

(2000) 03 AP CK 0067
In the Andhra Pradesh High Court
Case No : A No. 1583 of 1985

Tummuri Suryanarayana

APPELLANT

Vs

Jagatha Seshagiri Rao and others

RESPONDENT

Date of Decision : 02-03-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 5(1), Order 38 Rule 5(3), Order 38 Rule 6, Order 39 Rule 1
Transfer of Property Act, 1882 — Section 54

Citation : (2000) 5 ALD 400 : (2000) 3 ALT 746

Hon'ble Judges : B.S.A. Swamy, J

Bench : Single Bench

Advocate : Mr. N.V. Suryanarayana Murthy, for the Appellant; Mr. K.B.R. Krishna Murthy and Mr. A. Suryanarayana, for the Respondent

Judgement

1. This appeal arises out of a judgment and decree of the Sub Court, Amalapuram in OS No.46 of 1979, dated 21st March, 1985.
2. The second defendant is the appellant in this appeal.
3. The first respondent herein filed OS No.46 of 1979 on the file of the Sub-Court, Amalapuram for recovery of an amount of Rs.11,000/- on the basis of a mortgage said to have been executed by one late Rachakonda Satyanarayana, the first defendant in the suit on 30-8-1967. While the first defendant remained ex parte, the appellant herein who is a purchaser of the rice mill formed part of the mortgage deed in the auction conducted by the Court in execution of the decree in OS No.3 of 1966, dated 13-2-1969 contested the suit by filing a written statement that the mortgage deed is sham and nominal and was brought into existence to defeat his rights under OS No. 1 of 1958 bn the file of District Munsif, Amalapuram which was renumbered as OS No.3 of 1966 after remand by the appellate Court and was decreed against the first defendant personally and against the joint family properties of all the other sons including the third defendant herein by its judgment and decree dated 13-2-1969, which was later

confirmed by the Sub-Court, Amalapuram in AS No.61 of 1969 by its judgment and decree dated 16-6-1973. Nextly, contended that the suit document was brought into existence in violation of the undertakings given by the first defendant in IA No.973 of 1988 wherein he undertook not to alienate the mill pending disposal of the suit filed by him and Ex.B5, dated 8-11-1.958 and another undertaking given by him to the same effect in IA No.7 of 1964 and Ex.B6, dated 5-2-1964 and the action of the first defendant which are having the same legal effect as an attachment before decree ordered by the Court u/s 64 of CPC and he has to be treated as preferred-creditor. It is also his case that Defendant No.3 the son of the first defendant filed OS No.55 of 1965 in Sub-Court, Amalapuram, against the first defendant and other family members seeking partition of the family properties including the rice mill in question was pending by the time of the execution of the mortgage deed, dated 30-8-1967 which was later decreed by the judgment and decree of the Court dated 12-1-1970 wherein the plea of the first defendant on the debt in favour of the plaintiff was disbelieved. Hence, it is difficult to believe that the respondent herein lent an amount of Rs.11,000/- during pendency of the suit filed by him as well as the suit filed by his son for partition. He nextly contended that in the EP filed by him for execution of the decree in OS No.3 of 1966 the respondent herein filed a claim petition in EA No.71 of 1979 and the same was dismissed on 23-6-1979. At any rate, the suit was filed by the respondent herein long after 12 years after execution of the alleged mortgage deed just one day prior to the expiry of the limitation. He also contended that even assuming without admitting that the mortgage deed is true and valid, the same can be executed against the first defendant alone as the properties are being joint family properties and as the major sons of the first defendant did not join the execution of mortgage deed, he is entitled for a decree for the sale of 1/4th share of the joint family property in discharge of his mortgage debt, as there is no obligation on the part of the sons of the defendant to discharge the mortgage debt. He also contended that in the event of the decreeing the suit equities has to be worked out and the respondent herein have to first proceed against item No.1 of the plaint-schedule for realisation of his decree-debt and if any balance is there then only he may be permitted to proceed against item No.2, the rice mill in his possession, as he being a bona fide purchaser for value having purchased the same in execution of a Court decree which prevails over the mortgage deed. The suit was filed against the first defendant and himself without impleading the sons of the first defendant is bad for non-joinder of necessary parties. The first defendant is a small farmer and he is entitled to the benefit of Act 7 of 1971 under which the suit debt is to be treated as abated. Hence, the suit is liable to be dismissed with exemplary costs against him.

4. While the above suit is pending the first defendant died on 13-1-1984 and respondents 2 to 5 herein were brought on record as defendants 3 to 6 as legal representatives of late Rachakonda Satyanarayana, the first defendant in the suit. The third defendant filed his written statement stating that even before the

execution of the suit document he filed OS No.55 of 1965 on the file of Sub-Court for partition of the family properties between him, his father and brothers and the same was decreed on 12-1-1970. As he was a defendant in OS No.3 of 1966 filed by the appellant herein he is bound by decree in OS No.3 of 1966 but not the mortgage debt of his father. In the partition suit the first defendant shown several debts including the mortgage debt. But, the Court has not believed the same and as such the document cannot bind him. He also contended that the suit under mortgage deed was not executed by his father as kartha of the family and the same is hit by the principles of lis pendens in view of the pendency of partition suit, as well as the suit filed by the appellant herein. He also contended that the mortgage deed is sham and nominal and no consideration was passed to the first defendant under the suit document. He also contended that the first defendant being an agriculturist is entitled to the benefit of Act 7 of 1977 as a small farmer as the suit debt is abated. For these reasons the respondent prayed the Court to dismiss the suit with costs. Respondents 5 and 6 who are the sons of late Rachakonda Satyanarayana adopted the written statement filed by the fourth defendant. They also contended that they were brought on record after the suit was abated long after the expiry of the period of limitation after the death of the first defendant. Nextly, they contended that there is no joint family existed as on the date of the mortgage deed and as such the first respondent herein cannot claim any relief against them as they are not the executants of the mortgage deed. Nextly, they contended that the suit debt is hit by lis pendens apart from being brought into existence in collusion with the first respondent to defeat their rights. They also stated that the first defendant filed any insolvency petition in the year 1982, hence they are not necessary parties to the suit. They also contended that Act 7 of 1977 is applicable to this debt and as such the debt suit is declared as abated. At any rate, no decree can be passed against them or the properties that fell to their share and the suit is liable to be dismissed with costs.

5. On the above pleadings the Court framed the following issues :

(1) Whether the suit mortgage was created nominally by the first defendant in favour of the plaintiff with a view to defeat the money claim of the second defendant in OS No.3 of 1966 and hence the suit mortgage is not binding on the second defendant?

(2) Whether the second defendant is not liable for the suit mortgage debt for the reason that the first defendant created the suit mortgage contrary to the undertaking given by him in OS No.3 of 1966 (OS No.1 of 1958) on the file of the District Munsif's Court, Amalapuram?

(3) Whether the second defendant is not liable for the suit mortgage debt for the reason that he is a preferred-creditor of the first defendant?

(4) Whether the plaintiff is not a bona fide mortgagee?

(5) Whether the first defendant was a small farmer entitled to the benefits of Act

of 1977 and for that reason the suit mortgage debt became abated?

(6) Whether the first defendant's son Gangachalam is a necessary party and whether this suit is bad for non-joinder of the said Gangachalam?

(7) To what relief?

Additional Issues:

(1) Whether the suit mortgage bond is binding on defendants 3 to 6?

(2) Whether the suit mortgage bond is a collusive document executed to defeat the rights of defendants 3 to 6?

(3) Whether defendants 3 to 6 are entitled for the benefits of Act 7 of 1977?

6. The first respondent in support of his claim got examined himself as PW1 and examined PW2 attester on Ex.A1 the mortgage deed and PW3 another attester on Ex.A2 dated 6-1-1967 under which defendant alleged to have taken a loan of Rs.6,000/-which forms part of the mortgage debt and got marked Exs.A1 to A9. On behalf of the defendants while the appellant himself got examined as DW1, the third defendant and fourth defendant were examined as DW2 and DW3 and Exs.B1 to 88 were marked on their behalf. After completion of the trial, the Subordinate Judge held that the suit document is not a sham and nominal one to defeat the claim of the appellants herein and as such it is binding on the second defendant. On issue No.2 the Subordinate Judge held that the appellant herein the second defendant in the suit is liable to discharge the mortgage debt and he cannot avoid the same on the ground of undertakings said to have been given by the first defendant in the suit filed by him in OS No.1 of 1958 renumbered as OS No.3 of 1966 filed by him on the file of District Munsif, Amalapuram. On the issue No.3 the Court below held that the appellant herein couldn't be treated as preferred-creditor. On issue No.4 the Court held that the respondent herein is a bona fide mortgagee. On issue No.5 the learned Subordinate Judge held that though the defendants have taken the plea that the suit is hit by Act 7 of 1977 no evidence whatsoever was placed by the defendants and as such it is unsafe to rely on the testimony of DWs.1, 2, 3 and 4 that the first defendant is a small farmer. On issue No.6, the Court held that as the third defendant was brought on record after the death of the first defendant the question of abatement of the suit does not arise. On additional issue No. 1 the Court held that as the defendants 3 to 6 being class one heirs of the first defendant they are bound by the suit mortgage deed. On additional issue No.2 the learned Judge held that defendants 3 to 6 failed to prove any necessity for the first defendant to colluded with others to defeat their claims and in the absence of any evidence the mortgage deed cannot be treated as collusive document executed to defeat the claims of the defendants 3 to 6. On additional issue No.3, the Court held that on the day, on which Act 7 of 1977 was enforced, as the first defendant was alive his legal representatives cannot plead the benefit of Act 7 of 1977 and as such defendants 3 to 6 are not entitled to the benefit of Act 7 of 1977. On issue No.7

it was held that the suit is not barred by limitation as the legal representatives were brought on record after condonation of the delay in filing an application to set aside the abatement and once the delay is condoned and the petitioners were brought on record it will date back to the filing of the suit. Hence, the suit cannot be treated as neither abated nor barred against the legal representatives of the first defendant.

7. The Court below rejected the plea of equity raised by the appellant herein by holding that the appellant purchased the property knowing all these difficulties as is revealed in his evidence. In the result, the suit was decreed with costs against the plaintiff schedule property representing 1/4th share of the first defendant. Questioning the correctness of the judgment and decree in the suit the defendant No.2 appellant herein filed this appeal. On the basis of the grounds of appeal and the arguments addressed before this Court, the issues to be decided by this Court are formulated as hereunder :

(1) Whether the suit mortgage deed is only sham and nominal and intended to defeat the claims of the appellants/ decree holder in OS No.3 of 1966, the purchaser of one of the items of the property i.e., rice mill covered by the mortgage deed in the auction conducted by the Court in execution of the judgment and decree in OS No.3 of 1966?

(2) Whether undertakings given by D1 in OS No.1 of 1958 on 8-11-1958 under Ex.B5 in IA No.973 of 1958 and Ex.B6 dated 5-2-1964 in IA No.7 of 1964 in OS No.1 of 1958 on the file of Principal District Munsif, Amalapuram which was renumbered as OS No.3 of 1966 after remand are having the legal effect on of an attachment order of the Court u/s 64 of CPC?

(3) Whether the suit mortgage deed Ex.A1 dated 30-8-1967 is hit by the principles of lis pendens?

(4) Whether the first defendant was a small farmer and entitled to the benefit of Act 7 of 1977?

(5) Whether the suit is bad for non-joinder of Rachakonda Gangachalam the eldest son of the first defendant Rachakonda Satyanarayana the decree holder in OS No.55 of 1965 on the file of the Sub-Court Amalapuram wherein the Court ordered for partition of family properties between himself, his father and his brothers?

8. In this appeal this Court need not consider the correctness of the judgment to the extent that it went against the interests of D3 to D6, as they did not choose to file any appeal.

9. To avoid confusion and for the sake of convenience I would like to refer to the case of the parties as read in the cause title in OS No.46 of 1979. As per the averments in the plaint, the case of the plaintiff is that the first defendant mortgaged M/s. Satyanarayana Rice Mill, constructed by him in Survey No.041 belonging to Kesava Swamy Temple and a tiled house owned by him in an extent

of 809.37 sq. yards in Gadelanka village of Mummidivaram taluk on 30-8-1967 for an amount of Rs. 11,000/- comprising three loans advanced by the plaintiff prior to 30-8-1967 i.e., an amount of Rs.6,000/- taken by the Defendant No.1 from the plaintiff under receipt (Ex.A2) dated 6-1-1967. Another sum of Rs.2,400-33 paise taken by the first defendant from the plaintiff under receipt dated 17-8-1967 to discharge the debt taken by the 1st defendant from one Tadi Venkat Rao and an amount of Rs.2,599-67 paise taken from time to time as per the katha maintained by the plaintiff. It is also the case of the plaintiff that the first defendant agreed to discharge the loan amount with interest @ 0.46 paise in three instalments within three years. The first instalment of Rs.4,000/- agreed to be paid on 29-8-1968, second instalment of Rs.4,000/- and the balance amount of Rs.3,000/- on 29-8-1970. It is also the case of the plaintiff that if the defendant failed to pay the amount within three instalments, the first defendant agreed to pay compound interest at 0.46 paise on the outstanding amount and for discharge of the said loan amount the first defendant mortgaged these two items of property. In the plaint it is also stated that as the second defendant purchased the rice mill in Court auction he was also made a party defendant in the suit. As the defendant failed to discharge the debts the plaintiff laid the suit on 20-8-1979 just one day prior to the expiry of the limitation. The mortgage deed Ex.A1, apart from the above recital contain the following recitals i.e., the first defendant created the first charge on the rice mill to an extent of Rs.5,000/- in a suit filed by the second defendant by way of filing an undertaking in the Court. Except the above charge the properties that are mortgaged are free from any other encumbrance or charge. In the mortgage deed it is clearly stated that these properties fell to the share of the first defendant in the family partition that has taken place on 14-1-1951. From this it is evident that the properties that were mortgaged being joint family properties any prudent man is expected to get the mortgage deed executed by the defendant and his sons. But the first defendant alone has executed the mortgage deed and the explanation offered by the plaintiff in the witness box is that he did not make the sons of the defendants as party-defendants as the property in question is self-acquired property of the defendant. It is also his case that by the time the suit is filed the defendant and his sons are separated and they are living separately. In the cross-examination on behalf of the defendants 4 to 6 he clearly stated. "It is not true to say by the time of Ex.A1, D1 and his sons are living separately. They are living jointly. I do not remember I gave an affidavit in the suit OS No. 55 of 1965 filed by D3 for partition." These statements not only establish that PW1 was speaking falsehood but also the mortgage property is self-acquired property of D1 and it is not true to say that I have not made any claim in my original plaint that D1 and his sons are joint family members and they are liable to pay the debts since I know D1 and his sons are divided by that time." These admissions run counter to the recitals in the mortgage deed Ex.A1 wherein it was categorically stated that these properties fell to the share of D1 in the family partition on 14-8-1951.

10. Next, the plaintiff tried to deny the knowledge of the suits filed by the

second defendant and D3 against D1. But, in the cross-examination he categorically stated that he is in knowledge of the security bond executed by the defendant in the suit filed by the second defendant in the following terms :

"I know D1 executed a security bond in favour of the plaintiff for Rs.5,000/- securing the rice mill."

11. From this it is evident that on the day when the mortgage deed was executed by D1 he is in the knowledge of the suit filed by the second defendant. Further in the execution proceedings initiated by the second defendant to execute the decree in the above suit, the plaintiff filed EA No.71 of 1979 seeking a direction from the executing Court that the rice mill may be sold subject to his mortgage deed and the same was dismissed by the order Ex.A9, dated 26-3-1979, it is only five months thereafter he laid the present suit. Coming to the suit filed by D3 i.e., OS No.55 of 1965 though it is stated that he is not aware of the decree passed in the above suit on 12-1-1970 wherein the Court disbelieved the debts pleaded by the first defendant in that suit including the doubt in his favour, the village karanam who is said to be the attester for another receipt Ex.A3 and also identifying witness to the registration of the mortgage deed who was examined as PW2 categorically stated that he knew that there are serious disputes between D1 and D3 in the following terms :

"I know by the time Ex.A1 there are open disputes between D1 and D3, however I did not advise the plaintiff to get Ex.A1 executed also by D3."

12. The plaintiff in the cross-examination on behalf of D2 and D3 also admitted this fact. "Even though I know there are already disputes between him and his son in respect of the rice mill I paid Rs.5,000/- for effecting repairs to the rice mill." This witness (PW2) further stated, "I was not present when Ex.A1 was written and executed. But, however, the writing of Ex. A1 and execution of it took place on the date of registration of Ex.A1 near Kacherisavidi of Mummudivaram. So I was a distant spectator. The attester and scribe were not present when Ex.A1 was written..... I cannot say whether what is contained in Ex.A1 is incorrect not in respect of attestation."

13. From the above and the other statements in his cross-examination, extracted supra, it is seen that the plaintiff is aware of the disputes between D1 and D2 as well as D1 and D3 by time of the execution of the mortgage deed. But, he went on speaking falsehood in the witness box he admitted that he was doing rice mill business till 1972 and thereafter he filed an insolvency petition in the same Court and he has shown this debt in it. But, at the same time, in the cross-examination he stated that the creditors has taken all his immovable properties and adjusted the loan proportionately by leaving the loans to him from others. But, he has not filed any proceedings of the insolvency Court to see how the creditors distributed among themselves, the amounts realised from the properties of the plaintiff taken over by them. It is rather a bitter pill to believe that the creditors have left the amounts to be recovered by the plaintiff towards the loans advanced by him

to others.

14. Now, coming to the merits of the claim of the plaintiff, according to him, the debt under mortgage is comprised of three amounts. The first amount advanced by the plaintiff is Rs.6,000/- to the first defendant under receipt executed by him on 6-1-1967 i.e., Ex.A2. In the mortgage deed as well as in the plaint though it is stated that the loan was raised the purpose for which the amount was advanced to the first defendant was not given. But, in the witness box he categorically stated that he advanced an amount of Rs.6,000/- for the repairs of the mill with an undertaking that the plaintiff shall run the mill for a period of three years. But, at the same time, the said agreement was not produced in the Court. He also admitted by the time he advanced this amount one Tadi Venkat Rao is running the mill and the defendant did not get repairs done to the mill. Again PW2 in the witness box categorically stated that Tadi Venkat Rao did not deliver the keys of the rice mill by the date of registering of the mortgage deed. When the possession of the rice mill was in the hands of a third-party as per the deposition of the plaintiff, and one Tadi Venkat Rao was running the mill of D1 till the execution of the mortgage deed and he vacated the mill on the date of execution of Ex.A1, it is rather difficult to believe that the plaintiff advanced the monies for effecting the repairs of the mill to a person who is not in physical possession of the mill. Nextly, as per his own version the plaintiff paid this amount under Ex.A2 pursuant to the undertaking between him and the defendant. At the same time he states that he do not know what DW1 has done with the money taken from him. Again in the cross-examination on behalf of defendants 4 to 6 and D1 and D3 he stated that "I do not remember Rs.6,000/- covered by Ex.A2 was paid only in order to effect repairs of the rice mill, Ex.A2 shows that I paid Rs.6,000/- as per the terms of the agreement between me and D1." Again on 16-2-1985 after Chief examination with permission in the cross-examination the plaintiff stated "I do not remember whether Rs.6,000/- was paid by me directly to Venkat Rao or D1 who in turn paid to Tadi Venkat Rao" Surprisingly, the entry in the ledger Ex.A4 dated 6-1-1967 is to the effect that the amount was paid as advance for milling the paddy on contract system under the caption Satyanarayana Rice Mill, Mummidivaram proprietor Rachakonda Satyanarayana garu. This entry is completely at variance to the version spoken by the plaintiff in the witness box as PW1. Further he admitted in the witness box "D1 was not indebted to be in any connection prior to Ex.A1."

15. To prove the execution of this receipt he examined one Motturi Prabhakara Murthy whose elder sister was given in Marriage to the elder brother of the plaintiff as PW3. In the chief examination he stated that he attested Ex.A2 receipt and D1 signed in his presence. It is interesting to see the evidence of this witness. According to him, the plaintiff, his brothers and himself were doing rice mill business jointly three years prior to the execution of Ex.A2. At the time of execution of Ex.A2 that they are taking the rice mill of D1 and run the same for the benefit of the partnership firm. At the same time he stated that he has neither seen the agreement till that day nor verified the accounts book to know

whether this Rs.6000/- was paid from out of the joint business or by the plaintiff in his individual capacity. He also stated that Ex.A2 was not written in his presence. The contents of Ex.A2 were not read over either to the attester or to the executants. He also stated that he do not know whether D1 is aware of the contents of Ex.A2 or not. Nextly, he stated that he cannot identify the signature of D1, as he is not acquainted with them. It is interesting to note that as per the version of this witness, the receipt was written at the rice mill, which was in physical possession of Tadi Venkat Rao with whom D1 was having serious disputes by that time. It is further interesting to note from his evidence that he do not know why the plaintiff filed the suit and for what relief.

16. From the above it is seen, that from the recitals of the mortgage deed Ex.A1 and the plaint, the amount of Rs.6,000/- was advanced by him as a loan but at the time of evidence in the suit he plaintiff and PW3 stated that pursuant to an agreement entered into between the plaintiff and the defendant to take over the rice mill of D1 for a period of three years for the benefit of partnership, the amount was advanced for effecting repairs of the mill to D1 which is not in his possession on the date when the amount was advanced and as per the evidence given by PWs.1 and 2 Tadi Venkat Rao who is in possession of the mill handed over the possession of the mill only after execution of the mortgage deed. According to PW3 the said receipt was executed at the rice mill of D1. As per ledger entry Ex.A4 dated 6-1-1967, the amount was advanced for milling the paddy on contract basis and the account is in the name of rice mill showing D1 as proprietor, though the mill was in possession of Tadi Venkat Rao.

17. Coming to the second item of the loan covered by mortgage deed i.e., the plaintiff advanced an amount of Rs.2, and 400-33 paise to D1 under receipt Ex.A3, dated 17-8-1967. As per the recitals in the mortgage deed as well as in the plaint the amount was advanced by the plaintiff of D1 to settle the amounts payable to Tadi Venkat Rao, perhaps to take over the possession of the rice mill. Firstly, it is to be seen that this amount to not find a place in Ex.A1 mortgage deed and he admits the same in the witness box. But, he tried to explain by stating that due to lack of knowledge this transaction was not mentioned in Ac.A1. From Ex.A3 it is seen that the plaintiff paid the amount to Tadi Venkat Rao on 17-8-1967. From this document it is seen that Venkat Rao handed over the possession of the mill on that day. But, the plaintiff deposed that Venkat Rao vacated the mill on the date of Ex.A1.

18. PW2, the alleged attester of Ex.A3, though stated that the plaintiff paid the amount to Tadi Venkat Rao he did not remember how much amount was paid under Ex.A3. But, at the same time it should be kept in mind that the plaintiff did not choose examine Tadi Venkat Rao, the recipient of the money under Ex.A3.

19. Now, coming to the third item, the amount of Rs.2,597-67 paise payable by D1 to the plaintiff on the basis of a katha maintained in the books of accounts. In the cross examination on behalf of D4 to D6 the plaintiff categorically stated that prior to execution of Ex.A1, D1 was not indebted to him in any connection.

20. Next, he stated that the katha of the first defendant was settled as on the date of Ex.A1 mortgage deed. As the two statements run counter to each other, it is to be seen whether this transaction is a genuine one or not on the basis of ledgers produced by the plaintiff in the Court. Firstly, it is seen that the plaintiff did not produce the corresponding daybook to prove the entries of the ledgers produced before this Court. It is a well-known thing that the transaction of any business firm is truly reflected in the daybook than the ledgers maintained by the business firm. Without corroborating the evidence by way of daybook, ledger entries cannot be given much credence, as it is difficult to say whether these ledgers were maintained during the course of business or not and also it is not a difficult thing for anyone to make some entries in the ledger and produce the same in the Court. Further neither any audit reports even by a Chartered Accountant nor the assessment orders passed by the concerned department were produced in the Court to prove the ledger entries. Though the plaintiff stated that the Income Tax Department or Sales Tax Department inspected these books, no semblance of inspection by the officer of these departments could be seen from these books. Further the plaintiff stated that he was an income tax assessee during that time and the Income Tax authorities imposed a penalty of Rs.70,000/- having not accepted the accounts maintained by the plaintiff. Next, the plaintiff stated that accounts of the 1st defendant were settled on the day of execution of the mortgage deed, but from the ledger it is seen that the accounts in the name of the 1st defendant continued till 28-3-1968 and the defendant has to pay Rs.12,835-02 paise including Rs.1,841-09 paise alleged to have been paid on the date of registration.

21. Next, the plaintiff admitted in the witness box that the entries in Exs.A5 and A6 appear in different inks. The plaintiff tried to offer an explanation that Ex.A6 entries were made till 30th August by one clerk and from 31st August by another clerk. It is rather difficult to believe the version of plaintiff for the simple reason that the ledger entries will not be made every day like the entries in the cash book. Hence, no credence can be given to these ledger entries produced in the Court. The Court below simply carried away by ledger entries without looking into all these aspects and held that all the three transactions covered under mortgage deed are true and binding on the defendants. Further the defendant extracted various contradictions from the ledgers produced by the plaintiff. More so in the light of the admission of PW1 in the witness box that these amounts were taken by D1 subsequent to Ex.A3 in the following words :

"Rs.2,597-17 paise represents the amounts D1 took to various times from me subsequent to Ex.A3 i.e., on 17-8-1967 and prior to the execution of the mortgage deed".

22. Where as from the ledgers produced by the plaintiff in the Court that the katha was being maintained in the name of the D1 rice mill during 1966-67 and thereafter in the personal name of the 1st defendant. When it is the case of the plaintiff that the rice mill was run by one Tadi Venkata Rao at that time, the

question of maintaining any accounts in the name of D1's rice mill during 1966-67 does not arise. The personal account was maintained in the name of the 1st defendant since 1967-68, whereas the ledger account was maintained after Ex.A3 i.e., 17-8-1967 as per the version of the plaintiff in the witness box.

23. Now, coming to the execution of Ex.A1 the mortgage deed, according to plaintiff, the idea of the proposals of running the mill of the defendant with the monies advanced by him was dropped after three or four months after execution of Ex.A1 mortgage deed. Having advanced the money for getting repairs to the mill and also for payment of the amount due to Tadi Venkata Rao, and if the proposal was dropped after three or four months later to 31-8-1967, I fail to see any reason for getting mortgage deed executed by D1 after resolving disputes between D1 and Tadi Venkata Rao on 17-8-1967. PW2, the identifying witness for the execution of the mortgage deed Ex.A1 clearly stated that he was not present when Ex. A1 was written and executed and he is not aware of the contents of Ex.A1. The plaintiff has not chosen to examine neither the scribe nor the attester to this document. Hence, except the evidence of plaintiff himself no independent evidence is forthcoming with regard to the execution of the mortgage deed Ex.A1. It is also to be seen that D1 who is alive till 1984 remained ex parte and he did not file even written statement either accepting or denying the plaint allegations. If we look at the conduct of the first defendant, having given an undertaking in the Court twice that he will neither create a charge nor encumber the rice mill by bringing third party interest during the pendency of the suit proceeded to execute this mortgage deed stating that he has given first charge only to an extent of Rs.5,000/- on the rice mill. Further, having suffered decrees in OS No.3 of 1966 on the file of the Principal District Munsif, Amalapuram and also OS No.55 of 1965 filed by D3 seeking partition of the family properties seemed to have filed an insolvency petition in the year 1972. From this an impression is given to this Court that D1 is somehow trying to defeat the claims of the decree holder in the above suit. In the light of the foregoing discussion on the issue, I have no hesitation, to hold that the mortgage deed Ex.A1 is only a sham and nominal document without passing any consideration to D1 and intended to defraud the claims of D2 the decree holder in OS No.3 of 1966 and appellant herein, purchaser of the rice mill in the auction conducted by the Court in execution of the judgment and decree in OS No.3 of 1966. This issue is accordingly held in favour of the appellant.

Issue No.2:

24. From the pleadings it is seen that the trial Court i.e., the Principal District Munsif Court, Amalapuram, decreed OS No.1 of 1958 filed by D2 against D1 or rendition of accounts and the Sub-Court, Kakinada having allowed the appeal AS No.270 of 1962 filed by D1 remanded the matter for fresh consideration. After remand the suit was numbered as 3/66 and the same was pending. Likewise, OS No.55 of 1965 filed by D3 for partition of the family properties between him, his father and brothers was also pending in the Sub-Court, Amalapuram for trial by

the time of execution of Ex.A1, i.e., 30-8-1967, D2 filed IA No.973 of 1958 along with the suit for attachment of the rice mill belonging to D1 and D1 filed an undertaking a Ex.B5 on 8-11-1958 in the Court stating that he will neither alienate nor create any encumbrance on the mill pending disposal of the suit. While the appeal is pending in the Sub-Court D1 seemed to have started getting the mill repaired and D2 having apprehended that D1 may sell away the mill filed another IA No.7 of 1964 in the Additional District Munsif Court, Amalapuram, seeking injunction restraining D1 from alienating either the mill or any part of it. Once again D1 executed another undertaking Ex.B6, dated 5-2-1964 stating that he brought the mill into working condition and he is not going to either alienate or part with the possession of it, during the pendency of the suit. Subsequently, AS No.270 of 1962 filed by D1 was allowed and the matter was remanded to the trial Court for fresh consideration. After remand the suit was numbered as OS No.3 of 1966 on the file of Principal District Munsif Court, Amalapuram. While the suit is pending adjudication after remand D1 executed mortgage deed on 30-8-1967 in favour of the plaintiff for a sum of Rs.11,000/-. D1 admitted in that mortgage deed that he has given an undertaking for a sum of Rs.5,000/- in the Court in the suit filed by D2. This statement of D1 in the mortgage deed clearly establishes the plaintiff's knowledge about the pendency of the suit filed by D2. Thereafter the suit OS No.3 of 1966 was decreed by the trial Court on 13-2-1969 and ASNo.61 of 1969 filed by D1 was dismissed by the Sub-Court in 16-6-1973. Thereafter D2 filed EP No.21 of 1977 seeking execution of the decree by bringing the rice mill to auction. At that stage plaintiff filed EA No.71 of 1979 by contending that the mill should be sold subject to his claim over it (Ex.A9) under the mortgage deed dated 30-8-1967. The said application was dismissed by the execution Court on 26-3-1979 (Ex.A9) and D2 having obtained permission of the Court to participate in the auction purchased the rice mill in the auction held by the Court and sale certificate was also issued in his favour on 28-4-1979, which was marked as Ex.B2. The said order rejecting EA 71 of 1979 has become final as the same was not challenged by filing appeal as provided under Order 21, Rule 58 after Amendment Act, 1976 w.e.f. 1-2-1977 or by filing suit as provided under the unamended provisions. Hence, it is not permissible for the plaintiff to file suit based on the mortgage. Thereafter just one day prior to the expiry of the limitation, the plaintiff filed the present OS No.46 of 1979 on the file of the Sub-Court, Amalapuram. In the plaint it is stated that D2 was made party defendant as he purchased some property out of the mortgage property in the Court and he is in possession of the same and as such he is liable to discharge the suit debt. In the witness box initially he tried to plead lack of knowledge of the pendency of the suit by stating "I am not a party to the proceedings to the Court in which item No.2 of the mortgage deed was sold to D2. I do not know whether D2 purchased item No.2 of the plaint schedule property in the Court auction subject to mortgage or not. The order of the Court in Ex.A9 i.e., EA No.71 of 1979, dated 26-3-1979 belies this statement. In fact at a later stage in the cross-examination, he admitted about the disposal of the claim petition filed by him by the execution Court. Subsequently, in the cross-examination he admitted his

knowledge of the undertaking given by D1 in the suit filed by D2 in the following words.

"I know D1 executed security bond in favour of the Principal District Munsif Court, Amalapuram for Rs.5,000/-securing the rice mill."

25. From the above material on record it has to be seen whether both the undertakings given by D1 i.e., Exs.B5 and B6 are having legal effect of an attachment of the order of the Court u/s 64, CPC. The trial Court held that D2 is liable to discharge the suit mortgage debt and cannot the avoid the same on the ground of undertaking said to have been given by D2 in his suit on the file of the District Munsif, Amalapuram and accordingly a finding was recorded against the D2. To arrive at this conclusion :

(1) DW1 i.e., D2 was aware of the mortgage of the rice mill to the plaintiff by 1971 itself and hence it is futile on his part to put the plaintiff to strict principles of execution of Ex.A1.

(2) The D2 has not filed final orders passed in the petitions showing that the Court accepted the undertaking given by D1 and closed the petitions. The learned Judge gone to the extent of saying that there was possibility of the said petition having been dismissed on merits without the necessity of the undertaking given by D1. This undertaking will not find the D1 in absence of proof on the part of D2 that by virtue of the undertaking the Court did not order attachment.

(3) D2 has not shown that the undertaking given by D1 automatically make any alienation affected by such person is void.

(4) With regard to the undertaking given under Ex.B6 the Sub-Judge held that D2 himself is aware of the non-effective nature of the earlier undertaking covered by Ex.B5 for the same reasons as are given for Ex.B5. At the same time the learned Judge held that the mortgage is subject to Rs.5,000/- first charge of D2 as the document itself contain such a recital.

(5) As the suit filed by D2 is only for rendition of accounts it cannot be emphatically and assertively said that D1 is indebted for a particular amount to D2.

(6) As the suit claim is for an unascertained amount of debt, it cannot be possible to imbibe knowledge to the subsequent alienees and term them as not bona fide alienees bringing them u/s 54 of the Transfer of Property Act.

(7) The D2 has to purchase the mill after intimating all subsequent mortgages in the sale, as the subsequent mortgages have interest in the property that is being brought to sale. Hence, the sale will not bind the plaintiff and therefore item No.2 of the plaint schedule property is liable to discharge the suit mortgage debt.

26. Having taken the above view, the learned Judge held that the mortgage is subject to the security given by D1 for Rs.5,000/- in the mortgage deed and to

that extent D2 can be termed as preferred creditor.

27. I have no manner of doubt in holding that the above reasons given in support of the findings arrived at by the learned Sub-Judge are perverse and they cannot be sustained in law. A reading of the judgment gives me an impression that in a suit filed by the plaintiff the learned Judge shifted the burden of proof on the defendant to prove that the undertakings given by D1 in the suit filed by D2 are not binding on the plaintiff. It is the case of the plaintiff that D1 has given undertaking to an extent of Rs.5,000/- on the rice mill in the suit filed by D2 because of such a recital in Ex.A1. In other words, the plaintiff was informed by D1 that he has given an undertaking to the Court for a sum of Rs.5,000/- on the rice mill. But, from a look at the undertakings given by D1 i.e., Exs.B5 and B6 it reveals that the undertaking was not limited to Rs.5,000/- and D1 in unequivocal terms stated that he will not alienate the rice mitt or create any encumbrance on the property. When the mortgagor was saying that he has given an undertaking for a sum of Rs.5,000/- is it not the duty of the mortgagee to verify whether the mortgagor is speaking truth or not by going through the undertakings given by him in the Court. When the mortgagee failed in his primary duty to verify the truth or otherwise of the statement of the mortgager it is sufficient to hold that the mortgage deed was not brought into existence bona fide. Likewise, the observation of the Court that the undertaking given by D1 will not bind him in the absence of proof that the Court accepted the same. Next, the finding of the Court that D2 is a preferred creditor to the extent of Rs.5,000/- as mentioned in the mortgage deed without looking to the undertakings (Exs.B5 and B6) given by D1 in the suit filed by D2 is atrocious. I have already held that Ex.A1 is a sham and nominal document and no consideration whatsoever passed under the mortgage deed to D1 and it cannot be acted upon.

28. Coming to the binding nature of the undertakings given by D1 at the first instance it is useful to extract Section 64, CPC dealing with the attachment orders to be passed by the Court.

"64. Private alienation of property after attachment to be void :--Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment."

29. In *Raghunath Das and others v. Sundar Das Khetri and another*, AIR 1914 PC 129, Their Lordships considered the affect of attachment ordered u/s 64 CPC and held :

"An attachment prevents and avoids any private alienation, but does not invalidate any alienation by operation of law such as is effected by a vesting order under the Insolvent Debtors Act of 1848, and an order for sale though it binds the parties does not confer title."

30. From this it is seen that when once an attachment order is issued u/s 64 CPC, private alienation made by judgment debtor is prohibited and if any such alienation is made the same is invalidated.

But, at the same time attachment does not invalidate alienation by operation of law.

31. In *Thondam Annamalai Mudali v. Tiruttani Ramasami Mudali and others* AIR 1941 Mad. 161 (FB), Justice Patanjali Sastri, in his separate judgment but concurrent, while answering the reference whether an application by stranger auction purchaser for delivery of possession as against the judgment debtor or his representative is not covered by Section 47; and whether Section 47 applies to a case where the dispute arises between the party and his own representative or between two persons, but both represent the same party, considered the effect of Section 64 CPC in the following terms :

"In the present case, having regard to the nature of the dispute which relates to the superior title claimed by the appellant under a Court sale as against respondents 1 to 3 who have purchased the property under a private sale from the judgment-debtor's widow pending attachment, it seems to me that the appellant can and should be regarded as the representative of the decree-holder. The position is this : The judgment-debtor having already sold the property to respondents 1 to 3, the appellant who purchased only the right, title and interest of the judgment-debtor at the Court sale would get nothing under the sale but for the protection afforded by Section 64, Civil PC, to a decree holder executing his decree. That section, it will be observed, does not render an alienation pending attachment void against all persons and for all purposes, but only against a "claim enforceable under the attachment" i.e., against the decree-holder's right to bring the property to sale under his attachment unaffected by any alienation by the judgment debtor subsequent to such attachment."

32. From this it is seen that when once the property is under attachment, the decree holders right to bring the property to sale under his attachment is unaffected by any alienation of the judgment-debtor subsequent to such attachment.

33. In *Parachuri Veerayya Vs. Yalavarti Veeraraghavayya and Others*, , Their Lordships while considering the question whether subsistence of an attachment before judgment of some property is a bar to the same property being sold in execution of a decree obtained subsequent to the attachment, observed as follows :

"Section 64 CPC does not enact an absolute prohibition of the sale of the property on which the attachment was subsisting.A private sale of property subject to attachment could be avoided by the attaching creditor or his representatives-in-interest. This does not preclude the same property from being brought to sale in execution of another decree."

34. From this it is seen that while the creditor can obtain attachment or his representative to avoid a private sale such an attachment does not preclude from bringing the same property to sale in execution of another decree in the light of the language employed in Section 63(2) CPC. From this judgment it can be safely concluded that an order of attachment avoids any private alienation by the judgment debtor.

35. Now, it has to be seen whether the undertakings given by D1 to the Court can be treated as an attachment or not before judgment. Order 38, Rule 5 contains the procedure to be followed by the Court before ordering attachment of the property. It is useful to extract the same :

"5. Where defendant may be called upon to furnish security for production of property:--(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,--

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show-cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.

36. From Clause I of the said order, at any stage of the suit, if the Court is satisfied that the defendant is likely to dispose of the whole or any part of his property or remove from the local limits or jurisdiction of the Court with an intention to obstruct the execution of any decree that may be passed against him, the Court is entitled to direct the defendant within the specified time either to furnish security for the value of the said property to produce and place the property or such portion of the property as may be sufficient to satisfy the decree at the disposal of the Court when required or to appear and show-cause why he should not furnish security for the value of the property. In other words, the Court was given several options either to direct the defendant to furnish security to the value of the property or produce and place whole or part of the property to satisfy the decree or give a show-cause notice to explain why he

should not be directed to furnish security. Under clause 3 of the said order, the Court is also entitled to direct conditional attachment of the property in the order.

37. In *Yenamala Chandra Reddy Vs. Nuvvula Chandramouli Naidu and Others*, , a Division Bench of this Court considered the effect of Order 38, Rules 5 and 6 CPC and after surveying the case law on the aspect held as hereunder:

"For the aforesaid reasons, we hold that the Court by reason of the power under Order XXXVIII, Rule 5(3) can order conditional attachment "also" along with a show cause notice to be issued under Order XXXVIII, Rule 5(1) of CPC. The Court can adopt the first part of Form No.5, and in such an event, it may be necessary for the Court to hear the defendant before issuing such a notice. It is also open to the Court to adopt both the first and the second parts of Form No.5, without issuing notice and direct the Bailiff to attach the property straightaway, if the defendant fails to comply with the first part of the Form. In the latter case, the order will be one of "conditional attachment". However, if the defendant comes to Court and satisfies the Court, it will be open to the Court to withdraw such conditional attachment under Order XXXVIII, Rule 6(2)."

38. From this it is seen that it is open to the Court either to give a show-cause notice and hear the party before passing an attachment order or while issuing notice direct the bailiff to attach the property straightaway. If the order given by the Court contains both the parts of Form 5, the order will be treated as a conditional attachment order and it is open to the Court to withdraw the conditional attachment order under Rule 6(2) if the defendants satisfy the Court that there is no basis for the apprehension of the creditor. If we look at the facts of the case, it is seen that D2 filed IA No.973 of 1958 along with the suit and D1 having received the notice filed an undertaking on oath in the Court that he will not alienate the mill. As D1 filed an undertaking by himself, the question of refusing the undertaking by the Court does not arise. Likewise, when the defendant himself filed an undertaking before the Court, the question of dismissal of the IA by the Court does not arise. At any rate, it is not the case of the plaintiff that the undertaking given by D1 was not accepted by the Court and the application was dismissed on merits, and it is for the plaintiff to prove that the undertakings given by D1 to the Court were neither accepted by the Court nor subsisting on the day when Ex.A1 was executed. Unfortunately, the learned Judge observed that the Court might not have accepted the undertakings given by D1. Such an inference drawn by the Court is unwarranted. At any rate, had the learned Judge looked into the order passed by the execution Court in EA No.71 of 1979 in EP No.21 of 1977, he would have found that one of the reasons given by it for dismissal of the claim petition filed by the plaintiff is the undertakings given by D1 in the suit filed by D2. Likewise, with regard to the undertaking given by D1 i.e., Ex.B6 dated 5-2-1964, the comment made by the learned Judge is that the D2 himself is aware of the non-effective nature of the earlier undertaking covered by Ex.B5 for the same reasons as are given for Ex.B5 are unwarranted. When D1 was trying to get the mill repaired during the

pendency of the appeal in the first round of litigation as an abundant precaution D2 might have filed IA No.7 of 1964 under Order 39, Rule 1 CPC, seeking injunction restraining D1 from alienating the mill or any part of it. But, as D1 gave an undertaking, the Court below, having accepted the undertaking might not have passed any order in the injunction petition. Hence, it cannot be said that D2 filed second application having realised the non-effective nature of the earlier undertaking.

39. From the above it is seen that while the first application is for attachment of the rice mill before judgment, the second application was filed seeking injunction restraining D1, which is more effective than the attachment before judgment sought for earlier. But, the Court might have felt that there is no need to issue an injunction order in the light of the second undertaking given by D1, more so after he suffered a decree in the trial Court and during the pendency of the appeal preferred by him. Even assuming for a moment that the suit filed by D2 is for an unspecified debt, the second undertaking was given by D1 after he suffered decree. Hence, it cannot be said that D1 and the persons claiming under him are not bound by the undertaking given by him, on an imaginary ground that the Court might not have accepted the undertakings and might have dismissed the application that was not even the case of the plaintiff himself. Further the learned Judge has forgotten that these undertakings were given to the Court not to the party and some sanctity should be given to the proceedings in adjudication of a dispute in a competent Court and they cannot be thrown as a waste paper. Hence, I hold that the undertakings given by D1 operates as an order of attachment u/s 64 CPC and any private alienation of the property subsequent to the undertaking cannot be sustained in law.

40. It is rather surprising to note the findings of the Court that as D2 was aware of the execution of Ex.A1 by 1971 itself, he cannot put the plaintiff to strict proof of execution of Ex.A1, more so when it is the specific case of D2 that Ex.A1 was brought into existence to defeat the claim in OS 3 of 1966. Mere knowledge of execution of Ex.A 1 itself cannot give any credence to the execution of the mortgage deed, as the claims of D2 are secured by way of an undertaking given by D1 to the Court and he need not bother himself whether Ex.A1 was executed with a bona fide intention and whether any consideration really passed to D1 or not. When the plaintiff brought the suit, it is not known how D2 is estopped from contending that Ex.A1 is only a sham and nominal document intended to defeat his claims, more so after the claim petition of the plaintiff in Execution Proceedings in his suit was dismissed by the Court (Ex.A9). Accordingly, I hold that the mortgage deed Ex.A1 is hit by the provisions of Section 64 CPC.

Issue No. 3:

A reference was made to the pendency of the suit filed by D2 in Ex.A1 itself, wherein it was categorically stated that D1 has given an undertaking to an extent of Rs.5,000/- towards the claim of D2 in a suit filed by him. I have already held that neither in Ex.B5 nor in Ex.B6 the undertaking was limited to Rs.5,000/-, but

it is an absolute and irrevocable undertaking given by D1. Hence, it can be safely presumed that the plaintiff is aware of the disputes between D1 and D2 by the time of execution of Ex.A1 and D2 has to be declared as a preferred creditor to the extent of suit claim.

41. Coming to the partition suit filed by D3 against D1 and his other brothers, in the first instance he tried to plead ignorance of the suit but at a later stage he admitted that he was aware of the disputes between D1 and his son even by the time he advanced Rs.6,000/- under Ex.A2 on 6-1-1967. Likewise, though he tried to contend that suit schedule property is a self acquired property of D1, the recital in Ex.A1 that he got these properties in a family partition in the year 1951 belied this contention.

42. Nextly, at one stage he assailed that D1 and D3 to D6 are living combinedly, but at a later stage he admitted that they are living separately. Infact, when a question was put to him on behalf of those defendants whether he has given any affidavit in OS No.55 of 1965, his answer was "I do not remember whether I gave an affidavit in the suit OS No.55 of 1965 filed by D3 for partition." Likewise, when he was furnished with the judgment in OS No.55 of 1966 wherein the Court held that Ex.A1 mortgage debt pleaded by D1 was held to be not binding on D3, he gives an avoiding answer saying that he was not aware of it. But, the learned Judge referred the contents of the judgment in OS No.55 of 1966 in Para 16 of the judgment wherein the Court held that it is not a joint family debt.

43. When the mortgager is having major sons, any prudent person would have insisted that the mortgager's sons should also join in executing the same to avoid complications in future. But, the explanation offered by the plaintiff in the witness box for not insisting the sons of the mortgager to join him in execution of the mortgage deed is unbelievable in the light of the facts adverted to above.

44. For all these reasons, I hold that Ex.A1 dated 30-8-1967 is hit by the principle of *lis pendens* also.

Issue Nos.4 and 5 :--

As these issues do not relate to the claim of the appellant herein and as the sons of D1 are not before this Court, I need not consider these issues as they affect the rights of the children of D1.

45. In the result, the appeal is allowed, and the findings recorded by the Court below affecting the interests of the appellant herein are set aside and OS No.46 of 1979 is dismissed to the extent of the claim made by the plaintiff against D2.

46. The appellant will have his own costs throughout the proceedings.