

(2017) 04 KL CK 0013
In the High Court Of Kerala
Case No : 434 of 2001

THE SOUTH INDIAN BANK LIMITED

APPELLANT

Vs

K.P. RAMACHANDRAN & ANR.

RESPONDENT

Date of Decision : 10-04-2017

Acts Referred:

Transfer of Property Act, 1882, Section 59, Section 58(f) - Mortgage when to be by assurance - "Mortgage", "mortgagor", "mortgagee", "mortgage-money", and "mortgage- deed" defined
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Citation : (2017) 04 KL CK 0013

Hon'ble Judges : V.Chitambaresh, Sathish Ninan

Bench : DIVISION BENCH

Advocate : K.K.JOHN

Judgement

1. Does a memorandum of acknowledgment of mortgage executed on the very date of the creation of mortgage by deposit of title deeds, require registration?
2. The denial of a decree as against the 2 nd defendant and on the mortgage, in a suit for recovery of money due to a Bank under a loan transaction, is under challenge.
3. Defendants availed a credit facility from the plaintiff-bank on execution of necessary documents. The plaint schedule property was equitably mortgaged by the 2 nd defendant to secure the facility. Since the amounts were not repaid in terms of the loan agreement, the bank instituted the suit for recovery of the amounts due. The 1 st defendant remained ex parte. The 2 nd defendant contended that he is a stranger to the transaction, that he has not signed any documents nor availed any facility from the plaintiff. The creation of the mortgage was disputed.
4. The court below found that the signatures of the 2 nd defendant in the loan documents Exts.A1, A2, A3, A4, A9 and A10 differs from his admitted signatures.

It was also found that Ext.A9 letter acknowledging deposit of title deeds, was not registered. Accordingly it was held that the plaintiff is not entitled for a decree as against the 2 nd defendant and also on the mortgage.

5. Though notice in the appeal was issued to the 2 nd defendant/2nd respondent, he has not entered appearance. Heard the learned counsel for the appellant.

6. The reasons given by the court below are according to us, unsustainable. To enter a finding that the signatures in the loan documents are forged, the court below has solely relied upon the comparison of the signatures by the court with the signatures of the 2 nd defendant in the vakalath, written statement and admitted documents. We looked into the loan documents, viz., Exts.A1 to A4, A9 and A19. The signatures in all these documents are one and the same. Between the signatures in the said documents, there is no dissimilarity. However, the signature as seen therein is entirely different from the admitted signatures of the 2 nd defendant. But that by itself would not be sufficient to hold that the loan documents were not signed by the 2 nd defendant. It is possible that the 2 nd defendant might have signed the loan documents in a different manner. There are various circumstances, which indicate that the 2 nd defendant was a party to the loan transaction. The original title deed relating to the property owned by the 2 nd defendant is with the plaintiff-bank which the bank claims, has been deposited by the 2 nd defendant to create mortgage as security for the facility. It is the contention of the 2 nd defendant that the original title deed is lost/stolen, and the mortgage is fraudulently created.

7. It is to be noted that the 2 nd defendant has not taken any steps as against the loss or theft of his title deed. He has not even lodged a complaint before the police. He has not bothered to give a paper publication. Even after he became aware that the title deed has been deposited with the bank as security, he did not take any steps. The notice issued from the plaintiff-bank to the 2 nd defendant was not even replied to. The explanation given by the 2 nd defendant that on receipt of the letter from the bank he personally approached the bank authorities and convinced them, cannot be swallowed without a pinch of salt. Though it is his case that the original title deed has been lost which has been misused, the plaintiff-bank has produced Exts.A8 and A8(a) which are two tax receipts relating to the mortgaged property, dated 20.03.1987 and 04.08.1984, respectively. The availability of Ext.A8 and A8(a) with the plaintiff, has not been explained. Added to all these, it is to be noticed that the 2 nd defendant had filed an application to have the signatures examined by an expert. The documents were referred to the forensic science laboratory which returned the documents requiring deposit of Rs.2,500/- towards the fee and also requesting to make available documents contemporaneous to the disputed documents and which contain the standard signatures of the 2 nd defendant. The 2 nd defendant did not pay the requisite fee nor make available the documents required to by the expert. The inaction on the part of the 2 nd defendant also casts doubt on the veracity of his contention. PW1 is the manager of the plaintiff-bank in whose

presence the 2 nd defendant has signed the documents. He has deposed that the documents were signed in his presence. There is no reason to disbelieve PW1. There is no reason to hold that the loan documents were not signed by the 2 nd defendant and that he is not involved in the transaction. In fact the circumstances show otherwise. The finding of the court below as against the liability of the 2 nd defendant is unsustainable.

8. As regards creation of equitable mortgage, the finding of the court below that since the letter acknowledging the mortgage was executed on the same day of creation of mortgage, it requires registration, is unsustainable. It would be apposite to refer to Section 17(1)(c) of the Registration Act and Sections 58(f) and 59 of the Transfer of Property Act, 1882 which read thus: "17(1)(c) Documents of which registration is compulsory.-

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(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest."

"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgaged" defined.

..... (f) Mortgage by deposit of title-deeds.- 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 intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

59. Mortgage when to be by assurance.- 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 a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property."

Though in terms of Section 17(1)(c) of the Registration Act a mortgage needs to be registered, in view of Section 59 of the Transfer of Property Act a mortgage by deposit of title deeds does not require registration. In order to create a mortgage by deposit of title deeds, all that is necessary is a mere handing over of title deeds with the intend to create mortgage over the property. No formal document is necessary. It is the practice that often a memorandum/letter of acknowledgment of creation of mortgage or a letter of acknowledgment of deposit/handing over of title deeds is obtained from the mortgagor. The purpose behind the execution of such a document is to acknowledge the fact that the title

deed/s referred to therein relating to the particular property has been deposited/handed over by the party to the creditor with intend to create a mortgage. Mortgage is created by the deposit of the title deed and not under the memorandum or letter of acknowledgment. Ext.A9 is such a document. The court below, relying on the decision in *Hubert Peyoli v. Santhavilasath Kesavan Sivadasan* (1998 (2) KLT 125) has held that since Ext.A5 memorandum of deposit of title deeds is executed on the very same day of deposit of title deeds, the document requires to be registered. In the said decision, it is held thus: "...when the memorandum or letter was executed on the date of the deposit or delivery of the title deeds, that needs registration. And after the delivery of the title deed, any letter or memorandum was executed endorsing the earlier deposit of title which already created a mortgage that letter needs no registration. In the instant case before me, it is quite clear that Ext.A2 was executed on the same date on which the document was delivered....."

Going by the said judgment, to determine whether the memorandum or letter acknowledging the mortgage is to be registered or not, what is relevant is the point in time when the memorandum/letter was executed. If it is executed on the very date of deposit of title deeds, the document requires registration and if not, it is not registrable.

9. In our opinion, there is no warrant for such a conclusion. A memorandum or letter merely acknowledging the deposit of title deed, by itself, does not create a mortgage. If any terms and conditions relating to the mortgage are incorporated therein, then the position would be different. If the document merely refers to the handing over of the title deeds or acknowledges that title deeds are deposited with the creditor, without inclusion of any further term or condition, it is not a document that requires registration. The mortgage is created by the mere handing over of the title deeds as security. No registered instrument is necessary for the said purpose. However, if a memorandum evidencing the terms and conditions with regard to deposit is executed, then it shall require registration in terms of Section 17(1)(c) of the Registration Act. In other words, it is not the time of execution of the memorandum/letter of acknowledgment that is decisive but whether the memorandum or the letter incorporates any term or condition, is the benchmark. If the memorandum is prepared merely to confirm/acknowledge the deposit of title deeds, registration is not required irrespective of the point of time at which it is executed. However, if the memorandum creates rights and liabilities, the same requires registration. The legal position has been laid down by the Apex Court in *State of Haryana and Others v. State of Punjab and Others* (supra) thus: "...The essence of a mortgage by deposit of title deeds is the handing over, by a borrower to the creditor, the title deeds of immovable property with the intention that those documents shall constitute security, enabling the creditor to recover the money lent. After the deposit of the title deeds the creditor and borrower may record the transaction in a memorandum but such a memorandum would not be an instrument of mortgage. A memorandum reducing other terms and conditions with regard to the deposit in

the form of a document, however, shall require registration under Section 17(1) (c) of the Registration Act, but in a case in which such a document does not incorporate any term and condition, it is merely evidential and does not require registration."

Therein the Apex Court has referred to the decision in *Rachpal Madraj v. Bhagwandas Daruka* (AIR 1950 SC 272) wherein it has been held thus:

".....The time factor is not decisive. The document may be handed over to the creditor along with the title deeds and yet may not be registrable."

The Apex Court in *State of Haryana and Others v. State of Punjab and Others* (supra) further proceeded to hold thus:

"... the parties may choose to have a memorandum prepared only showing deposit of the title deeds. In such a case also registration is not required. But in a case in which the memorandum recorded in writing creates rights, liabilities or extinguishes those, the same requires registration."

As is evident therefrom, the point in time at which a memorandum or letter acknowledging deposit of title deeds was executed whether it is contemporaneous or simultaneous with the deposit of title deeds, or on any subsequent day, is not the relevant criterion in deciding whether the document requires registration or not. The touchstone is as to whether the document incorporates any term or condition of the bargain.

10. In *Rachpal Madraj v. Bhagwandas Daruka* (supra) the reason why such a memorandum or letter incorporating the terms of the contract requires to be registered has been explained thus: ".....when the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required under Section 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication 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. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under Section 17 of the Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards...."

11. In view of the above, we hold that the decision in *Hubert Peyoli v. Santhavilasath Kesavan Sivadasan* (1998 [2] KLT 125) does not lay down the correct law. Exhibit A9 letter merely acknowledges the factum of handing over of the title deeds for the creation of the mortgage and does not require registration. The finding to the contrary is not correct and is liable to be interfered with. The

mortgage created in respect of the plaint schedule property is upheld.

12. We find that the court below has awarded interest at the rate of 18% per annum from the date of suit till date of recovery which is apparently excessive. Considering the fact that the claim is of the year 1990 and looking into the interest component and the principal, adopting the principle laid down by the Apex Court in Central Bank of India v Ravindra and Others ([2002] 1 SCC 367) we feel that grant of interest at the rate of 6% is just and reasonable. Accordingly, we re-fix the rate of interest at 6%. In the result, the appeal is allowed. The judgment and decree passed by the court below are set aside. The appellant-plaintiff is granted a decree for realisation of Rs.2,43,849/- with interest at the rate of 6% per annum from the date of suit till recovery and also the costs, by sale of the plaint schedule mortgaged property and also from defendants 1 and 2 jointly and severally.