
(2007) 06 AP CK 0009
In the Andhra Pradesh High Court
Case No : CMA No. 341 of 2007

Shriram Chits Pvt. Ltd.

APPELLANT

Vs

Kannri Venkata Narayana and Others

RESPONDENT

Date of Decision : 26-06-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1
Limitation Act, 1963 — Article 116
Stamp Act, 1899 — Section 35
Transfer of Property Act, 1882 — Section 59

Citation : (2007) 6 ALD 46 : (2008) 1 ALT 80

Hon'ble Judges : G. Bhavani Prasad, J;B. Prakash Rao, J

Bench : Division Bench

Advocate : Kuncheammabeswara Rao, for the Appellant; Madhava Rao Ambadipudi, for the Respondent

Final Decision : Allowed

Judgement

B. Prakash Rao, J.—Heard Sri K. Maheswara Rao, learned Counsel appearing for the appellant and Sri Madhava Rao Ambadipudi, learned Counsel appearing for the respondents and at their request, the main appeal itself is taken up for disposal.

2. The appellant is the plaintiff, who aggrieved by the judgment dated 14.3.2006 in O.S. No. 3 of 2003 on the file of the Court of VII Additional District Judge (Fast Track Court) Krishna at Vijayawada, filed this appeal under Order XLIII Rule 1 of the Code of Civil Procedure.

3. The relevant facts that require for the purpose of deciding this appeal are that the appellant/plaintiff had filed the main suit against the respondents 1 to 4/defendants 1 to 4 for recovery of a sum of Rs. 1,01,540/- (Rupees eleven lakhs one thousand five hundred- and forty only) towards the suit mortgage debt and accordingly pass a preliminary decree and in default of payment, grant a final decree by way of sale of the mortgaged property shown in the plaint schedule

and further in the event the sale proceeds are not found sufficient to discharge the entire decretal amount, the plaintiff is entitled to recover the balance amount along with interest from the defendants personally and other reliefs.

4. The case of the appellant/plaintiff in the plaint was that the appellant is a Company registered under the Indian Companies Act, 1956 having its registered office at Hyderabad and doing chit fund business. On 20.1.2001, the first defendant had joined in a chit as a member in the scheme and was allotted Chit No. 13 where he agreed to be a subscriber at Rs. 50,000/- (Rupees fifty thousand only) per month payable on or before 10th of every month for a period of 30 months and the total chit value is Rs. 15,00,000/- (Rupees fifteen lakhs only). Accordingly, the first defendant signed the agreement of chit on the same day abide by the terms and conditions contained therein. Later, in an auction held on 18.2.2001, the first defendant, who participated in the auction, became the successful bidder and agreed to forego a sum of Rs. 6,50,000/- (Rupees six lakhs fifty thousand only) and the same was confirmed and the amount was paid after following all other procedures. The first defendant had paid only a sum of Rs. 4,00,000/- (Rupees four lakhs only) by way of 8 installments till the date of auction and his future liability is Rs. 11,00,000/- (Rupees eleven lakhs only). The defendants 2 to 4 are the guarantors, who executed an agreement of guarantee on 28.3.2001 in favour of the plaintiff agreeing to guarantee due payments. Thus, the defendants 2 to 4 are jointly and severally liable to the entire balance amount to be paid in future installments with interest at 12% p.a., in case of default. There is no dispute to the fact that the first defendant was paid the prized amount of Rs. 8,50,000/- (Rupees eight lakhs fifty thousand only) by way of a cheque bearing No. 660317 with the adjustment Voucher No. 660648 on the same day. Further, the second defendant had deposited her documents of title in regard to the plaint schedule property by creating an equitable mortgage in favour of the plaintiff for securing the due payments and the same was evidenced by a letter executed by her. Thus, there exists a mortgage by way of deposit of title deeds in favour of the plaintiff. However, the first defendant had paid in all a sum of Rs. 5,50,500/- (Rupees five lakhs fifty thousand five hundred only) by way of 11 full installments including the dividends given to him and later he committed default in payment from 12th installment onwards whereby he lost his right to claim any dividends. Thus, the plaintiff had issued a legal notice on 23.11.2001 and in spite of the same, no amounts were paid. Hence, the suit for recovery of the aforesaid amount and the other reliefs as sought for.

5. Contesting the suit claim, the defendants raised various objections including the very maintainability of the suit as has been filed and framed, individual liability and non-following of the mandatory provisions under the law. Further, it was pointed out that the first defendant is having another chit with the plaintiff Company where the defendants 2 to 4 stood as guarantors and taking advantage of that transaction, the suit documents have been created and the suit claim is barred by limitation. The defendants denied the correctness of the amounts and also the amount as claimed.

6. On these and other allegations, the Court below framed the following issues:

1. Whether the plaintiff is entitled for the suit claim as prayed for?
2. Whether the plaintiff company followed the mandatory provisions of the A.P. Chit Fund Act?
3. Whether the suit pronote and agreement of guarantee are forged?
4. Whether the suit is barred by limitation?
5. Whether the calculations of the plaintiff made in the plaint are correct?
6. To what relief?

7. During the course of enquiry, on behalf of the appellant/plaintiff, the appellant/ plaintiff examined P.W. 1 and marked Exs. A.1 to 14 whereas on behalf of the respondents /defendants, no evidence of either oral or documentary was produced.

8. On a consideration thereof, the Court below on issues 2, 3 and 5 found favour with the plaintiff holding that the plaintiff is entitled to the suit amount and on issue No. 4, it was found that the suit is not barred by limitation. However, while considering issue No. 1, the Court below straight away took up the plea on the objection as to the invalidity of the mortgage document which is marked as Ex. A,6 since it is not registered and therefore, it is not admissible for any purpose nor any suit can lie. While considering the same, it was also observed that the chit transaction took place at Eluru in West Godavari District and therefore, the Court had no jurisdiction and ultimately held that the suit is not maintainable and the Court below returned the plaint to file the same in proper Court. Hence, the appeal.

9. Having considered the submissions made from both the sides in detail and in depth, the question which arises for consideration is as to whether on the facts and circumstances, the suit as has been filed and framed is not maintainable for recovery of money?

10. Taking the aforesaid facts and circumstances as already mentioned from out of the pleadings apart from denying the very transaction, liability and other pleas, which have been raised by and on behalf of the defendants, the fact remains that there has been a chit transaction between the parties, which is the basic and original one and which was entered into on 20.1.2001 and the first defendant was paying the installments in terms of the agreement, which has been executed on the same day and later he also participated in the auction and became a successful bidder on 18.2.2001 by foregoing a part of the amount and received the prized amount and at which time the case of the plaintiff was that the defendants 2 to 4 had deposited their title deeds by way of equitable mortgage for due discharge of the future liability of the first defendant. There is no dispute to the fact that the first defendant had received the prized amount as evidenced from the records. After regular trial and with the evidence as available

on record which is only let in on behalf of the appellant herein and taking note of the fact that no attempt has been made by the defendants to produce any evidence in rebuttal from their side, yet, the Court below while considering the very crucial and basic issue No. 1, has restricted itself only in regard to the validity of the mortgage and the maintainability of the suit without considering the entire transaction since inception and no reason has been assigned by the Court below as to why such restricted approach is being made in regard to a part of the transaction for the purpose of deciding the primary issue which goes to the very root of the case. There is no reference at all to the entire evidence or the material, which has been produced in respect of the basic transaction between the parties, which is in the nature of a chit, and the documents filed in support thereof. It is not anybody's case that the mortgage transaction is independent from that of the main chit transaction and in fact, it is only a continued one and connected with the prized amount in pursuance of a successful participation and having become as an highest bidder in the auction, we are of the view that the very approach as made by the Court below primarily is not correct and totally kept the blind eye to the transaction in its entirety and from its inception. There cannot be any breaks in regard to the whole transaction. It is also now well settled that wherever any transaction spreads over in more than one act or deed or correspondence, necessarily all such material should be treated as the one and ascertain the nature of transaction or any liability arising thereunder. There is no dispute to the fact that in addition to the mortgage, which was held to be invalid and in respect of which, there being no serious dispute on behalf of the appellant, of course, the defendants had also executed a pronote in Ex. A.4 as a part of the same transaction. The mortgage is only stated to be by way of deposit of title deeds, which is evidenced by Exs. A.6 and A.7 by the defendants 2 to 4 and further the Court below held that the entire chit transaction took place at Eluru and the mortgage being not valid, the plaintiff is directed to present the plaint in proper Court. It is needless to reiterate the principles, which are already well laid down even in regard to such inadmissible transactions, the plaintiff can as well fall back on the original transaction. In considering the similar such situation in suits on the foot of pronotes, the Full Bench of this Court in Lothamasu Sambasiva Rao Vs. Thadwarthi Balakotiah, , held that on the failure of proving or invalidity of the pronote, the plaintiff can rest its claim on the original transaction which is supported by the receipt and further held that:

A plaintiff can lay an action for recovery of the amount advanced by him basing on the original cause of action where the suit negotiable instrument becomes inadmissible in evidence u/s 35 of the Indian Stamp Act, provided there is an allegation in the plaint and proof in evidence about the fact that the promissory note did not incorporate all the terms of the contract of loan and that it was executed as a conditional payment or a collateral security.

11. Similarly, the question now at the most which is cropped up is as to whether in respect of the suits based upon mortgages and the said mortgage having been found invalid or inadmissible, the plaintiff could fall back on the original amount

which has been lent? Another curious aspect noted from out of the judgment is to the effect that even though the Court below states that as per the settled principles of law, it keeps the blanks without giving any reference to the so called decision and such practice should be deprecated especially in leaving any blanks in the judgment. Though there is no such serious attack on behalf of the appellant on the said proposition, it has to be noticed that even accepting such a mortgage is inadmissible or invalid in law, it is now well settled that on par with the suits on promotes as referred to above, the plaintiff can fall back on the original money lent.

12. The learned Counsel for the appellant relied on the decisions reported in *Sadu Kavaur v. Tadepalulli Basaviah* 17 MLJ 167 wherein it was held that:

it is settled law that non-registration of deeds purporting to mortgage immovable property and as such requiring to be registered, does not affect the validity of the contract to pay the debt.

Non-compliance with the provisions of Section 59 of the Transfer of Property Act cannot have any further effect than to invalidate the instrument as a mortgage i.e., as a transfer of an interest in immovable property for the purpose of securing repayment of a loan, and if the instrument contains a personal covenant to pay, the same may be enforced, in spite of nonregistration.

in *Jagannadhan v. Official Assignee* AIR 1931 Mad. 124, it was held that:

It was clearly within the competence of the Court, upon failure of the mortgage, to give such a decree on a plaint so framed. It has been held by a Full Bench of this Court in *P.V.M. Kunhu Moidu v. T. Madhavan Menon* (1909) 32 Mad. 410 that a personal covenant to pay may be proved by a mortgage invalid for defect of attestation, and I think it is incontestable that a trial Court on finding a mortgage to be invalid for this or any other reason, may give a decree on the personal covenant which it contains, provided of course that it be not barred. The only case to the contrary cited before us is AIR 1925 169 (Privy Council) where their Lordships of the Privy Council decided, clearly in the special circumstances of that case, that they should not themselves give a decree of this nature. Nor do I think that where, as here, the debt is embodied in a promissory note which forms the basis of the invalid mortgage the Court is any more disqualified from giving a decree upon that note.

in *Jagappa v. Latchappa* ILR (1882) Mad. 119 it was held that:

Although an unregistered mortgage bond which creates an interest in land in excess of Rs. 100/- is of no effect as a mortgage, it may be received as evidence of the personal obligation.

in *Sada Kavaur v. Tadepally Basaviah* ILR (1907) Mad. 284 it was held that:

A, who had brought a suit to recover the amount due on a mortgage executed to him, assigned to B for valuable consideration, all his claims under the mortgage

deed and in the suit brought by A. The assignment contained a covenant that "A, his executors or administrators shall not be liable for any defect in the claim hereby transferred and assigned or for any sums of money that may not be recovered." Subsequent to the assignment, B, was added as a co-plaintiff in the suit brought by A and it was discovered that the mortgage executed to A, was inoperative as it was attested by only one witness and the suit was withdrawn.

B filed a suit against A for a declaration that the contract of assignment was void and for a return of the consideration paid:

Held, that A was entitled to claim the benefit of the covenant, which exempted him from any liability, even though both A and B acted under the mistaken belief that the mortgage was valid and that A was not bound to refund the consideration received.

in *Rama Rao v. Vedayya* ILR (1923) Mad. 435 it was held that:

Where land not intended to be mortgaged was included in a mortgage deed merely to get registration of the deed before a particular registering officer who would otherwise be incompetent to register it.

Held, (1) that the registration of the deed was a fraud on the Registration Law and did not affect the immovable properties comprised in the deed, (2) but that the registration was good as regards the personal covenant to repay the mortgage money, and enabled the mortgagee to sue for it within six years as provided by Article 116 of the Limitation Act.

and the Privy Council in *Krishnaswami v. Kamalamma* AIR 1941 PC 90, it was held that:

The testator executed a pronote in favour of the plaintiff and along with it deposited the title deeds of certain property A as collateral security. On the testator's death his executors executed a mortgage of the property A in favour of a third person. In the suit by the plaintiff to enforce the equitable mortgage created by the collateral security the subsequent mortgagee was also impleaded. The collateral security was found to be invalid for want of registration:

Held that (1) the mortgage security being unregistered was invalid for all purposes and not merely as between the plaintiff and the subsequent mortgagee;

(2) the only decree that could have been properly made after the declaration of the invalidity of the mortgage was a simple money decree against the execution in favour of the plaintiff for the amount due under the pronote;

(3) the subsequent mortgagee was not a proper party to a suit for a money decree and the suit against him therefore should have been dismissed.

When once it had been decided that the plaintiff was merely an unsecured creditor of the testator, the question of the validity or otherwise of the subsequent mortgage could not by any possibility be an issue in the suit. It could

only arise for determination if and when the plaintiff would seek to enforce his decree in execution against the suit property. It was wrong for the Court to direct a sale of the property in suit, or to make any pronouncement as to the validity or otherwise of the subsequent mortgage or to give the subsequent mortgagee any relief whether as against the property or as against the executors.

Similar principles have been reiterated in the decisions reported in *Sriramulu v. Chinna* ILR (1902) Mad. 396 *Shir Seshathri v. Sankara* (1873) 7 Mad. HC 296 and *Guduri v. Rapaka* (1874) 7 Mad. HC 348. It is to be noticed that even in case of such invalidity of a mortgage document, it can always be used for collateral purpose to prove the nature and character of the transaction vide in *Varatha Pillai v. Jeevarathnammal* ILR (1919) Mad. 244. In view of the aforesaid settled principles, which have not been come up for consideration, necessarily it follows that the plaintiff can certainly be entitled to lay a claim for recovery of the money, which has been originally lent and as proved by the documents other than the mortgage. Even otherwise, the mortgaged document can also be used for collateral purpose for establishing the money had and lent. Though the plaintiff may not be able to proceed against the mortgaged property as such having regard to the invalidity of the document, it does not operate against the plaintiff to lay a claim for recovery of money. Further, having regard to the fact that in this case, the very nature of the transaction or the claim vis-avis the entitlement of the plaintiff on the original transaction has not been considered apart from several other questions which may arise and which also requires to be paid attention to, we deem that the matter requires fresh consideration and disposal on merits in accordance with law.

13. The civil miscellaneous appeal is allowed. The impugned judgment under challenge is set aside and the matter is remitted to the Court below for fresh disposal on merits in accordance with law. No. costs.