
(1970) 08 AP CK 0001

In the Andhra Pradesh High Court

Case No : Appeal No's. 28 and 381 of 1967

Reddi Veerraju

APPELLANT

Vs

Chittori Lakshminarasamma and Others

RESPONDENT

Date of Decision : 04-08-1970

Acts Referred:

Partnership Act, 1932 — Section 15, 29, 29(1)

Citation : AIR 1971 AP 266

Hon'ble Judges : Venkateswara Rao, J;Obul Reddi, J

Bench : Division Bench

Advocate : K.B. Krishna Murty, for the Appellant; G.R. Subbarayan, for the Respondent

Judgement

Obul Reddi, J.—Appeal No.28 of 1967 arises out of the Judgment in O.S. 53 of 1964 on the file of the Subordinate Judge, Rajahmundry passing a preliminary decree in favour of the plaintiff in terms thereof. Appeal No. 381 of 1967 and the un-numbered appeal (SR1448/67) are directed against the decision in O.S. No.54 of 1964 passing a preliminary decree. 2nd defendant in O.S.No.53 of 1964 preferred appeal No.28 of 1976; defendants 2 and 3 in O.S. No.54 of 1964 and the 6th defendant the very same suit preferred appeal NO.381/67 and the un-numbered appeal respectively.

2. The plaintiff instituted O.S. No.53 of 1964 for recovery of Rupees 14,000/- on the foot of Ex. A-2 dated 4-1-1952, a registered mortgage deed executed by the 1st defendant; and O.S. No.54 of 1964 for recovery of a similar amount of Rs. 14,000/- on the foot of Ex. A-1 mortgage executed on the same date i.e., 4-1-1952 by the 1st defendant for himself and on behalf of his minor sons, defendants 2 and 3. Though the defendants are different in each of the two suits, the plaintiff (1st respondent in these appeals) is common to both the suits. As the defenses raised by the contesting defendants in each of the two suits were substantially the same, the two suits were tried together with the consent of parties and the evidence recorded in O.S. No.54 of 1964 was treated as evidence

in both the suits.

3. The case of the plaintiff as narrated by her, in O.S. No.53 of 1964 is that the 1st defendant, in partnership with others as partners, established a rice mill called "Veera Venkata Satyanarayana Rice Mill" at Someswaran. For the purpose of the partnership business, he borrowed moneys from the plaintiff's husband and executed promissory notes on 5-6-1950. He also borrowed moneys from the second son of the plaintiff under another promissory note dated 16-5-1950. As the 1st defendant was unable to discharge the debts due under the promissory note, he borrowed Rs. 12,658/- from plaintiff and executed the mortgage bond (Ex.A-2) dated 4-1-1952 hypothecating the properties shown in the schedule thereto. The 1st defendant in O.S. No.54 of 1964, who is also a partner of the firm, borrowed Rs. 9,242/- and executed Ex. A-I on behalf of himself and on behalf of his two minor sons defendants 2 and 3. The 2nd defendant in O.S.No.53 of 1964 is the subsequent purchaser of item (1) of the plaint schedule properties at a court sale held by the Receiver in O.S. No.56 of 1957 on the file of the Sub-court Rajahmundry, It is the plaintiff's case that the sale was subject to the mortgage and therefore she is entitled to proceed against the share of the 1st defendant in item (1) of the plaint schedule properties; or, in the alternative to proceed against the 1st defendant's share of the sale proceeds which have been deposited into Court to the credit of O.S. NO.56 of 1957.

4. The 2nd defendant in O.S. 53 of 1964 is the 6th defendant in O.S. No.54 of 1964. The defences put forward by the contesting defendants in both the suits are identical. The 1st defendant in O.S. No.53 of 1964, remained ex parte. The 2nd defendant pleaded ignorance of the mortgage (Ex. A-2) in favour of the plaintiff. According to him, he purchased the share of the 1st defendant on 16-11-1954 in an execution sale in O.S.No.134 of 1951 on the file of the Sub-Court, Kakinada. The firm of which the 1st defendant in O.S.No.53 of 1964 and the 1st defendant in O.S. 54/64 and others were partners, stood dissolved on 31-8-1954 and one of the partners filed O.S. No.56 of 1957 for settlement of accounts which was decreed on 9.4.1960. In the final decree proceedings the mill was sold on 24-4-1962 and the 2nd defendant in O.S. No.53 of 1954 was the purchaser in that auction. It is the case that the sale was no subject to the mortgage; and as such, the mortgage is not binding on him. It is also his case that even otherwise, the mortgage, being a share of the partnership properties, is not valid as it would not create any interest in the plaintiff to follow the properties of the partnership in the hands of this defendant who was a purchaser at a Court auction. The plea of limitation was also raised on the ground that the action was not brought within three years from 31-8-1954, the date when the firm stood dissolved. The 3rd defendant remained ex parte as also the 4th defendant, Officer Receiver.

5. The defence, in short in both the suits is that a mortgagee cannot claim any interest in the properties of the firm in specie and follow the properties in the hands of an auction-purchaser as, according to the contesting defendant (2nd

defendant) the remedy, if any, is only to file a suit for account of the dissolved partnership and ask for a share in the assets within three years from the date of dissolution, and even that remedy is barred by limitation. The other contesting defendants in O.S.No.54 of 1964 also disputed the claim of the plaintiff for recovering the amounts.

6. On the principal issues settled in the two suits, the trial court held that the two mortgage bonds in question are true and supported by consideration, and that the plaintiff is entitled to recover the amounts in terms of the decrees passed in both the suits. It also held that the suit is not barred by limitation.

7. Mr. K.B. Krishnaamurty, learned counsel appearing for the appellants in these appeals, relying upon a decision of the Supreme Court in Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, mainly contended that a mortgagor, who is a partner of the firm, cannot claim or exercise any exclusive right over any property of the partnership firm; and in this case what the 1st defendants in each of the suits did was to exercise his rights as partner to the extent of his sons' shares in the partnership property by mortgaging certain items of property belonging to the partnership. On the other hand, it is contended by Mr. G.R. Subbarayan appearing for the 1st respondent (Plaintiff) that what has been mortgaged is not the partnership property but only the interest or share of the mortgagors in the partnership business; and cover the suit amount from out of the proceeds realised by sale of the hypothecated property at the court auction in O.S. 56/57.

8. To decide the question whether what was mortgaged was in interest in proportion to their share in the partnership business, or whether it was the property in specie it is necessary, to read the terms of Ex. A-1 or Ex. A-2 both of which are couched in identical language. Apart from Item (1) with which we are now concerned, the deed of mortgage (Ex. A-1) refers to certain other items: The portion relating to Item (1) which is in Telugu, when translated into English, reads:

"Item 1: Sri Veera Venkata Satyarayana Rice Mill is situated in Ac. 1.11 cents in the middle towards the south out of a total extent of Ac. 6-11 cents in Revision Survey No. 436 near a canal is Someswaram village of Ramachandrapuram Taluk, Ramachandrapuram Sub-Division in East Godavari District over which (the mortgagors) have title to and possession including the buildings and bungalows appurtenant thereto and a Ruston engine bearing No.274924 of 47-52 H.P. etc

And they are bounded;

On the east and north by the land of Reddi Gangaraju;

On the West by the land of Doddi Satyanarayana; and

On the South by irrigation canal.

It is the land compared within these boundaries where Sri Veera Venkata Satyanarayan Rice Mill is situate, engine, pulleys, belts etc., and all other instruments and implements, buildings bungalows, trees, fruit, easementary rights in which the first party and the other mortgagors have jointly owned an undivided share of one Anna."

9. The description of Item (1) which is mortgaged is in two parts. The first part refers to the partnership mill which is constructed on an extent of Ac. 1-11 cents and also the buildings and bungalows appurtenant thereto in addition to a Ruston oil engine. The second part of it gives the boundaries of the land referred to in the first part; and in addition, specifically refers to the mill located thereon as also the other buildings, engine pulleys, trees, easementary rights and all other machinery.

10. According to Mr. Subbarayan, what is mortgaged is only in interest in the partnership to the extent of the share of the mortgagors viz., one Anna and not the property of the partnership. We are unable to agree with Mr. Subbrayan that what is mortgaged is the undivided interest of one anna's share of the mortgagors and not the property of the partnership. u/s 15 of the Partnership Act, the property of the firm subject to any contract between the parties, shall be held and used by the partners exclusively for the purpose of the business. Therefore, no partner can say or treat any item of the property so long as the partnership subsists. In other words, as held by a Full Bench of the Lahore High Court in *Ajudhia Pershad Ram Pershad v. Sham Sunder* AIR 1947 Lah 13 while a partnership is in existence, no partner can point to any part of the assets of the partnership as belonging to him alone. It should be borne in mind that notwithstanding the dissolution of the firm. The partners continue to be liable by any one of them which would have been an act of the firm, if done before dissolution, until public notice is given of the dissolution. The assets or the property of the firm on dissolution have to be applied in the first instance to the payment of liabilities of the firm; and it is only then that a partner or his representative will be entitled for the distribution of the surplus.

It is thus clear that until the dissolution and payment of the debts and liabilities of the firm, the question of any share in what is left over of remains, does not arise. In other words, no partners can lay his hands on any item of the partnership property claiming any exclusive rights over it as all the members of the partnership property. As has been pointed out in *Lingen v. Simpson* (1924) *Simons and Stuarts Reports*, Case in *Cancery*, 600), no partner can claim an exclusive right in any article of the partnership property. But upon a dissolution any part of the partnership property may be contract of the partners, be converted into the separate individual property of either. To the same effect, it was pointed out by *Romer, J.* in *Re Ritson, Ritson v. Ritson* (1898) 1 Ch 667 that

"The debts of the partnership are not the testator's debts. Neither are the assets of the partnership the testator's assets."

It, therefore, follows that, so long as there is a partnership in existence, no partner has any right to take any portion of the partnership property, or to say that it belongs to him exclusively so as to assign or transfer the partnership property. The right that he possesses in the partnership property is his right as a member of the partnership and not a right which he can claim in his individual capacity.

11. The learned counsel for the 1st respondent, Mr. Subbarayan, invited our attention to a decision of the Madras High Court in Srinivasa Mudaliar Vs. Abraham Pillai, in support of his contention that what is conveyed under Exs. A-1 and A-2 is only an interest in the partnership and not the property of the partnership. That was a case where, under a will, the testator has transferred his share in the partnership of a rice mill with all its assets and liabilities and also the right of continuing an appeal in regard to the mill and enjoyment of all the profits arising therefrom. The question that arose in that case was whether under the terms of the will, the petitioner in the revision petition was entitled to be treated as the legal representative of the deceased appellant for continuing the appeal. The application made by the petitioner when the appeal was pending in the Court of the District Judge was dismissed on the ground that what was assigned to the original appellant was only a mere right to sue, and that a mere right to sue cannot be transferred. It is against the decision of the District Judge that the revision was filed and a single Judge of High Court held that what was transferred under the will was not a mere right to sue, but the tangible interest in the property and as such, the transfer was not hit by Section 6(e) of the Transfer of Property Act. So, it is obvious that there was no transfer of partnership property in that case, but only interest in that property.

12. As has already been noticed, the question in these appeals is whether what was mortgaged under Exs. A-1 and A-2 is a share in the partnership of the rice mill or certain items of the partnership property detailed in Ex. A-1. A reading of Exs. A-1 and A-2 will make it clear that what has been mortgaged is not the interest in the partnership business but certain items of property owned by the partnership firm. It has been held in *Rodriguez v, Speyer Brothers* (1919) AC 59 by Lord Finally, L.C. that

"When a debt due to the firm is got is not partner has any definite share of interest in that debt; his right is merely to have the money so received applied, together with the other assets, in discharging the liabilities of the firm and to reconvene his share of any surplus there may be when the liquidation had been completed His interest can be finally ascertained only when the liquidation has been complied and it consists of his share of the surplus. He may be benefited as consequence of the action by the reduction of his indebtedness to the firm as a whole, or conceivably his getting some part of any surplus when the winding up has been complied. But he has no right to any part of the sum recovered."

13. What is meant by a share of a partner, as put by Lindley (Chapter 17 at p. 375) is his proportion of the partnership assets after they have been all risked and converted into money, and all the partnership debts and liabilities have been paid and discharged.

14. The Supreme Court in Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, construed the scope and applicability of Section 29 of the Partnership Act where it was observed:

"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."

Section 29(1) only permits transfer by a partner of his interest in the firm, either absolute or by mortgage or by the creation of a charge on such interest. But such a transfer will not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm. This sub-section only entitled a transferee to receive the share of profits of the transferring partner, and he shall accept the account of profits agreed to by the partners. It is manifest that, not until the dissolution of the firm, the transferee will be entitled as against the remaining partners to receive a share of the assets to the extent the transferring partner was entitled to" and for that purpose an account as from the date of dissolution will have been taken.

15. In the two mortgage bonds in question, what was transferred by the mortgagors was not interest or the right to the partnership business, but certain items of the partnership property were mortgaged. A transfer of partnership property, either by mortgage or by sale or otherwise, is not permissible under the Act; and all that a partner can transfer is his interest in the partnership business to the extent of his share as provided in Section 29(1) of the Partnership Act. On a true construction of the documents we have reached the conclusion that the transfer under the two mortgage deeds (Exs. A-1 and A-2) is not to the extent of their share or interest in the partnership business but the property of the firm. The fact that in the deeds the mortgagors mentioned that they have one Anna's share in the property shown in the schedules thereto cannot be construed as transfer of a share or interest in the partnership property. The recitals clearly bring out that what was mortgaged was the property of the mortgagors in specie to the extent of their share. It is not even the case of the plaintiff that all that the partnership concern possessed was the property shown in Exs. A-1 and A-2 and nothing more.

It is thus clear that what the mortgagors transferred was their rights and interest in certain items of property owned by the partnership as if they had the exclusive

right of ownership to the extent of their share in the property. We have, therefore, no hesitation in setting aside the finding of the Court below in this regard. The plaintiff would only be entitled to recover the moneys advanced under Exs. A-1 and A-2 provided the action was brought within the prescribed period of limitation of six years. But since the action has been brought beyond that period, they will not be entitled to recover the moneys due under Exs. A-1 and A-2.

16. We, therefore, set aside the judgment and decrees under appeal and allow the appeals with costs in A.S. No.28 of 1967. The court-fee payable on the memorandum of appeal in appeal No.381 of 1967 will be paid by the 1st respondent. S.R. No.1448/67 has been filed by the 6th defendant in O.S.No.54 of 1964 by way of abundant caution and therefore no orders are necessary and it may be returned. Since the appeals are allowed the application filed by the plaintiff for amendment of the decree of the trial Court is dismissed.

17. Appeals allowed.