

(1927) 02 MAD CK 0074
In the Madras High Court

Lakshmiddevamma

APPELLANT

Vs

Pobbiseti Krishtiah

RESPONDENT

Date of Decision : 23-02-1927

Acts Referred:

Citation : AIR 1927 Mad 1107

Hon'ble Judges : Madhavan Nair, J

Bench : Division Bench

Judgement

Madhavan Nair, J.—The defendant a widow is the appellant. The plaintiff's suit was to recover Rs. 1281-4-0, the principal and interest due on a mortgage-deed, executed in his favour, by her. She pleaded that the suit mortgage was nominal and brought about by fraud and undue influence. The other pleas raised in the case are not pressed before me. The first Court found that the mortgage was supported by consideration to the extent of Rs. 200, that there was no fraud and undue influence and gave a decree to the plaintiff for that sum. Both sides appealed. The learned District Judge decreed the plaintiff's suit as prayed for.

2. Now, the plea urged in the second appeal is limited to the liability for the payment of Rs. 800 only, inasmuch as the memorandum of second appeal shows that the appellant submits to the decree so far as Rs. 200 is concerned. The lower appellate Court found on evidence that the promissory note is supported by full consideration. What is argued in second appeal is that in arriving at this conclusion, the learned District Judge has relied entirely upon inadmissible evidence and has also thrown wrongly the burden of proving want of consideration on the appellant.

3. Ex. A. relates that Rs. 300 was paid to D. W. 5, Rs. 400 to one Venkatakrishtayya now deceased and Rs. 100 to C. Narasimhayya. The balance of Rs. 200 was paid to the defendant in cash before the Sub-Registrar In a suit brought by a reversioner against the appellant as the defendant 1 and the present plaintiff as the defendant 4 to set aside this alienation, O. S. No. 30 of 19, evidence was given by the present D. Ws. 1 and 2, 4 and 5 regarding the

payment of Rs. 800. D. W. 1 is the writer of Ex. A. and D. Ws. 2 and 4 are its attestors. The evidence of these witnesses given in the prior suit was filed in the present suit on behalf of the defendant-appellant as Exs. 1, 2, 3, and 4 and the judgment in that suit was filed as Ex. 5 In the appellate Court, the learned District Judge admitted two new documents Exs B and C as he thought that in the interests of justice it was necessary that they should be admitted Ex. B is the copy of the deposition given by the deceased Venkatakrishnayya in O. S. No. 30 of 19. It will be remembered that he was the person to whom Rs. 400 was given by the plaintiff according to the recital in Ex. A, and C is the receipt passed by this Venkatakrishnayya to the plaintiff. They both, therefore, deal with a portion of the consideration viz., Rs. 400 mentioned in Ex. A. Of course D. W. 1 in his evidence then given which, as I have said, is exhibited in this case says that the plaintiff gave Rs. 400 to the deceased Venkatakrishnayya so that even without B and C admitted for the first time in the appellate Court evidence has already been given in the first Court itself with regard to this part of the consideration.

4. It is argued that Ex. 1, 2, 3 and 4, the depositions given by the defendant's witnesses in the prior suit should not have been admitted in the present case as these witnesses are alive and the admission of their depositions is contrary to the provisions of Section 33, Indian Evidence Act. I cannot see how the defendant can with any show of reason put forward this argument inasmuch as these documents were filed by her and not by the plaintiff. However, the argument is inadmissible for two reasons viz., (1) no objection was taken to their admissibility in any of the Courts below, not even in the grounds of second appeal here. Objection has been put forward only at the time of the argument before me. In such circumstances, I cannot give any effect to the contention now put forward for the first time. Objections as to the admissibility of evidence will not, as a general rule, be entertained for the first time in second appeal see: *Radhakrishna v. Kedar Nath A. I. R. 1924 All. 845* Apart from this, as I have already remarked, the documents were filed on behalf of the defendant herself. Even if we treat this as a case of admission of evidence by consent, this Court has held that such evidence is admissible: (*Jainab Bibi Saheb v. Hyderally Saheb* [1920] 43 Mad. 609) A further observation may also be made with regard to this part of the appellant's contention. Though these depositions, Exs. 1, 2, 3, and 4 given in prior proceedings were exhibited, it should be noticed that the deponents themselves were examined as witnesses in this case and these documents were put to them while they were under examination. Section 33, Indian Evidence Act, becomes, therefore, inapplicable. It seems to me that this ground is by itself enough to overrule the appellant's present contention.

5. As regards the documents, Exs. B and C admitted in appeal, it is sufficient to say that these only supplement the evidence regarding the payment of Rs. 400 as regards which, as I have already pointed out, there is other evidence on record which has been believed by the lower appellate Court. As regards these also no objection seems to have been taken in the lower appellate Court. As Venkatakrishnayya was dead and the question now raised was substantially in

issue between the present parties though they were defendants in the prior suit, I think their admissibility does not offend the provisions of Section 33, Evidence Act, and the learned Judge was under Order 41, Rule 27 entitled to admit them in appeal as he says in the interest of justice. For these reasons I must overrule the argument that the conclusion of the lower Court as regards consideration of Ex. A is based upon inadmissible evidence.

6. Another objection urged is that the lower Court has wrongly thrown the burden of proving want of consideration on the defendant. This is not very material as the learned Judge has found from evidence, though mainly from the evidence given by the defendant, that the plaintiff has proved that the consideration did pass. Further it seems to me that the, learned Judge's observation is also perfectly right in the circumstances of this case. Ex. A. is a registered document executed by the defendant reciting consideration. The recital contained in it is evidence against, though it is not conclusive upon the defendant. The onus in such a case is on the defendant to show that the recitals are not correct. (see p. 729 of the Woodroffe and Ameer Ali's Evidence Act, 8th Edition). But, as I have pointed out, this question is not very material as the evidence given in the case shows that consideration did pass. It is true that no witnesses were examined for the plaintiffs but the document Ex. A., supports his case and this, taken along with the evidence given by the defendant, conclusively shows that the suit document is supported by consideration.

7. In these circumstances, accepting the finding of the lower appellate Court. I dismiss the second appeal with costs.