(1951) 08 AP CK 0006

In the Andhra Pradesh High Court

Case No : Second Appeal No. 964 of 1355

Viswanatha and others — APPELLANT

Vs

Fatima Bi — RESPONDENT

Date of Decision : 23-08-1951

Acts Referred:
Hyderabad Transfer of Property Act, 1351 — Section 58, 59

Citation : AIR 1951 AP 39

Hon'ble Judges : Ahmed Mohiuddin Ansari, J

Bench : Single Bench

Advocate : Laxman Rao Ganu, for the Appellant; Shahali Hussaini, for the Respondent

Judgement

Ahmed Mohiuddin Ansari, J.—This is a second appeal by the defendant in a mortgage suit which was decreed. by the Original Court and affirmed in appeal by the lower Appellate Court. The defendant had not denied the contract of mortgage and the fact that the period of the mortgage had terminated. But he contended that after the mortgage, some amount fell due towards the mortgagor in connection with, the expense of litigation following the mortgage, and the mortgagor orally promised to allow the mortgagee to keep the mortgage property in his possession for five years more in lieu of the interest of the new debt. This the plaintiff denied, in view of the fact that the subsequent contract was an oral one, the Original Court did not permit the defendant to prove the subsequent contract.

2. The Lower Appellate Court also agreed with the Original Court and decided that under Sections 58 and 59 of the Hyderabad Transfer of Property Act, an oral contract cannot be recognised, and as such, the plaintiff was not entitled to claim possession for five years more.

3. In this second appeal, it is stressed on behalf of the Advocate for the appellant that the subsequent mortgage is by nature not an extension of mortgage, but a mere charge" and is not required to be proved by a registered document, and he

has cited ''Trimbak Gangadhar v. Bhagwandas'', 23 Bom 4348; ''Kuppuswami v. Rasappa Chettiar, AIR (23) 1936 Mad 895, and ''Bibhuti Bhusan v. Baikuntha Nath'', 164 Ind Cas 477 (Cal).

4. I do not agree with this contention. In the first place the subsequent contract does not amount to mere charge, but is in fact, an additional mortgage, for, according to the plaintiff it was stipulated between the parties that besides the mortgage amount originally drawn by the plaintiff, he owed Rs. 500/- more which had to be paid at the time of the redemption and in lieu of the interest of this additional sum, the mortgagee was entitled to remain in possession for five years more. Therefore by nature this contract was a usufructuary mortgage, and as such u/s 59 of the Hyderabad Transfer of Property Act, it could only be effected by a registered document. Even if it were a charge I do not agree that it could be an oral one. There is a subtle distinction between a mortgage and a charge; and in the former a transfer of interest is contemplated, while in the latter a mere Hen or security for debt is obtained.

5. As was decided in ''Viswanadhan v. M. S. Menon'', AIR (26) 1939 Mad 202 and ''Shivarao v. shanmugha Sundara Swami'', AIR (27) 1940 Mad 140 even an oral charge could not be a valid one. As I have said, the subsequent contract relied upon by the plaintiff is that of an additional mortgage and as such, it could only be effected by a registered deed in the absence of which the defendant cannot be permitted to adduce oral evidence. Besides, the extended period has also expired and the defendant has no right whatsoever to remain in possession of the mortgage property. Appeal is, therefore, dismissed with costs all through.

