
(1981) 11 AP CK 0008
In the Andhra Pradesh High Court
Case No : Appeal No. 853 of 1975

Kanigalla Prakasa Rao

APPELLANT

Vs

Nanduri Ramakrishna Rao and Others

RESPONDENT

Date of Decision : 18-11-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 11, 34
Transfer of Property Act, 1882 — Section 58, 78
Usurious Loans Act, 1918 — Section 3

Citation : AIR 1982 AP 272

Hon'ble Judges : Punneya, J; P. Ramachandra Raju, J

Bench : Division Bench

Advocate : Chella Seeta Ramayya, for the Appellant; T. Veerabhadrayya, K. Ram Gopal and C.V.N. Sastry, for the Respondent

Judgement

P. Ramachandra Raju, J.—This is a plaintiff's appeal arising on the following material facts. The plaintiff advanced a sum of Rs. 25,000 to defendants 1 and 2, partners of a rice mill, under Ex. A-1 pronote dated 30-4-1970, stipulating for the payment of interest at 24% per annum with annual rests. The 1st defendant is the father-in-law of the 2nd defendant. The rice mill was constructed to a vacant site of about 3,354 sq. yards. An extent of 2,292 sq. yards originally belonged to one Digavalli Venkataratnam husband of the 3rd defendant. Defendants 1 & 2 took on lease this vacant site from the said Venkataratnam for constructing the rice mill, but in doing so, have constructed the rice mill partly on that site and in an extent of 1962 sq. yards belonging to one K. Chiranjivi Rao. The 1st defendant later acquired title to the site of 1062 sq. yards under the registered sale deed Ex. A-2j dated 2-5-1951; subsequently both defendants 1 and 2 acquired title to the site of 2292 sq. yards from the 3rd defendant under the registered sale deed Ex. A-3 dated 29-7-1966 in respect of which transaction, part of the sale consideration remained still to be paid to the 3rd defendant. To secure the repayment of the amount due under Ex. A-1 pronote, both the defendants 1 and 2 deposited Exs. A - 2 and A-3 with the plaintiff on 10-5-70

with an intent to create an equitable mortgage and executed the memorandum Ex. A-4 dated 12-5-1970. The 3rd defendant filed O. S. No. 136/72 to recover the unpaid purchase money due to her in respect of Ex. A-3 sale transaction and impleaded to here suit, both the plaintiff and the 5th defendant, State Bank of India, and obtained a decree against defendants 1 and 2. The plaintiff thereupon filed the suit O. S. No. 96/72 which has given rise to this appeal. He filed the suit initially against defendants 1 to 4, the 4th defendant having been impleaded as the lessees in possession of the mortgage property and having an interest in the same. Interest was claimed at 24% per annum up to the date of suit and at the same rate from the date of suit till date of decree and at 6% per annum from the date of decree. Defendants 1 and 2 contested the suit, stating among other grounds, that there was a prior equitable mortgage dated 21-10-65 created in favour of the 5th defendant over the property covered by Ex. A-2 sale deed; that at the time the equitable mortgage was created in favour of the 5th defendant over the property covered by Ex. A-2 sale deed; that at the time the equitable mortgage was created in favour of the plaintiff, the plaintiff as informed about the earlier equitable mortgage created in favour of the 5th defendant and the rate of interest was usurious and interest should be calculated at 9% per annum. The 5th defendant was subsequently added as per order in I. A. No. 29/73. The Bank, in its written statement, denied the equitable mortgage alleged by the plaintiff in his favour. According to the Bank, at the time the equitable mortgage was created in its favour on 21-10-1985, defendants 1 and 2 orally and in their written statement assured the Bank that the original title deed dated 2-5-1951 was lost and they were, therefore, depositing the registration extract and it was on the strength of such assurance, the Bank accepted the certified copy of the state deed date 2-5-1951 with a view to bring about the transaction as an equitable mortgage. The Bank claimed priority over the mortgage in favour of the plaintiff. The learned Subordinate Judge, Eluru, held that the equitable mortgage pleaded by the 5th defendant was true and in granting a preliminary decree for redemption calculating interest at 12% till date of suit and thereafter at 6%, held that the plaintiff's rights in terms of the decree are subject to the prior encumbrances created by defendants 1 and 2 in favour of the 5th defendant. He did not give any indication that while the equitable mortgage in favour of the plaintiff was over the mill raised on the site purchased under Exs. A-2 and A-3, the equitable mortgage in favour of the 5th defendant had effect only against that portion of the site acquired under Ex. A - 2.

2. It is not disputed that at the time defendants 1 and 2 created the equitable mortgage in favour of the 5th defendant, they deposited with the 5th defendant the partnership agreement Ex. B-17 dated 2-11-1961, the encumbrance certificate Ex. B-19 dated 24-9-1965 and Ex. B-18 registration extract of the sale deed Ex. A-2 and obtained the receipt Ex. B-1 dated 26-10-1965 and the 1st defendant also addressed the letter Ex. B-20 informing the Bank that the original of Ex. B-18 was lost.

3. Sri Seetharamayya, learned counsel appearing for the plaintiff-appellant has

made the following main submissions; (1) There cannot be a valid equitable mortgage in favour of the Bank over the property subject-matter of Ex. A-2 without delivering to the Bank the original title deed. What S. 58(f) of the Transfer of Property Act contemplates is the delivery of the document of title which in the context means the original document and not a registration extract. If such equitable mortgages can be created by delivering registration extracts, it gives scope to persons to commit repeated frauds and injustice to persons who subsequently deal bona fide with the owners, who are still found to be in possession of the original title deeds. (2) It was an act of gross neglect on the part of the Bank to have accepted the delivery of a registration extract of a sale deed without insisting on the delivery of the original of the sale deed. The Bank has not let in any evidence as to what enquiry the Bank made to verify the statement allegedly made by defendants 1 and 2 that the original of Ex. B-18 was lost. Such evidence, as has been given by the 2nd defendant as D. W. 1 in the case, does not establish that the Bank made any enquiry expected of it in accepting Ex. B-18 registration extract and, therefore, gross neglect on the part of the Bank should be inferred. Under S. 78 of the T. P. Act, the Bank's rights shall therefore be postponed to the plaintiff's rights in view of the Bank's gross neglect. (3) The Subordinate Judge erred in cutting into the agreed rate of interest and he should have granted to the plaintiff the agreed rate of interest till date of decree. (4) The Bank has no prior encumbrance over the subject matter of Ex. A-3 sale deed and the decree should appropriately be modified.

4. The submission that a valid equitable mortgage can never be made without delivering the original title deed has to be rejected. Such original documents of title may, at times, be lost or destroyed due to natural causes like cyclones and fire-accidents. They may also be lost either by thefts or due to want of proper care and sometimes they would have been filed in courts and not taken return of in time. The owners of property who have so lost their documents of title will, therefore, be not in a position to deliver such original documents with intent to create an equitable mortgage. It will be rather anomalous if such persons can validly execute registered documents of sale, lease and mortgage, but will not be entitled to raise any monies by creating an equitable mortgage. If the original title deeds are lost, we do not see why the owner of the property should not be in a position to an equitable mortgage. The mortgagee in such cases has only to be vigilant in accepting such representation made to him and should make the necessary enquiries before agreeing to advance any monies on the basis of registration extracts of documents of title or copies of documents. That seems to be the underlying principle behind S. 78 of the T. P. Act which provided that if the conduct of a prior mortgagee amounted to gross neglect, the mortgage in his favour will be postponed to the subsequent mortgagee.

5. Before noticing the cases cited before us, we may as well clear the submission made by Sri Seetharamayya that in this case the 5th defendant was guilty of gross neglect. The Bank did not examine any witness on its behalf. It has relied upon only the evidence of D. W. 1. The 2nd defendant, as D. W. 1, has stated

that at the time the equitable mortgage in favour of the plaintiff was created, they informed the plaintiff about the subsisting earlier equitable mortgage created by them in favour of the State Bank. The Bank elicited from the 2nd defendant that defendant that defendants 1 and 2 informed the Bank that they have lost the original of Ex. B-18 and to that effect, the 1st defendant passed the letter Ex. B-20.

"I lost the registered document of the vacant site. So I took a duplicate copy of it in the year 1959. I have not pledged this site to anybody."

Ex. B-18 registration extract was obtained on 15-7-1959. When the 2nd defendant was cross-examined, he denied the suggestion made to him that Ex. A-2, the original title deed, was with the 1st defendant at the time Ex. B-20 was executed. Ex. A-2 was not deposited with anybody else prior to their borrowing any amount from the Bank. Ex. A-2 original document was handed over to Anjaneyulu and others during the year 1956, the lessees of the mill, for the purpose of writing a document and Ex. A-2 was returned to the defendants by the lessees in the year 1967. He denied the suggestion made that Ex. A-2 was deposited with the contractors of the rice mill by way of an equitable mortgage. According to him, defendants 1 and 2 represented to the Bank that it was the contractors who lost the original title deed, but the Bank officials did not enquire from the contractors. It is clear from this evidence that defendants 1 & 2 made a representation to be true and advanced monies on the basis of Ex. A - 18 registration extract. The plaintiff as P. W. 1 denied that he was informed by defendants 1 and 2 about the prior encumbrance in favour of the Bank at the time the equitable mortgage was created in favour of the plaintiff. In his cross-examination, however, it was elicited that the 2nd defendant was receiving finances from the State Bank, but he did not make any enquiry as to on what basis the Bank was financing defendants 1 and 2. When it was suggested that there was a board displayed by the Bank on the property that the property was pledged to the Bank, the plaintiff gave an evasive answer that he does not remember if it was so. One has to appreciate the evidence in the background of normal human conduct. Then a Bank advances monies, it is usual for the display of such board on the property intimating the public that the property is pledged to the Bank; Both Exs. A-2 and A-3 have reference only to vacant sites and have no reference to the machinery that has been set upon those sites. The plaintiff did not make any enquiry with the bank to know about their interest over the mill property. True, Exs. A-2 and A-3 original title deeds were delivered to the plaintiff, but those documents while establishing the title of defendants 1 and 2 to the site covered by the mill, do not have any bearing on the title of defendants 1 and 2 to the mill put up on that site. As between the two versions given by the plaintiff and 2nd defendant the 2nd defendant's evidence is in accord with the course of human conduct. We accept his statement that at the time the equitable mortgage in favour of the plaintiff was created, the plaintiff was in fact informed about the earlier equitable mortgage subsisting in favour of the Bank. It is accepted that "gross neglect" means and involves a failure on the part of the

prior mortgagee to take such reasonable precautions against the risk of a subsequent encumbrance being deceived as in the circumstances renders it unjust that the earlier mortgage should retain its priority. When defendants 1 and 2 informed the Bank that the original title deed was lost, the Bank accepted the statement to be true and proceeded to deal with the defendants and 1 and 2 that the original title deed was in fact lost. The Bank has also obtained Ex. B-20 letter so that such representation made to the Bank by the 1st defendant may be on record. True, they have not enquired from the contractors to whom the original document was given. The absence of such enquiry does not constitute gross neglect on the part of the Bank when the Bank accepted Ex. B-18 along with the letter Ex B-20 and acted bona fide in its relations with defendants 1 and 2. We do not, therefore against the Bank.

6. In *Jessie Moyle Stewart v. Bank of Upper India Ltd., Simla* (AIR 1916 Lah 39), one of the submissions made for the first time in Lahore High Court was that as attested copies of the original deeds only were delivered, their deposit could not create an equitable mortgage. The Lahore High Court, while not permitting such a plea to be taken, however observed:

"The deeds in question were executed many years ago and there is every reason to believe that the originals have been lost, a fact which could, no doubt, have been established had the present objection been taken at the trial of the suit. And in this connection we would refer to a later passage in Gour's work where, citing the same authority as that above mentioned, he observes that "title-deeds include copies of the deeds when the originals are not forthcoming." We accordingly hold that his objection cannot be entertained at this stage of the case."

7. In *Sailendra Nath Palit Vs. Syed Hade Kaza*, it was held that the memorandum creating an equitable mortgage require registration, but in passing, the observation was made:

"Moreover the documents that were deposited are not original documents but copies only and are not such substantial documents as may be regarded as documents of title to the property."

Nothing was, however, stated as to the circumstances in which the copies of such original documents came too be deposited.

8. In *Gurdas Mal v. Punjab-Sindh Bank Ltd.* (AIR 1933 Lah 972) a copy of award evidencing title was held to be sufficient to create a valid equitable mortgage. That was because the original award continue to be part of the record in the proceeding in which it has filed into court and the original award itself could not have been deposited for creating an equitable mortgage.

9. In *Hem Raj v. Simla Banking and Industrial Co. Ltd.* (AIR 1935 Lah 10), the Bank accepted a copy of title deed as security. There was no evidence let in to suggest that the original was not available for deposit or was in hostile hands.

Such is not the case here, as representation of the loss of original has been made to the Bank and the Bank acted on it bona fide. In *Punjab and Sind Bank Ltd. v. Ganesh Das Nathu Ram* (AIR 1935 Lah 721), it was observed that if the debtor is not in a position to deposit documents of title from which an intention to create a mortgage could not be reasonably inferred, the only result will be that he will not be able to effect an "equitable" mortgage and to hold that such mortgages can be effected even by the deposit of copies, would be to open the door wide to fraud and perjury of the worst type. In that case, the mortgagor had failed to prove that the original sale deeds relating to the properties in dispute were in fact lost or were not in the possession or power of the mortgagor. Nonetheless, an observation was made:

"But I may remark that even this point is by no means free from doubt."

10. In *Jowala Das Govinda Ram v. Thakur Das* (AIR 1936 Lah 251), the Lahore High Court once again notices the aforesaid decision and made similar observations. In Coote's *Law of Mortgage*, Vol. I, Page 348 (5th Edn.) it was observed "An equitable mortgage may be created by the deposit of a receipt of purchase money, containing the terms of the agreement for sale, if there be no title deeds or conveyance in the depositor's possession; but not by a deposit of an attested copy of a deed." The learned author did not say that such is the position even when the title deed was lost.

11. It is thus to be seen that when title is traced to an award or probate, the originals of which are in Court, the Courts have always accepted the right of a party to deposit copies thereof to evidence a valid equitable mortgage. The general trend of the observations is that if the originals are lost, a valid equitable mortgage could be created by depositing a copy. If in some cases it was held that the deposit of such copies did not create a valid equitable mortgage, it was because the loss of the original title deed has not been properly accounted for.

12. It is enough if on the subject of "gross neglect" reference is made to *Surendra Mohan Rai Choudhury Vs. Mohendra Nath Banerjee and Others*, After noticing some English cases, the principles of which have been codified in S. 78 of the T. P. Act, it was observed:-

"We have to see whether there was gross negligence on the part of the plaintiff. A more careful lender would perhaps have taken an affidavit from the borrower as to the loss of the original redemption certificate, but in our judgment this omission was not negligence far less any gross negligence such as the section contemplates."

In the case of *Dixon v. Muckleston* (1872) 41 LJ Ch 210 Lord Selborne, it was observed:

"It is not legal negligence to accept the owner's statement that the deeds deposited are all that are necessary. If the court is satisfied of the good faith of the person who has got a prior equitable charge and has been satisfied that

there has been a positive statement honestly believed that he has got the necessary deeds, then he is not bound to examine the deeds, nor is he bound by constructive notice of their contents or of a deficiency which by examination he might have discovered in them."

13, The Bank, in this case, has taken Ex. B-20 letter and honestly believed that the original deed was in fact lost. The failure on the part of the Bank to have enquired from the contractors of the mill does not, therefore, constitute gross neglect. It is unnecessary to consider the cases where a prior equitable mortgagee, having come into possession of the tile deeds, delivered them in favour of the mortgagor and made it possible for the mortgage to create a second equitable mortgage in favour of a person who advance monies to the mortgage without notice of the prior encumbrance. The plaintiff was in fact made aware of the subsisting prior equitable mortgage in favour of the Bank. No equities, therefore, arise in favour of the plaintiff merely because Ex. A-2 original sale deed was delivered to him at the time the equitable mortgage was created in his favour. We accordingly reject the first and the second of the submissions made by Sri Seetaramayya.

14. There is no dispute that the interest to be provided on the mortgage has to be under the provisions of O. 34, C. P. C. The mortgage in favour of the plaintiff provided for payment of interest at 24%. The learned Sub. Judge felt that the said right of interest is prima facie usurious said the defendants 1 and 2 should be given relief under the Usurious Loans Act. Cases which have enabled the creditors to claim the contract rate of interest before the Usurious Loans Act was enacted are inappropriate and in that view, we hold that *Umes Chander Sircar v. Mst, Zahoor Fatima*, (1890) 17 Ind App 201 (PC) cannot serve as a precedent. In *Srinivasavardachariar and Others Vs. Gopala Menon and Others*, , the Supreme Court felt that the view taken by the Madras High Court in *Buragada Venkatarao and Another Vs. Godavarti Venkatratnam and Others*, that anything above 12 per cent per annum simple interest is excessive, considering the nature of transaction in this State, was correct and in making such an observation, the Supreme Court further observed (at p. 414):

"It appears to us, therefore, that in the opinion of a number of Judges of the Madras High Court who were cognizant of the state of affairs prevailing in the State, interest beyond the rate of 12 percent per annum simple would be considered excessive by courts of law where the security was not inadequate and the risk run by the creditor was not abnormal."

They have accordingly allowed 10% compound interest with yearly rests which works out roughly to 12% simple interest per annum. In *Konakalla Venkata Satyanarayana (Died) and Others Vs. State Bank of India and Others*, this court after noticing a number of decision rendered under the Usurious Loans Act held that the interest stipulated at 8 1/2% per annum will monthly rests in favour of the Bank was not usurious The Supreme Court in *Soli Pestonji Majoo and Others Vs. Gangadhar Khomka*, , held that O. 34, R. 11 gives a discretion to the Court in

not allowing the contractual rate of interest pendente lite. Having regard to the number of encumbrances on the property, viz., the charge decree in favour of the 3rd defendant and the amount to the Bank from defendants 1 and 2, the learned Sub. Judge has properly invoked the provision for interest 12% till date of suit and thereafter at 6% per annum from the date of suit. We, accordingly, reject this submission made by Sri Sitarammayya. The learned Sub.Judge held that the encumbrance in favour of the Plaintiff was subject to the prior encumbrance in favour of the 5th defendant. He has only not made it clear that the prior encumbrance in favour of the 5th defendant relates only to the property covered by Ex. A-2. To avoid future disputes, we have felt it necessary to make this clear and we accordingly direct amendment of Cl. 3 of the decree to read as follows:-

"It is hereby further ordered and decreed that in default of payment of the aforesaid, the plaintiff may apply to the court for a final decree for the sale of the mortgaged property and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold subject to the petitioner in favour of the 5th defendant over Ex. A-2 property and for the purpose of such sale, the plaintiff shall produce, before the court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property."

Subject to this slight modification, the appeal is dismissed.

15. As the appellant has substantially failed in the appeal, he is directed to pay the 5th defendant the costs in full and direct the other defendants, in the circumstances, to bear their respective costs.

16. An oral request is made for leave to appeal to the Supreme Court. We do not consider that any substantial question of law of general importance requiring to be decided by the Supreme Court is involved. The oral request is accordingly rejected.

17. Appeal dismissed.