

(1992) 07 KL CK 0037

In the High Court Of Kerala

Case No : Indigent A.S. No. 441 of 1989

Mrs. Rosy George

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

Date of Decision : 16-07-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34
Limitation Act, 1963 — Article 1, 55, 62
Transfer of Property Act, 1882 — Section 96

Citation : AIR 1993 Ker 184 : (1994) 80 CompCas 371 : (1992) 3 ILR (Ker) 823

Hon'ble Judges : T.L. Viswanatha Iyer, J;L. Manoharan, J

Bench : Division Bench

Advocate : S.K. Brahmenandan, for the Appellant; S. Ananthasubramanyan, S. Shyam and Raju Joseph, for the Respondent

Final Decision : Dismissed

Judgement

Manoharan, J.—First defendant in O.S.No. 174 of 1985 of the III Additional Sub Judge, Ernakulam is the appellant; plaintiff and defendants 2 to 6 are the respondents.

2. The plaintiff's case can be summarised as follows:

Appellant is the widow of late Sri P.L. George. Late Shri P.L. George approached plaintiff -- first respondent bank for raising a loan for construction of a multi-storeyed building in the plaintiff A schedule property and offered to secure the loan by mortgaging plaintiff A schedule property by deposit of title deeds. First respondent bank agreed to the same pursuant to which on 19-7-1979 the said P.L. George deposited Exts. A1 to A3 title deeds with respect to the A schedule property along with Ext. A4 power of attorney with the intention to create an equitable mortgage on his behalf as well as on behalf of defendants 1 to 3, and executed Ext. A-16 memorandum of deposit of title deeds. On the basis of the same amounts were advanced and he executed Ext. A5 series demand promissory notes when amounts were advanced. All the above advances were

kept on separate accounts and later the balance due as per the said accounts were transferred to one account on 30-9-1981, and the amount due on the said date was Rs. 8,31,736.55. Late P.L. George acknowledged the said amount by Ext. A-11 communication written by him. After his death defendants executed a confirmation Ext. A-19 on 14-1-1983 and thus acknowledged the liability. According to the plaintiff since the defendants failed to insure the building in the plaint A schedule property as agreed, plaintiff got it insured and the amount was added to the principal. Several demands were made for payment of balance and ultimately a registered notice was issued on 31-10-1984, copy of which is Ext. A-12. Since the defendants did not comply with the demand the suit is necessitated.

3. Defendants 1 to 3 filed a joint written statement, and defendants 4 to 6 filed another joint written statement. Their contentions briefly are : Late P.L. George did not create an equitable mortgage, that they did not authorise him to create an equitable mortgage, that the suit is barred by limitation," that there was no agreement to pay the interest as claimed and that the promissory note mentioned in the plaint since are materially altered the plaintiff is not entitled to any relief.

4. Learned Subordinate Judge found the suit is maintainable and that late P.L. George created a mortgage by deposit of title deeds. It was found, the suit is not barred by limitation as against the first defendant and A schedule property. The court also found, though of the 59 Ext. A-5 series promissory notes 50 were materially altered since the suit is based on accounts also the same is maintainable. Ultimately the suit was decreed for the plaint amount with interest at 14% from the date of the suit till recovery against the first defendant and the plaint A schedule property. The plaintiff was also allowed to realise the decree amount from the assets of the late P.L. George in the hands of defendants 1 to 6. The said decree and judgment are under challenge in this appeal.

5. Learned counsel for the appellant contended that after having found 50 out of 59 promissory notes were materially altered, no decree for the plaint claim could have been passed. It was also contended, at any rate the suit as against the first defendant is barred by limitation. It was also his case that no equitable mortgage was created, in the alternative late P.L. George had no authority to execute an equitable mortgage on behalf of defendants 1 to 3. Learned counsel maintained, since there was no agreement to pay interest the lower court ought not have awarded interest at 14%.

6. On the other hand it was contended by the plaintiff that Exts. A1 and A2 title deeds along with Ext. A-16 memorandum and Ext. A4 General power of attorney executed by defendants 1 to 3 would prove the equitable mortgage, and that Exts, A6 and A7 account would prove that loan was advanced. According to him the suit being on accounts the claim is not barred by limitation. He supported the decree and judgment rendered by the lower court.

7. Maintainability of the suit is attacked in view of the finding by the lower court that 50 out of Ext.A5 series promissory notes are materially altered. The first question to be considered in this regard is whether there is material alteration. According to the appellant the portion concerning interest was left blank in the promissory notes which was later filled up by the plaintiff without the consent of the promisor. Reliance was made on "Ext.BI series carbon copies of Ext.A5 series. According to defendants plaintiff used to supply carbon copies of the promote to late P.L. George when he executed the same. We cannot but remark that it is an unusual and strange practice. Whereas the portion concerning interest is filled up in Ext,A-5 series, the said portion remains blank in Ext.BI series. The lower court states, there was however no dispute as regards the validity of Exts. A5(b), A5(c), A5(ac), A5(ae) A5(ag), A5(c), A5(aj) A5(am) and A5 (ap). Still, according to the learned counsel for the appellant inasmuch as the claim in the suit rests on materially altered promissory notes no decree could have been passed in favour of the plaintiff. According to him since no cause of action could arise on a materially altered promissory note the suit itself is not maintainable. Learned counsel relied on decisions inclusive of the decision of the Privy Council in support of the said contention. We may advert to the said decisions.

8. In the decision in AIR 1940 160 (Privy Council) the Privy Council held that material alteration is one which varies the rights, liabilities, or legal position of the parties ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally ascertained or may otherwise prejudice the party bound by the deed as originally executed. In the decision in N. Narayanaswamy Vs. Madanlal, , it is held, the filling up of the interest column in a promissory note without the consent of the promisor would amount to material alteration; and the decision in Sankara Filial v. Usman Settu, 1963 Ker LT 241 held that affixing of additional stamps on a promissory note in order to make it a valid instrument in law is a material alteration. It was also held in the said decision that when a promissory note on the face of it is materially altered the promisee has to prove that there was no alteration after the execution. There is no acceptable evidence to show that such filling of the interest column in the said 50 promissory notes was with the consent of the promisor. Thus it could be seen that the said promissory notes were materially altered.

9. In the decision in Verco Private Ltd., Padi and Others Vs. Newandram Naraindas and Another, it is held that as per Section 87 of the Negotiable Instruments Act such alteration would render the promissory note void and inoperative. No cause of action will arise on the basis of a materially altered promissory note. As noted the contention is, inasmuch as the suit is based on the promissory notes which are materially altered, the plaintiff is not entitled to a decree for the plaint amount and in the circumstance, the plaintiff is not entitled to a decree on the original cause of action also as the amounts were advanced simultaneously with the execution of the said promissory notes.

10. But the main question to be considered is whether the suit is on promissory notes as is maintained by the learned counsel for the appellant or whether the same is on accounts secured by an equitable mortgage as contended by the first respondent. Finding on this aspect has crucial relevance not only on the maintainability of the suit but also on the question of limitation as according to the learned counsel for the appellant even assuming the suit is within time in so far as the A. schedule properties are concerned the personal liability of the first defendant is barred by limitation. The point urged is, even though the period of limitation for enforcing payment of money secured by mortgage is 12 years from the date when the money becomes due, so far as personal liability of first defendant is concerned the article applicable being Article 55 which prescribes only 3 years from the date when breach occurred, the liability of the first defendant is barred by limitation. According to the learned counsel Ext.A-19 acknowledgement relied on by the plaintiff could not save limitation as to personal liability of first defendant, since the same is beyond 3 years of the equitable mortgage.

11. If suit is on accounts secured by equitable mortgage the said argument by the learned counsel for the appellant as to the maintainability of the suit as well as limitation will lose its force. When the suit is based on accounts, the cause of action for the same being not on the promissory note the invalidity of the same cannot affect the maintainability of the suit. And when the suit is based on mutual and current account the same would be governed by Article I of the Limitation Act, the period being 3 years from the close of the year in which last item admitted or proved is entered. Plaintiff produced Exts. A6 and A7 extracts of the account duly attested. The genuineness of the account except the rate of interest is not in dispute. According to the plaintiff the suit being within 3 years of the last entry in Ext. A7 is within time. Thus as regards maintainability and as well as limitation the scope and nature of the suit acquires paramount importance.

12. Now we may examine the nature and scope of the suit. That has to be judged on the basis of the allegations and recitals in the plaint. A reading of paragraphs 1 to 3 of the plaint would show that, the loans were advanced on the basis of equitable mortgage, that as and when amounts were advanced promissory notes were got executed, that plaintiff used to keep separate accounts for the advances that later it was consolidated into one account and that the balance outstanding was admitted by late P.L. George in Ext.A-11 and by the appellant in Ext. A-19. The very valuation in the plaint states: "the amount due as per the account" as on 31-3-1985." The allegations and recitals in the plaint clearly brings out that the suit is based on account secured by an equitable mortgage. Thus the character of the suit being so Ext. A5 series pronotes could only be collateral in nature and their invalidity on account of material alteration cannot affect the maintainability of the suit. The contention regarding limitation can be conveniently dealt with after adverting to the contention of the defendants that no equitable mortgage as alleged was created.

13. The question for consideration is whether in fact an equitable mortgage was created by late P.L. George and if so whether that was on behalf of defendants 1 to 3 also. As has already been noted plaintiff produced Exts. A1 to A4 and A-16 in support of their contention. Ext.A-16 is the memorandum executed by late P.L. George. According to plaintiff the said George deposited Exts. A1 and A2, executed Ext. A-16 and produced Ext. A-4 General power of attorney executed by defendants 1 to 3. There is absolutely no explanation by the defendants as to how plaintiff obtained custody of those documents. The fact that the defendants have no dispute that the said George raised loans from the bank is a circumstance to be reckoned in appreciating the case of the plaintiff as regards the creation of the equitable mortgage. The production of the said documents by the plaintiff in the context of the loans availed by him and Ext. A-16 unambiguously establishes that late George deposited the title deeds and executed Ext. A-16 with the intention of creating an equitable mortgage. The production of Ext.A4 in the circumstance admits of only one explanation, that is, he produced the same in proof of his intention to create the equitable mortgage on behalf of defendants 1 to 3 also. In our view the production of Ext.A4 along with the memorandum as well as the title deed is a positive circumstance which can lead to the only inference that the deceased created equitable mortgage not only on his behalf but on behalf of defendants 1 to 3 also. This is also supported by Exts. A11 and A-19. Ext. A-12 suit notice was not replied. In Ext.A-19 the appellant admitted the liability of Rs. 9,13,993.95 balance due as per loan taken by late P.L. George. Of course the learned counsel for the appellant attacked Ext. A-19 contending that the first defendant signed Ext. A-19 without understanding its contents. First defendant is an educated lady, and no acceptable evidence was tendered as to the occasion for her to sign a document without noting its contents. It is significant to note that it is not her case that she signed a blank paper. In the given circumstances we are not persuaded to accept the said argument of the learned counsel. In Ext. A-11 the late P.L. George himself admitted the liability under the transaction. Though advances were made only pursuant to the creation of equitable mortgage that cannot affect its validity. An equitable mortgage can as well be for an existing debt or future advances as transfer of an interest in property to secure payment of money advanced or to be advanced, or an existing or future debt is a mortgage u/s 58(a) and Sub-section (f) which defines equitable mortgage merely prescribes one of the modes of creating mortgage (See page 385 of Mulla on Transfer of Property Act, 1882, Seventh Edition).

14. Now we may take up the contention regarding limitation. The plaintiff's claim is sought to be enforced against the plaintiff's schedule property and against the defendants. As per Section 96 of the Transfer of Property Act the provisions of which apply to a simple mortgage, so far as may be, apply to a mortgage by deposit of title deeds also. Under Article 62 of the Limitation Act the period for enforcing payment of money secured by a mortgage or otherwise charged upon immovable property is 12 years, and the period would start to run when the

money sued for becomes due. The equitable mortgage was on 19-7-1979. The suit was instituted on 10-4-1985. Thus the suit is within time with respect to the claim against A schedule property.

15. According to the learned counsel so far as personal remedy is concerned, the period of limitation is only 3 years under Article 55 of the Limitation Act, in which case, according to him, the suit is beyond the. Though under the Limitation Act of 1908 personal remedy could be enforced under Article 116 of the said Limitation Act, since there is no corresponding Article in the Limitation Act of 1963 the Article applicable is Article 55 which provides for a period of three years for suits for compensation for the breach of any contract and the period would commence from the date of breach. The learned counsel relied on the commentaries to the Transfer of Property Act by Mulla (page 472 -- Seventh Edition) in support of the said contention. According to the learned counsel since the transaction was on 19-7-1979 and the period of limitation being only three years, the suit so far as it relates to personal liability of the first defendant is barred by limitation. The learned counsel pointed out that 3 years" period expired by 18-7-1982 and Ext. A-19 being only on 14-1-1983 cannot operate as an acknowledgement as the same was not within the period of limitation.

16. We do not think that this contention of the learned counsel for the appellant is sustainable. We have already pointed out that the suit is on accounts secured by equitable mortgage. Ext. A7 is the consolidated account. The last advance was made on 9-10-1980. Ext. A-19 acknowledgement was executed by the first defendant on 14-1-1983 within three years of the last advance. Incidentally one aspect has to be adverted. Though the plaintiff has a case that Ext.A-19 was executed by the first defendant on behalf of the other defendants also, that was not accepted the court below, and the court below passed the decree against the first defendant, A schedule property and the assets of late P.L. George in the hands of the defendants. There being no cross appeal it is unnecessary to consider whether Ext.A-19 was executed on behalf of the other defendants also. The Article applicable in such circumstances is Article I of the Limitation Act. A suit for balance due on a mutual, open and current account where there have been reciprocal demands between the parties, the period of limitation is three years, from the year in which the last item admitted or proved is entered in the account. It is true a mere loan transaction and periodical repayment of the said loan cannot make the account mutual, open and current. The Article would apply only where there are transactions on either side creating independent obligations on the other. In other words limitation would start to run from the date of the last item in the case of the mutual account between parties with reciprocity of dealings -- transactions in which there was mutual credit on either side or an express or implied agreement for the set off of mutual debt is a mutual and current account. There should be a mutual contractual relationship between the parties where the dealings between them disclose two contractual relationship between them arising demands by the one against the other to make the account a mutual and current account so as to attract Article I of the Limitation

Act.

17. Now the question therefore is whether account in question is purely a loan transaction or is a mutual and current account. The loan admittedly was taken for constructing a building in A schedule and was used for constructing it; now admittedly the first respondent's office is functioning in the first floor of the building. The rent towards the said premises is being credited against the loan. Ext.A11 letter by the said late George specifically states that the rent of the first floor is being adjusted against loan and that he has also remitted more amount. It is clear from the evidence that the rent of the first floor of the building which is the subject matter of the equitable mortgage was being adjusted against the loan taken by the mortgagor. Thus there were mutual obligations arising from the contract, and in such circumstance the Article applicable is Article I of the Limitation Act. When such is the position it could be seen that, the personal remedy against the first defendant also is not barred by limitation. By virtue of Section 96 of Transfer of Property Act the provisions of simple mortgage are applicable to a mortgage by the deposit of title deeds. Personal liability either express or implied being one the ingredients of simple mortgage, the first defendant's personal liability as one of the mortgagors cannot be doubted.

18. It was also contended that there was no agreement to pay the interest. It cannot in the circumstances be envisaged that the loan was advanced without an agreement to pay interest. The account would show that the interest was calculated at the rate mentioned in paragraph 3 of the plaint and after the consolidation of the account as on 31-3-1985 the total amount due inclusive of interest was Rs. 11,16,083.21. In Ext. A-II late George, wanted the bank to inform him the rate of interest and he requested the bank to charge only the minimum interest. Ext.A-12 lawyer notice mentioned total amount due as on 30-9-1974 inclusive of interest. But no reply was sent. Ext.A-21 in this regard is of importance. Ext.A-21 is a letter sent by the first defendant whose genuineness was found by the lower court. In the letter itself she alleges that the rate of interest chargeable on such amounts is only 13% and that the rate of interest must be reduced to the minimum permissible under the rules issued by the Reserve Bank of India from time to time. They wanted the bank to charge the minimum interest. Yet they had no objection in charging interest at the rate fixed by the Reserve Bank from time to time. That was what the plaintiff charged. Therefore we find no force in the argument of the learned counsel with respect to the rate of interest.

19. It was contended by the learned counsel that at any rate future interest cannot exceed 6%. Reliance was placed by the learned counsel on the decisions reported in Soli Pestonji Majoo and Others Vs. Gangadhar Khomka, , State Bank of Travancore Vs. May C. George, and Divl. Manager, LIC of India v. Bhagavathy Amma, (1991) 2 Ker LT 522 in support of the said argument.

20. Learned counsel contended that there is a significant difference between Order XXXIV Rule 11(a)(i) of the unamended C.P.C. and Order XXXIV Rule 2(a)

(1) of the amended C.P.C. Whereas in the former interest to be paid was on the principal amount found or declared due on the mortgage "at the rate payable on the principal" the new Rule 2 Sub-rule 1(l)(a)(i) provides for only principal and interest on the mortgage. The unamended Rule 1 l(a)(i) reads:

"In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the court may order payment of interest to the mortgagee as follows, namely :--

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage,--

(i) on the principal amount found or declared due on the mortgage, -- at the rate payable on the principal, or where no such rate is fixed, at such rate as the court deems reasonable.

Order XXXIV was substituted by notification No. D 22480/88 dated 16-12-1989. Rule 2(1) (a)(i) of Order XXXIV so substituted reads:

"2(1) In a suit for foreclosure, if the plaintiff succeeds, the court shall pass a decree--

(a) declaring the amount due to the plaintiff on the date of such decree for--

(i) Principal and interest on the mortgage;

The decision in Soli Pestonji Majoo and Others Vs. Gangadhar Khomka, held with reference to the unamended C.P.C. that Order XXXIV Rule 11 gave discretion to the court so far as pendente lite and subsequent interest is concerned and it is not obligatory on the courts to decree interest at the contractual rate up to the date of redemption in all circumstances; and in the decision in State Bank of Travancore Vs. May C. George, it was held as per the then amendment to Order XXXIV as per notification dated 10-12-1973 where also Rule 2 Sub-rule (a) (i) was similar in terms, the decree holder is entitled to interest on the principal only at the rate of 6% per annum which is the maximum provided u/s 34, C.P.C.

21. As has already noted in the new Rule in the substituted Order XXXIV also there is a significant change, and hence according to the learned counsel, the maximum provided u/s 34, C.P.C. which is 6% alone can be awarded. In support of the said contention learned counsel relied on the decision in Divl. Manager, LIC of India's case (1991) 2 Ker LT 522. Though in the circumstances Section 34, C.P.C. should govern the awarding of future interest the amendment to Section 34, CPC since State Bank of Travancore's decision 1976 Ker LT 205 : (AIR 1971 Kerala 8) is of importance. Section 34, CPC was amended by CPC amended Act 1976 which came into force on 1-7-1977. By the amendment a proviso was added to Section 34, CPC according to which when the liability is in relation to an adjudged sum arising out of a commercial transaction the rate of future interest could exceed 6% but should not exceed the contractual rate of

interest. Explanation II of Section 34, CPC states that, for the purpose of the Section a transaction is a commercial transaction if it is connected with industry, trade or business of the party incurring the liability.

22. Learned counsel for the first respondent contended, the transaction in question being a commercial transaction within the meaning of proviso to Section 34, CPC the future interest has to be at the contract rate. But the learned counsel for the appellant maintained that the transaction is not a commercial transaction. As has noted the loan was taken for constructing a building which was intended to be let out, as a matter of fact the first floor of the building is now occupied by the first respondent and the rent of which is being credited against the outstanding liability. Thus the loan was taken for the purpose of constructing a building to be let out. The object of the endeavour was to make profit. Investment in real estate is now common and large amounts are being invested in the real estate. In considering the scope and ambit of the proviso to Section 34, CPC one cannot forget the fact that now real estate transaction is very much a commercial transaction. The words employed in a provision would acquire content and meaning from the context in which they are used. We are of the view that transaction of this nature whose object is to earn a return and make profit is commercial activity at least it is a business activity. That being so, the proviso to Section 34, CPC is attracted and hence interest could be at the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions. Lower court awarded future interest only at 14% which is the minimum charged by the bank. We do not see anything wrong in awarding interest at the said rate. Thus the points raised by the learned counsel for the appellant are not sustainable and the appeal is liable to be dismissed.

In the result the appeal fails and the same is dismissed with costs of the first respondent.

The appellant was permitted to file the appeal as an indigent person. The appellant is liable to pay court fee under Rule 11 of Order 33, C.P.C. and we order him to pay the court-fee. A copy of the decree shall be forwarded to the Collector under Rule 14 of Order 33 read with Rule 1 of Order 44, C.P.C. for realisation of the court-fee.