

(1971) 03 MAD CK 0071

In the Madras High Court

Case No : Appeal No's. 730 and 755 of 1963

Visalakshi Achi

APPELLANT

Vs

Arunachalam Chettiar (Died) and Others

RESPONDENT

Date of Decision : 26-03-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 62
Transfer of Property Act, 1882 — Section 60

Citation : AIR 1972 Mad 174 : (1972) 85 LW 40 : (1971) 2 MLJ 436

Hon'ble Judges : V. Ramaswami, J;R. Sadasivam, J

Bench : Division Bench

Judgement

1. These appeals have been preferred by the defendant and the plaintiff in O. S. No. 43 of 1962, on the file of the Subordinate Judge's Court, Devkottai, against the decree and judgment therein in so far as they are against each of them. The suit was filed by the plaintiff Visalakshi Achi for recovery of Rupees 26,024-09 being the principal and interest due on the mortgage deed, Ex. A-1, dated 28-12-1965, executed by her husband, the deceased Parichiappa alias Kasi Chettiar, in her favour for Rs. 21,400. It is clear from the mortgage deed, as well as the averments in the plaint, that it was executed in discharge of two deposit letters, Ex. A-4 and the evidence that it was executed in discharge of an earlier deposit letter Ex. A-4 and A-6 dated 13-11-1955 for Rs. 8006-12-6 and Rs. 13435-2-3 respectively. It is clear from the recitals in Ex. A-6 and the evidence that it was executed in discharge of an earlier deposit letter Ex. A-2 dated 2-4-1947 executed by Kasi Chettiar in favour of the plaintiff. In respect of these specific recitals in paragraph 5 of the plaint about the deposit letters Ex. A-4 and A-6, the only plea of the defendant in his written statement is that the recitals of consideration in the mortgage deed are fictitious and false, that the plaintiff and her father had no means to enable the plaintiff to had no means to enable the plaintiff to deposit moneys with her husband and that he denied that any money of the plaintiff was deposited with the husband Kasi Chettiar. PW. 1 Chinnian Chettiar, is the nearest pangali of Kasi Chettiar. He has attested the suit

mortgage Ex. A-1. He stated that the deposit letter Ex. A-2 was written and signed by Kasi Chettiar. But he admitted in cross-examination that he was not present at the time of the writing of Ex. A-2. In fact, the plaintiff admitted in cross-examination that at the time of writing of Ex. A-2, no other adult was present except the writer. D. W. 1 Venkatachalam Chettiar admitted in cross-examination that the handwriting in Ex. A-2 is that of his father-in-law Kasi Chettiar, PW. 1, Chinnian Chettiar, has attested the endorsement of discharge Ex. A-3 made on Ex. A-2, when it was discharged by the execution of Ex. A-6 P. W. 1 has attested Ex. A-6. On the same date, Kasi Chettiar executed Ex. A-4 and it was also attested by P. W. 1 Exs. A-5 & A-7 are the endorsements made on Exs. A-4 and A-6 respectively when they were discharge by the execution of the suit mortgage Ex. A-1. P. W. 1 denied the suggestion Exs. A-4 and 6 were got up to support the recitals in Ex. A-1. But it should be noted that there is no plea in the written statement of the defendant that Exs. A-4 and A-6 are ante-dated documents. The execution of Exs. A-4 & A-6 has been proved by the evidence of P. W. 1 Chinnian Chettiar, who has attested them and it corroborates the evidence of the plaintiff.

2. The defendant Arunachalam Chettiar is the brother of the second wife of Kasi Chettiar and he purchased the hypotheca in a Court auction sale held in execution of the decree in O. S. 13 of 1960, on the file of the District Munsif Court, Devakottai, subject to the suit mortgage. His plea is that the suit mortgage is not supported by consideration. We have already referred to his plea that neither the plaintiff nor her parents had means to deposit moneys with Kasi Chettiar.

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(Discussion of evidence omitted).

3. In these circumstances, it is impossible to rely on the evidence of the defendant and his witness, that the plaintiff had no means to advance loans to her husband and that the suit mortgage is therefore not supported by consideration.

4. It is clear from the recitals in Ex. A-4 that Kasi Chettiar received various amounts on different dates and that on the date of Ex. A-4, the amount owed by him to the plaintiff came to Rs. 8006-12-6. Out of this amount, a sum of Rs. 1800 represents the value of 24 sovereigns belonging to the plaintiff and the balance represents amounts withdrawn on various dates from the account of the plaintiff in the Indian Bank, Karaikudi. The plaintiff has produced her pass book, Ex. A-9. She has also produced the discharged promissory note Ex. A-10 executed by her in favour of the Indian Bank and the letter Ex. A-11 sent by the Bank to her acknowledging the receipt of pass book and cheques to secure the loan and the credit slip Ex. A-12 sent by the bank. The learned trial Judge has rightly believed the evidence of the plaintiff that the moneys belonged to her only and she had drawn the moneys and paid them to her husband, as

acknowledged by Kasi Chettiar in the deposit letter Ex. A-4. he also accepted the evidence of the plaintiff that she got 75 varahans of gold bars from her mother at the time of her father's death and we have already referred to it. Thus there can be no doubt about the truth of the recitals in Ex. A-4. We see no sufficient ground to differ from the finding of the trial Court, that the entire consideration under Ex. A-4 had passed.

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(Discussion of evidence omitted).

For the foregoing reasons, we find that the suit mortgage is fully supported by consideration and it is valid.

5. An untenable contention was urged in the lower Court that the suit mortgage got extinguished and as the plaintiff became a heir of Kasi Chettiar, in fairness, it should be stated that this contention was not urged by Sri R. Gopalaswami Iyengar in this Court. This is not a case where the plaintiff has acquired in whole or in part the share of a mortgagor to invoke the last clause of S. 60 of the Transfer of Property Act. There could be no extinguishment of a mortgage either completely or in part only if there is merger of title. If the plaintiff had succeeded to the estate of Kasi Chettiar as the sole heir, she could not obviously enforce the mortgage debt due to her against the hypotheca inherited by her absolutely. If the plaintiff inherited a share in the suit properly as a heir of her husband Kasi Chettiar, the integrity of the mortgage would have been broken and she would even then be entitled to recover the share of the mortgage payable by the other sharers. It is usual in such cases for the heirs of a person to partition the estate of the deceased after making provision for his debts. Thus is the heirs of Kasi Chettiar effected a partition and the suit hypotheca was allotted to one of the heirs," subject to his discharging the suit mortgage, the heir who gets the property cannot dispute his liability for discharging the mortgage, In this case, the property has been purchased by the defendant in a court auction and subject to the suit mortgage and there is therefore no question of the suit mortgage being extinguished.

6. The learned advocate for the plaintiff contended that the defendant having purchased the suit house subject to the suit mortgage, he cannot be allowed to plead against the validity of the mortgage and that the finding of the trial Court to the contrary is incorrect. Order XXI, Rule 62, C. P. C. is as follows:

"where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession and thinks fit to continue the attachment, it may, do so subject to such mortgage or charge."

At page 1112 of Mullah's civil Procedure Code, 13th Edn. volume 2 the words "subject to a mortgage" in the above rule have been commented in the following terms:

"The Code clearly makes a distinction between the case in which property is

expressly sold subject to a mortgage and the case in which notice of an alleged mortgage is given in the proclamation of sale. the former is provided for by the present rule, and the latter by R. 66 below. In the former case, the Court, after being satisfied of the existence of the mortgage sells only the judgment-debtor's equity of redemption, that is to say, the purchaser buys the property subject to the mortgage. In the latter case, he buys the property with notice of the mortgage and subject to such risk as the notice might involve; the executing court does not decide whether the mortgage subsists or not. Such being the case, if there is in reality a subsisting mortgage, then the purchaser has to redeem it. If, on the other hand, the mortgage specified in the proclamation of sale turns out invalid, the purchaser acquires the property free from liability, for the mortgage. The point to be noted is that mere notice of an alleged mortgage in the proclamation of sale does not preclude the purchaser from questioning the validity of the mortgage. But if the property is sold subject to a mortgage under this rule, the auction purchaser cannot challenge the validity and existence of the mortgage. Where the question is whether an order made on an application of the mortgagee is one directing a sale of the property subject to the mortgage, or whether it is one merely notifying it, the answer to it must depend on whether there has been a judicial determination of the truth of the mortgage and of the amount payable thereon."

7. In *Daso Polai Vs. Narayana Patro and Others*, it has been held by a Bench of this court that the CPC makes a clear distinction between a case where property is sold subject to a mortgage as under O. XXI R. 62, C. P. C., and a case in which notice of an alleged mortgage is given in the proclamation of the sale as under Order XXI Rule 66, that in the former case, the Court is satisfied of the existence of the mortgage and sells only the judgment debtor's equity of redemption and the purchaser has to redeem the mortgage and that in the latter case, the purchaser buys the property with notice of the mortgage subject to such risks as the notice might involve, in other words, the executing court does not decide whether the mortgage subsists or not and the purchaser is not precluded from questioning the validity of the mortgage. It appears from that case that by a note in the sale proclamation the decree-holder intended to give notice of the mortgage which he thought was *prima facie* valid. It was held that he was not precluded from questioning the validity of the mortgage. It is clear from page 200 of the decision that there was nothing on the record in that case to show that the executing Court decided whether the suit mortgage subsisted or not and ordered attachment and sale subject to the mortgage, as required under Order XXI Rule 62, C. P. C. The appellant in that case filed a suit on a mortgage which he himself had pleaded in a prior proceeding as having merged and completely extinguished by a sale deed in his favour. It was held in the decision that the respondent-defendant who became the owner of the property as the decree-holder auction purchaser in a prior suit was not precluded by an admission in the sale proclamation that the property had been sold subject to the mortgage on which the appellant filed the suit.

8. In *Chekku Vs. Puliyaseri Parvathi alias Amma Ammal*, the above decision and other decisions have been referred to and it has been held that a purchaser of a property which is under mortgage is not precluded from impeaching the validity of the mortgage unless he has purchased the same subject to the mortgage or has undertaken to discharge it. It is clear from the decision that the mere mention in the sale certificate of the existence of the mortgage does not preclude the auction-purchaser from contending that the mortgage is not valid and binding as the executing Court does not decide whether the mortgage subsists or not. In *Govinda Mohapatra Vs. T. Venkatakrishnayya and Others*, , it has been held that the question whether an order of the executing Court mentioning in the sale proclamation that the attached property was to be sold "subject to mortgage" has the effect of so selling the property or has the effect of selling it with notice of the mortgage, depends upon the circumstances of the case and the construction of the order and that the question always depends upon whether the existence of the mortgage and the amount due under it have been judicially determined.

9. In this case, the sale certificate Ex. B-1 in favour of the defendant shows that the sale is subject to the suit mortgage. In O. S. No. 13 of 1960 on the file of the District Munsif Court, Devakottai, the suit property was brought to sale by the plaintiff's son-in-law as the assignee decree-holder impleading the heirs of Kasi Chettiar, including the plaintiff, as defendants. It is true in the execution petition filed in the said suit the plaintiff's son-in-law has stated that the encumbrance of the suit property will be intimated later. "The evidence of the plaintiff is that her son-in-law did not know of the mortgage in her name. Even assuming that the plaintiff's son-in-law knew the suit mortgage, no adverse inference could be drawn from the mere fact that he promised to mention the encumbrance later. He produced the encumbrance certificate, which disclosed the suit mortgage. Ex. A-14 shows that the learned District Munsif has passed the following order in E. P. 307 of 1961 in O. S. 13 of 1960 on the file of the District Munsif Court, Devakottai, "property has to be sold subject to encumbrance proclamation and sale on 8-1-1962." It is an undisputed fact that in the proclamation of sale, the suit property was brought to sale subject to the suit mortgage. Thus this is not a case where the suit mortgage was merely notified under Order XXI, Rule 66, C. P. C. But this is a case where the suit property has been ordered to be sold and actually sold subject to the suit mortgage.

10. It is clear from Mulla's commentary on Order XXI, Rule 62, C. P. C., and the decisions referred to above that where the question is whether an order made on an application of the mortgage is one directing a sale of the property subject to the mortgage, or whether it is one merely notifying it, the answer to it must depend on whether there has been a judicial determination of the truth of the mortgage and of the amount payable thereon. thus in spite of the fact that the suit property has been proclaimed to be sold subject to a mortgage and that the sale certificate issued by the Court also evidences that fact, it will not attract the provisions of Or, XXI, Rule 62 C. P. C. unless there is a judicial enquiry about the

mortgage as Or. XXI, rule 62 requires that the court must be satisfied that the property is subject to a mortgage. But this does not mean that there should be an elaborate enquiry or trial about it. In ILR 57 Mad 195 = (AIR 1933 Mad 879) there was only a note in the sale proclamation by the decree-holder that he intended to give notice of a mortgage which he thought was prima facie valid. We have already referred to the observations at page 200 of the decision that there is nothing on the record to show that the executing Court decided whether the suit mortgage subsisted or not and ordered attachment and sale subject to the mortgage as required under Order XXI, Rule 66, C. P. C. It is also pointed out in the decision that the decree-holder in that case gave also notice of other encumbrances which in his view were invalid and that he is therefore not precluded from questioning the validity of the suit mortgage in that case. In Chekku Vs. Puliyaseri Parvathi alias Amma Ammal, it has been held that the mere mention in the sale certificate of the existence of the mortgage does not preclude the auction purchaser from contending that the mortgage is not valid and binding as the executing court does not decide whether the mortgage subsists or not. But in this case, the plaintiff, Visalakshi Achi, the mortgagee, was the fifth defendant in that suit. The heirs of the mortgagor Kasi Chettiar were on record. The decree-holder in that suit, who will be interested in denying the mortgage in order to get the full decree amount due to him, has admitted the mortgage. It was under these circumstances, the District Munsif Court, Devakottai,. ordered that the property has to be sold subject to the encumbrance namely, the suit mortgage. As there were no bidders, the upset price was reduced to Rs. 7500 subject to the suit mortgage, and the defendant purchased the property for Rs. 12,300. subject to the suit mortgage,. The defendant went to the extent of pleading ignorance whether the sale in his favour was subject to the suit mortgage. He denied the suggestion that the suit property was worth Rs. 45000. he went to the extent of stating that he purchased the suit property knowing that the suit mortgage was sham. He stated that the suit house was worth Rs. 15000 and that he purchased it for Rs. 12,300 D. W. 1 also stated that the suit house was not worth Rs. 40,000 or Rs. 50,000, that it was worth only Rs. 15,000 and that the defendant purchased it for Rs. 12000 and odd. The amin's valuation was Rs. 25,000. The upset price for the suit house was fixed at Rs. 15,000 and reduced to Rs. 7500 only on account of the suit mortgage. As pointed out in Govinda Mohapatra Vs. T. Venkatakrishnayya and Others, , it is not necessary that the decision that the property should be sold subject to the mortgage should be passed on a claim by the mortgage under Order XXI, Rule 58, C. P. C. as the mortgagee will have no cause of action for such a claim if the parties to the execution acknowledged and gave effect to the mortgagee's rights. It has been rightly held in the decision that the test is whether the matter has been judicially determined as between the parties then before the Court. It should be noted that it was decided in that case that properly construed the order of the District Judge, though passed on a petition purporting to be under Order XXI, Rule 66 and Section 151, C. P. C. it was none the less an expression of judicial adjudication and that in the contact of the circumstances it should be

construed as one under O. XXI, Rule 62 C. P. C. It is clear from the several decisions referred to above that the order of the executing Court in this case is also a judicial order that the sale shall be subject to the suit mortgage. hence the defendant cannot be allowed to plead against the validity of the mortgage.

11. Sri. R. Gopalaswami Iyengar for the defendant urged that the burden of proof is really on the plaintiff to prove that the suit mortgage is supported by consideration. He referred to some decisions in support of his contention as to the burden of proof. In *Bisheswar Dayal. v. Harbans Sahay*, (1908) 3 MLT 38 it has been held that if an action to enforce a mortgage security is contested by the mortgagor, the onus lies upon the mortgagor or against whom the execution of the mortgage has been proved, to prove that the recitals as to the payment of consideration for the deed are untrue. But it has been held in the decision that where the suit is contented by a stranger who denies that the bond was executed and also asserts that there was no consideration for the mortgage, the onus is upon the mortgagee to prove the same. It has been held in the decision that recitals in a deed that consideration has been paid is good evidence as against the maker and may be presumed to be true, till at any rate, the maker, who has special means of knowledge, proves it to be mistaken or untrue, but that the position of the execution purchaser, who may be a representative in interest of the judgment debtor for certain purposes, is obviously different as he knows nothing about the deed; he is not a party to it and he is entitled to call upon the plaintiff not only to prove the execution of the deed, but also to establish that there was consideration for it. This decision has been followed in *Kumarappan Chettiar v. Narayanan Chettiar* 35 Ind Cas 455 : AIR 1917 Mad 492 by a Bench of this Court. It has been held in this decision that when a suit upon a mortgage is contested by a stranger who denies that the bond was executed and also asserts that the mortgage was devoid of consideration, the onus is on the plaintiff to prove his case. But this case is distinguishable as the sixth defendant was a purchaser in execution of a decree on a prior mortgage and he could not be bound by admissions made by the mortgagor in a subsequent mortgage. It is really unnecessary in this case to go into the question how far the defendant is a representative in interest of the mortgagor Kasi Chettiar and to what extent he will be bound by the admissions made by Kasi Chettiar as to the truth of the consideration of the suit mortgage at the time when he had proprietary interest over the suit property for the following reasons. But parties have adduced evidence and the question of the burden of proof is no longer of any importance in deciding this case. In view of our finding that the defendant purchased the suit property subject to the suit mortgage and also that the suit mortgage is supported by consideration, it is really unnecessary to go into the question whether the burden of proof is on the plaintiff to prove consideration or for the defendant to prove want of consideration.

For the foregoing reasons, the decree and judgment in O. S. No, 43 of 1962, on the file of the Sub-court Devakottai, in favour of the plaintiff are confirmed and App. No, 730 of 1963 is dismissed with costs., In view of our finding that the

deposit letter Ex. A-2 is fully supported by consideration, we set aside the decree and judgment in so far as they are against the plaintiff, with the result the suit is decreed as prayed for with costs. App. 755 of 1963 is allowed with costs.

12. Order accordingly