
(1982) 12 GUJ CK 0014
In the Gujarat High Court

Bank of Baroda

APPELLANT

Vs

Manva Bone Mills and Others

RESPONDENT

Date of Decision : 21-12-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34, 34

Citation : (1983) 2 GLR 1025

Hon'ble Judges : S.B. Majmudar, J;R.J. Shah, J

Bench : Division Bench

Judgement

R.J. Shah, J.—The aforesaid appeals arise from a judgment rendered in Special Civil Suit No. 75 of 1976 by the Civil Judge (Senior Division), Himmatnagar.

2. The facts giving rise to the present appeals are that the original plaintiff, namely Bank of Baroda had filed the aforesaid suit against four defendants. Defendant No. 1 was a partnership firm and defendants Nos. 2 to 4 were its partners. There is no dispute that original defendant No. 5 who was a partner of defendant No. 1 firm had retired from the said partnership. The plaintiff bank alleging that there was an equitable mortgage between the parties had prayed for a decree for the principal amount of Rs. 4,01,158.51 due as on September 30, 1976 and also for Rs. 30,772.00 being the amount of interest on the said amount from 1st October 1976 to 22nd December 1976 together with Rs. 829.40 being the insurance charges. The total amount on the aforesaid basis came to Rs. 4,32,759.91 and further running interest was claimed at 16 per cent per annum from the date of the suit till payment and costs. It was also prayed that the decretal amount may be ordered to be realised by sale of the suit properties equitably mortgaged as described in the schedule as also from the person and properties of the defendants. It appears that the defendants had raised several contentions in the said suit and had also challenged the alleged equitable mortgage. The learned trial Judge had raised issues as per Exhibit 29 in the said suit. In the judgment under appeal the learned trial Judge was pleased to hold that there was no equitable mortgage in favour of the plaintiff and so the plaintiff

was ordered to return the documents stated in Exhibit 80 to the defendants. The suit against defendant No. 5 was dismissed with no order as to costs. The suit, however, was decreed against defendants Nos. 1 to 4 for a sum of Rs. 3,04,775.00 with simple interest at 7 per cent per annum from the date of the judgment till the date of payment. An order awarding proportionate costs was passed in favour of the plaintiff. Defendants Nos. 1 to 4 were also allowed to pay the decretal amount by annual instalments of Rs. 50,000 commencing from 2nd May 1982. It was further ordered that if there was default in payment of any two instalments, the plaintiff would be entitled to execute the decree for the entire balance at once.

3. Feeling aggrieved by the said judgment and order, the plaintiff-appellant has filed the aforesaid Appeal No. 788 of 1981. Defendants Nos. 1 to 4 feeling aggrieved by the aforesaid judgment and decree have filed the aforesaid First Appeal No. 1460 of 1981. Since both the appeals arise from the same judgment, they have been heard together and are being disposed of by this common judgment.

4. The first contention urged on behalf of the appellant-bank is in respect of the finding of the learned trial Judge to the effect that there was no equitable mortgage existing in favour of the plaintiff-bank. Before we proceed to examine the said contention in the context of facts and circumstances of the present case, it would be apposite to refer to the case of Deb Dutta Seal Vs. Ramanlal Phumra and Others, . In this case, the only point raised by the learned advocate for the appellant was that the document Exhibit 2 dated 17th December 1951 required registration and was inadmissible in evidence. The said letter was as under:

Calcutta, the 17th December, 1951 Girdhari Lal Phumra, Esqr., 56, Burtolla Street Calcutta

Dear Sir, Re : 35, Puddo Pukur Road I write to record that I delivered to and deposited with you this day at No. 56, Burtolla Street, Calcutta my title deeds relating to the premises No. 35, Puddo Pukur Road, Calcutta, solely belonging to me with intent to create security for my liability for the moneys payable under the three hundies dated this day for the sum of Rs. 80,000 Rupees (Eighty thousand only) drawn by me in your favour and I have undertaken to execute a legal mortgage at my costs whenever called upon by you to do so. I further assure you that the said premises No. 35, Puddo Pukur Road, is free from all encumbrances and the same absolutely belongs to me.

Yours faithfully, Sd. Debdutt Seal (DEBDUTT SEAL) 17-12-1951

The only evidence led as to the circumstances in which this letter was executed was that of P.W. 1 Raman Lal Phumra s/o late Girdharilal Phumra. The defendant denied the execution of the hundies referred to in the letters. The relevant evidence of P.W. I has been extracted in paragraph 3 of the said judgment. Both the trial Court and the High Court had come to the same conclusion that the said letter did not require registration. The Supreme Court has observed that it

appeared to them that on the evidence reproduced above what happened was that in the morning the money was advanced and the Hundies executed and in the afternoon the defendant brought the title deeds with a view to create an equitable mortgage. He gave the title deeds to the father. The title deeds were approved and a list was made by defendant No. 1 and at that moment the creation of equitable mortgage by deposit of title deeds was complete. Then the letter Exhibit 2 was given. The Supreme Court has further observed that when the witness said in cross-examination that the letter and the title deeds were given together in the afternoon it did not mean that the title deeds had not already been given. Exhibit 2 dated 17th December 1951 in the view of the Supreme Court did not create any mortgage on the face of it. It recorded a past transaction and then the writer undertook to execute a legal mortgage and further assured that the premises were free from all encumbrances etc. The latter two provisions could not make the document registrable because they did not create or declare any interest in the premises. On the aforesaid facts, the Supreme Court has concluded that the document did not intend to create a charge by such inclusion. In the aforesaid Supreme Court decision the case of United Bank of India Ltd. Vs. Lekharam Sonaram and Co. and Others, has also been considered. In the said case, the letter read as under:

This is to place on record that I have this day deposited with you at your Head Office at Clive Street, Calcutta, the undernoted documents of title relating to my properties viz. Giridh Malho properties as described in the title deeds with intent to create an equitable mortgage upon all my rights, title and interest in the said properties to secure the repayment on demand of all moneys now owing or which shall at any time hereafter be owing from me or from M/s. Lekharam Sonaram and Co. either singly or jointly or otherwise to Bengal Central Bank Limited, whether on balance of account or by discount or otherwise in respect in any manner whatsoever and including interest with monthly rests commissions and other Banking charges and any law costs incurred in connection with the amount. I do hereby put on record that the properties mentioned below are free from all encumbrances.

About the said letter, Ramaswami, J. has observed as under:

As regards Ex. 12 also, it is not possible to accept the argument of the respondents that it created a charge for the reason that the language in Ex. 12 suggests that it recorded a transaction which had already been concluded and under which rights and liabilities had already been agreed upon. It is also significant that Ex. 12 is written not by Lekharam - the Karta of the joint family - but by Babulal Ram. It recites that he had deposited the title deeds with an intent to create an equitable mortgage "upon all my rights, title and interest in the said properties". The language of Ex. 12 is identical in material respects with the language of the document construed by this Court in Rachpal Mahraj Vs. Bhagwandas Daruka and Others, and is covered by the decision in that case.

After reproducing the aforesaid observations of Ramaswami, J. the Supreme

Court has observed in Deb Dutt Seal's case (supra) that it was said that if a transaction had already been entered into by the parties, then Ex. 2 may not require registration, but if a transaction had not already been entered into it required registration. Reliance was placed especially on Kedarnath Dutt v. Shamlall Khettry (1873) 11 Ben LR 405. The words in the memorandum in that case were:

For the repayment of the loan of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit with the plaintiff, as a collateral security by way of equitable mortgage, title-deeds of my property.... " The Court held that the memorandum did not require registration on the ground that this was "not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred". Earlier the Court had observed;

When we consider what the memorandum is, we find it is not the contract for the mortgage,- not the agreement to give a mortgage for the Rs. 1,200 but nothing more than a statement by Woomachurn Banerjee of the fact from which the agreement is inferred. It is an admission by him that he had deposited the deeds upon the advance of the money for which promissory note was given.

In the case under reference, the Supreme Court has observed that they were not concerned with the correct interpretation of that memorandum but if the decision laid down that even if a document on the face of it and properly interpreted in the light of the circumstances did not disclose the creation of a mortgage, or in the words of the Privy Council in AIR 1939 167 (Privy Council) , even if the document itself was not an operative instrument and was merely evidential, it required registration, the decision could not be approved. After considering the aforesaid decisions, the Supreme Court has concluded that the document in question must contain all the essentials of the transaction and one essential was that the following should be mentioned:

1. Date
2. Date of repayment
3. Sum secured
4. Nature of mortgage
5. Subject matter of mortgage.

While holding that the document before them did not require registration it was further observed by the Supreme Court that before them stress was also laid on the time element. In that connection it has been observed as under:

Assuming that we are wrong in the interpretation that the deeds mentioned in the letter, after being shown to the father and approved, were handed back together, even then we are of the view that the document does not require registration because it is not an "operative instrument." It does not contain all

the essentials of the transaction. What is registrable under the Indian Registration Act is a document and not a transaction.

It is true that the aforesaid is a majority decision, Mitter, J. dissenting. All the same, it has not been shown by either side before us that the law on the point is different from that contained in the said majority decision.

5. In the light of the aforesaid legal position, we will now proceed to examine the facts in the present case. Exhibit 80 in the present case is the bone of contention. It contains the hearing "Memorandum depositing the title deeds of the property equitably mortgaged". The said document is dated 20th July 1972. It is partly printed, partly typed and partly handwritten. It reads as under:

A/c M/s Manwa Bone Mills Mr. Ahmedhusein Nathabhai Manwa, Mr. Mahomadhusein Nathabhai Manwa & Abdulkarim Nathabhai Manwa of Modasa authorised to deposit title deeds called at the Bank's Office at Gandhi Road, Ahmedabad on 20th July 192 at 1.45 P.M. and handed over the title deeds as listed below of the lands and properties situated at Modasa and Talod belonging to them to Mr. Dhinatrai Vithalbhai Jha, agent of the Bank's Gandhi Road, Ahmedabad office in the presence of Mr. Jayantilal Mahijibhai Patel of the Bank's Gandhi Road, Ahmedabad office with an intent to create first equitable mortgage on the lands and properties belonging to them to secure the Banking Credit Loan of Rs. 2,00,000/- and interest thereon and all costs, charges and expenses payable to the Bank as security for the said advance up to Rs. 2,00,000/- made by the Bank's Gandhi Road, A''bad office to M/s Manwa Bone Mills Limited, Ahmedabad and interest as aforesaid.

This memorandum was read over to Mr. Ahmedhusein Nathabhai Manwa, Mr. Mahomadhusein Nathabhai Manwa & Mr. Abdulkarim Nathabhai Manwa as also explained in Gujarati Dated this 20th day of July, 1972.

LIST OF THE TITLE DEEDS DEPOSITED

... .. It is not necessary to reproduce the particulars of the title deeds mentioned in Exhibit 80. In the first place, no rate of interest has been mentioned in the said memorandum. Secondly, Exhibit 80 has been styled as a memorandum depositing the title deeds of the property equitably mortgaged. Thirdly, the words used are "and handed over the title deeds" and not "hereby hand over the title deeds" giving a clear indication that the handing over of the title deeds had taken place prior to the rendering of the memorandum namely. Exhibit 80. Fourthly, Exhibit 80 shows that the delivery of title deeds as made was clearly intended to create a first equitable mortgage as expressly stated therein. Fifthly, in the nature of things, description of the documents in question could not have been entered in Exhibit 80 unless the documents in question were handed over previously to the plaintiff-bank. The defendants have not claimed that they had filled any printed memorandum after blank printed memorandum was handed over to them by the plaintiff-bank and before they handed over the title deeds in question. Sixthly, the contents of Exhibit 80 cannot be said to

contain the complete bargain between the parties inasmuch as no rate of interest has been mentioned therein. The use of words "handed over the title deeds" militates against such a construction since it clearly brings out the fact that the title deeds in question had been previously handed over to the plaintiff-bank.

6. In this connection, Mr. H. M. Mehta, the learned Counsel for the defendants, has invited our attention to the fact that in Exhibit 80 it has been stated that the title deeds had been handed over at 1.45 PM on the day in question and the bank personnel who has signed Exhibit 80 has also stated in Exhibit 80 itself that he had signed the same at 1.45 PM. At this stage, we would like to mention that when the hearing of these appeals was in progress, we had an occasion to peruse Exhibit 80. At that time, we had clearly noted that the bank personnel had signed the same at the bottom mentioning the time as 1.45 PM. As we intended to refer to Exhibit 80 for the purpose of this Judgment, we again saw Exhibit 80 and we were surprised to find that a small portion at the right-hand bottom corner of Exhibit 80 had disappeared which contained the aforesaid signature and time. We therefore brought it to the notice of the learned Counsel for both the sides and both the counsel have also agreed that the bank personnel had signed Exhibit 80 mentioning the time as 1.45 PM. With the consent of both the sides, a xerox copy of Exhibit 80 is taken on record and we direct that the same be retained as Exhibit 80 on record. The xerox copy of Exhibit 80 clearly contains the said signature and the aforesaid time. The submission of Mr. H. M. Mehta, however, cannot stand the test of probabilities. A glance at Exhibit 80 will convince anyone that some time after the title deeds were handed over must have been taken to insert the typewritten material in Exhibit 80. It is nobody's case that the bank personnel had signed Exhibit 80 before typewritten material was inserted therein. The bank personnel therefore could not have signed Exhibit 80 exactly at 1.45 PM as stated by him if the title deeds were handed over only at 1.45 PM on the same day. Thus only an inaccuracy regarding time has crept in in this connection. The same cannot in the aforesaid circumstances establish that Exhibit 80 is not a memorandum as claimed by the defendants. There is no cogent oral evidence in this case of any person having personal knowledge regarding the contents of Exhibit 80 which can seriously affect the theory that Exhibit 80 is only a memorandum and nothing else. Use of printed forms for the purpose of Exhibit 80 by a banking institution such as the plaintiff also belies the theory that Exhibit 80 is not a memorandum. We have therefore no hesitation in concluding in the circumstances of the case and in keeping with the ratio of the aforesaid Supreme Court decisions that Exhibit 83 is a mere memorandum and not a document which contains the complete bargain between the parties. Hence the same does not require registration. The trial Court has therefore clearly erred in concluding that the defendants had not executed a mortgage by deposit of title deeds and in further concluding that Exhibit 80 was not admissible in evidence for want of registration. In our opinion, Exhibit 80 is not such a document as would require registration. The findings of the trial Court in this connection therefore cannot be sustained.

7. The next controversy between the parties centres round the amount of interest. The suit has been filed on 22nd December 1976. In plaint paragraph 9 it has been mentioned that defendants Nos. 1 to 4 had executed a pronote on 24th April 1974 for Rs. 2,75,000 and had agreed to pay 6 per cent interest over and above that of the Reserve Bank of India with quarterly rests. According to the plaintiff, as stated in paragraph 14 of the plaint, the break-up of the plaintiffs total claim is as under:

1. Principal amount with interest up to 13-6-1976 at the rate of 6 per cent per annum Rs. 4,01,158.51 2. Interest at the rate of 16 per cent per annum from 30-6-76 to 22-12-76 Rs. 30,772.00 3. Insurance premium charges Rs. 829.40 Rs. 4,32 759.91

8. At Exhibit 71 there is a pronote dated 29th June 1971. The same is for Rs. 2,75,000. It is, however, pertinent to note that in the said pronote, the rate of interest over Reserve Bank of India rate has not been mentioned. In fact, the place at which the rate of interest over Reserve Bank of India rate ought to have been mentioned has been kept blank. However, in Exhibit 71. the minimum rate of interest has been mentioned to be 7 per cent and it has also been mentioned that there should be quarterly rests.

9. At Exhibit 96 the plaintiff bank has produced the relevant accounts. The learned Counsel for the bank has conceded that in the said account interest has not been calculated at 7 per cent as required by Exhibit 71 in the aforesaid circumstances. The calculation therefore regarding the principal amount due from the defendants as mentioned in the plaint would be adversely affected and will need to be suitably revised accordingly. At Exhibit 73 there is a letter dated 29th June 1971 addressed by the defendants to the plaintiff-bank wherein defendants have confirmed that the balance at the debit of the account was repayable on demand and will bear interest at 7 per cent per annum subject to quarterly rests. The plaintiff bank has not taken any exception to the said letter. There is nothing on the record of the case which points in that direction.

10. At Exhibit 76 there is a pronote dated April 24, 1974: In this pronote, the amount mentioned is Rs. 2,75,000 and it has farther been stated therein that the said amount was to carry interest at the rate of 6 per cent over Reserve Bank of India rate with a minimum of 13 per cent with quarterly rests. There is no specific evidence led in this case which goes to show as to what was the Reserve Bank of India rate at the relevant time. In the absence of such evidence, the plaintiff will only be entitled to the minimum amount of interest calculated at 13 per cent per annum as per the pronote Exhibit 76. The learned Counsel for the plaintiff-bank has conceded the above position in view of the aforesaid and has therefore furnished accounts based on the aforesaid lines. The said accounts have been perused by the defendants and their learned Counsel and both the sides agree that the said fresh accounts reflect the true position regarding the liabilities of the defendants in connection with the suit claim. The said accounts reflect the position up to the date of the suit. With the consent of both the

parties, the aforesaid fresh accounts are taken on record.

11. So far as the amount of interest from the date of the suit up to the date of payment or realisation is concerned, the trial Court has been pleased not to allow any amount of interest from the date of the suit till the date of the judgment. The trial Court however has awarded 7 per cent running interest from the date of judgment till the date of payment. In the first place, the trial Court has failed to appreciate that the suit dues are dues which are covered by an equitable mortgage. As such, the question of interest from the date of the suit till the date of the preliminary decree and beyond will have to be considered in the light of the provisions under Order 34 of the Civil Procedure Code, the particular Rule being Rule II which reads as under:

11. In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage:

(i) on the principal amount found or declared due on the mortgage, - at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,

(ii) (Omitted by Amendment, Act, 1956), and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage money, - at the rate agreed between the parties, or, failing such rate, at such rate not exceeding six per cent per annum as the Court deems reasonable; and

(b) subsequent interest up to the date of realisation or actual payment on the aggregate of the principal sums specified in Clause (a) as calculated in accordance with that clause at such rate as the Court deems reasonable.

We had recently had an occasion to examine the question of interest in respect of mortgage dues in First Appeal No. 790 of 1981 *State Bank of India v. Gujarat Oil Engines Pvt. Ltd.* 24(2) G.L.R. 1019 decided on 6th December 1982. Relying on the Supreme Court and other decisions mentioned in the said judgment, we reached a conclusion in the said judgment that so far as mortgage dues are concerned, Section 34 of the CPC will have no application as in the face of a specific provision no reliance can be put on a general provision. In the aforesaid circumstances, in the present case on the principal amount of Rs. 2, 75,000 as per the fresh account the defendants would be liable to pay interest at 6 per cent per annum up to the date of the preliminary decree and thereafter also at the same rate up to the date of payment of realisation. Considering the circumstances of the present case, we feel that it would be reasonable to award

interest at such a rate. None of the parties to the appeals has been able to point out that an award of interest at such a rate from the date of the suit would be unreasonable.

12. This brings us to the last point which requires our consideration in the present appeals. By the judgment under appeal, the trial Court has granted annual instalment of Rs. 50,000 inclusive of interest commencing from 2nd May 1982 in respect of the decretal amount as found by the trial Court. The trial Court has also decreed that if there was a default in payment of any two instalments, the plaintiff-bank would be entitled to execute the decree for the balance amount forthwith. It appears that as the trial Court had treated the present suit as a money suit and not as a mortgage suit the trial Court has proceeded to grant instalments. As found by us, the present suit cannot be regarded as a simple money suit but is in fact a suit in respect of an equitable mortgage.

13. Considering Order XXXIV of the CPC it is apparent that the Court has no power to grant any instalment while passing the preliminary decree. Such an opportunity may become available to the judgment debtors if the decretal amount has not been paid during the period prescribed by the preliminary decree and a stage has reached where the judgment creditor applies for a final decree. It is therefore not possible for this Court at this stage to direct that the payment of the decretal dues under the preliminary decree should be paid by instalments. The submission in this connection therefore is not well-founded.