

(1926) 09 MAD CK 0046
In the Madras High Court

H.M.A.N. Kirmany and Sons

APPELLANT

Vs

Aga Ali Akbar Khazviny Saheb and Others

RESPONDENT

Date of Decision : 07-09-1926

Acts Referred:

Citation : AIR 1928 Mad 919

Judgement

1. The plaintiffs are the appellants before us. They are a firm of Mahomedan "merchants known as H. M. A. N. Kirmany and Sons consisting of the father and his two sons. The defendants are the legal representatives of one Abbas Khazviny Sahib, who is now dead. Defendant 1 is his eldest son, defendant 2 is his widow and defendants 3 to 5 are his children by defendant 2. The suit was brought to recover a sum of money due on a promissory note, which bears date 1st January 1920, for Rs. 3,166-12-9 and sums due on account of the further dealings up to the death of Abbas, which happened about the end of March 1920. The plaintiffs also allege an equitable mortgage by deposit of defendant's title-deeds and ask for a decree for sale. The Subordinate Judge gave a decree for the amount sued for; but he held that there was no valid equitable mortgage and "gave a mere money decree to be recovered" from the estate of Abbas in the hands of the defendants.

2. The suit was filed on 21st July 1920. Defendants 1 and 2 did not appear. Defendants 3, 4 and 5 who were minors were represented by a Court guardian who filed a written statement putting the plaintiff to proof of "his allegations. Defendant 6 was a Marwadi Sowcar who obtained a mortgage of the properties of Abbas under Ex. 2 dated 31st July 1920.

3. Though the document purported to be for Rs. 50,000 it is now admitted before us that the sum due to him at the time of the mortgage was Rs. 24,000 odd. He filed a written statement in November 1920, in which he denied the plaintiff allegations that title-deeds were deposited on 17th September 1917. He also raised other pleas about the validity and priority of the mortgage. The suit came on for trial on 13th February 1922, and we find it was adjourned on six different

occasions on petitions. On :13th February P.W. 1 was examined in part and Exs. A to F. 2 were filed. The case was then adjourned to the next day. On the 14th it was adjourned "at the defendant's request, " the "defendant being: presumably defendant 6. On 15th February a petition was filed by defendant 1 praying for setting aside the order directing the suit to proceed without him and for permission to file a written statement. This was supported by an affidavit in which it was stated that up to then he did not contest the suit on account of the advice of the plaintiffs but two days prior to the affidavit he found certain account books in a lumber room along with furniture, which shows that the mortgage could not be true. The suit was thereupon adjourned to 14th March 1922.

4. On 1st March 1922 defendant 1 filed a written statement, in which he alleged that the suit promissory note was not executed at Madras but at Bezwada and that it was sent to the plaintiff's firm by registered post, that there was no deposit of title-deeds, and that the title-deeds were obtained by the plaintiff by collusion with defendant 2. He also denied the deposit of title-deeds on 17th September 1917. The reasons given in the affidavit of defendant 1 are so flimsy that an ex-parte decree would never be set aside on such allegations. But in the present case, as the trial was going on the lower Court was probably not wrong in allowing him to file his written statement, provided the allegations which were sought to be proved by him were scrutinized with great care and caution. At the trial the plaintiff examined only one witness, the second son in the firm. It is true that in some respects his evidence is not quite satisfactory, for instance his proof of Exs. A and B promissory notes dated 14th and 17th September 1917 respectively.

5. But A and B are now proved by defendant 1 who is examined as the witness 6 for the defendants. The suit promissory note Ex. E is proved both by P.W. 1, and defendant 1. Defendant 1 denied that Ex. C (a letter depositing the deeds) was executed by his father; but on a comparison of the signatures of A and B and E with that of C we have no doubt that Ex. C was also executed by the late Abbas. There is no doubt therefore that on 17th September 1917 Abbas deposited his title-deeds with the plaintiff's firm at Madras, purporting to create a mortgage by deposit of title-deeds. It is true that as now decided by *Subramanian v. Latchman* AIR 1923 P.C 50 is inoperative as an equitable mortgage for want of registration.

6. Now the accounts between the plaintiff's firm and the defendants may be briefly described. The late Abbas borrowed Rs. 2000 on two promissory notes, Exs. A and B on 14th and 17th September 1917, respectively and up to the end of that year he owed to the plaintiffs Rs. 2,106-13-9. On 12th January 1918 he borrowed Rs. 2700 on a promissory note. Thereafter he owed Rs. 4806-13-9. In April and May a portion of his debt was discharged amounting to nearly Rs. 2,800 and the rest of the debt with interest and further small items amounted to Rs. 2,757-1-6 at the end of the year 1918. During the year 1919 there were only

small transactions and accumulations of interest.

7. At the end of the year 1919 the amount due was Rs. 3,166-12-9. It appears that at the end of the year 1918 a copy of the accounts was sent to the plaintiffs' firm by registered post. But there is no such entry about the end of the year 1919. The plaintiffs say that on 1st January 1920 Abbas came to Madras and executed the suit promissory note. It is typed, unlike Exs. A and B. The defendants say that it was typed with a Remington at Bezwada.

8. It bears the word "Madras" and the date " 1st January 1920 " at the top. The defendants say that it was executed at Bezwada on the 15th January 1920, and was sent by registered post. To support these allegations they filed a day-book, Ex. III. According to defendant 1's evidence it is the only book found in the lumber room, though he refers to several other books in the affidavit. Seeing that this book was filed two years after the defendant allowed the suit to proceed ex parte it must be received with the greatest caution.

9. A look at the book shows that it bears no signs of having been handled though it is a daybook. And though on account of want of acquaintance with the Hindustani handwriting we find some difficulty in judging of these Mahomedan account books, yet we think that Ex. 3 cannot be accepted as a genuine account, the suspicion being that it was prepared prior to the application of February 1922, probably at the instigation of the defendant 6.

10. This Ex. 3 does not show an entry, for instance, of the sending of the promissory note by registered post on 15th January. The promissory note is attested by two witnesses, who are admittedly residents of Bezwada. They are D. Ws. 1 and 2. Both these witnesses were dependants of the late Abbas and for a long time connected with him. For some of the hearings of this suit they were summoned by the plaintiffs. Afterwards they had to be given up.

11. The witnesses themselves say that they told the plaintiffs that they could not support them. Both of them admitted that at the time of attestation they noticed the discrepancy in respect of the date and the place, but were satisfied with the explanation they were offered, namely, that they were merely to attest and not to ask questions about the date and the place. P.W. 1 admits that he was absent from Bezwada in Agency Tracts and arrived there only on that morning. In chief-examination he said that he attested it on the same day subsequent to 1st January. D. W. 1 is related to Abbas. D. W. 2 says that D. W. 1 saw Abbas sign Ex. E. In this he is contradicted by D. W. 1. In cross-examination D. W. 2 admits that after the death of Abbas he went on the business of the defendant's firm to Madras along with the brother of Abbas. This shows it was likely that these two witnesses followed Abbas to Madras on the 1st January 1920 as deposed to by P.W. 1. The note, Ex. E, being proved to be genuine, and as it bears the date 1st January 1920, we think the presumption is that it was executed both at the place and on the date it shows. It is for the party who pleads that it was executed on a different day and at a different place to show it. If otherwise it is

for the defendants to make it out. It is very difficult to say that this case was made out on the evidence of D. W. 1 and D. W. 2. When the defendants oral evidence was taken only defendant 6 called his witnesses and D. Ws. 1 to 5 were all defendant 6's witnesses.

12. Then the 6th witness for the defendants was called. This was defendant 1 and he was put into the box not as defendant 6's witness, but as defendant 1's witness. It seems to us to be a gross irregularity in the case which the Subordinate Judge ought not to have allowed, for the object of it is too plain. After the chief-examination of defendant 1, by himself defendant 6 proceed to cross-examine him, and in the course of such cross examination he elicits a number of details which are all favourable to himself. And the first question in the cross-examination of the plaintiff is whether he was not contesting the suit at the instance of defendant 6. We think that it is very obvious in this case that defendant 1 began his contest late at the instance of defendant 6. Defendant 6 is said to be a very rich man, and it is admitted that he is worth 15 lakhs, quite possibly he won over D."Ws. 1 and 2 being a rich man, though this cannot be proved but only be suspected under the circumstances of the case. We think that the defendants have not made out that Abbas did not go to Madras on 1st; January 1920 and did not execute the note at Madras.

13. The only question that remains is whether there was an equitable mortgage by the deposit of title-deeds. Though the original mortgage of 17th September was invalid the title-deeds continue to remain with the plaintiff. It is highly probable that, when the plaintiffs and the late Abbas met at Madras on 1st January 1920 Abbas said that the title-deeds which were already with the plaintiffs would continue to be security. P.W. 1 deposes to this, We do not see why we should not believe P.W. 1 on this point though his evidence on other matters is unsatisfactory, especially as it agrees very highly with the probabilities of the case. There is an entry in the plaintiff's ledger Ex., G., a translation of which is Ex. J. This being only a ledger and the corresponding entry not appearing in the day-book, we do not wish to rely on it in support of the plaintiff's case. The entry is

the title-deeds of the Bezwada house which were under mortgage will remain intact till the liquidation of the whole amount.

14. We can use this entry against the plaintiff. It seems to us that the equitable mortgage was only for the amount then due and not for further advances. Though the parties met in March 1920, while Abbas was ill and again in June, when they met in Bezwada in connexion with the defendant's family affairs, it is not anybody's ease that the defendants agreed to mortgage the title-deeds as security for the further advances, and it is very difficult to imply such security from mere conduct) between January and July.

15. The result is we must hold that the plaintiffs have made out an equitable mortgage for the sum of Rs. 3,166-12-9 and its interest and not for the amount

that became due to the plaintiffs under further dealings. So far as the latter dealings are concerned the Subordinate Judge's decree will be confirmed. But, so far as the amount due under the promissory note and its interest are concerned they will be entitled to a decree for sale. Six months will be allowed for payment. The decree of the Subordinate Judge will be modified accordingly. The plaintiffs and defendant 6 will give and receive proportionate costs. But defendants 1 to 5 will be liable for all the costs of the plaintiffs in the first Court, to be recovered from the assets of Abbas. The costs of the plaintiffs will include the amounts paid by the plaintiffs for the expenses of the Court guardian appointed in the Court below and here.