
(1972) 08 MAD CK 0046
In the Madras High Court

Angu Pillai alias Kalyani Achi (died) and Others APPELLANT
Vs
M.S.H. Kasiviswanathan Chettiar and Others RESPONDENT

O.T.M.S.H. Kasiviswanathan Chettiar Vs R.M.H.O.
Udayappa Chettiar (died) and Others

Date of Decision : 02-08-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : (1973) ILR (Mad) 261 : (1973) 86 LW 94 : (1973) 1 MLJ 334

Hon'ble Judges : K.S. Palaniswamy, J;K.S. Palaniswami, J

Bench : Division Bench

Judgement

K.S. Palaniswamy, J.—These two appeals arise out of two suits disposed of by a common judgment by the Subordinate Judge of Sivaganga. In both the suits O. S No. 54 of 1961 and O.S. No. 55 of 1961) the plaintiff was the same. The plaintiff Kasiviswanathan Chettiar is the son of one Somasundaram Chettiar. Angu Pillai alias Kalyani Achi the sole defendant in O.S. No. 54 of 1961, had obtained a money decree in O.S. No. 1 of 1959 on the file of the Subordinate Judge, Sivaganga against one Subramania Chettiar and attached certain, properties in execution of that decree. The plaintiff intervened with a claim u/s 47 of the CPC contending inter alia that the money of his mother Kuppachi alias Visalakshi had been deposited with the joint family, which was having money-lending business in Malaya, Burma and Madurai, that on the death of his mother, he as the sole, heir, became entitled to the said amount, that the amount was calculated and settled at Rs. 40,000 that his father had executed an agreement on 28th October, 1955 Ex. A-22) agreeing to mortgage the properties against which attachment was sought for and that, therefore, the decree-holder in O.S. No. 1 of 1959 should be directed to bring the property for sale subject to the said agreement.

2. Valliammal Achi, the first defendant in O.S. No. 55 of 1961, who died during the pendency of the suit, is the mother of Angu Pillai alias Kalyani Achi, the sole defendant in O.S. No. 54 of 1961. She had obtained a decree in O.S. No. 21 of

1958 on the file of the Subordinate Judge, Sivaganga, against Somasundaram Chettiar, father of the plaintiff. In execution of that decree, she attached same properties and brought them for sale. The plaintiff intervened with a claim contending that in respect of the aforesaid sum of Rs. 40,000 due to him, his father had created an equitable mortgage over the attached properties in his favour by depositing title deeds and that the decree-holder should bring the properties to sale only subject to the equitable mortgage.

3. In both the suits, the defences were that the alleged deposit of Stridhana amount was not true, that the alleged agreement dated 28th October, 1955, to execute a mortgage in favour of the plaintiff was neither true nor valid and that likewise the equitable mortgage was also neither true nor valid.

4. After an elaborate trial, the trial Court upheld the case of the plaintiff with regard to the Stridhana amount of his mother and held that for discharging the amount of Rs. 40,0.00 found to be due to the plaintiff, the plaintiff's father had executed the agreement Exhibit A-2 to mortgage and that the properties could be brought to sale by the decree-holder in O.S. No. 1 of 1959 only subject to that right of the plaintiff. As regards the controversy about the equitable mortgage put forward by the plaintiff, the trial Court found that certain documents were in fact entrusted by the plaintiff's father with the plaintiff with intention to create an equitable mortgage. But the lower Court, however, found that the documents were not documents of title, and as such, no valid equitable mortgage was created. In that view, the claim of the plaintiff was disallowed. Against the decree in O.S. No. 54 of 1951 upholding the plaintiff's claim, the defendant in that suit has filed A.S. No. 130 of 1964. Aggrieved by the dismissal of his suit O.S. No. 55 of 19.61, the plaintiff has filed A.S. No. 356 of 1965.

5. Mr. Raghaviah, appearing for the appellant in A.S. No. 130 of 1964, repeated before us the same contentions urged before the lower Court, namely, that the alleged deposit of Stridhana amount of the plaintiff's mother was not true, that the agreement put forward by the plaintiff for executing a mortgage in his favour by his father was not true and that in any event the said agreement could not confer any right upon the plaintiff so as to have precedence over the right of the decree-holder to proceed in execution of the decree in O.S. No. 1 of 1959. We shall deal with these contentions before dealing with the questions that arise for consideration in A.S. No. 56 of 1965.

6. So far as the fact of deposit of Stridhana amount of the plaintiff's mother is concerned, there is overwhelming evidence. P.W. 1 is the plaintiff's maternal uncle. He speaks about his having drawn a hundi for Rs. 4,250 in favour of the plaintiff's mother on A.R.S.L. firm in Rangoon and payment of the amount by the said firm to the firm of the plaintiff's father at Rangoon. The relevant entry in the account book is Exhibit, A-1 which is in the handwriting of one Subbiah who was employed in Malaya. The hundi referred to by P.W. 1 has not been produced, the explanation being that it is missing. The payment in regard to that hundi is recorded in Exhibit A-1. P. W. 1 speaks about issuing another hundi Exhibit A-2

for making a kaluthura (a jewel) to the plaintiff's mother, the hundi having been drawn on A.R.S.V.L. firm payable to the order of the plaintiff's father. Exhibit A-3 is an endorsement made by the plaintiff's father for collection of the amount. The collection of the amount is found entered in the account Ex. A-4. Receipt of the amount is also acknowledged as per the endorsement, Ex. A-5 made on Ex. A-2. P.W. 1 has spoken about the entry Ex. A-1 being in the handwriting of the aforesaid Subbiah. The further evidence of P. W. 1 is that he issued another hundi Exhibit A-6 for Rs. 450 for the benefit of the plaintiff's mother payable to the order of the plaintiff's mother that it was endorsed for collection as per the endorsement Exhibit A-7 and that the collection of the amount is entered into the account Exhibit A-9. The evidence of P. W. 1 shows that the said entry is in the handwriting of the Pechimuthu, who is now dead.

7. The plaintiff examined as P. W. 2 has generally spoken about the accounts, as he could not have personal knowledge of the several transactions. It was not the case of the defendant that the Stridhanam transactions were not true. The plaintiff was merely put to strict proof of the truth of the transactions. As a matter of fact, the suggestion made to the plaintiff in cross-examination was that the monies referred to above really belonged only to his father and that with a view to bolster up the claim in the suit, the plaintiff put forward his mother's claim. The plaintiff denied the suggestion. He also denied the suggestion that the entries in the accounts were fabricated. Our attention has not been drawn to any circumstances to support this suggestion. The trial Court rightly rejected this suggestion.

8. P. W. 4, an erstwhile Kariyasthan of the plaintiff's family was maintaining accounts for certain periods. He has proved the relevant entries in the accounts in the handwriting of other persons who were in the employ of the plaintiff's firm in Malaya--We see no reason to disbelieve the evidence of P.W. 4 which is corroborated by the relevant entries in the accounts, the genuineness of which we see no reason to doubt.

9. The case of the plaintiff is that along with his mother's money, the money belonging to his step-mother had also been deposited and that his step-brother Meyyappan, became entitled to that amount and that certain amounts belonging to Meyyappan's wife had also been deposited with the joint family firm. The further case of the plaintiff is that all the three amounts were settled and it was found that a sum of Rs. 40,000 was due to him, Rs. 15,000 to Meyyappan and Rs. 5,000 to Meyyappan's wife. The further case of the plaintiff is that in acknowledgment of the family's liability, the plaintiff's father executed Exhibit A-22, on 28th October, 1955 agreeing to execute a mortgage over the suit properties for re-payment of the said amounts. The defence is that the said agreement is neither true nor valid. So far as the truth of the agreement is concerned, there is abundant evidence. In addition to the evidence of the plaintiff (P.W. 2), there is the evidence of P.W. 3, who is, no doubt a relation of the plaintiff. It was P.W. 3, who intervened and asked the plaintiff's father to settle

the amount. The evidence of the plaintiff shows that after the plaintiff's father agreed to execute the mortgage, he consulted a lawyer and decided to obtain an agreement in order to avoid the stamp duty in the event of executing a mortgage straightaway. P.W. 5, is an attester to Exhibit A-22. P.Ws. 4 and 6, are also attestors. Consequent on the execution of Exhibit A-22, relevant entries were made in the accounts also (vide Exhibits A-15 and A-16). Exhibit A-22, is a stamped agreement. We find no circumstances to doubt its genuineness. Mr. Raghaviah, appearing for the appellant in A.S. No. 130 of 1964, strenuously contended that it must be an ante-dated agreement brought into existence at the time when the plaintiff's family was heavily involved. There is no circumstance to warrant this suggestion. The matter does not rest with the agreement alone. The relevant entries in the accounts Exhibits A-15 and A-16 show that Exhibit A-22, is a genuine document. We have, therefore, no hesitation in holding that in settlement of the Stridhana amount of the plaintiff's mother it was found that a sum of Rs. 40,000 was due to the plaintiff, that for the purpose of discharging that amount and the amounts due to Meyyappan and his wife, the plaintiff's father executed Exhibit A-22, agreeing to execute a mortgage.

10. The next question that arises for consideration is whether, on the basis of Exhibit A-22, the plaintiff can contend that his right to obtain a mortgage would have precedence over the right of the decree-holder in O.S. No. 1 of 1959 to attach the property. Exhibit A-22, is no doubt unregistered. But can it be said on that account that no right at all flows in favour of the plaintiff thereunder? Exhibit A-22 as already noticed, is only an agreement to execute a mortgage. That by itself does not create an interest in the property proposed to be mortgaged just as a contract for sale of an immovable property does not by itself create any interest in the property (vide Section 54 of the Transfer of Property Act). The right of a promisee under a prior agreement of sale as against the subsequent attachment and the rights of a Court auction-purchaser under that attachment have been considered in several decisions of this Court beginning as early as in *Savithri Animal Vs. Ramasami and Others*, . See also *Veerappa Thevan*, since adjudicated insolvent, *The Official Receiver Vs. C.S. Venkatarama Aiyar*, . The entire case-law is reviewed in *Diravyam Pillai v. Veeranan Ambalam*. There, the suit properties belonged to a Hindu joint family consisting of five brothers and the sons of four of those brothers. A decree had been obtained for money payable by the five brothers personally and from out of the family properties in the hands of the brothers and sons. In execution of the decree, the decree-holder attached only the interest of the sons in the joint family properties on 15th March, 1933, as the brothers had been already adjudicated insolvents in June, 1927. But even prior to the adjudication the brothers had, on 24th July, 1926, entered into a contract to sell the suit properties to one V and under orders of the Insolvency Court, the Official Receiver executed a sale deed in favour of V on 6th November, 1931. The decree-holder contended that the sale was invalid, as by virtue of the attachment of the sons' interest before the sale deed was executed, the power of the brothers and of the Official Receiver as representing their estates to

convey the sons' shares must be deemed to have come to an end. Varadachariar, J., speaking for the Court, observed that as there was in existence, prior to the attachment, a contract of sale entered into by the brothers at the time when the family was joint and as they had the power to sell also the sons' interests in the properties, the sale in pursuance thereof was not one contrary to the terms of Section 64 of the Civil Procedure Code, and was, therefore, not affected by the attachment. The learned Judge has pointed out that the right of the judgment-debtor in the property was on the date of the attachment qualified by the obligation, incurred by him under the earlier contract to sell and that the attaching creditor cannot claim to ignore that obligation. It was, therefore, held that a sale by the contracting parties in pursuance of the pre-existing contract to sell cannot be said to prejudice the attaching creditor. In coming to this conclusion, the learned Judge has referred to Section 64 of the Code of Civil Procedure, which merely provides that any private transfer by the judgment-debtor of the property attached shall be void on against all claims enforceable under the attachment. It is not correct to read Section 64 as putting an end to the power of sale because as between the transferor and the transferee, the alienation will undoubtedly be operative. The attachment in execution of a decree does not create any interest in favour of the decree-holder in the property.

11. A single Judge of this Court, Wads-Worth, J., in Athinarayana Konar and Another Vs. V. Subramania Aiyar, , had to consider a similar case of a prior contract of sale of a property that was subsequently attached in execution of a decree. Following Diravyam Pillai and Another Vs. Veeranan Ambalam and Others, , the learned Judge held that though a contract to sell land does not create any interest in or charge on the property it does give rise to an obligation which limits the right of its owner and attachment of the right, title and interest of the owner is subject to any such limitation by which he was bound.

12. An attaching decree-holder attaches not the physical property but only the right of the judgment-debtor in the property. As recognised in Section 40 of the Transfer of Property Act, the right of the judgment-debtor in the property is, on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. If the attachment is followed by a Court sale and the purchaser at the Court sale has no notice of the obligation, he may get a good title and the promisee under the private contract would be left to seek his remedy against his promisor.

13. Mr. Raghaviah, appearing for the appellant in A.S. No. 130 of 1964, did not bring to our notice any decision holding that a person like the plaintiff having obtained a right to obtain a mortgage cannot insist that the property should be sold subject to the obligation incurred in his favour by the owner. We are of the opinion that the trial Court was right in upholding the claim of the plaintiff,

namely, that the decree-holder in O.S. No. 1 of 1959 can bring the property to sale only subject to the right of the plaintiff under Exhibit A-22.

14. We shall next deal with A. S. No. 56 of 1965. As already pointed out, that appeal has been filed by the plaintiff in O.S. No. 55 of 1961, against the decree dismissing that suit which he instituted to enforce an equitable mortgage. The trial Court found, on the evidence, that certain documents were handed over to the plaintiff by his father with intent to create a mortgage. But the trial Court did not uphold the case of the plaintiff in the view that the documents which were handed over to the plaintiff by his father were not documents of title within the meaning of Section 58 of the Transfer of Property Act. The correctness of this view, upon which the suit was dismissed is now challenged before us. we may point out in this connection that the arguments proceeded before us only upon the question as to whether the deposit of certain documents constituted a valid equitable mortgage. The point was not in controversy as to the factum of deposit. However, we shall briefly refer to this aspect also. The property, which is the subject-matter of this controversy, was originally a vacant site. It belonged to one Arunachalam Chettiar. On behalf of Somasundaram Chettiar, father of the plaintiff, one Annamalai Chettiar negotiated the sale. One Narayana Chettiar drew a hundi on behalf of Somasundaram Chettiar in favour of the said Annamalai Chettiar and some correspondents passed between them. Exhibit A-26 dated 20th April, 1920 is the said hundi. On 22nd April, 1920, Annamalai Chettiar wrote the letter Exhibit A-24 to Arunachala Chettiar in that connection. On 30th April, 1920, Arunachala Chettiar wrote the letter Exhibit A-25 to Somasundaram Chettiar agreeing to convey the site. Subsequent to the purchase, Somasundaram Chettiar put up a superstructure upon the site and the same has been numbered as Door No. 101, for which Somasundaram Chettiar has paid tax to the Kalayakoil Panchayat. Exhibit A-25 is the house tax receipt issued in the year 1955. According to the plaintiff, the documents which were handed over to him were Exhibits A-23 to A-26. This transaction appears to have been brought about by one Sri Venkatarama Ayyar, Advocate. Exhibit A-27 dated 23rd April, 1956 is the memorandum prepared by the said Advocate. In that memorandum, the aforesaid documents are referred to in detail. The Advocate has certified that the said documents were deposited in his presence at Madurai by Somasundaram Chettiar with the plaintiff with intent to create a mortgage for the amount mentioned therein. The said Advocate was not examined and he was said to be not available. The execution of that memorandum was however proved by P.W. 5 an attester thereto. The truth of that letter was not challenged. As we have already pointed out, the factum of deposit of the aforesaid documents with the plaintiff by his father is not in controversy.

15. The only question, in these circumstances, is whether, by depositing Exhibits A-23 to A-26 a valid equitable mortgage was created in favour of the plaintiff. Section 58 of the Transfer of Property Act inter alia provides that where a person in any of the towns mentioned therein 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. It would be seen from this provision that three essentials are required for an equitable mortgage, namely, (1) a debt, (2) deposit of title deeds, and (3) the intention that the delivery should be security for the debt. In the instant case, the first and third essentials are satisfied. The only question is whether Exhibits A-23 to A-26 are documents of title within the meaning of Section 58. The trial Court, relying upon the decisions of the Rangoon High Court in *V.E.R.M.A.R. Chettiar Firm v. Ha Joo Teen* AIR 1933 Rang 299, held that the said documents were not documents of title and that, therefore, no valid equitable mortgage was created. We are clearly of the opinion that this conclusion cannot be sustained. The expression "documents of title" occurring in Section 58 has been the subject of consideration in some decisions. The law in regard to equitable mortgages is precisely the same in England as it is in India. In *Goodwin v. Waghorn* 41 Revised Reports 208, a purchaser, who had paid his purchase money and had taken possession of the land, did not obtain a conveyance and no title deeds were delivered to him by the vendor. But he had the document of contract under which the property was purchased by him. He deposited that document of contract with intent to create an equitable mortgage. The question arose whether such a document of contract was a document of title. It was argued before Pepys, Master of the Rolls, that copies of Court Rolls though not title deeds by themselves, would be documents of title, the deposit of which would be sufficient to create an equitable mortgage. The learned Judge accepted the position and observed at page 210:

But if the deposit of the copies of Court Roll be sufficient, I cannot see why an agreement should not also be sufficient. The deposit of the copy of the roll is held to create an equitable mortgage, because it is the best evidence of title that the party has the power of depositing, so the agreement for purchase is the best evidence of title, until the contract is completed, and the title deeds are handed over; and in this case there was a deposit of that which was the best evidence....

16. In *Dixon v. Muckleston* (1872) 26 L.T. 152 : 20 W.R. 619 on Appeal (1872) 8 Ch. 155, the question of priority between two parties who claimed equitable mortgages arose for consideration. The owner of a farm deposited deeds of conveyance by way of security for money then due, writing at the same time a letter which stated that the deeds were the title deeds of the farm and were to be security. Subsequently, he deposited the subsequent title deeds of the farm with certain bankers by way of security for money due to them. The bankers investigated the title deeds and they had no notice of the prior charge. The question arose whether the letter under which the earlier title deed was deposited created an equitable mortgage or not. It was held that the said letter created an equitable mortgage on the farm and that the owner of the prior charge had not been guilty of negligence, so as to deprive herself of her priority.

17. In Indian, law, deposit of patta has been held to constitute a valid equitable mortgage, though a patta is not in itself a deed of title, but is only an evidence of title. This Court has consistently taken the view that the main object of tender of

patta is merely to give information of the land revenue payable and the details of the property and that the exact weight to be given to the patta would depend upon the circumstance of the case. It is pointed out that in case of pattas in respect of a land in Zamindari, if the land be at the disposal of the landlord at the time of granting the patta, prima facie such patta would not be a mere bill of rent but something more and that if it is not so, it would not create any rights in the pattadar in derogation of the rights of a person who would be entitled to the land subject to the proper and regular payment of rent. The question directly arose before a Bench of this Court in *Official Assignee v. Basadevadoss* 48 M.L.J. 423 : ILR 48 Mad. 454 : AIR 1925 Mad. 723, as to whether a deposit of patta is enough to constitute an equitable mortgage. The Bench answered the question in the affirmative. Srinivasa Aiyangar, J., who delivered the leading judgment in that case, has pointed out that the answer to the question as to whether the patta in respect of a land is a document which would be sufficient, by being deposited, to evidence the intention required for an equitable mortgage would vary according to the conditions of the country and the consciousness on the part of the members of the community and that though a patta is not a document of title, still a deposit of the same with intention to create an equitable mortgage would create an equitable mortgage.

18. The decision of the Rangoon High Court in *V. E. R. H.A.R. Chettiar Firm v. Ha joo Teen* AIR 1933 Rang 299, upon which the trial Judge relied, was overruled by a Full Bench of the Rangoon High Court in *Chidambaran Chettiar v. Aziz* AIR 1938 Rang 149. This Full Bench decision unfortunately does not appear to have been brought to the notice of the trial Judge. The Full Bench has reviewed the English and Indian authorities and has pointed out that in order to create a valid mortgage, it is not necessary that the whole, or even the most material of the documents of title to the property should be deposited, that the documents deposited should show a complete or good title in the depositor and it is sufficient if the deeds deposited bona fide relate to the property or are material evidence of title or are shown to have been deposited with the intention of creating security thereon.

19. Mr. Sivamani, appearing for the respondent in this appeal relied on a decision of a Bench of this Court in *V. Venkataramayya Pantulu Vs. V.B. Narasinga Row and Others*, , in support of his argument that even the deposit of the sale deed in certain circumstances would not be sufficient to create an equitable mortgage. In that case, the debtor deposited a sale deed in the name of his father who had made a gift of the property in favour of his grandson by a deceased son. The property was admittedly the self-acquired property of the father of the first defendant in that case. The question arose whether the deposit of that sale deed was sufficient to constitute a valid equitable mortgage. The Bench pointed out that the only document that was deposited did not show any kind of title in the depositor to the property as it was not a sale deed in his name but was a sale deed in the name of his father and that, therefore, no valid equitable mortgage was created. This decision is not applicable to the facts of the instant case, for

here, the documents in question though not complete in themselves for holding title in favour of the plaintiff". father, are undoubtedly document relating to the property or in respect of the property showing prima facie title to the same. The hundi towards the purchase price, the agreement by the previous owner of the site to convey the site and the tax receipt in the name of the plaintiff's father are undoubtedly documents in respect of or relating to the property in question and are, as such, documents of title within the meaning of Section 58 of the Transfer of Property Act. We have already pointed out that the plaintiff's father was indebted to the plaintiff and that the plaintiff's father intended to create an equitable mortgage as recorded by the advocate in Exhibit A-27. We, therefore, differ from the conclusion of the trial Judge and find that the plaintiff holds an equitable mortgage over the property, which is the subject matter of O.S. No. 55 of 1961. In the result, A.S. No. 130 of 1964 is dismissed with costs of the plaintiff therein and A.S. No. 56 of 1965 is allowed with the costs of the plaintiff in both the Courts.