

(1942) 04 MAD CK 0028
In the Madras High Court

Maddali Sreeramulu and Another

APPELLANT

Vs

Kavur Thandavakrishnayya and Others

RESPONDENT

Date of Decision : 06-04-1942

Acts Referred:

Citation : AIR 1943 Mad 77 : (1942) 55 LW 594 : (1942) 2 MLJ 452

Hon'ble Judges : Abdur Rahman, J

Bench : Division Bench

Judgement

Abdur Rahman, J.—This appeal arises out of a suit brought on the basis of a mortgage-deed (Ex. A) executed by the 1st defendant for himself and as guardian of his minor sons, defendants 2 and 3 on the 25th November, 1929, for a sum of Rs. 700. The defence raised on behalf of the father was to the effect that the mortgage was without consideration and executed with a view to preserve the property against his own bad ways. A separate written statement was put in on behalf of the minor sons in which the validity of the mortgage was also contested. Two issues were framed by the District Munsiff of Narasaraopet:

(1) Whether the suit mortgage is true and valid, supported by consideration and binding on the defendants 2 and 3?

(2) Whether the suit mortgage was executed in the circumstances stated by the 1st defendant and as such is unenforceable? On a consideration of the evidence adduced by the parties, the trial Court decided both these issues in favour of the plaintiff and decreed the suit. But on an appeal having been taken to the Subordinate Judge of Guntur, this decree was reversed on the ground that the mortgage-deed Ex. A was not supported by consideration. In doing so he held the onus to be on the plaintiff as he was under the impression that the case made out by the plaintiff in regard to the passing of consideration at the trial was different from what was stated in the document although he happened to observe that the question of onus did not arise at that stage. In spite of this, however, if I read paragraph 2 of his judgment aright, I feel that his conclusion as to consideration was mostly if not wholly based on his view as to the onus of

proof. Having held the mortgage-deed Ex. A to be without any consideration, the lower appellate Court abstained from going into the second issue raised at the trial and dismissed the suit. This has led the plaintiff to prefer the present appeal.

2. The recital of consideration in Ex. A was to the following effect:

We have received in all Us. 533-1-3 by your undertaking to pay to the aforesaid creditors. This sum of its. 533-1-3 and the sum of Rs. 166-14-9 borrowed from you in cash this day for our family expenses make a total of Rs. 700.

My attention was drawn by learned Counsel for the appellant to the words "" by Havalat"" appearing after the word ""creditors"" thereby implying that the recital was to the effect that there was a novation or in other words the plaintiff had agreed to make himself liable to the creditors who had accepted him, i.e., the plaintiff as their debtor, thereby discharging the defendant or defendants from his or their liability to the creditors mentioned in Ex. A. This may be correct; but it is clear that the case was not put on behalf of the plaintiff in that manner and was not therefore considered from that aspect by both the lower Courts. Moreover, different interpretations were placed upon this clause by learned Counsel for the parties and by the Court interpreter. But in view of the decision at which I have arrived it seems to me unnecessary to decide the correct meaning of these words at this stage although it must be stated that the difference alleged to have been existing between the allegations of the plaintiff and those contained in the mortgage-deed Ex. A referred by the lower appellate Court in paragraph 3 of its judgment is incorrect. There was a reference to an undertaking by the plaintiff to pay to the creditors in both these documents.

3. From the way the case was dealt with by the trial Court or treated by the lower appellate Court, it appears that the matters in controversy were not looked at in their correct perspective and the question in regard to the onus was not fully appreciated by both the subordinate Courts. It must be, however, admitted that the pleas taken on behalf of the 1st defendant were not very clear. He came to Court with a mere denial of consideration but in view of what was contained in the document in regard to the debts that were due by him, he apparently intended to raise the plea of failure of consideration. If he intended to do so, the onus of proving that the sum of Rs. 166-14-9 had not been received by him or that the consideration of the deed in regard to the debts due by him had otherwise failed should have been in view of his own admission in the document laid on him. The plaintiff's "undertaking to pay to the aforesaid creditors" was in itself good consideration so far as the 1st defendant was concerned, and must be regarded to be sufficient in law on the date on which the mortgage was executed. That the 1st defendant's admission in regard to the receipt of the consideration in the deed would shift the onus of proving the absence of it, on him or on those who claim through him admits of no doubt. It is fully borne out by the decision of their Lordships of the Privy Council in *Thakur Bhagwan Singh V. Bishambhar Nath* (1940) 2 M.L.J. 452 : ILR (1940) Kar. (P.C.) 267. to which my attention was drawn by learned Counsel for the appellant. The facts of that

were that one Durjan Sal, the father of the 1st appellant in that case and the great grandfather of the 2nd and 3rd appellants had mortgaged some of his ancestral land to one Bhojraj, the father of the 4th respondent for Rs. 25,000. The consideration for the mortgage was stated in the deed to be a discharge of two promissory notes with interest amounting to Rs. 6,221-8-0 and a cash payment of Rs. 18,778-8-0 for payment of a debt due under the bond. The execution of the mortgage and the receipt of Rs. 6,221-8-0 were admitted by the mortgagor in the presence of the Sub-Registrar who certified that the cash payment of Rs. 18,778-8-0 was made to the mortgagor in his presence. In regard to the onus of proof their Lordships observed, in the circumstances, as follows:

But in the opinion of their Lordships, the onus of proof on the question whether there was consideration or whether the full consideration stated in the mortgage did in fact pass is wholly on the defendants and it is not for the plaintiff to prove this matter affirmatively.

The position would be the same if the 1st defendant pleaded subsequent failure of consideration. Once consideration is found to have been admitted by a person, the onus of proving its failure would have to be, generally speaking, discharged by him or by those who claim through him.

4. But inasmuch as the defendants in the Privy Council decision happened to be the son and grandson of the mortgagor, learned Counsel for the appellant contended that the onus of proving the want of consideration should lie, in view of the admission by the 1st defendant in the mortgage-deed, not only on him, but on his minor sons as well. It must be, however, remembered that Durjan Sal had apparently died before the suit and his son and grandson were being sued on the mortgage executed by their father and grandfather as his heirs or legal representatives and the question as to the extent of consideration alone, as distinct from the question of its being binding on the son or the grandson, was being taken by their Lordships into consideration.

5. Learned Counsel for the respondents has drawn my attention to a decision of this Court in *Mariappa Goundan Vs. Palaniappa Goundan and Others*, . which refers to an earlier decision of a Division Bench of this Court in *S.K. Raghavendra Rao Vs. Venkatasami Naickan and Others*, . and holds that the admission contained in a recital of a document only applies to the case where the suit is brought either against its executant himself or against persons who are claiming under him and has no application to the persons on whom the family properties devolve by the rule of survivorship. This seems to be correct as apart from the question of a pious obligation which alone is not sufficient to validate a mortgage as such, the fact whether the father's statement in the recitals of a document binds the other members of the coparcenary would depend on the fact whether he was entitled to make an alienation on their behalf. It is unnecessary however to rest my decision on this ground as the plaintiff, if he wishes to enforce the mortgage qua mortgage and to get a decree for sale against the sons' interests,

will have to establish that the mortgage had been effected by the 1st defendant either for a legal necessity or for the payment of an antecedent debt. If the plaintiff succeeds in establishing his allegation, the mortgage of the minors' interest in the joint family property would have to be held valid. In order to substantiate his allegations against the sons, the plaintiff: would have to prove either necessity in fact or its legitimate substitute, a bona fide and proper enquiry as to the existence of such necessity or the existence of antecedent debts. Since he cannot succeed in getting his decree for sale against the sons without proving these facts, he must prove against the minors, in spite of the recital contained in Ex. A, the money which he advanced to the 1st defendant for legal necessity or on his behalf to his creditors in payment of antecedent debts and the recitals by the 1st defendant alone are not sufficient against them to shift the onus of proof.

6. The first issue therefore would have to be sub-divided into two portions laying the onus on the 1st defendant so far as his denial or plea as to failure of consideration is concerned and on the plaintiff both in regard to the payment of consideration by him as well as to the existence of legal necessity or of antecedent debts which could have entitled the father (the 1st defendant) to alienate his sons' interest in the joint family property.

7. For the above reasons, I would call for a fresh finding on both these issues, and permit the parties to adduce such further evidence as they may, in the light of my observations, desire to do. The case may be sent to the Court of first instance for recording further evidence and submitting its findings to this Court by the 9th August, 1941. Time for objections ten days.

[In pursuance of the above order, the District Munsiff of Narasaraopet submitted the finding.]

* * * * * 8. After receipt of the finding, the Court delivered the following

9. The finding has been received. The learned District Munsiff has in a well-considered judgment come to the decision that the 1st defendant was liable under the mortgage-deed but his minor sons have not been proved to be so. The directions in my order in regard to the circumstances under which the minors could be held liable were explicit, but no advantage was sought on behalf of the plaintiffs to prove facts which could make the minors liable under the mortgage. After hearing learned Counsel for the parties, I am of the opinion that the finding of the lower Court must be confirmed.

10. An application was presented on behalf of the 1st defendant under the Madras Agriculturists' Relief Act (IV of 1938) to the lower Court. The learned District Munsiff however refused to entertain it on the ground that the case was sent back for a finding by this Court. This was perfectly correct. The application, should have been made to this Court and not to the District Munsiff. The application presented to that Court is in this Court and the requisite court-fee thereon has been undertaken by learned Counsel on behalf of the 1st defendant

to be made up in the course of the day. As soon as the necessary court-fee is paid, the application will go back to the District Munsiff for enquiry as to whether the 1st defendant is an agriculturist and whether the debt or any portion of the same can be scaled down under the provisions of that Act. This will be done after opportunity to file a counter-affidavit is given to the other side.

11. The report as regards this application will be submitted within a month. Four days for objections.

12. The final decree will be passed after the receipt of the report.

[In pursuance of the directions contained in the above judgment, the District Munsiff of Narasaraopet submitted the finding.]

* * * * * 13. After receipt of the finding, the Court delivered the following

14. It has now been found that the 1st defendant is an agriculturist. A decree will, therefore, be passed against him for a sum of Rs. 700 and interest at 6 1/4 per cent. from 1st October, 1937, to the date of the decree and at 6 per cent, thereafter. As to costs, the plaintiff will have to pay the costs of defendants 2, and 3 throughout and will similarly get the costs from the 1st defendant to the extent of the amount decreed against him. There will be a decree for sale of the mortgaged property against the share of the 1st defendant. Three months for redemption.