(1950) 08 KL CK 0003

In the High Court Of Kerala

Case No : Appeal Suit No. 436 of 1121

Potnen Uthuppan APPELLANT

Vs

Nilkanta Iyer Venkitachalam Iyer and Others RESPONDENT

Date of Decision : 02-08-1950

Acts Referred:
Debt Relief Act — Section 15, 2, 5, 8, 9
Transfer of Property Act, 1882 — Section 58

Citation : AIR 1950 Ker 154

Hon'ble Judges : K. Sankaran, J;G. Kumara Pillai, J

Bench : Division Bench

Advocate : K.P. Abraham, for the Appellant; N. Varadaraja Iyengar, for the Respondent

Final Decision : Dismissed

Judgement

1. The legal representatives of the debtor are the Appellants. They had filed a petition under Sections 8, 9 and 15, Debt Relief Act, for a declaration that they are entitled to discharge Ex. III debt as per the terms of that Act. Ex. III is styled as a usufructuary mortgage. It was stated that the intention of the parties was to treat it only as a simple hypothecation bond and so they had the right to discharge the debt under Sections 8 and 9, Debt Relief Act. Ex III dated 16-3-1119 was executed by the predecessor-in-interest of the Petitioners for 5480 paras of paddy and Rs. 500 in favour of the 1st counter-Petitioner. The same day the debtor had taken back the properties on lease under Ex. II agreeing to pay a rent of 451 paras and 11/2 edangalies of paddy per annum. Since possession was not passed on to the creditor, it was contended that the lease was executed only to secure the interest on the loan and that Ex. III, therefore, evidenced only a hypothecation bond. If this contention is accepted, then certainly it would be open to the Petitioners to discharge the debt under the provisions of the said Act. The 1st counter-Petitioner died and his legal representatives had been impleaded in the case. They contended that Ex. III was really a usufructuary mortgage and that it would come under the exception made

in Section 5 of the Act. The lower Court accepted the objections raised by the creditor and dismissed the petition. The Petitioners in the Court below have therefore, come up in appeal.

2. It was contended for the Appellants that possession had not been handed over to the mortgagee, for, it was not the intention of the parties to pass such possession. While the income from Ex. III properties was about 2000 paras of paddy and 3000 cocoanuts per year, the rent fixed was only 451 paras of paddy so that the creditor wanted only to secure the interest on the loan advanced and not to claim the whole yield from the properties. This will not in any way conclude that the transaction is not a usufructuary mortgage. Usufructuary mortgage is defined in Section 2 Clause (IX) of the Debt Relief Act. Usufructuary mortgage is a 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 and partly in payment of the mortgage money. So even if the mortgagor agreed to receive only a portion of the rent such agreement would not take away the legal characteristic of the mortgage transaction. Thus even accepting that the rent fixed in Ex. II was only a portion of the yield that would not detract the inference legitimately arising from the description of the transaction in Ex. III.

3. It was then contended that in the case of usufructuary mortgages personal liability was always excluded, whereas in Ex. III there was an undertaking to be personally liable for the mortgage debt. This was stated to be the characteristic, pure and simple of a hypothecation bond. It is open to the parties to add as many terms as necessary or expedient or agreed upon in a usufructuary mortgage deed so that the person who advances the money would be in a much better position. These aspects relating to usufructuary mortgage had been considered by Full Bench rulings in Abraham Nadar v. Chellappan 1943 T. L. R. 1026, Madhavan Pillai v. Muthukumara Ptllai 1943 T. L. R 1170. Documents practically containing identical terms were considered in those two rulings and it was held that the transaction evidenced a usufru3tuary mortgage. We do not find any reason to doubt the correctness of those rulings. We follow the same and hold that Ex. III evidences & usufructuary mortgage.

4. There is the further fact that Ex. III recites a prior transaction of 1098 between the same parties. That is Ex. A. It was styled to be a hypothecation bond. This was renewed under Ex. III and it is more or less dear that the intention of the parties was as to what they meant by styling Ex, III as a mortgage deed. We confirm the order of the Court below and dismiss the appeal with costs.

5. The Respondent had filed a cross appeal claiming the costs of the lower Court. The lower court has given soma reasons for disallowing the same and we do not

find our way to allow the costs of the lower Court. The cross appeal is, therefore, dismissed with costs.

