

(2001) 08 KL CK 0028
In the High Court Of Kerala
Case No : A.S. No. 720 of 1992

Indian Bank

APPELLANT

Vs

Bombay Hardwares and Sanitary Stores

RESPONDENT

Date of Decision : 23-08-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 11
Transfer of Property Act, 1882 — Section 58(1)

Citation : (2001) 2 KLJ 363

Hon'ble Judges : K.A. Mohamed Shafi, J

Bench : Single Bench

Advocate : E. Subramani and S. Easwaran, for the Appellant;

Final Decision : Allowed

Judgement

K.A. Mohamed Shafi, J.—The plaintiff in O.S. No. 45/89 on the file of the Principal Sub Court, Paravur is the appellant.

2. The Suit was filed by the appellant bank seeking a decree for Rs. 42,599/74 against the defendants jointly and severally with interest thereon at 18 per cent per annum with quarterly rests from the date of suit till date of recovery and by sale of plaintiff A schedule immovable property and other reliefs.

3. The third defendant remained ex parte in the Suit. Second defendant contested the Suit on behalf of himself and the first defendant partnership firm. After trial, the lower court decreed the Suit for Rs. 42,599/74 with future interest at 18% per annum on the principal of Rs. 30,908/15 from the date of Suit till realisation against the defendants and their assets.

4. The lower court disallowed the claim of the plaintiff for recovery of the amount by sale of plaintiff A schedule immovable property in enforcement of the equitable mortgage alleged to have been created by second defendant in respect of the property and awarded interest only on Rs. 30,908/15 instead of the plaintiff claim of Rs. 42,599/74 from the date of Suit. The above Appeal is preferred by the

plaintiff challenging these two findings of the lower court.

5. Though respondents 1 and 2 were served personally and third respondent was served by substitute service, none of the respondents appeared before this Court in this Appeal. The arguments advanced by the counsel for the appellant were heard.

6. It is not disputed that the first respondent partnership firm with respondents 2 and 3 as partners obtained a cash credit facility to the limit of Rs. 15,000/- from the appellant on 14.7.1980 and respondents 2 and 3 executed Ext. A1 promissory note on 16.8.1980 for Rs. 15,000/- and the second defendant deposited his title deeds Exts. A3, A5 and A6 as per Ext. A4 memorandum dated 18.8.1980 executed by the second defendant. Subsequently, the amount was enhanced to Rs. 30,000/- on 11.10.1980 and respondents 2 and 3 executed Ext. A7 pronote dated 15.10.1980 on behalf of the first defendant also and Ext. A8 agreement acknowledging the liability and the deposit of title deeds. On 16.6.1983 Ext. A10 pronote was executed and Ext. A11 acknowledgment of liability was also executed, renewing the liability. Again, there was further renewal by Ext. A12 acknowledgement of liability was executed by respondents 2 and 3 on 5.5.1987. The appellant sent Ext. A15 lawyer notice on 10.6.1988 to the respondents claiming the amount to which the respondents did not send any reply. In Ext. A15 it is stated that the amount outstanding as on that date was Rs. 30,908/15. But the Suit is filed claiming Rs. 42,599/74 as due on the date of suit.

7. The contentions raised by the respondents with regard to the execution of the promissory notes, their acknowledgment of liability and the interest payable by them to the appellant bank are all negated by lower court. But, even though the lower court found that the appellant is entitled to Rs. 42,599/74 claimed in the suit, awarded future interest only on Rs. 30,908/15 stated to be the principal amount from the date of suit at 18% per annum.

8. The pronotes executed by the respondents in favour of the appellant stipulated interest payable with quarterly rests which indicated if the interest is not paid in time, it will be added to the principal at the end of each quarter and the principal amount with the interest added to it will form the principal thereafter. It is on that basis the appellant filed the suit claiming Rs. 42,599/74 being the principal amount due on the date of the suit. In the decision reported in *Thandamma v. Kuriakose* (1960 KLT 184) a Full Bench of this Court has held that the interest accumulated with the principal at the end of each quarter becomes principal and never thereafter ceases to be dealt with as principal. In a subsequent decision reported in *Bank of India v. Mary George* (1991 (2) KLT 226), a Division Bench of this Court has held that if the agreement between the parties provides that defaulted interest becomes added to the principal, the principal must be deemed to include such arrears of interest also. Therefore, as it is clear from the pronotes and the acknowledgments of liability executed by the respondents in this case that there is an agreement between the appellant and

the respondents providing that the defaulted interest becomes added to the principal and therefore the principal must be deemed to include such arrears of interest also. Therefore, the lower court was in error in disallowing interest on the principal amount of Rs. 42,599/74 mentioned in the plaint and adjudged by the court and awarding future interest only on Rs. 30,908/15 which stated in Ext. A15 lawyer notice being the principal amount due on the date of issue of notice and that finding cannot be sustained. Therefore, I find that the appellant is entitled to interest on the principal amount of Rs. 42,599/74 mentioned in the plaint and adjudged at 18 per cent per annum from the date of suit till realisation.

9. The only other point that arises for consideration in this Appeal is whether there was an equitable mortgage in respect of plaint A schedule property in favour of the appellant bank and whether the appellant is entitled to a decree for realisation of the amount by sale of plaint A schedule property. The second respondent has contended that no valid equitable mortgage is created in favour of the appellant since the original title deed in respect of plaint A schedule property is not deposited with the appellant and only a registration copy of the title deed is deposited which is insufficient to create an equitable mortgage under law. The second respondent has deposited Ext. A3 registration copy of the Settlement Deed dated 22.12.1977, Ext. A5 encumbrance certificate and Ext. A6 land revenue receipt with the appellant along with Ext. A4 memorandum of deposit of title deeds. The settlement deed was executed by the father of respondents 1 and 2 in favour of his three children bequeathing A, B and C schedule properties mentioned therein to each of the donees. The second respondents as DW 1 has deposed that he has deposited certified copy of the document, encumbrance certificate and tax receipt with the bank. He has also deposed that, that property belongs to him exclusively. He has further deposed that the Manage of the Bank demanded the original document and he informed him that the original is in the custody of his brother and when he asked for that document, his brother told him that he has deposited that document in a bank to obtain loan. Therefore, it is clear that the original document was not available with the second respondent to be produced before the bank at the time of creating the equitable mortgage in respect of the property.

10. Even though S. 58(1) of the Transfer of Property Act contemplates deposit of the original title deeds for creation of equitable mortgage, when the original document is lost or not forthcoming, equitable mortgage can be created by depositing certified copy of the document. In the decision reported in *Assiamma v. State Bank of Mysore* (ILR 1992 Ker 43), a Division Bench of this Court has held that when the original documents are not forthcoming or lost, equitable mortgage can be created by depositing copies of the document. In this case, it is clear from the evidence of DW 1 that the original settlement deed is in favour of three brothers including the second respondent and it was in the custody of his elder brother and he has deposited the same in a bank for availing a loan. Therefore, it is evident that the original title deed is not forthcoming to be deposited by the second respondent with the appellant in this case. Hence the

deposit of certified copy of the settlement deed is sufficient in this case to create an equitable mortgage.

11. In the Book, the Transfer of Property Act, Ninth Edition at page 58, the learned Author Mulla has observed at page 627 that the requisites for creating an equitable mortgage are (1) a debt (2) a deposit of title deeds and (3) an intention that the deeds shall be security for the debt.

12. In this case, it is clear from the various pronotes executed by respondents 2 and 3 in favour of the appellant and the acknowledgments of liability made by second respondent that the deposited the title deed with the appellant with the intention to create security for the debt availed by the respondents from the appellant. Therefore, it is clear from the evidence on record that the second respondent has created a valid equitable mortgage in favour of the appellant by deposit of his title deeds. Therefore, the lower court is in manifest error in finding that no legal and valid equitable mortgage is created in this case, since the original title deed of the second respondent is not deposited with the appellant. Therefore, that finding entered by the lower court is liable to be set aside. Hence I find that the appellant is entitled to a decree for sale of plaint A schedule property belonging to the second respondent.

13. Hence this Appeal is allowed. The findings of the lower court that the appellant is entitled to interest only on Rs. 30,908/15 from the date of suit and the appellant is not entitled to a decree for sale of Plaint A schedule property are reversed and the plaintiff is granted a decree for Rs. 42,599/74 with interest thereon at 18% per annum from the date of suit till realisation against the defendants and also by sale of Plaint A schedule property.