

**Kumarappan Chettiar Vs. Narayanan Chettiar and ors.**

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**Court :** Chennai

**Decided On :** Aug-20-1915

**Reported in :** 35Ind.Cas.455

**Judge :** Spencer and ;Kumaraswami Sastri, JJ.

**Appellant :** Kumarappan Chettiar

**Respondent :** Narayanan Chettiar and ors.

**Judgement :**

**Spencer, J.**

1. The plaintiff is a puisne mortgagee under a hypothecation bond and he sued for sale of the mortgaged property. The 1st defendant is the son and legal representative of the mortgagor. The remaining defendants were impleaded as claiming an interest in the property by reason of a prior mortgage to defendants Nos. 2 to 5, a sub-mortgage by them to 6th defendant, a suit brought by 6th defendant followed by a decree and a sale of the mortgaged property in Court auction, and lastly a private sale by 6th defendant to defendants Nos. 7 and 8.

2. Both the lower Courts held that the plaintiff's mortgage was without consideration and dismissed his suit. The questions that arise in second appeal are (1) whether it was open to any of the contesting defendants to raise the question of consideration, (2) whether, when the execution of the mortgage

instrument is proved and it contains a recital that consideration passed, the onus of proving want of consideration does not lie on the persons who wish to attack its validity.

3. From the District Munsif's remark, in paragraph 11 of his judgment, about the plaint bond being a colourable one and the Subordinate Judge's remark, in paragraph 6 of his judgment, about its being nominal and fraudulent, I am inclined to think that, if the issue had been so worded, they would have declared the instrument to be a sham and collusive document; but as there was no issue on this point, we must see whether the plaintiff is entitled to succeed on the Subordinate Judge's finding that Exhibit A was indeed executed by 1st defendant's father but that no consideration passed.

4. I adhere to the view taken by Tyabji, J., and myself in *Bamaswami Chettiar v. Sundara Reddiar* 23 Ind. Cas. 805 that a mortgage without consideration is a nullity, and so inoperative, and that it creates no charge on the property as against a subsequent purchaser. Reliance is placed on certain observations in *Chinnan v. Ramachandra* 15 M.K 54 for the contrary view. Even in that case when the mortgagor was made a party to that suit, as the mortgagor's legal representative is a party to this suit, and when it was found that it was not intended that the plaintiff should take any interest under his assignment, the suit failed. The point that arises here can hardly be said to have been directly decided in *Chinnan v. Ramachandra* 15 M.K 54. The plaintiff in that suit was a sub-mortgagee and seems to have been treated on the footing of a bona fide transferee of the mortgage interest.

5. On the second point I agree with the view expressed by Mookerjee, J., in *Bisheswar Dayal v. Harbans Sahay* 6 C.L.J. 659 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. His further observation, as regards the recitals in the deed, that consideration has been paid being good evidence and being presumed to be true, till the contrary is proved, as against the maker, but that an execution purchaser who knows nothing about it is entitled to call upon the plaintiff to prove not only its execution but that there was consideration for it, commends itself as just and in

accordance with the provisions of Section 106 of the Indian Evidence Act.

6. In *Babu v. Sita Ram* 25 Ind Cas. 426 where some observations occur not easily to be reconciled with the above, the peculiar position of a stranger who purchases without notice has not been so carefully examined.

7. I dismiss this second appeal with costs.

**Kumaraswami Sastri, J.**

8. Plaintiff is the appellant. The 1st defendant's father, who was the owner of the suit property, mortgaged it to defendants Nos. 2 to 5 and they created a sub-mortgage in favour of the 6th defendant. The 6th defendant sued defendants Nos. 2 to 5 and 1st defendant's father and a decree was passed, in execution of which the decree-holder himself purchased the property; Although the suit was by a submortgagee, the mortgaged property seems to have been sold and not the mortgage interest of defendants Nos. 2 to 5. The 6th defendant, however, took possession of the property and has been in possession and enjoyment. The 7th and 8th defendants subsequently purchased the 6th defendant's interest. The plaintiff-appellant sues as the second mortgagee and his claim is resisted by the 7th and 8th defendants. Both the lower Courts found that the mortgage sued on was not supported by consideration.

9. It is argued for the appellant that it was not open to the defendants to raise the question as to want of consideration for the mortgage in his favour and, assuming that it was open, the onus is on them to show that there was want of consideration, the plaintiff being entitled to a decree on proof of execution, on the failure of defendants to adduce evidence as to want of consideration. It is to be remembered that in the present case the defendants claim to be prior mortgagees, and also claim title to the mortgaged property by virtue of the Court sale and possession for over 12 years as auction-purchasers. I am of opinion that it is open to third persons in possession of properties, which are sought to be sold for non-satisfaction of an alleged mortgage, to put the plaintiff to the proof that any debt is due to him. They were not parties to the mortgage transaction and, even assuming that the mortgagor admits or does not dispute the claim, his admission so far as

they are concerned, can only be treated as a piece of evidence in favour of the mortgagee, and not as conclusive against third parties. In *Bisheswar Dayal v. Harbans Sahay* 6 C.L.J. 659 it was held that, where a mortgage is contested by a stranger who asserts that there was no consideration for it, the onus is on the mortgagee to prove his case. Mr. Justice Mookerjee observes as follows:

No doubt, if the suit is contested by the mortgagor and execution is admitted by or proved against him, the onus lies upon him to prove that the recitals as to the payment of consideration for the deed which he executed are untrue. When, however, the suit is contested by a stranger who denies that the bond was executed and also asserts that there was no consideration for the mortgage, the onus is clearly upon the plaintiff to prove his case.

10. I entirely agree with Mr. Justice Mookerjee, A similar view was taken in *Janki Das v. Ahmad Husain Khan* 25 A. K 159 and *Saluk Singh v. Ajudhya Pershad* 15 Ind. Cas. 121 : 10 A.L.J. 108. Reference has been made by the appellant's Vakil to *Bhagwat Dayal Singh v. Debi Dayal Sahu* 12 C.W.N. 393 : 10 Bom. L.R. 230 : 7 C.L.J. 335 : 5 A.L.J. 184 : 3 M.L.T. 344 : 14 Bur. L.R. 49; *Achal Ram v. Kazim Husain Khan* 27 A. K 271 : 8 Sar. 772 and to *Adaikulam Chetti v. Subban Chetti* 26 Ind. Cas. 35 : 16 M.L.T. 279. I think these cases are distinguishable from the present one. All that they decide is that, where the right of performance under a contract has been assigned, it is not open to the obligee to call into question want of consideration for the assignment, if the assignment is, in other respects, valid in law. This is the view taken in *Dowlath Rai v. Khub Lal Singh* 22 Ind. Cas. 645. It is well established that, in cases of sales and assignments, mere non-payment of purchase-money would not vitiate the transaction, and in such cases, as remarked by the Privy Council, so long as the deed stands, it is no concern of a person, who was no party to the transaction, to call in question the non-payment of consideration. Where the transfer itself is impeached, on the ground of its being a colourable transaction, or of its being otherwise invalid in law, different considerations will prevail and *Chinnan v. Ramachandra* 15 M.K 54 and the other cases cited show, that want of consideration may be proved as part of other circumstances which go to show that the instrument is a colourable transaction and not intended to convey any interest to the ostensible purchaser or confer any

title on him.

11. It is next contended for the appellant that, if there was no consideration for the mortgage sued on, the transaction would still hold good in the absence of any proof that it was a colourable or sham transaction. I am unable to accept this contention. In *Ramaswami Chettiar v. Sundara Reddiar* 23 Ind. Cas. 805 it was held by Spencer and Tyabji, JJ., that the extent of the charge on the property would prima facie be measured by the actual consideration for securing which the charge was created and, where there was no consideration, there was prima facie no charge. With these remarks I concur. In the case of sales, when there is an intention to pass property, the non-receipt of consideration does not hinder the vesting of property. *Sagaji V. Namdev* 23 B.K 525. Again, as pointed out by their Lordships of the Privy Council in *Ismail Mussajee Mookerdam v. Hafiz Boo* 10 C.W.N. 570 the transaction may be viewed as a gift with an imaginary consideration inserted when there was no intention of demanding payment. Reference has been made to the observations in *Chinnan v. Ramachandra* 15 M.K 54 that if the execution of a mortgage or other conveyance is proved, further evidence is not necessary to show that the purchaser has taken the interest which the document purports to convey, and that it is not necessary for him to prove, as against a third person, that consideration passed. These observations are no doubt in conflict with the ruling of a Bench of this High Court above referred to, but with great deference I think that the decision in *Ramaswami Ghettiar v. Sundara Reddiar* 23 Ind. Cas. 805 lays down the sounder rule. A mortgage is prima facie security for a debt, and, where the debt does not exist, it is difficult to see how the security can be enforced. Where, therefore, a puisne incumbrancer or a person in possession of mortgaged property and claiming title there to, succeeds in showing that there was no debt, it is difficult to see how the property can be ordered to be sold. It may, perhaps, be open to the mortgagee to show that, though the consideration was recited in the document, the intention of the mortgagor was to benefit the mortgagee to the extent to which the fictitious consideration was recited, but that is not the case here, and if any such case is sought to be made out, the onus clearly is on the mortgagee.

12. I am of opinion that the decision of the lower Court is correct and dismiss the second appeal with costs.

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