IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 24.01.2022

Coram:

THE HONOURABLE MR.JUSTICE T.RAJA
and
THE HONOURABLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Appeal Suit No.595 of 2019

K.Palanisamy, S/o Kulandhaivelu
.. Appellant/defendant
Vs.
K.M.Duraisamy, S/o Late Marappa Gounder
.. Respondent/plaintiff

Appeal Suit (First Appeal) filed under Section 96 of the Code of Civil Procedure, against the judgment and decree, dated 14.09.2018 made in O.S.No.16 of 2015 on the file of the I Additional District Court, Coimbatore.

For appellant : Mr.C.R.Prasanan

For respondent: Mr.C.Veeraraghavan

JUDGMENT

(The Judgment of the Court was delivered by T.Raja, J)

The appeal is heard through video-conferencing.

2. This appeal has been brought before us by the unsuccessful defendant questioning the correctness of the findings and the conclusions reached by the learned First Additional District Judge, Coimbatore (hereinafter referred to as 'the trial Court'), in the impugned judgment and decree dated 14.09.2018 in O.S.No.16 of 2015, in and by which, the trial Court, while accepting the case of the plaintiff for money decree, decreed the suit, directing the appellant/defendant to pay a sum of Rs.32,38,136/- (which includes the principal amount of Rs.20 lakhs), and fixed the interest @ 9% per annum for the said sum of Rs.20 lakhs and the trial Court further directed that the future interest is payable @ 6% from the date of decree till the date of realisation.

3. Learned counsel for the appellant/defendant argued that it was the case of the respondent/plaintiff that both the

plaintiff and the defendant were known friends. While so, the plaintiff claims that the appellant/defendant is said to have borrowed a sum of Rs.20 lakhs by cash from the plaintiff on 14.06.2012 for construction of a building and also towards the business and family expenses by executing a Promissory Note (for short, "pro-note"), with the promise to repay the same with interest @ 2% per month on demand. It is also the further case of the respondent/plaintiff that the appellant/defendant had deposited his original title deed with the first respondent/plaintiff at Coimbatore Town on 15.06.2012.

4. Learned counsel for the appellant/defendant further contended that the sale deed, dated 17.9.2008 stated to have been executed in favour of the defendant by Mr.Subramanian and M.Thangavelu, is a registered document bearing Document No.4285 of 2008, in respect of the property in question, with an intention to create equitable mortgage over the same. Accordingly, an equitable mortgage was created upon the said property. After some time, when the plaintiff is said to have made demand for repayment of the said loan and on failure to pay back the money by the appellant/defendant, the respondent/plaintiff issued a legal notice, dated 06.12.2014 calling upon the appellant/defendant to re-pay the amount, and on receipt of the same, a reply notice, dated 05.01.2015 was issued by the appellant/defendant. Finally, the plaintiff had filed the suit to pass a personal decree for a sum of Rs.32,38,136/- with interest on Rs.20 lakhs @ 24% per annum from the date of suit till the date of realisation and to pass preliminary mortgage decree for a sum of Rs.32,38,136/- with interest on Rs.20 lakhs @ 24% per annum from the date of suit till the date of realisation and for payment of costs.

5. Learned counsel for the appellant/defendant emphatically denied the execution of both the Promissory Note, dated 14.06.2012 and also the creation of the equitable mortgage upon the said property. It is further argued that there was no such transaction that had taken place between the plaintiff and the defendant at any point of time. However, when the appellant/defendant received the notice, dated 06.12.2014 from the respondent/plaintiff's counsel, a suitable reply notice was given on 05.01.2015, asking the plaintiff through his counsel to furnish the copies of the alleged plaint-pro-note and also the alleged deed of deposit for the simple reason that the appellant/defendant was unknown to the execution of the pro-note and also the deed of deposit. The respondent/plaintiff did not even come forward to furnish a copy of the pro-note and only through the Court, the copy was served on the appellant/defendant. The defendant also, in his reply, specifically stated that both the documents were the result of forgery, because the signatures found in the alleged documents

were not that of the defendant since, according to the defendant, he never signed the alleged pro-note, or the original deed of deposit. Moreover, in the reply notice, the appellant/defendant also made it clear that there was collusion between one Mr.Mohan and the plaintiff.

6. Explaining further, it is argued by learned counsel for the appellant/defendant that when Mr.Mohan and the respondent/plaintiff were close friends, the said Mr.Mohan wanted a loan, but he had no property to show as security. Hence, the said Mr.Mohan sought the help of the appellant/defendant to temporarily handover the document of title of his property to be shown to the plaintiff so that he would be able to secure the loan. On that premise, the defendant had handed over title deed to the said Mr.Mohan and he might have shown the title deed and that, at that time, there was no intention for the defendant to be a guarantor and the defendant, at no point of time, expressed that he would be a guarantor or intended to give any security and only for showing the deed of title, it was given to the said Mohan, and that this defendant had kept a blank stamp paper signed by him, which had gone into the custody of the said Mr.Mohan. The said Mr.Mohan, who had borrowed money from the plaintiff, had misused the signed stamp paper kept by the defendant in his custody. It is further contended by the learned counsel for the appellant/defendant that the signed papers could not be traced out and stated to be missing, and later, it was found that the signed papers were misused by the said Mr.Mohan, but unfortunately, he, after some time, had committed suicide and died, as a result, the appellant/defendant could not pursue against a dead person, but the plaintiff has misused the signed stamp paper of the defendant and also his title deed.

7. Therefore, according to the appellant/defendant, the plaintiff filed a civil suit in O.S.No.16 of 2015 before the trial Court on 13.01.2015 and a detailed written statement was filed by the defendant on 28.04.2015 categorically denying the signature of the defendant in the pro-note stating specifically that the defendant had never signed in the alleged pro-note. Hence, as per the settled legal position, when the signature is disputed by the defendant, both in the reply notice and also in the written statement, the respondent/plaintiff ought to have taken steps for examination of the disputed signature by handwriting expert. In support of his arguments, the learned counsel for the appellant/defendant relied on a judgment of the Supreme Court reported in 2014 (1) SCC 105 (State of Haryana Vs. Narvir Singh) and a Division Bench decision of this Court in the case of P.Sood & Co. Vs. Peerchand Misrimalji Bhausali, reported in 2005 (3) CTC 12 (DB).

8. Arguing further, learned counsel for the appellant/defendant, taking support from another judgment of a Division Bench of this Court in the case of Indersain Vs. Mohammed Raza Gowher, reported in 1961 (Vol.74) LW 797, for the proposition that, where the equitable mortgage is sought to be created by deposit of title deeds and letter is written as evidence thereof, if the documents had been deposited before execution of that letter, i.e. the document had been handed over to the plaintiff as security for the suit loan and the letter only recorded the past transaction, then there is no necessity for registration. But, in the present case, the learned counsel for the appellant/defendant pleaded that when the alleged pro-note was executed on 14.06.2012, the equitable mortgage was created upon the said property on 15.06.2012. Therefore, as per the above said ratio laid down by this Court in the decision reported in 1961 (Vol.74) LW 797, the equitable mortgage said to have been created upon the said property ought to have been registered, and it is not a registered document, and thus, the arguments advanced by the plaintiff before the trial Court and also before this Court that there has been an equitable mortgage created upon the said property, has no legs to stand. But this vital and crucial legal aspect as settled by this Court, has been completely overlooked by the trial Court, therefore, the judgment and decree passed by the trial Court are liable to be set aside.

9. Again repeating his arguments, learned counsel for the appellant/defendant submitted that, when it is the duty cast on the plaintiff to take out an application when there is a specific denial by the appellant/defendant, denying his signature in the pro-note and also the creation of the very pro-note itself, dated 14.06.2012, the plaintiff ought to have taken out an application to send the pro-note for signature verification as per the ratio laid down by this Court in the decision reported in 2005 (3) CTC 12 (supra), for examination of the disputed signatures by handwriting expert. That has also not been done and this aspect was overlooked by the trial Court. Therefore, according to the appellant/defendant, there is no pro-note as alleged by the respondent/plaintiff which was said to have been created on 14.06.2012, and equally, there is also no creation of equitable mortgage upon the property under dispute. When these two vital aspects have been completely unanswered by the trial Court, the impugned judgment and decree of the trial Court are liable to be set aside.

10. Per contra, the learned counsel appearing for the respondent/plaintiff submitted that when the appellant/defendant approached the plaintiff seeking immediate help for borrowing a sum of Rs.20 lakhs from the plaintiff for raising his building and also for his family and business expenses, the

appellant/defendant has executed a pro-note in favour of the respondent/plaintiff on 14.06.2012, with a categorical agreement to re-pay the same with interest @ 2% per month, but after execution of the pro-note on 14.06.2012, as a dutiful person, he has again approached the plaintiff on 15.06.2012 and he executed and gave letter of receipt acknowledging the handing over of the document of title as security for the loan borrowed on 14.06.2012. Since the appellant/defendant has borrowed a sum of Rs.20 lakhs and executed a pro-note on 14.06.2012 and on his own, he has also created an equitable mortgage upon the property mentioned therein on 15.06.2012, the plaintiff never thought that the said creation of the equitable mortgage should be registered.

11. Learned counsel for the appellant/plaintiff further submitted that, however, when there was a promise given by the defendant in the pro-note that on demand, the said amount would be repaid with interest @ 2% per month and in support of his pro-note, he has also handed over the document of title on his property towards security till the amount is repaid, the plaintiff was under the fond hope that the defendant, as promised, would come forward to clear the loan amount, but he evaded. Therefore, the plaintiff, on many occasions, made repeated requests to repay the money and to his surprise, found the defendant evading. Therefore, the plaintiff was constrained to issue a legal notice on 06.12.2014, marked as Ex.A-4 before the trial Court, calling upon the defendant to repay the entire money with interest thereon @ 2% per month. Surprisingly, on receipt of the said notice, he has sent a reply, which is marked as Ex.A-6, dated 05.01.2015, denying the execution of the pro-note itself and creation of equitable mortgage and again, to top it all, he has also denied his signature therein. This signature was appended to the pro-note and he has built up a story that Mr.Mohan being the close friend of the plaintiff, only has taken out the blank stamp paper signed by him along with the title deed and replied that the plaintiff only colluded with the said Mohan and created a bogus loan document and false discharge receipt. When the defendant took a stand in the reply notice/Ex.A-6, dated 05.01.2015 that, at no point of time, he has taken any legal action whatsoever against the respondent/plaintiff for having forged his signature or for committing theft of the document of title on the property in question, that clearly goes to show that the defendant has conceded his case both before the trial Court and also before this Court.

12. Therefore, according to the learned counsel for the respondent/plaintiff, the trial Court has rightly decreed the suit and without honouring the same, the appellant has unnecessarily, in an effort to protract the case, has come to

this Court by way of this appeal, when he borrowed a huge sum of Rs.20 lakhs on 14.06.2012 and even after lapse of nearly ten years, the appellant/defendant has no heart to pay back the money. Therefore, the suit should be dismissed.

13. Heard the learned counsel appearing for the parties and perused the materials available on record.

14. We frame the following two questions for consideration:

(i) Whether the findings and conclusions reached by the trial Court are liable to be interfered with on the ground that the case of the defendant was not legally appreciated ? And

(ii) Whether there was equitable mortgage created upon the property belonging to the appellant/defendant ?

15. When it was the claim of the respondent/plaintiff that on 14.06.2012, the appellant/defendant borrowed a sum of Rs.20 lakhs by executing the pro-note in favour of the plaintiff, agreeing to repay the same with interest @ 2% per month on demand, the defendant is said to have created equitable mortgage on 17.09.2008, in respect of the property in question and the equitable mortgage was created in respect of the property mentioned in Ex.A-3. Receipt was issued for deposit of title deeds on 15.06.2012 marked as Ex.A-2. Further, on 17.09.2008, sale deed (Ex.A-3) has been executed in favour of one Subramanian and Thangavelu by the defendant and that parent deed (sale deed) deposited with the plaintiff. Moreover, the sale deed (parent document) of the property belonging to the defendant, was also handed over to the plaintiff which is evident from Ex.A-3. When it is claimed by the respondent/plaintiff that the sum of Rs.20 lakhs was borrowed by the defendant on 14.06.2012, the defendant is said to have remained evasive. Therefore, the plaintiff has sent a legal notice on 06.12.2014, marked as Ex.A-4, requesting the defendant to come forward to clear the borrowed amount without any delay, in which he has also indicated that the defendant had to pay the sum of Rs.31,54,663/- on the basis of the interest calculated thereon. On receipt of the same, the defendant issued a reply notice dated 05.01.2015 marked as Ex.A-6.

16. A cursory reading of the reply notice shows that first of all, the appellant/defendant has denied the very creation of the pro-note itself on 14.06.2012 and also the creation of equitable mortgage. When he has denied the execution of the pro-note itself stating that when he was keeping a blank stamp paper signed by him in his custody, it was taken out by the said Mohan along with title deed, and thereafter, misusing the stolen blank stamp paper signed by the appellant/defendant, the said Mohan

has borrowed a sum of Rs.20 lakhs from the plaintiff and conveniently, he has also entrusted the title deed.

17. When the above facts were brought to the notice of the defendant by the earliest document, namely legal notice, dated 06.12.2014 (Ex.A-4) and that when he denied the creation of pro-note itself and also the creation of the equitable mortgage and also the receipt for deposit of title deed, it is a big surprise that why the defendant did not take any legal steps to recover the title deed and moreover, the parent document was marked as Ex.A-3. When the sale deed executed by the defendant in favour of one Mr.Subramanian and Mr.Thangavelu and the same having been handed to the plaintiff as a security for the loan borrowed from the plaintiff and receipt for the deposit of title deeds was also marked as Ex.A-2, dated 15.06.2012, which was also available with the respondent/plaintiff, it is highly unjustifiable and unacceptable on the part of the defendant to deny not only his signature(s) appended in the pro-note, but also handing over the document creating the equitable mortgage. As we have highlighted above, when the defendant in his reply notice, dated 05.01.2015, marked as Ex.A-6, has denied the creation of the very pro-note itself and also followed by creation of equitable mortgage, no legal steps whatsoever has been taken. That goes without saying that the defendant is quite capable of denying even the amount borrowed by him from the plaintiff. Therefore, when the defendant has not taken any steps whatsoever to retrieve the parent document and had also not taken even any legal steps for the alleged forgery said to have been committed by the plaintiff for creation of pro-note, it is not open to him to say on this date that when he denied his signature, the legal duty is cast on the plaintiff to take steps for examination of the disputed signature(s) of the parties.
The appellant/defendant denied the execution of both the pro-note dated 14.06.2012 and also the creation of equitable mortgage on the said property stating that there was no such transaction signed by the defendant with the plaintiff at any point of time. Having taken a stand that no such transaction took place between the defendant and the plaintiff in respect of exchange of the equitable mortgage deed, the defendant, contradicting his own stand, pleaded that one Mr.Mohan, being a close friend of the plaintiff, sought for a loan, but he had no property to show as security, hence, the said Mohan, seeking the help of the defendant to temporarily handover the document of title of his property to be shown to the plaintiff, receiving the title deeds from the defendant, the said Mohan had shown the said title deed. Along with the said title deed, the appellant/defendant, while keeping a blank stamp paper signed by him, had gone to the custody of the said Mohan who, having borrowed money from the plaintiff, had misused the blank signed stamp paper kept in his custody. The above admission clearly

shows that Mr.Mohan, who was the common friend of the plaintiff and the defendant, approached the defendant to help him to temporarily handover the document of title of his property to be shown as a security to the plaintiff, the appellant/defendant had admitted that he only handed over the title deeds to the said Mohan, who in turn gave it to the plaintiff. Secondly, along with the said title deed, a blank stamp paper signed by the defendant were also handed over to the plaintiff who, after forging the same, had filed the suit. As a matter of fact, when the appellant has clearly admitted that the document of title deeds belonging to him were handed over to Mohan, who in turn gave it to the plaintiff, the appellant taking a stand that the blank stamp paper signed by him also went with Mohan to the plaintiff, had not taken any steps to file a criminal case either against Mohan or against the plaintiff. That clearly shows that the appellant/defendant is known for speaking lies to evade the repayment of the loan amount to the plaintiff. Secondly, when he has directly admitted his signature in the blank stamp paper, he cannot find fault with the plaintiff or the trial Court for not sending the document to the handwriting expert to identify his signature, for the simple reason that he himself had admitted his signature stating that while he was keeping the blank stamp paper with his signature, that had gone into the custody of the said Mohan, who in turn, while borrowing money from the plaintiff, had misused the said blank stamp paper signed and kept by him in his custody. Therefore, the decisions relied on by the learned counsel for the appellant/defendant, supra, cannot be made applicable to the present situation. Accordingly, the first question framed is answered in favour of the plaintiff and against the appellant/defendant.

18. Coming to the second question, this Court, while dealing with the issue as to when a document should be registered, it is to be noted that the pro-note was made on 14.06.2012 Ex.A-1, the deposit of title deed was made only on 15.06.2012, and after deposit of title deed, the plaintiff has also given the receipt for the deposit of title deed in Ex.A-2. As a matter of fact, the sale deed (parent document) executed by the appellant in favour of the said Subramanian and Thangavelu on 17.09.2008, was also handed over to the plaintiff, no where the defendant has made any complaint against the plaintiff that even the sale deed (parent document) has been stolen away from his custody. Therefore, we do not find any infirmity in the impugned judgment of the trial Court.

19. The reliance placed by Mr.Prasanan, learned counsel appearing for the appellant/defendant on the decision in P.Sood & Co. (Manufacturing) represented by its Partner, Krishna Kumar Vs. Peerchand Misrimalji Bhansali, Prop. Meena Metals, Bombay, reported in 2005 (3) CTC 12, has no application whatsoever to

the facts of this case, because in the said case, the defendant therein disputed his signature in the document. Again the defendant therein had denied the signature even in the reply notice and also in the written statement. Therefore, this Court held in the said case that when the signature in the particular document was disputed by the defendant and also in the reply notice, the plaintiff ought to have taken steps for examination of the disputed signature by handwriting expert. Whereas in the case on hand, the appellant/defendant has categorically admitted that while he was keeping the blank stamp paper with his signature, the same had gone into the custody of Mr.Mohan, a close friend of the plaintiff, who, while borrowing money from the plaintiff, misusing the blank stamp paper with his signature, had handed over the same to the plaintiff. Therefore, when the defendant himself had admitted his signature in the blank stamp paper, the plaintiff need not take steps to examine the disputed signature, because it is the admitted signature of the defendant.

20. The Apex Court in the case of State of Haryana and others Vs. Narvir Singh and another, reported in 2014 (1) SCC 105, has held that ordinarily Mortgage by deposit of title deeds (MDTD) is not registrable, if title deeds of the pledged interest are deposited in notified town in view of Section 59 of the Transfer of Property Act, 1882, as it provides exception in respect of MDTD as far as registration thereof is concerned. This is for the reason that even if a simple (cognitive) memorandum is prepared to evidence handing over of deposit of title deeds by the borrower to the creditor, it does not require registration. However, it is also held that if the memorandum/instrument in question is constitutive of the transaction creating rights and liabilities or extinguishes them with regard to the MDTD, then, it is further held that the registration of such constitutive memorandum/instrument is compulsory.

21. In the case on hand, the pro-note has been executed by the appellant/defendant in favour of the plaintiff on 14.06.2012 for borrowing a sum of Rs.20 lakhs. On the next day (15.06.2012), the appellant had deposited the original title deeds with the plaintiff at Coimbatore Town. Therefore, after execution of the pro-note, on 15.06.2012, when the documents of title were handed over to the plaintiff, the evidence of handing over the deposit of title deeds by the borrower to the creditor shows the intention to create a security thereof, therefore, it does not require registration, because it is only a written record of the pledge, hence, the memorandum need not be an instrument of mortgage.

22. In similar circumstances, the Division Bench of this Court (in which, one of us T.Raja,J, was a member), in the judgment reported in 2021 (4) CTC 716 (Johrilal Chowdhar (died) Vs. D.Shankar Chettiar) had dealt with the identical and similar issue, and the issue was answered in favour of the plaintiff holding that the deposit of title deeds being an equitable mortgage, need not be registered.

23. In the light of the above view taken by this Court, the three decisions relied on by the learned counsel appearing for the appellant/defendant, as stated supra, are distinguishable on facts and hence, the same could not be made applicable to the facts of the present case.

24. In the light of the above findings and also the conduct of the appellant that he has been evading payment even after executing the pro-note and handing over the parent document having been created as an equitable mortgage, while dismissing the present First Appeal (Appeal Suit), we are inclined to impose costs of Rs.25,000/- payable by the appellant/defendant to the respondent/plaintiff expeditiously.

25. Thus, the Appeal Suit is dismissed with costs as stated above.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1. The I Additional District Judge, Coimbatore.

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

+1cc to Mr.C.R.Prasanan, Advocate, S.R.No.4249

+1cc to Mr.C.Veeraraghavan, Advocate, S.R.No.3950

A.S.No.595 of 2019

SPD(CO)
CT/28/06/2022