(1999) 11 MAD CK 0030

In the Madras High Court

Case No : O.S.A.No.198 of 1997

Sirish Kumar Bros. APPELLANT

Vs

The Official Assignee, High Court, Madras RESPONDENT

Date of Decision : 30-11-1999

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 12
Transfer of Property Act, 1882 — Section 58

Citation : (2000) 1 CTC 73 : (2000) 1 MLJ 223

Hon'ble Judges : R. Jayasimha Babu, J;A. Subbulakshmy, J

Bench : Division Bench

Advocate : Mr. A. Venkatesan, for the Appellant; Official Assignee, for the Respondent

Judgement

Judgement Pronounced by A. Subbulakshmy, J.—The appellant filed a Claim No.203 of 1994 in I.P.No.14 of 1993 alleging that the

insolvent P.Savithri & P.Neeraja, partners of M/s.Shree Krishna Prasad & Co. and M/s.Padma Priya Trading Co. on the date of order of

adjudication viz. 25.2.93 were indebted for a sum of Rs.3,62,309.80 further Rs.2,00,000 was towards principal, Rs.1,32,509.80 towards interest

and Rs.29,800 towards commission as shown by the amount on 13 promissory notes as mentioned herein:-

Principal Interest Commission

1. Promissory Note dated 19.6.90 20,000 13,252 2,980

2. Promissory Note dated 19.6.90 11,000 7,288 1,639

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5. Promissory Note dated 19.6.90 15,000 9.938.25 2,235

6. Promissory Note dated 19.6.90 20,000 13,251 2,980

7. Promissory Note dated 18.6.90 25,000 16,563.70 3,725

8. Promissory Note dated 19.6.90 10,000 6,625.50 1,490

9. Promissory Note dated 15.4.91 20,000 13,251 2,980

10. Promissory Note dated 22.10.91 15,000 9,938.25 2,235

11. Promissory Note dated 22.10.91 11,000 7,288 1,639

12. Promissory Note dated 23.10.91 12,000 7,950.60 1,788

13. Promissory Note dated 20.1.92 10,000 6,625.50 1,490

According to the appellant equitable mortgage deed dated 15.6.90 for Rs.1,98,000 was created for that amount and the actual amount paid under

the abovesaid pronotes was Rs.2,00,000. No amount was received due on the abovesaid pronotes. Since the equitable mortgage has been

created as security for the due amount, the petitioner is entitled to claim security over the properties under the equitable mortgage.

2. The Official Assignee who heard the claim petition rejected it holding that there was no subsisting debt due from the insolvent in favour of the

claimant as on the date of execution of memorandum of deposit of title deeds.

3. The claimant filed Application No. 348 of 1996 in I.P.No.14 of 1993 to set aside the order of the Official Assignee dated 26.7.96.

4. The learned Single Judge dismissed that application.

5. The original side appeal is directed as against the order of the learned Single Judge in Application No.348 of 1996.

6. In this appeal, the appellant contends that they are the agents of the financiers.

7. Point for consideration is whether the claimant/appellant can claim to be the equitable mortgage and whether he is entitled to the claim made by

him.

8. In I.P. No.14 of 1993, Savithri and Neeraja were adjudicated as insolvents and their properties were ordered to be vested with the official

assignee. The appellant preferred claim that mortgage by deposit of title deeds was created in his favour on 15.6.90 by Savithri one of the

insolvents along with the memorandum of deposit of title deeds. Much reliance is placed upon by the claimant on the memorandum of deposit of

title deeds dated 15.6.90 and the claimant/appellant contends that the appellant is an equitable mortgages and is entitled to derive the benefits on

the equitable mortgage. In the memorandum of deposit of title deeds, it is recited that the borrower P.Savithri has already deposited the documents

and title relating to her property listed thereunder with the finance broker/ depositee with intent to create an equitable mortgage in favour of the

finance broker/depositee over the property to which the documents relate to for the purpose of securing repayment to the depositees/financiers of

all the amounts owing to the financiers under advance made and to be made to Mrs. P. Savithri by the depositee''s/financiers by way of loan under

different promissory notes not exceeding Rs.1,98,000. The properties described thereunder are the lands situate in Noombal Mathura Pallikuppam

Village, Saidapet Taluk, Chingleput District. The claimant contends that the insovents P.Savithri and Neeraja partners of M/s.Shree Krishna

Prasad & Co. and M/s.Padma Priya Trading Co. on the date of order of adjudication i.e., on 25.2.93 were indebted in a sum of Rs.3,62,309.80

being Rs.2,00,000 towards interest and Rs.29,800.00 towards commission and had executed equitable mortgage deed dated 15.6.90 for

Rs.1,98,000 and as no amount has been received from them, the appellant is entitled to claim that amount. It is significant to note that the equitable

mortgage deed was executed by the insolvent on 15.6.90 in favour of the claimant firm. All the promissory notes are dated from 19.6.90 to

20.12.92. only subsequent to the memorandum of agreement for deposit of title deeds, these promissory notes were executed. on the dates of the

memorandum of agreement for deposit of title deeds, there was no borrowing.

9. On a perusal of the memorandum of agreement for deposit of title deeds, it is seen that the deposit of title deeds was created for the purpose of

repayment to depositees/financiers of the loans to be made to Mrs. P. Savithri by the depositees/financiers. The 13 promissory notes were

executed in favour different persons and nowhere in the memorandum of agreement for deposit of title deeds, it is stated that the claimant is a

creditor. It is also not stated that the claimant is the agent of the creditor. memorandum of agreement for deposit of title deeds does not empower

the claimant to enforce the mortgage for reason of the claims on the 13 promissory notes executed by the insolvent in favour of 13 different

persons. The claimants are described only as finance brokers. The insolvents have executed 13 promissory notes in favour of 13 persons and

received the amounts mentioned thereunder. The promissory notes recite that for consideration received, the promissory notes were executed by

the insolvents. The execution of the promissory notes in favour of different persons does not confer any right on the claimant to proceed against the

insolvents for recovery of that amount. The claimant also bases, his claim on the affidavits of 13 persons who lent the amount to the insolvents

under the promissory notes. In the affidavits, they have stated that they advanced amounts to the insolvents and they have no objection for that

amount being credited in the account of the mortgagee. Nothing is mentioned in the affidavits that the claimant/appellant acted as their agent or that

the deposit of title deeds was made in their favour by the insolvents with the appellant acting as their agent. By merely filing of affidavit of persons

who had advanced the amounts, the claimant is not entitled to contend that he is the equitable mortgagee. The affidavits filed by the promisees have

nothing to do with the claim of the claimant. Simply because in the affidavit, the persons who advanced money had stated that the claimant is the

mortgagee. It is not sufficient to establish the claim of the claimant and that will not establish that the claimant is the creditor or the agent of the

creditor. Even in the memorandum of agreement for deposit of title deeds, it is only stated that the memorandum is executed for the amount owing

to the financiers under advance made and to be made to Mrs. P.Savithri by the depositees/financiers by way of loan under different promissory

notes. In the memorandum of agreement for deposit of title, deeds, nowhere the claimant is described as agent of the financiers. Absolutely, there

is no proof that the claimant acted act as agent nor is the claimant the creditor.

10. In the absence of any documentary proof that the claimant was the creditor or agent of the creditor at the time the equitable mortgage was

created, it is very difficult to sustain the case of the claimant with regard to his claim. For the advances made by 13 different persons under various

pro notes, the claimant cannot become the creditor merely on the memorandum of agreement for deposit of title deeds. There must be some basis

for the claim to base his claim either as a creditor or agent of the creditor and the mere affidavit of persons who have advanced the amounts will

not enable the claimant to make the claim. The claimant was neither lender nor agent. He never acted as the agent of the creditor also. The

memorandum of agreement for deposit of title deeds is silent as to whether he is the creditor or an agent. No document is filed with regard to the

status of the claimant as creditor or agent. The claimant is neither a creditor nor an agent. There is no document authorising the appellant to receive

or recovery the amount and the amount is not transferred or assigned in favour of the claimant. Unless the amount is transferred or assigned, the

claimant does not get the right to recover the same. So, the claimant has no locus standi to file the claim petition.

11. Counsel for the respondent submitted that no valid equitable mortgage has been created, Sec. 58(f) of the Transfer of Property Act deals with

mortgage by deposit of title deeds. It reads as follows:-

Where a person in any of the following towns namely the towns of Calcutta, Madras and Bombay, and in any other town which the State

Government concerned may, by notification in the Official Gazette specify in this behalf delivers to a creditor or his agent, documents of title to

immovable property, with intend to create a security thereon, the transaction is called a Mortgage by deposit of title deeds.

To attract the ingredients of Section 58(f) of the Transfer of Property Act, the delivery of documents of title to the immovable property to a

creditor or his agent should have taken place in any of the towns viz., Calcutta, madras and Bombay and any other town which the State

Government may specify in the Official Gazette. The Official Assignee has found that in the memorandum of agreement for deposit of title deeds

nothing is mentioned about the place where the delivery of documents had taken place. The memorandum of agreement for deposit of title deeds

was registered in the office of the Sub-Registrar at Kunrathur which is situate outside the City of Madras. The Official Assignee further found that

the place where the delivery of document took place is also not specifically mentioned in the memorandum of agreement for deposit of title deeds

and so no valid equitable mortgage has been created. The learned single Judge reversed the finding of the Official Assignee in that aspect and has

found that both the parties to the memorandum of agreement for deposit of title deeds were residing in the city limit and so, the delivery of the

document must have been effected only either at the place of the depositor or at the place of the depositees and so, the delivery of document had

to be presumed to have taken place within the city limit of Madras and mere non mentioning of the place in the memorandum of agreement for

deposit of title deeds is not of any significance. Accordingly, he found that the requirement of Sec. 58(f) of the Transfer of Property Act regarding

the place of delivery of the documents is satisfied and reversed the finding of the Official Assignee. Both the parties were residents of Madras. So,

the delivery of documents could have been effected within the city limits of Madras. Of course, there is no mention in the memorandum of

agreement for deposit as title deeds with regard to the place where the delivery of documents had taken place and as the parties are residents of

Madras, it can be taken that delivery of document was effected within the city of Madras for creating equitable mortgage.

12. We have already given our finding above that the claimant is neither a creditor nor an agent of the creditor. One of the essential conditions

under Sec. 58(f) of the Transfer of Property Act is that there must be delivery of documents of title relating to immovable property with intent to

create equitable mortgage was security thereon to the creditor or his agent. So, the delivery of documents must be to a creditor or his agent. The

claimant was neither a creditor nor was he the agent of the financiers at the time of the delivery of the documents of title. Since the appellant is

neither a creditor nor was he the agent of the creditors at the time of the deposit of the title deeds by the insolvements, such deposit will not amount

to mortgage as defined u/s 58(f) of the Transfer of Property Act. Even though there is memorandum of agreement for deposit of title deeds, that

will not clothe the claimant with the right to enforce the mortgage for recovery of moneys subsequently lent by others to the insolvent.

13. For the foregoing reasons, we are of the view that the appellant is not entitled to enforce his claim. We agree with the finding of the learned

single Judge. In the result, the Original Side Appeal is dismissed. No costs.

