

Balammal Vs. Murugan

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Court : Chennai

Decided On : Dec-21-2011

Judge : M.Venugopal, J.

Acts : Evidence Act - Section 114; Code of Civil Procedure (CPC) - Order 8 Rule 5; Stamp Act; Indian Registration Act

Appeal No. : S.A.(MD)No.896 of 2007 and M.P.(MD)No.2 of 2007

Appellant : Balammal

Respondent : Murugan

Advocate for Def. : Mr.R.T.Arivukumar, Adv.

Advocate for Pet/Ap. : Mr.V.Meenakshisundaram, Adv.

Judgement :

The Appellant/Plaintiff has filed the present Second Appeal as against the Judgment and Decree dated 29.11.2006 in A.S.No.43 of 2006 passed by the Learned Principal District Judge, Tirunelveli in affirming the Judgment and Decree dated 08.12.2005 in O.S.No.154 of 2004 passed by the Learned I Additional Subordinate Judge, Tirunelveli.

2. The First Appellate Court viz., the Learned Principal District Judge, Tirunelveli while passing the Judgment in A.S.No.43 of 2006 on 29.11.2006, has among other

things observed that 'Ex.A.1

unregistered mortgage deed dated 07.10.2002 is not a true document and on that basis, the Appellant/Plaintiff is not entitled to claim the reliefs as prayed for in the plaint and the said decision of the trial Court is an acceptable one and resultantly held that there is no reason to interfere with the Judgment of the trial Court and consequently upheld the Judgment and Decree passed by the trial Court as a lawful one. Finally, the Appeal has been dismissed without costs.

3. Earlier, before the trial Court in the main suit 1 to 4 issues have been framed for determination, at the time of trial of the case. On the side of the Appellant/Plaintiff, witnesses P.W.1 to P.W.3 have been examined and Ex.A.1 to A.6 have been marked. On the side of the Respondent/Defendant, witness D.W.1 has been examined and no exhibits were marked.

4. The trial Court on an appreciation of oral and documentary evidence available on record has come to a clear conclusion that execution of Ex.A.1 unregistered mortgage deed on 07.10.2002 has not been proved and consequently, dismissed the suit with costs.

5. At the time of admission of the Second Appeal, this Court has formulated the following Substantial Questions of Law for consideration. "1. Whether the Courts below are right in not granting the relief merely on the basis of the date referred to in the body of the document differs from the date but below the signature by the respondent after having found that the execution of Ex.A.1 is proved by the evidence of P.W.2 and P.W.3?

2. Whether the Courts below are right in not applying the principles of presumption under Section 114 of Evidence Act after having found the due execution of Ex.A.1 proved by the evidence of P.W.1 and P.W.2?

3. Whether the Courts below are right in giving a finding with reference to the date referred to under Ex.A.1 in the absence of any specific denial with reference to the pleadings as contemplated under Order 8 Rule 5 of C.P.C.?"

6. The Contentions, Discussions and Findings on Substantial Questions of Law (1) to (3):

According to the Learned Counsel for the Appellant/Plaintiff that the trial Court as well as the First Appellate Court have accepted Ex.A.1 unregistered mortgage dated 07.10.2002 as is true and valid one, but rejected the claim of the Appellant/Plaintiff on the ground that the date mentioned in the body of the document differs from the date put by the Respondent below his signature in the document.

(ii) It is the contention of the Learned Counsel for the Appellant/Plaintiff that both the Courts have ignored the date mentioned in the body of Ex.A.1 unregistered mortgage deed dated 07.10.2002 and this date could only be the one on which the transaction has taken place and therefore, the wrong date mentioned below the signature of the Respondent/Defendant cannot be accepted.

(iii) The Learned Counsel for the Appellant/Plaintiff projects an argument that from the recitals of Ex.A.1 unregistered mortgage deed dated 07.10.2002 clearly shows the date of which the transaction has been entered into between the Appellant/Plaintiff and the Respondent/Defendant.

(iv) Advancing his arguments, it is the contention of the Learned Counsel for the Appellant/Plaintiff is that even in Ex.A.3 notice dated 25.07.2004, the mistake has been referred to by the Appellant/Plaintiff, which has not been disputed in the reply notice Ex.A.5 dated 09.08.2004 sent by the Respondent/Defendant to the Appellant/Plaintiff.

(v) Expatiating his submissions, the Learned Counsel for the Appellant/Plaintiff contends that both the Courts have held that the Appellant/Plaintiff has proved the date of execution of Ex.A.1 unregistered mortgage deed as 07.10.2002 based on the evidence of P.W.2 and P.W.3. But, they erred in law by mentioning that no ordinary prudent man will permit the borrower to put up the different date in the absence of any other witness on the side of the Respondent/Defendant.

(vi) Apart from the above, the Learned Counsel for the Appellant submits that when once the execution of Ex.A.1 unregistered mortgage deed dated 07.10.2002, has been proved, then the presumption as per Section 114 of the Indian Evidence Act arises. However, the contra findings of both the Courts are not to be accepted.

(vii) Lastly, it is the submission of the Learned Counsel for the Appellant/Plaintiff that both the Courts have wrongly held that Ex.A.1 unregistered mortgage deed dated 07.10.2002 cannot be relied upon in regard to the transactions mentioned therein, without examining the scribe of the document and obviously they are overlooked the fact that the wife of the Respondent/Defendant is one of the attestors to Ex.A.1 unregistered mortgage deed dated 07.10.2002 has also made an endorsement to the receipt of consideration by the Respondent/Defendant.

(viii) Per contra, it is the contention of the Learned Counsel for the Respondent/Defendant that the trial Court as well as the First Appellate Court have looked into the entire oral and documentary evidence available on record and has come to a clear and categorical conclusion that the Appellant/Plaintiff has failed to establish the execution of suit Ex.A.1 unregistered mortgage deed dated 07.10.2002 by the Respondent/Defendant and rightly dismissed the suit as well as A.S.No.43 of 2006, which need not be interfered with by this Court at this distance point of time.

(ix) In the plaint, the Appellant/Plaintiff has averred that the Respondent/Defendant has borrowed a sum of Rs.75,000/- towards his family expenses to secure a job and for his sundry debts from him and agreed to repay the amount with interest at the rate of 2% per month. The Respondent/Defendant has acknowledged the said loan by executing an unregistered mortgage deed dated 07.10.2002 in respect of the schedule property, to and in favour of the Appellant/Plaintiff. The Respondent/Defendant signed in each page of the said unregistered mortgage deed.

(x) The stand of the Appellant/Plaintiff is that the Respondent/Defendant has written the date in Ex.A.1 unregistered mortgage deed dated 07.10.2002 carelessly as 10.10.2002 beneath his signature in page 2 of the said deed. The Respondent/Defendant's wife Poonkulali also signed as one of the attestors in the

aforesaid mortgage deed. The Respondent/Defendant has handed over his Manaivari patta to the Appellant/Plaintiff in respect of the suit schedule property as an additional security towards the loan. The Respondent/Defendant has evaded to repay the sum of Rs.75,000/- with agreed interest. The Respondent/Defendant is attempting to sell the suit schedule property to the third parties with a view to cheat the Appellant/Plaintiff. The Appellant/Plaintiff has issued Ex.A.3 legal notice dated 25.07.2004 calling upon the Respondent/Defendant to pay the sum of Rs.75,000/- with agreed rate of interest. The Respondent/Defendant has not sent any reply to Ex.A.3 notice issued by the Appellant/Plaintiff and further he has not paid the suit amount. The Respondent/Defendant is liable to pay as on date a sum of Rs.1,08,000/- (Principal sum of Rs.75,000/- and sum of Rs.33,000/- being the interest at 24% per annum from 07.10.2002 to 08.08.2004).

(xi) Therefore, the Appellant/Plaintiff has filed a suit against the Respondent/Defendant seeking a decree for payment of Rs.1,08,000/- to her with interest at the rate of 24% per annum from the date of plaint till date of payment on the principal sum of Rs.75,000/- and for costs.

(xii) In the written statement, the Respondent/Defendant has taken a plea of denying the borrowal of Rs.75,000/- to meet his family expenses etc., from the Appellant/Plaintiff from 07.10.2002 etc., and further, he has averred that it is false to state that he signed in each page of the unregistered mortgage deed.

(xiii) Continuing further, it is the stand of the Respondent/Defendant that in fact he borrowed a sum of Rs.10,000/- from Thangakaliswaran (the Appellant/Plaintiff's husband) during the month of March 2000 for purchasing sugar cane crushing machine with an exorbitant interest of 60% and he executed a Yadasth to that effect. Also, he borrowed a sum of Rs.5,000/- in August 2000 and executed a Yadasth. The rate of interest for the said amount is also 60% per annum. The Respondent/Defendant has not repaid the principal sum and interest from December 2000 and therefore, the Appellant/Plaintiff's husband obtained an undated promissory note for Rs.50,000/- on 22.05.2001. However, the rest of the contents have been left unfilled. Moreover, the Appellant/Plaintiff's husband asked the Respondent/Defendant and his wife to sign in an unfilled document for

Rs.75,000/- to and in favour of the Appellant/Plaintiff, since the Appellant/Plaintiff's husband has been serving as Security in the All India Radio, Tirunelveli.

(xiv) The Respondent/Defendant has learnt that the Appellant/Plaintiff and her husband have hatched a plan by filling up the promissory note to and in favour of the Appellant/Plaintiff's mother Pitchammal and also the Appellant/Plaintiff's husband has filled up the unfilled document as though the Respondent/Defendant has mortgaged the schedule property for the loan amount. Indeed, the Respondent/Defendant has never executed a mortgage deed as stated by the Appellant/Plaintiff. The loan amount is barred by limitation.

(xv) In the additional written statement, the Respondent/Defendant has stated that he knows only the husband of the Appellant/Plaintiff viz., Thanga Kaleeswaran and further he does not personally either the Appellant/Plaintiff or her mother Pitchammal. The Appellant/Plaintiff's husband has falsely created two documents one in favour of Pitchammal and another in favour of his wife viz., the Appellant/Plaintiff. These two documents have been created to extract money from the Respondent/Defendant, with a view to file the suit.

(xvi) The Appellant/Plaintiff's husband Thanga Kaleeswaran is a professional money lender, who has collected 60% interest every month from the Respondent/Defendant. The Respondent/Defendant has signed in Rs.20/- stamp paper only and that too in a blank stamp paper. He has not signed in the said document which is a fraudulent one.

(xvii) The unregistered mortgage deed dated 07.10.2002 (the suit document) has not been registered under the Indian Registration Act and therefore, it is not a valid document either under the Stamp Act or under the Indian Registration Act. As per unregistered mortgage deed dated 07.10.2002, possession of the suit property has been given to the Appellant/Plaintiff. Therefore, if possession is given to the Appellant/Plaintiff, she is not entitled to collect interest from the Respondent/Defendant.

(xviii) The evidence of P.W.1(the Appellant/Plaintiff) is to the effect that the Respondent/Defendant has received the suit sum and for Ex.A.1 loan as security

has given an approximate vacant site patta Ex.A.2 and Ex.A.3 is the lawyer's notice issued on her behalf to the Respondent/Defendant and after filing of the suit, Ex.A.5 is the reply notice has been given by the Respondent/Defendant.

(xix) P.W.1 in her evidence goes on to add that from the suit property, they won't get any income and it is not correct to state that they are in enjoyment of the suit property and as such, there are not entitled to claim interest. Added

further, it is the evidence of P.W.1 that Ex.A.1 document has been written in the Rs.20/- stamp paper, which has not been registered and the same has been written on 07.10.2002 and in Ex.A.1, it is seen that the Respondent/Defendant has signed on 10.10.2002 and at the time of affixing his signature, the Respondent/Plaintiff informed that he has by mistake carelessly put the date as 10.10.2002.

(xx) P.W.2 has deposed that he has gone to the house of the Appellant/Plaintiff along with the Respondent/Defendant and his wife and that the Respondent/Defendant from the Appellant/Plaintiff has received a loan of Rs.75,000/- at her residence and after receiving the loan, the Respondent/Defendant has executed Ex.A.1 document

and in Ex.A.1 document, the signature of the Respondent/Defendant as 'Murugan' is seen and in the said document as a first witness, the Respondent/Defendant's wife has signed and he has signed as a second witness.

(xxi) The evidence of P.W.2 is to the effect that the Respondent/Defendant has seen him and his wife signing as a first witness and he along with the Respondent/Defendant's wife has seen the Respondent/defendant putting his signature and Ex.A.2 patta has been given by the Respondent/Defendant to the Appellant/Plaintiff as a supportive document to Ex.A.1 document. That apart, P.W.2 in his cross examination has stated that he does not know as to what has been written in Ex.A.1 document and he knows to sign only and

slightly he cannot see and the words in the document are not seen by him and the Respondent/Defendant who received the money asked him to put a signature and

accordingly, he affixed his signature in Ex.A.1 document. Furthermore, the Respondent/Defendant has received the money, after writing his name 'S.Murugan', he affixed his signature.

(xxii) P.W.3 (the Appellant/Plaintiff's husband) in his evidence has deposed that his wife P.W.1 in his absence has given the money to the Respondent/Defendant after getting a document in her favour in a Rs.20/- stamp paper and he has not read the said document to know about its contents and also, his wife informed him that the Respondent/Defendant for the loan amount received

by him has executed a document on the date of receiving the money and also handed over the house patta to her.

(xxiii) It is the evidence of D.W.1 (the Respondent/Defendant) that it is not correct to state that he has received a loan amount of Rs.75,000/- from the Appellant/Plaintiff and executed Ex.A.1 deed and further, it is not correct to state that for Ex.A.1 document, as an additional document Ex.A.2 document has been handed over.

(xxiv) D.W.1 in his evidence has stated that there is no necessity to sign as 10.10.2002, if the document has come into existence on 07.10.2002 and further he has not executed any mortgage deed either on 07.10.2002 or 10.10.2002.

(xxv) Proceeding further, the evidence of D.W.1 is that at any point of time, he has not seen the Appellant/Plaintiff and he does not know the Appellant/Plaintiff and also not executed any kind of mortgage deed on 07.10.2002 and also that he has not brought the witnesses mentioned in the document filed by the Appellant/Plaintiff and further that he has not received any amount from the Appellant/Plaintiff.

(xxvi) A perusal of Ex.A.1 unregistered mortgage deed dated 07.10.2002 shows that the same has been executed by the Respondent/Defendant to and in favour of the Appellant/Plaintiff for a sum of Rs.75,000/-. In the first page of Ex.A.1 unregistered mortgage deed dated 07.10.2002, the Respondent/Defendant has signed. In the second

page of Ex.A.1 unregistered mortgage deed, the Respondent/Defendant has signed on 10.10.2002. After affixing his signature in the second page of Ex.A.1 unregistered mortgage deed dated 07.10.2002, the Respondent/Defendant has also written his name 'S.Murugan' in brackets. Ex.A.2 is the Manaivari approximate patta in Form No.4 issued by the Special Tahsildar (Natham Land Tax Scheme), Palayamkottai, in respect of new S.No.486-17 (Old S.No.168/gh) classified as Natham measuring 1.86.0 (land cite portion) measuring a total extent of 0.02.38.

(xxvii) In Ex.A.3 the Appellant/Plaintiff's lawyer's notice issued to the Respondent/Defendant, it is mentioned that the Respondent/Defendant has borrowed a sum of Rs.75,000/- for his family

expenses, searching a job and for his sundry debts from the Appellant/Plaintiff agreeing to repay the said amount with interest at the rate of 2% per month and also acknowledging the said loan, has executed an unregistered mortgage deed dated 07.10.2002 in respect of the schedule property and has also signed in each page of the unregistered mortgage deed. Further, in Ex.A.3 lawyer's notice, it is stated that the Respondent/Defendant has written a date carelessly as '10.10.2002' under his signature in page 2 of the said deed and his wife Poonkulali also signed as one of the attestor in the said document, etc.

(xxviii) The Appellant/Plaintiff in Ex.A.3 lawyer's notice dated 25.07.2004 has demanded a sum of Rs.75,000/- with interest at 2% per month from

the Respondent/Defendant from 07.10.2002 till date of repayment.

(xxix) In Ex.A.5 reply lawyer's notice of the Respondent/Defendant addressed to the Appellant/Plaintiff's lawyer, it is stated that the Respondent/Defendant has never borrowed any amount as mentioned in Ex.A.3 notice and further, the Respondent/Defendant has borrowed a sum of Rs.10,000/- from Thangakaleeswaran, who is the husband of the Appellant/Plaintiff in March 2000 for purchasing sugar cane crushing machine with an exorbitant interest of 60% and executed a Yadasth to that effect and further during August 2000, he again borrowed a sum of Rs.5,000/- and also executed a Yadasth. The interest for the

amount is 60% per annum. The reply notice Ex.A.5 dated

09.08.2004 also speaks to the effect that the Respondent/Defendant has not paid the principal amount and interest till December 2000. Therefore, the Appellant/Plaintiff's husband has obtained an undated promissory note for Rs.50,000/- on 22.05.2001. However, the rest of the contents have been left unfilled and that the Appellant/Plaintiff's husband asked the Respondent/Defendant and his wife to sign in an unfilled document for Rs.75,000/- in favour of the Appellant/Plaintiff, since her husband is working as a Security in All India Radio, Tirunelveli.

(xxx) The sum and substance of Ex.A.5 reply notice dated 09.08.2004 sent by the Respondent/Defendant's lawyer to the Appellant/Plaintiff's Counsel is that he never borrowed any amount from the Appellant/Plaintiff and as such there is no question of repayment.

(xxxi) The Learned Counsel for the Appellant/Plaintiff cites the decision of this Court Selvan V. Mohamad Gani reported in 2008(5) Current Tamil Nadu Cases at page 206, wherein it is held hereunder:

“As rightly contended by the learned Counsel for the petitioner, the Suit is merely one for recovery of money. It is not a Suit for foreclosure. Therefore the petitioner wanted to rely upon the document in question, just for the purpose of establishing the loan transactions between the parties. In such circumstances, when the petitioner is not suing on an unregistered mortgage deed, the Court below ought to have accepted the document to be marked in evidence. This is a settled position in law. Therefore, the Court below was wrong in rejecting the Application.”

(xxxii) He also relies on the unreported order of this Court dated 04.11.2006 in C.R.P.(PD)No.1863 of 2003 between Murugan V. 1.Sumathradevi

2.Durairaj, wherein in paragraphs 3, 4 and 6, it is held as follows:

“...It was the case of the plaintiff in that application that the suit was filed on the basis of an unregistered mortgage deed executed by the defendants in favour of the plaintiff. Therefore reliance was placed by the plaintiff on the said document for

proving the loan amount. Hence the said application was filed by the plaintiff for admitting the document as an Exhibit. A memo of objection was filed by defendants/respondents on the ground that the said document is not duly stamped and registered in accordance with law and hence they protested for marking the said document as an Exhibit.

4. The trial Court by an order dated 11.06.2002 dismissed the application on the ground that this document filed by the plaintiff is not a registered one. It is also stated by the trial Court that any document pertaining to immovable property with the value of more than a sum of Rs.100/-, the said document has to be necessarily registered. In this case, the document being a mortgage document and the value of it is more than Rs.100/- non-registration of the same cannot be accepted and the document cannot be marked as an Exhibit. Therefore on this ground, the trial Court did not accept the case of the plaintiff and rejected the same. Challenging the said order, the above revision petition has been filed.

6. The learned Counsel for the petitioner submitted that the petitioner only wanted to prove the payment of loan amount to the respondents herein and for this limited purpose the document in question is admissible in evidence, etc.”

Also, in the aforesaid order at paragraph 10, it is held that “an unregistered mortgage deed could be taken as an agreement of loan and the loan could be proved on the basis of the admission in the document itself.”

(xxxiii) The Learned Counsel for the Appellant/Plaintiff seeks in aid of the decision Kesavamattam Koda Nayakamma V. Edara Venkayya and Another reported in 1939(2) MLJ at page 664, wherein in paragraph 2, it has inter alia held as follows:

“...We are therefore reluctantly forced to come to the conclusion that the mortgage-deed has not been duly proved to be executed by the first defendant and a decree on the mortgage cannot be sustained and must be set aside. But Mr.Ramachandra Rao contends that there is a personal covenant in the document and on the strength of that personal covenant it is open to us to pass a money decree in favour of the plaintiff for the amount claimed. This can be done. Vide Kunku Moidin V. Madhava Menon (1908)19 MLJ 584: I.L.R.32 Mad.410(F.B.).

Therefore, while we set aside the mortgage decree as passed by the lower Court, we pass a decree against the defendants for the amount claimed in the plaint with interest at the contract rate up to date of plaint and at 6 per cent, from date of plaint.”

(xxxiv) He also draws the attention of this Court, the decision *Lakshman Naicker and Others V. Jayaram Naicker and Others* at page 178, wherein it is held as thus:

“A mortgage debt as such can be dissociated from the security for the repayment of the debt and if there is no bar to the admissibility of a document for the purpose of showing the transfer of the debt itself, apart from the security, the appropriate relief, which ought to be given to the transferee should not be denied to him.”

(xxxv) That apart, the Learned Counsel for the Appellant/Plaintiff has relied on the final decisions:

(a) in *Imperial Bank of India V. Bengal National Bank Limited* reported in AIR 1931 Privy Council at page 245 at page 246, it is observed and held as follows:

“On the same date the Imperial Bank, exercising a power given them by the debenture of 1st August 1923, appointed three gentlemen as receivers under the debenture. On 20th May 1927, a petition was presented for winding-up the respondent bank, and on 2nd August winding-up order was made. On 26th May the Imperial Bank commenced a debenture holders' auction, and on 1st June the three receivers appointed by them were appointed receivers by the Court. On 9th August two of the receivers, together with a third gentleman, were appointed official liquidators. On 10th February 1928, the official liquidators presented a petition to the Court asking for directions on various matters. The question which is the subject-matter of this appeal involves a considerable sum of money and is of great importance to persons lending money to companies, and especially to banks. It appears that the respondent bank in the ordinary course of its business lent money to customers on overdraft account on the security of title-deeds deposited by the customers, in respect of which loans at the date of the suspension of payment sums remained due to the bank, who continued to hold the security. The question is whether the two debentures held by the Imperial Bank

give them any and what interest in the amounts due to the respondent bank from such customers and in the property comprised in the title deeds. The Imperial Bank set up the express charge over the whole of the assets of the respondent bank. The liquidators contend that the debentures, so far as they seek to charge the debts secured on deposit of title-deeds come within S.17, Registration Act, which requires registration of all non testamentary instruments which

“purport or operate to create, declare, assign limit or extinguish, whether in the present or in the future, any right, title or interest whether vested or contingent of the value of Rs.100 and upwards to or in any immovable property.” and not being registered are covered by S.49 of the same Act, which provides that no document required by S.17 to be registered and, in fact, unregistered shall affect any immovable property comprised therein or be received as evidence of any transaction affecting such property. The result of non-registration is, as they contend, not only to deprive the Imperial Bank of any right to the property comprised in the title deeds, but also of any right over the sums so secured. This view has found favour with the High Court on appeal, and it is this decision which their Lordships have now to consider. It is desirable to mention two

incidental matters. in the course of its business the respondent bank had in some cases sued its customers on the overdrafts, obtained money decrees against them, procured the property comprised in the deposited title-deeds to be sold in execution, and had itself bought the property in the execution of sale. Such property obviously became part of the immovable property of the respondent bank. In some other cases the respondent bank had re-deposited some of the title-deeds with the Imperial Bank as security for loans. No question arises as to these, as it was eventually conceded by the liquidators that such transactions were protected by S.59, T.P.Act. 1882.”

(b) in *K.B.Saha and Sons Private Limited V. Development consultant Limited* reported in (2008)8 Supreme Court Cases at page 564, at page 565, it is held as follows:

“From the principles laid down in the various decisions of the Supreme Court and the High Courts, it is evident that:(i) a document required to be registered, if

unregistered, is not admissible in evidence under Section 49 of the Registration Act, (ii) such an unregistered document can however be used as an evidence for collateral purpose as provided in Section 49 proviso of the Registration Act, (iii) a collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration, (iv) a collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards, and (v) if a document

is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose.”

(c) In SMS Tea Estates Pvt. Ltd. V. Chandmari Tea Co.Pvt. Ltd reported in 2011(4) CTC at page 574, at page 575, the Honourable Supreme Court has laid down as follows:

“Section 49 makes it clear that a document which is compulsorily registrable, if not registered, will not affect the immovable property comprised therein in any manner. It will also not be received as evidence of any transaction affecting such property, except for two limited purposes. First is as evidence of a contract in a Suit

for specific performance. Second is as evidence of any collateral transaction which by itself is not required to be effected by registered instrument. A collateral transaction is not the transaction affecting the immovable property, but a transaction which is incidentally connected with that transaction. The question is whether a provision for arbitration in an unregistered document (which is compulsorily registrable) is a collateral transaction, in respect of which such unregistered document can be received as evidence under the Proviso to Section 49 of the Registration Act.”

(xxxvi) Further, the Learned Counsel for the Respondent/Defendant cites the decision Subramaniam V. 1. Gunasundari and two others reported in 2007-2- L.W. at page 535 at 536, wherein it is held as follows: “As far as the present case is

concerned the document is inadmissible in evidence since the document in question has not been registered under Sections 17 of the Registration Act and also not properly stamped under Section 23 of the Stamp Act; the trial Court has committed an error in marking the document even for collateral purpose. Hence, the order of the trial Court is liable to be modified.”

(xxxvii) At this stage, this Court aptly points out the decision C.Jagannadham Pillai V. Official Assignee, Madras and Others reported in AIR 1931 Madras at page 124, at page 125, wherein it is held thus: “A personal covenant to pay may be proved by a mortgage found invalid. The trial Court, on finding a mortgage to be invalid for any cause, may give a decree on the personal covenant which it contains provided that it be not barred: 32 Mad. 410, Rel. On: AIR 1925 P.C. 169, Expl.”

(xxxviii) In P.Joseph V. M.T.Santiagu reported in 2001-1-L.W. at page 613, it is held as hereunder:

“The order of the lower Court requires interference. Since the mortgage deed is unregistered, at the most, it could be said that plaintiff cannot enforce, as if it is a mortgage. But it could be taken as an agreement of loan, and the loan could be proved on the basis of admission in the document itself. As there is no change of cause of action nor in the nature of the suit, the finding of the lower Court that that plaintiff is not entitled to amend the plaint is not correct.”

(xxxix) A mortgage debt is immovable property both for the purpose of Section 54 of the Transfer of Property Act, 1882 and also for the purposes of Section 17(1)(b) of the Registration Act, 1908.

(XL) If under the Evidence Act, an unregistered document is receivable in evidence for a collateral purpose. Section 49 of the Registration Act is no bar. The proviso Section 49 clearly enjoins the Court to admit any unregistered document as evidence of a collateral transaction not require to be registered as opined by this Court.

(XLi) A mortgage debt as such can be disassociated from the security for the repayment of the debt. There is no bar to the admissibility of the instrument for the purpose of showing the transfer of debt itself, apart from the security.

(XLii) In *Avinash Kumar Chan V. Vijay Krishna Mishra* reported in 2009(2) Supreme Court Cases at page 532, it is held that 'the trial Court is empowered to direct payment of stamp duty and penalty of instrument before admitting the same.'

(XLiii) A collateral transaction must be a transaction not itself require to be effected by a registered document. An important clause or term in an unregistered document which does not constitute a collateral transaction cannot be admitted in evidence, in the considered opinion of this Court.

(XLiv) As far as the present case is concerned, in Ex.A.1 unregistered mortgage deed dated 07.10.2002, it is clearly mentioned that a sum of Rs.75,000/- has been received by the Respondent/Defendant from the Appellant/Plaintiff. In page No.2 of Ex.A.1 deed, it is stated that for the cash sum of Rs.75,000/-, the rate of interest agreed to be paid is Rs.2/- for Rs.100/- per month. Even though, Ex.A.1 mortgage deed dated 07.10.2002 for Rs.75,000/- is an unregistered one and the same is not admissible in law. Yet, for the purpose of establishing the loan transaction, the said mortgage deed can be looked into and further purpose, it can be marked in law. To put it differently, the Respondent/Defendant agreeing to repay the loan amount of Rs.75,000/- with interest for Rs.100/- per month. In Ex.A.1 unregistered mortgage deed dated 07.10.2002 is a collateral transaction not affecting the immovable property creating an equitable mortgage and the payment of loan amount of Rs.75,000/- together with interest as referred to earlier is an incidental transaction connected with the equitable mortgage and for a collateral purpose, Ex.A.1 unregistered deed can be marked in evidence as per proviso to Section 49 of the Indian Registration Act.

(XLv) On perusal of Ex.A.1 unregistered mortgage deed dated 07.10.2002 for Rs.75,000/- purportedly could have been executed by the Respondent/Defendant to and in favour of the Appellant/Plaintiff, it is to be pointed out that in the first portion of the document, the recitals in Tamil are written by not leaving sufficient

space in between the lines. But in the second portion of Ex.A.1 unregistered mortgage deed, the Tamil words are written by leaving a long space in between the lines. Therefore, for the naked eyes, Ex.A.1 unregistered mortgage deed dated 07.10.2002, the recitals in Tamil in the first portion are written not with enough space in between the lines. Significantly, the second portion of the Tamil recitals are written with lengthy space between the lines cause a simmering doubt about the coming into existence of the document on 07.10.2002, in the considered opinion of this Court. However, the perusal of recitals in Tamil in Ex.A.1 unregistered mortgage deed in page 2 shows that in page 2 in the second line, there is a scoring out which has been specifically made mention of by the scribe of the deed viz., A.K.Chelliah. Surprisingly, the scribe A.K.Chelliah has not been examined as a witness on behalf of the Appellant/Plaintiff before the trial Court. In Ex.A.1 unregistered mortgage deed dated 07.10.2002, in the second page, the Respondent/Defendant has signed on 10.10.2002, though in Ex.A.3, the Appellant/Plaintiff's lawyer's notice dated 25.07.2004, it is mentioned that the Respondent/Defendant has written the deed carelessly as 10.10.2002 like the scoring out of the one word written in Tamil in the second page of Ex.A.1 unregistered mortgage deed. No such endeavour has been made on behalf of the Appellant/Plaintiff in making the Respondent/Defendant to correct the date put by him then and there and to obtain atleast the counter signature immediately. If one reads the preamble portion of Ex.A.1 unregistered mortgage deed dated 07.10.2002 for Rs.75,000/-, it is clear that the date is mentioned as 07.10.2002, on which date the Respondent/Defendant has reportedly executed Ex.A.1 unregistered mortgage deed to and in favour of the Appellant/Plaintiff. In the second portion of Ex.A.1 unregistered mortgage deed in the first page, there is a reference that the Respondent/Defendant has received a sum of Rs.75,000/-. If one has to go by first page of Ex.A.1 unregistered mortgage deed dated 07.10.2002, then one has to say that the Respondent/Defendant has executed the unregistered mortgage deed only on 07.10.2002. If really the Respondent/Defendant has received a sum of Rs.75,000/- on 07.10.2002, in reality there would not have been any occasion for the Respondent/Defendant to put his signature along with the date as 10.10.2002 and with the blank ink in the said document.

(XLvi) Though on the side of the Appellant/Plaintiff, the evidence of P.W.1(Plaintiff) and P.W.2 have been relied upon to show that actually the money has been borrowed by the Respondent/Defendant on 07.10.2002, but the Respondent/Defendant has carelessly signed in Ex.A.1 unregistered mortgage deed as 10.10.2002, it is not the evidence of P.W.2 that by mistake, the Respondent/Defendant has put the date wrongly. Instead, P.W.2 has clearly deposed that on 07.10.2002 only, the amount has been given to the Respondent/Defendant and he signed the document. No ordinary, prudent and sensible person will advance money on one particular date and obtain the signature of the party on another date. In the present case, the Respondent/Defendant in Ex.A.1 unregistered mortgage deed has not only affixed his signature in English and dated as 10.10.2002, but also clearly mentioned his name in brackets as (S.MURUGAN) in capital letters.

(XLvii) As stated already, in view of the fact that in Ex.A.1 unregistered mortgage deed dated 07.10.2002, the first portion of Ex.A.1, 11 lines of the document are written in Tamil without leaving enough space in between the lines etc. and also between one line to another line and the way in which the later portion of the recitals of Ex.A.1 unregistered mortgage deed dated 07.10.2002 are written in big Tamil letters leaving enough space clearly cause a shroud or a cloud on the truth and validity of Ex.A.1 unregistered mortgage deed dated 07.10.2002 and its coming into existence. In this connection, this Court points out that the claim of the Respondent/Defendant is that he has borrowed a sum of Rs.10,000/- and Rs.5,000/- from the Appellant/Plaintiff's husband and on his failure to repay the same, he has been directed to sign in the unfilled stamp paper and subsequently, it has been filled up by the Appellant/Plaintiff's husband.

(XLviii) On a careful consideration of the totality of circumstances surrounding the coming into existence of Ex.A.1 unregistered mortgage deed dated 07.10.2002, this Court opines that the version projected by the Respondent/Defendant as referred to earlier is a cogent and coherent one and the same is accepted by this Court as worthy of credence. Without knowing the date of execution, it is quite probable that the unfilled stamp paper bearing the Respondent/Defendant's sign has been filled up by the Appellant/Plaintiff or her agent by mistake. Also, a

reading of the plaint filed by the Appellant/Plaintiff in O.S.No.154 of 2004 clearly goes to show that it is not the case of the Appellant/Plaintiff that the Respondent/Defendant borrowed a sum of Rs.75,000/- on 07.10.2002 by affixing his signature on 10.10.2002. The Appellant/Plaintiff has not discharged her burden in proving that Ex.A.1 unregistered mortgage deed dated 07.10.2002 has in fact been executed by the Respondent/Defendant in the manner alleged by her in the plaint on 07.10.2002 and in the absence of establishing the same, both the trial Court as well as the First Appellate Court are perfectly right in coming to the conclusion that the Appellant/Plaintiff is not entitled to get the relief as prayed for in the plaint and the Substantial Question of Law No.1 is so answered.

(XLix) Section 114 of the Indian Evidence Act empowers a Court of law to presume the existence of fact. It provides that a Court of Law may presume the existence of any fact which it thinks likely to have happened regard being had to the course of natural events, human conduct and public and private business in their relevant to the facts of the particular case. The word 'common course' qualifies not only natural event, but it also qualifies human conduct and public and private business as employed in Section 114 of the Indian Evidence Act. Section 114 of the Indian Evidence Act, as a matter of fact does not authorise a Court of Law to legislate in any manner. The power given as per Section 114 of the Indian Evidence Act is only in respect of inferences which has to be drawn by a Court of Law. Since a Court of Law trying an issue in a case does not possess any personal knowledge about the facts and dispute of that it can do is either to act upon the account of the disputed facts given by individual who has the personal knowledge about the same or to act upon an expert evidence as per Section 45 of the Indian Evidence Act or to contra a presumption as per Section 114 of the Indian Evidence Act. A presumption of fact is that an inference drawn as per Section 114 of the Indian Evidence Act. A presumption is a deduction which the law requires a trier to make; and an 'inference' is a deduction which the trier may or may not make according to his own conclusions. A presumption is mandatory. An inference is permissible. An inference may be and often is retroactive; that is to say a trier may from the present conditions infer a previous fact.

(L) A presumption in law gives rise to a legal fiction. In case of a rebuttable presumption unless the contrary is established, a fictitious state of affairs is presumed to exist as if it is an actual reality. No presumption can be drawn in favour of that which offends the legal principles. The presumption under Section 114 of the Indian Evidence Act pertains to the existence of certain facts and not their probative value. The presumption must be based on facts and not upon inferences or upon other presumptions. The effect of Section 114 of the Act is to make it crystal clear that Courts of justice are to use their own common sense and experience in judging of the effect of particular facts and they are subjected to no particular rules whatever on the subject. Section 114 of the Indian Evidence Act, indeed is wide enough to raise a presumption not only in regard to oral evidence, but also with regard to documentary evidence. Therefore, on the given set of present facts and circumstances of the case, both the trial Court as well as the First Appellate Court have come to a right conclusion that the Respondent/Defendant has been directed to sign in an unfilled stamp paper, later it has been filled up by the Appellant/Plaintiff's husband and consequently accepted the case of the Respondent/Defendant as true and finally held that the execution of Ex.A.1 unregistered mortgage deed dated 07.10.2002 has not been proved and while coming to the said conclusions, both the Courts are entitled to use their own common sense and experience in judging the effect of particular facts and it is not open to the Appellant/Plaintiff to contend that the trial Court as well as the First Appellate Court have not applied the principles of presumption as per Section 114 of the Indian Evidence Act and it is made clear by this Court that both the Courts are not to be covered by technical rules of law whatever on the subject and

accordingly, the Substantial Questions of Law 2 is so answered.

(Li) As regards the plea of the Appellant/Plaintiff that both the Courts are not correct in rendering a finding with reference to the date as mentioned in Ex.A.1 unregistered mortgage deed, in the absence of any specific denial with reference to pleadings as contemplated as per Order 8 Rule 5 of Civil Procedure Code, it is to be pointed out that the case of the Respondent/Defendant is that he has not borrowed any amount as mentioned by the Appellant/Plaintiff in the plaint at any

point of time and there is no cause of action for the Appellant/Plaintiff to file the suit.

(Lii) Generally, a wage denial is not enough. Denial is to be specific. Also, mere denial is not enough. Further, an express or numerical denial of a particular para of plaint is only a matter of form and not of substance. To do complete justice between the parties, a Court of Law can infer as to the existence of one fact from the existence of some other fact founded upon a previous experience of one's connection and the presumption of fact which nothing more than logical inference of the existence of one fact drawn from other proved or known facts without the help of any artificial rules of Law and they are always rebuttable. The presumptions of law are inference or propositions which derive their force or artificial effect from law and must be drawn. There cannot be a thing called conclusive presumptions. The modern trend is to regard all presumptions, including, irrebuttable presumptions to law as rebuttable. The peculiar effect of presumption of law is merely to invoke a rule of law compelling a jury/judge to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law and the case is in the jury's hands free from any rule.

(Liii) Also, it is the case of the Respondent/Defendant that the Appellant/Plaintiff's husband Thangakaleeswaran created the documents one in favour of Pitchammal and another in favour of Balammal and these two documents have been created with a view to extract money from him. In short, even in the absence of any specific denial by the Respondent/Defendant with reference to the pleadings as per Order 8 Rule 5 of Civil Procedure Code inasmuch as the Respondent/Defendant has come out with his case that he has never signed in Ex.A.1 unregistered mortgage deed and that it is a forged one etc. and also when he has come out with a wholesale or omni bus plea that he has never borrowed any amount as mentioned by the Appellant/Plaintiff in the plaint at any point of time from the Appellant/Plaintiff and there is no cause of action to file the suit, such a definite/unambiguous plea of defence mentioned in the written statement by the Respondent/Defendant is quite sufficient for both the Courts below to come to a

finding with reference to the date mentioned in Ex.A.1 unregistered mortgage deed and the Substantial Question of Law No.3 is so answered against the Appellant/Plaintiff.

(Liv) In the light of the aforesaid discussions, as referred to supra and on a consideration of entire gamete of the oral and documentary evidence on record, this Court comes to an irresistible conclusion that the Appellant/Plaintiff has not proved the execution of Ex.A.1 unregistered mortgage deed dated 07.10.2002 by the Respondent/Plaintiff on the date alleged by the Appellant/Plaintiff and in short, the execution of Ex.A.1 unregistered mortgage deed has not been proved by the Appellant/Plaintiff etc., and resultantly answers the Substantial Questions of Law against the Appellant/Plaintiff.

7. In the result, the Second Appeal is dismissed, leaving the parties to bear their own costs. Consequently, the Judgment and Decree of the First Appellate Court in A.S.No.43 of 2006, dated 29.11.2006 and the trial Court in O.S.No.154 of 204 dated 08.12.2005 are hereby confirmed by this Court for the reasons assigned in this Appeal. Consequently, the connected miscellaneous petition is also closed.

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