(2002) 02 AP CK 0037

Andhra Pradesh High Court

Case No: LPA No''s. 9 of 1990 and 38 of 1993

Allada Veerabhadra Rao		APPELLANT
	Vs	
Chakka Sriram Murthy and Company		RESPONDENT

Date of Decision: Feb. 8, 2002

Acts Referred:

- Transfer of Property Act, 1882 - Section 58

Citation: (2003) 1 ALD 170

Hon'ble Judges: D.S.R. Varma, J; B.S.A. Swamy, J

Bench: Division Bench

Advocate: N.V. Suryanarayana Murthy, for the Appellant; C. Poornaiah, for the Respondent

Judgement

B.S.A. Swamy, J.

The preliminary decree passed by a learned single Judge of this Court in A.S. No. 418 of 1981 arising out of O.S. No. 127 of 1977 partly allowing the appeal by treating the suit as a mortgage suit and the judgment allowing Transfer A.S. No. 1672 of 1988 arising out of O.S. No. 222 of 1979 on the file of II Additional Subordinate Judge, Kakinada, by dismissing the suit filed by the appellant for return of the document, are under challenge in these two LPAs.

2. The facts of this case are very interesting and also throw light on the human ingenuity in making false claims.

3. The respondent-firm in both the LPAs filed O.S. No. 127 of 1977 for realisation of an amount of Rs. 1,14,0357- by contending that the appellant herein, a cloth shop owner, was having credit facility with the firm since 1965 and by 31-3-1976 an amount of Rs. 89,247.18 ps was due from him for which debt the appellant not only acknowledged by signing in the account books of the respondent but also executed a promissory note agreeing to repay the said amount with 18% interest per annum

on demand. It is also the case of the respondent that after finalisation of the accounts, the appellant herein has taken yarn on credit and by 2nd. January, 1977, an amount of Rs. 92,683-68 ps was due to the firm and the said amount carries interest at 18% per annum. It is also its case that the firm gave a telegraphic notice demanding the amount due as on that date and the appellant having received the notice approached the firm and stated that he is not in a position to pay the said amount immediately, as people who have taken credit from him have not repaid the amounts to him and as and when the amounts are realised from his debtors, he will pay the said amount. Stating so, the appellant requested the respondent not to rush to the Court. But the managing partner of the respondent-firm was not willing to the offer made by the appellant herein. He sent a word to the appellant that the firm will not wait as it waited for a long time and the amount to be paid is very high.

4. It is the further case of the respondent that the appellant herein approached the managing partner of the firm and agreed to deposit the partition deed entered into between himself and his sons with an intention to create equitable mortgage and he accordingly deposited the partition deed with the managing partner of the respondent firm for creation of an equitable mortgage by deposit of title deeds. From the pleadings it is seen that the appellant gave a notice in Ex.A.10, for return of the said document and the respondent-firm sent a reply in Ex.A.11 dated 4-5-1977 stating that the partition deed was deposited with the firm with an intention to create equitable mortgage. However, the factum of creation of equitable mortgage was denied by the appellant by issuing Ex.A.3 dated 15-5-1977. Thereafter the respondent firm filed the suit on the file of the 11 Additional Subordinate Judge, Kakinada for recovery of the amount of Rs. 1,14,0357-seeking the relief of a preliminary decree by treating the debt as a mortgage debt and for other reliefs.

5. It is interesting to note that in the plaint itself, the respondent-firm categorically stated that the partition deed was not acted upon between the members of the appellant''s family and it is only executed to avoid the Land Ceiling Act. It is also the case of the respondent that the appellant stated that himself and his sons continued to be the members of the joint Hindu family and that they are residing together and that the partition deed was nominally executed and it was a sham document. The firm also impleaded the two sons of the appellant as defendants.

6. In the written statement, the appellant and his sons categorically stated that it is not true to contend that the partition deed is a sham and nominal document and it was acted upon and there is a severance in status between the appellant and his sons. It is also their case that when the respondent herein sent word for the appellant in regard to payment of the amount, the appellant represented to the respondent that he owes money to others and his khatadars also owe money to him and requested for sometime to pay the amount due to the respondent firm. On that the managing partner of the respondent asked him to bring the partition deed executed between the members of the appellant''s family to know the extent of

property the appellant got under the partition, so that it can also send word to all the creditors and debtors of the appellant for settling the matter amicably. On that, he produced the partition deed to show the extent of immovable property he got under the deed and the same was deposited with the respondent. When the respondent is not returning the document, he was forced to give a legal notice Ex.A.10 stating the events that were already adverted to. After the respondent filed the above suit, the appellant herein also filed Q.S.No. 222 of 1979 on the file of the District Munsif, Tuni, for return of the partition deed. Subsequently the suit was transferred to the Court of the II Addl. Subordinate Judge, Kakinada to be tried along with O.S.No. 127 of 1977. Both the suits were clubbed together and the trial Court framed as many as 11 issues including the two issues as to whether the equitable mortgage pleaded by respondent herein is true and whether the partition deed is only a sham and nominal document.

7. After trial, the trial Court held that the partition deed was not handed over by the appellant to the respondent with an intention to create an equitable mortgage and the partition has in fact taken place in the year 1972 itself and it is not a sham and nominal document. Having taken the said view the trial Court decreed the suit filed by the appellant viz., O.S. No. 222 of 1979.

8. Insofar as O.S. No. 127 of 1977 filed by the respondent is concerned, the Court below decreed the same treating it as a simple suit for money based on khatha for a sum of Rs. 89,247-18 against the appellant alone and dismissed the same as against D.2 and D.3, the sons of the appellant.

9. Aggrieved by the said judgments and decrees, the respondent herein filed A.S. No. 418 of 1981 against O.S. No. 127 of 1977 on the file of this Court and A.S. No. 31 of 1981 against O.S. No. 222 of 1979 on the file of the District Judge, East Godavari at Rajahmundry. Thereafter, the respondent got it transferred to this Court to be heard along with A.S. No. 418 of 1981 and the same was numbered as Transfer A.S. No. 1672 of 1988.

10. These two appeals were disposed of by a common judgment by the learned single Judge on 12th June 1989. The learned Judge reversed the judgment and decree passed by the trial Court in O.S. No. 127 of 1977 and held that the suit filed by the respondent has to be tried as a suit based on equitable mortgage and passed a preliminary decree for the amount due to the respondent firm. As a result of this, he dismissed the suit filed by the appellant herein in O.S. No. 222 of 1979 by allowing the Transfer A.S. No. 1672 of 1988. This common judgment is now under appeal.

11. In these LPAs the appellant''s Counsel fairly admitted the liability and he is not aggrieved by the judgment of the trial Court to that extent. The learned Counsel canvassed the correctness of the decree passed by this Court treating the debt as equitable mortgage.

12. We have carefully perused the judgment of the learned single Judge. The reasons given by the learned single Judge in reversing the well considered judgment of the trial Court are far from convincing. The only reason that weighed with the learned Judge is that the appellant herein while giving reply to the telegraphic notice Ex.A.8 did not mention that he owed moneys to others. He simply stated that several people owed money to him in the business. Likewise, the appellant while giving evidence as D.W.1 did not specify nor did he prove that by 29-3-1977, on which date he is said to have delivered Ex.A.1 to P.W.1, there were debts due by him to other creditors. Accordingly, the learned single Judge held that the contention of the appellant herein that he has given the partition deed to the managing partner of the respondent firm for settlement of the claims both against and due to him and not with an intention to create an equitable mortgage cannot be accepted.

13. In the trial Court, while the managing partner of the respondent firm examined himself as P.W.1, the appellant herein was examined as D.W.1 and documents were marked on both the sides. As there is a possibility of the witnesses speaking in favour of their contentions, we feel that the documents marked in this case will speak for themselves on the contentions of both the parties. It is an admitted case that the appellant while depositing or handing over the partition deed to P.W.1, did not execute any memorandum recording the deposit of the partition deed with an intention to create equitable mortgage. This fact was admitted by P.W.1 in his evidence stating

''I did not ask for a memorandum being written by D.1 saying that the deed was deposited creating security."

14. In K.J. Nathan Vs. S.V. Maruty Reddy and Others, , their Lordships of the Supreme Court having surveyed the entire case law on the subject, held as under:

"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, (1) 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 u/s 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 decision of English Courts making a distinction between the debt preceding the deposit and that following it can at best to only a guide; but the said distinction itself cannot be considered to be a rule of law for application under all circumstances. Physical delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be a constructive deposit. A Court will have to ascertain in each case whether in substance there is a delivery of title deeds by the debtor to the creditor. If the creditor was already in possession of the title deeds it would be hyper-technical to insist upon the formality of the creditor delivering the title-deeds to the debtor and the debtor 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."

15. From the above it is seen that the three requisites for creation of an equitable mortgage are: (1) debt; (2) deposit of title deeds; and (3) an intention that the deeds shall be security for the debt.

16. Whether there is an intention that the deed shall be security for the debt is a question of fact and the Court will have to ascertain in each case whether in substance there is delivery of title deeds by the debtor to the creditor with an intention to create equitable mortgage.

17. Admittedly in this case, except a statement in the plaint and the deposition on behalf of the respondent, no further evidence is forthcoming to prove that the appellant deposited the document with an intention to create an equitable mortgage. As we have stated already, the facts of the case are very interesting. In the plaint itself, the stand taken by the respondent is that it was informed by the appellant that the partition deed of the year 1972 was never acted upon and it is only a sham and nominal document. That is the reason why it seemed to have filed the suit against the appellant as well as his sons treating them as members of the joint family. In his evidence also, P.W.1 stated:

"At the time of deposit, I came to know that it was nominal document. In the sense, that it was executed to save property from land ceilings. I understood it is that sense. 1 know that the shares as stated in it did not fell on the members. Except the word of D. 1, I have no basis to say that it was a nominal document. I did not ask him why he was depositing a nominal but not real deed."

18. The statement made in the plaint, the deposition of P.W.1 and the fact that the respondent filed the suit against the appellant and his sons for recovery of the

money show that the respondent proceeded on the assumption that the partition deed is not a real document but it is only a document that was brought into existence to save the family properties from land ceilings legislation. When the respondent himself admits that it is a sham and nominal document, it is beyond our comprehension as to how the learned single Judge construed this document as a title deed. When the partition deed, according to the respondent, is not acted upon, no rights flow to the parties as stated in the partition deed. If that is the case, this document cannot be construed as a document of title because no immovable property is passed on to the executants of the document. Unfortunately the learned Judge missed this crucial issue in this case. Further the respondent filed the suit against the appellant as well as his sons treating them as members of the joint family on the ground that the partition deed was not acted upon and it is not his case that the sons of the appellant joined him in handing over the document with an intention to create equitable mortgage. On this ground also the inevitable conclusion that has to be drawn is that the document that was deposited with the respondent cannot be treated as a document of title.

19. Though the trial Court categorically held that the partition deed was acted upon and the suit was dismissed against the sons, the respondent did not assail this finding of the trial Court. On the other hand it filed the appeal only against the finding recorded by the trial Court stating that the suit cannot be treated as a simple suit for recovery of money. In fact the learned Counsel for the appellant herein brought to our notice that an appeal being a continuation of the suit and that the respondent wants to seek a decree by treating the suit as a mortgage suit, he has to pay ad valorem Court fee on the ground claimed by him u/s 31(1) read with Section 49 of the A.P. Court Fees and Suits Valuation Act. But in this case the respondent valued the first appeal at Rs. 10,000/- and paid Court Fee of Rs. 300/- u/s 47 of the A.P. Court Fees Act, which is a residuary provision. The contention of the respondent in this regard is that as the very suit was decreed and it is only aggrieved by the finding that it is not a suit based on mortgage and as the said finding cannot be valued, the respondent has taken resort to Section 47 of the Act and in support of his contention he tried to place reliance on some decisions. But we are keeping this issue open as we are of the firm opinion that the learned single Judge went wrong in allowing the appeals on merits.

20. The Counsel for the respondent strenuously contends that the appellant, neither in the legal notice exchanged between the parties nor in the evidence, has given the iist of the creditors and as such the version given by the appellant cannot be given any credence. But the legal notice exchanged as well as the evidence belies the contention of the respondent''s Counsel. In Ex.A.10 dated 9-4-1977, the legal notice issued on behalf of the appellant, it is categorically stated:

"Chakka Suryanarayana advised my client to bring the partition deed to know what extent my client''s share of the property in partition deed. He promised to settle the

matter with the other creditors of Tuni and induced my client to bring the partition deed. My client believing the representation of Chakka Suryanarayana gave the partition deed dated 18-11-1972 to Chekka Suryanarayana. The said Suryanarayana asked my client to come within a week or meanwhile he would send a word for all the creditors."

21. When the respondent started giving evasive replies, the appellant got this legal notice issued. Twenty days thereafter, the respondent sent a reply stating that the document is given with an intention to create equitable mortgage as Tuni is a town in which equitable mortgage could be created over the properties.

22. The appellant in the witness box has categorically stated that nothing was mentioned about the debt in Ex.A.9 i.e., the partition deed. According to the appellant, those debts concerned his business and so they were not mentioned in Ex.A.9. We have gone through the entire evidence of the appellant herein. Nowhere the respondent suggested to the appellant that he does not owe any amount to others except to the firm but the Counsel for the respondent strenuously argued by relying on a sentence in the cross-examination to the following effect:

"I cannot say the debts were there as well as dues from others to us."

23. In our opinion, this statement cannot be given any weight for the simple reason that when a person is asked of hand as to what are the loans lie has to pay and what are the loans he has to recover, it is highly impossible to a common man to give the details of all the transactions. Further if the version of the respondent is true that the appellant herein deposited the partition deed as an equitable mortgage, it (the respondent) would not have filed a suit within one month from the date of deposit of the document. In fact it is the case of the respondent that when the appellant was threatened by the managing partner of the respondent-firm that the firm cannot wait any longer and it wants to go to the Court, he deposited the partition deed with an intention to create equitable mortgage. When an equitable mortgage is created with an intention to gain some time by the appellant, the respondent would not have filed a suit within one month from the date of receiving the document.

24. Further it is seen that the case of the respondent is that the appellant and his sons are continuing as members of the joint family and residing together as the partition deed was not acted upon and the said partition deed was given as an equitable mortgage. When the trial Court dismissed the suit against the sons of the appellant, the respondent did not choose to file the appeal against the judgment and decree to the extent of the sons of the appellant and it was allowed to become final. With the result, by virtue of the decrees passed by the trial Court as well as the appellate Court, two inconsistent decrees came into existence, i.e., while the trial Court dismissed the suit against the sons of the appellant, the learned single Judge held that it is a suit based on equitable mortgage by deposit of title deeds by D.1 only to the extent of the properties that were allotted to his share. Again it is a moot

question whether such a decree could be passed in the light of the contention that the partition deed was deposited with an intention to create an equitable mortgage by D.1 on behalf of the sons also. As we have taken the view that the appellate Court erred in treating the suit as based on equitable mortgage on merits, we are not entering into any discussion on this issue.

25. From the conduct of the parties, we have no hesitation to hold that the respondent having come into possession of the partition deed started blowing hot and cold to suit its convenience throughout the proceedings and such a conduct on the part of the respondent is deprecated.

26. In the light of the view taken by us, the judgment and decree of the learned single Judge in passing a preliminary decree for the amount due to the respondent by treating the suit as based on equitable mortgage cannot be sustained in law and it is accordingly set aside and the judgment and decree of the trial Court in O.S. No. 127 of 1977 is restored. Accordingly L.P.A. No. 9 of 1990 is allowed.

27. O.S. No. 222 of 1979 is filed, as stated supra, after the respondent filed the suit for recovery of money, for return of the document i.e., partition deed Ex. A. 9 and the same was decreed. The learned single Judge having allowed A.S. No. 418 of 1981 arising out of O.S. No. 127 of 1977 dismissed the suit in O.S. No. 222 of 1979 by allowing Transfer A.S. No. 1672 of 1988. As we have now reversed the findings of the learned Judge in AS No. 418 of 1981 and restored the judgment and decree of the trial Court in OS No. 127 of 1977 to file, LPA No. 38 of 1993 has to be allowed. Accordingly, LPA No. 38 of 1993 is allowed and the judgment and decree of the trial Court in OS No. 222 of 1979 is restored and the transfer A.S. No. 1672 of 1988 is dismissed.

28. The appellant is entitled for costs throughout.