

(1933) 02 MAD CK 0003
In the Madras High Court

M.K.R.M. Muthuraman Chettiar

APPELLANT

Vs

Subramanian Chettiar and Others

RESPONDENT

Date of Decision : 24-02-1933

Acts Referred:

Citation : AIR 1933 Mad 612

Hon'ble Judges : Curgenven, J

Bench : Division Bench

Judgement

Curgenven, J.—The plaintiff, who appeals, is a money-lender and sued upon a hypothecation bond which purports to have been executed

to him for a sum of Rs. 4,000 on 29th November 1918 by one Palaniappa Chetty. The property hypothecated consisted of an undivided one-third

share in the family house, the other two shares being owned by other branches. Palaniappa Chetty died in 1923 and the suit was brought against

his two sons, defendants 1 and 2, and his natural brother defendant 3, who had been adopted to his uncle. The plaintiff was put to the proof that

Palaniappa Chetty had executed the document, and the further defences were raised that the bond was not supported by consideration and was

not binding upon the shares of the sons. The learned Subordinate Judge found against the plaintiff upon all these points and dismissed the suit.

2. So far as proof of execution is concerned the lower Court found that one of the attestors was alive and had not been examined by the plaintiff.

Accordingly u/s 68, Evidence Act, as it then stood, the document could not be used as evidence. Since then the section has been amended by Act

31 of 1926, which provides that it shall not be necessary to call an attesting witness in proof of the execution of such a document unless its

execution by the person by whom it purports to have been executed is specifically denied. In the present case there is no such specific denial. All

that the written statement of defendants 1 and 2 claims is that the plaintiff should be put to the proof of the execution. The question then arises

whether the amendment introduced by this Act operates retrospectively. Two cases have been cited to us as authority for the view that it does so

operate, *Thayammal and Others Vs. A. Muthukumaraswami Chettiar, and Yacubkhan v. Guljarkhan* AIR 1928 Bom. 267. Mr. Varadachariar has

questioned the correctness of these decisions upon this point, arguing that the amendment has not been made retrospective by express enactment

and therefore can only be held to be so as a provision of processual law. It is retrospective in the sense that it affects documents already in

existence, provided that the operation of receiving them in evidence takes place after the amendment came into force. It is not retrospective so far

as the operation of admitting evidence is concerned. We do not think that it is necessary to decide this matter in its general aspect because of

certain special features which are present in this case. The learned Subordinate Judge admits that the plaintiff made an attempt to secure the

evidence of the surviving attester, Sowmya Ayyangar, but considers that summons was not taken out early enough for this purpose. We find the

name of the witness first appearing in a list filed by the plaintiff on 7th November 1925, and summons was accordingly issued on 9th November

1925 for 28th November. This summons was served by affixture. The name again appears in a list dated 22nd December and summons was

issued on 25th December for 8th January 1926. This was returned unexecuted for want of time, the Christmas holidays doubtless having reduced

the time available. A third attempt was made to summon the witness on 4th March 1926 for the 16th, and was returned with the report that he had

left his home two days before and the time of his return was not known.

3. The hearing of the case was taken up on 16th and 17th March and on the latter date an application by the plaintiff's pleader for an adjournment

in order that the attester might be examined was refused and judgment was pronounced on 18th March. We cannot help thinking that this

adjournment should have been granted, because the plaintiff took early steps to secure the attendance of the witness and was not so far as appears

responsible for the last summons being ineffective. If matters stood there therefore we should have been disposed to remand the case for taking this evidence which, although formal, is indispensable. Such a remand would of course re-open the case and it can hardly be contended that then the trial Court could not avail itself of the amendment to Section 68. But we are informed that this witness has since died and accordingly, whether under the amendment or u/s 69 of the Act it is open to the plaintiff to prove the document by other means. His own evidence is, we think, in the circumstances sufficient to do this and we hold that the proof has accordingly been given. The next question is whether the bond is supported by consideration. (After discussing evidence, His Lordship concluded). The evidence certainly suggests that some consideration passed, but if specific evidence relating to payment is disbelieved there is no proof that the full consideration passed. And if the full consideration did not pass the question how much, if any, passed becomes incapable upon the evidence of any definite answer. We have accordingly no other course but to confirm the finding of the trial Court upon this issue and dismiss the appeal with costs.