

(1972) 08 MAD CK 0002
In the Madras High Court

L.A.N.N. Alagappan

APPELLANT

Vs

P.S. Kalyanasundaram Iyer (Died) and Others

RESPONDENT

Date of Decision : 05-08-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 11

Citation : (1977) 2 MLJ 291

Hon'ble Judges : T. Ramaprasada Rao, J

Bench : Division Bench

Judgement

T. Ramaprasada Rao, J.—The defendant who lost in O.S. No. 3720 of 1970 on the file of the City Civil Court, Madras, is the appellant.

The plaintiffs sued on a promissory note, but on the foot of an equitable mortgage over the property of the defendant judgment debtor, which,

according to the plaintiffs, was created by a voluntary act on the part of the defendant by depositing title deeds in respect of the property and

confirming such deposit under a letter which the defendant executed after such deposit of title deeds. The case of the plaintiffs is that under Exhibit

A-2 dated 27th November, 1967, the defendant borrowed a sum of Rs. 40,000 promising to repay the same with interest at 12 per cent per

annum. In fact, before the money was advanced, the defendant in Exhibit A-1 dated 22nd November, 1967, sought for the loan and expressed his

willingness to deposit with the plaintiffs the title deeds of his property as collateral security for the due repayment of the amount. On such offer

being made, the plaintiffs are said to have advanced the sum of Rs. 40,000 under Exhibit A-2 dated 27th November, 1967. This is followed up by

a memorandum Exhibit A-9, dated 29th November, 1967. On the strength of the aforesaid documents, the plaintiffs came to Court, seeking for a

mortgage decree, alleging that there was an equitable mortgage created over the suit property in the circumstances above stated. After giving credit

to certain amounts paid by the defendant, the plaintiffs came to Court for recovery of the principal and the balance of interest.

2. The defendant's case was that he deposited the title deeds in respect of the property on 29th November, 1967 and Exhibit A-9, equivalent to

Exhibit B-1 is the sole bargain between the parties. According to the defendant the deposit and the memorandum evidencing such deposit were

contemporaneous transactions and as by such contemporaneity the mortgage is said to have been created over immovable property, such a

document as Exhibit A-9 is not admissible in evidence without the same being registered under the Registration Act as it is one of those documents

which are compulsorily registrable having regard to the provisions of the Transfer of Property Act. The defendant, therefore, resisted the suit to

enforce a mortgage. He also pleaded that the interest was usurious and that the plaintiffs were not therefore entitled to any relief.

3. On the above pleadings, the following issues were framed:

1. What is the rate of interest payable by the defendant?

2. Whether the suit is invalid for the reasons set out in paras. 4 and 6 and 5 of the written statement?

3. What is the amount due to the plain-tiff ?

4. To what relief?

4. The learned Judge accepted the case of the plaintiffs and decreed the suit. Against this, the present appeal has been filed.

5. Mr. G. N. Chary, learned Counsel for the appellant, took us through the oral and documentary evidence and contended that Exhibit A-9 should

in the circumstances of this case be understood to be the real bargain between the parties and that though the recital in Exhibit A-9 speaks of an

anterior incident such as a deposit of title deeds, yet, having regard to the evidence of P.W. 1 the document should be interpreted as meaning that

the deposit of title deeds was made along with the execution of the said letter and that therefore the bargain being one and indivisible in this case,

the memorandum under Exhibit A-9 is not admissible in evidence as it is not registered. Strong reliance is placed upon a decision of a Bench of this

Court in *Modern Housing Construction and Properties Ltd. v. Alagappa Textiles*

(1972) 85 L.W. 251. The general observations made by the learned author Mulla in his book on the Transfer of Property Act were also pressed into service. Another contention of the learned Counsel is that the lower Court went wrong in awarding interest on the costs of the suit as such a grant is prohibited under Order 34, Rule 11, Civil Procedure Code, after the same has been amended in 1956. Contending to the contrary, Mr. N.S. Varadachari, learned Counsel for the plaintiffs, would say that on a totality of understanding of the facts and the events that led to the equitable mortgage, it cannot be said that Exhibit A-9 was the only under, standing between the parties. He would urge that Exhibit A-9 has to be literally understood and implemented. A fair reading of Exhibit A-9, according to him, would show that the title deeds have already been deposited and that the memorandum was only a confirmation of such earlier deposit. He invited our attention to two decisions of the Supreme Court rendered in United Bank of India Ltd. Vs. Lekharam Sonaram and Co. and Others, , and Deb Dutta Seal Vs. Ramanlal Phumra and Others, , and would urge that the lower Court was right in granting a mortgage decree. He had, however, to confess that the lower Court erred in granting interest over costs.

6. P.W. 1 who was examined on the side of the plaintiffs and who brought about the transaction, speaks of the execution of the promissory note Exhibit A 2 and the memorandum Exhibit A-9 and also the receipt of Exhibits A-3 to A-8 which are some of the title deeds relating to the suit property. When he was in the witness box, no suggestion was put to him by the defendant that the title deeds were deposited at or about the time when the memorandum Exhibit A-9 was drawn. In fact, there was not even a suggestion put to this witness to the effect that there has never been an earlier deposit of title deeds. Apparently, this witness in re-examination was allowed to make the position clear when he said that the documents of title were handed over even on the date when the promissory note was written up. The only evidence which is contrary to this is the self-serving evidence of the defendant. We are inclined, to believe P.W. 1 for the reason that even prior to the execution of the promissory note, the defendant made it clear under Exhibit A-1 that he was prepared to take a loan by depositing his title deeds and thus creating an equitable mortgage thereof. It

is natural to expect in such surrounding circumstances as in this case, that the plaintiffs as the lender should have had access to those title deeds

before they lent the money under the promissory note Exhibit A-2.

7. Even otherwise, the recitals in Exhibit A-9 are unambiguous and are incapable of two different interpretations. Exhibit A-9 runs as follows:

I have borrowed from you the sum of Rs. 40,000 (Rupees Forty Thousand only) for business purposes and I confirm having already deposited

with, you the available title deeds as collateral security for the due repayment of the amount due to you with interest.

8. It is the express recitals in Exhibit A-9 that come up for interpretation and a consequential adjudication by us.

9. The law on equitable mortgages has developed mostly from the facts and circumstances of each case. No particular yard-stick can ever be laid

down with rigidity so as to bind cases under the subject uniformly, as each case has to be dealt with on its own merits and indeed has to be

adjudged with reference to the surrounding circumstances as well. The law, which has so far developed and is likely to develop hereafter should

be confined to the particular facts of those cases. One telling principle which has emerged from the ratio of the decisions, however, is that if there is

evidence, either extrovert or introvert which would compel a Court to hold that under a single bargain the borrowing and the deposit of title deeds

were effected and that the intention is made clearer and public only in such a contemporaneous transaction, then a memorandum evidencing such a

bargain needs registration. It may be that the memorandum contains a recital as to the quantum of the amount borrowed. That would not make the

memorandum any the less a non-registrable one, provided it is an independent transaction and not the sole bargain to evidence the deposit of title

deeds. The only important feature on which the Court should pay its concentrated attention is that the deposit of title deeds should have taken

place earlier than the time of the writing of the memorandum. If such a dissociation in point of time is apparent from the memorandum itself, or if it

could be discovered from the totality or the facts and appreciation of the surrounding circumstances, then the plaintiff can successfully pilot his

case on the foot of an equitable mortgage and obtain a mortgage decree. If, however, the Court is not satisfied about the earlier deposit of title

deeds, but if the memorandum projected is the only piece of evidence whereby the equitable mortgage is created, then notwithstanding the nicety

of expressions used therein, the Court has to hold that such a memorandum is not admissible in evidence for want of registration.

10. We shall now refer to the decided cases cited at the Bar. Mr. G.N. Chary referred to us the decision in *Modern Housing Construction and*

Properties Ltd. v. Alagappa Textiles (1972) 85 L.W. 251. There, the relevant memorandum is quoted at page 253 and it runs as follows:

I hereby agree that the title deed of the guest house property already deposited with the company will remain with them as collateral security for

the above promissory note until it is fully discharged.

11. The facts of this case disclose that there was an earlier deposit of title deeds in connection with an earlier borrowing. Later on, when accounts

were settled, there was a fresh promissory note and a fresh memorandum. It was this memorandum which was couched in the above words. It is

plain from the memorandum as above that the deposit, even if it could be understood as a deposit at all, can be deemed to have been made only

on the date and at the time when the memorandum was drawn up. It is this which the learned Judges pointed out and expressed that it was a

memorandum which represented the bargain between the parties and therefore it required registration.

12. In *United Bank of India Ltd. Vs. Lekharam Sonaram and Co. and Others*, , the memorandum was in the following terms:

This is to place on record that I have this day deposited with you at your Head Office at Clive Street, Calcutta, the under noted documents of title

relating to my properties, viz., Siridith Malho properties as described in the title deeds with intent to create an equitable mortgage upon all my

rights, title and interest in the said properties to secure due repayment on demand of all moneys now owing or which shall at any time hereafter be

owing from me or from M/s. Lakharam Sonaram and Company, either singly or jointly or otherwise to Bengal Central Bank Limited, whether on

balance of account or by discount or otherwise in any manner whatsoever and including interest with monthly rests, commissions and other banking

charges and any law costs Incurred in connection with the account. I do hereby put on record that the properties mentioned below are free from all

encumbrances.

Interpreting this, the Supreme Court said:

Where the letter in question did not mention details of title deeds, which were to be deposited with the Bank and neither mentioned what was the principal amount borrowed or to be borrowed nor it referred to rate of interest for the loan, the letter was not intended to be an integral part of the transaction between the parties and did not by itself operate to create an interest in the immovable property and, therefore, it did not require registration.

13. In *Deb Dutta Seal Vs. Ramanlal Phumra and Others*, , the memorandum was in the following terms:

I write to record that I delivered to and deposited with you this day at No. 56, Burtolla Street, Calcutta, my title deeds relating to the premises No.

35, Puddo Pukar Road, Calcutta solely belonging to me with intent to create Security for my liability for the moneys payable under the three

hundies dated this day for the sum of Rs. 80,000 (Rupees Eighty thousand only) drawn by me in your favour and I have undertaken to execute a

legal mortgage at my cost whenever called upon by you to do so. I further assure you that the said premises No. 35, Puddo Pukar Road, is free

from all encumbrances and the same absolutely belongs to me.

Interpreting this, the majority of the learned Judges constituting the Bench of the Supreme Court said that the letter, on its true interpretation and in

the surrounding circumstances, merely recorded a past transaction and did not intend to create any mortgage, and that the undertaking to execute a

legal mortgage and the assurance that the premises were free from all encumbrances did not create or declare any interest in the premises. They

made the position absolutely clear by stating that it is not correct to say that even if a document on the face of it and properly interpreted in the light

of the circumstances does not disclose the creation of a mortgage, or even if the document itself is not an operative instrument and is merely

evidential, it requires registration. In order to require registration the document must contain all the essentials of the transaction and one essential is

that the title deeds must be deposited by virtue of the instrument or acknowledge an earlier deposit of title deeds and say further that the title deeds

shall be held as security on the said mortgage.

14. In Exhibit A-9, merely because the amount is mentioned, it does not make any difference, for the amount has been so mentioned in Deb Dutta

Seal Vs. Ramanlal Phumra and Others, . The mere fact that Exhibit A-9 contains reference to some of the documents of title in relation to the

property, does not take the memorandum away from being an admissible document. Certainly, by reason of the incorporation of a list of title deeds

in the same letter, it cannot be said that the document, which does not require registration, has to be compulsorily registered, if it is to be admitted

as evidence.

15. Again, the memorandum in question cannot be said to be intended to be the sole part of the transaction between the parties, nor was it the sole

evidence of creation of a mortgage over the suit property In our opinion, it is only an evidence of a past transaction and not a disclosure of 3 sole

bargain in praesenti. We are unable to agree with Mr. G N. Chary, that Exhibit A-9 is a compulsorily registrable document and that the plaintiff is

not entitled to a mortgage decree.

16. The contention of the learned Counsel for the appellant as regards the grant of interest over the costs of the action, as seen from the drafted

decree of the Court below, is well-founded. Though such a relief was available before the passing of the Central Act No. LXVI of 1956, yet, after

the date of the said enactment, a mortgagee is not entitled to interest on the costs of the suit. But, the learned Judge gave such a decree. Therefore,

Sub-clause (i) of Clause 2 of the decree shall be amended so as to read as follows:

That the Defendants do pay into Court on or before the 31st day of December, 1976 the said sum of Rs. 38,597.94 and the costs of the suit and

that the said sum of Rs. 38,597.94 shall carry interest at 12 per cent. per annum from the date of plaint viz., 28th April, 1970 till 21st June, 1972

and thereafter at six per cent. per annum and that the sum of Rs. 4,575.78 shall carry no interest.

17. The appeal is partly allowed with proportionate costs.