

(1976) 06 AP CK 0002
In the Andhra Pradesh High Court
Case No : C.C.C.A. No. 27 of 1973

Rachapudi Venkata Subba Rao	Vs	APPELLANT
Lingineni Lakshmiah Chowdary and Others		RESPONDENT

Date of Decision : 17-06-1976

Acts Referred:

Registration Act, 1908 — Section 17(1)
Transfer of Property Act, 1882 — Section 59

Citation : AIR 1977 AP 123

Hon'ble Judges : Ramachandra Rao, J;Jeevan Reddy, J

Bench : Division Bench

Advocate : N.K. Acharya, for the Appellant; A. Balakoteswara Rao, for P. Rama Rao and R.V. Subba Rao, for the Respondent

Judgement

Ramachandra Rao, J.—This is a plaintiff's appeal against the dismissal of his suit for recovery of money lent on a promissory note supported by a mortgage by deposit of title-deeds and for sale of the mortgaged property.

2. The case of the plaintiff is that the defendants 1 to 3 the respondents 1 to 3, herein, executed a promissory note (Ex. A-1) on 2-10-1967 in his favour and borrowed a sum of Rs. 60,000/- which was paid by way of cheque drawn in favour of the 1st defendant on the State Bank of India, Guntur, and that they promised to repay the amount jointly and severally together with interest thereon at 12% per annum with yearly rests. As security for the money borrowed, the defendants 1 to 3 deposited with the plaintiff title-deeds in respect of certain immovable properties situated in Hyderabad and Bangalore. They also executed a letter dated 4-10-1967 (Ext. A-2) giving the particulars of the documents of title deposited with the plaintiff and stating that the documents were deposited towards the monies borrowed under the promissory note on 2-10-1967. It is the further case of the plaintiff that the 2nd defendant made a payment that the 2nd defendant made a payment of Rs.17,080/- on 2-12-1968; and another sum of Rs.3,000/- on 5-12-1968. While making the payment of

Rs.17,080/- the 2nd defendant claimed by his letter dated 2-12-1968 (Ex. A-3) that he was paying the said amount towards his share of the money borrowed; but the plaintiff sent a reply on 4-12-1968 (Ex A-4) that all the defendants were jointly and severally liable and that the question of adjusting the amount paid towards the share of the liability of the 2nd defendant did not arise. As the defendants failed to pay the balance of the amount, the plaintiff filed the suit for recovery of the same with interest at 12% per annum with yearly rests. The suit amount came to Rs.58,195.55 P. as on 15-7-1970.

3. The suit was contested only by the defendants 1 and 2 and the 3rd defendant remained ex parte.

4. The last defendant filed written statement which was adopted by the 2nd defendant. The execution of the promissory note Ex. A-1 dated 2-10-1967 and the letter Ex. A-2 dated 4-10-1967 was admitted. He however contended that the defendants 1 and 2 borrowed a sum of Rs. 15,000/- each, while the 3rd defendant borrowed a sum of Rs.30,000/- under the promissory note (Ex. A-1) that each of them was liable individually for the amounts borrowed and that there was no joint and several liability. The 2nd defendant paid Rs.17-080/- pm 2-12-1968 and another sum of Rs.3,000/- on 5-12-1968 and the plaintiff having accepted the said amount, the defendants could not be made jointly and severally liable for the suit amount. It was further contended that the execution of the suit promissory note and the letter creating a mortgage by the deposit of title-deeds were simultaneously made on 2-10-1967 at one and the same time but the letter was post-dated as 4-10-1967 at the instance of the plaintiff on legal advice. The debt merged in the promissory note merged in the letter creating mortgage by deposit of title deeds. According to the defendants , the letter dated 4-10-1967 (Ex A-2) constituted a mortgage bond and that it is inadmissible in evidence for want of stamp duty and registration. Hence both the promissory note and the letter evidencing the mortgage were not enforceable in law. A further was raised that the promissory note and the letter creating mortgage were executed at Guntur where the plaintiff and the defendants 1 and 2 reside and therefore the plaintiff could not file the suit in the city Civil Court, Hyderabad, and that it had no jurisdiction to entertain the suit. The interest claimed at 12 % per annum with yearly rests and also challenged as unreasonable and usurious. The defendants claimed that they were agriculturists entitled to the benefit of the Andhra Pradesh (Andhra Area) Agriculturists" Relief Act 1938.

On the aforesaid pleadings the following issues were framed:

1. Whether as per the agreement pleaded by defendants 1 and 2, they are liable to pay Rs.15,000/- and third defendant is liable to pay Rs. 30,000/- individually is true?
2. Whether plaintiff received the payments from 2nd defendant in full discharge of liability of defendants 1 and 2 as contended by the defendants?

3. Whether the suit promissory note and the suit debt merged in the mortgage deed by deposit of title deeds, if so, whether the suit claim is redeemable on the basis of an unstamped and unregistered mortgage deed by deposit of title deeds on 4-10-1967?

4. Whether the suit in this Hon''ble Court at Hyderabad is maintainable and the letter dated 4-10-1967 creating mortgage by deposit of title deeds is admissible in evidence?

5. Whether the interest at 12% with yearly rests claimed by plaintiff is usurious and whether it is liable to be scaled down? If so to what extent?

5. On a consideration of the oral and documentary evidence, the lower Court held on issues 1 and 2 that the promissory note (Ex. A-1) and the letter (Ex A-2) clearly recite that the defendants 1 to 3 were jointly and severally liable for the suit amount and accordingly decided the issues in favour of the plaintiff.

6. On issues 3 and 4 the lower Court took the view that the promissory note (Ex A-1) and the letter (Ex A-2) evidence a single transaction, that Ex. A-2 created a mortgage and the said document having been unstamped and unregistered, was inadmissible in evidence and that the suit filed on the basis of the said document was not maintainable. The lower Court also took the view that though the properties given as security though within the jurisdiction of the said Court, the document Ex. A-2 not being admissible in evidence, the suit could not be entertained by it. On issue 5, the lower Court found that the defendants 1 and 2 were Income Tax assesseees and were not entitled to the benefit of scaling down of interest under the Andhra Pradesh (Andhra Area) Agriculturists'' Relief Act, that the interest claimed at 12% per annum with yearly rests, was not usurious and the defendants were bound by the terms of the documents Exs. A-1 and A-2 and were liable to pay the interest at the rate mentioned therein. However in view of the findings that Ex. A-2 was a mortgage deed and therefore inadmissible in evidence for want of registration u/s 17 of the Registration Act and Section 59 of the Transfer of Property Act and not enforceable in law and that the lower Court had also no jurisdiction to entertain the suit, the lower Court dismissed the suit with costs.

7. In this appeal the findings on issues 1, 2 and 5 are not challenged. Only the findings on issues 3 and 4 relating to the admissibility of Ex. A-2 and the jurisdiction of the lower Court to entertain the suit are challenged.

8. Mr. N.K. Acharya, learned counsel for the appellant (plaintiff) contended that Ex. A-2 is only a memorandum evidencing the deposit of title deeds, that a mortgage by deposit of title-deeds 4-10-1967 when the letter (Ex A-2) was written, that Exs. A-1 and A-2 do not constitute a single transaction, and that the lower Court''s view that Ex A-2 constitutes a mortgage is unsustainable. He also submits that if Ex. A-2 is admissible in evidence as evidencing the mortgage by deposit of title deeds it is enforceable at law and the lower Court has jurisdiction to entertain the suit.

9. On the other hand, it is contended by Sri A.V. Balakoteswara Rao, for Sri P. Rama Rao, learned counsel for the respondents that the transaction of borrowing and the deposit of title-deeds took place on 2-10-1967 itself, that the letter Ex. A-2 was post-dated on legal advice, that both Exts. A-1 and A-2 constitute a single transaction and even otherwise Ex A-2 provides for payment of interest at 12% per annum with yearly rests whereas the pronote merely provides for simple interest at 12 % per annum, that the parties reduced the bargains to writing by executing the letter Ex. A-2, that in the plaintiff also, interest was claimed at 12 % per annum with yearly rests on the basis of the letter (Ex A-2) and therefore Ex. A-2 itself constituted the bargain between the parties that it operated to create mortgage on the properties, mentioned therein and therefore, it was compulsorily registrable; and not having been duly stamped or registered, it is not enforceable at law and that if the said document is inadmissible in evidence, the suit is not cognizable by the lower Court. He also contended that the letter (Ex A-2) shows that the parties contemplated execution of a regular mortgage deed and this also shows that the parties intended that Ex. A-2 should contain the terms on which the security was created and therefore Ex. A-2 required to be registered.

10. In order to appreciate these contentions it is necessary to notice the following facts. The promissory note was executed on 2-10-1967 by the three defendants in favour of the plaintiff agreeing to repay the sum of Rs. 60,000/- with interest thereon at 12% per annum. Two days later i.e. on 4-10-1967 the letter in favour of the plaintiff and it reads as follows:

"Guntur

4-10-1967.

From

1. Lingineni Lakshmayya Chowdari.
2. Lingineni Krishna Rao.
3. H.K. Sankuntala.

To

Dr. Rachupudi Venkata Subbarao, Municipal Councillor, Chowtra, Guntur.

Sir,

We confirm having called on you and deposited with you on 2-10-1967 at your house at Guntur the documents of title set out below, relating to our properties shortly described as follows:

(Details of the 11 documents of title deposited have been given.)

In the presence of Kanamarlapudi Ramulu and Tadavarthi Ramulu as security for and with intent to create a first equitable mortgage on the said land and

buildings and the grape gardens now standing thereon and hereafter to be raised or constructed to secure our independence for the amount of Rs.60,000/- (Rupees sixty thousand) borrowed from you under cheque No. BA/34-701554 issued by you on the State Bank of India, Guntur in favour of the first of us and for which we executed a joint and several demand promissory note dated 2-10-1967 together with interest at 12% per annum with yearly rests as mentioned in the promissory note dated 2-10-1967 as also all such charges and expenses as collateral security by us together with subsequent interest at the same rate till realisation.

We confirm having declared that the documents deposited were all that were in our possession or control and that we are absolutely seized and possessed and well entitled to the said properties free from encumbrances and that no one else has any share or interest therein and that no adverse claim of any kind existed against the said properties.

We also confirm having agreed to execute and register at our cost a legal mortgage if and when called upon to do so by you.

Sd/- 1. Lingineni Lakshmaiah. 2. L. Krishna Rao 3. H. K. Shakuntala."

11. The main question that arises for consideration is whether this letter constitutes a mortgage or merely evidences the deposit of the title-deeds. The letter begins by saying "We confirm having called on you and deposited with you on 2-10-1967 at your house at Guntur the documents of title set out below."

12. Thereafter the documents of title are mentioned and it further recites that this deposit was made in the presence of Kanamarlapudi Ramulu and Tadavarthi Ramulu. The latter was examined as a witness on behalf of the plaintiff as P.W. 1. It is further recited that the deposit of the documents of title was made as security for and with intent to create a first equitable mortgage on the land and buildings and grape gardens for the amount of Rs. 60,000/- borrowed from the plaintiff under the promissory note on 2-10-1967. The said amount was repayable with interest at 12% per annum with yearly rests and also other charges and expenses. The letter is dated 4-10-1967, Ex facie Ex. A-2 shows that it was written two days after the execution of the promissory note Ex. A-1. The internal recital in Ex. A-2 also shows that the borrowing of the money of Rs. 60,000/- the execution of the promissory note (Ex A-1) and the deposit of the documents of title took place on 2-10-1967. The parties intended to put on record the aforesaid transaction by executing the letter Ex. A-2. This is clear from the very first recital in Ex. A-2, "We confirm having called on you and deposited with you on 2-10-1967 at your house at Guntur the documents of title set out below". It is therefore, not possible to accept the contention of the defendants that the letter Ex. A-2 was executed on 2-10-1967 but it was post dated as 4-10-1967 ; nor is it possible to accept the contention that Exs. A-1 and A-2 constitute a single transaction and that Ex. A-2 operated to create a mortgage by deposit of title deeds. The mere fact that there is variance with

regard to the rate of interest mentioned in the promissory note and that mentioned in the letter (Ex A-2) does not in our opinion give rise to any inference that Ex. A-2 would operate as a mortgage. The recital in Ex. A-2 mentioning that the amount of Rs.60,000/- was recoverable with interest "at 12% per annum with yearly rests as mentioned in the promissory note dated 2-10-1967", merely shows that the parties were referring to the original borrowal of the amount under the promissory note and also the understanding between them that interest was payable with yearly rests. The recital in Ex. A-2 does not create any fresh or new obligation but it is only referable to the anterior liability to pay interest on the amount borrowed at 12 % per annum with yearly rests. The further recital in Ex. A-2 that the documents deposited would stand as security for further charges and expenses, is also referable to the original bargain between the parties and that this recital is only an evidence of the bargain or transaction already completed on 2-10-1967 between the parties and it does not operate to create a charge for the first time over the properties given as security.

13. The evidence of P.Ws. 1 and 2 also supports the case of the plaintiff that the transaction of borrowing and the deposit of title-deeds, was completed on 2-10-1967 itself. The lower Court observed in paragraph 8 as follows:

"It has come in the evidence of the plaintiff as P.W. 1 that he advanced a sum of Rs.60,000/- to the defendants on a pronote and on deposit of title deeds of property which he styles as "Taket Dastaveju" executed on 2-10-1967, Ex. A-2 is the said document which he says was post-dated on legal advice".

14. After perusing the evidence of P.Ws. 1 and 2 it is admitted by the learned counsel for the defendants that there is no such statement by the plaintiff as P.W. 2 that the document Ex. A-2 was postdated on legal advice. This statement in the judgment of the lower Court, appears to be clearly wrong. On the other hand the evidence of P.W. 1 (one of the attestors of Ex. A-2) clearly shows that the transaction of borrowing and the deposit of title deeds, was completed on 2-10-1967 itself; whereas the document Ex. A-2 was written on 4-10-1967. We have therefore no hesitation in coming to the conclusion that Ex. A-2 is merely a record of the fact of borrowal under the promissory note Ex. A-1 and the deposit of title deeds on 2-10-1967 as security for the amount borrowed under Ex. A-1. If so, it follows that Ex. A-2 does not require to be registered u/s 17(1)(b) of the Registration Act or u/s 59 of the Transfer of Property Act.

15. The further recital in Ex. A-2, "that the parties contemplated execution and registration of a regular mortgage if and when called upon to do so by the plaintiff" would not support the contention of the defendants that Ex. A-2 by itself created a mortgage over the properties secured. On the other hand this recital would support the contention of the plaintiff that Ex. A-2 was intended only to be a letter evidencing the deposit of title-deeds as security for the money borrowed under Ex. A-1 on 2-10-1967.

16. A mortgage by deposit of title deeds is not required to be in writing but the deposit is normally evidenced by a memorandum in writing. If the writing itself constitutes a contract of mortgage which creates the mortgage, it has to be registered. But if the mortgage has been completed without the writing and the writing merely states that the mortgage has been effected or contains recitals from which the mortgage could be inferred, it does not require registration.

17. In the interest case on a consideration of the recitals in the document (Ex. A-2) and the surrounding circumstances we are inclined to hold that the mortgage by deposit of title deeds was completed on 2-10-1967 itself and that Ex. A-2 merely records the fact of the deposit of the title deeds as security for the money borrowed on 2-10-1967. Therefore Ex. A-2 does not require to be registered and is admissible in evidence and the suit for the enforcement of the mortgage by the deposit of title deeds is maintainable.

18. The learned counsel for the respondents invited our attention to the following decisions:-

19. Kakaraparthi Bhavanarayana Vs. Official Reciever, Krishna and Others, , ; and United Bank of India Ltd. Vs. Lekharam Sonaram and Co. and Others, . In the first case (Kakaraparthi Bhavanarayana Vs. Official Reciever, Krishna and Others, , the writing of Ex A-7 which fell for consideration then reads as follows:-

"To,

Sri Kokarlaparathi Bhavanarayan Sastri Garu Vijayawada, Letter Executed by Sonti Venkataratnam son of Kotaiah of Bezwada.

Myself and Tummu Subbarao borrowed Rs.13,500/- on 4-5-1951 and Rupees 1,800/- on 13-8-1951 on two promissory notes executed by us jointly in your favour at 12 percent, compound interest.

I now deposit the title deed of Sonti Venkatratnam among us relating to 1390 sq. yards of site in Municipal Ward No. No. 781-A dated 5-22-1948 as collateral security for the payment of the money due on the two promissory notes referred to above inclusive of interest. I executed this document of security in your favour after assuring you that I never created any charge or encumbrance on the property covered by the title deed dated 5-2-1948. Executed this 7th day of November, 1951.

Sonti Venkataratnam. 7-11-1951."

20. Construing the recitals in the document and the surrounding circumstances the learned Judge came to the conclusion that it did not appear that there was any earlier agreement between the parties or even a promise by the executant of Ex. A-7 to deposit the title deeds and as a consequence of which Ex. A-7 came to be written and there was nothing to show that the actual creation of the mortgage was different and apart from Ex. A-7. Their Lordships also observed, that the recital in Ex. A-7, " I executed this document of security in your favour"

clearly indicated that the writing itself created the mortgage, and on these facts the learned Judges held that Ex. A-7 required to be registered.

21. In the second case Veeramachineni Gangadhara Rao Vs. The Andhra Bank Ltd. and Others, , the learned Judges construing the document (Ex. A-6) which fell for consideration there came to the conclusion that it was intended to "put on record" the terms already agreed upon and that being the case the document could not be considered as a contract entered into between the parties. This case therefore, does not support the contention of the respondents.

22. In the third case United Bank of India Ltd. Vs. Lekharam Sonaram and Co. and Others, , it was held by their Lordships of the Supreme Court,

"When the debtor deposits with the creditor title deeds of his property with an intent to create a security the law implies a contract between the parties to create a mortgage and no registered instrument is required u/s 59 as in other classes of mortgage. It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract for writing this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration u/s 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in Immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in evidence at all and the transaction itself cannot be proved by oral evidence either."

23. On the facts of that case, their Lordships came to the conclusion that the letter which fell for consideration, was not intended to be an integral part of the transaction between the parties and did not by itself operate to create an interest in the immovable property and therefore it did not require registration.

24. The question whether a document merely evidences the record of a past transaction or of a completed mortgage by deposit of title deeds, or whether it constitutes the bargain or contract which created the mortgage has to be primarily decided with reference to the facts and circumstances of a particular case. In the instant case we are satisfied on a consideration of the recitals of Ex. A-2 and the evidence and the surrounded circumstances that it (Ex. A-2) merely evidences the record of a past transaction i.e. , the deposit of title deeds on 2-10-1967 as security for the money borrowed under the promissory note (Ex A-1). Therefore Ex. A-2 does not require to be registered; and is admissible in evidence. The view taken by the lower Court is erroneous and cannot be

sustained.

25. Once the document (Ex A-2) is held to be admissible in evidence, the suit for the enforcement of the mortgage against the property secured is maintainable in the lower Court as some of the properties offered as security are admittedly situated within the territorial jurisdiction of the lower Court. We therefore, hold that the lower Court has jurisdiction to entertain the suit.

26. In the result, the appeal is allowed the judgment and decree of the lower Court are set aside and a preliminary mortgage decree for recovery of the suit amount is passed against the defendants jointly and severally for payment of Rs. 58,195.55 ps. together with subsequent interest thereon at 6% per annum till date of payment and in default of such payment it is open to the plaintiff to apply for final decree for sale of the mortgaged property. The appellant (plaintiff) will have his costs both here and in the Court below.

27. This appeal having been set down on Friday the 2nd day of July, 1976, consequent upon the office note dated 1-7-1976 for orders as to fixation of time for redemption in the presence of N.K. Acharya, for the appellant, Mr. A. Balakoteswara Rao for Mr. P. Rama Rao, for the 2nd respondent and of Mr. R.V. Subba Rao advocate for the 3rd respondent and Respondents 4 to 6 not appearing in the person or by advocate, the Court made the following:

28. ORDER: Time for redemption is granted till 15th October, 1976.

29. Appeal allowed.