

(2017) 07 KL CK 0033
In the High Court Of Kerala
Case No : 431 of 1994

T.S. ARUMUGHAN, S/O.THAYYIL SANKARAN, & ORS.	APPELLANT
Vs	
K. MADHUSUDHANAN NAIR, & ORS.	RESPONDENT

Date of Decision : 05-07-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 41 Rule 27](#) -
[Evidence Act, 1872](#), [Section 114](#) - Court may presume existence of certain facts

Citation : (2017) 07 KL CK 0033

Hon'ble Judges : V.Chitambaresh, Sathish Ninan

Bench : DIVISION BENCH

Advocate : ROY THOMAS (MUVATTUPUZHA), AKHILA K.NAMBIAR

Final Decision : Allowed

Judgement

1. This appeal and Cross Objection are by the defendants and plaintiff respectively, in a suit for recovery of money.
2. M/s M.V.Subramania Iyer and Sons, Bankers and M/s Narsimha Financing Company belonged to one M.V.Subramanian. In I.P. Nos.3 and 4 of 1976 of the Sub Court, Palakkad, M.V.Subramanian was adjudicated as an insolvent. The Plaintiff is the Official Receiver appointed in the insolvency petition. According to the plaintiff, the defendants had availed various loans from M.V.Subramania Iyer and Sons, Bankers on execution of Promissory Notes marked as Exts.A1, A4, A6, A8, A9 and A11 in the suit. There had been partial repayments. On giving credit to the same, the suit is filed for realisation of the balance amount of Rs.7,80,467/-. The 1st defendant had created equitable mortgage of the plaintiff's schedule property belonging to him by deposit of title deed namely Settlement Deed No.3184 of 1964, to secure the debts. The suit is filed on obtaining permission from the insolvency court to sue on behalf of the estate of the insolvent.

3. The 1st defendant alone contested the suit. He denied the alleged transactions, execution of promissory notes and also the creation of equitable mortgage. According to him, the defendants had transactions with Narasimha Financing Company which were duly repaid. The documents in connection with the same have been misused to stake the present claim. It is also contended that the plaint claim is barred by limitation.

4. The court below found that all the promissory notes except Ext.A11 is supported by consideration. As regards Ext.A11 promissory note, it was found that the corresponding entry relating to the transaction was not found in the account books, viz., Exts.A2, A3, A5, A7 and A10. It was found that the 1st defendant had created equitable mortgage by deposit of title deeds. Though personal decree was found to be barred by limitation, a decree was granted on the mortgage. It is under challenge in the appeal, by the defendants. The plaintiff has filed a Cross Objection as regards the denial of personal decree and decree on Ext.A11 promissory note.

5. Heard the learned counsel on either sides.

6. As regards the execution of the promissory notes in question, in the written statement filed by the defendants they denied the execution and also the receipt of consideration. However, when the 1st defendant was examined as DW1, the execution of the promissory notes were admitted. He chose to put forward a defence to the effect that the said promissory notes were executed in order to make some "adjustments". What exactly was the nature and mode of adjustments and in respect of which transaction the said adjustments relate to, etc., are not pleaded or brought out. As pointed out, the said case is at variance from the one set up in the written statement. As noticed by the court below, all the transactions, except Ext.A11, are corroborated by corresponding entries in the loan ledger and cash books produced as Exts.A2, A3, A5, A5 and A10. We do not find any material to persuade us to differ from the finding entered by the court below regarding the execution of the promissory notes and as supported by consideration.

7. The main argument put forward by the learned counsel for the appellants is challenging the finding regarding creation of equitable mortgage. Exhibit A13 is the document of title, in original, in respect of the property over which mortgage is claimed to have been created. Exhibit A12 is a letter by the 1st defendant, confirming the deposit of Ext.A13 title deed. The genuineness of Ext A12 is challenged by the defendants. As regards the production of the original title deed by the plaintiff, the explanation offered in the written statement is that with respect to the transactions he had with Narasimha Financing Company he had created Ext.B1 registered mortgage and as "subsidiary document" the original title deed Ext.A13 was also given. According to him, the transaction was closed and Ext.B2 Ozhimuri (release) was executed in favour of the 1st defendant. However the original title deed Ext.A13 was not returned and a false claim of mortgage is foisted, is the contention. We find that the said contention is bereft

of bona fides. Exhibit B1, the registered mortgage deed recites that the plaint schedule property in the suit is under an equitable mortgage in favour of one Advocate K.M.Krishna Iyer which necessarily imply that the original title deed was with the said Adv.Krishna Iyer/the mortgagee, and not with the 1st defendant at that point of time. Therefore, the case set up by the 1st defendant that the original of the title deed, viz., Ext.A13, was handed over by him at the time of creation of Ext.B1 mortgage, is found to be unacceptable. So also, the 1st defendant as DW1 admitted that Ext.A12 memorandum acknowledging deposit of title deeds was executed by him as security for the debts due under the promissory notes. In the light of the said admission, the argument of the learned counsel challenging the genuineness of Ext.A12 is also liable to be turned down. Therefore, the very case of the 1st defendant regarding the mortgage fails.

8. Learned counsel for the appellants referring to the decision of the Apex Court in K.J. Nathan v. S.V. Maruthi Rao and Others (1965 KHC 508 = AIR 1965 430) would argue that there is no evidence to prove that the deposit of title deeds, if any, was with the intend to create an equitable mortgage, intention being the crucial element for creation of mortgage by deposit of title deeds. It was contended that mere possession of title deed by the creditor is not sufficient to infer the intention on the part of the debtor to create equitable mortgage.

9. It admits of no doubt that to create a valid mortgage by deposit of title deeds, the deposit must be with the intent to create a mortgage. As has been observed by the Apex Court in K.J. Nathan v. S.V. Maruthi Rao and Others (supra), the requisites for a mortgage by deposit of title deeds are: (1) debt; (2) deposit of title deeds and (3) intention to create security for the debt. Here the six promissory notes in question ranges for the period from 25.02.1972 to 12.06.1974. The creation of the equitable mortgage by deposit of title deeds is claimed to be on 23.11.1976 which is subsequent to the accrual of the debt. When during the subsistence of a debt, a debtor hands over the title deeds of his property to the creditor, in the normal course of events and human conduct a presumption would arise that the title deed was handed over as security for the debt. Here it would be relevant to refer to Section 114 of the Indian Evidence Act which runs thus:

"14. Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

During the subsistence of a debt if the debtor hands over his title deeds to the creditor then an initial presumption could be drawn that the title deed was handed over to secure the debt. In the backdrop of the subsisting debt, it could be considered to be a normal course of human conduct. Section 114 of the Evidence Act empowers the court to presume the existence of any fact which it thinks likely to have happened. Of course, it is a mere presumption of fact and it is always open for the debtor to show otherwise. But until the contrary is shown,

it could be presumed that the handing over of the title deed was with intend to create security over the same for the subsisting debt. The true purport, spirit and import of a "presumption", has been lucidly explained by the Apex Court in *Sodhi Transport Co. v. State of U.P.* ([1986] 2 SCC 486) thus:

"A presumption is not in itself evidence but only makes a prima facie case for a party in whose favour it exists. It is a rule concerning evidence. It indicates the person on whom the burden of proof lies. When presumption is conclusive, it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. Then the evidence will determine the true nature of the fact to be established. The rules of presumption are deducted from enlightened human knowledge and experience and are drawn from the connection, relation and coincide of facts, and circumstances."

In this case, apart from the presumption, the deposit of title deed is confirmed by Ext.A12 memorandum, the execution of which, as referred to supra, has been admitted by DW1. The intention to create mortgage of the property in question is clearly spelt out in Ext.A12. In view of the above, we uphold the finding of the court below regarding creation of the mortgage.

10. During the course of hearing, the appellants produced certified copy of correction deed No.1794 of 1974 and encumbrance certificate No.1038 of 2017 along with I.A. No.1222 of 2017 seeking acceptance of the same as additional evidence under Order XLI, Rule 27 of the Code of Civil Procedure. The affidavit filed in support of the application does not specifically state about the compliance of the requirements under Rule 27 to enable the appellants to produce additional evidence in appeal. However, to satisfy our conscience we have gone through the documents produced along with the application. Under the rectification deed, the sub-division of the survey number of the property is sought to be corrected as 4 in the place of 3 and 5. By the correction of the survey number, the identity of the property is not changed. The four boundaries of the property along with other descriptions remain the same. Even otherwise, there is no dispute with regard to identity of the mortgaged property. The encumbrance certificate only confirms the existence of the rectification deed. These documents do not advance the case of the appellants. The production of additional documents does not have any bearing on the final outcome of the case. Therefore, I.A. No.1222 of 2017 is dismissed.

11. As regards the Cross Objection filed by the plaintiff, as rightly found by the court below, the account books of the concern does not reveal the transaction regarding Ext.A11 promissory note whereas all the other transactions are reflected therein. We do not find any reason to interfere with the said finding. When the relevant account books are produced and the same contains all the

transactions except the one relating to Ext.A11 and no specific explanation has been put forward regarding the conspicuous absence of that particular transaction, there is no reason why the plaintiff should be granted a decree on the said promissory note. In the Cross Objection the plaintiff also challenges the finding of limitation as regards personal decree sought for. It is not sought to be demonstrated before us as to how the claim on the promissory notes which are apparently time barred could be saved from the clutches of limitation. Therefore, the Cross Objection deserves to be dismissed.

12. We find that the court below has granted interest at the rate of 12% per annum from the date of suit till realisation which is excessive considering the interest component that would accrue, the suit being one of the year 1984. We feel that grant of interest at 6% per annum from the date of suit till realisation is just and proper in the facts and circumstances of the case. Accordingly the appeal is allowed in part. The rate of interest payable is re-fixed at 6% per annum from the date of suit till realisation. In all other respects, the judgment and decree of the court below will stand confirmed. The Cross Objection is dismissed.

No costs.