaintiff was decreed directing the defendants to pay into the Court a sum of Rs.12,38,161.75 ps with interest on principal sum of Rs.4,00,000/- at the rate of 6% per annum from the date of plaint till the date of realisation and in default of payment, the plaintiff can apply for sale of the mortgaged property and that the money be realised by the same.

B. The Plaint :

2. The case of the plaintiff is that the defendants 1 and 2 borrowed a sum of Rs.1,00,000/- from the plaintiff on 15.06.1999 for their urgent business expenses and executed a promissory note in favour of the plaintiff agreeing to repay the same with interest at the rate of 24% per annum. Again on 20.09.1999, the defendants 1 and 2 had further borrowed another sum of Rs.3,00,000/- for their urgent business expenses and executed yet another promissory note promising to repay the same with interest at the rate



A.S.No.958 of 2012

WEB COPY

of 24% per annum. Thereafter, on 29.09.1999, with an intention of creating a mortgage by deposit of title deeds, the defendants 1 and 2 handed over the original title deed, dated 01.08.1975 of the suit schedule property and a photo copy of the registered partition release deed, dated 09.03.1995 executed in favour of the first defendant by his sisters and both the defendants 1 and 2 also executed a memorandum of deposit of title deeds. On default of payment, the plaintiff issued a legal notice on 30.08.2001. A reply was issued on behalf of the second defendant on 13.09.2001 stating that he was negotiating with the plaintiff for settlement, but, thereafter, the defendants 1 and 2 vanished away from Salem and evaded the payment. The first defendant also executed a settlement deed in favour of the second defendant, the third defendant, who is another son of the first defendant and the fourth defendant, his daughter, on 17.09.2008 which is not binding on the plaintiff. Therefore, the suit on mortgage was filed for a preliminary decree for a sum of Rs.11,32,750/- with subsequent interest on the principle amount of Rs.4,00,000/-.

C. The Written Statement :



A.S.No.958 of 2012

WEB COPY

3. The first defendant filed a written statement which is adopted by the other defendants, in and by which, they resisted the suit by stating that they never borrowed any amount from the plaintiff. The defendants 1 and 2 did not hand over the original partition deed, dated 01.08.1975 or the xerox copy of the release deed. The first defendant gets title to the property only by the original release deed, dated 09.03.1995 and in the absence of the title deed being deposited, there cannot be any valid mortgage. The plaintiff and the first defendant are both friends. One of the friends of the first defendant, one *Sundaresan*, gave order to the plaintiff for manufacture of silver ornaments, who seems to have defaulted in payment to the plaintiff. With an intention to collect the arrears of the said *Sundaresan* from the first defendant, the plaintiff created and fabricated the promissory notes and the memorandum of deposit of title deeds. Therefore, there is no liability on the part of the defendants and the suit is vexatious suit.

D. The Issues :

4. On the strength of the said pleadings, the Trial Court framed the following five issues:-

(i) *Whether the defendants 1 and 2 borrowed Rs.1,00,000/- and Rs.3,00,000/- from*



A.S.No.958 of 2012

plaintiff on 15.06.1999 and 20.09.1999 respectively and executed pronotes in favour of the plaintiff?

(ii) Whether the defendants created an equitable mortgage of the suit property by deposit of title deed on 29.09.1999?

(iii) Whether the settlement of the 1st defendant made in favour of defendants 3 & 4 on 17.09.2008 is valid and binding?

(iv) Whether the plaintiff is entitled for the relief sought?

(v) What other relief the plaintiff is entitled?

E. The Evidence :

5. On the above said pleadings, the plaintiff examined himself as P.W.1 and one *K.J.Ramesh* was examined as P.W.2. On behalf of the plaintiff, *Exs.A-1* to *A-14* were marked. The second defendant examined himself as D.W.1, but, however, no documents were marked on behalf of the defendants.

F. The Findings of the Trial Court :



A.S.No.958 of 2012

WEB COPY

6. The Trial Court, thereafter, proceeded to appraise the evidence and considered the submissions of the parties and by a judgment, dated 30.08.2011, considering the oral testimony of the plaintiff and the attesting witness, P.W.2 and the reply notice caused by the second defendant and the defendants being unable to prove and explain as to how **Exs.A-4** and **A-5** were handed over to the plaintiff, came to the conclusion that the execution of **Ex.A-3**, memorandum of deposit of title deeds is duly proved by the plaintiff and the defendants borrowed the amounts and have not repaid, and hence decreed the suit as prayed for. By calculating the interest up to 30.10.2009, granted a decree for a sum of Rs.7,32,750/- and also allowed costs of Rs.1,05,411.75 ps.

G. The Submissions :

7. Heard *Mr.R.Ezhilarasan*, learned Counsel appearing on behalf of the appellants and *Mr.R.Jayaprakash*, learned Counsel appearing on behalf of the defendants.

8. *Mr.R.Ezhilarasan*, learned Counsel appearing on behalf of the appellants, would submit that in this case, the second defendant was a minor



A.S.No.958 of 2012

WEB COPY

as on the date of the execution of the first promissory note in **Ex.A-1** and as such, it will render the entire promissory note invalid. Once the promissory note is held to be invalid, unless the plaintiff proves the advancement of the money by other positive evidence, the same could not have been decreed by the Trial Court. He would submit that there is no registered mortgage deed in the instant case. The only plea on behalf of the plaintiff is that the mortgage is created by deposit of title deeds. In this case, there are only two title deeds in respect of the suit schedule property. As far as the first title deed in **Ex.A-4** is concerned, that is the sale deed which was in favour of the father of the first defendant. However, after the death of his father, by registered partition release deed, the sisters of the first defendant released their shares in favour of the first defendant and the photo copy of the same is marked as **Ex.A-5** which alone is the title deed of the defendants. Therefore, when the title deeds of the defendants was not deposited with the plaintiff, no mortgage can be said to have been created by depositing of a photocopy. Therefore, the alleged mortgage is invalid and once the mortgage is invalid, the suit, based on pronotes, is liable to be dismissed for invalidity of **Ex.A-1** pronote and is barred by limitation since the alleged borrowals are of the year 1999 and the suit was filed in the year 2010. The



A.S.No.958 of 2012

WEB COPY

learned Counsel also relied upon the judgment of this Court in ***Deenadayalan Vs. N.Satish Kumar and Ors.***¹.

9. Per contra, *Mr.R.Jayaprakash*, learned Counsel appearing on behalf of the respondent, would submit that this is a clear case where the defendants have borrowed money and thereafter failed and omitted to repay. The suit is a mortgage suit. Even though the second defendant was a minor at the time of execution of ***Ex.A-1*** pronote, in any event, the same came to be superseded by ***Ex.A-3***, memorandum of title deeds and therefore, at that time, he had already become a major and thus, the first argument on behalf of the appellants is without any merits. The learned Counsel would submit that as far as the mortgage by deposit of title deeds is concerned, the plaintiff has to prove that there was (i) a valid debt - which is proved by marking ***Exs.A-1*** and ***A-2*** pronotes; (ii) the deposit of title deeds - which is also proved by producing original sale deed which is the defendants' title deed in respect of the suit property under ***Ex.A-4*** and photocopy of the registered partition release deed; and (iii) the intention of the parties, to create mortgage, is clearly and categorically proved vide ***Ex.A-3***, memorandum of deposit of title deeds. The attesting witness of the

¹ MANU/TN/6826/2021



A.S.No.958 of 2012

WEB COPY

pronotes, dated 15.06.1999 and 20.09.1999 and the memorandum of deposit of title deeds was also examined as P.W.2. Merely because the defendants did not deposit the registered partition release deed, the same will not in any manner invalidate the mortgage. In the absence of the original sale deed in **Ex.A-4**, the first defendant cannot deal with the property in any manner whatsoever. As a matter of fact, **Ex.A-5** is a partition release deed, under which, the sisters of the first defendant had released their shares in respect of the immovable and movable properties belonging to the family in favour of the first defendant and therefore, does not relate to the schedule property alone and therefore, since the deed was required in respect of the other properties also, the defendants did not deposit the original of the said deed. However, on a reading of **Ex.A-3**, it would be clear and categorical that the defendants 1 and 2 had intention to create mortgage and mortgage has been duly created. The defendants, having failed to repay the loan amount, the Trial Court had rightly decreed the suit. In support of his contentions, the learned Counsel for the respondents would rely upon the judgment of this Court in **M/s.Ride Master Rims Private Ltd., Vs. ING Vysya Bank Ltd.,**



A.S.No.958 of 2012

**Chennai² and C.Rajagopal Vs. State Bank of Travaneore, Karur Branch
and Ors.³**

H. Points for consideration :

10. I have considered the rival submissions made on behalf of either side and perused the material records of the case. The following questions arise for consideration in the instant case:-

*(i) Whether the plaintiff's suit is bound to fail for the reason that the second defendant was a minor at the time of execution of **Ex.A-1** pronote?*

*(ii) Whether the defendants 1 and 2 can be said to have created a mortgage of the suit schedule property by deposit of title deeds, in the absence of depositing the original of **Ex.A-5** release-cum-partition deed?*

I. Question No.1 :

11. To answer the first question, it can be seen that the suit is filed not just based on **Exs.A-1** and **A-2**, promissory notes, but on mortgage created by memorandum of deposit of title deeds in **Ex.A-3**. Once the defendants have created mortgage of the suit property in respect of the amounts

² 2006 SCC OnLine Mad 683

³ MANU/TN/0591/1994



A.S.No.958 of 2012

borrowed vide **Ex.A-3**, which also acknowledges the borrowal of the said loan, then by itself the plaintiff had proved the advancement of the loan amount and whether or not the second defendant was a minor at the time of execution of **Ex.A-1** pronote becomes redundant and therefore, the plaintiff's suit will not be in any manner affected merely because the second defendant was minor as on 15.06.1999 i.e., when the **Ex.A-1** pronote was executed and I answered the point accordingly.

J. Question No.2 :

12. As far as the second question is concerned, **Ex.A-3**, deposit of memorandum of deposit of title deeds is duly executed by the defendants 1 and 2. The signature is not disputed. Further, the attesting witness was also examined as P.W.2. The original title deed of the suit property namely, the sale deed, by which, the first defendant's father purchased the suit property is handed over to the plaintiff along with the memorandum and the same is also produced before the Court and is marked as **Ex.A-4**. The first defendant inherited the property along with his sisters. The sisters, by a composite deed of partition/release, released their shares in the suit property in favour of the first defendant vide **Ex.A-5**, dated 09.03.1995. However,



A.S.No.958 of 2012

the original of the said document was not deposited with the plaintiff and only a photocopy is filed. The contention of the defendant is that mere deposit of photocopy will not create a mortgage. The law on the subject can be encapsulated as follows:-

(i) Section 58 of the Transfer of Property Act, 1882, defines "Mortgage" as the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The "transferor" is called a "mortgagor"; the "transferee" is called a "mortgagee" and the money is called the 'mortgage money' and instrument, by which, the transfer is effected is called a "mortgage-deed".

(ii) Section 58(f) of the Transfer of Property Act, 1882, deals with creation of mortgage by deposit of title deeds which reads as follows:-

" 58. ...

(f) Mortgage by deposit of title-deeds.---

Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create



WEB COPY



A.S.No.958 of 2012

a security thereon, the transaction is called a mortgage by deposit of title-deeds."

13. It is not in dispute that all the municipalities and town panchayats are notified by the State of Tamil Nadu to be the other towns as far as the Section 58(f) of the Transfer of Property Act, 1882 is concerned. Salem, at the relevant point of time, was a municipality and therefore, mortgage by deposit of title deeds can be created.

14. The Hon'ble Supreme Court of India in ***K.J.Nathan Vs. S.V.Maruthi Rao & Ors.***⁴, in paragraph No.8, explained the requisites of creation of a valid mortgage under Section 58(f) of the Transfer of Property Act, 1882, which reads as follows:-

" 8.....Under this definition the essential requisites of a mortgage deposit of title deeds are, (i) debt, (ii) deposit of title deeds, and (iii) an intention that the deeds shall be security for the debt. Though such a mortgage is often described as an equitable mortgage, there is an essential distinction between an equitable mortgage as understood in English law and the mortgage by deposit of title deeds recognised under the Transfer of Property Act in India."

⁴ AIR 1965 SC 430



A.S.No.958 of 2012

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Therefore, in order to create a valid mortgage, there must be an existence of debt, deposit of title deeds and an intention that the property shall be the security for the debt.

15. This Court, in ***C.Rajagopal Vs. State Bank of Travaneore, Karur Branch and Ors.*** (cited supra), considered a similar claim of non-deposit of all the original title deeds and held in paragraph No.3 of the said judgment as follows:-

" 3.....*The Full Bench has reviewed the English and Indian authorities and has pointed out that in order 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. "*

16. Further, it was held in paragraph No.8 of the same judgment that:-

" 8. *Much closer to the decision the above said case is the remark made by Pepys, M.R. in Goodwin v. Waghorn, (1835) 41 R.R. 208, that the deposit of a copy of a court roll (official record) would suffice to create an equitable*



WEB COPY



A.S.No.958 of 2012

mortgage. It should, however, be noted that in England, and equitable mortgage can be created without deposit of title deeds, but in such cases, the charges must be registered under the Land Charges Act, 1925, In view of the provisions of Section 58(f) of the Transfer of Property Act, deposit of documents of title, is however, essential in India to create what is frequently referred to as an equitable mortgage. The issue that, therefore, arises in cases like the present is whether the term "document" of title would only apply to a document by which the mortgagor derives title to the property to be mortgaged, or whether it would also apply to any document which provides some, if not conclusive, evidence that the mortgagor has title to the property. In our view, it is beyond doubt that the term lends itself to the interpretation that it includes the latter category of documents. "

17. In a context where the borrower had actually purchased the property and presented it for registration and when the document was still pending with the Sub-Registrar, in ***M/s.Ride Master Rims Private Ltd., Vs. ING Vysya Bank Ltd., Chennai*** (cited supra), this Court had held that even the xerox copy along with the receipt for presentation amounted to valid deposit of title deeds. In ***Lakshmi Ammal Vs. The Catholic Syrian Bank Ltd. and Ors.***⁵, this Court, in paragraph No.13, held as follows:-

⁵ MANU/TN/3870/2021



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A.S.No.958 of 2012

*"13. The next question is whether by depositing Xerox copies of title deeds, equitable mortgage can be created. Again, it depends on the intention of the parties and the attendant circumstances..
....."*

18. This Court, in **Deenadayalan Vs. N.Satish Kumar and Ors.** (cited supra), in a situation where there is not even a memorandum of deposit which was executed, had held that a mere deposit of photocopy of document alone would not suffice to create a valid equitable mortgage. It has to be noted that by the Registration (Tamil Nadu Amendment) Act, 2012, w.e.f. 01.12.2012, even the memorandum of deposit of title deeds are made compulsorily registrable, which was not the case at the relevant point of time. Thus, on a consideration of all the above, the legal position can be encapsulated as follows:-

(i) A mortgage by deposit of title deeds is validly created if the three ingredients are proved. They are (a) debt, (b) deposit of title deeds, and (c) an intention that the deeds shall be security for the debt;

(ii) As far as the title deeds are concerned, the same have to be deposited. Ordinarily photocopies and Certified copies from the registration department cannot be construed to be title deeds and therefore, only original



A.S.No.958 of 2012

WEB COPY

of the title deeds have to be deposited, unless there are valid and exceptional circumstances like loss of original deeds, deed pending for registration or if the deed is in custody of other parties like of partition deeds relating to multiple properties etc.;

(iii) The deposit of title deeds does not mean the deposit of all the original title deeds. It is sufficient that the documents which show a complete or good title on the depositor or if the deeds bona fide relate to the property and form as the material evidence of the title;

(iv) The title deed need not be necessarily the document by which, the mortgagor derives title to the property and the documents which provide evidence as to the mortgagor's title to the property;

(v) The intention of creating the security thereon shall be clear and categorical.

19. Now, keeping all the above in mind, it can be seen that the original of **Ex.A-4** is deposited with the plaintiff. Therefore, that by itself provides some evidence that the defendants 1 and 2 the mortgagor's title to the property. As far as **Ex.A-5** is concerned, though ordinarily the deposit of photocopy is impermissible, since the document is not restricted to the



A.S.No.958 of 2012

WEB COPY

mortgage property alone and is in respect of all the movable and immovable property of the family, the same is a valid justification and reason for non-deposit of original and deposit of a photocopy can be treated as enough in the circumstances of the case. Further, the memorandum of the deposit of title deeds, which is marked as **Ex.A-3**, clearly and categorically expresses the intention of creating a security for the amounts borrowed by the defendants 1 and 2. Therefore, I answer the question that the mortgage by deposit of title deeds is validly created in the instant case and the plaintiff cannot be non-suited merely because only a photocopy of **Ex.A-5** was deposited at the time of creation of mortgage.

K. Answers to the Issues :

20. In view of my answers to the questions, I find that the findings and conclusions reached by the Trial Court in respect of issue No.1, in the Original Suit, that the defendants 1 and 2 have borrowed a sum of Rs.1,00,000/- and Rs.3,00,000/- from the plaintiff on 15.06.1999 and 20.09.1999 respectively, as correct. I also concur with the Trial Court in answering issue No.2, in the Original Suit, that the defendants 1 and 2 created an equitable mortgage of the suit property by depositing of title



A.S.No.958 of 2012

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deeds on 29.09.1999. I also answer issue No.3, in the Original Suit, that the settlement deed executed by the first defendant in favour of the defendants 2 to 4 on 17.09.2008 is not binding on the plaintiff/mortgagor. I answer issue Nos.4 and 5, in the Original Suit, in terms of the decree of the Trial Court.

L. The Result:

21. In the result, this Appeal Suit in A.S.No.958 of 2012 is dismissed. The judgment and decree, dated 30.08.2011 of the learned I Additional District Judge, Salem in O.S.No.3 of 2010 shall stand confirmed. The respondent/plaintiff is also entitled for costs throughout. Consequently, connected miscellaneous petitions are closed.

24.11.2022

Index : yes
Speaking order
grs

To

1. The I Additional District Judge,
Salem.
2. The Section Officer,
V.R.Section,
High Court of Madras.



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A.S.No.958 of 2012

D.BHARATHA CHAKRAVARTHY, J.,

grs

Pre-Delivery Judgment in

A.S.No.958 of 2012
and M.P.No.1 of 2012
and C.M.P.No.20135 of 2021

24.11.2022