
(1939) 02 MAD CK 0054
In the Madras High Court

Sri Vuppalapaty Venkatappala Narasimharaju Garu APPELLANT
Vs
Official Receiver and Another RESPONDENT

Date of Decision : 20-02-1939

Acts Referred:

Contract Act, 1872 — Section 63

Citation : AIR 1940 Mad 737

Hon'ble Judges : Varadachariar, J

Bench : Division Bench

Judgement

Varadachariar, J.—This appeal arises out of a suit instituted by the Official Receiver, East Godavari, as receiver of the estate of defendant 2, for the recovery of money due from defendant 1 to defendant 2 under a promissory note Ex. A, dated 20th February 1931. This note was executed in settlement of prior accounts between the parties and was for a sum of Rs. 4338-12-6 and it provided for payment of compound interest at 12 annas per cent, per month with annual rests. Defendant 1 admitted execution of the note but pleaded that he was not liable for interest; he also relied upon a letter, Ex. I dated 2nd March 1931, said to have been given to him by defendant 2, as amounting to a remission or discharge of the suit debt to the extent of Rs. 3500. Issues (ii) and (iii) related to the truth of the letter, Ex. 1 and its effect as against the Official Receiver. The learned Subordinate Judge allowed defendant 1's objection as to interest to some extent. On issues (ii) and (iii) he found against defendant 1, holding that Ex. I was not executed on the date that it bears but must have been got up later, i.e., after defendant 2 had been adjudicated insolvent. He was also of the opinion that even if Ex. I was true and binding it could not bind the Official Receiver. He accordingly passed a decree substantially in the plaintiff's favour; and against that decree defendant 1 has appealed.

2. The sequence of dates and events is no doubt calculated to raise considerable suspicion against Ex. I. The accounts were settled and the suit promissory note was executed only on 20th February 1931. On 5th March, defendant 2 was

obliged to execute a trust deed in favour of his creditors. On 9th March, the Imperial Bank from which he had borrowed compelled him to execute a mortgage deed for a sum of Rs. 60,000 to secure repayment of his dues. On 17th March, a petition was filed by some of defendant 2's creditors to get him adjudicated insolvent and he was so adjudicated in November 1931. If, in these circumstances, defendant 2 who, in February is said to have gone out of his way to insist upon defendant 1 making himself liable for payment of interest even though there was no such understanding before, is, within ten days after the date of Ex. A, found to give up the greater portion of the claim under that document, it was nothing strange that the learned Subordinate Judge felt inclined to think that Ex. I might, in all probability, have come into existence after defendant 2's creditors took steps to get him adjudicated insolvent. We, however, feel that beyond mere suspicion, there is not enough material to justify a positive conclusion to that effect. Such evidence as there is on the record is to the effect that Ex. I was executed on the date that it bears. The Official Receiver has not thought fit even to examine the insolvent to allow the Court an opportunity of knowing what his version might be. We prefer to leave this matter there, because we have come to the conclusion that even on the assumption that Ex. I was executed on the date that it bears, it does not, in the circumstances, furnish a valid defence to the claim on the suit note.

3. It is true that u/s 63, Contract Act, lit is open to a promise to remit his claim in whole or in part even without consideration. But when a person, who is on the verge of insolvency, purports to make a (remission like that under Ex. I, the validity of that transaction as against the Official Receiver cannot be determined merely with reference to Section 63, Contract Act. If the remission was one without consideration, it will obviously be inoperative as against the Official Receiver according to the principle of Section 53, Provincial Insolvency Act. It has however been contended before us that Ex. I is supported by consideration and that there is nothing on the record to show it was the result of any fraud or collusion to which defendant 1 was a party. The only proof of consideration is what is contained in Ex. I itself. It appears that for some years prior to the suit transaction, defendant 1 has been occasionally standing as surety for defendant 2 in connexion with the loans taken from the Imperial Bank at Coenada. The record does not clearly establish whether the amounts thus borrowed were wholly taken by defendant 2 alone or defendant 1 had any benefit out of these loans. Here again, we have to observe that defendant 1 has sworn that he was only a surety and there is no evidence to the contrary. We are surprised to note that even the books of the insolvent have not been produced in the case. Dealing with the case on the footing that defendant 1 was only a surety, we are, nevertheless, not satisfied that the remission could be said to have been supported by consideration.

4. The mortgage in favour of the bank was for a sum of over Rs. 50,000. Though only two promissory notes, Exs. II and II. a, have been exhibited in the case as showing defendant 1's connexion with defendant 2's borrowings from the bank,

we are not in a position to state what exactly the preexisting liability of defendant 1 to the bank was as a result of the transactions between the bank on the one hand and defendants 1 and 2 on the other. In the mortgage to the bank (Ex. III) certain other persons also are said to have joined. The record does not enable us to know what the extent of their respective liabilities was. The case has therefore to be decided on the footing that the bank to whom these various persons including defendants 1 and 2 were liable insisted upon their executing a mortgage to secure repayment of the amount due to itself. In effect, this mortgage only secured the pre-existing liability of persons who, whatever their relationship inter se might have been, were equally liable as principals to the bank. "We do not see how the joining of defendant 1 in the execution of the mortgage, Ex. III, under these circumstances can be held to amount to consideration in law justifying defendant 2 who was then practically an insolvent, circumstances giving up the greater part of the debt under Ex. A. The result, if Ex. I is to be upheld, would be that the creditors of defendant 2 are deprived of their resort to defendant 2's immovable properties so far as they are given as security under Ex. III and they are also deprived of the benefit of the amount due to defendant 2 under Ex. A. However much one might appreciate defendant 2's gratitude to defendant 1 for help given by him to defendant 2 in his transactions from 1925 as recited in Ex. I, that cannot be held to amount to consideration in law. On this footing, the decree of the lower Court must be confirmed and the appeal dismissed with costs of respondent 1.