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Court : Kolkata

Decided On : Jan-25-1917

Reported in : 41Ind.Cas.302

Judge : N.R. Chatterjea and ;Newbould, JJ.

Appellant : Akil Chandra Saha and ors.

Respondent : Girish Chandra Saha, Executor to the Estate of Hari Mohan Saha

Judgement :

1. This appeal arises out of a suit to enforce a mortgage bond. The mortgage bond was executed by the defendant No. 1 and the defendant No. 3 as guardian of her minor son, the defendant No. 2, and another minor son since deceased. The execution of the bond is admitted but it is pleaded that no consideration passed under it. The defendants' case appears to be that on the death of Madhu Sudan the father of Akhil, the latter and his brothers were threatened with the liability for a large amount of money on account of some dealings that the deceased had with one Kishori Mohan and that in order to frighten the latter to reduce his claim, it was arranged with Hari Mohan, who was a friend of Madhu Sudan, that a bogus mortgage bond should be executed in his favour for Rs. 4,000 and that some false and satisfied bonds should be shown as due and permission be taken by the defendant No. 3, who was the guardian of her minor, sons, from the District Judge

for raising the money on mortgage, that in furtherance of the design (as suggested by Hari Mohan himself) a sum of Rs. 2,000 was borrowed from one Hrishikesh Babu, and with that amount together with a sum of Rs. 1,000 raised on pledge of some ornaments of defendant No. 3 and some cash which they had, three currency notes for Rs. 1,000 each were purchased through the said Hari Mohan and that the said three currency notes were entered in the mortgage bond executed in favour of Hari Mohan as part of the consideration, namely, Rs. 4,000 but that as a matter of fact, no consideration passed under the mortgage. It is said that the defendants were enabled, on the strength of this mortgage bond, to have the; claim of Kishori Babu settled on payment of rupees one thousand only. The Court below held that the plaintiff had proved that consideration of the bond was paid to the defendants. The latter have appealed to this Court.

2. The execution of the bond, as we have said, is admitted. It is also admitted that the defendants obtained these currency notes of Rs. 1,000 each from Hari Mohan the mortgagee, but as stated above, the defendants plead that the money with which the currency notes were purchased was their own. The plaintiff has examined the scribe of the deed and three witnesses to prove that three currency notes of Rs. 1,000 each and Rs. 1,000 in silver were paid to the defendants, and those witnesses have been believed by the Court below. The only evidence in support of the plea that the money with which the currency notes were purchased belonged to the defendants is that of defendant No. 1 himself. His statements on the point, however, are not corroborated by documentary evidence, and there does not appear to be any reason why the money was not changed to currency notes at Dacca and why Girish, the maternal uncle of the defendant No. 1, took the money to Hari Mohan to Calcutta. It appears that the defendants borrowed Rs. 2,000 from one Hrishikesh, and it is the case of both the parties that the debt was paid off on the day of the execution of the bond with two of the currency notes of Rs. 1,000 each. The plaintiff Girish, who is the executor of the estate of the mortgagee, says that he and Janaki the defendant No. 2 took Rs. 2,000 (in two currency notes of Rs. 1,000 each) for payment to Hrishikesh at Dacca after the execution of the bond and the payment of the money thereunder, whereas the defendants' case is that the currency notes were with them, and that before the execution of the mortgage bond Girish, the maternal uncle of the defendant No. 1,

started for Dacca with two of the currency notes and paid the money to Hrishikesh on the 24th of Ashar. There is, however, no satisfactory evidence to show that the currency notes were with the defendants before the 24th of Ashar and the Court below has disbelieved the statement of defendant No. 2 that he did not accompany Girish to Dacca.

3. The evidence shows that the mortgage bond was executed at about 9 or 10 a. m. on 24th Ashar and that it takes about 13 or 14 hours to go from the village where the defendants reside to Dacca. It is contended that it was physically impossible for any person to start from the village after the execution of the bond and go to Dacca and make payment there on the same day to Hrishikesh Babu. Stress is laid upon the fact that the entry of the two currency notes appears in the account book of Hrishikesh Babu as the first entry on that day and that the notes were sold by the firm of Hrishikesh Babu to another firm on the very same day. There is positive evidence, however, that Girish arrived at Dacca at about 9 p. m. and that the firm was open for transacting business up to 11 p. m. and, if Girish started at 9 or 10 a. m. he might have arrived at Dacca at 9 or 10 p. m., if the tide and current were favourable. It was, therefore, not physically impossible for Girish to have made the payment on the 24th at Dacca even if he started after the money had been paid. There is no evidence that there was any entry earlier than 9 or 10 p. m. on that day, and in the face of the positive evidence on the point, we are unable to attach any importance to the fact that it was the first entry on that day.

4. The money borrowed from Hrishikesh, according to the plaintiff, was paid to one Brojonath to whom a sum of Rs. 2,500 was due by the defendants. The defendants say that Brojonath's debt was paid off with the money which they had, and not with the money borrowed from Hrishikesh.

5. The defendants' accounts, however, do not prove any such payment. It is pointed out that the hundis under which money was borrowed from Hrishikesh were executed more than a month after the date on which Brojonath's mortgage bond was paid off, and reliance is placed upon the endorsement on the mortgage bond and the entry in the account book of Brojonath. The account book, however, shows that only Rs. 1,225 was due on account of the mortgage bond and the

Court below does not believe the endorsement upon the mortgage bond. We do not think that it has been satisfactorily proved that the mortgage bond was paid off on 14th Chaitra 1313.

6. As already stated, there is evidence of four witnesses to prove the passing of the consideration. The evidence shows that the bond was drafted and engrossed in the house of Hari Mohan and taken to the house of the defendants for signature.

7. It is pointed out that although there were respectable people in the locality, the attesting witnesses to the deed were only the servants of Hari Mohan or persons connected with him; and it is contended that Hari Mohan was not likely to have advanced a sum of Rs. 4,000 to the defendants one of whom was a female and guardian of minors---without taking the precaution of having independent and respectable witnesses present at the execution of the bond and the passing of the consideration money. It is to be observed, however, that the lady herself had applied to the District Judge for sanction to raise a loan and that the draft of the mortgage was placed before the Judge. The applications for taking a certificate for guardianship and for sanction appear to have been made, and other proceedings connected with them to have been conducted, by a Pleader, Babu Mohini Mohan Das, who is a relation of the defendant No. 3. Under these circumstances, Hari Mohan might not have thought it necessary to take as much care as he would otherwise have taken in dealing with a pardanashin lady. We need not discuss the evidence of the plaintiff's witnesses. They were before the learned Subordinate Judge and were believed by him. He came to the conclusion that the case set up by the defendants was not true and we do not see any sufficient reason for differing from him.

8. It is contended that even if Hrishikesh was paid Rs. 2,000 out of the Rs. 4,000, there is no evidence to show that there was any necessity for the balance of the loan or that the balance was applied by the lady for the benefit of the minors. The District Judge appears to have made some enquiries, which of course were ex parte. But he appears to have been satisfied as to the necessity for the loan and sanctioned the mortgage. Under these circumstances, the lender was not bound to go behind the order, and was entitled to rely upon the order of the District Judge

sanctioning the loan unless he was a party to the fraud. The defendants have failed to prove that Hari Mohan was a party to the fraud, and if he acted bona fide, he is not bound to see to the application of the money. It is to be remembered that it was the defendant No. 1 and the defendant No. 3 who themselves represented to the Judge the necessity for the loan and the creditor appears to have acted upon such representation. Having regard to the fact that Babu Mohini Mohan Das was the Pleader who conducted the proceeding for sanction and acted for the defendants in the present suit in its earlier stages and is a relation of the defendants, we do not think that the transaction was fraudulent as stated by the defendants. The defendant No. 3 was putting up in his house when giving her deposition and she admits that Mohini Babu is a well-wisher of, and knows the state of, the defendants' family. On reference to a letter, dated 22nd June 1911, written by Mohini Babu to the adopted son of Hari Mohan, it appears that Mohini Babu sent away the men who had come to Dacca to institute a suit on the mortgage bond and that he undertook to make arrangements to pay off the debts by selling certain properties of the defendants. It is impossible, to hold that he was not aware of the real nature of the mortgage bond.

9. If the defendants' case is true they themselves are to blame for having entangled themselves in the elaborate fraud alleged by them, and it would require far better evidence than they have produced in order to establish the fraud and to enable them to extricate themselves from the difficult situation in which they are placed. On the whole, we are unable to differ from the findings of the Court below that the consideration passed under the mortgage bond and that the mortgage bond was not a benami one.

10. We see, however, no sufficient reason why the ordinary Rule as to interest at the bond rate up to the date of grace and thereafter at six per cent, should not be followed in this case. The decree of the Court below will accordingly be varied by directing that interest at the bond rate will run up to three months from the date of the decree of the lower Court and that interest thereafter will be at the rate of six per cent. With this variation, the appeal is dismissed with costs.