

(2011) 10 MAD CK 0086
In the Madras High Court
Case No : A.S. No. 131 of 2004

A.M. Ambrose

APPELLANT

Vs

S. Jeyaraj, Duraisingh and D. Mallika

RESPONDENT

Date of Decision : 04-10-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 3
Evidence Act, 1872 — Section 114
Negotiable Instruments Act, 1881 (NI) — Section 118
Partnership Act, 1932 — Section 69(2)
Registration Act, 1908 — Section 17
Transfer of Property Act, 1882 — Section 59

Citation : (2011) 10 MAD CK 0086

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : S. William, for the Appellant; J.J.R. Edwin, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Mr.Justice M.Venugopal

1. The Appellant/Plaintiff has filed the present Appeal before this Court as against the Judgment and Decree dated 22.09.2003 in O.S.No.3230 of 2001 passed by the Learned II Additional City Civil Court Judge, Chennai.

PLAINT FACTS:

2. The 2nd Respondent/2nd Defendant was the neighbor of the Appellant/Plaintiff. He introduced his brother-in-law, the 1st Respondent/1st Defendant, who was doing the Real estate business and he needed funds for his business. On several occasions, the Appellant/Plaintiff advanced a loan to the 1st Respondent/1st Defendant which was repaid by him together with interest @24% per annum. In June 1999, the 1st Respondent/1st Defendant approached the Appellant/Plaintiff and wanted a sum of Rs.6.5 lakhs for purchasing a property and promised to return the said amount, within a period of eight

months, at the latest by February 2000.

3. The Appellant/Plaintiff advanced a sum of Rs.6.5 lakhs on 15.06.1999 and that the 1st Respondent/1st Defendant executed a Promissory Note for an amount of Rs.6.5 lakhs on 15.06.1999, promising to repay the loan along with interest @24% per annum. The 3rd Respondent/3rd Defendant after receipt of an amount of Rs.35,000/- executed a separate Promissory Note on 17.02.1999, promising to repay the loan of Rs.35,000/- with interest @24% per annum. During February 2000, the Appellant/Plaintiff requested the Respondents/Defendants to repay the aforesaid amount with interest, since he fell sick and was in need of money for his medical treatment. The 1st Respondent/1st Defendant promised to settle the amount during the last week of February 2000. When the Appellant/Plaintiff approached the 1st Respondent/1st Defendant in the last week of February 2000, the 1st Respondent/1st Defendant refused to see him. In spite of the Appellant/Plaintiff approaching the Respondents/Defendants along with friends requesting to settle the amount, the Respondents/Defendants failed and neglected to pay the amount.

4. The Appellant/Plaintiff also advanced a hand loan of Rs.50,000/- to the 2nd Respondent/2nd Defendant. The 2nd Respondent/2nd Defendant promised to repay the said loan along with interest @ 24% per annum. The Respondents/Defendants in spite of several demands made by the Appellant/Plaintiff had failed to repay the amount.

5. For the due repayment of the loans, as referred to supra, the 3rd Respondent/3rd Defendant mortgaged the property on 22.06.1999 bearing Paimash No.242, S.No.64, Block No.1, T.S.No.39, consisting of a House and Ground at Puliur Village, Kamala Nehru, as collateral security for the repayment of the loan and created a mortgage for the loans advanced and for future loans to be granted by the Appellant/Plaintiff to the Respondents/Defendants. The security was kept alive, since there was some loans or the other advanced to both the defendants which remained unpaid. Further the security was continuing as an account of the Respondents/Defendant with the Appellant/Plaintiff was a running account.

6. The 3rd Respondent/3rd Defendant for the due repayment of the loan had created the following mortgage.

1. Name of the Mortgagor : Mrs. D. Mallika

2. Name of the Mortgagee : Mr. A.M. Ambrose, No.5, Vasuki Street, Thiruvalluvar Nagar, Arumbakkam, Chennai 106.

3. property subject to : 1.Property bearing Mortgage Paimash No.242, S.No.64, Block No.1, T.S.No.39, consisting of a house and ground, Puliur Village, Kamala Nehru Nagar, within the state of Tamil Nadu.

4. Rate of Interest : 24%p.a.

5. Amount due : Rs.7,35,000/- as on 09.04.2001.

7. The Appellant/Plaintiff issued a Lawyer's notice dated 23.03.2001 to the Respondents/Defendant, since the mortgage was in his favour in respect of three loans. The 3rd Respondent/3rd Defendant sent a reply stating that document of title was lost and that he gave the Police complaint for the same and this reply was only to evade payments. The Respondents/Defendants had not repaid the amount due to the Appellant/Plaintiff, in spite of reminders. The Appellant/Plaintiff, although he was entitled to claim interest @ 24% per annum for the sum of Rs.7,35,000/-, he restricted his claim only in respect of the Principal amount as he was unable to pay Court Fee for the interest portion. As such, the Respondents/Defendants were to pay a sum of Rs.7,35,000/- with future interest @24% per annum from the date of Plaint till the date of realisation.

8. The Mortgage created by the 3rd Respondent/3rd Defendant was for all the three loans. Therefore, a single suit was filed by the Appellant/Plaintiff in respect of three loans due by the Respondents/Defendants to the Appellant/Plaintiff, as a different cause of action against the Respondents/Defendants were clubbed as per order II Rule 3 of the Civil Procedure Code. Therefore, the present suit had been filed in directing the Respondents/Defendants jointly and severally to pay the Appellant/Plaintiff a sum of Rs.7,35,000/- along with further interest @ 24% per annum (along with penal interest), the quarterly rest from the date of filing of the suit till date of realisation and in default of the payment of the said amount within the time granted by the Court, the Plaint schedule mentioned property may be ordered to be sold etc.

WRITTEN STATEMENT AVERMENTS OF THE 1 s t R ESPONDENT/1 s t DEFENDANT
(ADOPTED BY THE 2 n d AND 3r d RESPONDENTS/DEFENDANTS:

9. The 1st Respondent/1st Defendant became a Partner in the real estate business run by the Appellant/Plaintiff's wife Mrs. Innocent Ambrose in which they both did business amounting to more than Rs.3 crores. On numerous occasions, he had financial transactions with his business Partner viz., the wife of the Appellant/Plaintiff and the same was shared by him during a short period of time. Later, because of the Appellant/Wife's fraudulent activities Police arrested the Appellant/Plaintiff and his wife. They were remanded to judicial custody. Hence, he quit the business which he had with the wife of the Appellant/Plaintiff, though his due amount was not paid by her.

10. Although the Appellant/Plaintiff promised the 2nd Respondent/2nd Defendant to pay the said sum of Rs.30,00,000/- as his share of profit. The Appellant/Plaintiff, in the partnership business, had not bothered to pay the profit share as agreed to. Thereafter, when he requested the Appellant/Plaintiff's wife, he was threatened by the Appellant and his wife that they would forge his signature in the Promissory Note and filed cases through nominees. The Appellant/Plaintiff had misused all the documents, Promissory Notes and Cheques to his convenience.

11. Before the trial Court, the Appellant/Plaintiff was examined as witness PW1 and Ex.A.1 to Ex.A.8 were marked. On the side of the Respondents/Defendants, the 3rd Respondent/3rd Defendant was examined as DW1 and no exhibits were marked.

12. On an appreciation of oral and documentary evidence available on record, the trial Court came to the conclusion that "the Promissory Notes were misused by the Appellant/Plaintiff and his wife and further held that the Pro-notes and alleged mortgage deed were not genuine documents and resultantly, dismissed the suit with costs."

13. Feeling aggrieved against the Judgment and Decree dated 22.09.2003 in O.S.No.3230 of 2001 passed by the trial Court, the Appellant/Plaintiff has projected the present Appeal.

14. The Points that arise for consideration in this Appeal are:

1. Whether the Appellant/Plaintiff is entitled to recover an amount of Rs.7,35,000/- together with interest @ 24% per annum?.

2. Whether the Appellant/Plaintiff is entitled to file a single suit for all the three loans due by the Respondents/Defendants (clubbing the different cause of action) as per Order II Rule 3 of the Civil Procedure Code?.

3. Whether the Appellant/Plaintiff has misused the Pro-notes etc., as alleged by the Respondents /Defendants?.

The Contentions, Discussions and Findings on Point Nos.1 and 3:

15. The Learned Counsel for the Appellant/Plaintiff submits that the trial Court failed to appreciate the fact that the Respondents/Defendants nowhere in the Written Statement denied the execution of Ex.A.1 unregistered Mortgage Deed dated 22.02.1996, Ex.A.2 Pro-Note dated 07.02.1999 and Ex.A.3 Pro-Note dated 15.06.1999 and the liability to pay the amounts.

16. It is the contention of the Learned Counsel for the Appellant/Plaintiff that the 3rd Respondent/3rd Defendant did not deny his signature in Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 in the Written Statement filed. Further, she had not denied the receipt of Rs.2,00,000/-. But these aspects were not looked into by the trial Court in a proper perspective.

17. The Learned Counsel for the Appellant/Plaintiff urges before this Court that DW1 in her evidence had deposed that Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 was not signed by her, but there was no pleading to that effect.

18. According to the Appellant/Plaintiff, DW1 (3rd Defendant) admitted in her evidence that her husband gave the Ex.A.1 guarantee document based on her property described in the suit on 22.02.1996. Also, DW1 admitted in her evidence that her husband handed over the title deed Ex.A.7 viz., the Original Sale Deed dated 26.03.1992 to the Appellant/Plaintiff and received a sum of

Rs.10,000/-. However, these vital facts were not taken into consideration by the trial Court which had resulted in miscarriage of justice.

19. The Learned Counsel for the Appellant/Plaintiff strenuously contends Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 was a deposit of title deed creating an equitable mortgage in respect of the suit schedule property and this was executed for the amount mentioned in the document which was borrowed by the 1st and 2nd Respondents/Defendants and the future loan to be obtained by the Defendants. But, this was not taken into account by the trial Court which had resulted in an erroneous Judgment being passed against the Appellant/Plaintiff.

20. The Learned Counsel for the Appellant/Plaintiff projects a plea that Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 was not required to be registered as per recitals of the document and that no objection was raised by the Respondents/Defendants at any point of time in regard to the admission of Ex.A.1, as a document in evidence.

21. The Learned Counsel for the Appellant/Plaintiff submits that DW2 had admitted in cross examination that he executed Ex.A.3 Pronote dated 15.06.1999 for Rs.6,50,000/-, but mentioned that only he received a sum of Rs.10,000/- and Ex.A.3 was executed in the year 1994 and that he had not mentioned anything about these aspects in the Written Statement. Yet another contention is raised on behalf of the Appellant/Plaintiff that a suggestion was put to the Appellant/Plaintiff that DW1 (3rd Defendant) received only a sum of Rs.10,000/- and not Rs.35,000/- and that it was created as Rs.35,000/- but curiously this was not made mention of in the Written Statement. As such, no amount of evidence could be let in by a party without there being a pleading to that effect.

22. It is the case of the Appellant/Plaintiff that the trial Court had committed an error in not appreciating the fact that the Defendants stated in one place that that Appellant/Plaintiff forged the document in another place, the Appellant/Plaintiff misused the Cheques and Pronotes and Stamp Papers and in another place, the Appellant/Plaintiff obtained the document by police force and all these allegations were not proved.

23. The Learned Counsel for the Appellant/Plaintiff submits that the 2nd Respondent/2nd Defendant had not denied the borrowal of Rs.50,000/- in the Written Statement. Also, he had not issued any reply to the notice of the Appellant/Plaintiff.

24. The Appellant/Plaintiff takes a stand that the 2nd Respondent/2nd Defendant was not examined before the trial Court and that was fatal to the Respondents/Defendants case.

25. The Learned Counsel for the Appellant/Plaintiff contends that the trial Court erred in coming to the conclusion that there was dispute between the Appellant/Plaintiff's wife and the 1st Respondent/1st Defendant (S. Jayaraj). When the 2nd

Respondent/2nd Defendant (Duraisingh) claimed Rs.30,000/- as share and that prompted the Appellant/Plaintiff to fabricate the document etc. for which there was no basis to verify at such a conclusion.

26. It is the plea of the Appellant/Plaintiff that the trial Court wrongly came to the conclusion that there was no independent witness in regard to the Appellant/Plaintiff's claim, when the Respondents/Defendant had not denied the execution and the borrowings in the written statement. In the absence of the same, there was no necessity for the Appellant/Plaintiff to prove his case through an independent witness when it is the specific case of the Appellant/Plaintiff that there was no independent witness present at the time of the transaction.

27. Lastly, it is the contention of the Learned Counsel for the Appellant/Plaintiff that the trial Court ignored the weight of evidence altogether.

28. Conversely, it is the submission of the Learned Counsel from the Respondents 1 to 3/Defendants that the trial Court had analysed the oral and documentary evidence and had come to a correct conclusion that the Appellant/Plaintiff and his wife were already arrested by the Police for cheating and such persons would stoop down to any level to create documents with a view to grab money by others by adopting any foul means etc. Further, it held the Pro-Notes were not genuine document and ultimately dismissed the suit with costs, which need not be disturbed by this Court at this distant point of time.

29. At this juncture, this Court refers to the evidence of PW1 and DW1 & DW2 for appreciation of the case.

30. It is the evidence of PW1(Appellant/Plaintiff) that in Ex.A.2 Pro-Note, dated 17.02.1999 Rs.35,000/- was returned by Duraisingh and at the time of bringing him of Ex.A.2 Pro-note by Duraisingh (the 2nd Defendant) Rs.35,000/- was already returned and he did not know who had returned the same and further he did not know who had mentioned the date in Ex.A.2 Pro-note and who had written the said pro-note.

31. PW1 in his further evidence deposed that at the time when the 2nd Respondent/2nd Defendant gave their pro-note his wife was present and nobody else was present and in pro-note, signature of either his wife or that of the 2nd Defendant had not been obtained and it was incorrect to state that in Ex.A.2 Pro-note, the small letters were written by his wife and at the time of receiving Ex.A.2 Pro-note no paper was purchased and he handed over a cash sum of Rs.35,000/- from his possession and that his wife handed over her salary to him and that he gave a sum of Rs.35,000/- to the 2nd Respondent/2nd Defendant for Ex.A.2 Pro-note.

32. The evidence of PW1 is to the effect that the 3rd Defendant's (Domelike) house document was handed over by the 2nd Respondent/2nd Defendant and his wife on 22.06.1996 and they handed over the said document for the purpose of receiving the money and they paid a sum of Rs.1,40,000/- in part and the Pro-

note date is 17.02.1999 and that he had not filed any case on the basis of the 2nd Respondent/2nd Defendant's statement made in the year 1996 and that on 22.06.1996, the 2nd Respondent/2nd Defendant and his wife, the 3rd Respondent/3rd Defendant gave a letter and took Rs.2,00,000/- in cash and for the said payment of Rs.2,00,000/- no pro-note was taken and in Ex.A.1 no witness signature was obtained and in Ex.A.1 unregistered mortgage Deed dated 22.02.1996, the 2nd Respondent/2nd Defendant had signed as a witness and he had lent a sum of Rs.2,00,000/- from his Bank account. For the payment of Rs.2,00,000/-, no mortgage deed or Othi Deed was registered.

33. That apart, the evidence of PW1 was that since the Defendant was in the habit of taking loan from him and he was having a continuous account in that manner. As such, he had not filed a case against him and during the year 1999, he had not received interest amount from the 2nd Respondent/2nd Defendant.

34. PW1 also deposed that in Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 the rate of interest was mentioned as 24% and during the 1st week of April 1999 a sum of Rs.85,000/- was due to be paid by the 2nd Respondent/2nd Defendant and that the 2nd Respondent/2nd Defendant had to pay a sum of Rs.50,000/- and his wife had to pay a sum of Rs.35,000/- as outstanding amount and he had filed the present case for recovery of sum of Rs.85,000/-.

35. Continuing further, it is the evidence of PW1 that as per Ex.A.2 Pro-note dated 17.02.1999 and as per Ex.A.7 Original Sale Deed dated 26.03.1993, he had to receive a sum of Rs.85,000/- in all and that he filed a case before the trial Court for one promissory note and that Ex.A.3 pro-note dated 15.06.1999 was in the name of Jayaraj, who is the brother in law and he signed in his presence and the rest which was written already, was brought by him and at the time of writing of Ex.A.3 Pro-note dated 15.06.1999, no one was present. Also, at the time of execution of Ex.A.3 Pro-note dated 15.06.1999, the 2nd Respondent/2nd Defendant was present and the signature was not obtained and that he did not receive the interest for Ex.A.3 Pro-note.

36. PW1 in his evidence proceeded to state that in Ex.A.4 Lawyer's notice dated 23.03.2001 there was no mention of the payment of Rs.2,00,000/- and the sum of Rs.50,000/- paid under pronote was included in the sum of Rs.85,000/- and that from Jayaraj for the payment of Rs.6.5 lakhs he had obtained the Pro-note and that he had not received house documents in the name of Jayaraj and he had obtained a sum of Rs.6.5 lakhs in cash from his possession and that Jayaraj for the purpose of real estate business for payment of advanced money received a sum of Rs.6.5lakhs from him and for the said sum of Rs.6.5lakhs, he had not received the interest and that he advanced the loan of Rs.6.5 lakhs to Jayaraj based on the confidence he reposed on him.

37. PW1 (in cross examination) had stated that the 1st Respondent/1st Defendant beginning from the year 1996 to 1999 on different dates had received different amounts, but he could not say on what date and month the said

amounts were received by him and further for the first time how much amount he received from him he did not know and the 1st Respondent/1st Defendant approximately 25 times would have received money from him and that he had repaid the money received from him for 24 occasions out of 25 and he had not kept account for the money paid by the 1st Respondent/1st Defendant on the 24th occasion. Further, he did not remember how much money the 1st Respondent/1st Defendant had received from him on 24th occasion and even for the 24th occasion when he received money from him he obtained a pro-note executed in his favour and that in Ex.A.1 unregistered Mortgage Deed dated 22.02.1996, the 3rd Respondent and the 2nd Defendant had affixed their signature as guarantors for 1st Respondent/1st Defendant and even for the future loan amount to be advanced also they stood as guarantors and Ex.A.1 was executed for the 3rd Respondent receiving a sum of Rs.2,00,000/- and that the 1st Respondent/1st Defendant for the sum of Rs.2,00,000/- received he returned back a sum of Rs.1.95 lakhs and he could not say as to whether he repaid the money and for the receipt of sum of Rs.2,00,000/- in Ex.A.1 unregistered Mortgage Deed dated 22.02.1996, he had paid a sum of Rs.1,95,000/- in cash and that there was a balance of Rs.5,000/- and at the time of filing the present case Rs.5,000/- was left out and in Ex.A.1 there was no signature of 1st Respondent/1st Defendant.

38. The evidence of DW1 (3rd Defendant) is to the effect that the 1st Respondent/1st Defendant was her own brother and that in her proof affidavit she had stated that her husband, the 2nd Respondent/2nd Defendant had deposited the documents and received a sum of Rs.10,000/- from the Appellant/Plaintiff, but she did not know the loan details, her husband had informed her about the money received as loan by him and that he informed her that he gave the document to the Appellant/Plaintiff about which she had not asked and that no lawyer's notice was received by her and she had not signed and received the same.

39. It is the further evidence of DW1 that the 1st Respondent/1st Defendant (her brother) was doing real estate business and it was incorrect to state that she along with other Defendants on 22.02.1996, had received a sum of Rs.2,00,000/- from the Appellant/Plaintiff by creating a mortgage and she did not know that on 17.02.1999 she received a sum of Rs.35,000/- as loan from the Appellant/Plaintiff and executed a Pro-Note.

40. The evidence of DW2 is to the effect that he had not taken any loan and that he was doing a real estate plot sales broker job and that he along with the Appellant/Plaintiff and his wife were doing the real estate business and for this partnership real estate business there was no document and everything was oral and that on the basis of the complaint lodged by one Kannan, the Appellant/Plaintiff was arrested by the police and that he had not given the complaint.

41. Added further, it is the evidence of DW2 that he did not know about the Ex.A.1 guarantee letter and that since the Appellant/Plaintiff had included them

as three persons in the guarantee letter it was written that the suit property was included and further that he did not know about the execution of Pro-note by the 3rd Respondent/3rd Defendant (D. Mallika) and the signature was not to be seen in the said Pro-note as stated by him in the Written statement and in Ex.A.3 the signature was fabricated and it was correct to state that he had mentioned that only he received a sum of Rs.10,000/- and not Rs.6,50,000/- mentioned in Ex.A.3 Pro-note dated 15.06.1999 and that during the year 1994, he received a sum of Rs.10,000/-.

42. DW2 further deposed that during the year 1999 he had not received a sum of Rs.10,000/- either from the Appellant/Plaintiff or from his wife and that during the year 1994, he executed a blank on demand bond by affixing his signature and when he asked the Appellant/Plaintiff after filing of the present case, he informed him that he had torn the Pro-note executed by him in the year 1994.

43. The Learned Counsel for the Appellant/Plaintiff cites the decision of the Honourable Supreme Court Ravinder Singh Vs. Janmeja Singh and Others, , at Page 192 wherein it is held that "no evidence can be led on a plea not raised in the pleadings and no amount of evidence can cure defect in the pleadings.

44. He also relies on the decision of this Court Arulmigu Viswewaraswami and Veeraraghava Perumal Temples Tiruppur, Coimbatore District v. R.V.E. Venkatachala Gounder and another, 1996 (2) CTC 1999, wherein it is observed that "it is settled law that without specific plea no evidence can be let in".

45. The Learned Counsel for the Appellant/Plaintiff invites the attention of this Court to the decision Union of India (UOI) Vs. Sankar Store and Another, , at Page 86, wherein it is laid down as follows:

Thus the plaintiffs having omitted to plead a case that they obtained title to the goods on paying full price for it, through their agent, to the consignor, evidence in that regard should not have been allowed to be led.

46. Yet another decision K. Kanakarathnam Vs. A. Perumal and another, , is relied on the side of the Appellant, wherein it is held hereunder:

In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, necessary and material facts should be pleaded in support of the case set up and that in the absence of pleading, evidence if any produced cannot be considered. The object of the rule is that in order to have a fair trial it is imperative that the party should state the essential material facts so that the other party may not be taken by surprise.

47. The Learned Counsel for the Appellant/Plaintiff brings it to the notice of this Court to the decision Ramachandra Das v. Hiralal Modi, AIR 1978 ORI 172, wherein it is held as follows:

The well-known principle of pleadings is that no evidence should be allowed contrary to it. Thus, where the pleading was that the plaintiff was suing as a

trustee for P and not in his individual capacity, he should not be allowed to lead evidence that he was suing in his individual capacity, and a decree should not be passed in favour of plaintiff in his individual capacity, on basis of such evidence. Union of India (UOI) Vs. Sankar Store and Another, , Rel.on.

48.The Learned Counsel for the Appellant/Plaintiff places reliance on the decision of this Court V.V. Textiles rep. by its Proprietor S. Baskaran v. M/s. Mahavir Fabrics rep. by its Partner Suryakantha, 2001(4) CTC 409, at Page 419 at para 39 wherein it is held hereunder:

Thus,

(1) The Registration of a firm is a condition precedent for the launching of a suit by the firm as per Section 69(2) of the Partnership Act. Subsequent registration cannot cure the defect.

(2) The objection regarding non-registration has to be specifically pleaded. Once pleaded it is incumbent on the plaintiff to prove the same and failure is fatal.

(3) if non-registration is not specifically pleaded no evidence can be let in for the plea not raised. The objection regarding non-registration can be waived. Unless the waiver of the right or the absence of the right makes any particular matter illegal, or where the benefit is conferred by a statute which has public policy for its object, and,

(4) Such waiver can be expressed or be inferred from the facts and circumstances of the case.

49. According to the Learned Counsel for the Appellant/Plaintiff, the Defendant must specifically make a claim and where he has made a claim in the defence presented, no amount of evidence can be looked into upon a plea which was never put forward and to lend support to the same, he relies on the decision of the Honourable Supreme Court Bhagat Singh and others v. Jaswant Singh, AIR 1966 SC 1861.

50. However, the Learned Counsel for the Respondents cites the decision Syndicate Bank v. M. Sivarudrappa and others, AIR 2003 KAR 210, at Page 212 and 213 wherein in Para 9, it is observed as follows:

9.No doubt, u/s 58F of the Transfer of Property Act, a person may create an equitable mortgage by delivering the title deeds to a creditor or to his agent in respect of the documents of title to immovable property with an intent to create a security thereon. In the instant case, even according to the Bank, the 2nd defendant has delivered the certified copy of the sale deed on 10-6-1982. From the plaint averment as stated earlier, the list of documents was not accepted by the Bank as the sale deed is only a certified copy and therefore insisted upon defendant 2 to execute a memorandum of title deeds and to get the same registered. If that is so, transaction of mortgage has been completed only on execution of deposit of title deeds and got the same registered. When such being

the case, when the defendant 2 specifically denied the very execution of the document and the signature found on Exs. P. 8 and P. 9 the burden is on the Bank to, prove the execution of Exs. P. 8 and P. 9. Ex. P. 9 is a registered deed attested by two witnesses. If it is a registered deed attested by two witnesses and the attestors are available to give evidence, the Bank was at liberty to examine any one of the attesting witnesses to prove the signature of M. Shivarudrappa. Section 68 of the Indian Evidence Act reads as follows:

68. Proof of execution of document required by law to be attested.--If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

If a document is required to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if there being an attesting witness alive and capable of giving the evidence. Section 59 of the Transfer of Property Act reads as follows:

59. Mortgage when to be by assurance.--

Where the principal money secured is one hundred rupees or upwards, a mortgage [other than a mortgage by deposit of title deeds] can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by [a registered instrument] signed and attested as aforesaid or [except in the case of a simple mortgage] by delivery of the property.

No doubt, the deposit of title deeds need not be in writing. The deed of mortgage other than the mortgage of deposit of title deeds is required to be attested by two witnesses. In the instant case, as the mortgage is by depositing of title deeds u/s 58F, there is no need to execute any document in order to create a charge in respect of an immovable property, as delivery of the title deeds itself is sufficient to create a charge in respect of an immovable property for the money borrowed. But, in the instant case, the list of documents referred to in Ex.P8, said to have been delivered by the 2nd defendant to the Bank was not accepted by the Bank, since the title deed delivered is only a certified copy and not the original. As delivery of certified copy since has not been accepted by the Bank, the memorandum of deposit of title deed was got executed and registered. As the memorandum of title deed is a registered document and when that document has been specifically denied by the 2nd defendant in his reply notice and in the written statement filed by the L.Rs of the 2nd defendant, the plaintiff-Bank ought to have examined one of the attesting witnesses to the said deed. In the instant case, no attesting witness has been examined in order to prove the execution of the document by the 2nd defendant. Further, the signature found on Exs.P8 and P9 is disputed and as there is discrepancy in the spelling of the name of

Shivarudrappa as observed earlier, the Bank ought to have examined one of the attestors of the document. The Bank Manager who has been examined as P.W.1 has not stated anywhere in his evidence that the 2nd defendant has signed Exs.P8 and P9 in his presence. If that is so, in the absence of any such positive evidence adduced by the plaintiff to prove the documents, Ex.P9, I am of the view that the Trial Court is justified in dismissing the suit insofar as the 2nd defendant is concerned.

51. He also places reliance on the decision *Chunilal Someshvar Bhatt v. Vithaldass Karsandas*, AIR 1922 Bom 440, at Page 441 wherein it is observed and held as follows:

Defendant borrowed in Bombay a sum from plaintiff on depositing with him the tile deeds of his house outside Bombay. The transaction was recorded in a writing which recited the loan and the deposit and proceeded as follows.

In security of that we have given out one house in Godhra... In mortgage for the above amount. And we have also given to you the copy of the record. We shall execute a pacca document in respect of the same whenever you may ask us. Its interest is settled at 8 annas. It is agreed that you should return to us the copy of the record on paying the above amount....

This writing required registration, as it is a complete transaction and is itself nothing less than a mortgage. The plaintiff therefore, was not entitled to a declaration that he had a charge on the property mentioned in the title deeds deposited with him or to an order for sale thereof or to obtain a mortgage deed from the defendant.

52. The Learned Counsel for the Respondents cites the decision *M. Subramanian and another v. M.L.R.M. Lutchman and others*, A.I.R.1923 PC 50, at Page 51 wherein it is held as follows: Where a memorandum amounting to a creation of an Equitable mortgage, was not registered as required by law, held that the memorandum was inadmissible in Evidence.

53. It is to be pointed out that a mortgage by deposit of titledeeds falls as per following possibilities:

- (1) The document may record a past transaction of a mortgage by deposit of title-deeds and may be executed with that intention.
- (2) The title-deeds may be passed "without more" or "without nothing said" except that they were to be security.
- (3) The delivery may be accompanied with a bargain which either is not written or if written does not constitute the contract.
- (4) There may be a written bargain a memorandum which is tacitly considered by the parties themselves as the only repository and appropriate evidence of the agreement.

It is only the fourth class that requires registration as per decision *Subramanian v. Lutchman*, AIR 1923 P.C.50.

54. As a matter of fact, if the memorandum speaks of an already completed agreement, the same does not require registration as per decision *C. Krishnaveni Ammal and Another Vs. P.S. Subrahmanyam Chetty and Others*, . In the decision AIR 1931 36 (Privy Council) , Lord Tomlin made the observations hereunder:

The question which falls to be determined is whether the memorandum, having regard to its true construction and the circumstances in which it came into existence and passed into the hands of the plaintiff, is an instrument which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest whether vested or contingent of the value of Rs.100 or upward to or in immovable property.

55. This Court aptly points out the decision of the Honourable Supreme Court *Syndicate Bank Vs. Estate Officer and Manager, A.P.I.I.C. Ltd. and Others*, , at Page 364 wherein it is among other things observed as follows:

The requisites of an equitable mortgage are : (i) a debt; (ii) a deposit of title deeds; and (iii) an intention that the deeds shall be security for the debt. The territorial restrictions contained in Section 58(f) Transfer of Property Act also do not stand as a bar in creating an equitable mortgage. whereas a deposit of title deeds by itself does not require a document in writing, but in the event a mortgage is created thereby, it will require registration.

It is one thing to say that a person cannot convey any title which he himself does not possess, but it is another thing to say that no mortgage can be created unless he obtains a title by reason of a registered conveyance. Various High Courts have also held that for the purpose of creating mortgage by depositing title deeds in terms of Section 58 of the Transfer of Property Act, it is not necessary that the mortgagor would have forfeit complete title over the property. Even if the mortgagor derives some interest which can be subject-matter of mortgage, a mortgage by deposit of title deeds can be created. If insistence on the original document of title is laid, it may give rise to the conclusion that once the document of title is lost, no mortgage by deposit of title deed can be created at all.

The existence of ingredients (i) and (iii) of an equitable mortgage as set out above is not in dispute in the present case. The principal question, which, requires consideration in the present case is as to whether for satisfying the requirements of Section 58(f) of the Transfer of Property Act, it is necessary to deposit documents showing complete title or good title and whether all the documents of title to the property are required to be deposited. A fortiori the question which would arise for consideration is as to whether in all such cases, the property should have been acquired by reason of a registered document.

56. It cannot be gainsaid that as per Section 58(f) of the Transfer of Property

Act, 1882, where a person delivers to a creditor the documents of title in respect of an immovable with an intent to create a security thereon, transaction is called a mortgage by deposit of title deeds. The intention is to be that the title deeds shall be the security for the debt in question.

57. No wonder, mortgage is a transfer of interest in an immovable for the purpose of securing the payment of a loan which is created by the act of parties, as per decision of the Honourable Supreme Court Harbans Vs. Om Prakash and Others, .

58. The burden of non-payment of consideration is on the mortgagor as per decision Karan Raj and Another Vs. Chunnilal and Others, .

59. This Court worth recalls the observation of Fisher in his book on mortgage that security is a redeemable estate or right which one person has in the property of another.

60. Stroud defines "Security" as anything that makes the money more assured in its payment or more readily recoverable; as distinguished from e.g. a mere I.O.U. which is only evidence of a debt. (Stroud's Judicial Dictionary Vol.4 3rd Edition, Page 2697 (See SECURITIES. See further, per Stirling, L.J., British Oil Mills Co. v. Inland Revenue Commissioners, (1903) 1 K.B.697.

61. In law, a mortgage can be made to secure payment and for future advance as per decision Durga Prosad Charnaria Vs. Mario Galstaun and Others, .

62. Intention on ambiguity in language can be ascertain from the content of the deed and extrinsic evidence is admissible to show that the language of the deed was related to the existing facts.

63. Section 118 of the Negotiable Instruments Act speaks of certain presumptions to be attached to a negotiable instrument until the contrary is established. But before these presumptions can be drawn, an execution of the instrument should be admitted or proved. It is to be remembered that there is no presumption about an execution of a Negotiable Instrument and in case of a denial by the other side the individual resting its claim on such instrument ought to fully establish its execution as per decision Visvonata Raghunath Audi v. Mariano Colaco, AIR 1976 GDD 60.

64. The term "burden of proof" has two meanings. (1)The burden of proof as a matter of law and pleading (2)The onus of establishing a case, the former is fixed as a question of law based on the pleadings and remains unchanged during the full trial of the case. However, the latter will not remain static but shifts as soon as a party let in sufficient evidence to raise a presumption in his favour. As per Section 101 of the Indian evidence Act, the burden initially falls on the Plaintiff who has to prove that the Promissory Note was executed by the Defendant. As soon as the execution of the Promissory Note is established the rule of presumption prescribed in Section 118 of the Negotiable Instruments Act, aids him to shift the onus to the opposite side. The onus of proof as a question of law

rests on the Plaintiff, but as soon as the execution is established, Section 118 of the Negotiable Instruments Act casts a duty on a Court of Law to raise a presumption in his favour that the said instrument was made for consideration. In a case where the Defendant takes the plea of signature or thumb impression on a blank paper, burden lies on the Plaintiff to establish execution of Promissory Note by the Defendant. Thereafter, the burden shifts to the Defendant to establish that there was no consideration for such document as per Section 118(a) of the Negotiable Instruments Act, the Defendant can rebut such presumption either by direct evidence or circumstantial evidence, as per decision Sri Khetramohan Ray Vs. Udayanarayan Panda and Another, .

65. It is open to the Defendant to rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the onus may likewise shift again to the Plaintiff. He may also rely upon the presumptions of fact mentioned in Section 114 and other Sections of the Indian Evidence Act. As per Section 114 of the Indian Evidence Act, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts to the particular case.

66. Illustration (g) to Section 114 of the Indian Evidence Act says that the Court may presume that evidence which could be and is not produced would, if produced be unfavourable to the person, who withholds it. The question whether a statutory presumption is rebutted by the rest of the evidence is a question of fact as per decision AIR 1930 91 (Privy Council) at Page 93.

67. If a document was executed for the purpose of creating a mortgage as per Section 58(f) of the Transfer of Property Act, no doubt it needs to be registered likewise, when the memorandum or letter was executed on the date of deposit or delivery of the title deeds, the same is to be registered. After the delivery of the title deeds, if any letter or memorandum was executed endorsing the earlier deposit of title which already created a mortgage, the letter requires no registration, as per decision Hubert Peyoli Vs. Santhavilasathu Kesavan Sivadasan and Another, .

68. This Court, to promote substantial cause of Justice, cites the following decisions:

(a) In Kissen V. Ram 12 WR 13, it is observed that if after admission of a document which is subsequently found to be irrelevant or otherwise inadmissibility, it may be rejected at any time under the rule.

(b) Even an erroneous omission to object to an inadmissible evidence does not make it admissible, if the evidence per se is inadmissible, as per the Indian Evidence Act, as per decision Miller V. Madho 23 IA 106.

(c) In Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Satteyya and Others, , it is observed by the Honourable Supreme Court that the marking

of a document as an exhibit on the side of one party does not dispense with its proof as per decision.

(d) In *Rajagopal v. State Bank of Travancore*, (1995 1 MH LJ 175), this Court has held that in order to create a valid equitable mortgage it is not necessary the original documents, of title to the property should be deposited and deposit of copy of the title deeds are sufficient to create an equitable mortgage and it is only the intention of the parties that is the prime factor to be considered.

(e) In *C. Assiamma v. State Bank of Mysore*, 1992 74 Comp. Cases 139, at Page 149, it is held as follows:

By "documents of title" we mean the legal instruments which prove the right of a person in a particular property..... When a person who is acclaimed and recognised by law as the owner of property transfers his rights by an instrument which satisfies all the requirements of law, the instrument of transfer is a title deed in respect of the property so far as the transferee is concerned.... A copy of a deed of transfer is not ordinarily a document of title for the purposes of an equitable mortgage. It is the original deed of transfer that is the document of title.... At the same time there may be cases where the original document is lost and there are no chances of that document being made use of for any purpose. In the absence of the original deed of transfer the next best evidence of the owner's title to the property is a certified copy of that document. A certified copy in such cases may with sufficient safeguards be received as a document of title.

(f) In *R. Janakiraman Vs. State represented by Inspector of Police, CBI, SPE, Madras*, , the original title deeds were not deposited. What were deposited were not title deeds, but only a certificate issued by the Co-operative House Building Society, certifying that the appellant is owner of the particular building and two receipts showing that the appellant had paid some electric charges. The alleged mortgage by deposit of title deeds was based upon Ex. P69 in that case, which was also not produced. In that context it was held that the equitable mortgage was also a make-believe and not real one, inasmuch as no document of title was shown to have been deposited.

(g) In *K.J. Nathan Vs. S.V. Maruty Reddy and Others*, , the Honourable Supreme Court has inter alia held as follows:

Physical delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be a constructive deposit. A court will have to ascertain in each case whether in substance there is a delivery of the title deeds by the debtor to the creditor. If the creditor was already in possession of the title-deeds, it would be hypertechnical to insist upon the formality of the creditor delivering the title deeds to the debtor, and the debtor redelivering them to the creditor. What would be necessary in these circumstances is whether the parties agreed to treat the documents in the possession of the creditor or his agent as delivery to him for the purpose of the transaction.

Also, in the aforesaid decision at Para 13 at Page 431, the Honourable Supreme Court has held that "question whether on facts found a transaction is a mortgage by deposit of title deeds is a mixed question of fact and law and further that the concurrent finding of both Courts below vitiated on account of the fact that they missed the importance of the particular document bearing on the question.

69. The Learned Counsel for the Respondents submits that the trial Court came to the clear conclusion that Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 was a created, fraudulent, bogus document and PW1 in fact in his evidence clearly stated that the 1st Respondent/1st Defendant for a sum of Rs.2,00,000/- received, repaid Rs.1,95,000/- and that there remains a balance of Rs.5,000/- as per Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 and that at the time of filing of the suit, a balance sum of Rs.5,000/- was left out.

70. According to the Learned Counsel for the Respondents/Defendants, when there was no liability on the part of the Respondents/Defendants, then, there was no question of handing over the collateral document. Further, it is the contention of the Learned Counsel for the Respondents/Defendants that for Rs.6.5 Lakhs, the Appellant/Plaintiff took a bogus Ex.A.3 Pro-Note dated 15.06.1999 for a sum of Rs.6,50,000/-.

71. Proceeding further, it is the further contention of the Learned Counsel for the Respondents/ Defendants that PW1 clearly stated that for Ex.A.3 Pro-Note dated 15.06.1999, he gave a sum of Rs.35,000/- to the 2nd Respondent/2nd Defendant and therefore, it is clear that he had not given the said amount to the 3rd Respondent/3rd Defendant.

72. It is the further contention of the Learned Counsel for the Respondents/ Defendants that further sum of Rs.50,000/- no consideration was paid and to the 3rd Respondent/3rd Defendant no amount was paid.

73. Repelling the contention of the Learned Counsel for the Respondents/ Defendant, the Learned Counsel for the Appellant/Plaintiff submits that based on Ex.A2 and Ex.A.3 Pro-notes dated 17.02.1999 and 15.06.1999, a Decree could be passed and in regard to the sum of Rs.50,000/- was concerned, no Written Statement was filed by the 2nd and 3rd Respondents/Defendants and further, the 2nd Respondent/2nd Defendant was examined and also, there was no denial in this regard.

74. In Ex.A.1 unregistered Mortgage Deed dated 22.02.1996, the signature of the 3rd Defendant is seen in English. Further, the recitals in the said document point out that the 3rd Respondent/3rd Defendant for her husband namely, the 2nd Respondent/2nd Defendant and her brother 1st Respondent/1st Defendant for the purpose of her brother's business received a sum of Rs.2,00,000/- on this day and further, for the loan amount and also for their future loan or her future loan, she mortgaged the pattaland of an extent of 180 sq.ft. in T.S. No. No.39, Block No.1, Paimash No.39, S.No.64 of Puliyur Village, also the building together with the enjoyment of 420 sq.ft. of land (Document No.1500/93, Sub-

Registrar, Kodambakkam). Also, the recitals in Ex.A.1, the 3rd Defendant agreed to pay the sum with 24% interest for this loan amount. Significantly, the recitals of Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 were typed in Tamil.

75. In Ex.A.2 Pro-Note dated 17.02.1999 for Rs.35,000/-, the signature of the 3rd Respondent/3rd Defendant (DW1) is seen over the Revenue Stamp dated 17.02.1999. The first four lines of Ex.A.2 Pro- Note dated 17.02.1999 were written in Tamil and it is in one ink. But the word "business" was written in Tamil in a different ink. Also, the sum of Rs.35,000/- was written in different ink in Tamil. The signature of the 3rd Respondent/3rd Defendant made with a ballpoint pen in Ex.B.2 Pro-Note dated 17.02.1999 was seen over the Revenue Stamp.

76. In Ex.A.3 Pro-Note dated 15.06.1999 for Rs.6,50,000/-, the recitals was seen in Tamil and over the Revenue Stamp the signature of the 1st Respondent/1st Defendant was seen. In Ex.A.3 Pro-Note dated 15.06.1999, it was mentioned that money was taken for business expenses. Eight lines in Ex.A.3 Pro-Note dated 15.06.1999 were printed in hand in Tamil.

77. In Ex.A.4 Appellant/Plaintiff Lawyer's notice dated 23.03.2001 addressed to the Respondents/Defendants, it was among other things mentioned that the 1st Respondent/1st Defendant approached the Appellant/Plaintiff and wanted a sum of Rs.6.5lakhs for purchasing the property and promised to return the said sum at the latest by February 2000, etc. Also, it was mentioned that when the Appellant/Plaintiff approached the 1st Respondent/1st Defendant during the last week of February 2000, he has refused to see the Appellant/Plaintiff etc.

78. Moreover, in Ex.A.4 Lawyer's notice dated 23.03.2001, it was mentioned that the Appellant/Plaintiff also advanced a sum of Rs.50,000/- to the 2nd Respondent/2nd Defendant and a sum of Rs.35,000/- to the 2nd Respondent/2nd Defendant and that they had agreed to pay the loan together with interest @24% per annum. For the due repayment of the loans, the 3rd Respondent/3rd Defendant had deposited the title deeds in respect of the Plaint schedule property as collateral security for the due repayment of the loans and created an equitable mortgage.

79. In short, in Ex.A.4 Appellant/Plaintiff Lawyer's notice dated 23.03.2001 addressed to the Respondents/Defendants, the 1st Respondent/1st Defendant was called upon to pay a sum of Rs.6.5 lakhs together with interest @ 24% per annum from June 1999 till the date of repayment and further he called upon to pay a sum of Rs.50,000/- together with interest @24% per annum from April 1999 till the date of repayment and also called upon to repay the amount of Rs.35,000/- together with interest @24% per annum from February 1999 till date of repayment etc.

80. The 3rd Respondent/3rd Defendant (DW1) in her reply Lawyer's notice dated 30.03.2001 had among other things stated that she had not taken any money from the Appellant/Plaintiff on the basis of her House property documents and that she lost her property original document during transit and made a complaint

about the missing of the document. Further, she also stated that the Appellant/Plaintiff is claiming fraudulently alleged use of her property original document dated 23.06.1993.

81. As per Section 101 of the Indian Evidence Act, the onus of proof in establishing that the Respondents/Defendants executed the Pro-notes and the mortgage deed lies on the Appellant/Plaintiff. Admittedly, the Appellant/Plaintiff's wife is serving as a Lecturer in the College. It is the stand of the Respondents/Defendants that the Appellant/Plaintiff's wife was running a real estate business wherein the 1st Respondent/1st Defendant became a Partner.

82. Before the trial Court, the wife of the Appellant was not examined as a witness. The non examination of the wife of the Appellant on the side of the Appellant/Plaintiff was an adverse circumstance against him in the considered opinion of this Court. As a matter of fact, heavy burden was on the Appellant/Plaintiff to prove to the satisfaction of this Court that Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 was executed by the 3rd Defendant, in his favour. In Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 the name of the person who typed the contents of the deed was not made mention of. Also, his signature did not find a place in the said document. Furthermore, the Author/Typist who typed the contents of Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 was not examined before the trial Court. PW1 in his evidence clearly deposed that he paid a sum of Rs.2,00,000/- in cash after withdrawing from his Bank account for which he had not registered a Mortgage Deed or an Othi Deed.

83. Strangely, in Ex.A.4 Appellant/Plaintiff Lawyer's notice dated 23.03.2001 addressed to the Respondents/Defendants (as admitted by PW1 in his evidence), no mention was made about the payment of Rs.2,00,000/-. In Ex.A.4 Appellant/Plaintiff Lawyer's notice dated 23.03.2001 addressed to the Respondents/Defendants, there was a mention that the Appellant/Plaintiff advanced a sum of Rs.6,50,000/- on 15.06.1999 and that the 1st Respondent promised to pay the said amount together with interest @24% per annum. But, on behalf of the Appellant/Plaintiff Ex.A.3 Pro-Note dated 15.06.1999 for Rs.6,50,000/- was filed into Court in his favour allegedly executed by the 1st Respondent/1st Defendant. In Ex.A.1 unregistered Mortgage Deed dated 22.02.1996, it was mentioned by the 3rd Respondent/3rd Defendant that for her husband Duraisingh (2nd Defendant) and for her brother Jayaraj (1st Defendant) business she has received a sum of Rs.2,00,000/- from the Appellant/Plaintiff on 22.02.1996 and further stated that if her husband and her brother or herself received further loan amounts, she mortgaged her property at Puliur Village in S.No.64, Paimash No.242, Block No.1, T.S.No.39, an extent of 180 sq.ft. etc. The very fact that for the payment of said Rs.2,00,000/- PW1 did not obtain the Mortgage Deed or Othi Deed as per his evidence shows that he was not sure of himself as to whether the 3rd Respondent/3rd Defendant deposited the title deed or handed over the said document together as a collateral security.

84. On going through the contents of Ex.A.1 unregistered Mortgage Deed dated

22.02.1996, this Court is of the considered view that the said document requires compulsory registration as per Section 17 of the Indian Registration Act. In the absence of Ex.A.1 being an unregistered Mortgage Deed dated 22.02.1996, the same cannot be received in evidence as an admissible one, as opined by this Court. Ex.A.1 being an Mortgage Deed in law cannot be even looked into for an incidental or collateral purpose also. The Appellant/Plaintiff and his wife were arrested by the Police for cheating which was not denied on the basis of complaint lodged by Kannan as per Evidence of DW2.

85. As far as the present case is concerned, the Appellant/Plaintiff had not examined any other independent witnesses (apart from himself being examined as PW1) to prove the execution of Ex.A.1 to Ex.A.3 documents viz., the unregistered Mortgage Deed and the Pronotes. From the perusal of Ex.A.2 and Ex.A.3, it is candidly clear that the said Pro-notes for Rs.35,000/- and Rs.6.5 lakhs were filled up in Tamil words in different inks. Even though in Ex.A.2 and Ex.A.3 Pronotes dated 17.02.1999 and 15.06.1999 respectively, the signature of the 3rd Respondent/3rd Defendant and the 1st Respondent/1st Defendant were seen over the Revenue Stamp, yet this Court is of the considered view that these documents are doubtful documents and the Appellants/Plaintiff through his evidence as PW1 had not established to the satisfaction of this Court that the reasons for the Pro-notes being filled up in Tamil in different inks. In the absence of the Appellant/Plaintiff removing the cloud/shroud surrounding the coming into the existence of Ex.A.2 and Ex.A.3 Pro-notes, this Court is of the considered view that the versions of the Respondents/Defendants that the 1st Respondent/1st Defendant and Plaintiff's wife were engaged in the real estate business and they did business to an extent of Rs.3 crores out of which the 2nd Respondent/2nd Defendant claimed a sum of Rs.30,00,000/- as share in the profit and there arose a dispute between the Appellant/Plaintiff and the 1st Respondent/1st Defendant and because of the dispute, the Appellant/Plaintiff created Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 and Ex.A.2 and Ex.A.3 Pro-notes dated 17.02.1999 and 15.06.1999 are a probable and believable one as seen from the Defendants side evidence adduced on their behalf and also on consideration of available materials on record and they are accepted by this Court as worthy of credence.

86. The case of the Appellant/Plaintiff is that he filed a suit for recovery of Rs.85,000/- under Ex.A.2 and Ex.A.3 Pro-notes and he filed the suit to recover a sum of Rs.50,000/- from the 2nd Respondent/2nd Defendant and Rs.35,000/- from the 3rd Respondent/3rd Defendant, thus aggregating in all a sum of Rs.85,000/-. Therefore, without hesitation, this Court comes to an inevitable conclusion that the Appellant/Plaintiff gave up his claim of Rs.7.5 lakhs made in Paragraph 8 of the Plaint.

87. It is to be remembered that the Appellant/Plaintiff claimed a sum of Rs.6.5lakhs from the 1st Respondent/1st Defendant. The Appellant/Plaintiff as PW1 in his evidence tacitly admitted that on payment of Rs.85,000/- he was

ready to return the documents viz., Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 and the original title deeds to the 3rd Respondent/3rd Defendant.

88. In a Civil suit, it is for the Appellant/Plaintiff to prove his case/establish his claim. In other words, he should stand on his own legs. But, in the present suit, the Appellant/Plaintiff has taken a consistently and inconsistent stand which is evident from his evidence as PW1 before the trial Court. The Respondents/Defendants through DW1 and DW2 evidence have clearly probalised their version that Ex.A.1 to Ex.A.3 documents have been given to the Appellant/Plaintiff at a time of real estate business and subsequently, they have been misused and created in his name which culminated in filing of the present suit. When the Appellant/Plaintiff in his cross examination as PW1 has categorically stated that he projected the suit to recover a sum of Rs.85,000/- then, claiming a sum of Rs.7.5 lakhs as per Paragraph 8 of the Plaint is definitely not a true one. In short, the Appellant/Plaintiff as seen from the averments made in the Plaint and also, from his evidence as PW1 has taken a mutually, destructive and self contradictory stand affecting his case in entirety. Looking at from any angle and in the light of detailed qualitative and quantitative discussions referred to supra, this Court holds that the Appellant/Plaintiff is not entitled to recover a sum of Rs.7.35 lakhs with interest at 24% per annum and further it is held that the Appellant/Plaintiff has misused the Pro-notes as alleged by the Respondents/Defendant and the Points are answered against the Appellant/Plaintiff accordingly. The Contentions, Discussions and Findings on Point No.2:

89. It is the stand of the Appellant/Plaintiff that Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 created by the 3rd Respondent/3rd Defendant is for all the three loans and therefore, a single suit filed by the Plaintiff for all the three loans due by all the three Respondents/Defendant to the Plaintiff on a different cause of action is maintainable as per Order II Rule 3 of Civil Procedure Code.

90. Though the Appellant/Plaintiff relies on Ex.A.1 unregistered Mortgage Deed dated 22.02.1996 and Ex.A.2 and Ex.A.3 Pro-notes dated 17.02.1099 and 15.06.1999. It is to be pointed out that if the ingredients of Order I Rule 3 and Order II Rule 3 of CPC are read together they indicate that the question of joinder of parties also involves the joinder of cause of action.

91. To avoid plurality of proceedings, the Appellant/Plaintiff can join several causes of action in one suit. Different cause of action against the different Defendants can be arrayed in one suit, as opined by this Court. Therefore, this Court holds that the present single suit filed by the Appellant/Plaintiff against the Respondents/Defendants in respect of the three loans on a different cause of action is maintainable in law. Therefore, he is entitled to file the present suit against the Respondents/Defendants and the point is answered in favour of the Appellant/Plaintiff.

In the result, the Appeal is dismissed leaving the parties to bear their own costs. Consequently, the Judgment and Decree of the trial Court dated 22.09.2003 in

O.S.No.3230 of 2001 passed by the Learned II Additional City Civil Court Judge, Chennai, are affirmed by this Court for the reasons assigned in this Appeal.