
(1926) 04 MAD CK 0039
In the Madras High Court

Poothakka Nachiar and Others

APPELLANT

Vs

Annamalai Chetty and Others

RESPONDENT

Date of Decision : 16-04-1926

Acts Referred:

Transfer of Property Act, 1882 — Section 3

Citation : AIR 1926 Mad 1173

Hon'ble Judges : Wallace, J;Phillips, J;Madhavan Nair, J

Bench : Full Bench

Judgement

Phillips, J.—This is an appeal from a mortgage decree. The mortgage; was executed by Defendants 1 and 2, their elder sister, Vengu Nachiar for Rs. 43,500, It is admitted that the whole of this amount was not paid, and the suit is brought for the principal amount of Rs. 24, 936 and interest. The executants are gosha ladies and at the time of execution Vengu Nachiar and the last defendant were wives of one. Udayana Thevar alias Delhi Batcha. The 2nd defendant, sister of the other two" executants, was living with her sisters under the. protection of Delhi Batcha and subsequently married him.

2. The main objection taken by the appellants, Defendants 1 and 2 and the 8th defendant, is that the mortgage deed was, not duly executed and attested. The mortgage property had been leased by the sisters to certain persons now represented by Defendants 4 and 8, of whom the 4th defendant has not filed an appeal. The contention for the appellants is that the mortgage deed was not properly attested. It purports to be attested by a large number of witnesses but inasmuch as the executants are gosha ladies it is admitted that all the attesting: witnesses, except two, attested the document without actually seeing the execution which took place behind the purda, These. two witnesses are P.Ws. 1 and;2, viz, Arulammal, a dependant of the sisters, and Delhi Batcha, the" husband of two of the sisters. These two witnesses deny having witnessed the execution, but the Subordinate Judge has found that their evidence is untrue. The signature of the three ladies, both at the time of execution and at the time

of registration is admitted, but in their statements Defendants 1 and 2 deny proper attestation and also deny receipt of consideration. Arulammal deposes that she did sign the document and that she was present at the time of registration as an identifying witness, but she denies having been present at the execution. Her evidence is highly improbable, seeing that she pretends to know nothing whatever about execution. If that is so, it is extraordinary that she, a woman, should have been asked to attest the documents. Delhi Batcha also denies witnessing execution and puts forward as one ground for this assertion that the 2nd defendant was gosha to him.

3. This is a most improbable story considering the relations between them and it is flatly contradicted by the evidence of P.W. 3, the Sub-Registrar, who says that at the time of registration Arulammal and Delhi Batcha were the identifying witnesses of the executants. He also states that the male identifying witness, namely Delhi Batcha, must have been a person to whom the three executants were not gosha. There is no reason to disbelieve this statement ; for it is not essential that there should be two identifying witnesses; but in this case the Sub-Registrar thought it advisable to have two witnesses and accepted Delhi Batcha as one of them as he was in a position to go behind the screen and identify the executants. This false statement of Delhi Batcha, namely that the 2nd defendant was gosha to him throws a great deal of doubt on his evidence, which has apparently been given with a view to protect the executants. As against the evidence of P. Ws. 1 and 2, we have the evidence of P.W. 4"who attested the document outside the place where it was signed. He however, states that three ladies came into a place called Gowri Vilas" in the palace when Delhi Batcha took the mortgage deed inside the building and brought it out to the witnesses outside, and that it then contained the signatures of the three sisters, Delhi Batcha and Arulammal. If this witness is believed, and the Subordinate Judge has believed him and no reason is shown why he should not be believed, it is a strong piece of evidence that the two attesting witnesses, P. Ws. 1 and 2, did actually witness the execution. In a case of this sort, it is very easy for gosha ladies to pretend that execution was not duly carried out, and, if the attesting witnesses can be, induced to perjure themselves, it is difficult for the other side to prove satisfactorily that the document was properly attested. It is therefore legitimate in estimating this evidence to consider the circumstances of the case. The three ladies admit their signature, but neither the first nor the second defendant (Vengu Nachiar being dead), is prepared to go into the witness-box and swear that they signed in the absence of witnesses. They are the persons who have the best knowledge of what took place behind the screen and their omission to go into the witness box very strongly discredits their story. Delhi Batcha also states that he sent the document through one Karuppayi and asked her to get the Signatures of the three ladies. This Karuppayi has not been examined. On the whole, therefore, the statement of P.W. 4 that the signatures of the three executants and the two attesting witnesses were placed on the document behind the screen is sufficient proof that it was duly attested.

4. The next point taken by the appellants is that the executants being gosha it is essential that the plaintiff should prove that they knew what they were doing when they executed the document. They are not illiterate persons, as is shown by their signatures, nor is there any evidence to show that they are in any way deficient in intellect, whereas we do have evidence that the person in whom they would have the utmost confidence, namely Delhi Batcha, took an active part in the transaction. There is also the letter, Exhibit F, written by the three sisters on 23-10-1909, in which they request the plaintiff, to get stamps for the execution of the hypothecation deed for Rs. 43,500. These facts are amply sufficient to prove that the executants knew what they were about when they executed the document. We also have the Sub-Registrar's statement that it was read to them before-registration. It is" next argued for the appellants that the items of consideration have not been properly proved, and the fact that the plaintiff has not produced his accounts is strongly commented upon. The first item is a sum due upon a prior mortgage deed, and it is not disputed that the amount was due and would form good consideration ; but it is suggested that there is nothing to protect the defendants from the amount paid being claimed again. It, however, appears that a suit has since been filed upon the mortgage deed, whose interest was paid off by the first item of consideration, and in that suit credit has been given to the amount paid under the suit mortgage. The second item relates to an amount, of Rs. 7,450-10-6 borrowed for household expenses. Exhibit, B,C,D and E are" put forward in support of this amount, but the amounts of these documents do not amount quite to Rs. 7,450. On this point P.W. 2 says that the amounts due under Exhibits B,C and D are included in Rs. 7450-10-6 referred in Exhibit A, He does not state that the balance was not borrowed by him, consequently the recital in the document as to the proper amount may be accepted. The third item relates to Rs. 3,600 paid for maintenance out of which only Rs. 1,200 is now claimed for receipts are produced.

5. The last item relates to a sum of Rs. 8,995-5-6 paid in cash. When P.W.2 was examined he did not state that a lesser amount had been received. He said that out of Rs. 8,995-5-6, referred to in Exhibit A as received in cash, only about Rs. 2,000 had been recovered by him in several instalments and that the plaintiff did not pay the balance, He thus denies the receipt of any cash at the time of execution, whereas we have the evidence of P.W.4 that a bag of money was handed to P.W.2 and taken by him behind the screen. He does not actually know the amount of money in this bag and says that it was about Rs. 7,000 and odd. This is somewhat vague; but inasmuch as P.W.2 does not suggest any definite amount as not having, been paid out of the total cash consideration this evidence, coupled with the recital in the document, is sufficient to prove the amount,

6. The last point taken in appeal is that the decree which directs that

This plaintiff will in the first instance proceed to execute the decree against

Defendants 4 and 8 or recovery of lease amounts due by them.

cannot be justified. Under the suit mortgage deed the amount of rent due by Defendants 4 and 8 to the executants is specifically hypothecated, and consequently it is urged for the 1st respondent that this amount can be claimed by him as mortgagee. It is very curious that Defendants 1 and 2 should have made common cause with the 4th defendant in putting forward this ground of appeal for if it succeeds Defendants 1 and 2, unless they are colluding with the 4th defendant, will undoubtedly be prejudiced in that it would be necessary to sell a greater portion of the mortgaged property. However, they have combined and it remains to be considered whether this is a valid order. The claim for rent appears to come within the definition of "actionable claim" as defined in Section 3 of the Transfer of Property Act and consequently a transfer of such actionable claim is valid : vide *Chidambaram Pillai v. Doraisami Chetty* [1915] 31 L.C. 473. The appellants, however, rely, on a case reported in *Reeves v. Pope* [1914] 2 K.B. 284 but that case was concerned with quite a different question viz., whether a lessee against whom a usufructuary mortgagee claimed arrears of rent could, set off damages which arose from a breach of contract by his lessor and it was held that he could not, because these damages were not an interest in the land. It does not appear from the judgment that the Court of appeal held that the claim to rent could not be transferred; for they were not concerned with that question at all. If the claim of rent is an actionable claim, then it would appear that Section 109 of the Transfer of Property Act would apply, under which the lessee cannot object to pay the arrears of the rent to the transferee of his lessor. In this case it was admitted that no such payment has been made.

7. A further point has been raised that notice of the transfer was not given to the 4th defendant in accordance with the provisions of Section 131, Transfer Property Act. In the plaint it was alleged as follows:

In pursuance of the hypothecation deed, notice has been given to 4th defendant directing him to pay the lease amount to the plaintiff. On the very day of the execution of the suit hypothecation deed, a letter was written to the 4th defendant asking him to pay the lease amount to the plaintiff.

8. In answer to that, the 4th defendant in his written statement stated:

The allegation in paragraph 8 of the plaint that a notice was given to the elder brother of this defendant in connexion with lease amount is denied.

9. This reference to the elder brother is explained by the fact that the words "elder brother" appeared in the original plaints as drafted and were afterwards struck out. So far, therefore, as this notice is concerned, this may be taken as denied by the 4th defendant, but he does not deny that on the day of execution a letter was written to him asking him to pay the lease amount to the plaintiff. Consequently no specific issue on this point was framed and the plaintiff, did not adduce any evidence on the point because it had not been denied in the 4th defendant's written statement. This plea must also fail.

10. As the appellants have failed on all these points, the lower Court's decree must be confirmed and this appeal dismissed with costs of the 1st respondent's legal representatives.

Madhavan Nair, J.

11. I entirely agree. On the last point argued before us I would add a few words. The suit is brought on a hypothecation debt-bond, by which the property which had been already leased to the lessees (now represented by Defendants 4 and 8) and the future rent payable by them under the lease have been mortgaged by the lessors to the present plaintiff, the 1st respondent. The lower Court gave a decree for the sale of the property as well as a personal decree against the lessors for the lease amounts due by them, i. e., rent due for six years next prior to the suit. No objection is taken before us so far as the decree for the sale of the property is concerned ; but the learned vakil for the appellant argues that no decree should be given against the lessors for the future rent payable by them subsequent to the date of the suit mortgage deed. The point for determination is whether rent which is to fall due in future is not transferable or in other words whether it is not "an actionable claim" as defined in Section 3 of the Transfer of Property Act. This definition was substituted by Act II of 1900 instead of the one contained in the old Section 130 of the Act. Under the old Section actionable claim" was defined thus:

A claim which the Civil Courts recognise as affording grounds for relief is actionable, Whether a suit for its enforcement is or is not actually pending or likely to become necessary.

12. As could naturally be expected from the vague definition there was a conflict of judicial opinion as to its exact scope, and so far as the question in issue at present is concerned, it was held in *Shib Lal v. Azmat Ullah* [1896] 18 All 265 and *Arunachalam Chetti v. Subramaniam Chetti* [1907] 30 Mad. 235 , that the said definition does not include debts which are to fall due in future but it included only those which have already become due. Whatever doubt there may have been with regard to the question under the old Section 130 it seems clear that the present definition in Section 3 of the Act referring to " accruing debts" includes also debts which are also to fall due in future. The definition, so far as it is material for the present purpose is as follows:

Actionable claim means a claim to any debt, other than a debt secured by mortgage of, Immovable property or hypothecation or pledge of movable property...which the civil Courts recognise as affording grounds for relief, whether such debt be existent accruing conditional or contingent.

13. That rent to fall due in future is an actionable claim has also been held by Mr. Justice Seshagiri Aiyar in *Chidambaram v. Doraiswami* [1915] 31 I.C. 473. I agree with that view. In my opinion, the lower Court was right in giving a decree for rent also in this case.

14. I agree that the, appeal should be dismissed with costs.