

(1955) 11 KL CK 0011
In the High Court Of Kerala
Case No : A.S. No. 657 of 1953

Thomeos Bank Ltd.

APPELLANT

Vs

Mathew Pereira and Others

RESPONDENT

Date of Decision : 15-11-1955

Acts Referred:

Transfer of Property Act, 1882 — Section 53, 58, 64

Citation : (1955) 11 KL CK 0011

Hon'ble Judges : T.K. Joseph, J; Nandana Menon, J

Bench : Division Bench

Advocate : T.R. Subramonia Iyer, for the Appellant; N. Narayana Pillai and T.K. Narayana Pillai, for the Respondent

Judgement

Nandana Menon, J.—This appeal is by Thomeos Bank Ltd., and arises out of a suit filed by the Bank based upon a hypothecation bond executed by the Defendants on 29-9-1122 Defendants 4 and 5 were wholesale merchants carrying on business at Vallakkadavu In Trivandrum under the name of Abdul Azeez and Co.", They had a demand loan account with the Plaintiff Bank.

On 20-9-1122 a sum of Rs. 25,512-1-0 was ,due to the rank us per its accounts and the Bank wanted to safeguard its position. So as demanded, defended 4 and 5 and Defendants, I to 3 jointly executed the hypothecation bond ext. A for Rs. 15,000 charging the plaint schedule properties belonging to Defendants 1 to 3. Claiming that the debt was not discharged, the Bank came forward with the suit.

2. Defendants 1, 4 and 5 contested. The 1st Defendant contended that though the bond was execute it was wanting in consideration as the Bank did not credit the amount shown therein towards the amount due under the loan account of Defendants 4 and 5 then itself, that the conduct of the Bank showed that it had forfeited and abandoned its rights, if any, under the hypothecation bond and even otherwise the debt had been discharged by payments by Defendants 4 and 5. Defendants 4 and 5 also raised a similar contention and pleaded that the hypothecation bond had not come into effect and that the amounts as claimed

were not due to the Bank.

3. The lower Court held that as the Bank did not credit the consideration shown in the hypothecation bond towards the loan account of Defendants 4 and 5 when the deed was executed, but only on 7-7-1949, even according to Bank accounts the hypothecation bond was not enforceable as It was not supported by consideration. On that ground the suit was dismissed. Hence the Plaintiff has come here on appeal.

4. The first point that arises for consideration is whether Ext. A being the hypothecation bond now sued upon is vitiated and unenforceable because the consideration of Rs. 15,000 shown therein was not credited in the registers of the plaintiff Bank then itself towards the demand loan account of Defendants 4 and 5 as contemplated at the time of its execution. In-Ext. A what is stated is that the consideration of Rs. 15,000 was satisfied by crediting the said amount in the Bank's accounts towards the demand loan accounts carried on by Defendants 4 and 5 for their ration and whole-sale business.

It is admitted by the Bank that there was no crediting of the said amount on that date in their Recounts and the crediting was only on 7-7-1949 as shown in the copy of their accounts filed as Ext. B. What is urged on behalf of the Plaintiff is that the omission to credit on the date of the execution of Ext. A. does not affect the rights of the Bank under the hypothecation bond and the deed does not become invalid and unenforceable on that ground and the lower Court erred in hiding so. So what we have to consider here is whether the mortgage deed is vitiated because the consideration was not satisfied on the date contemplated under the deed but only at a later date.

5. The nature of a mortgage transaction is described in Section 58(a) of the Transfer of Property Act being as follows:

A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or performance of an engagement which may give rise to a pecuniary liability.

Though the Act as such was extended to the Travancore area only a short time back, still the principles have been followed generally even before that. The definition of a mortgage pointed out above shows that the validity of a mortgage deed is not dependent upon the passing of consideration then and there. As soon as the deed, is executed a transfer of an interest takes place. The question of consideration will certainly arise when the mortgagee comes forward to enforce his right under the deed and the quantum of liability is to be fixed. But there is no legal flaw in the deed as such because consideration was not satisfied as contemplated therein.

This question has come up for consideration in several cases of the Indian high Courts relied upon on behalf of the Plaintiff. In Abdul Hashim v. Kader Batcha AIR

1919 Mad 781 V 6 (A), the mortgagor sued for a declaration that the mortgage deed executed by him was not supported by consideration and was hence void. It was held that the Plaintiff was not entitled to a declaration regarding the void nature of the mortgage deed and its cancellation and irrespective of the question of satisfaction of consideration, a valid deed came into existence as soon as the parties signed the document. At page 783, it is observed as follows:

As regards the prayer for the cancellation of the mortgage deed, I think it must fall. A distinction has to be drawn between a case where the matter rests simply on contract and where It has passed to the stage of an executed conveyance and, in the latter case, mere non-payment of consideration will not render the transaction void or voidable.

The same is the principle laid down in Raghunath Bhagat and Others Vs. Amir Bakhsh and Sheikh Muhammad Latif @ Sheikh Chandra and Guru Prasad Bhagat, There the contention raised was similar to the one here. When the mortgagee sued upon the mortgage-bond, the mortgagors contended that the full consideration money had not been paid before the sale was executed by them and hence the deed was unenforceable. At page 301 it is observed as follows:

The argument that the, mortgage does not become effective until the money is actually paid loses sight of the fact that mortgage is a conveyance and not a contract. The distinction was pointed out by Farran, C.J. In *Tatia v. Babaji* 22 Bom 176 (c). That learned Judge said as follows in the course of his judgment in that case: "I am not, however as, at present advised, prepared to assent to the train of thought which puts conveyances of lands in the Mofussil perfected by possession or registration, where the consideration expressed in the conveyance to have been paid has not in fact been paid, in the same category as contract void for want of consideration.

The radical distinction between a perfected conveyance and a contract does not seem to have been sufficiently borne in mind throughout the judgment". In this, case there is no doubt that the mortgage became perfected by registration and the only question between the parties is, whether the consideration money was paid on the 6th of May as is alleged by the Plaintiff, or on the 10th of May as is alleged by the Defendant second party. I am of opinion that if there is nothing in the mortgage deed to suggest that the mortgage was not to become effective until the consideration money was paid, the mortgage deed became operative as from the date of the execution of the mortgage.

Thus this decision fully supports the Plaintiff's position here. In Ext. A there is no clause at all which can be interpreted as going to show that unless the crediting was done in the demand loan account of Defendants 4 and 5 then itself the deed was not to become effective.

6. Another authoritative decision on the point is *Allah Ditta v. Nazar Din* AIR 1916 Lah 155 V 3 (FB)(D) being a Full Bench decision which exhaustively deals with the law on the point and reviews the relevant decisions. In that case the

Plaintiff sued upon the basis of a possessory mortgage for recovery of possession of the mortgaged items.

The mortgagor contended that only a part of the consideration was satisfied as the mortgage did not redeem a prior mortgage for the purpose of which the major part of the consideration was reserved and hence contended that the mortgagee cannot claim that he is entitled to recover the property. In view of the divergent decisions of the Court on the point of law involved the case was referred to a Full Bench.

It was held that the failure to satisfy part of the consideration did not affect the mortgagee's right. The principles laid down there are fully applicable to a case where the whole of the consideration was not satisfied on the day contemplated. The general principles upon which the decision was arrived at are given at page 156:

I think it will be most convenient to state as simply as I can the general principles I have arrived at and then to explain the road by which I have travelled, incidentally pointed out, where necessary, what seem to me to be errors in some of the rulings frequently quoted in this Court. A sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. (Section 64, Transfer of Property Act).

This is Statute Law for the greater part of India, and has always been recognised as the Law for the Punjab and, it implies that, in the absence of a covenant to the contrary, title passes to the vendee at the time when the contract of sale is made, regardless of whether or when the price is actually paid, (C.F. *Bhagan v. Allaha Ditta* 53 P&H Re 1911 (E).)

A mortgage is the transfer of an interest in specific Immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. (Section 53, Transfer of Property Act.) This also is Statute Law for the greater part of India, though not for this Province; and in my opinion, just as many, perhaps most, of the provisions of the Transfer of Property Act have been recognised as good law for the Punjab, this provision should also be unreservedly adopted by us and should be given its full logical effect. It connotes a consequence on the same lines as that stated above in the case of sales; that is to say, in the absence of a covenant or stipulation to the contrary a mortgage is complete, or in other words the "transfer of interest" is effected, not when the consideration is paid or made good or whether and when the consideration is paid or made good.

Lastly, the covenant or stipulation to the contrary may be express or implied, the question in such cases always being--when did the parties intend that the "transfer of interest" should take place? The presumption would be in favour of immediate transfer; but this presumption could be rebutted by proof of an express stipulation to the contrary, or by proof of facts and circumstances from

which such a contrary intention might reasonably be inferred. It is impossible to lay down any hard and fast rules for drawing of such inferences.

7. As already pointed out there is no clause in Ext. A to show that the parties intended that the deed was to come into effect only when crediting was made in the Bank accounts. The purpose for which Ext. A was executed giving immovable property as security is clearly to safeguard the interest of the Bank with regard to the demand loan account in the name of Defendants 4 and 5.

Ext. C is the reply notice sent by the 4th Defendant and Ext. D that of the 3rd Defendant. In Ext. C what is stated is that the hypothecation bond was executed as a security for loans advanced and to be advanced and the statement in Ext. D is that the hypothecation bond was for securing advances made towards the whole-sale business of Defendants 4 and 5.

Thus the main purpose was to enable Defendants 4 and 5 to have the continued credit facilities of the Bank. Even though no credit was made in the accounts on that day Defendants 4 and 5 were allowed to operate their accounts though substantial balance remained due. Thus in spite of the credit being made at a later date they enjoyed certain benefits as a result of the execution of Ext. A. So even a rescission on their part of the mortgage transaction before crediting on 7-7-1949 would not have affected the mortgagee's right.

In the present case there is no corroboration on behalf of the Defendants that there was such a recession. Thus it is clear that the lower Court was wrong in holding that Ext. A was an invalid document because the consideration shown therein was not credited, then towards the amount due from Defendants 4 and 5 as per their demand loan account with the Plaintiff-Bank.

8. The next point to be considered is as to whether under Ext. A the liability of Defendants 1 to 3 was only that of sureties. What is urged on behalf of the 1st Defendant is that their position was only as such and the subsequent conduct of the Bank discharged their liability. The lower Court has found this issue against the Defendants. Emphasis is placed upon the entry in Ext. B on 10M-XS17 in the remarks column that the mortgaged properties were taken as security.

The evidence of the agent of the Bank, the sole witness examined on its behalf and of D.W. 1 an ex-employee of the Bank is also relied upon in support of his position. In view of the clear wording in Ext. A the contention that the liabilities which arise from the said deed are only those of sureties cannot stand. If that was the intention it could have been clearly indicated there. The 6th Defendant himself when examined as D.W. 3 admits that at the time of the execution of Ext. A more than Rs. 23,000 was due from himself and the 4th Defendant to the Bank. The entries in Ext. B also prove the same.

The liability undertaken in Ext. A is an unconditional one and was clearly to the extent of Rs. 15,000 of the loan then outstanding in the name of Defendants 4 and 5. The entry in Ext. B that the property was taken as security can only be

Interpreted as a reference to a part of the loan being secured by the hypothecation of immovable properties.

So Ext. A clearly created a mortgage liability and there is no question of any subsequent conduct on the part of the Bank discharging the said liability as long as the amounts covered by the said deed were still title to the Bank. So further advances to and transactions with Defendants 4 and 5 on the part of the Bank cannot be invoked as a ground in support of the plea of discharge of liability of Defendants 1 to 3.

9. Now that we have held that Ext. A is an enforceable deed, the question as to what is the subsisting liability under it has to be considered. (After reviewing the evidence briefly the judgment proceeded)

There is no merit at all in any of the grounds urged on be-half of the defence with regard to the plaint claim in the trial Court an issue was raised as to whether" the amounts were drawn on the basis of a promissory note executed on 10-4-1917 and the trial Court has come to a finding that the said transaction also, was in .the nature of a security only. Tins question is clearly foreign to the scope of a suit based upon a hypothecation bond and hence the said issue is left open.

The lower Court has found that in cam it is held that Ext. A is an enforceable deed, plaint A schedule properties will only be liable for one-third of the suit claim. This finding was questioned on behalf of the Plaintiff. But in view of the wording in Ext. A, it is clear that the lower Court's finding on the point is quite correct.

10. In the result, the appeal is allowed with costs in both the Courts. The plaint A schedule properties are liable only for one-third of the suit claim. The suit is decreed as prayed for with the said modification. Future interest is allowed at six per cent on the principal amount.