

(1972) 08 MAD CK 0016

In the Madras High Court

Case No : Appeal No's. 130 of 1964 and 56 of 1965

Angu Pillai and Others

APPELLANT

Vs

M.S.M. Kasiviswanathan Chettiar and Others

RESPONDENT

Date of Decision : 02-08-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47, 64
Transfer of Property Act, 1882 — Section 40, 54, 58

Citation : AIR 1974 Mad 16

Hon'ble Judges : Palanisway, J;Ismail, J

Bench : Division Bench

Judgement

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. 54 of 1961 and O.S. 55 of 1961) the plaintiff was the same. The plaintiff Kasiviswanathan Chettiar is the son of one

Samasundram Chettiar. Angu Pillai alias Kalyani Achi the sole defendant in O.S. 54 of 1961, had obtained a money decree in O.S. 1 of 1959 on

the file of a Subordinate Judge, Sivaganga, against Subramania Chettiar, and attached certain properties in execution of that decree. The plaintiff

intervened with a claim u/s 47 C.P.C. 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, and that on the death of his mother, he as the sole heir,

become entitled to the said amount, that the amount was calculated and settled at Rupees 40,000 that his father had executed an agreement on 28-

10-1955 (Ex. A.22) agreeing to mortgage the properties against which attachment was sought for and that, therefore, the decree-holder is O.S. 1

of 1959 should be directed to bring the property for sale subject to the said agreement.

2. Vallimmal Achi, the first defendant in O.S. 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. 54 of 1961. She had obtained a decree in O.S. 21 of 1958 on against Somasundaram Chettiar, father of the plaintiff. In

execution of that decree, she attached same properties and brought them for sale. The plaintiff intervened the aforesaid sum of Rupees 40,000 due

to him, his father had created an equitable mortgage over the attached properties in 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 Sridhana amount was not true, that the alleged agreement dated 28-10-1955 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 Sridhana amount of his mother of Rupees 40,000 found

to be due to the plaintiff, the plaintiff's father had executed the agreement Ex. A.2 to mortgage and that the properties could be brought to sale by

the decree-holder in O.S. 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 1961 upholding the plaintiff's claim the

defendant in that suit has filed A.S. 130 of 1964. Aggrieved by the dismissal of his suit O.S. 55 of 1961, the plaintiff had filed A.S. 356 of 1965.

5. Mr. Raghaviah, appearing for the appellant in A.S. 130 of 1964, repeated before us the same contentions urged before the lower court, namely,

that the alleged deposit of Sridhana 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 right of the decree

holder to proceed in execution of the decree in O.S. 1 of 1959. We shall deal with these contentions before dealing with the questions that arise

for consideration in A.S. 56 of 1965.

6. So far as the fact of deposit of Sridhana 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 Rupees 4250 in favour of the plaintiff's mother on A.R.S.L. firm in Rangoon and

payment of the amount by the firm to the firm of the plaintiff's father at Rangoon. The relevant entry in the account book is Ex. 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 Ex. A-1. P.W. 1 speaks about issuing another hundi Ex. A-2 for making a kaluthura

(a jewel) to the plaintiffs' mother, the hundi having been drawn on A.R.S.V.L. firm payable to the order of the plaintiff's father. Ex. 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-4 being

in the handwriting of the aforesaid Subbiah. The further evidence of P.W. 1 is that he issued another hundi Ex. A-8 for Rupees 459 for the benefit

of the plaintiff's mother payable to the order of the plaintiff's mother and further, that it was endorsed for collection as per the endorsement Ex. A-

7 and that the collection of the amount is entered into the account Ex. A-8. The evidence of P.W. 1 shows that the said entry is in the handwriting

of one Pachaimuthu, who is now dead.

.....

(Discussion of evidence omitted)

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.

7. 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 become entitled to that amount and that certain amount belonging to Meyyappan's wife has 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 Rupees 40,000 was due to

him. Rupees 15,000 to Meyyappan and Rupees 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 Ex. A-22 on 28-10-1955 agreeing to execute a mortgage over the suit properties for repayment 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 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 straightway. P.W. 5 is an attester to Ex. A.22, P.Ws. 4 and 6 are

also attestors. Consequent on the execution of Ex. A-22 relevant entries were made in the accounts also vide Exs. A-15 and A-16. Ex. A-22 is a

stamped agreement. We find no circumstances to doubt its genuineness. Mr. Raghaviah, appearing for the appellants in A.S. 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. Exs.

A-15 and A-16 show that Ex. 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 Rupees 40,000 was due to the plaintiff, that for the purpose of the discharging that amount and

the amounts due to Meyyappa and his wife, the plaintiff's father executed Ex. A-22 agreeing to execute a mortgage.

8. The next question that arises for consideration is whether, on the basis of Ex. A-22, the plaintiff can contend that his right to obtain a mortgage

would have precedence over the right of the decreeholder in O.S. 1 of 1958 to attach the property. Ex. A-22 is no doubt unregistered. But can it

be said that on that account no right at all flows in favour of the plaintiff thereunder? Ex. A-22 is as already noticed, 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 promise 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 and Another Vs. Veeranan

Ambalam and Others, . 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 decreeholder attached only the interest of the sons in the joint family properties on 15-3-1933,

as the brothers had been already adjudicated insolvents in June 1927. But even prior to the adjudication the brothers had on 24-7-1926, 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 6-11-1931. The decreeholder contended that the sale deed was executed, the power of the brothers and of the Official Receiver as

representing their estate to convey the son's 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 son's interest in the properties, the sale in pursuance thereof is not one contrary to the terms of Section 64,

C.P.C. 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, Civil P.C. which merely

provides that any private transfer by the judgment-debtor of the property attached shall be void as 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 decreeholder in the property.

9. A single Judge of this Court Wadsworth, 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 any attachment of the right, title and interest of the owner is subject to any such

limitation by which he was bound.

10. 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 had no notice of the obligation, he may get a good title and the promise under the private contract would be left to seek his remedy

against his promisor.

11. Mr. Raghaviah, appearing for the appellant, in A.S. 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. 1 of 1959

can bring the property to sale only subject to the right of the plaintiff under Ex. A.22.

12. We shall next deal with A.S. 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 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 Narayanan Chettiar drew a Hundi on behalf of Somasundaram Chettiar in favour of the said Annamalai Chettiar and some correspondences passed between them. Ex. A-26 dated 20-4-1920 is the said hundi. On 22-4-1920, Annamalai Chettiar wrote the letter Ex. A.24 to Arunachala Chettiar in that connection. On 30-4-1920, Arunachalam Chettiar wrote the letter Ex. 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 Kalyakoil panchayat. Ex. 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 Exs. A.23 to A.26. This transaction appears to have been brought about by one Sri Venkataram Iyer, advocate, Ex. A.27 dated 23-4-56 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 as he was said to be not available. The execution of the memorandum was however proved by P.W. 5, an attestor 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.

13. The only question, in these circumstances, is whether, by depositing Exs. 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 Exs. A.23 to A. 26 are documents of title within the meaning of S. 58. The trial Court, relying upon the

decisions of the Rangoon High Court in *V.E.R.M.A.R. Chettiar firm v. Ma Joo Teen* AIR 1933 Ran 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 mortgage is precisely the same in England as it is in India. In *Goodwin v. Waghorn*, (1835) 41 RR 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 documents of contract under which the property was purchased by him. He deposited that document of contract with intent to create as

equitable mortgage. The question arose whether of title. It was argued before Peeps, 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.....

14. In *Dixon v. Mukhleston*, (1872) 8 Ch Ap C 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 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 deeds 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.

15. In Indian law, deposit of patta has been held to constitute a valid equitable mortgage, though patta is not in itself a deed of title, but is only on 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 circumstances of the case. In *(Mandala) Donganna and Another Vs. Mandala Jammanna and Another*, 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 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 *The Official Assignee of Madras Vs.*

Basudevadoss Badrinarayan Doss, 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 pattas 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 intent to create an equitable mortgage would create an equitable mortgage.

16. The decision of the Rangoon High Court in AIR 1933 Rang 299 upon which the trial Judge relied, was overruled by a Full Bench of the

Rangoon High Court in Chidambaram Chettyar v. Aiz Meah, 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;

nor 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 a security thereon.

17. 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 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's father, are undoubtedly

documents 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 the plaintiff's father intended to create an equitable mortgage as recorded by the advocate in Ex. 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. 55 of 1961. In the result, A.S. 130 of 1964 is dismissed with costs of the plaintiff therein and A.S. 56 of 1965 is allowed with the costs of the plaintiff in both the courts.

18. Order accordingly.