

(1985) 02 KAR CK 0041
In the Karnataka High Court
Case No : CRP No. 1773 of 1981

Nagabhusappa

APPELLANT

Vs

Laxminarayana

RESPONDENT

Date of Decision : 14-02-1985

Acts Referred:

Transfer of Property Act, 1882 — Section 58, 58 (a), 58 (b)

Citation : (1985) ILR (Kar) 1742

Hon'ble Judges : Kulkarni, J

Bench : Single Bench

Advocate : V. R. Dattar, for Shivraj Patil, for the Appellant; P. Munikrishna, for G.S. Visweswara, for the Respondent

Final Decision : Allowed

Judgement

Kulkarni, J.—This is defendant No. 1's revision against the Judgment and decree dated 6-12-1980 passed by the Civil Judge, Yadgir, in R.A. 173 of 1979, reversing the Judgment and decree dated 29-6-1979 passed by the Munsiff, Shorapur, in O.S. 67 of 1977 dismissing the suit.

2. The plaintiff filed the suit alleging that the defendants, who are his friends, borrowed Rs. 1,000/- from him on 22-12-1973 after executing a deed in his favour. It was agreed that the money should be repaid within one year. It was further agreed that in case of their failure to repay the money, the plaintiff would be entitled to recover the said money by sale of R.S. No. 99 measuring 19 acres 18 guntas assessed at Rs. 32-19, situated at Mangloor. After the expiry of one year stipulated in the document, he called upon the defendants to pay the money. He sent lawyer's notice and chits to the defendants requesting them to repay the money. Notwithstanding so many requests, the defendants did not repay the same. Hence, the suit.

3. The defendants denied the execution of the document or the passing of consideration. They denied all the allegations in the plaint.

4. The Trial Court, on consideration of the material, held that the plaintiff had proved that defendant No. 1 had borrowed Rs. 1,000/- and executed a deed on 22-12-1973. However, he held that the suit was barred by limitation. Hence, he dismissed the suit. The plaintiff approached the Civil Judge with an appeal. The lower Appellate Court held that the document in question amounted only to a bond and thus the suit was in time. The lower Appellate Court has upheld the finding of the Munsiff that Rs. 1,000/- had been given to defendant No. 1 by the plaintiff. In short, he decreed the suit. Hence, the revision by defendant No. 1.

5. The most important question that arises in this case is whether the document in question amounts to a bond or a mortgage. A copy of the said document has been made available to me by the Learned Counsel for the respondent. It reads as -

"I, Nagabhushana, father Bheemaraya of Mangloor, hereby pass the following document -

I, in order to meet my family difficulties, have received Rs. 1,000/- from Sri Lakshminarayana, father Mohan Lal Seth by way of loan to-day the 22nd December 1973. If I fail to repay the Rs. 1,000/- within one year, to the said Sri Lakshminarayana Seth, he is entitled to recover the said amount of Rs. 1,000/- by the sale of R.S. No. 99 measuring 19 acres 18 guntas assessed at Rs. 32-19 standing in my name..... "

The Learned Counsel Sri Datar, appearing for the revision petitioner, urged that the said recitals in the deed amounted to a mortgage within the meaning of Section 58 of the Transfer of Property Act. Section 58(a) of the Transfer of Property Act reads as -

"A Mortgage is the transfer of an interest in specific Immovable 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."

Section 58(b) reads as -

"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."

In short, a mortgage is a transfer of an interest in specific Immovable property as security for the repayment of a debt. In a simple mortgage what is transferred is a power of sale which is one of the component rights that make up the aggregate of ownership. The characteristic feature of mortgage is that the right in the property created by the transfer is accessory to the right to recover the

debt.

6. The learned Author Mulla in his Transfer of Property Act, Sixth Edition, at page 370 has stated as -

"It is not necessary that the transfer should be formally expressed If the transfer is not in express terms, it is sufficient if the instrument taken as a whole operates as a transfer."

The learned Author has further stated at page 380 as --

"A simple mortgage consists of (1) a personal obligation, express or implied, to pay and (2) the transfer of a right to cause the property to be sold. The right transferred to the mortgagee is not ownership."

It is thus a matter of construction whether the security is a simple mortgage. For a simple mortgage there must be a personal covenant either express or implied and in the absence of such a covenant the security is generally but not necessarily a charge. In Balasubramania Nadar Vs. Sivaguru Asari and Another, the words that came up for construction were "in default I shall on the security of the house site belonging to me - pay and make good the principal and interest." These words were held by the Madras High Court to constitute a simple mortgage. The Privy Council in Gokuldoss v. Kriparam (1874) 13 Cal. L.R. 205 held that the following words sufficed to create a simple mortgage: "If I fail to pay the money as stipulated, land my heirs shall with- out objection cause the settlement of the said village to be made with you." When a mortgage deed gives a mortgagor the option of repaying the loan by selling the mortgaged property, that does not exclude the personal covenant in cases where there is on. Therefore, in a simple mortgage the security for the debt is two fold : (1) the personal obligation, and (2) the property.

7. In the present document, which has been extracted above, the defendant has undertaken to repay the money personally within one year. The said document also recites that if the borrowers fail to pay the money within one year, the creditor is entitled to recover the amount of Rs. 1,000/-by sale of R.S. No. 99 measuring 19 acres 18 guntas assessed at Rs. 32-19. Therefore, the said document consists of a personal liability as well as a right to the creditor to recover the amount by sale of the specific Immovable property i.e., R.S. No. 99. These recitals are practically the same as the one found in the said Madras case and the Privy Council case narrated supra. Though there may not be any specific averment in the deed stating that the interest in the property is transferred, when the right to recover money by sale of the property is given to the creditor, impliedly it amounts to transfer of an interest in the property. Therefore, I have no hesitation to hold that the deed in question is a simple mortgage.

8. Further para 12 of the Trial Court judgment reads -

"At the out set it is rightly conceded by Mr. B. S. Patil appearing for the plaintiff, that the transaction on which the suit claim is based is a mortgage and not a

bond."

Having once conceded in The trial Court that it is a mort-gage, it would not be rather proper for the creditor, now at this stage, to turn back and contend that it is a bond. Even apart from it, it has already been shown above that the document in question amounts to a simple mortgage.

9. The word "bond" has been defined in Section 2(a) of the Karnataka Stamp Act, as -

" "bond" includes -

(i) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed or is not performed, as the case may be ;

(ii) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another : and

(iii) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another ; "

If a document consists of only an obligation to repay the money, then it may be considered as a bond. But when the document, in addition to the undertaking to repay the money personally, also gives a right to the creditor to recover the money by sale of a specific Immovable property, it will not come within the ambit of "bond" as defined by the Karnataka Stamp Act.

10. The word "bond" has been defined by Section 2(d) of the Limitation Act, 1963, as -

" "bond" includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be ; "

This document, as already stated above, not only includes a personal liability, to repay, but also includes a right to the creditor to recover the money by sale of the specific immovable property. Therefore, by any stretch of imagination, the document in question will not amount to a bond at all. The lower Appellate Court has wrongly construed this document as a bond. Therefore, under these circumstances, the suit will have to be taken as the one filed on the foot of a mortgage.

11. The document in question is admittedly not written on a proper stamp paper and it is not registered. A mortgage requires compulsory registration. Any document, which requires, compulsory registration, if it is not registered, is inadmissible in evidence. If it is inadmissible in evidence, the suit based on such an inadmissible document, will not be maintainable or competent at all. The period of limitation for a mortgage may be twelve years. But if the mortgage itself is inadmissible on account of non-registration, the suit, though filed within

time, wilt have to be thrown out.

12. Both the Courts below have concurrently held that defendant No. 1 has received Rs. 1,000/- from the plaintiff. This is a question of fact. Further the said conclusion is well substantiated by the material on record. Therefore, I do not want to interfere with that conclusion.

13. The Trial Court has rightly held that the document in question amounted to a mortgage and that it was inadmissible in evidence on account of non-registration and thus it rightly dismissed the suit.

14. Under these circumstances, the Judgment and decree passed by the lower Appellate Court are set aside. The revision is allowed. The Judgment and decree passed by the Munsiff, dismissing the suit, are restored.