

(1967) 07 DEL CK 0006

In the Delhi High Court

Case No : Regular First Appeal No. 128-D of 1960

Kakoo Shah Uttam Chand and Others

APPELLANT

Vs

Kamla Wati and Others

RESPONDENT

Date of Decision : 19-07-1967

Acts Referred:

Citation : AIR 1969 Delhi 120

Hon'ble Judges : I.D. Dua, C.J;Om Prakash, J

Bench : Division Bench

Advocate : S.N. Chopra and H.K. Sabharwal, for the Appellant; Iqbal Krishnan, for the Respondent

Judgement

Dua, C.J.—This is a plaintiffs' appeal directed against the judgment and decree of a Subordinate Judge 1st Class, Delhi, dismissing the plaintiffs' suit for the recovery of Rs. 15,900/- comprising of principal and interest claimed on the basis of an equitable mortgage of a house situated in Kucha Chelan, Delhi, effected by Deep Chand deceased, father of defendants Nos. 2 and 3, and husband of defendant No. 1 and by Inder Dev Upadhyaya, defendant No. 4. The suit was dismissed on the finding that the mortgages by deposit of title-deeds have not been proved, the documents Exhibits P. Y. and P. 13 being inadmissible in evidence for want of registration.

2. The only question canvassed before us on appeal in the circumstances lies within a very narrow compass and is confined to the question whether the mortgages in question were effected by means of documents requiring registration.

3. According to the allegations in the plaint, on 6-8-1952, Shri I. D. Upadhyaya and Shri Deep Chand, father of Vishal Chand Jain and Ramesh Chander (defendants Nos. 2 and 3) and husband of Smt. Kamla Wati (defendant No. 1) borrowed Rs. 10,000/- from M/s Kakoo Shah Uttam Chand, plaintiff No. 1, and executed a demand promissory note for that amount agreeing to pay back the

loan with interest at the rate of 12 per cent per annum till the date of payment. As security for the loan due under the promissory note, Shri Deep Chand deposited with the plaintiff-firm by way of equitable mortgage the title-deeds of house No. 2727 in Kucha Chelan, Delhi. On 22-4-1953, Shri Deep Chand and Shri I. D. Upadhyaya took a further loan of Rs. 1,000/- on executing a promissory note promising to pay the amount with interest at 12 per cent per annum. As security for this loan also, a further charge by way of equitable mortgage was created by Shri Deep Chand on the property, the title-deeds of which had already been deposited with the plaintiff-firm for the loan of Rs. 10,000/-.

The suit was instituted on 5-8-1958 and the interest was claimed in the plaint only at the rate of Rs. 7/8/- per cent per annum on the plea that higher rate of interest could not be claimed under the law. As Shri Deep Chand had died in the meantime, his legal representatives were impleaded as defendants.

4. Defendants Nos. 1 to 3 in their Joint written statement admitted that Shri Deep Chand had died on 15-9-1953 and that the answering defendants were his legal representatives. They denied the factum of the two loans and also of the creation of equitable mortgage. In further pleas, the only relevant plea to be noticed is the denial by the defendants that the letter dated 6-8-1952 purporting to be signed by Shri Deep Chand Jain created any charge on the property in suit or that the same was admissible for the said purpose. The property was alleged to be joint Hindu family property of the defendants, the mortgage of which was neither for consideration, nor for legal necessity, nor for the benefit of the family, with the result that it was in nowise binding on the defendants. It appears that Shri I. D. Upadhyaya did not appear in spite of service and ex parte proceedings were ordered against him on 5-2-1959.

5. On the pleadings of the parties, several issues were framed, but it is unnecessary to refer to any other issue except issue No. 3 which reads as follows:

"3. Whether Deep Chand deceased created a mortgage by deposit of title-deeds (a) for Rs. 10,000/- on 6th August, 1952?

(b) for Rs. 1,000/- on 22nd April, 1953 on the suit property?"

6. Shri Mangal Sain P. W. 5 is a property dealer residing in Karol Bagh, New Delhi. He claims to have known Shri Deep Chand and Shri I. D. Upadhyaya, defendant No. 4. Both of them had approached the witness for arranging some loan for them to the extent of Rs. 25,000/- or Rs. 30,000/- because they wanted to import rock salt from Italy. Mangal Sain thereupon contacted the plaintiffs in this connection and the plaintiffs agreed to advance the loan against mortgage by deposit of title-deeds. The two prospective debtors agreed to this proposal. Initially a sum of Rs. 10,000/- was advanced to Deep Chand and defendant No. 4, both of whom signed Exhibit P. 8, the promissory note dated 6-8-1952 in the presence of the witness after admitting the contents to be correct. A sum of Rs. 10,000/- was actually paid partly in cash and partly by means of a cheque. The

amount given in cash was to be paid to the previous mortgagee of the house who had a claim to the extent of about Rs. 3,040/-. Deep Chand and I. D. Upadhyaya also signed the receipt Exhibit P. 9 dated 6-8-1952 after admitting its contents to be correct.

According to Exhibit P. 9, it may be pointed out, a sum of Rs. 6,000/- was paid by means of a cheque and a sum of Rs. 3,090/- was to be paid by M/s Kaku Shah Uttam Chand plaintiffs themselves to Pandit Inchha Ram with whom the property in question was stated to be already mortgaged. The balance of Rupees 910/- was also stated to have been paid in cash. The amount due to the previous mortgagee was actually paid by Deep Chand who was accompanied by Roshan Lal at the house of the said mortgagee in the presence of this witness. This payment is evidenced by the receipt Exhibit P. 7, which was attested by the witness Mangal Sain. The executants of the promissory note had agreed to pay interest at the rate of one per cent and at the time of advancing the loan, it was expressly agreed that the title-deeds of the property in question would be obtained by the plaintiffs from the previous mortgagee and the transaction would partake of the nature of a mortgage by deposit of title-deeds.

After payment to the previous mortgagee, the title-deeds were delivered by him to Roshan Lal in the presence of Deep Chand who had also accompanied the witness and Roshan when they went to the previous mortgagee. The amount reserved for payment to the previous mortgagee being Rs. 3,090/- and the amount actually to be paid to the previous mortgagee being Rs. 3,045/-, the balance of Rs. 45/- was paid by the plaintiffs to Deep Chand and defendant No. 4 and in lieu of this payment. Deep Chand and I. D. Upadhyaya executed Exhibit P. 10 dated 7-8-1952. The promissory note Exhibit P. 8, which is payable on demand, it may be pointed out, mentions the rate of interest to be 12 per cent per annum and it also contains a term waiving protest and presentment, About seven or eight months after this transaction. Deep Chand and I. D. Upadhyaya again approached Mangal Sain P. W. 5 with the object of getting a further loan of Rs. 1,000/- arranged. The witness took them to the plaintiffs and the required amount was lent by them to the two debtors, the amount of loan having been paid by means of a cheque. Exhibit P. 11 is the pronote dated 22-4-1953 payable on demand executed by the two debtors in which just like Exhibit P. 8, interest was provided at the rate of 12 per cent per annum and protest and presentment was waived.

Exhibit P. 12 dated 22-4-1953 is the receipt for this amount and in the letter addressed to the plaintiffs Exhibit P. 13, which was dated 22-4-1953. Deep Chand Jain expressly recited that he had already deposited with the plaintiffs the title-deeds of his property house No. 2727 in Kucha Chelan for creating an equitable mortgage in respect of the loan of Rs. 10,000/- taken on the basis of a pro-note dated 6-8-1952 executed by him and Shri I. D. Upadhyaya. It was further confirmed in this letter that regarding the additional loan on the basis of the pronote dated 22-4-1953 also, the title- deeds relating to house No. 2727 in

Kucha Chelan were to remain in deposit by way of equitable mortgage. Exhibit P. 14 is another letter sent by both the debtors and addressed to the plaintiffs in which the existence of the earlier loan on the basis of a pronote dated 6-8-1952 payable with Interest was confirmed and it was added that the amount borrowed on 22-4-1953 was to be an addition to the pre-existing loan of Rs. 10,000/- borrowed on 6-8-1952.

All these documents have been stated by P. W. 5 Mangal Sain to have been signed by the parties concerned in his presence. In his cross-examination, nothing has been elicited which can be considered even remotely to cast any doubt on his testimony or on the genuineness of the documents mentioned above. Indeed before us. In his arguments, the learned counsel for the respondents has made no attempt to criticise the testimony of the plaintiffs' witnesses on the transaction in question. It may, however, be pointed out that Mangal Sain has in his cross-examination deposed that without the deposit of title-deeds, the plaintiffs were not prepared to advance the loan. Inchha Bam P. W. 3 is the previous mortgagee with whom Deep Chand had mortgaged this very property. He has proved Exhibits P. 6 and P. 7 and has deposed about the payment to him of the amount by Roshan Lal, son of Uttam Chand on 7-8-1952 and of the return of the mortgage-deed to the person making the payment. In his cross-examination, he has stated that the sale-deed relating to the mortgaged property had been handed over by him to Roshan Lal.

Lal Chand, plaintiff No. 2, a partner of plaintiff No. 1, has appeared as P. W. 7. According to him, the sale-deed relating to the property in question and the previous mortgage-deed had been brought to him on 6-8-1952 and they were again brought to him on 7-8-1952 by Roshan Lal. In his cross-examination, it has been elicited by the defendants that on 6-8-1952, when the pronote was executed. Deep Chand had brought the mortgage-deed and the sale-deed of the property with him. After the execution of the pronote, they were taken back by him. After payment of the amount to the previous mortgagee, Roshan Lal brought documents to P. W. 1. Exhibits P. X. and P. Y. were put to witness in cross-examination and it was admitted by him that Exhibit P. X. had been signed by him whereas Exhibit P. Y. had been signed by Deep Chand. Both these documents were admitted to have been executed at the same time and on the same day as Exhibits P. 8 and P. 9 were executed, but Exhibit P. X. was not handed over to defendant No. 4 on that date.

The witness has denied that the plaintiffs ever desired to do the business of selling rock salt along with defendant No. 4, though he has admitted that the defendants had taken Rs. 10,000/- for doing the business of rock salt Roshan Lal has appeared as P. W. 8 and has deposed about Deep Chand having shown to the plaintiffs certified copies of the sale-deed of the property to be mortgaged by him, and also about the witness having paid the amount due to Inchha Ram and thereafter to have secured the mortgage-deed with the endorsement thereon of the receipt of the amount The original sale-deed was also secured by him at that

time. In support of the defendants' denial of the plaintiffs' claim, Wishan Chand. D. W. 1 has denied the signatures of his father Deep Chand on Exhibits P. 8 to P. 14, but his cross-examination shows that his denial is practically valueless.

7. The trial Court came to the conclusion that the title-deeds of the property in question were handed over by Inchha Ram to Roshan Lal on 7-8-1952 when he was paid the amount of the mortgage and not on 6-8-1952. On the basis of this conclusion, the Court did not uphold the plaintiffs' averment in the plaint that equitable mortgage by deposit of title-deeds had been created on 6-8-1952. In view of this averment, the plaintiffs were also held disentitled to prove that the equitable mortgage had been effected on 7-8-1952. The Court added that the incurring of debt and the creation of mortgage were intended to be contemporaneous events because, as deposed by Mangal Sain P. W. 5, the plaintiffs were not willing to advance loans except on the basis of an equitable mortgage. Exhibit P. Y. not being registered and no oral evidence of the mortgage intended to be created by this document being admissible, in the opinion of the Court below, the plaintiffs' claim on the basis of mortgage must fail for want of admissible evidence. In regard to the further loan of Rs. 1,000/-the Court took the view that the mortgage in regard to this loan was created by Exhibit P. 13 and not by deposit of title-deeds which were already with the creditors. Exhibit P. 13 being also unregistered, the plea of additional mortgage was also repelled. On this reasoning, the plaintiffs' suit failed in the Court below.

8. On appeal in this Court, the short question, as already observed, centres round the validity of the two equitable mortgages. The learned counsel for the respondents has in his reply to the appellants' arguments conceded at the outset that the documents should be considered to have been delivered by Deep Chand to the plaintiffs on 6-8-1952, as recited in Exhibit P. Y. In other words, he has not attempted to support the conclusion of the trial Court that the documents should, on the facts and circumstances of this case, be deemed to have been delivered on 7-8-1952 after their return by the previous mortgagee Shri Inchha Ram P. W. 3. This concession renders it unnecessary for us to consider at length the arguments urged on behalf of the appellants that the title-deeds on the facts and circumstances of this case should be deemed to have been deposited on 6-8-1952 and the alternative submission that in any event, even though the actual delivery of the original sale-deed and the prior mortgage-deed was finally made on 7-8-1952 by Inchha Ram, the said delivery did not affect the validity of the mortgage by deposit of title-deeds in respect of the loan of Rs. 10000/- actually advanced on 6-8-1952.

It may, however, be observed in passing that the testimony of Roshan Lal P. W. 8 read with the testimony of Lal Chand P. W. 7 and of Mangal Sain P. W. 5, in the light of the contents of Exhibit P. Y., clearly tends to show that on 6-8-1952, the documents of title were shown to the plaintiffs for their satisfaction and after payment of the prior mortgage debt by the plaintiffs to the prior mortgagee, the original title-deeds were actually taken over by the plaintiffs from the prior

creditor and the whole transaction being one continuous whole, any legal objection to the validity of the mortgage on the score of the actual final delivery of title-deeds a day later than the advancement of loan seems to us to be misconceived and untenable. Inchha Ram's statement as P. W. 3 does not in any way go against this view. It may be recalled that a part of the amount intended to be advanced as loan to Deep Chand was retained by the plaintiffs themselves to be paid to the prior mortgagee on behalf of the debtors. A sum of Rs. 3,045/- was paid to Inchha Ram out of Rs. 3,090/- retained by the plaintiffs and a sum of Rs. 45/-, the balance of the amount, retained for payment to Inchha Ram was paid to I. D. Upadhyaya, a co-debtor on 7-8-1952. This quite clearly shows that the loan was advanced both on the 6th and 7th of August, 1952. But this apart, it may also be appropriately assumed in the present case that Deep Chand must have authorised the plaintiffs to take delivery of the title-deeds from the prior mortgagee on payment of the debt due to him, and if that be so, then quite clearly no serious legal infirmity can attach to the validity of his mortgage by deposit of title-deeds merely on the ground that a part of the bulk of the loan was initially advanced on 6-8-1952 and the actual delivery of title-deeds was made to the creditor on 7-8-1952 when also a part of the loan was paid both to the debtor and to his nominee, who was the prior creditor. If a mortgagor by deposit of title-deeds instructs his mortgagee to take delivery of the title-deeds from a prior mortgagee on payment to him of the amount due by the mortgagor, and if after making such payment, the documents of title are taken delivery of by the subsequent mortgagee, then, in our opinion, the legal requirements of a mortgage by deposit of title-deeds must be considered to be fully complied with,

Support for this view seems to us to be forthcoming from the decision of the Master of Rolls (Sir John Romilly) in *Daw v. Terrell* (1863) 55 E. R. 351. In so far as the additional loan of Rs. 1,000/- is concerned, the view of the Court below that this loan could not be considered to have been secured by a mortgage by deposit of title-deeds because the title-deeds were already with the plaintiffs, is wholly unsustainable. Deposit or delivery of title-deeds can be both actual and constructive and in this case, it must be held to be a case of constructive deposit of title-deeds with the plaintiffs for the purpose of covering the second loan. As observed by Subba Rao J. (as he then was) in *K.J. Nathan Vs. S.V. Maruty Reddy and Others*, , "physical delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be a constructive deposit. A Court will have to ascertain in each case whether in substance there is a delivery of title-deeds by the debtor to the creditor. If the creditor was already in possession of the title-deeds, it would be hyper-technical to insist upon the formality of the creditor delivering the title-deeds to the debtor and the debtor re-delivering them to the creditor. What would be necessary in those circumstances is whether the parties agreed to treat the documents in the possession of the creditor or his agent as delivery to him for the purpose of the transaction." In this connection, it must not be forgotten that a mortgage by deposit of title-deeds rests on the principle of part performance and is founded on the rule that equity treats that as done

which ought to be done. Being a rule of equity, in our opinion, it has to be construed keeping in view equitable considerations.

9. Coming now to the principal argument addressed on behalf of the respondents, we have to see if Exhibit P. Y. dated 6-8-1952 and Exhibit P. 13 dated 22-4-1953 require registration and being unregistered, the mortgages by deposit of title-deeds must be considered to be invalid or unprovable. This takes up to the relevant statutory provisions. Section 58(f) of the Transfer of Property Act provides that where a person, has the areas to which that section is applicable, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds. According to section 59 of the T. P. Act, where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by registered instrument signed by the mortgagor and attested by at least two witnesses.

Adverting to the Indian Registration Act, the relevant clause for our purpose is section 17(1)(b) which provides for compulsory registration for non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in Immovable property. The question, Therefore, arises whether Exhibit P. Y. and Exhibit P. 13 fall within the terms of this clause. Exhibit P. Y. dated 6-8-1952 reads as under:

"Dear Sir,

Regarding the sum of Rs. 10,000/-received from you by pronote dated today executed by Shri I. D. Upadhaya and myself I hereby send to you the title-deed of my property in Kucha Chelan House No. 2727, to remain in deposit with you by way of equitable mortgage."

Exhibit P. 13 dated 22-4-1953 may now be read:

"Dear Sir,

I had already deposited the title-deeds of my property in Kucha Chelan H. No. 2727 to remain in deposit with you by way of Equitable Mortgage in respect of sum of Rs. 10,000/- received from you by pronote dated the 6th August, 1952 executed on that day in your favor by Shri I. D. Upadhaya and myself.

I confirm that regarding the sum of Rs. 1,000/- received from you by pro-note dated today by Shri I. D. Upadhaya and myself, the said title-deeds of property in Kucha Chelan, H. No. 2727 shall remain in deposit with you by way of Equitable Mortgage for the amount due under this pronote dated today also."

As the plain reading of Exhibit P. Y. shows, it merely purports to be a covering letter whereby Deep Chand alone has forwarded the title-deeds of his property to

remain in deposit with the plaintiffs by way of equitable mortgage. It does not seem to us to embody all the terms of the mortgage. It is significant that this document neither mentions the rate of interest to be paid by the debtor on the loan nor does it contain the term whereby protest and presentment was waived. It is, Therefore, not easy to sustain the contention that this document purports to be the sole repository of all the terms of the mortgage by deposit of title-deeds which is capable of being effected orally. Merely because a document happens to contain a recital about a mortgage by deposit of title-deeds, does not necessarily render it subject to compulsory registration.

As at present advised, we can conceive of at least four following possibilities of a document connected with a mortgage by deposit of title-deeds:

1. The document may record a past transaction of a mortgage by deposit of title-deeds and may be executed with that intention;
2. The title-deeds may be passed without more or without anything said except that they were to be security;
3. The delivery may be accompanied by a bargain which either is not written, or if written, does not constitute the contract of mortgage; and
4. There may be a written bargain in the form of a memorandum which is tacitly considered by the parties themselves as the only repository and appropriate evidence of the agreement.

It is, in our view, only the last category of documents which may require compulsory registration. In the present case, it is merely a covering letter emanating only from Deep Chand, one of the co-debtors, forwarding the title-deed with the expressed intention that they were to remain in deposit by way of equitable mortgage in respect of the loan of Rs. 10,000/- taken by the writer and Shri Upadhyaya on a pronote that very day. Such a document quite clearly does not require registration. A mortgage by deposit of title-deeds, it may be remembered, requires three ingredients; the existence of a debt, in present or in future; the deposit of title-deeds; and an intention that the title-deeds shall be security for the debt. The intention is indeed the essence of the transaction. Exhibit P. Y., in our view, is intended to emphasise such intention, the previous existence of which is amply proved on the record, and this letter merely forwards the title-deeds. It is not the sole repository of all the terms of the mortgage, and indeed was not intended by the parties to be an integral part of the transaction between them. It is not even signed by both the co-debtors.

We may here appropriately quote from a judgment of the Supreme Court in *United Bank of India Ltd. Vs. Lekharam Sonaram and Co. and Others*, .

"It is essential to bear in mind that the 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, 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 under S. 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in Immovable property where the value of such property is 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."

After quoting from a decision on the original side of the Calcutta High Court and from L. R. 43 IA 122 = AIR 1916 Pc 115 AIR 1931 36 (Privy Council) Sundarachariar v. Narayana Ayyar and Rachpal Mahraj Vs. Bhagwandas Daruka and Others, , the Court added:

"Applying the principle to the present case, we consider that the letter at Ex. 7 (a) was not meant to be an integral part of the transaction between the parties. The letter does not mention what was the principal amount borrowed or to be borrowed. Neither does it refer to rate of interest for the loan. It is important to notice that the letter does not mention details of title-deeds which are to be deposited with the plaintiff-bank. We are, Therefore, of the opinion that the view of the High Court with regard to the construction of Ex. 7 (a) is erroneous and the document was not intended to be an integral part of the transaction and did not, by itself, operate to create an interest in the immovable property." In view of what has been said above, we do not consider it necessary to deal in detail with the other decisions cited at the bar. What has been said in regard to Exhibit P. Y, goes completely for Exhibit P. 12 as well as a matter of fact, Exhibit P. 13 may also be considered to contain a recital of the past transaction of equitable mortgage in respect of Rupees 10,000/- effected on 6-8-1952 and may be held to be admissible in evidence for that purpose, but on the view that we have taken in regard to Exhibit P. Y., it is unnecessary to say anything more about Exhibit P. 13 in this connection,

10. Before concluding, we may in passing advert to the observation of the Court below that in the plaint, 6-8-1952 having been pleaded to be the date of the equitable mortgage, it was not open to the plaintiffs to rely on the equitable mortgage having been effected on 7-8-1952. On the view that we have taken, it is not necessary to deal with this point, but we cannot help observing that the Court below has taken far too technical a view of the pleadings in this respect on the facts and circumstances of the present case. The transaction of equitable mortgage quite clearly extended to both 6th and 7th of August, 1952 and to construe the law of pleadings with the rigidity with which the Court below has done on the peculiar facts of the present case, seems to us to be inappropriate and certainly not calculated to serve the cause of justice for which the law of

procedure is largely designed. We may, however, say nothing more on this point.

11. For the foregoing reasons, we allow this appeal and setting aside the judgment and decree of the Court below pass a preliminary decree in favor of the plaintiffs for a sum of Rs. 15,900/-with interest thereon from the date of the suit up to the date of the present decree at 7 1/2 percent per annum with costs of both the trial Court and this Court. Future interest from the date of this decree till realisation should be paid at the rate of 4 per cent per annum. The amount decreed may be paid on or before 1-1-1968 and failure to do so would render the mortgaged property liable to sale as required by Order 34, Code of Civil Procedure. The appellants would be entitled to their costs, both here and in the Court below. A preliminary decree as required by Order 34, Rule 7, Code of Civil Procedure, may be framed by the office in accordance with the above decision.

Om Parkash, J.

12. I agree.

TVN/D.V.C.

13. Appeal allowed.