

(1930) 12 MAD CK 0008
In the Madras High Court

(Kintali) Chandramani Prushti		APPELLANT
	Vs	
Jambeswara Rayagaru and Others		RESPONDENT

Date of Decision : 09-12-1930

Acts Referred:

Citation : AIR 1931 Mad 550 : (1931) 34 LW 598

Hon'ble Judges : Pandalai, J

Bench : Division Bench

Judgement

Pandalai, J.—The plaintiff appeals from a decree of the learned District Judge of Ganjam dismissing his suit brought on six simple mortgages

marked A, A-1, A-2, A-3, A-4, and A-5, executed by defendant 1 to him between September, 1909 and July 1911 for a total sum of Rs. 2,000.

Defendant 2 (respondent 2), the principal contesting defendant, is the* minor of defendant 1. The other defendants, of whom defendant 3 is a

divided cousin by adoption of defendant 1, and defendants 4 to 9 are persons holding under defendant 3 were made pro forma: defendants. A

number of formal defences were raised which were all found in favour of the plaintiff. The substantial defence on the merits was that the mortgages

sued on were sham transactions made without consideration with the object of defeating any claims which defendant 3 might make to the property

or the income on the basis of his adoption which defendant 1 was then denying. On this the learned Judge found in favour of the defence and hence

dismissed the suit.

2. The main questions in the appeal are whether the mortgages sued on are supported by consideration and whether the defence that they were not

so supported is open to defendants 1 and 2 or either of them. Logically, the

second point should precede the first as, if it is found in favour of the appellant the first point would not arise.

3. Defendant 1 and his brother's adopted son, defendant 3, were living together before 1909 when they quarrelled and defendant 1 denied the adoption and drove defendant 3 out of the house. Litigation followed in which the adoption was upheld. In 1914 defendant 3 sued for partition and obtained a decree for his share and costs and mesne profits. In execution of this decree defendant 1's and 2's shares were attached. The plaintiff who had obtained the mortgages now sued on between 1909 and 1911 preferred a claim based on them in execution which was dismissed. He brought a suit, O.S. 14 of 1918, to set aside the claim order, and though he failed in the first Court (Ex. 7) in appeal the District Judge upheld the mortgages as true and valid and supported by consideration (Ex. E). To this suit defendant 1 was party. This suit on the mortgages was brought afterwards. Clearly the question of the validity and consideration for the mortgages is *res judicata* as between the plaintiff and defendant 1. The learned Judge below misunderstood Ex. E when he considered that the Judge who decided that case, after upholding the mortgages, left the same question open as between the parties to the suit. This he did not in fact do and had not the power to do.- The sentence in Ex. E which reference is made clearly refers to defendant 1's minor son (present defendant 2) or anyone else who could legally raise the question and not defendant 1 himself. We hold" that the defence of want of consideration is not open to defendant 1 (respondent 1.)

4. As to defendant 2, he is not barred from raising the same question on the ground of *res judicata*, as he does not claim the family property through his father, but by reason of his birth as a coparcener in the family. There is however the point arising from the fact that he was not born on the date of the mortgages in question but only, as found by the learned Judge, which is not objected to by him, in 1912. According to the Hindu law as now well settled, *Chuttan Lal v. Kallu* [1911] 33 All. 283, *Lachmi Narain Prasad v. Kishen Kishore Chand* [1916] 34 All. 126, *Bholanath Khettry v. Kartick Kissen Das Khettry* [1907] 34 Cal. 372, *Mayne*, Edn. 7, Section 342, a son who was born after the alienation of the family property by his father cannot question the validity of that alienation if the father

was at the time of the alienation the only member of the family, or if there being other members they had consented to and so validated the alienation. In this case defendant 1 was not the only member of the family at the dates of these mortgages but there was defendant 3 who became divided only by the decree in the suit of 1914. Not only is there nothing to show that he had consented to but everything to show that he repudiated these mortgages which were held not binding on him. It is therefore open to defendant 2 to question these mortgages: Tulshi Ram v. Babu Lal [1911] 33 All. 654,

5. On the merits we have been taken through the evidence as to the consideration for the mortgages sued on. After giving the best consideration to the circumstances mentioned by the learned Judge for preferring the opinion of the first Court in Ex. 7, we have come to the conclusion that the better view is that of the District Judge in appeal in Ex. E. The mortgage Ex. A was for Rs. 400 and given for two promissory note debts Exs. D. for Rs. 225 and D-I for Rs. 110 and for some cash. This is spoken to by the plaintiff and the writer P. W. 9. Ex. A-I is for Rs. 400 paid in cash. This is spoken to by P. W. 4. Ex. A-2 is for Rs. 200 in payment of two promissory notes D-2 for Rs. 100 and D-3 for Rs. 100. These are spoken to by P. W. 6, P. W. 7 and P. W. 5. Ex. A-3 is for Rs. 400 including a promissory note debt; Ex. D-4 for Rs. 127. This is spoken to by P. W. 5. Ex. A-4 is for Rs. 300 of which Rs. 150 was in payment of a promissory note D-5. This transaction is spoken to by P. W. 3 and P. W. 7. Lastly, A-5 is for Rs. 300 paid in cash and is spoken to by P. W. 6 and P. W. 7. All the mortgages are also spoken to by the writer P. W. 9 and the plaintiff.

6. These mortgages were executed at a time when litigation and family disputes existed between defendants 1 and 3, and they are executed for household and litigation expenses. The plaintiff is a village money-lender, a Komati, and defendant 1 is a Brahmin. There is no reason for assuming any conspiracy between them. The learned Judge has laid emphasis on the rapidity with which these transactions followed each other. If that is a ground for surprise, it is equally surprising that, if the object was to create a mortgage in order to defraud third parties (defendant 2 was not then alive), so many as six mortgages were thought necessary for that purpose when

it would have been far more easy to create one document. In one case, i.e. Ex. A-2, the mortgage was executed the next day after one of the promissory notes (D-3) recited as paid off by the mortgage. This was regarded as suspicious. The reason appears to be that on the date of D-3 itself the parties contemplated executing a mortgage, as the date of the purchase of the stamp for A-2 shows, but as they were living some miles from the registration office a note was first given and the mortgage was registered the next day. Similar explanations are possible for the other transactions. In any case we see no ground to reject the large body of apparently disinterested testimony given by the plaintiff, which the defendants have not in any way attempted to meet. Defendant 1 did not even go into the box to deny receipt of consideration. We must therefore find that the mortgages sued on were executed for proper consideration and necessity. No question of illegality or immorality has been raised. Defendant 2 being the son is also bound by Hindu law to pay his father's debts. The mortgages are therefore binding on defendant 2. There will be six mortgage decrees as prayed with costs in both Courts. Time for payment 15th July 1931.