

**(2001) 07 MAD CK 0077**  
**In the Madras High Court**  
**Case No : C.S. No. 1605 of 1991**

Dhanraj N. Kochar

APPELLANT

Vs

Sri Krishna Theatre and Others

RESPONDENT

**Date of Decision :** 09-07-2001

**Acts Referred:**

Madras City Tenants Protection Act, 1922 — Section 9  
Transfer of Property Act, 1882 — Section 69

**Citation :** (2001) 07 MAD CK 0077

**Hon'ble Judges :** A. Ramamurthi, J

**Bench :** Single Bench

**Advocate :** S.S. Trivedi, for the Appellant; T.V. Krishnamachari, for V.K. Elango, for the Respondent

## **Judgement**

A. Ramamurthi, J.—The plaintiff filed the suit for recovery of a sum of Rs. 77,23,000/-with further interest at 24% per annum and in default,

the property may be sold and the proceeds applied towards the payment of principal and interest and if the proceeds shall not be sufficient, the

defendant may be ordered to pay to the plaintiff the amount of deficiency with interest at 24% p.a. until realisation.

2. The case of the plaintiff in brief is as follows :--

The plaintiff took on lease the property measuring 13 1/2 grounds in Door Nos. 7 and 8, TH Road, Chennai-21 under a registered lease deed

dated 12.12.1946 and raised a construction for the purpose of running a cinema theatre known as Sri Krishna Theatre. Though D1 was declared

as sole and absolute owner of the superstructure including the equipments and accessories by the order of the Court in C.S. 36/69, the other

defendants have been included in the business as partners by a partnership deed

dated 1.2.79 and latter by another partnership deed dated

11.6.80. D2 acquired a loan from Karnataka Bank, Thambu Chetty Street, Madras-1 and to discharge the entire loan due to the Bank and some

other debts approached the plaintiff for a loan of Rs. 5 lakhs and borrowed the same and as security for the due repayment of the loan, mortgaged

the property with the lease-hold rights and other equipments on 31.10.83 and the rate of interest is 24% p.a.

3. The plaintiff also advanced another sum of Rs. 5 lakhs at the request of the defendants on 20.1.85 and they executed an equitable mortgage by

deposit of title deeds of the property bearing Door Nos. 7 and 8, TH Road, Madras-79 with an intention to create an equitable mortgage and

deposited the entire title deeds with the plaintiff as per their letter dated 20.1.85 with interest at 36% p.a. The defendants also borrowed a further

sum of Rs. 3,10,000/- and executed a further equitable mortgage by re depositing the entire title deeds with an intention to create an equitable

mortgage on 30.3.86 with interest at 36% p.a. The defendants further borrowed a sum of Rs. 3,90,000/- and executed a further equitable

mortgage by re depositing the entire title deeds with an intention to create an equitable mortgage on 1.4.87 with interest at 36% p.a. The defendants

further borrowed a sum of Rs. 13,00,000/- and executed a further equitable mortgage by re depositing the entire title deeds with an intention to

create an equitable mortgage on 1.4.89 with interest at 36% p.a. The plaintiff is entitled to claim compound interest. The owner of the land filed

C.S. 471783 and the defendants filed O.P. 4595786 u/s 9 of the City Tenant Protection Act to purchase the land and it was also ordered on

6.10.89 and the defendants had to deposit the amount being the value of the land into the Court. The plaintiff requested the defendants to confirm

the outstandings due to him and accordingly, by the letter dated 1.11.1991 confirmed the outstandings. Hence, the suit.

4. D2 died after filing of the suit. D3 is the wife of D2 and D4 to D10 are the children of D2 and D3. D1 and D3 to D10 filed a written statement

denying the suit claim. The defendants borrowed only a sum of Rs. 5 lakhs and there was no intention to create an equitable mortgage. The plaintiff

made use of the signed blank papers for creating equitable mortgages. The plaintiff look advantage of the disputes between the defendants and 3rd

parties, exploited by them by taking promissory notes in blank and also signed blank papers promising not to misuse them. They denied the borrowing of Rs. 3,10,000/-, Rs. 3,90,000/- and Rs. 13,00,000/- and also the execution of equitable mortgages as alleged in the plaint. There is no creation of any equitable mortgage in the eye of law. The payments made by the defendants have not been given credit to in respect of the only loan transaction. The claim of interest is also usurious. The promissory note is also not supported by consideration. Several payments towards principal have been made and the plaintiff has to account for them. They did not give any letter dated 1.11.91 or any other letter by way of confirmation. One of the signed blank papers has been used by the plaintiff for creating the letter dated 1.11.1991. The claims are also barred by limitation. The plaintiff is not entitled to any relief.

5. On the pleadings of the parties, the following issues are framed for trial:--

- (a) Whether the claim of Rs. 13,54,000/- based on the simple mortgage dated 31.10.1983 is correct?
- (b) Whether the defendants have executed any mortgage in favour of the plaintiff?
- (c) Whether there are any arrears of interest due from the defendants?
- (d) Whether the promissory note is not supported by consideration?
- (e) Whether the plaintiff is entitled to claim compound interest?
- (f) Whether the plaintiff is entitled to the suit claim?
- (g) To what relief the plaintiff is entitled?

6. Issues:--The plaintiff, doing financial business has filed the present suit for recovery of a sum of Rs. 77,23,000/- based upon number of equitable mortgages. D1 is M/s. Sri Krishna Theatre represented by the Managing Partner, who is the 2nd defendant. It is not in dispute that the 2nd defendant died without filing any written statement. D3 is the wife of D2 and the other defendants are their children. The plaintiff was examined as PW 1 and according to him under Ex. P1 a sum of Rs. 5,00,000/- was lent and a mortgage deed was executed. The entire theatre equipments and right to purchase the land were also included and the rate of interest was 24% p.a. On 19.1.85 another sum of Rs. 5,00,000/- was given under a promissory note Ex. P2 and the rate of interest was 36% p.a. and they deposited

the title deeds under the memo Ex. P3. Again on 29.3.86 PW 1

lent a further sum of Rs. 3,10,000/- with interest at 36% p.a. under a promissory note Ex. P4 and on 30.3.86 they deposited the title deeds with a

memo Ex. P5. Again on 31.3.87, he lent another sum of Rs. 3,90,000/- under a promissory note Ex. P6 executed by D2 in his capacity as

Managing Partner on 31.3.87 and the title deeds were re-deposited on 1.4.87 as per memo Ex. P7. Ex. P8 is the confirmation relating to the

aforesaid transactions. D2 also obtained permission from the Corporation for construction under Ex. P9. Ex. P10 is the receipt for payment of Rs.

2147-. Ex. P11 is the document relating to the land in which the theatre is situated. The Corporation gave permission under Ex. P12. D2 is the

absolute owner of the property as seen from Ex. P13. Ex. P14 is the certified copy of the order passed in A. No. 3078778. D2 deposited Rs. 12

lakhs and Ex. P15 is the receipt. Ex. P16 is the partnership deed dated 1.2.79 and Ex. P17 is the supplementary document dated 11.6.80,

wherein the family members were added as partners. Ex. P18 is the certified copy of the order passed by this Court dated 27.9.79. Exs. P19 to

21, Exs. P27 and 28 are the encumbrance certificate for various periods. Ex. P22 is the property tax receipt. On 31.3.89 a further sum of Rs. 13

lakhs was advanced on equitable mortgage under Ex. P23. D2 confirmed the balance amount as Rs. 71,89,000/- under Ex. P24. Ex. P25 is the

memo confirming the earlier three equitable mortgages and Ex. P26 is the confirmation letter dated 1.11.1991 given by D2.

7. PW 1 further stated that the promissory notes and other documents were written in his office at No. 54, Audiappa Naicken Street, Sowcarpet,

Chennai-79. He has also got jewellery business in NSC Bose Road. The residential property of D2 bearing Door No. 14, Veerasamy Street was

also mortgaged. D2 has paid Rs. 64 lakhs for purchase of the land and the owners have withdrawn the amount also by the order of the Court. D2

is highly indebted to various persons. One Bakthavatchala Naidu is collecting the income from the theatre for the amount due to him. Prior to the

filing of the suit, D2 paid Rs. 4,10,000/- towards interest by means of a cheque. He did not receive any money in cash. He had also disclosed his

loan transaction in their income tax returns, day book and ledgers etc.

8. On behalf of the defendants D4 was examined as DW1. He is the Managing

Partner of the Theatre (D1). D2 died in 1993 without filing any written statement. The transaction under Ex. P1 alone is admitted. The documents referred to in Ex. P3 were already given to the plaintiff and no documents were entrusted on the date of Ex. P3. The theatre had a seal inscribed as ""Sri Krishna Theatre and Managing Partner"". Infact, the partners have signed in Ex. P1, whereas in other documents, the other partners have not signed. The particulars in the other documents were also filled up only by the plaintiff. These documents have been created with the blank signature taken from D2. Excepting Ex. P1 in respect of other documents no money has been paid by PW1. The plaintiff has not given any money as per Ex. D1. There is also no records about the promissory note under Ex. D1. No doubt, Exs. P24 and 26 contain the signature of D2. The Firm never created any equitable mortgage to the plaintiff. They have also paid various amounts towards the admitted claim under Ex. P1 and they were not duly given credit to.

9. Learned Counsel for the plaintiff mainly contended that the signature in all the promissory notes and confirmation letters have been admittedly signed by the second defendant and under the circumstance, it is no longer open to the defendants to contend that some of the documents were created with the help of blank signatures. According to him, when the signatures are admitted in the documents, the burden is only upon them to show that they were not supported by consideration and they were executed under different circumstances stated by them. The 2nd defendant is admittedly the Managing Partner of the theatre and later, the family members, namely, defendants 3 to 10 were also included as partners.

Admittedly, the 2nd defendant was alive, but he did not file any written statement and only after his death, the other defendants filed the written statement denying the liability; but, however, admitting the claim relating to the simple mortgage under Ex. P1. Excepting Ex. P1, in other documents relied on by the plaintiff to prove his claim, they were not signed by defendants 3 to 10, Learned Counsel for the plaintiff attempted to explain that the 2nd defendant was the Managing Partner of the company and he had signed for and on behalf of the family members also. I am unable to agree with the contention of the learned Counsel for the plaintiff because in most of the other documents relied on by him, the language

employed would indicate as if they were written by more than one person; but curiously enough, it contains only the signature of the second

defendant. In some of the documents, the seal of the theatre represented by the Managing Partner finds a place, but in most of the documents, they

were only hand-written. In fact, P.W. 1 himself admitted that printed forms have been used for the promissory notes and they were filled up only

by him. When evidently defendants 3 to 10 have not signed in the other promissory notes or the letters given to create an equitable mortgage, the

initial burden is only upon the plaintiff to establish that all these documents are supported by consideration and the defendants are liable to pay the

claim.

10. P.W. 1 in the course of evidence admitted that he had not exercised his right to bring the property for private sale. Although it is explained that

since they are equitable mortgage, he cannot exercise the right. It is pertinent to point out that Ex. P1 is the simple registered mortgage and if the

amounts have not been paid as provided under the document, then it is always open to him to bring the property for sale. Perusal of the document

itself clearly indicates that the plaintiff was fully empowered to bring the property for sale in case of default. Ex. P1 was executed only for a sum of

Rs. 5,00,000/-. Clause (3) of Ex. P1 indicates that in case the mortgagors commit default in payment of monthly instalments towards the principal

and/or interest for 6 consecutive months, then it is lawful for the mortgagee in his discretion to recall by demand payment of the entire principal and

interest due on this mortgage. Clause (8) also indicates that the mortgagee or any person authorised by the mortgagee and acting on his behalf has

all the power u/s 69 of the Transfer of Property Act with he at the intervention of Court to sell or concur in selling the mortgaged property by

public auction and realise the mortgage money. In spite of that covenants in Ex. P1, admittedly the plaintiff has not taken any diligent steps to bring

the property under private sale or file any suit for recovery of the amount.

11. Learned Counsel for the plaintiff further stated that the defendants had deposited the title deeds with an intention to create an equitable

mortgage. P.W. 1 in the course of evidence admitted that only at the time of Ex. P3 dated 20.1.1985 the title deeds have been deposited. There

are also subsequent letters signed only by the 2nd defendant to show that these

title deeds have been redeposited again with an intention to create an equitable mortgage. There is no evidence to show that the title deeds were again returned to the 2nd defendant to enable him to redeposit to create an equitable mortgage. It, therefore, follows that the averments in the subsequent documents relating to redeposit of the title deeds with an intention to create an equitable mortgage is only a make belief affair to give a colour of reality. P.W. 1 admitted that he had disclosed the entire loan transaction in income tax returns, day book and ledgers, but curiously enough none of these documents have been filed by him into the Court.

When the liability has been disputed by the contesting defendants, the burden is only upon the plaintiff to file these documents in order to establish that the entire loan transaction finds a place in the account books. The non-production of any of these accounts would only lead to the irresistible conclusion that the case of the plaintiff could not be true and moreover, adverse inference can be drawn against him. Simply because some confirmation letters were given by the 2nd defendant, it cannot be presumed that the entire accounts were produced and after satisfying himself the 2nd defendant had signed the documents. In fact, it is seen from Ex. D3, the counter filed by the 2nd defendant himself relating to injunction application filed by the plaintiff that he had denied the liability. However, learned Counsel for the plaintiff stated that the second defendant had not taken a stand at the earliest point of time that blank signatures have been taken from him. In fact, perusal of the counter Ex. D3 only indicates that with reference to the injunction application only, the counter has been filed and not in respect of the averments in the plaint. Under the circumstance, the omission to mention about the subsequent documents cannot be made much of by the plaintiff. It has also come out in evidence that after the death of the 2nd defendant also, no statement of account was given by the plaintiff either to the defendants or to the Court. It is also pertinent to point out that prior to the filing of the suit, no legal notice was also sent to the defendants. P.W. 1 also admitted that when the 2nd defendant availed the second loan in 1985, he produced the title deeds and he alone filled up the particulars in the documents. Similarly, P.W. 1 alone filled up the contents in Exs. P4 and P6. He also admitted that the 2nd defendant has paid Rs. 4,10,000/- towards all the loans. However, in

the end of the cross-examination, P.W. 1 stated that he did not maintain day book and ledger contradicting his earlier testimony. The entire reading

of the evidence of P.W. 1 clearly indicates that his evidence cannot be safely accepted and acted upon.

12. The plaintiff claimed amount under various heads. As per Ex. P1 dated 31.10.1983 he claimed a sum of Rs. 5 lakhs with interest at 24% per

annum. So far as this claim is concerned, it is admitted by the defendants. According to P.W. 1, he advanced another sum of Rs. 5 lakhs on

20.1.1985 with the defendants and for which, promissory note was taken and the defendants executed the equitable mortgage. The third

transaction is for Rs. 3,10,000/-and for which also, a further equitable mortgage was created by redepositing the entire title deeds on 30.3.1986. It

is further stated that the defendant borrowed a sum of Rs. 3,90,000/-on 1.4.1987 and for which also, equitable mortgage was created on

1.4.1987 and lastly, a sum of Rs. 13,00,000/- was advanced on 1.4.1989 and for which also, an equitable mortgage was created. When the

defendants were not able to pay the instalments as provided under Ex. P1 regularly, it is not known how the plaintiff had advanced the subsequent

amounts. As adverted to, the signatures of all the defendants have been taken only in Ex. P1, but in respect of other loan transactions, the

signatures of defendants 3 to 10 have not been taken. When P.W. 1 had taken the signature of all the parties under Ex. PI, the absence of any

such signature in respect of subsequent transactions would throw suspicion and it only probabilises the case of the defendants. This view will be

confirmed by the non-production of the income tax returns as well as day book and ledgers said to have been maintained by P.W. 1 in the course

of business. Admittedly, P.W.1 is a financier and as such, he should be naturally maintaining the accounts.

13. Learned Counsel for the defendants took a plea that the suit claim is also barred by limitation. Admittedly Ex. PI had come into existence on

31.10.1983. The present suit has been filed in the year 1991 and as such, it cannot be said that the suit is barred by time. So far as the other

transactions are concerned, the plaintiff had miserably failed to establish that these documents are supported by consideration and they have re-

deposited the title deeds with an intention to create the equitable mortgage. It is quite probable that the subsequent letters have been created by

P.W. 1 for the purpose of creating equitable mortgage after getting the signature of the 2nd defendant. Even in those documents, excepting the signature of the 2nd defendant, they do not contain the seal of the theatre. The plaintiff has also not chosen to examine any other person relating to the passing of consideration in respect of other documents. Neither the auditor nor the person who wrote the documents was examined by P.W. 1.

P.W. 1 also admitted that some of the documents were typed in the theatre; but D. W. 1 had clearly stated that there is no typewriter in the theatre. All the documents have been prepared only by P.W. 1 and signature has been taken from the 2nd defendant. Even a perusal of confirmation letters relied on by the plaintiff only indicates that they were written in apiece of paper without any proper particulars. Under the circumstance, I am of the view that except Ex. P1, the other claims have not been proved by the plaintiff and as such, the defendants cannot be directed to pay the same.

14. Learned Counsel for the plaintiff next contended that if really blank signatures have been taken, the 2nd defendant could not have kept quiet without sending any complaint to the police. Admittedly, the landlord of the site had already filed a case against the 2nd defendant, wherein the 2nd defendant filed a petition u/s 9 of the City Tenants Protection Act to purchase the property. It is now stated that the application filed by the 2nd defendant was allowed and the value of the site was also fixed and the same has been deposited by the defendants into the Court. Before this, the 2nd defendant had obtained a loan from Karnataka Bank and only for discharging the loan, it appears that Ex. P1, mortgage deed had come into existence. There is a reference in Ex. PI about the loan with Karnataka Bank. However, P.W. 1 admitted that after discharge of the loan, the documents have not been taken by him defendants 3 to 10 are only the legal heirs of the 2nd defendant and in order to mulct liability on them, the burden will be on the plaintiff to prove the entire transaction. No letter of confirmation has been taken from defendants 3 to 10 in respect of the entire claim. The defendants have clearly admitted the liability in respect of claim under Ex. P1 and disputed their liability in respect of the other claims. Taking into consideration of the entire materials, I am of the view that the plaintiff has miserably failed to prove that the defendants are liable

to pay the entire suit claim. Hence, I am of the view that the defendants are liable to pay the claim under Ex. P1 only. It is stated that the defendants have so far paid a sum of Rs. 4,10,000/- and it has to be naturally given credit to by the plaintiff. Hence, these points are answered accordingly.

15. For the reasons stated above, the plaintiff is entitled to get a preliminary decree only in respect of the claim covered under Ex. P1 with interest

at 12% per annum from the date of Ex. P1 till the filing of the suit and thereafter at 9% till realisation and the amounts paid by the defendants,

namely, Rs. 4,10,000/- has to be given credit to. Hence, preliminary decree is passed for the sum of Rs. 5,00,000/- only and the plaintiff is entitled

to claim interest at the rate of 12% per annum from 31.10.1983 till the filing of the suit and thereafter at the rate of 9% per annum till date of

realisation. The payment of Rs. 4,10,000/- given by the defendants has to be given credit to. Time for payment 3 months. In other respects, the

suit is dismissed. The plaintiff is entitled to proportionate costs.