(2000) 12 MAD CK 0003

In the Madras High Court

Mrs. K. Shanthasundari APPELLANT

Vs

S.S. Mani and Others RESPONDENT

Date of Decision : 22-12-2000

Acts Referred:
Transfer of Property Act, 1882 — Section 58(f)

Citation : (2001) 1 MLJ 690

Hon'ble Judges : Prabha Sridevan, J

Bench : Division Bench

Judgement

Prabha Sridevan, J.—The suit is for recovery of money due on a mortgage.

The plaint averments are as follows:

The defendant borrowed various sums of money from the plaintiff on different dates, namely on 1.11.1979, 2.3.1981, 19.4.1981, 22.7.1981,

30.9.1981, 18.1.1982, 10.3.1982, 11.11.1982, 1.8. 1985 and 20.1.1986. The loans were for different sums and except for the last two loans the

other eight loans were to bear an interest of 24% per annum. The loans on the last two dates were to bear an interest of 30% per annum and 36%

per annum respectively. The money was borrowed for business purposes. The first defendant had paid the interest upto date on all the loans till

3.12.1985, except for the last loan which was availed of on 20.1.1986. Since the total amount borrowed was quite huge, the plaintiff asked the

first defendant to furnish security. Therefore, on 12.9.1985, he executed a mortgage deed by depositing the title deeds of the suit property. Though

there are two door numbers, since the property mortgaged is under one single document, the entire transaction is a single one. The first defendant

had acknowledged all the borrowings made by him prior to the date of mortgage.

The total amount borrowed is Rs. 2,05,000. On 20.1.1986, the

plaintiff wrote a letter agreeing to pay interest at 36% per annum uniformly on all the loans from January, 1986. Pursuant to the execution of the

mortgage deed on 12.9.1985, the first defendant had deposited the title deeds of the suit properties. Since the first defendant did not pay any

amount after January, 1986, plaintiff caused a lawyer''s notice to be issued on 28.9.1997, 19.10.1997 and 3.10.1998. After the mortgage in

favour of the plaintiff, the suit properties have been mortgaged to defendants 2 and 3 and they are impleaded as subsequent mortgagees.

Therefore, the plaintiff prays for recovery of a sum of Rs. 10,59,235 with interest at 36% per annum on principal amount of Rs. 2,05,000.

2. The first defendant alone filed a written statement. The other two defendants were set ex parte. The averments of the written statement are as

follows:

The suit is time-barred. Two independent transactions have been clubbed together. Therefore, suit is not maintainable. The defendant has paid

whatever amount was borrowed and no amount is due. The creation of equitable mortgage was denied. There was no acknowledgment of the

borrowings made by the first defendant. The letter dated 20.1.1986 was also denied as also the agreement to pay interest. The plaintiff had

obtained signatures in blank papers, blank promissory notes and blank stamp papers and after receiving the entire amounts had misused those

papers to extract money from the first defendant. The suit should be dismissed.

3. The following issues were framed for trial:

(1) Whether the first defendant executed a mortgage by deposit of title deeds in respect of the plaint schedule properties in favour of the plaintiff on

12.9.1985 in respect of 11 borrowings made from 1.11.1979 to 20.1.1986?

(2) Whether the discharge pleaded by the first defendant is true?

(3) Whether the 1 st defendant agreed to pay increase in interest at the rate of 36% per annum by executing a letter on 29.1.1986?

(4) Whether the mortgages executed by the first defendant in favour of defendants 2 and

3 are binding on the plaintiff and whether the said mortgages are subject to the rights of the plaintiff?

(5) Whether the suit had been properly valued?

(6) To what reliefs the plaintiff is entitled? Issue No. 1:

The case of the plaintiff is that the defendant borrowed several sums under various documents. Ex.P.1 is a pronote dated 1.11.1979 for a sum of

Rs. 5,000 repayable with interest at 24% per annum. On the reverse of Ex.P.1, there are two endorsements dated 20.10.1982 and 1.10.1985, as

follows:

Ex.P.2 is a promissory note dated 2.3.1981 for a sum of Rs. 10,000 repayable with interest at 24% per annum. On the reverse of Ex.P.2, there is

an endorsement dated 27.2.1984, stating that on that day, a sum of Rs. 500 was paid and the principal is due and payable. Ex.P.3 is a promissory

note dated 19.4.1981 for a sum of Rs. 4,000 repayable with interest at 24% per annum. On the reverse of Ex.P.3, is an endorsement dated 27.

2.1982 identical to the endorsement on Ex.P.2. Ex.P.4 is a promissory note dated 22.7.1981 for a sum of Rs. 6,000 repayable with interest at

24% per annuity. On the reverse of Ex.P.4 is an endorsement dated 21.6.1984 which is identical to the endorsement on Ex.P.3 and Ex.P.2.

Ex.P.5 is a promissory note dated 30.9.1981 for a sum of Rs. 10,000 repayable with interest at 24% per annum and on the reverse of Ex.P.5 is

an endorsement identical to the above. Ex.P.6 is a promissory note dated 18.1.1982 for a sum of Rs. 10,000 repayable with interest at 24% per

annum. On the reverse of it is an endorsement dated 10.1.1985, which is identical to the endorsement in Ex.P.1. Ex.P.7 is a promissory note dated

10.3.1982 for a sum of Rs. 10,000 repayable with interest at 24% per annum. On the reverse of this, there is an endorsement dated 6.2.1985

which is identical to the endorsement on the reverse of Exs.P-1 and P-6. Ex.P.8 is a promissory note dated 11.11.1982 for a sum of Rs. 11,000

repayable with interest at 24% per annum and on the reverse of it is an endorsement dated 1.10.1985 which is identical to the above. Ex.P.9 is a

promissory note dated 1.8.1985 for a sum of Rs. 50,000 repayable with interest at 30% per annum. There was no endorsement on the reverse.

Ex.P.10 is a promissory note dated 12.1-1.1985 for a sum of Rs. 60,000 repayable with interest at 30% per annum. There are no endorsements

on the reverse of it. Ex.P.11 is a promissory note dated 20.1.1986 for a sum of Rs. 40,000 repayable with interest at 36% per annum. There are no endorsements on the reverse of it. The promissory notes therefore, fall into three groups, Group I consisting of Ex.P.1, Exs.P-6 to P-8, with the

endorsement:

and in these four documents, under those endorsements, the date is written beneath the signature. The next category Group II consists of Exs.P-3,

P-4 and P-5 with the endorsement,

Here the date is not written underneath the signature but on the left side under the word ''''Chennai"". The former two endorsements are dated

27.2.1984 and the latter two endorsements are dated 21.6.1984. The third category, Group III consists of Ex.P.9, P-10 and P-11, which have no

endorsements on the reverse. According to the plaint, these borrowings were made for business purposes and on 12,9.1985 the mortgage, deed

was executed by depositing the title deeds. Ex.P.12 is the agreement which speaks of the mortgage. As per the recitals in Ex.P.12, the defendant

had acknowledged the receipt of Rs. 1,50,000 on various dates of execution of promissory note, for which he gave the suit property as security.

The exact words are extracted hereunder:

According to the plaintiff, by this Ex.P.12, the first defendant had acknowledged all the borrowings made by him and that the subsequent loan of

Rs. 40,000 also forms part of the transaction. It is also the case of the plaintiff that pursuant to the mortgage deed dated 12.9.1985 the first

defendant deposited the title deeds. When we look at the evidence of plaintiff, P.W.1, nothing has been elicited in the chief as regards the date on

which the title deeds were deposited. In the cross examination, she has stated as follows:

I have received the title deeds of the property on 1.8.1985. But I deny that I have received the title deeds as per Ex.A12. It is not right to say that

I received the documents as per Ex.D-1 and not as per Ex.B-2. It is true to say that I have received the documents as per Ex.D-1 and that filing

the case on 1997 is barred by limitation.

In the written statement, there is a denial of all the averments in the plaint, but there is nothing to show how the title deeds of the suit property came

to the custody of the plaintiff. The constant reiteration in the written statement is that all the documents were paid and there was nothing due. It is

also the defence case that the plaintiff had made use of the blank papers, blank promissory notes and blank stamp papers in which the defendants

have signed. In evidence, D. W. 1 has started that on 1.8.1985, he received a sum of Rs. 50,000 and deposited the title deeds of his house and

Ex.D-1 dated 1.8.1985 is the letter given by the plaintiff for the said deposit. In cross examination, this is what he has stated:

It is not correct to say that for the first time, I deposited the title deeds and created equitable mortgage through Ex.P. 12. I do not remember the

date on which I created equitable mortgage for the first time by depositing the title deeds. I do not remember about the contents of Ex.D-1 and

Ex.P.9.1 do not remember the date on which I deposited the title deeds to the plaintiff.

Exs.P-30 and P-40 are the title deeds. Ex.P.20 and P-21 are the respective encumbrance certificates. Exs.P-16 to P-19 are the notices sent on

behalf of the plaintiff and Ex.P. 19 is the statement of account which was not signed. Ex.D-1 is the letter dated 1.8.1985, which as we have seen

earlier is the date on which the plaintiff had admitted that she had received the title deeds of the suit property though she subsequently denied it.

Similarly, this is the date on which the defendant had stated that he received Rs. 50,000 and deposited the title deeds of the house. Subsequently in

cross-examination, he had stated that he does not know when he deposited the title deeds. The plaintiff has admitted that she had signed Ex.D-1.

The recitals in Ex.D-1 by the plaintiff to the defendant are:

Therefore, this is an acknowledgment by the plaintiff of the handing over by the defendant of the title deeds namely Exs.B-13 and B-14 as security

for the loan borrowed from her on that date. There is another relevant document which is Ex.P. 15, a letter dated 20.1.1986 which is sub-sequent

to Ex.D-l and Ex.P.2 which is addressed by the defendant to the plaintiff agreeing to repay the amounts due on the four promissory notes and

other promissory notes mentioned thereunder with interest at the rate of 36% per annum. The four promissory notes mentioned thereunder are

Exs.P-1, P-6, P-7 and P-8. As I have already stated above, these four form one group.

The learned Counsel Mr.V.R. Gopalan appearing for the plaintiff, on the question of the equitable mortgage submitted that Ex.D-1 cannot be of

the document under which the mortgage is created. It is only an acknowledgment receipt. Unless there is an intention to create a mortgage an

equitable mortgage would not come into existence. He has also submitted that Ex.P. 12 on the other hand is a stamp paper in the name of the first

defendant where there is an express intention to create an equitable mortgage.

Mr. Samsuddin, the learned Counsel appearing for the defendant on the other hand pointed out to the discrepancies in the evidence of P.W.1

regarding the creation of equitable mortgage. In the plaint, the case of the plaintiff is that the execution of the mortgage deed is on 12.9.1985

(paragraph 8 of the plaint)

The first defendant had pursuant to the execution of the mortgage deed on 12.9.1985, deposited all the title deeds pertaining to the plaint schedule

properties with the plaintiff.

In Exs.P-16 to P-18, which are all notices issued on behalf of the plaintiff, dated 28.9.1987, 19.10.1987 and 3.10.1990 respectively, it is stated:

You have deposited the documents of title in respect of the house bearing Door Nos. 21, 22, Ibrahimji Sahib Street, Muthialpetai, George Town,

Madras 1 on 20.1.1986, with intention to create a mortgage over the same for the amounts due to my client.

In the evidence as P.W.1 in chief, she would say:

Ex.P. 12 is the equitable mortgage dated 12.9.1985

In cross, she has said:

As per Ex.D-1, I have received the title deeds of the property on 1.8.1985, but I deny that I have received the title deeds as per Ex.A-12. It is not

true to say that I received the documents as per Ex.D-1, not as per Ex.B-2. It is not true to say that I have received the document as per Ex.B-1

and that filing the case on 1.9.1997 is barred by limitation.

4. Here, the reference to the exhibits is a little confusing. Ex.D-1 is dated 1.8.1985. The reference to Ex.A-12 must be only to Ex.P. 12, which is

the document dated 12.9.1985 what is called the equitable mortgage deed. The reference to Ex.B-2 above must be taken to refer to Ex.A-12 and

the reference to Ex.B-1 must be taken to refer to Ex.D-A. From this, the learned Counsel for the defendant would argue that the plaintiff herself

has not come out with a categoric stand as to when the equitable mortgage was created by deposit of title deeds. The learned Counsel for the plaintiff referred to several decisions with regard to creation of equitable mortgage. Those decisions are: K.J. Nathan Vs. S.V. Maruty Reddy and

Others, , The Chief Controlling Revenue Authority, Madras v. Pioneer Spinners Private Ltd. AIR 1968 Mad. 223, Kakoo Shal Uttam Chand v.

Kamla Wati AIR 1969 Del. 120 and Saradindu Mukherjee Vs. Amiya Kumar Basu, . Section 58 (f) of the Transfer of Property Act defines a

mortgage by deposit of title deeds thus:

Where a person in any of the following towns namely the: towns of Calcutta, Madras and Bombay... delivers to a creditor or his agent, documents

of title to immovable property with intent to create a security there on, the transaction is called a mortgage by deposit of title deeds.

In all the decisions referred to above, the courts have expressed that: the essential requisites of a mortgage by deposit of title deeds are (1) debt,

(2) deposit of title deeds and (3) an intention that the deeds shall be security for the debt. It has also been held that physical delivery of the title to

the creditor is not the only mode of deposit, there may be constructive delivery. But what the court will have to ascertain in each case is whether

factually, there was a delivery with intention to create the mortgage. In the Madras decision referred to by the learned Counsel for the plaintiff, the

Full Bench held as follows:

A mortgage by deposit of title deeds does not require any writing in law. Besides the deeds and the deposit, what is required is an intention that the

deeds shall be security for the debt. The existence of the intention is a matter of inference from facts, The existence of the intention may be

established by written documents alone, or coupled with oral evidence or oral evidence only. In a particular case, the circumstances may warrant

the inference of a deposit for security from the very fact of deposit. The question whether oral evidence is admissible to explain or establish a

deposit of title deeds, would depend on, whether the writing itself has constituted the bargain between the parties. Oral proof cannot be substituted

for the written evidence of any agreement, which the parties have put into writing. If the writing evidences be agreement, it must be taken that the

parties themselves have tacitly considered the writing as the repository and appropriate evidence of the agreement.

In all cases of equitable mortgage, what is crucial is the date of deposit and, not the date of document, since as seen from the extract of the Full

Bench decision above, there need not be any writing to create an equitable mortgage. Now, there are three dates, which could possibly be the

crucial dates: 1.8.1985, 12.9.1985 or 20.1.1986. As far as 20.1.1986 is concerned, apart from the allegation in the notices Exs.P-16 to P-18,

there is no other evidence to show that the documents were deposited on that date. The only other document dated 20.1.86 is Ex.P. 15, a letter

said to be written by the defendant to the plaintiff, agreeing to pay interest at 36% . In this document, there is no reference to deposit of title deeds,

nor is it stated by the plaintiff in her oral evidence that the documents were given on that date. So, we may ignore the allegations in Exs.P-15 to P-

17, that equitable mortgage was created on 20,1.1986. As regards, Ex.P.12, dated 12.9.1985, it has been admittedly written by the plaintiff''s

husband and which according to the defendant was signed by him in blank and filled up by the plaintiff''s husband. In the plaint also, apart from the

statement in paragraph 4 and in paragraph 8, which are as follows:

... as a result of which the first defendant had on 12.9.1985 executed a mortgage deed by depositing the title deeds of the properties... and... the

first defendant had pursuant to the execution of the mortgage on 12.9.1985, deposited all the title deeds."", the stress seems to be more on the

execution of the mortgage deed, than on the deposit. In fact, in the cause of action paragraph, the date of deposit of title deeds is not given. On the

one hand, it is incumbent upon the plaintiff to show that the deposit of title deed was made and Ex.P. 12 is only a record of the same, but the

language of Ex.P. 12 is more to the effect that Ex.P. 12 itself is the only evidence of the mortgage. The oral evidence regarding creation of

equitable mortgage on 12.9.1985 is far from satisfactory. I have already extracted what P.W.1 has said regarding the date on which she received

the title deeds. She has in fact clearly said that she had received the title deeds of the property on 1.8.1985. The defendant on the other hand,

categorically denies that he had deposited the title deeds and created equitable mortgage by Ex.P. 12. In fact, on a true consideration of EX.P-12,

the inescapable conclusion is that there was no past transaction of actual deposit of title deeds before the execution of Ex.P. 12 and that is the sole

piece of evidence of the equitable mortgage, if the allegation of the plaintiff were to be true. And therefore, it cannot be really admitted in evidence

to prove a valid equitable mortgage, since it is not registered. But, this point was not advanced or argued by the counsel. Since I have come to the

conclusion that there is no satisfactory evidence, that there was a deposit of title deeds on 12.9.1985, I hold that there was no equitable mortgage

on 12.9.1985 as pleaded by the plaintiff. I have already grouped the promissory notes under three heads. The last of the promissory notes is dated

20.1.1986. In any event, this promissory note, Ex.P. 11 is subsequent to Ex.P. 12 and the suit having been filed in 1997, the claim in respect of

Ex.P. 11 should fail. According to the learned Counsel for the plaintiff, all the dues in respect of the promissory notes, Exs.P-1 to P-12 had been

consolidated and it is for the said sum, that the equitable mortgage security was created. If we calculate principal amounts payable by the

defendant to the plaintiff under Exs.P-1 to P-10 as on 12.9.1985 it comes to Rs. 1,65,000, whereas the amounts set out in Ex.P. 12 is only Rs.

1,50,000. According to the learned Counsel for the defendant, this is another suspicious circumstance to show that Ex.P. 12 was filled up by using

the; blank papers signed by the defendant. The endorsements on the reverse of the promissory note relied on by the plaintiff as acknowledgment of

liability are denied by the defendant, since according to him, he had signed several promissory notes in blank on the reverse and they had been

filled up. When the defendant comes out with a case that his signature had been obtained in blank, the plaintiff ought to prove that it is not so. The

promissory notes coming under Group I referred to me above bear the signature of the plaintiff along with the date also in his writing. It is indeed

farfetched to accept the defendant''s case that he had signed in blank as well as written the dates and he also admits in his cross-examination: ""I

have signed along with the date in the promissory notes, Exs.P-1 and P-6 to P-8."" However, as regards the promissory notes, Exs.P-2 to P-5, I

am of the opinion, that the recitals therein are not natural and the plaintiff has not proved that the endorsements had been filled up by her husband

before the defendant affixed the signature. It appears to me to be introduced subsequently for the purpose of extending the period of limitation.

Issue No. 2: According to the defendant, when he received Rs. 50,000 on 1.8.1985, he had settled all the dues that were payable by him before that and that he deposited the title deeds of his house only to secure a sum of Rs. 50,000. Ex.D-1 is a letter written by the plaintiff, which shows

that the defendant had handed over the title deeds of the property, subject matter of the suit. It is also admitted by the plaintiff that the title deeds

were given on that date. The defendant while pleading that he had discharged all the loans payable till that date has not produced any document to

show the same. In the absence of any satisfactory evidence, I am unable to accept the discharge pleaded by the defendant. Issue No. 3: According

to the plaintiff, the defendant had agreed to pay 36% interest and as evidence had produced Ex.P. 15. According to the defendant, he had signed

and also affixed the date in Ex.P. 15, but the recitals were not his. The very fact that he admits signing his name and writing the date shows that he

was aware of what was written above his signature. Therefore, as regards Issue No. 3, I find that the defendant agreed to pay the increase in the

interest at the rate of 36% per annum.

Issues 4 and 5: These issues were not argued and the subsequent mortgagees also did not appear before the court. Perhaps, those debts have

been discharged.

5. Issue No. 6: As discussed by me in the paragraphs above, Ex.P. 12 said to be the equitable mortgage Deed pursuant to which the title deeds

were deposited is not sufficient to accept the plaintiff''s claim that the defendant created an equitable mortgage on that date. The evidence on the

side of the plaintiff is absolutely unsatisfactory and as already stated, even in the plaint, there is not clear record of, when the title deeds were

actually deposited. The learned Counsel for , the defendant also points out and with relevance that Ex.P. 15, which deals with the increase of

interest also refers only to promissory note and not to any mortgage and according to him, this is another piece of evidence to show that there was

no mortgage. Though I have rejected the defendant''s plea of discharge, the plaintiffs remedy to sustain his right to recover his dues will have to

stand or fall on the validity of the equitable mortgage alleged by him. The very word ""equitable mortgage"" shows that it is founded on principles of

equity and has to be construed keeping in mind, equitable considerations. The plaintiff invoking the principle of equity should satisfy the court that

he is entitled to do so. She has not even stated categorically and unambiguously on what date the deposit of title deeds were made and the

equitable mortgage was created, to the satisfaction of this Court. As already held by me in respect of Issue No. I, the documents were not

deposited on 20.1.1986, which is the date of equitable mortgage as per the suit notice, there was no equitable mortgage on the date of Ex.D-1,

because according to the learned Counsel for the plaintiff, that was only an acknowledgment receipt and there is no evidence of deposit of title

deeds as per Ex.P. 12. So the case of the plaintiff that there was an equitable mortgage on 12.9.1985 has not been satisfactorily proved. The last

of the promissory notes is of the year 1986 and the last of the endorsements is of the year 1985. The suit has been filed only in 1997. The

plaintiff''s claim is time barred. The contention of the plaintiff that an equitable mortgage had been created on 12.9.1985 and therefore, the suit filed

on 30.7.1997 is in time, cannot be accepted.

6. The suit is therefore dismissed, but in the circumstances of the case, no costs.

