

(1977) 02 CAL CK 0003

Calcutta High Court

Case No: A.F.O.D. No. 191 of 1969

Saradindu Mukherjee

APPELLANT

Vs

Amiya Kumar Basu

RESPONDENT

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**Date of Decision:** Feb. 9, 1977**Acts Referred:**

- Transfer of Property Act, 1882 - Section 58

**Citation:** AIR 1977 Cal 343**Hon'ble Judges:** N.C. Mukherji, J; B.C. Ray, J**Bench:** Division Bench**Advocate:** P.N. Mitter, Satya Priya Ghosh and Amal Kumar Mukherji, for the Appellant;  
Saktinath Mukherjee and Tapan Kumar Mitra, for the Respondent**Final Decision:** Dismissed

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**Judgement**

B.C. Ray, J.

This appeal is at the instance of the plaintiff appellant against the judgment and decree dated 28th July, 1967 passed by Shri R. N. Patra, Subordinate Judge, Third Court, Alipore in Title Suit No. 4 of 1961 dismissing in part the plaintiff's suit with respect to the claim for Rs. 14,200 with interest thereon. The plaintiff appellant instituted a suit for recovery of Rs. 20,324 due on a mortgage stating inter alia that the defendants borrowed from him the sum of Rs. 14,200 on 16-11-57 and a further sum of Rs. 2,200 on November 10, 1958. There was a stipulation that the said sums would carry interest at the rate of 8 per cent per annum. In respect of the advance of Rs. 14,200 the defendant No. 1 drew a Hundi payable to the plaintiff on 30 days' sight without grace and it was accepted by the defendant No. 2 and as evidence of the later loan of Rs. 2,200 the defendant No. 1 gave an "I owe you" in writing dated February 10, 1958. The Hundi was presented to the defendant No. 2 on maturity for payment but he did not make any payment. The notice of dishonour was given to each of the defendants. On March 28, 1956, the defendant No. 1 deposited with the plaintiff at 3/1, Bankshall Street the deed of lease dated 2-3-46 executed between

Sm. Kumidini Ghosh and the defendant No. 1 by which the property in Schedule "A" to the plaint has been let out at a monthly rent of Rs. 750 and subsequent increments in rent for the term of 15 years with option to renew of the same for a further period of 15 years. The same was deposited with an intent to create an equitable mortgage in favour of the plaintiff by the defendant No. 1 in respect of moneys advanced or to be advanced by the plaintiff to the defendant. It was made to secure the payments of a loan made by the defendant for the sum of Rs. 3,650 from the plaintiff under a promissory note dated March 28, 1956. This amount was included in the Hundi drawn by the defendant No. 1 in favour of the plaintiff for a sum of Rs. 5,000. Again this sum of Rs. 5,000 has been included in the "loan for Rs. 14,200 referred to above. The said deposit of title deeds was regarded as security for loan that was made from time to time by the defendants. A sum of Rs. 17,600 and Rs. 2,716 respectively due and payable by the defendants as stated in schedule "B" to the plaint. The defendants had not made any payment in repayment of the said loans and as such the plaintiff has filed the present suit for recovery of Rs. 20,324 i.e. Rs. 17,608 as principal and Rs. 2,716 as interest.

2. The defendant No. 1, Amiya Ku-mar Basu, filed a written statement on January 8, 1962 denying the allegations made in the plaint. It has been stated that a Hundi was executed by him as alleged but the same was without consideration. It was further alleged that the said Hundi was not executed in accordance with law and it did not bear the proper stamp fee and as such no loan was created by the said Hundi. It has also been alleged that the statement made in the plaint "I owe you" has not the effect of creating the loan or it was not intended to be an admission of the loan. It has also been stated that there was no deposition of title deeds in respect of the alleged loans. The true fact is that the document of lease dated 2-6-46 along with some share scripts of A. K. Collieries Limited was handed over to the plaintiff in order to help him in Rent Execution Case No. 4 of 1955 of the Court of the 5th Subordinate Judge at Alipore. This will be evident from the receipts granted on behalf of the plaintiff and it will falsify the story of the deposit of title deeds. It has also been stated that there was no deposit of the document with intent to create a security or an equitable mortgage in favour of the plaintiff.

3. The plaintiff in support of his case that the title deeds of the land described in schedule "A" to the plaint has been deposited with an intent to create an equitable mortgage for the loans that have been advanced and will be advanced by the plaintiff examined three witnesses besides examining himself whereas the defendant has examined one witness in order to negative the case of deposit of title deeds with intent to create a mortgage in respect of the loans advanced and to be advanced. On July 28, 1967, the Subordinate Judge, Third Court, Alipore after considering the evidences on record held that the suit was barred by limitation under Article 57 of the Indian Limitation Act (old). It was also held that the original lease deed dated March 2, 1946 was deposited by the defendant with the plaintiff on March 28, 1956 as security against the pro-note dated March 28, 1956. This would

appear from letter Ext. 1 dated March 28, 1956. It was also held that there was no mortgage in favour of the plaintiff in respect of sum of Rs. 14,200 and as such the plaintiff's claim for the same was barred by limitation. The loan of Rs. 2,200 advanced on 10-2-58 was admitted by the defendant himself as would appear from Ext. 4. This claim is not barred by limitation. A decree for Rs. 2,200 with interest at the rate of 8 per cent per annum from 10-2-58 till the filing of the suit has therefore been passed by the court below against the defendants.

4. It is against this judgment and decree this appeal has been filed.

5. Mr. Pramatha Nath Mitter, learned Advocate for the appellant has submitted that the title deed was deposited with the plaintiff not only to secure the loan advanced on 28-3-56 but also the future loan that will be advanced to the defendant inasmuch as the said loan of Rs. 3,650 was included in the loan of Rs. 14,200 evidenced by the Hundi executed by the defendant on 16-12-57. Mr. Mitter has secondly submitted that it is not necessary that for each loan fresh security is to be furnished. He also submitted that the keeping of the said title deed with the plaintiff and non-production of any receipt or evidence in support of repayment of the loan taken on 28-3-56 will prove that the said loan was not repaid and the said title deed has been kept as security for the payment of the loans advanced on different dates as evident from the Hundi marked X (3) for identification executed on 16-12-57. The loan of Rs. 14,200 being a mortgage loan the suit is not barred by limitation so far as this claim is concerned.

6. Mr. Saktinath Mukherjee, learned Advocate appearing on behalf of the respondent submitted that from the pleading of the plaintiff it is evident that the said title deed Ext. 3 was handed over to the plaintiff to secure the loan of Rs. 3,650 advanced on 28-3-56 under a promissory note. Mr. Mukherjee has further submitted that this pleading of the plaintiff in para 3 of the plaint read with the letter Ext. 1 whereby the title deed was deposited with the plaintiff clearly belied the case of the plaintiff that the said document was intended to be a security for all future loans that will be advanced by the plaintiff to the defendant. As such the loan of Rs. 14,200 evidenced by Hundi dated 16-12-57 does not constitute a mortgage and the trial Court has rightly held that the suit which was instituted more than three years after the date fixed for repayment is barred by limitation so far as this loan is concerned.

7. The plaintiff appellant has pleaded in paragraph 3 of the plaint that the registered deed of lease Ext. 3 dated 2nd March, 1946, was deposited with the plaintiff by the defendant No. 1 to secure the repayment of a loan made by the defendant for a sum of Rs. 3,650 from the plaintiff under a promissory note dated 28-3-56. It has further been pleaded that the said deposit was made also with an intent to create an equitable mortgage in favour of the plaintiff by the defendant No. 1 in respect of moneys that were advanced or will be advanced by the plaintiff to the defendant. It appears from Ext. 1, that is, letter written by Amiya Kumar Basu the defendant to the plaintiff on 28-3-56, that he deposited the original lease deed with the plaintiff at

3/1, Bankshall Street as security against the pro-note dated 28-3-56. This along with the pleading in paragraph 3 of the plaint clearly establishes that this title deed had been deposited in order to create a mortgage in respect of the loan of Rs. 3,650. The plaintiff has pleaded that the title deeds have been kept in deposit with him with an intention of securing other loans that were advanced subsequently. The plaintiff has further stated that this loan of Rs. 3,650 has been included in the loan of Rs. 14,200 evidenced by a hundi executed by the defendant. This hundi has not been marked as an exhibit and as such the plaintiff cannot prove that this loan of Rs. 14,200 has been included in the loan of Rs. 3,650. Moreover, the said loan of Rs. 14,200 was advanced on 16-12-57 as stated in the plaint and this suit was filed on 14th January, 1961. Now the question is whether this loan does constitute a mortgage as the title deeds came out of the custody of the plaintiff. I have already mentioned that the lease deed Ext. 3 was deposited by the defendant with the plaintiff on 28-3-56 as security against the pro-note dated 28-3-56. This is evident from the letter Ext. 1 written by the defendant to the plaintiff while depositing the title deed. There is nothing in writing to show that the lease deed was deposited with the plaintiff in order to secure all advances made subsequently. It is well established that mere deposit of title deeds with the creditor by the debtor will not constitute an equitable mortgage unless it is proved that the said title deeds had been deposited with the intention of creating a mortgage. It appears from Ext 4 (1) a letter, written by Shri Ma-khan Lal Bondopadhyay, an employee of the plaintiff to the defendant on 9th June, 1956 that the lease deed was taken from the defendant promising to return the same to him within a day or two. This clearly shows that the document which was kept as security in respect of the loan of Rs. 3,650 was returned to the defendant. The court below is therefore perfectly justified in holding that the loan was repaid and the property was released from mortgage before 9-6-56. Moreover, P.W. 1. Makhan Lal Bondopadhyay admitted in cross-examination that the mortgage was created on 28-3-56 and on that day the document was made over. He also stated that the letter Ext. 1 was written by Shri Amiya Kumar Basu and the mortgage was created. He further admitted that there was no paper to show that the mortgage was created as security for future loans. He also admitted that the lease deed was taken by him from the defendant from his house at 34A, Sardar Sankar Road. The plaintiff who was examined on commission stated that on the date on which the letter of deposit was given, the mortgage was created. D.W. 1, Balai Chandra Das stated that on 28-3-56 a mortgage was executed by transfer of title deeds. He also stated that the lease deed was taken back on the date on which the loan was repaid. He further stated that the defendant made over the deeds to the employee of the plaintiff on taking receipt on 9-6-56. Thus considering these evidences we have no hesitation to hold that the lease deed was not deposited with the plaintiff with an intention to create security in respect of all loans that will be advanced subsequent to 28-3-56. We also hold that the plaintiff failed to prove by any cogent evidence that the defendant had kept the said title deeds with the plaintiff with an intention of creating a security in respect of the property on which

the lease deed was taken by the plaintiff. It is pertinent to refer in this connection the decision reported in (1896) 23 Ind App 106 (PC), *Miller v. Babu Madho Das* where it has been observed by their Lordships of the Privy Council that in a suit against an insolvent and the official assignee for sale of mortgaged property, the onus is on the plaintiff to prove that the title deeds in his possession after the insolvency was deposited with him as security before the adjudication of insolvency. In [K.J. Nathan Vs. S.V. Maruty Reddy and Others](#), it has been held that in order to constitute a mortgage there are three requisites which are to be satisfied viz. (i) debt, (ii) deposit of title deed, and (iii) an intention that the deeds shall be security for the debt. Whether there is an intention that the deed shall be security for the debt is a question of fact which will have to be decided like any other fact on presumptions and on oral, documentary or circumstantial evidence. In a Bench decision of this Court reported in [Bejoy Ranjan Das Vs. Ajit Kumar Dutta](#), the above decision of the Supreme Court was followed and it was held that the question whether the deed was kept with the intention of creating the security for the debt has got to be decided on the materials on record. We, therefore, hold that the plaintiff failed to prove that the loan of Rs. 14,200 was secured by keeping the title deeds and as such there was no mortgage in favour of the plaintiff. The suit being filed beyond the period prescribed is barred by limitation under Article 57 of the Indian Limitation Act (old) with respect to the claim for Rs. 14,200.

8. For the reasons aforesaid the appeal is dismissed. The judgment and decree of the court below are hereby affirmed. There will be no order as to costs in the circumstances of the case. Let the records be sent down to the court below immediately.

N.C. Mukherji, J.

9. I agree.