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A.S.No.189 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.12.2023

PRONOUNCED ON : 03.01.2024

CORAM

THE HON'BLE Mr. JUSTICE **G.K.ILANTHIRAIYAN**

A.S.No.189 of 2007

S.Kasthuri

...Appellant

Vs.

1. Parameswari
2. Sri.Balaji Educational &
Charitable Public Trust,
36, Fourth Cross Street,
Sithankudi,
Ulavargarai Municipality,
Pondicherry.
Rep by its Trustee
M.K.Rajagopalan
3. Malliga.

...Respondents

PRAYER: Appeal Suit filed under Section 96 of C.P.C., against the Judgment and Decree dated 20.01.2005, made in O.S.No.17 of 2003 on the file of the learned Additional District Judge, Pondicherry at Karaikal.

For Appellant : Mr.T.P.Manoharan
Senior Counsel
For Ms.D.Kamatchi

For Respondents
For R1 : Mr.R.Sunil Kumar
For R2 : Mr.K.Doraisami, Senior Counsel
For Mr.Muthumani Doraisami.
For R3 : No appearance



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JUDGMENT

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The Appeal Suit is filed as against the Judgment and Decree dated 20.01.2005, made in O.S.No.17 of 2003 by the learned Additional District Judge, Pondicherry at Karaikal, thereby dismissed the suit for recovery of mortgage amount.

2. The appellant is the plaintiff and the respondents are the defendants. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

3. The plaintiff filed suit for recovery of mortgage amount against the defendants. The case of the plaintiff is that, the first defendant had borrowed loan of Rs.70,000/- on 10.09.1990 and agreed to repay the said amount with interest at the rate of 24% per annum. The first defendant with an intention to create an equitable mortgage over the suit schedule properties, made deposit of title deed at the plaintiff's residence in Karaikal. The first defendant also handed over a letter of memorandum dated 02.01.1991, to the plaintiff evidencing the deposit of title deed as security for the loan. She had also executed a promissory on 02.01.1991,



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as collateral security for the said mortgage created by her. However, the first defendant failed to discharge her debt and as such the plaintiff caused legal notice. On verification of encumbrance certificate, the plaintiff found that the first defendant sold some of the items of the mortgaged properties to the second & third defendants by the registered sale deed. Therefore, the purchaser of the property subject to mortgage is also liable to discharge the loan amount. Hence, the suit.

4. Resisting the same, the first defendant filed written statement stating that she borrowed a sum of Rs.70,000/- and agreed to pay interest only at the rate of 12% per annum on 10.09.1990. Before advancing the loan, the plaintiff required the credit worthiness of the first defendant and required certain documents of properties held in her name. Hence, the documents mentioned in the plaint were given to the plaintiff's husband for his perusal and after being satisfied, the said loan was advanced to her. The interest has been paid periodically with the portion of principal amount also. Now the entire debt was cleared and there has been delay in returning the pro note and the documents. Since the documents were handed over prior to 10.09.1990, without any



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intention to create mortgage by deposit of title deeds, the present suit is not maintainable under law.

5. The second defendant filed written statement stating that the suit itself collusive one between the plaintiff and the first defendant. The memorandum of deposit of title deed is not in accordance with law. As far as the second defendant is concerned, he is a bonafide purchaser of the suit property for the valid sale consideration. Therefore, the plaint is not entitled any claim as against the second defendant.

6. On completion of pleadings, the trial Court framed the following issues :-

(i) Whether the first defendant has not created any equitable mortgage in favour of the plaintiff by deposit of title deeds of the suit properties for the borrowal of Rs.70,000/- on 10.09.1990?

(ii) Whether Karaikal region is not notified area for the purpose of creating equitable mortgage by deposit of title deeds?

(iii) Whether the first defendant has borrowed the sum of Rs.70,000/- from the plaintiff only on the basis of pronote dated 02.01.1991?



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(iv) *Whether the plaintiff is not entitled to claim the rate of interest as calculated in the plaint and whether the claim of such interest is not legally permissible.?*

(v) *Whether the first defendant has already discharged fully the debt borrowed from the plaintiff under the promissory note dated 02.01.1991 and hence she is not liable to pay any amount to her towards the alleged equitable mortgage as claimed in this suit?*

(vi) *Whether the suit is barred by law of limitation?*

(vii) *Whether the second and third defendants as purchasers of the suit properties are bound to discharge the suit amount?*

(viii) *Whether the plaintiff is entitled for a judgment and preliminary decree against the defendants as prayed for?*

(ix) *To what other relief or reliefs, the parties are entitled? ”*

7. On the side of the plaintiff, she examined P.W.1 and marked documents in Ex.A.1 to Ex.A.7. On the side of the defendants, they examined D.W.1 and no documents were marked. On considering the oral and documentary evidences, the trial Court dismissed the suit. Aggrieved by the same, the plaintiff preferred this appeal suit before this Court.



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8. The learned Senior Counsel appearing for the appellant submitted that the first defendant admitted her borrowal of Rs.70,000/- on 10.09.1990. She had also deposited her titled document with the plaintiff and also signed in promissory note and memorandum of deposit of title deed on 02.01.1991. The memorandum of deposit of title deed entered in the house of the plaintiff and it is a notified area under the Transfer of Property Act. However, the trial Court dismissed the suit as the documents came into the possession of the plaintiff on the date of loan itself i.e., on 10.09.1990 for ascertaining the credit worthiness of the first defendant and thereafter, the promissory note and the memorandum came into existence. The trial Court also concluded that the plaintiff failed to prove that the memorandum of deposit of title deed was executed in the place of residence of the plaintiff at Karaikal.

8.1. He further submitted that, though the plaintiff did not get into the box, her husband deposed on her behalf as P.W.1. It is permissible under the law. In support of his contention, he relied upon the judgment reported in **(2010) 10 SCC 512** in the case of **Man Kaur (died) by LRs., Vs. Hartar Singh Sangha**, in which the Hon'ble Supreme



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Court of India held as follows :-

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“(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his ‘state of mind’ or ‘conduct’, normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his ‘bona fide’ need and a purchaser seeking specific performance who has to show his ‘readiness and willingness’ fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or ‘readiness and willingness’. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.”

Even as per the plaint, only in the place of the plaintiff at Karaikal, the memorandum of deposit of title deed was executed as such, it is notified area.



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9. The learned Senior Counsel appearing for the second defendant submitted that delivery must be in the towns mentioned in the Transfer of Property Act. As per Section 58(f) of the Transfer of Property Act, 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 immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds. Admittedly, in the place of the first defendant, the alleged memorandum of deposit of title deeds was executed and it is not notified area under the Act. Therefore, the suit itself is not maintainable and the trial Court rightly dismissed the same. In support of his contention, he relied upon the judgment reported in *AIR 1960 Madras 529* in the case of *Veerammal and anr Vs. KR.L.Lakshmanan Chettiar and anr.*

10. Heard the learned counsel appearing on either side and perused the materials placed before this Court.



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11. Having regard to the pleadings, evidence and the submissions made by the learned counsel appearing on either side, the following points arise for consideration in this appeal :-

(i) Whether the plaintiff has established that the memorandum of deposit of title deed was executed in the place of the plaintiff as contemplated under Section 58(f) of the Transfer of Property Act?

(ii) Whether the plaintiff proved her case for recovery of money?

12. In support of the plaintiff, her husband had deposed as P.W.1. According to the plaintiff, the first defendant had borrowed a sum of Rs.70,000/- on 10.09.1990 and agreed to repay the same with interest at the rate of 24% per annum, for which, the first defendant created equitable mortgage of the suit schedule properties by depositing his title deeds at her residence at Karaikal. However, the plaintiff failed to depose, in order to prove the same. Her husband only was examined as P.W.1. He deposed that at his residence, the plaintiff advanced loan to the first defendant on 10.09.1990. However, as per the averments made in the plaint, the first defendant borrowed amount from her directly and the



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documents were handed over to the plaintiff's husband viz., P.W.1 only in the residence of the first defendant in Thiruvettakudy Village.

13. Therefore, the place of handing over the documents and the execution of the memorandum thereof for creating mortgage is a crucial point on which, the plaintiff has to establish the same, by satisfactory evidence. The plaintiff has to establish her case that the first defendant had deposited the title deeds only in Karaikal, which is notified area for the purpose of Section 58(f) of the Transfer of Property Act for creating mortgage by deposit of title deed. However, the plaintiff failed to establish the same in the manner known to law.

14. It is relevant to extract the provisions under Section 58(f) of the Transfer of Property Act as follows :-

“58(f) Mortgage by deposit of title-deed :- 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 immovable property, with intent to create a security



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thereon, the transaction is called a mortgage by deposit of title deeds.”

15. As rightly relied upon by the learned Senior Counsel appearing for the second defendant, in the judgment reported in *AIR 1960 Madras 529* in the case of *Veerammal and anr Vs. KR.L.Lakshmanan Chettiar and anr.*, this Court issued guidelines for equitable mortgages as follows:-

“(9) The requisites of an equitable mortgage by deposit of title deeds are:

- (i) There must be a debt;*
- (ii) Delivery must be by a debtor or his agent;*
- (iii) Delivery must be in the towns mentioned in the Act;*
- (iv) Delivery must be to a creditor or his agent;*
- (v) Delivery must be of documents of title to immovable property; and*
- (vi) Delivery must be with intent to create a security thereon.”*

Therefore, the deliver must be in the towns mentioned in the Act. However, the plaintiff failed to establish that the first defendant had deposited the title deed in Karaikal. Therefore, the plaintiff failed to satisfy the provision under Section 58(f) of the Transfer of Property Act, to prove the memorandum of deposit of title deeds.



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WEB COPY 16. Further, the first defendant borrowed loan on 10.09.1990.

However, the plaintiff filed suit only on 01.01.2003, for taking action on the mortgage by deposit of title deeds. Therefore, the delay would create doubt regarding the genuineness of the suit and the transaction between the plaintiff and the first defendant. Accordingly, all the points are answered in favour of the defendants and the trial Court rightly dismissed the suit. This Court finds no infirmity or illegality in the judgment passed by the trial Court.

17. In the result, the Appeal Suit stands dismissed. There shall be no order as to costs.

03.01.2024
(3/3)

Index : Yes / No
Internet : Yes / No
Speaking order /Non-speaking order

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To
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1. The Additional District Judge,
Pondicherry at Karaikal.



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G.K.ILANTHIRAIYAN, J.

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Judgment in
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