

(1918) 11 MAD CK 0034
In the Madras High Court

Srinivasa Raghava Iyengar

APPELLANT

Vs

K.R. Renganatha Iyengar and Others

RESPONDENT

Date of Decision : 27-11-1918

Acts Referred:

Citation : 51 Ind. Cas. 963

Hon'ble Judges : Spencer, J;Sadasiva Ayyar, J

Bench : Division Bench

Judgement

Spencer, J.—The 1st defendant in this suit executed a promissory note for Rs. 2,500 on 4th December 1913 in favour of one Aramudachari, and two days later gave a security-bond to the same individual for the same debt. The plaintiff obtained an assignment of both instruments and sued upon them. The 2nd defendant is a subsequent purchaser; and the 3rd defendant is the Official Receiver of Tanjore, who was made a party in consequence of the 1st defendant's insolvency. The plaintiff has succeeded in obtaining a personal decree against 1st defendant for what was due upon the promissory note, but his claim to be allowed to enforce his charge upon the 1st defendant's Immovable properties has been refused by both the lower Courts on the ground that there was no consideration for the security-bond (Exhibit C), and upon this point he has lodged this second appeal.

2. The consideration for Exhibit C is stated in paragraph 4 of the plaint to be the forbearance of the payee under the promissory note (Exhibit A) to press the 1st defendant for payment, when he became aware after the execution of Exhibit A of the great extent of 1st defendant's indebtedness and his concession of some time before filing a suit. Both the Subordinate Judge and the District Judge, in considering the issue relating to consideration for the security bond, in my opinion, misdirected themselves on the question of law involved in this issue.

3. The Subordinate Judge followed Manna Lal v. Bank of Bengal 1 Ind. Dec. 211 which he thought to be exactly in point. The District Judge seems to think that forbearance to sue must be forbearance for some particular time in order to

constitute valuable consideration, as he rejects the evidence of the payee Aramudachari himself (P.W. No. 2) on account of his failure to specify the length of time he gave the first defendant when he executed Exhibit C, although it does not appear from his deposition that any question was put to the witness on this point. *Manna Lal v. Bank of Bengal* 1 Ind. Dec. 211 has been followed by this Court in *Muthukaruppa Mudali v. Kathappudayan* 25 Ind. Cas. 726 ; (1914) M.W.N. 706 but both those cases are distinguishable from the present case on the facts. In the former case the hundi debt had not matured when the acceptor of the hundis pledged his own house and shops as security for due payment and thus there was obviously no consideration for the pledge. In the latter case it was held that a mere recommendation by A of a borrower B was not good consideration for a contract based on a subsequent promise to the lender C to pay advances made to B.

4. Both in England and in India it is settled law that past consideration may be good consideration if there has been a precedent request vide *Lampleigh v. Braithwait* (1616) 1 Smith 10 and *Sindha Shri Ganpatsingji v. Abraham alias Vajir Mahomed Akuji* 10 Ind. Dec. 1074 and Pollock and Mulla's Contract Act, 3rd Edition, page 22 and forbearance from suing comes under the expression "does or abstains from doing" u/s (2)(d) of the Indian Contract Act, which defines consideration".

5. In the present case forbearance from suing has been set up in the plaint, there is evidence to support the plea, and there is the fact that the 1st defendant was not actually sued upon the promissory note from the date of its execution, 4th December 1913, till this suit was brought on 12th July 1915. Even in the absence of evidence it was open to the lower Courts to have presumed from the circumstances of the case that the security-bond would not have been given unless the creditor had expressed his dissatisfaction with the promissory note payable on demand.

6. In *Alliance Bank v. Broom* (1864) 2 Drew & Sm. 289 ; 5 N. R. 69 ; 34 L.J. Ch. 256; 13 W.R. 127 the Vice Chancellor observed: "It appears to me that, when the plaintiffs demanded payment of their debt, and, in consequence of that application the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did in effect give, and the defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time, but, at all events, some extent of forbearance." This case was followed in *Fullerton v. Provincial Bank of Ireland* (1903) A.C. 309; 89 L.T. 79 in which Lord Maonaghten said:--"In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it." Similar observations occur in the judgment of Vaughan Williams and Fletcher Moulton, L.Js., and of

Parker, J., in *Glegg v. Bromley* (1912) 3 K.B. 474.

7. On these principles it is clear that the learned District Judge's decision being based on a refusal to recognise an act of forbearance on the part of the creditor, which was not for a definite period, cannot be supported.

8. On the appellant's behalf reliance is also placed on the words of Section 58 of the Transfer of Property Act defining mortgage as a transfer of interest, for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt", and it is argued that Exhibit C is a mortgage. The document describes itself as a security bond, and I think it amounts to a charge on Immovable property, but in the view I have taken it becomes unnecessary to decide whether it is a mortgage involving thereby a transfer of interest in property, or a mere charge.

9. The 2nd defendant claimed to be a bona fide purchaser for value without notice, and the fourth issue relates to the questions raised by this claim. Assuming that he had no notice of the charge created in favour of Aramudachari, although he must have known of it before his sale deed was registered on 13th June 1914, as it is mentioned in the security bond (Exhibit II) given to him on 31st March and it has been found that he and Aramudachari are next-door neighbours, still this would not help him to avoid Exhibit C for if Aramudachari took a bona fide charge on the same property for good consideration on 6th December 1913, the subsequent sale to 2nd defendant on 2nd March 1914 must be subject to that charge.

10. I would allow this appeal and would give the plaintiff a decree for sale of the property which is the subject of the charge with costs throughout and I would direct 2nd defendant to bear his own costs in all the Courts, Time for sale is 8 months from this date.

Sadasiva Aiyar, J.

11. I entirely agree throughout. The decree we pass for sale is, of course, intended to award to the plaintiff a relief additional to the relief he has obtained against the 1st defendant personally. As the 1st defendant has not opposed the plaintiff's claim, he will not be liable personally for the plaintiff's costs here and in the lower Appellate Court.

12. The question whether the security-bond created a simple mortgage or a mere charge is a difficult one which it is unnecessary to decide, as pointed out by my learned brother, see *Jwahir Mal v. Indomati* 22 Ind. Cas. 973 where two learned Judges differed as to the construction of the bond in question therein. The language of the bond in that case was, however, weaker than that of the security-bond before us.

13. As regards Section 40 of Act IV of 1882, an obligor who executes a bond creating a charge on specific Immovable property does, in my opinion, transfer an interest therein and the obligee is entitled to an interest in the property and

not merely to the benefit of an obligation annexed to the obligor's ownership of Immovable property within the meaning of Section 40, Act IV of 1882. The obligation contemplated in that section is a personal obligation correlative to a personal right in the obligee such as a right to obtain a mortgage deed or a sale-deed (which deed it is that transfers the interest contracted to be transferred). The subsequent purchaser from a man who has already created a valid charge is as much bound by it as the creator himself on the same principle that the subsequent purchaser for valuable consideration from a simple mortgagor is bound by the mortgage, the question of actual notice to him being immaterial see *Cooling v. Saravana* 4 Ind. Dec. 397.

14. As regards the distinction between a mortgage and a charge, it seems to me that every mortgage document creates also a charge but conversely, a charge may not amount to a mortgage in all cases. That in some cases a document creating a charge may be a mortgage document is implied in the language of Section 100 of the Transfer of Property Act itself, defining a charge. Where it is created by law and not by act of parties, it is, of course, not a mortgage, as the definition of a mortgage u/s 58 contemplates the creation of the mortgage by the intentional act of a private person called the mortgagor who transfers the mortgage interest in favour of the mortgagee.

15. The distinction between a charge and a simple mortgage is oftentimes very difficult to appreciate. Where no personal covenant to pay the borrowed money is found in the deed which creates the charge, it is probably not a simple mortgage according to the trend of the decisions. Where, however, the charge is created over specific Immovable property, I am inclined to hold that though it may not be a simple mortgage owing to the absence of a personal covenant to pay, it is still a mortgage, though of the anomalous kind mentioned in Section 98 of the Act (Act IV of 1882). Where the Immovable property is not described in a definite manner, then the transaction may create merely a charge and not a mortgage, as Section 100 of Act IV of 1882 uses the general expression "immovable property" and not the expression "specific Immovable property" found in Section 58 of Act IV of 1882.

16. The result, as I said before, is that Section 40 of Act IV of 1882 does not apply and the principle of the decision in *Cooling v. Saravana* 4 Ind. Dec. 397 does not apply to the document we have to construe in the present case. I am inclined to think, with great respect, that the decision in *Royzuddi Sheikh v. Kali Nath Mookerjee* 4 C.L.J. 219 takes a too narrow view of the effect of a document creating a charge on specific Immovable property and I hold that even where there is no personal covenant to pay, the document, creating such a charge, is a mortgage and not a mere charge liable to be defeated by a subsequent mortgage-deed or sale deed, though executed in favour of a bona fide transferee for consideration without notice.