

(2002) 10 MAD CK 0202
In the Madras High Court
Case No : S.A. No. 372 of 2001

D.S. Rajagopalan, D. Harasabahavan, D. Jagatherakchakan
and D. Padmanabhan

APPELLANT

Vs

A. Mohammad Ali

RESPONDENT

Date of Decision : 23-10-2002

Acts Referred:

Evidence Act, 1872 — Section 92

Citation : (2003) 1 MLJ 199

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : T.R. Mani for T.M. Hariharan, for the Appellant; N.A., for the Respondent

Final Decision : Dismissed

Judgement

1. Defendants in O.S.No.1/1997 on the file of the Subordinate Judge, Thanjavur, are the appellants in the second appeal. The respondent herein filed the suit for a preliminary decree, directing the defendants to pay a sum of Rs.2,18,250/- with subsequent interest thereon at 6% per annum, and for a final decree for the sale of the mortgage property in default of payment on the following averments:

2. The defendants borrowed a sum of Rs.2,25,000/- from the plaintiff through one Mohan, their sister's son, agreeing to repay the said sum with 6% interest per annum within a period of six months and executed a simple mortgage. Towards the amount due they paid a sum of Rs.15,000/- and as they attempted to sell the mortgaged property without paying the amount due, it became necessary to file the suit.

3. The defendants resisted the suit inter alia on the following contentions:

It was false to say that they borrowed a sum of Rs.2,25,000/- from the plaintiff. Their sister's son Mohan had borrowed moneys on promissory notes from the plaintiff. The defendants were asked to execute the suit mortgage deed as

security. No consideration passed to the defendants under the mortgage deed. The mortgage at best was only a collateral security. Without proceeding against the principal debtor and without exhausting the remedies against him the suit as framed, was not maintainable. Even assuming without admitting that the plaintiff could proceed against the defendants on the mortgage, in law, he ought to have discharged all the promissory notes or ought to have assigned the promissory notes in their favour. The suit filed was clearly not maintainable and was liable to be dismissed.

4. On the above pleadings, the learned Subordinate Judge framed the following issues:

- (1) Whether the mortgage deed is not supported by consideration?
- (2) Whether the endorsement of Rs.15,000/- made on the mortgage deed is not true?
- (3) Whether the suit is bad for non-joinder of necessary parties?
- (4) To what relief the plaintiff is entitled to?

5. On the side of the plaintiffs Exs.A.1 to A.8 were marked. The plaintiff besides examining himself as P.W.1, examined one Mohammed Farooq as P.W.2. On the side of the defendants there was no document marked. The third defendant examined himself as D.W.1 and Mohan was examined as D.W.2

6. The trial Court held as follows:

The suit mortgage is supported by consideration. The suit is not bad for non-joinder of Mohan as a party in as much as it has been accepted that Mohan had received the money. In as much as the plaintiff himself has accepted receipt of Rs.15,000/-, the endorsement is true. So holding, by judgment and decree, dt.6.4.2000, the trial Court decreed the suit as prayed for.

7. The defendants filed appeal in A.S.No.50/2000 before the Principal District Judge, Thanjavur. The learned Principal District Judge, by judgment and decree, dt.21.8.2000 dismissed the appeal confirming the decision of the trial Court. It is as against that the present second appeal has been filed.

8. Mr. T.R. Mani, learned Senior Counsel, made the following submissions:

The Courts below ought to have seen that no consideration passed to the defendants under the suit mortgage, either directly or through Mohan. If really moneys were paid to the defendants through Mohan, they would have been required to sign the promissory notes. The plaintiff had been shifting his case contrary to the pleadings. There is inconsistency in the pleading vis-a-vis the oral evidence on the side of the plaintiff. In his deposition, the plaintiff had said that he paid amount for the suit mortgage/Ex.A.1 and the defendants received the same, and that Ex.A.1 was executed for discharge of promissory notes executed by Mohan. The promissory notes were executed six months prior to Ex.A.1, and

that Mohan gave the amounts borrowed on the promissory notes to the defendants. Thus, there was conflict regarding passing of consideration for Ex.A.1. In any event it was not established that moneys were paid to the defendants for Ex.A.1. At best, Ex.A.1 could be only a collateral security and the defendants would not be liable until the principal debtor was proceeded against and the remedies against him were exhausted. The suit was also bad for non-joinder of Mohan. Even otherwise the plaintiff had not assigned the promissory notes executed by Mohan in favour of the defendants and in the absence of pleadings on their behalf the suit was not maintainable and liable to be dismissed. It was an after thought for P.W.1 to say that on the date Ex.A.1 was executed, Mohan received back the promissory notes. The promissory notes ought to have been handed over to the defendants. It was also open to the defendants to establish total want of consideration in view of Sec.92 of the Evidence Act enabling them to do so. According to the learned Senior Counsel, the recitals in Ex.A.1, the admissions of P.W.1 and the clear and cogent testimonies of D.Ws 1 and 2 would categorically establish that no consideration passed to the defendants under Ex.A.1 and that at the most, it was only a collateral security for the borrowings of Mohan. The lower appellate Court was in error in holding that the defendants were barred from letting in oral evidence against the tenor of recitals in Ex.A.1. Failure to advert to the pleadings of the parties, the evidence on record and the very recitals in Ex.A.1 enabling the defendant to establish total lack of consideration as envisaged in Section 92 of the Evidence Act, according to the learned Senior Counsel, vitiated the decrees and judgments of the Courts below.

9. On 27.3.2001 notice of motion was ordered and after service on the respondent it came up before me. The following substantial questions of law arise for decision in the second appeal:

(1) Whether the suit as framed is maintainable when the principal debtor is not impleaded and the promissory notes in favour of third parties which constitute the original liability are not produced?

(2) Whether Ex.A.1/Mortgage Deed sued upon is supported by consideration?

(3) Is there any legal basis for the suit claim, in the light of the varying versions given in Ex.A.1, the plaint and the evidence of P.W.1?

10. The learned Senior Counsel broadly stressed that the case in the plaint has not been established by document, that P.W.1's evidence is contrary to the document, that it is not pleaded that Mohan took back the promissory notes nor is it mentioned in the notice.

11. It is now necessary to have a look at the pleadings in the present case. The plaint, which was presented on 8.1.1997 states as follows:

The defendants' sister's son one Mohan resides in the same house along with the defendants. The defendants borrowed a sum of Rs.2,25,000/- through above-

named Mohan, their sister's son, agreeing to repay the amount with 6% interest within a period of six months, i.e. on or before 27.11.1996 and executed a simple mortgage in favour of the plaintiff mortgaging their property scheduled in the plaint. They undertook to discharge the mortgage within the periods specified in the mortgage. They have not discharged the mortgage as promised and are evasive. The plaintiff just prior to the suit came to know that the defendants were making efforts to sell the property mortgaged to third parties without reference to the suit mortgage. Therefore, the plaintiff caused a notice, dt.10.12.1996 (marked as Ex.A.3), calling upon the defendants to discharge the mortgage. The defendants sent a reply through their counsel on 19.12.1996 (marked as Ex.A.8) denying the contents of the plaintiff's notice. They went to the extent of stating that the mortgage was not supported by any consideration, and that the amount was borrowed only by Mohan. The plaintiff brought to the notice of the defendants that they had also paid Rs.15,000/- towards the mortgage and it was endorsed in the mortgage deed itself on 3.7.1996. The defendants though admit the payment and endorsement, claimed that it was done on compulsion, at the same time, the defendants admitted that they had executed the simple mortgage at the request of the plaintiff as a security for the loans advanced to Mohan under the promissory note.

12. In the written statement, the defendants denied the borrowing from the plaintiff through Mohan and contended as follows:

The plaintiff advanced the amount to Mohan on promissory note and for prompt repayment the defendants were requested to execute such a mortgage deed by way of security. No consideration was passed under the mortgage deed. The transaction regarding passing of money was only with the said Mohan and not with the defendants. The suit was not maintainable for want of consideration. There was no necessity for the defendants to sell the suit property and even the encumbrance certificate would prove that the mortgage was in subsistence. The notice had been correctly replied. In the reply notice it was made clear that the plaintiff obtained the mortgage only as a security for the amount advanced to Mohan and no amount was paid for the mortgage loan. If really the plaintiff wanted recourse under the mortgage, on getting the mortgage from the defendants, he should have returned the pro-note executed by Mohan by discharging the same. Having failed to do so, the plaintiff could not act to enrich himself under two headings. The endorsement alleged for Rs.15,000/- in the mortgage deed was not accepted as genuine by the defendants. Since the pro-notes executed by Mohan had not been returned, it was surprising to see an averment that there was an endorsement for Rs.15,000/-. The plaintiff was bound to prove the endorsement. Cash consideration to mortgagors was not done directly. The consideration for the suit mortgage would become substantiable only if the pro-note executed by Mohan earlier were assigned in favour of the defendants or discharged by the plaintiff and others in favour of the defendants. Otherwise the mortgage was not one supported by consideration but could be only a collateral security for the loans received by the said Mohan. The

plaintiff or others could enforce the suit mortgage only after exhausting the remedies against Mohan to whom alone the consideration was passed. The suit was premature and not maintainable under law and facts. The suit was bad for non-joinder of necessary party and also under Order II Rule 2 CPC. There was no cause of action for the suit.

13. It is necessary to know the contents of the mortgage deed, Ex.A.1., dt.28.5.1996. The material portion is as follows:

@v";fSf;F g{h;tPf brhe;jKk; mDnghfKk; cs;s ,jdoapw;fz;l gpu";gof;Fs;s tPL
tifauhit eh";fs; j";fsplk; ehsJ njjp Kjy; 6 MW khj bflLt[f;F bge;jfkhf itj;J mjd;
nghpy; eh";fs; j";fsplk; fldhf buhf;fk; bgw;Wf; bfhz;IJ U:gha; 2.25.000-?. ,e;j
U:gha; ,uz;L yl;rj;J ,Ugj;ije;jhapuKk;. v";fsJ K:j;j rnfhjupapd; Fkhuh; jpU tp/
nkhfd; mth;fs; j";fs; tifauhtplk; gpuhkprhp nehl;Lfs; K:ykha; bgw;Wf;bfhz;Ltpl;l
tifapy; v";fsJ gw;W tHp Mfptpl;l tifapy; v";fsJ gw;W tHp Mfptpl;lgoahy;. ,dp
eh";fs; bge;jf mry; bjhif U:gha; 2.25.000-?j;jpw;Fk; ehsJ njjp Kjy; khjk; 1f;F
U:gha; 100-?f;F 6 MW rjtPjk; tl;o nrh;j;J Toa tl;o Kjy; bjhifia bfl Kothfpa
27/11/1996 njjpf;Fs; j";fsplk; buhf;fkhf bfhlj;J ,e;j bge;jfg; gj;jpuj;jpy;
bry;Yitj;J bge;jfk; kPl;Lf;bfhs;nthkhft[k;/@

The scribe of Ex.A.1 is Mohan, who it is seen is a document writer, and he is the nephew of the defendants. There are three witnesses. One of the witnesses Mohammed Farooq has been examined as P.W.2. Mohan has been examined as D.W.2. The document clearly recites that the amount had been received by the defendants through Mohan, who had executed promissory notes and received the amount of Rs.2,25,000/-. There is nothing equivocal about receipt of consideration through Mohan. The money had reached the defendants. There was a notice issued on 10.12.1996 under Ex.A.3 on behalf of the plaintiff. It clearly says that the defendants, as owners of the property set out in the notice, had executed a registered simple mortgage on 28.5.1996 for Rs.2,25,000/-. For the amount received through Mohan, their sister's son, they had agreed to repay the amount with interest at the rate of 6% per annum within a period of six months i.e. on or before 27.11.1996. The notice further states that the defendants had paid a sum of Rs.15,000/- on 3.7.1996 and it was endorsed in the mortgage deed itself and after the payment of Rs.15,000/- the defendants had not paid any amount to discharge the mortgage as per the terms of the mortgage deed. The notice gave them ten days time to discharge the mortgage. The reply is Ex.A.8, dt.19.12.1996. It states that the defendants did not receive any consideration for the mortgage at any point of time, that their sister's son got loans separately under promissory notes, that the same was specifically mentioned in the mortgage deed, that if really the consideration mentioned in the mortgage deed was true, the plaintiff ought to have returned the promissory notes immediately to the defendants to prove the consideration, that in the absence of the same, it was not possible to claim twice the amount under two headings while it was only one amount paid under pronote to Mohan, that if the defendants were to be made liable for the amounts received by Mohan then

there should have been an assignment of pronotes in favour of the defendants and not otherwise, and that even if the defendants were bound to pay the mortgage amount, then, unless the pronotes obtained by Mohan were not assigned, such claims under two headings were not maintainable. The reply expressed surprise as to how an endorsement in the deed was compelled to be done without assigning the promissory notes by Mohan to the defendants, if at all the mortgage was only a collateral security for realisation. The plaintiff had not exhausted his remedies against Mohan and if the plaintiff could not realise the amount due under the promissory notes, then only he could have a recourse against the defendants. Till such time, the demand was premature and not maintainable.

14. D.W.1/Jagathratchagan, the third defendant, in his oral evidence has stated that his brother's son Mohan had borrowed from Meeran Mohideen. As there was delay in the repayment, the property security was required and therefore the defendants mortgaged the suit property to the plaintiff. They did not receive any money. It should be incidentally pointed out that the name of Meeran Mohideen is not mentioned in the reply notice or in the written statement. The words used in the document are "j";fs; tifauh". That will not automatically take in Meeran Mohideen who is stated to be the father-in-law of the plaintiff. The witness further says that the loan transaction between Meeran Mohideen and Mohan got discharged. He denies the suggestion that it was not correct to say that on the date the mortgage was executed, the pronote executed in favour of Mohammed Ali had been returned. He further states that he had seen the promissory notes executed by Mohan in favour of Meeran Mohideen. All the above things have been stated in the chief examination. In cross-examination he admits that on the date the suit notice was issued, Meeran Mohideen was alive. He further states that Mohan had repaid the amount due to him and settled the account and that these facts were not set out in the reply notice. He further admits that the contents of the mortgage deed are correct, and that it was executed for a valid consideration.

15. D.W.2/Mohan also admits as to how consideration arose has been correctly written in Ex.A.1.

16. From the above, it would be clear that there were other transactions between Mohan and Meeran Mohideen and it was totally unnecessary to involve the name of Meeran Mohideen with regard to the suit transaction.

17. As regards the endorsement made in the mortgage deed, it is specifically spoken to by the plaintiff in his chief examination that it was only the second defendant who wrote the endorsement. Significantly, the second defendant has not entered the box. Much was made of the fact that the plaintiff had not pleaded that after execution of Ex.A.1, Mohan had taken return of the promissory notes. It is not the case of the defendants that the plaintiff had filed any suit against Mohan on the promissory notes. It is rather surprising that the stand taken by the defendants in the written statement is sought to be watered down by

contending that there was no passing of consideration for the mortgage deed. We have already noted that in the pleadings it is stated that the suit was premature and unless the promissory notes were assigned in the name of the defendants, the suit on the mortgage was not maintainable. There can be no two opinions, and the mortgage deed, Ex.A.1, clearly recites the receipt of consideration by the defendants through Mohan. It is therefore not open to the defendants to contend that unless the promissory notes executed by Mohan were returned, the suit was not maintainable. As already noted, the defendants had received money through promissory notes executed by Mohan and as the plaintiff wanted

security, the suit document Ex.A.1 came to be executed. The learned Senior Counsel particularly submitted that the consideration recited in Ex.A.1 is different from the consideration pleaded and attempted to be proved. I do not think that there is any inconsistency in this regard. It is clearly established that the amount had been advanced and the admission by D.W.1, regarding the contents of Ex.A.1 being correct, has already been extracted.

18. In BOMANJI ARDESHIR WADIA v. SECRETARY OF STATE AIR 1929 PC 34 : 56 IA 51 : ILR 53 Bom.230 : 33 CWN 293 it was held as follows:

"When parties have entered into a formal contract that contract must be construed according to its own terms and not be explained or interpreted by the antecedent communings which led up to it."

19. Neither in Ex.A.8/reply notice nor in the written statement, discharge is pleaded. The pronotes were not returned to Mohan after execution of mortgage is all that is mentioned. There is a vital admission in the written statement regarding payment of Rs.15,000/- though stated to be under compulsion.

20. In State of Kerala Vs. Cochin Chemical Refineries Ltd., , relied on by the learned Senior Counsel and referred to by the lower Court, it has been held as follows:

" A transaction of mortgage formally executed does not become void or ineffective merely because the mortgagee fails to advance the amount of money undertaken to be advanced by him. If without advancing the amount agreed to be advanced, he sues on the title created under the deed of mortgage, the Court will not award him a decree for anything more than what he has advanced. But that is not to say that the mortgage is invalid."

In the case before the Supreme Court, the respondent executed a mortgage under which the State of Travancore Cochin was to have advanced certain sum to the respondent. The respondent transferred by way of simple mortgage certain properties to the State. The respondent-mortgagor undertook to supply certain quantity of ground-nut cake to the State. The State failed to advance the money and also failed to take the ground-nut cake. On the question of its liability for damages for breach of covenant it was contended that failure to advance the

amount absolved the State from its obligation to purchase the goods of the respondent. It was held by the Supreme Court as follows:

"The State was liable. It could not be said that by refusing to advance the loan which the State had undertaken to advance, the obligation to purchase ground-nut cake from the Company came to an end. It could not also be said that the State was by its default liable to compensate the Company only for loss arising out of its failure to advance the money, and not out of its failure to purchase the goods. The cause of action arising out of the refusal to take delivery of the goods offered was independent of the cause of action arising out of the breach committed by the State in not advancing the loan. The two causes of action were cumulative and not alternative. There was therefore no warrant for the plea that by claiming damages for loss suffered by it as a result of the failure to advance the loan, the respondents elected to give up its claim for damages for breach of the contract to take delivery of ground-nut cake by the State."

It is clearly laid down by the Supreme Court that the Court is entitled to award the mortgagee a decree for the amount that he has advanced.

21. I am not satisfied that the suit mortgage is not supported by consideration. Even assuming that the promissory notes had not been returned by the plaintiff to either Mohan or the defendants, it is not contended on behalf of the defendants that the plaintiff has taken any independent action in respect of the promissory notes. Their pleading is that the promissory notes had not been assigned to the defendants. When the mortgage deed clearly recites that the defendants had received the consideration through Mohan, who executed promissory notes in favour of the plaintiff and others, and the mortgage being in the name of the plaintiff alone, the present suit on the mortgage cannot be held to be either premature or not maintainable. For the moneys advanced, a mortgage was created and in the mortgage deed the defendants had undertaken that they would discharge the mortgage within a period of six months. They had also not disputed the payment of Rs.15,000/-, though, according to them, the endorsement was made under compulsion. They have failed to make out any case of compulsion. It is totally un-understandable as to why an endorsement should be made in a mortgage deed regarding payment of money if really no such payment was made. By accepting the payment as having been made, the plaintiff has reduced the amount claimed by him in the present suit on the mortgage. May be none of the defendants has signed the endorsement. But, according to the plaintiff, the second defendant wrote the endorsement. He has not been examined to dispute this.

22. I do not agree with the contention that the promissory notes are the original liability. May be at the time the amounts were borrowed through Mohan, they were the original liability. But there is a substitution in the shape of Ex.A.1 under which it is specifically accepted that the defendants had received Rs.2,25,000/-. Equally, it cannot be accepted that Ex.A.1 was only to secure payment. It is also in evidence that the promissory notes were returned by the plaintiff at the time

Ex.A.1 was executed by the defendants. More than anything else there is a vital admission by D.W.1/Jagathratchagan that the recitals in Ex.A.1 are true and that the document was executed for proper consideration. When that is the position, it is not open to the defendants to attempt to defeat the claim of the plaintiff by raising some technical objections which in my view are also not tenable. When there is an admission in law and when document is executed in lieu of promissory notes earlier executed, there is no escape for the defendants from honouring their commitment under the document. It is not the case of the defendants that the plaintiff had filed suits on the promissory notes. It is clearly recited in Ex.A.1 that the defendants had borrowed through Mohan under promissory notes and in substitution of the promissory notes the suit document came into existence.

23. There was a point made as if the borrowing had been from Meeran Mohideen. There is no reference to Meeran Mohideen, either in the reply notice or in the written statement. There can be no evidence admissible contrary to the terms of the document. It is spoken to by D.W.1 that money borrowed from Meeran Mohideen by Mohan had been discharged. Apparently, that was a different transaction. Any way it is not pleaded in the written statement that the money was borrowed only from Meeran Mohideen, and that the amount had been repaid and discharged. The pleading by the defendants also leaves much to be desired. It is specifically stated that the plaintiff or others could enforce the suit mortgage only after exhausting all remedies against Mohan to whom alone the consideration was passed and the present suit is pre-mature.

24. It is only the defendants who are guilty of prevaricating and not having a consistent case. Both the Courts having concurrently held that the mortgage is true and valid, and that consideration had, indeed, passed. I answer the substantial questions of law as follows:

(1) The defendants are only the principal debtors and not Mohan. Suit without impleading Mohan is maintainable. Alleged non-production of promissory notes in favour of "third parties" is immaterial as long as there are no suits filed in respect of those promissory notes.

(2) Ex.A.1/Mortgage deed is supported by consideration.

(3) There are no irreconcilable varying versions in respect of the suit claim. It is well established that

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consideration for a contract cannot be said to be a condition of the contract and oral evidence may be adduced as to what was the exact nature of consideration. There is legal basis for the suit claim.

25. I do not find any merit in the second appeal. The second appeal fails and the same is dismissed. No costs. Consequently, CMP No.3828/2001 is dismissed.