

(1935) 09 MAD CK 0009
In the Madras High Court

Muthu K.R.A.R.P.L. Arunachalam Chettiar and Another	APPELLANT
Vs	
Rangaswami Chettiar and Others	RESPONDENT

Date of Decision : 30-09-1935

Acts Referred:

Citation : AIR 1936 Mad 88 : (1936) ILR (Mad) 289 : 159 Ind. Cas. 729 :
(1935) 42 LW 976 : (1935) 69 MLJ 788

Hon'ble Judges : Stodart, J;Cornish, J

Bench : Full Bench

Judgement

Cornish, J.—This second appeal arises out of a mortgage suit which was dismissed, both the lower Courts holding that the mortgage was not supported by consideration. It has been suggested before us that the burden of proving want of consideration had been wrongly put upon the plaintiff mortgagee. If this was so, it would be a ground for interfering in second appeal for there can be no doubt that in a suit by a mortgagee against his mortgagor to enforce a mortgage the onus of proving a plea of no consideration rests on the mortgagor. But we are satisfied from a perusal of the judgments that in the discussion of the evidence in the case this rule has not been lost sight of. It appears to us that the lower Courts have accepted the defendants' evidence that the mortgage was not supported by consideration and have rejected the plaintiffs' evidence to the contrary. The point which has been strenuously argued on behalf of the appellants relates to the competency of the defendants' plea. The mortgage, Ex. N, was executed on the 22nd of May, 1923, and registered three days later, on the 25th of May. The consideration is said to be Rs. 2,000 for discharging debts contracted for the expenses of the father's obsequies and for discharging sundry debts contracted for the expenses

of the mortgagors" family. And the money is stated to have been received on that day, that is, on the date of the mortgage instrument, from one

Muthuswami Aiyar, the mortgagee's agent. Paragraph 6 of written statement runs thus:

These defendants state that shortly prior to the execution of the plaint mortgage bond, they had entered into the contract with Palaniappa Chetty

(plaintiffs' father) for securing to him all the properties of the defendants family for accommodating them with the loan of Rs. 25,000 and as certain

creditors threatened to attach the family properties, the "late Palaniappa Chetty and his agent Muthusami Aiyar,...advised the said defendants to

execute several documents in respect of the various family properties for the purpose of safeguarding the same against the said creditors by

preventing the attachment and thus facilitating the carrying out of the contract of the loan of Rs. 25,000 aforesaid.

2. In paragraph 7, they state that in pursuance of such advice they:

executed the suit mortgage document with all kinds of recitals which the said agent proposed in order to give an air of reality to the mortgage which

was an entirely fictitious and sham transaction, and not intended to be enforced at all, but only intended to scare away creditors.

3. In short, the defendants set up the plea that the mortgage was a sham transaction, a device to defeat a possible attachment of the properties by a

creditor. As a matter of fact, a creditor filed a suit on 23rd May, 1923, on a promissory note executed by the defendants, but he was persuaded

not to attach and no attachment before judgment was made. It has not, however, been proved that the creditor was induced not to attach by

reason of Ex. N, the suit mortgage-deed. The question is whether the defendants are estopped from setting up a case which rests on their

fraudulent conduct. It has been argued that this is a fit case to apply the maxim *nemo allegans turpitudinem suam est audiendus*. This maxim has

been applied in a number of cases, for example *Kamayya v. Mamayya* (1916) 32 M.L.J. 484, *Subbaraya Chetty v. Subbaraya Chetty* (1926) 24

L.W. 500 and *Rao Bahadur K.S. Venkatarama Aiyar Vs. Janab V. Hamid Sultan Maracayar Sahib Bahadur and Others*, . But can it stand in the

way of a mortgagor's right to plead and prove against his mortgagee that the mortgage which is sought to be enforced against him was without

consideration because it was a sham transaction? The question appears to be answered by the Privy Council ruling in *Ram Surun Singh v.*

Mussamat Pran Peary (1890) 13 M.I.A. 551 (P.C.). It was held there that it was competent to the defendants in a foreclosure suit to plead that

the statement made by him in a previous suit relating to the mortgage was false and intended as a fraud on a third party. The law on the subject has

been succinctly laid down in authoritative text books such as *Taylor on Evidence* and *Smith's Leading Cases*. In *Taylor on Evidence*, Vol. I,

Section 93, it is stated:

It seems now clearly settled that a party is not estopped by his deed from avoiding it by proving that it was executed for a fraudulent, illegal, or

immoral purpose.

4. And later on there is this passage:

Indeed, the better opinion seems to be, that where both parties to an indenture either know, or have the means of knowing, that it was executed

for an immoral purpose, or in contravention of statute, or of public policy, neither of them will be estopped from proving those facts which render

the instrument void ab initio.

5. It seems to us that that passage is very appropriate to the facts of the present case. From the evidence it is clear that the object of this mortgage-

deed was to defraud a third person and that the mortgagee was cognisant of and indeed a party to that intended fraud. But we are of opinion that

this circumstance will not operate to estop the mortgagor from pleading the real nature of the transaction against the claim of the mortgagee upon

the instrument.

6. For these reasons, we think that this is not a case in which we should interfere in second appeal. The appeal is accordingly dismissed with costs.

Stodart, J.

7. I agree and I have nothing to add.