A.B. Govardhan vs P. Ragothaman on 29 August, 2024

Author: Hima Kohli

Bench: Hima Kohli

2024 INSC 640 REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 9975-9976 OF 2024
[@ SPECIAL LEAVE PETITION (CIVIL) NOS.5034-5035 OF 2019]

A. B. GOVARDHAN … APPELLANT

VERSUS

P. RAGOTHAMAN … RESPONDENT

JUDGMENT

AHSANUDDIN AMANULLAH, J.

Heard Mr. Narendra Kumar, learned counsel for the appellant and Mr. V. Prabhakar, learned Senior counsel for the respondent.

2. Leave granted. The pending applications shall be dealt with in the final pages of this judgment.

3. The present appeals germinate from the:

3.1.

to as the “First Impugned Order”) 1 passed by a Division Bench of the Date: 2024.08.29 16:49:47 IST Reason:

2017 SCC OnLine Mad 11918 | (2017) 3 CTC 777 | (2017) 3 Mad LJ 522 | (2017) 4 LW 421.

High Court of Judicature at Madras (hereinafter referred to as the “High Court”) in Original Side Appeal 2 No.189 of 2011, whereby the appeal filed by the respondent was allowed and Judgment dated 01.04.2010 passed by a Single Judge of the High Court in Civil Suit No.701 of 2005

(hereinafter referred to as the "suit") was set aside. 3.2. Order dated 12.07.2018 (hereinafter referred to as the "Second Impugned Order") passed by the same Division Bench, whereby Civil Miscellaneous Petition3 No.10107 of 2017 in OSA No.189 of 2011 filed by the appellant seeking to "set aside" the First Impugned Order and restore the main appeal for fresh hearing, was dismissed. BRIEF FACTS:

4. The respondent (defendant in the suit) and his wife are engaged in business of building materials. As per the appellant (plaintiff in the suit), the respondent approached him in February, 1995 seeking a loan for his business. The appellant advanced a loan of Rs.10,00,000/- (Rupees Ten Lakhs) to the respondent on the security of his properties.

5. Since the respondent could not pay Stamp Duty on the Mortgage Deed, it was agreed between the parties that the said sum be split into Hereinafter abbreviated to "OSA".

Hereinafter abbreviated to "CMP".

two registered mortgages and the balance in four promissory notes. Accordingly, the respondent executed the following:

i) Mortgage Deed dated 16.03.1995 for Rs.1,00,000/-

(Rupees One Lakh) agreeing to repay the same together with interest at 36% per annum4;

ii) Mortgage Deed dated 17.04.1995 for Rs.50,000/- (Rupees Fifty Thousand) agreeing to repay the same together with interest at 36% p.a., and;

iii) Four promissory notes for the balance amount of Rs.8,50,000/- (Rupees Eight Lakhs Fifty Thousand).

6. Besides the two mortgages supra, the respondent borrowed the remaining Rs.8,50,000/- (Rupees Eight Lakhs Fifty Thousand) in four promissory notes on different dates. Since there was default in payment of interest, the appellant demanded repayment of the amount due under the four promissory notes. The respondent thereupon, in various panchayats, promised to repay the amounts. Ultimately, in the panchayat dated 24.06.2000, the respondent produced title document of his property as security towards debt under the four promissory notes, which has been noted in the Agreement dated 24.06.2000 (hereinafter referred to as the "Agreement"). This Agreement, in essence, is the root of the instant lis.

Hereinafter abbreviated to "p.a.".

7. The Agreement notes that the respondent owed a total amount of Rs.11,00,000/- (Rupees Eleven Lakhs) to the appellant and in settlement thereof, the respondent handed over the title deeds pertaining to the property situated at No.33, Avvai Thirunagar, Chennai - 600111, admeasuring 1300 square feet of land together with 700 square feet building (hereinafter referred to as the

"schedule property"), which was valued at Rs.9,00,000/- (Rupees Nine Lakhs). Per the Agreement, the respondent agreed to register the Sale Deed as and when demanded. Further, for re-paying the balance sum of Rs.2,00,000/- (Rupees Two Lakhs), it was agreed that the respondent will redeem the mortgaged property from the appellant and re-mortgage it elsewhere.

8. After the Agreement was entered into between the parties, the promissory notes were returned which were torn-out in the panchayat. Thereafter, the respondent neither executed a Sale Deed nor paid the balance sum of Rs.2,00,000/- (Rupees Two Lakhs). As a result, the appellant-plaintiff, filed the suit before the High Court, praying for:

> "(I) granting a usual preliminary mortgage decree of the Schedule mentioned property against the defendant for the recovery of Rs.23,96,000/- together with interest at 36% p.a. on Rs.11,00,000/- till the date of realization;
>
> And pass a final decree thereafter for sale of the Mortgaged property;
>
> (II) for costs of this suit; and for such other equitable reliefs as may deem fit and proper in the circumstances of the case and render justice." (sic)

9. The Single Judge, after perusing the evidence on record and hearing the parties, passed judgment dated 01.04.2010 holding that the respondent-defendant had agreed to "create equitable mortgage by depositing the title deeds". Finding thus, the Single Judge decreed the suit. Aggrieved, the respondent filed an intra-court appeal being OSA No.189 of 2011 along with Miscellaneous Petition 5 No.1 of 2011, which was an application seeking condonation of delay of 176 days. The appellant through his advocate, Mr. V. Manohar received notice and filed a counter-affidavit opposing the said condonation of delay application. On 18.04.2011, the Division Bench was pleased to condone the delay, subject to payment of cost of Rs.1,000/- (Rupees One Thousand) to the appellant.

10. The Division Bench vide the First Impugned Order allowed the appeal, holding that the appellant had failed to prove that there was a mortgage executed by the respondent. It is to be noted that none appeared for the appellant in the appeal. Subsequently, the appellant filed CMP No.10107 of 2017 in OSA No.189 of 2011, praying therein to "set aside" the First Impugned Order and for restoration of the main appeal for fresh hearing. The appellant contended that his erstwhile counsel (Mr. V. Manohar) was authorized only to appear in the MP filed Hereinafter abbreviated to "MP".

to condone the delay [MP No.1 of 2011] and that there was no notice issued to him after registering of the appeal. The Division Bench vide the Second Impugned Order dismissed the CMP.

SUBMISSIONS BY THE APPELLANT-PLAINTIFF:

11. At the outset, the learned counsel for the appellant submitted that the Division Bench of the High Court gravely erred in holding that the plaint averments were not sufficient to conclude that there was a valid mortgage entitling him to sue for a mortgage decree. It was submitted that the plaint, read as a whole, alongwith the Agreement, the Proof Affidavits and evidence of PW-1/appellant and

DW1/respondent clearly evince the fact that a loan was secured by the respondent by mortgaging the schedule property. The amount in the Agreement pertains to loan transactions for which the mortgage was created by the Respondent. It was submitted that in such circumstances, the findings in the First Impugned Order are highly erroneous.

12. It was submitted by learned counsel that the Single Judge has rightly arrived at the conclusion that the present case is one where the respondent agreed to create a mortgage by depositing the title deed. There was an actionable debt and the respondent had fully intended that the deed ought to be the security for the debt. The Single Judge had also noted that the respondent in his evidence as DW1, had agreed to deposit the title deed to create an “equitable mortgage” for the loan amount obtained by him from the appellant. Thus, the Single Judge had rightly decreed the appellant's suit and passed preliminary decree of mortgage.

13. It was further submitted that the Division Bench in the First Impugned Order had erred in holding that there was no stipulation to pay interest in the Agreement and that therefore the rate of interest as granted by the Single Judge could not have been so granted. It was submitted that various loans were advanced by the appellant to the respondent categorically stipulating interest at the rate of 36% p.a. on repayment. Once this contractual rate of interest was agreed upon by the parties, there was no scope for the Division Bench to state that there was no stipulation to pay interest in the Agreement. The Agreement had to be read in conjunction with various promissory notes and documents evidencing the mortgage and repayment of the loan with interest. Learned counsel contended that the Division Bench erred in holding that there was no prayer for grant of a personal decree against the respondent. It was submitted that the prayer clause of the plaint would show to the contrary.

14. On the Second Impugned Order, learned counsel for the appellant submitted that the Division Bench went wrong in not appreciating that the appellant had never authorized his counsel to represent him in the OSA and his vakalatnama was confined to the MP filed by the respondent seeking condonation of delay of 176 days. The MP was allowed by the Division Bench vide order dated 18.04.2011. Thereafter, the appellant, claims learned counsel, was not served with any notice in the OSA. The appellant submits that he was neither informed by his counsel, Mr. V. Manohar or by the Registry of the High Court about the status of the appeal.

15. It was further submitted that the Division Bench gravely erred in holding that the vakalatnama was given to Mr. V. Manohar for appearing in the MP for condonation of delay, the main appeal as also this Court. It was submitted that Mr. V. Manohar, counsel, was practicing only in the High Court. There was no question of the appellant authorizing any counsel for taking up the case in this Court as and when a case would come up. It was urged that a blanket printed statement on a vakalatnama can never constitute the intention of a litigant authorizing his/her/their counsel to represent the litigant in question in all courts and all proceedings.

16. Learned counsel contended that the appellant’s advocate Mr. Sukumar, who was appearing for the appellant in the Court at Tiruvannamalai, called the appellant and informed him that a judgment showing the appellant’s name was published in one of the law reports under the citation

2017 (3) MLJ 521 and it also showed that he went unrepresented therein. The appellant categorically submits that it was only then that the appellant came to know that the OSA arising from the suit had been decided against him ex-parte. Prayer was made to allow the appeals.

SUBMISSIONS BY THE RESPONDENT-DEFENDANT:

17. Per contra, learned senior counsel for the respondent submitted that there is no merit in the present appeals and the impugned orders do not call for any interference by this Court under Article 136 of the Constitution of India (hereinafter referred to as the "Constitution"). It was submitted that the Agreement does not refer to any mortgage having been created, since the recitals therein make it clear that the Agreement was to sell the schedule property to the appellant, and for the said purpose alone, the title deed of the property was handed over to the appellant. It was submitted that when the very genesis of the suit is the Agreement and the Agreement per se does not disclose the creation of any mortgage, a suit for foreclosure cannot be maintained and the Division Bench had rightly held so. The findings in the First Impugned Order that no mortgage has been created, stands justified in view of the contents of the Agreement.

18. Next, it was advanced that the plaint claims that Rs.23,96,000/- (Rupees Twenty Three Lakhs Ninety Six Thousand) was due as per the Agreement by including interest @ 36% p.a. till the date of institution of the suit. It was submitted that no particulars have been set forth in the plaint as to how this amount of Rs.23,96,000/- (Rupees Twenty Three Lakhs Ninety Six Thousand) was arrived at. While the cause of action pleaded in the suit makes reference only to the Agreement, the appellant makes a claim in respect of the mortgages dated 16.03.1995 and 17.04.1995, while also reserving the right to take separate action. Thus, it was submitted that the appellant has not put forth any specific case but has attempted to intermingle the mortgages and/or promissory notes with the Agreement. It was submitted that the mortgages dated 16.03.1995 and 17.04.1995 as also the promissory notes have been merged to arrive at the figure of Rs.11,00,000/- (Rupees Eleven Lakhs), which is being claimed as due from the respondent. It was further submitted that the promissory notes have not been exhibited in the suit.

19. Learned Senior counsel also pointed out that in respect of the two mortgages dated 16.03.1995 and 17.04.1995, the High Court in Second Appeal6 No.1235 of 2014 (which emanated from a suit for redemption filed by the respondent) passed an interim order dated 25.08.2022, directing the respondent to pay the appellant a sum of Rs.10,00,000/- Hereinafter abbreviated to "SA".

(Rupees Ten Lakhs), being the principal and interest on both the mortgages. Subsequently, the High Court, by way of its final order dated 24.01.2023 in the said SA, noted the payments made by the respondent to the appellant, the return of the original Mortgage Deeds and also the cancellation of the mortgages. Thus, as the decree in the redemption suit had been complied with, it dismissed the second appeal as having become infructuous. Payment had been made and, after receiving the same, the appellant had returned the original title deeds to the respondent in respect of the property which was the subject-matter of the two mortgages dated 16.03.1995 and 17.04.1995.

20. It was further submitted that in the criminal case filed by the appellant against the respondent under Section 138 of the Negotiable Instruments Act, 1881, this Court dismissed Special Leave Petition (Criminal) No.994 of 20197, confirming the acquittal of the respondent. As regards the Second Impugned Order, it was submitted that the facts recorded therein speak for themselves and the appellant did not deserve any indulgence. Based on the above pleas, the respondent has sought dismissal of the instant appeals.

Order dated 28.08.2023 reads as below:

> "Heard learned counsel for the petitioner. After having perused the evidence of the petitioner- complainant, we are satisfied that the acquittal of the respondent is a possible conclusion, which could have been recorded by the High Court.
>
> Though, something can be said about the manner in which the findings have been recorded by the High Court, we are recording our findings after having perused the evidence of the complainant. Hence, we concur with the ultimate order of the High Court and accordingly, the special leave petition stands dismissed.
>
> Pending application(s), if any, shall stand disposed of." ANALYSIS, REASONING & CONCLUSION:

21. Having given our anxious thought to the lis, we find that the Orders impugned need interference.

22. In our view, the Single Judge had appreciated the bundle of facts in the correct perspective, that is, the respondent had, by way of the Agreement, created a mortgage by deposit of title deeds. There was no redemption of this mortgage. The Division Bench fell in error in concluding that "The plaint averments are self-contradictory, vague and does not make out a clear case of mortgage." (sic). Moreover, the plea of the respondent that the mortgage was redeemed is factually incorrect. Another point not noted by the Division Bench is that the mortgage which took care of the return of Rs.8,50,000/- (Rupees Eight Lakhs Fifty Thousand), was never redeemed and initially, only re the two previous mortgages, the principal amount of Rs.1,50,000/- (Rupees One Lakh Fifty Thousand) was returned, without the agreed interest. As noted above, subsequent to the passing of the Impugned Orders, in SA No.1235 of 2014, interim Order dated 25.08.2022 had directed the respondent to pay the appellant a sum of Rs.10,00,000/- (Rupees Ten Lakhs), being the principal and interest on both the mortgages. This stood complied with and the SA was dismissed as having become infructuous on 24.01.2023.

23. However, the Agreement envisaged property worth Rs.9,00,000/- (Rupees Nine Lakhs) out of the total claimed due of Rs. 11,00,000/- (Rupees Eleven Lakhs), being registered in favour of the appellant or his nominee. The Agreement also stipulated that after redeeming the earlier/previous mortgages, the respondent would re-mortgage for the purpose of raising Rs.2,00,000/- (Rupees Two Lakhs). Thereafter, the said sum of Rs.2,00,000/- (Rupees Two Lakhs) would be paid to the appellant. The said condition was not followed through i.e., no Sale Deed was executed and registered, nor was the sum of Rs.2,00,000/- (Rupees Two Lakhs) paid. We are of the view that in

such a case, it was well-within the competence of the appellant to move the Court, which he did by instituting the suit.

24. Another factor is that the appellant was not heard in the appeal, as recorded in the First Impugned Order itself. Undoubtedly, in the face of non-appearance by the appellant before it, the Division Bench was free to proceed with final hearing of the appeal, as it did. However, what seems to have transpired is that in the absence of the appellant, what was averred by the respondent in the appeal was accepted as correct by the Division Bench. Fact remained that the respondent admitted to having executed Exhibit P-1 (the Agreement) and that the signature(s) thereon were his, in the Proof Affidavit dated 01.03.2010 as also cross- examination dated 08.03.2010. No doubt, he (respondent) has denied its voluntary execution and contended that it was under coercion and threat, but no evidence was brought or led by him to support this plea. The Division Bench opined, correctly, that "It is true that there was no supporting evidence adduced by him to show as to how he was threatened and forced to execute Ex.P1." Pausing here, we may emphasise that for every fact which is pleaded, there has to be evidence, either oral or documentary, to substantiate the same. A bald averment or mere statement by a defendant bereft of evidentiary material to back up such averment/statement takes such defendant's case nowhere. While deciding a statutory appeal under Section 116A of the Representation of the People Act, 1951 against an order of the Gauhati High Court rejecting an Election Petition, this Court in Kalyan Kumar Gogoi v Ashutosh Agnihotri, (2011) 2 SCC 532 commented that the term 'evidence' is used colloquially in different senses:

> "33. The word "evidence" is used in common parlance in three different senses: (a) as equivalent to relevant,
>
> (b) as equivalent to proof, and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc." (emphasis supplied)

25. However, we see in the facts at hand that there is no dispute qua execution of the Agreement. The respondent claims/pleads coercion etc. Arguendo, such was the case, what would assume relevance would be the steps taken immediately thereafter by the respondent. Admittedly, no steps whatsoever were taken, in law, by the respondent to resile from the Agreement or to revoke it for at least half a decade i.e., from the date of the Agreement till the suit came to be instituted. The respondent did not even lodge appropriate legal proceedings and hence, it does not lie in his mouth to take the plea that the Agreement was not signed voluntarily. If such coercion etc. had actually occurred, the respondent has no explanation to offer as to why he did not avail of any civil law remedy (to have the Agreement nullified or voided) or take recourse to criminal law (filing a complaint or registering a First Information Report). What seems clear to us is that the panchayat

tried to resolve the dispute and that led to the Agreement between the parties.

26. It would be profitable to refer to some decisions, after looking at the relevant provisions of the Transfer of Property Act, 1882 (hereinafter referred to as the "Act"). Chapter IV of the Act is entitled "Of Mortgages Of Immovable Property And Charges" and the relevant Section is quoted below:

> "58. "'Mortgage', 'mortgagor', 'mortgagee', 'mortgage-money' and 'mortgage-deed'" defined.—
>
> (a) A mortgage is the transfer of an interest in specific immoveable 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.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any), by which the transfer is effected is called a mortgage-deed.

(b) Simple mortgage.—Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale.—Where the mortgagor ostensibly sells the mortgaged property—on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

> Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.
>
> (d) Usufructuary mortgage.—Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-

money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) English mortgage.—Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds .—Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) Anomalous mortgage.—A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage. ” (emphasis supplied)

27. In Syndicate Bank v Estate Officer & Manager, APIIC Ltd., (2007) 8 SCC 361, this Court held:

> “28. The requisites of an equitable mortgage are : (i) a debt; (ii) a deposit of title deeds; and (iii) an intention that the deeds shall be security for the debt. The existence of the first and third ingredients of the said requisites is not in dispute. The territorial restrictions contained in the said provision also does not stand as a bar in creating such a mortgage. The principal question, which, therefore, requires consideration is as to whether for satisfying the requirements of Section 58(f) of the Transfer of Property Act, it was necessary to deposit documents showing complete title or good title and whether all the documents of title to the property were required to be deposited. A fortiori the question which would arise for consideration is as to whether in all such cases, the property should have been acquired by reason of a registered document. xxx
>
> 38. In K.J. Nathan v. S.V. Maruty Reddy [AIR 1965 SC 430: (1964) 6 SCR 727] this Court held: (AIR pp. 435-

36, para 10) “10. The foregoing discussion may be summarised thus: Under the Transfer of Property Act a mortgage by deposit of title deeds is 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.

Therefore, 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 deeds; and (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. There is no presumption of law that the mere deposit of title deeds constitutes a mortgage, for no such presumption has been laid down either in the

Evidence Act or in the Transfer of Property Act. But 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 hypertechnical to insist upon the formality of the creditor delivering the title deeds to the debtor and the debtor redelivering 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 question which arose therein was that what would be the extent of subject-matter of mortgage; the entire property forming the subject-matter of mortgage or a part thereof." (emphasis supplied)

28. In the interest of completeness, we may note that the Bench of 2 learned Judges in Syndicate Bank (supra) had referred to a larger Bench, the question as to whether a property could be equitably mortgaged by deposit of documents other than the title deeds or registered title document. However, the 3-Judges Bench in Syndicate Bank v Estate Officer and Manager (Recoveries), Andhra Pradesh Industrial Infrastructure Corporation Limited, (2021) 3 SCC 736 was "of the opinion that the reference need not be answered in the peculiar facts and circumstances of the case since in our opinion the State of Andhra Pradesh and its successor viz. APIIC and Telangana Industrial Infrastructure Ltd., are estopped from challenging the validity of the mortgage." In State of Haryana v Narvir Singh, (2014) 1 SCC 105, this Court observed:

> "11. A mortgage inter alia means transfer of interest in the specific immovable property for the purpose of securing the money advanced by way of loan. Section 17(1)(c) of the Registration Act provides that a non- testamentary instrument which acknowledges the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extension of any such right, title or interest, requires compulsory registration. A mortgage by deposit of title deeds in terms of Section 58(f) of the Transfer of Property Act surely acknowledges the receipt and transfer of interest and, therefore, one may contend that its registration is compulsory. However, Section 59 of the Transfer of Property Act mandates that every mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument. In the face of it, in our opinion, when the debtor deposits with the creditor title deeds of the property for the purpose of security, it becomes a mortgage in terms of Section 58(f) of the Transfer of Property Act and no registered instrument is required under Section 59 thereof as in other classes of mortgage. The essence of a mortgage by deposit of title deeds is the handing over, by a borrower to

the creditor, the title deeds of immovable property with the intention that those documents shall constitute security, enabling the creditor to recover the money lent. After the deposit of the title deeds the creditor and borrower may record the transaction in a memorandum but such a memorandum would not be an instrument of mortgage. A memorandum reducing other terms and conditions with regard to the deposit in the form of a document, however, shall require registration under Section 17(1)(c) of the Registration Act, but in a case in which such a document does not incorporate any term and condition, it is merely evidential and does not require registration.

12. This Court had the occasion to consider this question in Rachpal Mahraj v. Bhagwandas Daruka [1950 SCC 195: AIR 1950 SC 272] and the statement of law made therein supports the view we have taken, which would be evident from the following passage of the judgment: (AIR p. 273, para 4) "4. A mortgage by deposit of title deeds is a form of mortgage recognised by Section 58(f) of the TP Act, which provides that it may be effected in certain towns (including Calcutta) by a person 'delivering to his creditor or his agent documents of title to immovable property with intent to create a security thereon'. That is to say, when the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required under Section 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under Section 17 of the Registration Act, 1908, as a non-

testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title deeds and yet may not be registrable."

13. This Court while relying on the aforesaid judgment in United Bank of India Ltd. v. Lekharam Sonaram & Co. [AIR 1965 SC 1591] reiterated as follows: (AIR p. 1593, para 7) "7. ... It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration under Section 17 of the Registration

Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in the evidence at all and the transaction itself cannot be proved by oral evidence either." xxx 14.2. But the question is whether a mortgage by deposit of title deeds is required to be done by an instrument at all. In our opinion, it may be effected in a specified town by the debtor delivering to his creditor documents of title to immovable property with the intent to create a security thereon. No instrument is required to be drawn for this purpose. However, the parties may choose to have a memorandum prepared only showing deposit of the title deeds. In such a case also registration is not required. But in a case in which the memorandum recorded in writing creates rights, liabilities or extinguishes those, the same requires registration.

14.3. In our opinion, the letter of the Finance Commissioner would apply in cases where the instrument of deposit of title deeds incorporates the terms and conditions in addition to what flows from the mortgage by deposit of title deeds. But in that case there has to be an instrument which is an integral part of the transaction regarding the mortgage by deposit of title deeds. A document merely recording a transaction which is already concluded and which does not create any rights and liabilities does not require registration.

14.4. Nothing has been brought on record to show existence of any instrument which has created or extinguished any right or liability. In the case in hand, the original deeds have just been deposited with the Bank. In the face of it, we are of the opinion that the charge of mortgage can be entered into revenue record in respect of mortgage by deposit of the title deeds and for that, an instrument of mortgage is not necessary. A mortgage by deposit of the title deeds further does not require registration. Hence, the question of payment of registration fee and stamp duty does not arise.

xxx 14.5. By way of abundant caution and at the cost of repetition we may, however, observe that when the borrower and the creditor choose to reduce the contract into writing and if such a document is the sole evidence of the terms between them, the document shall form an integral part of the transaction and the same shall require registration under Section 17 of the Registration Act." (emphasis supplied)

29. We are of the opinion that the Single Judge has appreciated the law correctly as far as the Agreement is concerned to hold it to be a mortgage in view of Section 58(f) of the Act. We have read and re-read the Agreement. We have also minutely considered the exposition of law made in Narvir Singh (supra). We are of the opinion that the Agreement only records what has happened and does not create/extinguish rights/liabilities. It would, therefore, be covered by para 14.3 of Narvir Singh (supra), as highlighted hereinbefore. The reasoning of the Division Bench proceeds as under:

> "10. ...The recitals of the document marked as Ex.P1 and duly extracted in the judgment does not contain any, clear admission that a mortgage was created on the property. The document proceeds as if the appellant agreed to pay a sum of Rs.11 lakhs in full and final settlement. There is nothing to show that a mortgage was created. Even in the evidence given by the respondent as P.W.1, it was his case that the parent document was handed over only as a security. Such being the evidence on

> record, the learned single Judge was not correct in giving a □nding that mortgage was created and the title deed was given in furtherance of the mortgage. We are therefore of the view that there is no evidence adduced by the respondent to show that a mortgage deed was executed by the appellant and as such, he is entitled to a mortgage decree. ...” (sic)

30. Quite evidently, the Division Bench did not account for Section 58(f) of the Act. Indubitably, the respondent pleaded threat and coercion whilst executing/signing the Agreement, yet having accepted that he did sign the same in his own hand, the burden was on him to prove such threat/coercion. Looked at from any angle, the First Impugned Order suffers from legal errors, and cannot withstand the scrutiny of law. At the cost of repetition, it is to be stated that the Single Judge has rightly considered the factual prism and focused on the core issue without reference to facts which were irrelevant and not germane to the issue(s) before her.

31. The Second Impugned Order raises serious questions about how and why the appellant went into slumber. If we may say so, a ‘fantastic’ plea was taken that the appellant had engaged a counsel only for the delay condonation MP and not to argue the main appeal. Such a contention is noted only for the purpose of outright rejection. This ‘fantastic’ plea has been dealt with correctly by the Division Bench and no legal infirmity can be found therein.

32. Alas, only if things were as simple as they seemed! We have already indicated that the First Impugned Order has to be set aside. In order to do justice, quashing of the First Impugned Order would necessarily mean that the effect of the Second Impugned Order would get nullified, for all practical purposes, despite this Court being of the view that on its own merits, the Second Impugned Order cannot be faulted. However, for such legal misadventure resulting in wastage of precious judicial time of the High Court, which could have been better spent answering the call of justice raised by the teeming millions, we impose costs of Rs.1,20,000/- (Rupees One Lakh Twenty Thousand) on the appellant. Such cost shall be deposited within 6 weeks with the Registry of the High Court, to be utilised as follows:

> i. Rs.40,000 for juvenile welfare in a manner to be decided by the Juvenile Justice Monitoring Committee;
>
> ii. Rs.40,000 for welfare of the Advocate-Clerks in a manner to be decided by Hon’ble the Acting Chief Justice, and;
>
> iii. Rs.40,000 for legal aid in a manner to be decided by the High Court Legal Services Committee.
>
> Receipt of deposit be filed in the Registry of this Court soon thereafter. In case of non-compliance, the matter will be placed before us with appropriate Office Report.

33. Accordingly, both Impugned Orders stand set aside. The Judgment dated 01.04.2010 passed by the Single Judge stands restored with a slight modification i.e., reduction in the rate of interest

which has been claimed by and allowed to the appellant. Interest at the rate of 36% p.a. is on the excessive side and we pare down the same to 12% p.a. in the interest of justice. Hence, simple interest will run only @ 12% p.a. from 24.06.2000 till the date of realisation.

34. The appeals are allowed in the above terms.

35. I.A. No.16204/2019 for exemption from filing Certified Copy of the Impugned Judgment(s) is allowed. I.A. No.180367/2019 for permission to file Additional Documents is allowed.

36. I.A. No.16203/2019 seeks condonation of delay in filing the petitions. There is a delay of 589 days in filing the petition against the First Impugned Order. The petition against the Second Impugned Order is also delayed by approximately 84 days. We are cognizant that the appellant had moved the Division Bench seeking a fresh hearing of the main appeal, which led to passing of the Second Impugned Order. In Collector, Land Acquisition, Anantnag v Mst Katiji, (1987) 2 SCC 107, the Court noted that it had been adopting a justifiably liberal approach in condoning delay and that "justice on merits" is to be preferred as against what "scuttles a decision on merits". Albeit, while reversing an order of the High Court therein condoning delay, principles to guide the consideration of an application for condonation of delay were culled out in Esha Bhattacharjee v Managing Committee of Raghunathpur Nafar Academy, (2013) 12 SCC 649. One of the factors taken note of therein was that substantial justice is paramount 8.

37. In N L Abhyankar v Union of India, (1995) 1 MhLJ 503, a Division Bench of the Bombay High Court at Nagpur considered, though in the context of delay vis-à-vis Article 226 of the Constitution, the decision in M/s Dehri Rohtas Light Railway Company Limited v District Board, Bhojpur, (1992) 2 SCC 598, and held that "The real test for sound exercise of discretion by the High Court in this regard is not the physical running of time as such, but the test is whether by reason of delay there is such negligence on the part of the petitioner, so as to infer Para 21.3 of Esha Bhattacharjee (supra).

that he has given up his claim or whether before the petitioner has moved the Writ Court, the rights of the third parties have come into being which should not be allowed to be disturbed unless there is reasonable explanation for the delay."9 The Bombay High Court's eloquent statement of the correct position in law found approval in Municipal Council, Ahmednagar v Shah Hyder Beig, (2000) 2 SCC 48 and Mool Chandra v Union of India, 2024 SCC OnLine SC 1878.

38. In the wake of the authorities above-mentioned, taking a liberal approach subserving the cause of justice, we condone the delay and allow I.A. No.16203/2019, subject to payment of costs of Rs.20,000/- (Rupees Twenty Thousand) by the appellant to the respondent.

.....J. [HIMA KOHLI] .....J. [AHSANUDDIN AMANULLAH] NEW DELHI AUGUST 29, 2024 Emphasis supplied.