(1995) 10 AP CK 0067

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 700 of 1993

Voleti Srirama Reddy (died) per L.Rs. APPELLANT

Vs

Voleti Appalaraju and Others RESPONDENT

Date of Decision : 24-10-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Registration Act, 1908 — Section 17, 49

Citation : (1996) 1 ALT 810

Hon'ble Judges : V. Rajagopala Reddy, J

Bench : Single Bench

Advocate : T. Durgaprasada Rao, for the Appellant; V.V.L.N. Sarma, for the Respondent

Final Decision : Dismissed

Judgement

V. Rajagopala Reddy, J.—This Court by order dt. 13-8-1992 in C.R.P.No. 289/91 directed the Subordinate Judge, Pithapuram, to consider the admissibility of Ex. B-2 filed in O.S. No. 9/89 on his file and to collect the deficit stamp duty with penalty, if it is insufficiently stamped and also to consider whether the document requires registration and if the document is being relied upon only for collateral purpose, the same may be marked even though it was not registered. In pursuance of the said order, the learned Subordinate Judge considered the document and found that Ex. B-2 was not a conditional sale agreement but was usufructury mortgage and it requires registration. It was also found that it was not relied upon for collateral purpose and that the document was unstamped. The petitioner was directed to pay the stamp duty of Rs. 1,495/- and penalty of Rs. 14,950/-, aggregating to Rs. 16,445/- on or before 8.2.93. This order is in question in the Civil Revision Petition.

2. The 1st petitioner is the 3rd defendant in the suit. The suit filed by the 1st respondent is for partition of plaint schedule property which is in possession of the plaintiff and for allotment of a share to him. 1st defendant is his son. 2nd

defendant is his unmarried daughter and the 3rd defendant (1st petitioner) is his brother. Defendants pleaded oral partition with their two other brothers. It is specifically averred in the plaint that the plaintiff incurred a debt of Rs. 15,000/- from the 3rd defendant by way of owelty and for discharging the said debt, he executed Ex. B-2 in favour of 2nd defendant. The 1st petitioner in his written statement has also averred that in the partition the plaintiff paid Rs. 9,500/- only towards his share of Rs. 24,500/- and that he owed Rs.15,000/- to him and when he pressed for payment he put him in possession of the land executing Ex. B-2, "a conditional sale agreement", since he offered to purchase the same.

3. It is contended by the counsel for the petitioner, relying upon the recitals of the document, that Ex. B-2 is a conditional sale agreement and therefore, does not require registration. It is also contended that the relationship between the parties and the surrounding circumstances will go to show that the plaintiff agreed to sell the land in his favour, however with a condition to repurchase the same; if he could not repay the advance taken within a specified time, failing which the plaintiff shall have to execute the sale deed. On the other hand the learned counsel for respondents 2 and 3 argued that it was a usufructury mortgage and therefore, inadmissible in evidence for want of registration.

4. Several decisions have been referred to at the bar in support of their respective contentions. In the court below the petitioners'' case was that Ex. B-2 was a sale with a condition of retransfer, but not a mortgage and the Court ultimately found that it was a usufructury mortgage. However, the counsel for the petitioner before me argued that Ex. B-2 is only a conditional agreement of sale but not a mortgage. The decisions cited highlight the distinction between a mortgage by conditional sale or a sale with a condition to repurchase, in either case the document has to be properly stamped and also registered. Since the counsel for the petitioners argues that Ex. B-2 was a conditional agreement of sale, I will have to consider the nature of the document to find whether it is an agreement of sale or mortgage. In Bhoju Mandal Vs. Debnath Bhagat, the disitinction between mortgage by conditional sale and sale with condition of repurchase is brought out. The document is a mortgage if there is a relationship of debtor and creditor and it is sale with a condition of repurchase if there is an out and out sale whereby the owner transfers all the rights in the property reserving a personal right of repurchase. It was held that the intention of the parties has to be ascertained in such a case on a consideration of the contents of the document and the relevant surrounding circumstances. The description given in the document is not conclusive. In P.L. Bapuswami Vs. N. Pattay Gounder, it was held that the intention of the parties could be gathered from the language of the deed, interpreted in the light of the surrounding circumstances. The important distinction between the mortgage by conditional sale and sale with condition of repurchase is held to be a relationship of debtor and creditor and the transfer being a security for the debt. In that case it was held to be mortgage by conditional sale, firstly on the ground that the condition of repurchase has been embodied in the same document; secondly on the circumstance that patta was

not transferred to the purchaser after the execution of the document and thirdly the land revenue was continued to be paid by the vendor. A Divisional Bench of this Court in Venkatakrishna Rao v. Nagendram (1956 (2) An.W.R. 569) held that the distinction between the two documents depends upon the intention of the parties, and reference could be made to their conduct at the time of execution of the document. Taking the circumstance of an antecedent relationship of debtor and creditor between the parties and the document having been executed for the full amount due by the vendor to the vendee, it was held that the document was not an absolute sale but transfer by way of security. Other decisions referred to also show how the distinction could be made between the sale with a condition of repurchase and mortgage. I, therefore, do not propose to consider them in detail as it does not serve any purpose, in view of the authoritative pronouncement of the Supreme Court in this regard, as seen above. That apart none of these decisions highlight the distinction between the conditional agreement of sale or mortgage.

5. I will now consider the recitals in the document. The document dated 14.4.85 contains in more than one place that it is a conditional agreement of sale. The value of the property is given as Rs. 30,000/-. It was executed for the purpose of meeting the family expenses. It is stated that the plaintiff has taken Rs. 15,000/- as advance and if for any reason he does not want to sell, he would return the advance between 15th March and 31st March, 1987and if the advance was not repaid accordingly it should be treated that he agreed to sell the land and he should pay the remaining sale consideration of Rs. 15,000/- by 15th April, 1987. The sale deed has to be executed according to the draft sale deed. The possession of the land has been given on the same date. However, he agreed to pay the land revenue. I have already stated the surrounding facts of the case. If the recitals are considered in the light of the surrounding facts and circumstances, the alleged advance of Rs. 15,000/- is referable to the debt due by the plaintiff to 3rd defendant, the petitioner, as stated by him in his plaint and also by the 3rd defendant in his written statement. The giving of possession of the land by the plaintiff to the 3rd defendant should also be treated as security for the payment of Rs. 15,000/-, otherwise there is no reason for fixing the date between 15th March and 31st March, 1987, i.e., after three years. The recital that if he returns the advance of Rs. 15,000/- by that time, the sale will not be processed with, also refers to the discharge of the debt of the plaintiff to 3rd defendant. This cannot be a sale with a condition of repurchase, because there is no out and out sale under this agreement. It is also not an agreement of sale because in an agreement of sale the purchaser is entitled to pay the balance of sale consideration, as early as possible; and entitled to obtain registered conveyance deed. The fixing of date after 3 years, is that to between 15th March to 31st March, 1987 detracts from the nature of an agreement of sale. As stated by their Lordships in P.L. Bapuswami v. N. Pattay (2 supra), the characteristic feature of the mortgage is relationship of debtor and creditor and the existence of a debt. In this case, the facts disclose that the parties to the document have

the relationship of debtor and creditor. The plaintiff on his own admission owes a debt of Rs. 15,000/- to 3rd defendant and admittedly it was not paid. The so called advance in Ex. B-2 is also for the same amount of Rs. 15,000/-. The circumstance that quite a long date is fixed for repayment of the so called consideration for the sale demolishes the theory of the petitioner that it is an agreement of sale. The Court below has taken into consideration all the circumstances of the case and examined the recitals in their proper perspective reached the correct conclusion that Ex. B-2 is a usufructury mortgage. There is no reason to interfere with the order. The counsel for the petitioners did not bring to my notice any infirmity in the order which would vitiate the same. I am also of the view that Ex. B-2 is a usufructury mortgage and is, therefore, inadmissible in evidence for want of registration and is liable to be impounded. The C.R.P. is therefore dismissed, in the circumstances, no costs.

