

(1977) 02 AP CK 0008

In the Andhra Pradesh High Court

Case No : Appeal No. 115 of 1974 and C.M.P. No.1504 of 1977

Boda Narayana Murthy and Sons

APPELLANT

Vs

Valluri Venkata Suguna and Others

RESPONDENT

Date of Decision : 21-02-1977

Acts Referred:

Partnership Act, 1932 — Section 14

Transfer of Property Act, 1882 — Section 58, 8

Citation : AIR 1978 AP 257

Hon'ble Judges : Ramachandra Raju, J;Raghuvir, J

Bench : Division Bench

Advocate : N. Bapiraju and N.V. Surayanarayana Murthy, for the Appellant; C.V.N. Sastry and J.V. Suryanaryana Rao, for the Respondent

Judgement

Ramachandra Raju, J.—Plaintiff in the suit is appellant in the appeal . It is a firm represented by one of the petitioners. The suit is laid to recover a sum of Rs. 52,087.47 with interest from the date of suit, on the foot of an equitable mortgage by deposit of title deed made by one late. N. V. Narshimham, father of defendants 1 and 2. Only one title deed was deposited and it is Ex. A-9 dated 23-1-1945 under which the site, an up-stair building and some structures standing thereon, were conveyed in favour of five persons, namely father of defendants 1 and 2, 3rd defendant, Nidamarthi Suraiah Venkata Krishna Murthy and one Nidamarthi Satyanarayana Murthy. Subsequently, a cinema house, called "Minerva Takies" was built on the site purchased under Ex A-9 by the time equitable mortgage was created which is evidenced by the Memorandum, Ex. A-10 dated 19-1-1970. According to Ex. A-10 the deposit was made on 18-1-1970.

2. After obtaining Ex. A-9, one of the five purchasers viz., Venkatakrishna Murthy by Ex. A-23 dated 22-3-1945 relinquished his share by mentioning it as 1/8th in favour of the remaining four vendees under Ex. A-9. Subsequently some others also became entitled to a share in the property relating to Ex. A-9. All of them re

made parties to the suit and they are defendants 3 to 8.

3. The first defendant filed a written statement which has been adopted by defendants 2 and 8. The third defendant filed a separate written statement which has been adopted by defendants 5, 6 and 7. The contentions raised by the defendants in defending the suit are as follows:----

1. The suit is not maintainable as the plaintiff-partnership firm was not registered and the partner who filed this suit was not authorised to do so;

2. The borrowing said to have been made by N. V. Narasimham, father of defendants 1 and 2 and creation of the mortgage are not admitted and the plaintiff is put to strict proof of the same;

3. The interest claimed is excessive;

4. The hypotheca was a partnership property of a firm, consisting of partners, N. V. Narasimham, father of defendants 1 and 2, defendants 3, 5, 7 and 8 and another called A. Visveswara Rao, and therefore, the mortgage created by the father of defendants 1 and 2, as a security for his personal debt is not valid; and

5. Defendants 4 and 6 have no interest in the hypotheca.

4. The lower Court found all the points in favour of the plaintiff, except for the finding that the hypotheca was partnership property and, therefore, the mortgage created by the father of defendants 1 and 2 is not a valid one. Accordingly, the lower court granted a simple money decree for the suit amount to be realised from the assets of N. V. Narasimham, the debtor, in the hands of defendants 1 and 2.

5. There is also a finding given by the lower court that 5/14th is the share of the mortgagor in the mortgaged property, even assuming that it is not partnership property and remained joint property between the co-owners. But, according to the case of the plaintiff his share was 5/28th.

6. Sri J. V. Suryanarayana Rao, learned counsel for the respondents has also raised a new point in his arguments, which was not raised in the lower court by arguing that what can be said to have been hypothecated by depositing Ex. A-9 title deed is only the property purchased under that sale deed as the cinema house called "Minerva Talkies" which was subsequently built cannot be said to have been hypothecated by means of depositing Ex. A-9 only.

7. Therefore, the points that arise for our consideration in the appeal are:

1. Whether the property mortgaged was partnership property?

2. What is the property that can be said to have been mortgaged by deposit of the title deed, Ex. A-9?

3. If the mortgaged property was not partnership property and it was the property owned by co-owners, what is the share of N. V. Narasimham, the

mortgagor in it?

8. Point No. 1: A reading of Ex. A-9 shows that the five persons mentioned therein as vendees purchased the property as individuals. There is nothing to show in the document that they purchased the property as partners of firm. As a matter of fact, no evidence has been adduced to show that any partnership funds were utilised to make the purchase. The property purchased under Ex. A-9 is a site of an extent of 2868 square yards with an up-stair building and some houses bearing door numbers 17/180 and 17/181. Admittedly the cinema house called "Minerva Talkies" was built subsequently. There is also no evidence to show that any partnership funds were utilised for constructing the same. Nonetheless, it is in evidence that there has a partnership of which N. V. Narasimham, father of defendants 1 and 2, defendants 3, 5, 7 and 8 and one A. Visveswara Rao were partners, for the purposes of doing business by exhibition of film. Ex. B-1 dated 1-6-62 is an agreement entered into between the partners mentioned above, agreeing upon additional terms of the partnership. It refers to the partnership deed dated 1-4-1962 executed by the partners. Ex. B-2 dated 1-12-1970 is an Income Tax Assessment Order relating to the assessee called "Minerva Talkies, Rajamundry" as a registered firm, the partners of which being the six persons mentioned above and who entered into Ex. B-1 agreement. This assessment order, Ex. B-2 agreement was for the accounting year ending with 31-3-1970 and the firm was in existence earlier also. It is not in dispute that the partnership firm was exhibiting films as its business in the cinema house, which was built on the site purchased under Ex. A-9. Therefore, the question for consideration is whether the hypotheca for which the mortgage was created became the property of the partnership?

9. It is not necessary that every partnership for the purpose of its business should own and utilise its own partnership property. It can also utilise the property owned by others for the purpose of its business. Therefore, the fact that the partnership firm was exhibiting films in the Mineva Talkies does not by itself make the Minerva Talkies the property used by it is necessary to carry on the business, by operation of law it would become the property of the partnership. In support of this argument the learned counsel has placed reliance on *Forester v. Hale*, ((1800) 31 ER 603). *Dale v. Hamilton*, (1870) 1 AC 174. I do not think anything said in the cases supports such a broad proposition. In *Lachhman Das v. Mt. Gulab Devi*, AIR 1963 All 270 a Bench of the Allahabad High Court has held that because certain partners jointly own immovable property which was used for the purpose of partnership business it does not necessarily follow that the property is partnership business it does not necessarily follow that the property is partnership property. Whether it is or is not depends upon the agreement between the partners. In Civil Appeal No. 1008 of 1966 decided on 18th April, 1969 reported in *ArjunKanoji v. Santha Ram Kanoj Tankar*, 1969 UJSC 405, the Supreme Court also has held that the property belonging to a person in the absence of an agreement to the contrary does not, on the person entering into a partnership with others become the property of the partnership merely because

it is used for the business of the partnership. It would become property of the partnership only if there is an agreement, express or implied that the property under the agreement of partnership is to be treated as the property of the partnership. What would be the property of a firm is mentioned in Section 14 of the Indian Partnership Act. According to that provision, the property of a firm includes all property and rights and interests in property originally brought into the stock of the firm or acquired by purchase or otherwise, by or for the firm in the course of the business of the firm and includes also the good will of the business. Therefore, for a property to become the property of a firm it must have been brought into the stock of the firm by the partners originally when the firm was formed or subsequently acquired by purchase or otherwise in the course of the business of the firm. In the present case there is no evidence adduced to show what are the properties that were brought into the stock of the firm when it was originally formed or what are the properties that were subsequently purchased or acquired by the firm in the course of its business. The accounts of the firm have not been produced to show that property was brought into the stock of the firm by the partners or what was acquired subsequently in the course of its business. Only one witness was examined on behalf of the defendants. He is the 3rd defendant who gave evidence as D. W. 1. He has stated that the site of the Minerva Talkies is the partnership property and it was contracted in 1945. By the time the site was purchased under Ex. A-9 the partnership was already in existence. But he has admitted that under Ex. A-9 the partners of the cinema hall only purchased the property. Ex. A-9 also shows as already mentioned above, the purchase was made not in the name of any partnership but only in the name of individual persons. As would appear from Exs. B. 1 and B. 2, the partners of the partnership firm are Nidamathi Venkata Narasimham, father of defendants 1 and 2 and defendants 3, 5, 7, 8, and also one A. Visweswararao, who is not one of the defendants. But out of them defendants 5, 7, 8, and A. Visweswararao were not parties to Ex. A-9. It is not the case of the defendants herein that the original partners of the firm are the five vendees who purchased the property under Ex. A-9. Therefore, it is clear that the purchase under Ex. A-9, was not by the partnership. Except D. W. 1 merely saying that by the date of Ex. A-9 the partnership was already formed, no documentary evidence has been produced in support of it. Some documentary evidence should have been available to show as to when exactly the partnership was formed and who were the partners then. But it was not produced. The only documentary evidence we have, where any reference about partnership was made, is the one afforded by Exs. B-1 and B-2. As already mentioned above, Ex. B-1 dated 1-6-1962 is an agreement entered into between the partners of the alleged firm. It mentions that a partnership deed was entered into on 1-4-1962. Ex. b. 2 is an assessment order relating to the partnership for the accounting year ended with 31-3-1970. It mentions that there was no change in the constitution of the firm. That means, the same firm must have been in existence as in the previous year. These are the only two documents which we have relating to the existence of the partnership.

10. As already mentioned above, there was absolutely nothing to show that the Minerva Talkies was brought into the stock of the firm by any of the partners or it was acquired or built subsequently by the firm in the course of its business. On the other hand, from the other documentary evidence adduced in the case it only appears that this property was never treated as the partnership property and it had always been held jointly by co-owners. Exs. A-20 to A-22 are encumbrance certificates respectively for the periods 23-1-1945 to 31-12-1956, 1-1-1957 to 25-1-1945 and 25-12-1969 to 19-5-1970. Ex. A/20 shows the sale deed dated 23-1-1945 under Ex. A-9. The next document is Ex. A-23 dated 24-3-1945 (sic). Mention about this document has already been made above. The next document is dated 28-3-1947 (not exhibited) under which Nidamarthi Surayya, one of the five purchasers under Ex. A-9 executed a settlement deed with regard to 1/16th share in favour of one P. Suseelamma (vendor under Ex. A-18) and another 1/16th share in favour of one K. Indira Sundaramma, the predecessor in title of the 4th defendant. Ex. A-21 shows security for Rs. 2000 given by an advocate who was appointed to a panel of Receivers by Court. He is the son of Surayya, one of the vendees under Ex. A-9. The second document is dated 14-6-1960 under which the donee K. Indira Sundarmma sold her 1/16th share in the property she got to the 4th defendant. The next document is Ex. A-18 sale deed date 8-8-1961 under which P. Suseela sold 1/16th share in the property which she got under the document dated 28-3-1947 mentioned above to all the other co-owners. Under the document Ex. A-18 she sold to each of the other seven co-owners proportionately to their respective shares which they were owning then in the property, Ex. A-22 does not show any encumbrances. From the above discussion it is clear that during the entire relevant period the suit property was never considered to be the property of the partnership. It was being dealt with by the individuals as co-owners of the property.

11. In this connection Sri. J. V. Suryanarayana Rao has placed strong reliance on Ex. A-24 date 6-8-1961 rental deed for the Minerva Talkies executed by the seven persons in whose favour Ex. A-18 was executed namely, the father of defendants 1 and 2 and defendants 3 to 8. The lessee under Ex. A-24 is an individual. In Ex. A-24 it is recited that the Minerva Talkies was owned jointly by the seven persons who executed it. The argument of Sri. J. V. Suryanarayana Rao is that defendants 4 to 8 were not the purchasers of the property under Ex. A-9 and if they joined in the execution of Ex. A-24, they must have joined in their capacity as partners of the partnership and hence it shows that the partnership owned the Minerva Talkies. Under Ex. A-18 defendants 4 to 8 are the vendees. But Ex. A-18 came into existence only subsequent to Ex. A-24. two days later to it. There is a recital in Ex. A-18 to the effect that the 1/16th share of the vendor was delivered to the vendees on 1-4-1960 itself, that is, more than one year prior to Ex. A-24 rental deed. So, by the date of the rental deed defendants 4 to 8 acquired interest in the Minerva Talkies though it was only later a formal sale deed was executed in their favour. Therefore, if they joined in the execution of Ex. A-24 rental deed it could be in their capacity as co-owners

also. That Ex. A-24 would not have been executed on behalf of the partnership is evident from the fact that all the partners of the firm did not join in its execution. A. Viswaswararao, who is one of the partners of the firm, is not party to Ex. A-24. Similarly the 4th and 6th defendants who are not partners of the partnership were parties to Ex. A-24. This clearly establishes that Ex. A-24 rental deed was executed by the seven persons being interested in the demised property as co-owners and it could not have been on behalf of the partnership firm.

12. Another important circumstance to be noted is, the shares of the partners in the partnership are not identical with the shares of the partners in the properties mentioned in the documents. From Ex. A-18 we get the shares of the father of defendants 1 and 2, and defendants 3 to 8 respectively as 5/16, 4/16, 1/16, 1/16, 1/16 and 2/16 which were owned by them on that date. Each of their shares was augmented proportionately by the 1/16th share in the property sold under it. Thereafter, their shares respectively had become 5/15, 4/15, 1/15, 1/15, 1/15 and 2/15. Of these, as already mentioned above, the father of defendants 1 and 2 and defendants 3, 5, 7 and 8 are partners of the partnership. Their shares in the partnership as would appear from Ex. B. 2 are 5/15, 4/15, 1/15, 1/15 and 2/15 respectively. From the above it is clear that when the 8th defendant was owning in the property a 1/4th share, he was having a 2/15th share in the partnership, the 7th defendant who was having a 2/14th share in the property was having only a 1/15th share in the partnership. It is not as if the partners were having the same shares in the partnership as they were having in the property. This goes against the theory that the property was the property of the partnership.

13. After reviewing the case law, the Supreme Court in *Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others*, has observed as follows (at p. 1304 of AIR):

"The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the exclusive property of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of the partnership. His right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from partnership or with his retirement from partnership of the value of his share in the net partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges."

14. From the treatment given to the property all along it appear clear that the property was always treated as property of the co-owners and not as property of the partnership. Accordingly, we hold on Point No. 1 that the property mortgaged was not the partnership property.

15. Point No. 3: Regarding the share of N. V. Narasimham, father of defendants 1 and 2 in the property in the plaint it is claimed that it is 5/14th share. D. W. 1 in his evidence has also stated that N. V. Narasimham had a 5/4th share in the Minerva Talkies. But from the calculations made above on the information we get from Ex. A-18 sale deed, the share of N. V. Narasimham in the property would come to 5/15th share as already mentioned above. Accordingly, we find that the share of N. V. Narasimham in the property in question is 5/15th and not 5/14th. We answer Point No. 3 accordingly.

16. Point No. 2 : Coming to the question as to what was the property that can be said to have been mortgaged by deposit of the title deed, Ex. A-9, as per the arguments of Sri. J. V. Suryanarayana Rao it would be only the property which was actually purchased under that document. The Minerva Talkies was not in existence at that time. It was built only subsequently. Therefore, his argument is that by the deposit of Ex. A-9 sale deed no mortgage could be created with regard to the Minerva Talkies which was constructed subsequent to Ex. A-9. Ex. A-10 is a Memorandum evidencing the deposit of the title deed. The property comprised in the sale deed Ex. A-9 is 2868 square yards with up-stair houses bearing Door Nos. 17/180 and 17/181 and other structures thereon. According to Sri. J. V. Suryanarayana Rao, the mortgagee could have security only over this property. No schedule was given in the memorandum Ex. A-10. What is mentioned in the plaint schedule is, 5/14th share in Door Nos. 17/189 and 17/190 corresponding to Old D. Nos. 17/180 and 17/181 standing in a site of 2868 square yards ---- Minerva Talkies.

17. It is provided under S. 8 of the Transfer of Property Act that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof and such incident include where the property is land, the assessment annexed thereto, the rents and profits thereof accruing after the transfer and all things attached to the earth etc., Sri Bapiraju. the learned counsel for the plaintiff appellant has submitted that when the mortgage is created by deposit of Ex. A-9 title deed the Minerva Talkies was there. The mortgagor was then capable of mortgaging his share in the Minerva Talkies also. Though the Minerva Talkies was not in existence at the time the title deed which was deposited came into existence still the mortgagor was capable of creating the mortgage over the Minerva Talkies also as a legal incident. In this connection some decisions were cited. A Bench of the Kerala High Court in George Vs. South Indian Bank Ltd. and Another, has said a building is a thing attached to the earth. A house being imbedded in the earth is immovable property and when land is transferred by way of mortgage,

buildings erected upon it pass by necessary implication to the transferee. Therefore if the title deed deposited mentions only the land and not the building standing thereon still the Kerala High Court held, that the mortgage would operate both on the land and the building. To a similar effect is the decision of a single Judge of the Madras High Court in *Berumull Sowcar v. Velu Gramany*, AIR 1942 Mad 369. There also the title deed deposited mentions only the land and not the building thereon. The Madras High Court held that the title deeds could create an equitable mortgage of the entire property consisting of the ground and the super structure standing thereon. We are in entire agreement with the view expressed by the Bench of the Kerala High Court and the single Judge of the Madras High Court and hold that even though the title deed deposited relates to land only, if at the time the deposit was made there were any structures on it, equitable mortgage would be created both with regard to the land as well as the structures thereon. Point No. 2 is answered accordingly.

18. If that is so, the plaintiff is entitled to a mortgage decree as prayed for over 5/15th share of the property mentioned in the plaint Schedule. Accordingly, the appeal is allowed and there will be a preliminary decree as mentioned above. The plaintiff is entitled to recover costs throughout from defendants 1 and 2. We direct defendants 3 to 8 to bear their respective costs both in the appeal and in the suit. Time for redemption --- six months.

C. M. P. No. 1504 of 1977:-----

19. This petition is filed at a very belated stage after the arguments were concluded and the dictation of the judgement started on Friday was half way on Monday. We do not find sufficient grounds to entertain this application which is filed at a very belated stage. Accordingly, the petition is dismissed.

20. Order accordingly.