(2009) 07 CHH CK 0033

In the Chhattisgarh High Court

Case No : First Appeal No. 95 of 2001

Jeewandamal Kakkad and Another APPELLANT

Vs

Punjab and Sindh Bank RESPONDENT

Date of Decision : 13-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5
Registration Act, 1908 — Section 17
Transfer of Property Act, 1882 — Section 58

Citation : (2009) 3 CGLJ 281

Hon'ble Judges : T.P. Sharma, J

Bench : Division Bench

Advocate : Bhaskar Payashi, for the Appellant; Malay Kumar Bhaduri, for the Respondent

Judgement

T.P. Sharma, J.—This appeal is directed against the judgment and decree dated 10-4-2001 passed by the 5th Additional District Judge, Raipur in Civil Suit No. 13-A/96, whereby learned Additional District Judge has decreed the suit for sale of mortgage property.

2. Judgment and decree are challenged on the ground that the Court below has erred in holding that the suit for recovery of amount was based on mortgage and the suit was not barred by limitation and also on the ground that the Court below has committed illegality by holding that the Appellants have mortgaged the house to the Respondent by deposit of title deed.

3. Brief facts of the case are that the Respondent is a body corporate registered under the Banking Companies Act, 1980 having its head office at New Delhi and Appellant No. 1 was dealing with the business of auto parts. Cash Credit Hypothecation Loan Facility was granted to Appellant No. 1 by the Respondent and Appellant No. 2 was guarantor for the said transaction. According to the case of the Plaintiff/Respondent, the Defendant/Appellant has deposited document of title of immovable property i.e. house with intent to create a security thereon to

the Bank. The Appellant has not deposited the loan taken from the Respondent and an amount of Rs. 1,97,430/- was due against Appellant No. 1 including interest till 15-2-95. Suit for sale of mortgage property was filed by the Respondent.

4. The Appellant has not admitted the allegations of the plaint and alleged that Cash Credit Hypothecation Loan Facility was granted only for the year 1978 and it was not extended after 1978. The Plaintiff/Respondent has obtained signature on different blank printed forms from the Appellants and has filled up the same on different dates. The present Appellant has not executed any document.

5. It was specifically pleaded by the Plaintiff/Respondent in para 4 of the plaint that Appellant No. 1 has mortgaged his residential house No. A-20 situated at Shankar Nagar, Raipur, by creating equitable mortgage in favour of the Plaintiff/ Respondent which was denied by the Appellants/Defendants.

6. On the basis of averments of the parties, issues were framed and after affording opportunity of hearing the suit was decreed.

7. I have heard learned Counsel for the parties, perused the judgment and decree and record of the Court below.

8. Learned Counsel for the Appellants argued that the present Appellant has not created any charge over his property by equitable mortgage, the alleged transaction was only for one year and the suit was hopelessly barred by time. The Respondent has forged and interpolated the documents and tried to create the suit within limitation. In absence of any loan on the basis of mortgage, limitation for recovery of loan amount was only three years. Learned Counsel further argued that the Respondent has not discharged the burden that Appellant No. 1 has mortgaged his house by depositing the title deed. Learned Counsel also argued that it is clear from Ex.P-18 that Appellant No. 1 has not executed any registered deed of legal mortgage in favour of the Respondent but executed Ex.P-18 which is another unregistered document of mortgage and has deposited the title deed to the Bank/Respondent. Therefore, in absence of any execution of mortgage deed, no charge could be created upon the property and the loan was simple loan not based on any mortgage. Learned Counsel placed reliance in the matter of United Bank of India Ltd. Vs. Lekharam Sonaram and Co. and Others, in which it has been held by the Apex Court that in case of mortgage by deposit of title deeds, if parties choose to reduce contract to writing, registration is compulsory. Learned Counsel further placed reliance in the matter of Rachpal Mahraj Vs. Bhagwandas Daruka and Others, in which it has been held by the Apex Court that in case of mortgage by deposit of title deeds, if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be sole evidence of its terms. In such a case the deposit and the document both form integral part of the transaction and are essential ingredients in the creation of the mortgage.

9. On the other hand, learned Counsel for the Respondent supported the

judgment and decree and argued that Appellant No. 1 has mortgaged the property (house) by depositing title deed of the house and suit for recovery was based on mortgage, the suit was filed within limitation. The Court below has rightly decreed the suit filed on the basis of mortgage. Learned Counsel placed reliance in the matter of Dinesh Shah Vs. Ravi Sharma, in which it has been held that charge may be created by depositing the title and for creating charge by depositing the title no registration of any document is required. Learned Counsel further placed reliance in the matter of M/s. Chitalia Bros. v. The South Indian Bank, Trichur and Ors. AIR 1988 Karn 59 in which it has been held that mortgage by depositing title deed does not contemplate the execution of any further document for creating a mortgage in favour of the Bank and such suit is maintainable. Learned Counsel also placed reliance in the matter of Smt. Rajamma v. Sri Mahant, P. Krishnandagiri Goswamy and Ors. AIR 1973 Myso 310, in which it has been held that document/memo accompanying deposit of title deed does not require registration.

10. No other points are raised or argued by the parties.

11. Para 4 of the plaint relating mortgage by depositing title deed reads as follows:

4. As collateral security for the due repayment of the outstanding balance found due in the account of the Defendant No. 1 (One), the Defendant No. 1 (One) mortgaged his residential house number A-20 (Twenty) situated at Shankarnagar, Raipur by creating equitable mortgage in favour of the Plaintiff. The description of the property mortgaged by the Defendant No. 1 (One) is fully described in Schedule - "A" hereto written.

SCHEDULE-"A"

House No. A-20 (Twenty) situated at M.P. Housing Board Colony Shankanagar, Raipur, M.P. The house was purchased by Shri Jiwandamal Kakkad S/o Phula Singh Kakkad, the Defendant No. 1 (One) for a sum of Rs. 29,250/- (Twenty nine thousand two hundred fifty) by means of a registered sale deed. The sale deed is registered in the office of the Sub-Registrar, Raipur in Book No. Ad-1 (One), Volume 5881 (five eight eight one) Pages 157 (One hundred fifty seven) to 164. (One hundred sixty four) as Serial No. 6178 (Six one seven eight) on 1.6.78 (First June Seventy eight). The Defendant No. 1 (One) created equitable mortgage by the deposit of the original sale deed with the Plaintiff.

12. The Appellants/Defendants had denied, the allegations of contents of para 4 of the plaint in para 4 of their written statement which reads as follows:

4. Contents of para 4 of the plaint are denied.

13. The Appellants have made other specific pleadings, but have not pleaded anything relating to equitable mortgage i.e. mortgage by depositing the title except denial in para 4 of their written statement.

14. According to the pleadings of the Respondent/Plaintiff, Appellant No. 1/ Defendant has mortgaged the property by depositing the title deed i.e. sale deed with intent to create a security thereon, mortgage by deposit of titled-deeds is defined in Clause (f) of Section 58 of the Transfer of Property Act, 1882 (for short ''the Act'') which reads as follows:

58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.-(a) xxx xxx xxx

(b) xxx xxx xxx

(c) xxx xxx xxx

(d) xxx xxx xxx

(e) xxx xxx xxx

(f) Mortgage by deposit of title-deeds.-Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

15. Letter relating to deposit of title executed by Appellant No. 1 vide Ex.P-18 reads as follows:

The Manager, The Punjab and Sind Bank Ltd., Raipur.

Dear Sir,

Jiwandamal and Brother have already taken from you an advance of Rs. 75,000/- (Rupees seventy five thousand only) at Raipur per cent P.A. with... monthly rests with post diem interest at stipulated rate till actual payment of debit balance in the above office of the Bank, for the repayment of which I/we are surety and guarantors. As a further and collateral security for the principal amount, interest and other charges due thereon I/we have already deposited with the Bank the documents of title of the property as detailed in schedule ''A'' given herein below to be held till the said debit is fully paid or in case of a sanctioned limit i.e. fully paid and the limit cancelled. Please note that I/we shall have no objection to execute and get registered a deed of legal mortgage, if and when so required by the Bank. As already assured, the property already given in security to the Bank is not previously encumbered anywhere else.

SCHEDULE "A"

No. Description Estimated Value Remarks

One Residential House measuring 6750 sq.ft. situated at A/20 Shanker Nagar Raipur 70,000/-

THE ABOVE SCHEDULE IS CORRECT.

Yours faithfully Signature Sd/- Address: Shanker Nagar, Raipur

Date 29.6.81 Station Raipur

16. It is not disputed that Appellant No. 1 and the Respondent have not executed any document other than Ex.P-18 containing any terms of the agreement or mortgage. Therefore, no document is required to be registered. In the matter of United Bank (supra), the Apex Court while dealing with the question of mortgage by deposit of title deeds held that "essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain". Para 7 of the judgment reads thus,

... It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is that the essence of a mortgage by deposit of title deeds is the actual handing over by borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration u/s 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in immoveable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in the evidence at all and the transaction itself cannot be proved by oral evidence either....

17. While dealing with the question of mortgage by deposit of title deeds, the Apex Court has held in the case of Rachpal (supra) that any memorandum given along with title deeds requires registration and forms integral part of the mortgage. Para 4 of the judgment reads thus,

...when the debtor deposits with the credit the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required u/s 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration u/s 17, Registration Act 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title deeds and yet may not be registrable,....

18. Ex.P-18 is a letter relating to handing over of title deed for creating charge over the property. Contents of Ex.P-18 are clear and unambiguous. Intention of the executor of Ex.P-18 is clear that by depositing title deed he has created charge over the property mentioned in Schedule ''A'' and also intimated that he is having no objection to execute and get the deed of legal mortgage registered, if and when so required by the Bank. This shows that the executor of letter Ex.P-18 has not executed any document creating charge, but simply intimated the Bank that if the Bank requires execution of some document he will execute the same. Contents of Ex.P-18 showing such intention are neither conditions of mortgage nor a bargain between the parties. Therefore, this document which is virtually a forwarding letter is not an integral part of the agreement of mortgage.

19. Judgments of the Apex Court relied upon by learned Counsel for the Appellants in the matters of United Bank (supra) and Rachpal (supra) are distinguishable on facts to that of the present case in hand.

20. The Respondent/Plaintiff has specifically pleaded in para 4 of his plaint relating to mortgage by deposit of title deed, but in response to contents of para 4 of the plaint, the Appellants have stated that contents of paja 4 of the plaint are denied. The Appellants have not specifically denied the contents or by necessary implication as required under Rule 5 of Order 8 of the Code of Civil Procedure, 1908. In absence of such specific denial, such formal or evasive denial shall be deemed to be admission of the allegation of the plaint as held by the Apex Court in the case of Badat and Co. Vs. East India Trading Co., . In absence of such specific denial it shall be deemed that the Appellants have admitted mortgage of the house in dispute by depositing title deed with the Bank with intent to create charge over the property.

21. Mortgage by deposit of title deeds is a special kind of mortgage applicable in limited towns of India namely, Kolkata, Chennai, Mumbai, Ahmedabad, Bandra, Kurla, Chathkoper Kirol, Cawnpore, Allahabad, Lucknow, Coimbatore, Madura, Cocanada, Cochin and other towns notified by the State Government concerned in the Official Gazette. The provisions of Clause (f) of Section 58 of the Act i.e. mortgage by deposit of title deeds are not applicable to all the cities or territories of India and is only limited to some towns. The Plaintiff/Respondent has neither alleged in his plaint nor has proved by oral or documentary evidence that the State of Chhattisgarh or the undivided State of Madhya Pradesh has notified the town Raipur in the Official Gazette for application of Clause (f) of Section 58 of the Act. The Plaintiff has also not pleaded that Appellant No. 1 has deposited the

title deed to the Respondent/Plaintiff at New Delhi in the Head Office of the Respondent Bank. The Appellants have also neither pleaded nor adduced evidence to show that Appellant No. 1 has deposited the title deed only at Raipur and not at other towns or that the Raipur town has not been notified for application of Clause (f) of Section 58 of the Act. Deposit of title deed for creating mortgage under Clause (f) of Section 58 of the Act in only specific towns is sine qua non for creating charge by mortgage deed. In absence of such pleading of the parties and in absence of such document it is difficult to hold that Appellant No. 1 has created charge over the property by depositing title deed to the Respondent and town notified by the State Government. For deciding the case and dispensing the justice necessary pleading and opportunity of adducing evidence would be essential. In absence of such evidence any final decision would not cause substantial justice between the parties.

22. For the foregoing reasons, the judgment and decree are not sustainable and deserve to be set aside. Accordingly, the appeal is allowed and the judgment and decree impugned are hereby set aside. The case is remitted back to the trial Court for limited purpose of affording opportunity of making necessary pleading, adducing evidence relating to applicability of the provisions of Section 58(f) of the Act and deciding the case afresh.

23. Parties shall bear their costs.

24. Advocate fees as per schedule.

25. Decree be drawn up accordingly.

