

Balan Vs. Devaki R. Nayar

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Court : Kerala

Decided On : Dec-22-2009

Reported in : 2010(1)KLT603

Judge : K.M. Joseph and; M.L. Joseph Francis, JJ.

Acts : [Transfer of Property Act, 1882](#) - Section 58; ;Evidence Act - Section 114; ;Punjab Relief and Indebtedness Act, 1934 - Section 5; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Section 34

Appeal No. : A.S. No. 339 of 1997

Appellant : Balan

Respondent : Devaki R. Nayar

Advocate for Def. : Dinesh R. Shenoy,; V.P.K. Panicker,; K.N. Narayana Pilla

Advocate for Pet/Ap. : O. Ramachandran Nambiar and; V. Jayaprakash, Advs.

Disposition : Appeal dismissed

Judgement :

K.M. Joseph, J.

1. Appellants are the defendants in a Suit for realisation of money. The Suit stands decreed in a sum of Rs. 6,12,803.75 and interest on the principal amount of Rs.

5,59,000/- at the rate of 11 per cent from the date of Suit till recovery and the second plaintiff was allowed to recover from the plaint schedule property charged on them by sale of them for a sum of Rs. 87,700/- and interest on the principal amount of Rs. 80,000/- at the rate of 11 per cent from the date of Suit till recovery and the third plaintiff was allowed to recover from the plaint schedule property charged on them and by sale of them for a sum of Rs. 27,406.25 and interest on the principal amount of Rs. 25,000/- at the rate of 11 per cent from the date of Suit till recovery and the plaintiffs were further allowed to recover personally from the first defendant the plaint amount with future interest at 11 per cent from the date of suit till the date of realisation.

2. The first plaintiff (since died) was the mother of one late M. Ramachandran Nair. The second plaintiff was the wife of late M. Ramachandran Nair and the third plaintiff was the daughter of M. Ramachandran Nair. It is their case that late M. Ramachandran Nair and plaintiffs 2 and 3 had plenty of money. The first appellant was running a money lending business. The first defendant and late M. Ramachandran Nair were acquainted with each other and on the said basis, the first defendant became acquainted with plaintiffs 2 and 3 also. The first appellant approached late M. Ramachandran Nair and second and third plaintiffs for loans to develop his business of money lending. They loaned Rs. 40,000/-, Rs. 45,000/- and Rs. 15,000/- respectively on 17.4.1983. Apart from promissory notes, the first appellant deposited the original title deeds of the properties. Subsequently, it is not in dispute, from 3.4.1986 till 7.10.1989, the first appellant borrowed various sums from late M. Ramachandran Nair and plaintiffs 2 and 3. According to the plaintiffs, it was orally agreed between the parties that the title deeds deposited with late M. Ramachandran Nair and second and third plaintiffs would be retained by them as evidence of equitable mortgage on the schedule properties and no separate memorandum would be taken on each occasion. Since there was no repayment of the loans taken from 3.4.1986 to 7.10.1989, the suit came to be filed for recovery of the unpaid amounts by sale of the mortgaged properties.

3. The appellants, inter alia, set up the plea of limitation. It was further contended that there was no mortgage. The Trial Court found that the Suit is not barred on the basis that there was valid mortgage created by deposit of title deeds and

decreed the Suit as aforesaid.

4. We heard Shri O. Ramachandran Nambiar, learned Counsel for the appellants as also Shri T.S. Harikumar, learned Counsel appearing for the respondents 1 and 2.

5. Shri O. Ramachandran Nambiar, learned Counsel for the appellants would contend that the Trial Court has erred in not finding that there was no mortgage by deposit of title deeds. He would contend that the Suit was barred except in respect of a few transactions. There is no dispute that the title deeds of the properties which had been deposited with late M. Ramachandran Nair and plaintiffs 2 and 3, when the loan amounting to Rs. 1 Lakh was taken, continued to remain with them. He would point out that the court below overlooked the fact that admittedly the said amount was repaid by the first defendant in the year 1986 and the Suit was laid for recovery of the amounts which were taken as loans by the first appellant from 3.4.1986 onwards till 7.10.1989. He posed the question as to how it could be found that there was a mortgage by deposit of title deeds in respect of the loans availed from 3.4.1986 till 7.10.1989. He would submit that the mere possession of the documents of title with late M. Ramachandran Nair and plaintiffs 2 and 3 would not lead to the creation of a valid mortgage. He would submit that the documents must be deposited with the intention of creating a security. He would further contend that the Trial Court has erred in relying on the judgment of the Delhi High Court in *Sh. Ishar Dass Malhotra v. Sh. Dhanwant Singh and Ors.* : AIR 1985 Del. 83. According to him, the decision was rendered in the facts of the case which are distinguishable. He relied on the judgment of a Division Bench of the Calcutta High Court in *Bejoy Ranjan Das v. Ajit Kumar Dutta* : AIR 1974 Cal. 319 for the proposition that the intention to create security by deposit of title deeds is a question of fact, and not of law. He took us through the deposition of PW1 who is none other than the third plaintiff, to buttress his argument that the plaintiffs could not press for the decree on the strength of a mortgage. Shri O. Ramachandran Nambiar would further contend that the Trial Court has erred in decreeing interest at 11 per cent. According to him, the transaction in question could not be characterised as a commercial transaction and hence under Section 34 of the CPC, the court could have granted only at six per cent from the date of the decree,

if at all, till the date of realisation.

6. Per contra, learned Counsel for the respondent/plaintiffs would contend that it is pertinent to note that the documents of title have not been returned. According to him, under Section 58 of the Transfer of Property Act, there was indeed a mortgage by deposit of title deeds. He would further point out that the promissory notes have been executed agreeing to repay the amounts with interest at 11 per cent and according to him, it is a commercial transaction and the decree is only to be supported.

7. The first appellant was having financial dealings with late M. Ramachandran Nair and plaintiffs 2 and 3. The materials on record would show that the appellant borrowed various sums from them in a total sum of Rs. 1 Lakh on 17.4.1983. In connection with the same, Exts.A1 and A2 documents of title of the properties belonging to the first appellant came to be deposited with them. It is not in dispute that the amount which was borrowed came to be repaid by the first appellant some time in 1986. It is also not in dispute that the appellant borrowed various sums from them beginning with 3.4.1986 and culminating with the last loan on 7.10.1989. There is no serious dispute that the appellant has not repaid the said sums. It is also not in dispute that the appellant has executed promissory notes. It is further admitted case that the documents of title were not returned to the appellant, upon the discharge of the first debt in the year 1986. On the contrary, the documents of title continued to remain with the creditors and they have been produced and marked and proved as Exts.A1 and A2. The main question to be considered is whether a mortgage by deposit of title deeds had been created ?

8. A 'Mortgage' is defined in Section 58(a) of the Transfer of Property Act as follows:

58.(a): A 'mortgage' is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary-liability.

A mortgage of immovable property is a transfer of an interest in immovable property. The [Transfer of Property Act, 1882](#) contemplates various types of mortgages. The distinction in the various categories of mortgages is marked by the nature of the interest that is transferred and the reliefs that are available to the parties under the particular type of mortgages. In *K.J. Nathan v. S.V. Maruthi Rao and Ors.* : AIR 1965 SC 430, the Apex Court held as follows:

Under the Transfer of Property Act, a mortgage by deposit of title deeds in one of the forms of mortgages whereunder there is a transfer of interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan. Such a mortgage of property takes effect against a mortgage deed subsequently executed and registered in respect of the same property. The three requisites for such a mortgage are (i) debt; (ii) deposit of title deed; (iii) an intention that the deeds shall be security for the debt. Whether there is an intention that the deeds shall be security for the debt is a question of fact in each case. The said fact will have to be decided just like any other fact on presumptions and on oral, documentary or circumstantial evidence. Though there is no presumption of law that the mere deposit of title deeds constitutes a mortgage, a Court may presume under Section 114 of the Evidence Act that under certain circumstances a loan and a deposit of title deeds constitute a mortgage. But, that is really an inference as to the existence of one fact from the existence of some other fact or facts. Nor, the fact that at the time the title deeds were deposited, there was an intention to execute a mortgage deed in itself negatives, or is inconsistent with, the intention to create a mortgage by deposit of title deeds to be in force till the mortgage deed was executed. The decisions of English Courts making a distinction between the debt preceding the deposit and that following it can at best be only a guide; but, the said distinction itself cannot be considered to be a rule of law for application under all circumstances. Physical delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be a constructive deposit. A Court will have to ascertain in each case whether in substance there is a delivery of title deeds by the debtor to the creditor. If the creditor was already in possession of the title deeds, it would be hyper-technical to insist upon the formality of the creditor delivering the title deeds to the debtor and the debtor re-delivering them to the creditor. What would be necessary

in those circumstances, is whether the parties agreed to treat the documents in the possession of the creditor or his agent as delivery to him for the purpose of the transaction.

The Apex Court referred to Fisher in his Book on 'The Law of mortgage' (2nd edition at Page 32), wherein the Author stated as follows:

The intent to create such a security may be established by written documents alone or coupled with parol evidence; by parol evidence only that the deposit was made by way of security; or by the mere inference of an agreement drawn from the very fact of the deposit.

The Apex Court, in fact, took the view that there is an essential distinction between an equitable mortgage and a mortgage by deposit of title deeds recognised under the Transfer of Property Act in India and held as follows;

Though such a mortgage is often described as an equitable mortgage, there is an essential distinction between an equitable mortgage as understood in English law and the mortgage by deposit of title deeds recognised under the Transfer of Property Act in India. In England, an equitable mortgage can be created either, (1) by actual deposit of title deeds, in which case parol evidence is admissible to show the meaning of the deposit and the extent of the security created, or (2) if there be no deposit of title deeds, then by a memorandum in writing, purporting to create a security for money advanced: See White and Tudor's Leading Cases in Equity, 9th edition, Vol. 2 at p.77. In either case, it does not operate as an actual conveyance though it is enforceable in equity, whereas under the Transfer of Property Act, a mortgage by deposit of title deeds is one of the modes of creating a legal mortgage whereunder there will be transfer of interest in the property mortgaged to the mortgagee. This distinction will have to be borne in mind in appreciating the scope of the English decisions cited at the Bar. This distinction is also the basis for the view that for the purpose of priority it stood on the same footing as a mortgage by deed.

In *Sh. Ishar Dass Malhotra v. Sh. Dhanwant Singh and Ors.* : AIR 1985 Del. 83 on which the Trial Court has relied on, the Delhi High Court held as follows:

13. It is nobody's case that the documents, receipt Ext.P6 receipt Ext.P8 and letter Ext.P 12 required registration. The fact remains that the title deeds were with Malhotra. He has stated that when further loans were raised, the same were done on the security of these documents of title. Admittedly, it is not necessary that a memorandum in writing should pass while creating a mortgage by deposit of title deeds. Three things are requisite for such a mortgage: (1) debt, (2) deposit of title deeds, and (3) an intention that deeds shall be security for the debt. In K.J. Nathan's case : AIR 1965 SC 430 (supra), the Supreme Court has held that physical delivery of document by the debtor to the creditor is not the only mode of deposit. There may be a constructive deposit. The court will have to ascertain in each case whether in substance there is delivery of title deeds by the debtor to the creditor. If the creditor was already in possession of the title deeds, it would be hypertechnical to insist upon the formality of the creditor delivering the title deeds to the debtor, and the debtor delivering them back to the creditor. When the loan of Rs. 4,500/- was taken by Dhanwant Singh on 20.5.1967 a consolidated pronote of the previous loan of Rs. 8,500/- and the present loan of Rs. 4,500/- was executed. Similarly, when further loan of Rs. 3,000/- was taken on 4.5.1971, another consolidated pronote of Rs. 16,000/- was written by Dhanwant Singh in favour of Malhotra. The receipt dated 4.5.1971 refers to a sum of Rs. 13,000/- on account of 'equitable mortgage' created on 20.5.1967 for Rs. 13000/-. This receipt is for a total amount of Rs. 16,000/-. The letter Dt. 16.5.1970 also refers to the 'equitable mortgage' of 20.5.1967 for Rs. 13,000/-. Malhotra has said in his statement that the subsequent amounts were advanced on the security of the title deeds already lying with him, and since he has not been cross-examined on this point, his statement has to be believed, and it has to be held that there was a mortgage by deposit of title deeds for a sum of Rs. 7,500/- (comprising the two subsequent loans of Rs. 4,500/- and Rs. 3,000/-) in respect of property No. J-7/24 Rajouri Garden, New Delhi. It follows, therefore, also that Malhotra is entitled to interest at the rate of 7-1/2%
per annum on this amount of Rs. 7,500/- as was agreed to between him and Dhanwant Singh. This rate of interest is permissible under Section 5 of the Punjab Relief and Indebtedness Act, 1934, as extended to Delhi. The first loan of Rs. 8,500/- was advanced on 18.5.1966 when document Ex.P2 was stated to have been executed. In the documents, Exs.P6, P8 and P12, there

is no reference to any 'equitable mortgage' of 18.5.1966. Since document Ex.P2 has been held to be inadmissible in evidence, the judgment of the Trial Court decreeing the suit of Malhotra to the extent of Rs. 8,500/- with interest against Dhanwant Singh has to be affirmed, though on a different ground. Now, since the principal amount of Rs. 16,000/- has been held to consist of two distinct transactions of Rs. 8,500/- (Ex.PI) and Rs. 7,500/- (Exs.P6 and P8), it appears fair that the claim of interest of Rs. 1,500/- in the suit is split up into two respective amounts of Rs. 800/- and Rs. 700/-. Thus, for the amount of Rs. 9,300/- (Rs. 8,500/- + Rs. 800/-), there is no mortgage, and only the amount of Rs. 8,200/- (Rs. 7,500/- + Rs. 700/-) is secured by mortgage of property stated above.

9. It is now necessary to examine the testimony of the third plaintiff as PW1. She has, inter alia, stated as follows:

When the various amounts amounting to Rs. 1 Lakh was given to the first appellant, he had deposited the original title deeds of his properties. It was for creating an equitable mortgage that the first appellant entrusted them with the original documents. She further states that the documents were entrusted to create an equitable mortgage by way of collateral security in respect of the loan given on 17.4.1983 and also for the amounts to be given as loans subsequently. She further states that the first defendant had stated that title deeds should be considered as collateral security for the amounts given on each time. It is further stated that no Memorandum was executed each time. She denies the case that an equitable mortgage was not created by the first appellant. She denies the contention of the first appellant that an unregistered mortgage was prepared. She further says that it is not correct to say that the title deeds were not given as pleaded in the plaint. In Cross Examination, she would state that on 17.4.1983, she was present when her father gave money to the first appellant and also to her knowledge, that a Memorandum had not been prepared. On 17.4.1983, no paper has been executed to her knowledge. She states that a promissory note had been prepared on that date. It is also stated by the first defendant as follows:

She further states that then itself the first defendant gave Exts.A1 and A2 title deeds as security, her father had the ability to decide that Exts.A1 and A2 will be

sufficient security. She does not know whether it was shown to any Lawyer. To her knowledge, it was not shown. She says that she was not able to definitely say that the amounts given as per Exts.A3 to A14 Pronotes were given after the discharge of the liability incurred on 17.4.1983. She admits the statement in para.6 of the plaint that it was after the closing of the transactions of 17.4.1983 that the further transactions were entered into. She states that to her knowledge, when the amount was loaned as per Ext. A3 promissory note, there was no other amount due from the first appellant. She states that Exts.A1 and A2 were not given back as further amounts may be demanded. Exts.A1 and A2 documents given on 17.4.1983 were not given back to the first defendant. A question was put to PW3 as follows: Did the first defendant subsequently re-entrust Exts.A1 and A2 She answers by saying that it was in their possession.

She says that her late father must have believed that a valid mortgage could be created by the giving of the title deeds only by the first defendant. There was discussion about it in her presence. She does not remember what all were discussed. She says that going by the account which her father had written, she cannot understand whether the loans were given on the strength of the properties or as simple loan. She says that there are no documents apart from Exts.A1 and A2 to show that the loans were given on the strength of the security of the properties. She says that there is no other document apart from Exts.A1 and A2 to prove creation of equitable mortgage. She says that her understanding was that when Exts.A1 and A2 were given, equitable mortgage is created. The equitable mortgage was given not for Rs. 1 Lakh, but for amounts given without quantification, on 17.4.1983. She says that she does not remember when the three loans taken on 17.4.1983 were discharged. She further says that she understood that when Exts.A1 and A2 documents were given along with the Promissory Notes, equitable mortgage was created. It was in 1986 that the first defendant told her that there will be equitable mortgage for the amounts taken in future.

10. As held by the Apex Court that the three requisites for a mortgage are:

(i) Debt;

(ii) Deposit of title deeds, &

(iii) An intention that the deeds will be security for the debt.

It is also well settled that the question of intention that the deeds shall be security for the debt, is a question of fact in each case. As held by the Apex Court, when the creditor is already in possession of the title deeds, it will be hypertechnical to hold that to create a mortgage by deposit of title deeds, the creditor has to give back the title deeds to the debtor and the debtor has to again deposit the same with the creditor in respect of subsequent loans. Clearly, the principle of constructive deposit will apply. What is crucial is whether the parties agreed to treat the documents in the possession of the creditors as delivery to him for the transaction.

11. No doubt, PW1 would state that the documents were entrusted to create an equitable mortgage by security in respect of the loan given in 1983 and also to the amounts to be given as loans subsequently and she further stated that the first defendant has stated that the title deeds should be considered as collateral security for the amounts given on each time. When DW1 was subsequently recalled, in cross examination, she would state that it was in 1986 that the first defendant told her that there will be an equitable mortgage for the amounts taken in future. This latter statement of herself appears to be a contradiction. However, we take note of the following circumstances:

In this case, the first appellant contended that the mortgage by deposit of title deeds was in respect of Rs. 1 Lakh with interest only, and that the entire amount (Rs. 1 Lakh) with interest had been repaid. According to him, there is no mortgage to secure the subsequent loans. It is significant that after setting up such a case, the first defendant has not chosen to give any evidence in support of his claim. One fact which would stare at the face of the first appellant is that Exts.A1 and A2 documents continued to be in the custody of the creditors including the plaintiffs and what is more, there is no evidence that the appellant demanded back Exts.A1 and A2 even after having discharged the debt incurred under the three loans taken on 17.4.1983 aggregating Rs. 1 Lakh. If that is so, a question will naturally arise that if there is no understanding between the parties that continued retention of

Exts.A1 and A2 is enabled as a security, why the first appellant did not even demand back Exts.A1 and A2. We would think that the conduct of the appellant in not demanding possession of the documents and the admitted retention of Exts. A1 and A2 by the creditors and their production in the court by the plaintiffs, clearly buttresses the plaintiffs' case of there being a mortgage by deposit of title deeds to cover the loans taken by the first appellant apart from Rs. 1 Lakh, taken on 17.4.1983. We are reinforced in our opinion, by the conduct of the first appellant in not coming forward to offer evidence in support of his case. It is to be noted that the first appellant has a definite case that documents were obtained from the custody for the purpose of satisfying that the first appellant was having sufficient property and to establish his solvency and credit-worthiness.

12. The debts are not in dispute. There was a deposit made of Exts.A1 and A2 by the first appellant, even according to him, to secure the loan of Rs. 1 Lakh. All that remains, is the question of intention of the parties. The question of intention has to be proved on the basis of the facts and circumstances of each case. In the circumstances of this case, we are of the view that the parties contemplated that there be a mortgage by deposit of title deeds in respect of all amounts which were advanced to the first appellant by the creditors. In that view of the matter, we uphold the finding of the Trial Court that there was mortgage by deposit of title deeds to cover the entire transactions, and that the Suit is not barred by limitation.

13. The further question which is contended, is as regards the rate of interest. The court below has awarded 11 per cent interest. Learned Counsel for the appellants would point out that it is not a commercial transaction, as they were personal loans. Learned Counsel for the respondents would point out that the rate of interest is stipulated in the Promissory Notes executed by the first appellant and the court below has only awarded interest at the agreed rate. Learned Counsel for the appellants would point out that interest can be only at the rate of 6 per cent under Section 34 of the C.P.C., there being no commercial transaction in the matter. Section 34 of the C.P.C. undoubtedly provides that the court cannot award interest at the rate higher than 6 per cent from the date of decree till the date of realisation, unless the transaction is a commercial transaction. In this context, it is necessary to refer to the Explanation to Section 34 C.P.C. which defines

'commercial transaction'. It reads as follows:

34. Interest:

Explanation II: For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.

Thus, going by the definition, the question as to whether it was a commercial transaction may have to be decided on the basis of the connection of the transaction with the industry, trade or business of the person who incurred the liability. In this case, it is not in dispute that the first appellant had availed loans for the purpose of his money lending business. If that is so, it is he who had incurred the liability within the meaning of the Explanation. If that be so, quite clearly, the transaction has to be treated as a commercial transaction. Thus, there is no merit in the contention that the rate of interest cannot exceed six per cent and we reject the contention. We confirm the Judgment and Decree of the Trial Court and dismiss the Appeal. There will be no order as to costs.

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