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C.S.No.678 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.11.2024

CORAM:

THE HONOURABLE MR.JUSTICE A.A.NAKKIRAN

C.S No.678 of 2011

Ashok Kumar Rathi

... Plaintiff

..Vs..

1.Henrieta May (deceased)
(Amended as per order dated
23.01.2017 in Appl.No.1202 of 2013)

2.Christopher Martin(deceased)

3.Clement Martin

4.Deepak Ranjit Martin
(4th defendant was impleaded as
legal heir of the deceased 2nd defendant
vide order dated 27.02.2017 made in
A.No.870 of 2011)

5.Julian Rajiv Martin
(5th defendant was impleaded as
legal heir of the deceased 2nd defendant
vide order dated 09.03.2022
made in Appl.No.840 of 2022)

.. Defendants



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Prayer: Civil Suit has been filed under Order IV Rule 1 read with Order XXXVII Rules 1 & 2 of the Rules of the High Court of Madras Original Side, praying to pass the following judgment and decree against the defendants:

a) directing the defendants to pay the plaintiff a sum of Rs.1,15,09,000/- together with interest thereon at the rate of 36% per annum on Rs.70,00,000/- from the date of plaint till the date of realization within the time fixed by this Court.

b) in default of making such payments, the said mortgaged property may be sold for realization of the decree amount.

c) for costs of the suit.

For Plaintiff : Mr.R.Skandha Kumar

For Defendants : D3 to D5 - Set Exparte
D1 & D2 – Died

J U D G M E N T

This Civil Suit has been filed, seeking the relief as prayed therein.

2. The case of the Plaintiff, as set out, in the plaint is as follows:-

a).The property being flat in third floor measuring 2112.88 sq.ft. inclusive of super built up area together with 1029.973 sq.ft. undivided



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share of land out of 4592 sq.ft. in premises bearing Old Door No.8, New Door No.6, Bishop Wallers Avenue (South) Mylapore, Chennai-600 004 belonged to late Mr.C.R.Basil, son of late Mr.Clarence Rupert who was residing in the aforesaid flat morefully described in the schedule, had passed away on 07.07.2010 leaving behind him as his legal heirs and legal representatives, the defendants 1 to 3 herein. Mr.C.R.Basil had borrowed a sum of Rs.40 lakhs from the plaintiff by means of two Account Payee Cheques bearing Nos.622502 and 622503 both dated 05.11.2008 drawn on Vijaya Bank, each for a sum of Rs.20 lakhs and the said Basil had executed a mortgage deed on 07.11.2008 registered as document No.2645 of 2008 in SRO, Mylapore in respect of the property morefully described in the schedule to the plaint belonging to him situate within the jurisdiction of this Court, for the due repayment of the mortgage debt of Rs.40 lakhs together with interest thereon at 36% per annum. The mortgagor C.R.Basil had paid interest due on the aforesaid mortgage upto 23.08.2009. The balance of interest from 24.08.2009 at 36% per annum comes to Rs.26,58,000/- and the total amount due on this simple mortgage comes to Rs.66,58,000/-.



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b).The said C.R.Basil borrowed from the plaintiff a further sum of Rs.30 lakhs on 30.11.2008 and in consideration of the same, the said Basil had executed 60 promissory notes, at Chennai each for Rs.50,000/- in favour of the plaintiff and in and by the said promissory notes, the said Basil promised to repay to the plaintiff or order on demand, the total sum of Rs.30,00,000/- together with interest thereon at 36% per annum on the security of the documents of title pertaining to the property morefully described in the schedule to the plaintiff, already deposited by him with the plaintiff at the time of execution of the registered deed of simple mortgage dated 7.11.2008 with intent to create a security on the said property and thereby created an equitable mortgage by deposit of title deeds at Chennai for due repayment of the aforesaid sum of Rs.30 lakhs with interest thereon at 36% per annum. A memorandum of deposit of title deeds was also executed by him in favour of the plaintiff on the 1st day of December 2008. Towards the said equitable mortgage, there remains a sum of Rs.30,00,000/- for principal and Rs.18,51,000/- for interest from 11.10.2009 in all aggregating to Rs.48,51,000/- due under this equitable mortgage by deposit of title deeds created at Chennai on 1.12.2008 comes to Rs.48,51,000/-.



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c).The said C.R.Basil had taken away from the plaintiff the following documents, namely (1) Power of attorney executed by Pramila Martyn also called Pramila Clarence, dated 11.06.1999, (2) Letter by City Centre Developers to Pramila Clarence, (3) Water and Sewerage charges receipts, (4) E.C from 15.07.2005 to 03.11.2008, for clarification and return the same to the plaintiff. But ultimately, the said late C.R Basil failed and neglected to return the above referred documents to the plaintiff. The plaintiff caused to be issued a notice dated 9.4.2010 through Advocate Mr.Kurien F.Manavalan to the mortgagor C.R.Basil, claiming the principal amounts of Rs.70,00,000/- and balance of interest due on both the mortgages. The said C.R.Basil by his reply dated 15.04.2010 sent through his advocate J.Kanna, admitted the claim of the plaintiff as mentioned in the said notice dated 9.4.2010 and pleaded that due to his serious health condition he was unable to meet the plaintiff and explain the position. He has assured in the said reply that on improvement of his health condition he would personally meet the plaintiff and settle the matter. But unfortunately, C.R.Basil died on 07.07.2010 and the matter could not be settled amicably during his life time as agreed by the said Basil.



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d).The plaintiff understands that the defendants are the heirs of C.R.Bail and the legal representatives of his estate. They are liable to pay the amount due to the plaintiff under the two mortgages from out of the estate of C.R.Basil in their hands. The plaintiff therefore caused to be issued a notice to the defendants through advocate on 3.12.2010, to which the defendants have issued a reply through their advocate on 14.12.2010 admitting the claim under the registered simple mortgage but denying the equitable mortgage to which the plaintiff sent a rejoinder on 29.12.2010. The defendants have not sent any further communication nor paid the amount due under the two mortgages. Hence this suit.

2.Though summons were served on the defendants 3, 4 and 5, they did not enter appearance before this Court and hence, the defendants 3 and 4 were set exparte on 13.07.2023 and the 5th defendant was set exparte on 19.09.2022. The 1st defendant had passed away on 30.05.2018 and there are no surviving legal heirs to the 1st defendant and a memo has been filed to that effect.



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3. On the side of the Plaintiff, the plaintiff examined himself as PW1 and Ex.P1 to Ex.P15 were marked.

4. Heard the learned counsel for the plaintiff and perused the records.

5. The learned counsel for the plaintiff submitted that the PW1 has deposed on 18.08.2023 that Mr.C.R.Basil had borrowed a sum of Rs.40 lakhs from the plaintiff by means of two Account Payee Cheques bearing Nos.622502 and 622503 both dated 05.11.2008 drawn on Vijaya Bank, each for a sum of Rs.20 lakhs and the said Basil had executed a mortgage deed on 07.11.2008 registered as document No.2645 of 2008 in SRO, Mylapore in respect of the property morefully described in the schedule to the plaint belonging to him situate within the jurisdiction of this Court, for the due repayment of the mortgage debt of Rs.40 lakhs together with interest thereon at 36% per annum. The mortgagor C.R.Basil had paid interest due on the aforesaid mortgage upto 23.08.2009. The balance of interest from 24.08.2009 at 36% per annum comes to Rs.26,58,000/- and the total amount due on this simple mortgage comes to Rs.66,58,000/-.



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6. It has been further submitted by the learned counsel for the plaintiff that further on 30.11.2008 he had borrowed a sum of Rs.30 lakhs against the promissory notes 60 Nos. each for Rs.50,000/- in favour of the plaintiff together with interest thereon at 36% per annum for which a memorandum of deposit of title deeds was also executed by him in favour of the plaintiff on the 01.12.2008. There remains a sum of Rs.30,00,000/- for principal and Rs.18,51,000/- for interest from 11.10.2009 in all aggregating to Rs.48,51,000/-.

7. The learned counsel for the plaintiff further submits that since the Mr.Basil failed to repay the aforesaid amount, the plaintiff issued a notice dated 09.4.2010 claiming the principal amounts of Rs.70,00,000/- and balance of interest due on both the mortgages. The said C.R.Basil by his reply dated 15.04.2010 admitted the claim of the plaintiff as mentioned in the said notice dated 9.4.2010 and pleaded that due to his serious health condition he was unable to meet the plaintiff and explain his position. Unfortunately, C.R.Basil died on 07.07.2010 and the matter could not be settled amicably during his life time as agreed by the said Basil.



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8.It has been further submitted by the learned counsel for the plaintiff that the defendants are the heirs of C.R.Basil and the legal representatives of his estate. They are liable to pay the amount due to the plaintiff under the two mortgages from out of the estate of C.R.Basil in their hands. Therefore notice has been issued to the defendants on 3.12.2010, to which the defendants have issued a reply on 14.12.2010 admitting the claim under the registered simple mortgage but denying the equitable mortgage to which the plaintiff sent a rejoinder on 29.12.2010. The defendants have not sent any further communication nor paid the amount due under the two mortgages. Further, they failed to enter before this Court to deny the claim of the plaintiff. Hence, he seeks the relief as prayed for.

9. Despite notices were served on the defendants, they have not chosen to contest the suit against the claim of the plaintiff. However, having considered Ex.P1 which has been registered as Document No.2645 of 2008 dated 04.11.2008, it is seen that Flat bearing No.6/3, Bishop Wallers Avenue South, Mylapore, Chennai-600 004 has been mortgaged by way of simple Mortgage executed between the plaintiff and Late



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Mr.C.R.Basil for a sum of Rs.40 Lakhs which has been paid by way of two Cheques bearing Nos.622502 and 622503 dated 05.11.2008 drawn on Vijaya Bank each 20 Lakhs. Further, on perusal of Ex.P4, it is seen that the plaintiff sent a legal notice dated 09.04.2010 to Late Mr.C.R.Basil claiming a sum of Rs.70 Lakhs from Late C.R.Basil. In reply to Ex.P4, Late C.R. Basil sent a reply notice dated 15.04.2010 (Ex.P5), wherein he merely admitted the borrowal without mentioning the loan amount and interest therein and further stated that he always willing to settle the issue amicably by repaying the loan after the statement of Accounts being verified.

10. On perusal of Ex.P6, it is seen that the plaintiff has again sent Notice dated 03.12.2010 to the defendants by claiming a sum of Rs.70 Lakhs along with interest totaling to Rs.1,00,81,000/-. In reply to Ex.P6, the defendants have sent Notice dated 14.12.2010 (Ex.P7) wherein it was admitted by them that an amount of Rs.40 Lakhs was received against the Simple Mortgage vide Document No.2645 of 2008 dated 04.11.2008 on Flat in 3rd floor, together with undivided share of land in premises bearing Old No.8, New No.6, Bishop Wallers Avenue (South) Chennai-600 004 is



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not in dispute and they were ready to settle the amount of Rs.40 lakhs along with interest @12% p.a, after denying another borrowal of amount of 30 Lakhs executed under the promissory notes -60 Nos.

11. In reply to Ex.P7, the plaintiff has sent another Notice dated 29.12.2010 (Ex.P8) stating that Late C.R.Basil has borrowed sum of Rs. 30 lakhs under sixty promissory notes for Rs.50,000/- each and also created a Memorandum of deposit of tittle deeds under Ex.P3 between them on 01.12.2008. However, it is seen from the records that the defendants have not sent rejoinder against the Ex.P8.

12. Having considered the Ex.P7, it is admitted that Late C.R.Basil has borrowed only a sum of Rs. 40 Lakhs against the Simple Mortgage vide Document No.2645 of 2008 (Ex.P1) dated 04.11.2008 and further they were ready to repay the said amount. However, even though the plaintiff has produced promissory notes in 60 Nos for Rs.50,000/- each for borrowing an amount of Rs. 30 Lakhs by Late C.R.Basil, it is seen that out of 60 promissory notes, Late C.R.Basil had signed in the twenty one promissory notes and thumb impressed in the thirty nine promissory notes without his signature on the same date ie. 30.11.2008 which creates



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suspicious ground that why on the same date 21 pro-notes had been signed and 39 pro-notes had been used thumb impression. In this regard, the plaintiff has not examined any attesting witnesses who have signed in the Pro-notes, to prove the veracity of the Pro-notes and failed to let in any oral and documentary evidence accordingly. Even though the plaintiff produced Ex.P3 (Memorandum of deposit of Title Deed) executed between the plaintiff and Late Mr.C.R. Basil, for borrowing another amount of Rs.30 Lakhs under Ex.P1-Mortgage Deed, it creates suspicious as the said document has been executed without any attesting witnesses having signed only by Late C.R.Basil leaving the signature of the Plaintiff therein. Further, the defendants did not accept the borrowal of another amount of Rs.30 Laksh in reply notice under Ex.P7 and any other letter. Under such circumstances, the plaintiff is bound duty to prove the aforesaid document by way of oral and documentary evidence.

13. In view of the above observation and considering the Ex.P1 and Ex.P7, the plaintiff is entitled to a sum of Rs.40 Lakhs only along with interest @ 12% p.a. from the date of plaint till the date of decree and thereafter 6% from the date of the Decree till the date of realization. Time for payment is two months.



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14. In the result, the suit is partly decreed. No costs.

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Index:Yes/No

Web:Yes/No

Speaking/Non Speaking

uma/lbm

1. List of Witnesses examined on the side of the Plaintiff:-

PW1- Mr.Ashok Kumar Rathi

2. List of Exhibits marked on the side of the Plaintiff:-

1. Ex.P1 07.11.2008 Original Simple Mortgage Deed
2. Ex.P2 30.11.2008 Original Promissory notes (60 nos.)
3. Ex.P3 01.12.2008 Original Memorandum of deposit of title deeds
4. Ex.P4 09.04.2010 Office copy of legal notice along with postal acknowledgment card.
5. Ex.P5 15.04.2010 Original reply notice
6. Ex.P6 03.12.2010 Office copy of the legal notice along with postal acknowledgment card (2 nos.) and one returned cover.
7. Ex.P7 14.12.2010 Original reply notice



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- 8.Ex.P8 29.12.2010 Office copy of the rejoinder
9.Ex.P9 Original Encumbrance certificates (3 nos.) dated
27.06.2011, 20.01.2011 and 10.08.2011.
- 10.Ex.P10 16.02.2001 Original Probate order passed in O.P No.878
of 2000
- 11.Ex.P11 30.03.2001 Certified copy of the extract from the
Permanent Land Register.
- 12.Ex.P12 27.06.2001 Original Construction agreement
- 13.Ex.P13 07.08.2002 Notarised copy of the legal heir ship certificate
- 14.Ex.P14 Original Encumbrance Certificates (5 nos.) from
01.01.1937 to 4.07.2005.
- 15.Ex.P15 29.04.1999 Original property tax demand card and property
tax receipt

3. List of witnesses and Exhibits marked on the side of the Defendants:-

Nil

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A.A.NAKKIRAN, J.

uma/lbm

Pre-Delivery Judgement in
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