HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

A.S. No.438 of 1997

JUDGMENT:

This Appeal is filed against the judgment and decree dated 23.07.1996 passed in O.S.No.50 of 1995 by the III Additional District Judge, Visakhapatnam.

2. For the sake of convenience, as this is a first appeal, the parties are referred to as the plaintiff and the defendants only.

3. The suit was filed for recovery of Rs.1,37,938/- with subsequent interest at 2% per month against the defendants and for sale of mortgaged property (which is the plaint schedule house and site) for recovery of the loan advanced. The brief averments of the plaint are that the 1st defendant himself and on behalf of his minor son-second defendant borrowed a sum of Rs.28,000/- from the 5th defendant under a mortgage deed dated 23.12.1974 for discharging debts incurred by him for construction of the plaint schedule house and also for other family necessities. The 5th defendant transferred the same in favour of the plaintiff on 09.09.1987 with absolute rights for consideration. Again on 21.05.1975 the 1st defendant for himself and as a guardian of his minor son-2nd defendant borrowed an amount of

Rs.8,000/- under another mortgage deed from the 5th defendant for repairs and improvement of the mortgaged property and for discharge of family debts. Later, the 5th defendant transferred the second mortgage also to the plaintiff for consideration. On 23.05.1975 the 1st defendant paid an amount of Rs.2,800/- towards interest on the mortgage deed dated 23.12.1974 from 23.12.1974 to 23.05.1975 and made an endorsement of payment on 23.05.1975. Again on 06.01.1976 he made payment of Rs.3,920/- towards interest from 23.05.1975 to 23.12.1975 and a payment endorsement was made on the mortgage deed. On 06.01.1976 the 1st defendant made payment of Rs.1,120/- towards interest on the second mortgage deed from 21.05.1975 to 21.12.1975 and a payment endorsement was also made on the second mortgage deed. Thereafter, the defendants did not pay any amount towards two mortgage deeds and so the plaintiff got issued a registered legal notice dated 23.09.1987. The same was received by the defendants on 26.09.1987 and the 5th defendant got issued a lawyer's notice dated 23.09.1987 informing the other defendants about transferring her rights under the two mortgage deeds and directing them to pay the debts due under two mortgage deeds to the plaintiff. The same was received by the defendants, but they did not discharge the mortgage debts. So, the plaintiff filed the suit for recovery of the amount of Rs.1,37,938/-.

4. The first defendant filed a written statement admitting that the 2nd and 3rd defendants are his sons but denying having borrowed the amounts under the two mortgage deeds from the 5th defendant. He stated that the plaint schedule property is not his self-acquired property and it is constructed by his father-Sanyasi Raju during his life time. He also stated that the contention of the 5th defendant that she has transferred the two mortgage deeds executed by him in her favour to the plaintiff is not correct and they are only created documents. He also denied the part-payments made under the two mortgage deeds and stated that nothing is paid by him as part payment and in fact he has not executed the mortgage deeds. It is also contended by the 1st defendant that the recitals in the deeds further show that the 5th defendant paid the amounts due in proceedings in EP No.180 of 1973 in OS No.114 of 1971, EP No.336 of 1973 in OS No.59 of 1976 and the amount due under mortgages in favour of the plaintiff and obtained receipts, though she has not actually paid the amount. So, according to the 1st defendant, the mortgage

deed dated 23.12.1974 was not supported by consideration, as the 5th defendant has not paid any amount to the decree holder in the proceedings mentioned. The plaintiff is not entitled to any amount under the alleged deed of transfer transferring the mortgage deed dated 23.12.1974, which was not supported by consideration. According to the 1st defendant, as the 5th defendant failed to pay the amount to the decree holders in OS No.114 of 1971 and OS No.115 of 1971, they instituted the execution proceedings in EP No.86 of 1975 and EP No.87 of 1975 respectively and he had to pay the amounts ultimately to the decree holders in SC No.193 of 1970 and OS No.59 of 1960. His contention is that transfer deeds are also not supported by consideration and they cannot be enforced and he also contended that the suit is liable to be dismissed.

5. The defendants 2 to 4 filed a written statement denying the allegations that the 2nd and 3rd defendants are the undivided sons of the 1st defendant and that the defendants 1 to 4 constituted members of a joint hindu family. According to them, the 1st defendant was not taking care of their mother and themselves and so their mother took up their guardianship and was looking after

their interest. The 1st defendant was never the Manager or Kartha of the family and they are not aware of the mortgage deed executed by the first defendant in favour of the 5th defendant for Rs.28,000/-. According to them, the plaint schedule building was constructed by their grandfather-Sanyasi Raju during his life time. So, the question of the 1st defendant contracting debts for the construction of plaint schedule building does not arise and the debts contracted by the 1st defendant are not for the benefit of the joint family. The 2nd defendant was a child in 1974 and by that date 3rd and 4th defendants were not even born and hence the question of necessity for the estate of the minors does not arise. As the plaint schedule house was constructed by their grandfather, it is not the self-acquired property of the 1st defendant and it is ancestral property. So even if the mortgage deeds are valid, they are not binding on them or their share in the property and they cannot be made liable to pay the same. They further contended that they are not aware of the 5th defendant transferring the mortgage deed dated 23.12.1974 it is sham and brought up document.

6. The 5th defendant filed a written statement stating that the two mortgage deeds were transferred to the plaintiff on 09.09.1987 after receiving valuable

consideration and stated that the 1st defendant received the money under two mortgage deeds and the receipts obtained from the 1st defendant have been misplaced by her husband-late Marayya and she will produce them whenever she finds and stated that a decree has to be passed in favour of the plaintiff.

7. On the above pleadings, the following issues were framed for trial:

i) Whether the mortgage dt.23.12.1974 is supported by consideration?

ii) Whether the mortgage deed dt.21.5.1975 is true, valid and binding on the defendants?

iii) Whether the endorsement dt.23.05.1975 for Rs.2,800/- and endorsement dt.6.1.1976 for Rs.3,920/- are obtained by the 5th defendant under coercion?

iv) Whether the endorsement dt.6.1.1976 for Rs.1,120/- on the mortgage deed dt.21.12.75 is true valid and binding on the first defendant?

v) Whether the transfer of mortgage dated is sham?

vi) Whether the plaintiff is not entitled to claim interest prior to 9.9.1987?

vii) Whether the interest claimed is usurious and liable to be scaled down?

viii) Whether the mortgages bind the defendants 2 to 4?

ix) Whether the defendants are agriculturists and the debt is abated?

x) To what relief?

<u>Additional issues</u>:

1. Whether the 5th defendant paid money sufficient to discharge the suit claim to the 1st defendant?

2. To what relief?

8. On behalf of the plaintiff, PWs.1 to 5 were examined and Exs.A.1 to A.16 were marked. On behalf of the respondents, DWs.1 and 2 were examined and Exs.B.1 to B.4 were marked. The lower Court after hearing the oral submissions and documentary evidence dismissed the suit. Questioning the said dismissal order, the present appeal is filed.

9. This Court has heard Sri K. Sai Rama Murthy, learned counsel representing Sri K.V. Subrahmanya Narusu, learned counsel for the appellant/ plaintiff on record and Sri P. Venugopal, learned senior counsel appearing on behalf of Sri S.V.R. Subrahmanyam, learned counsel for the respondents/defendants.

10. Before going into the merits and demerits of the matter, this Court is reproducing the important submissions made by both the learned counsel. The learned counsel for the appellant/plaintiff strongly argued that the lower Court committed a fundamental error in passing the impugned judgment. According to the learned counsel, Exs.A.1 and A.2 mortgage deeds along with Exs.A.3 and A.4 transfer deeds are all registered documents, which carry a certain value and weight by themselves, in view of the registration as per law. The execution of Exs.A.1 and A.2 is not denied by

the defendant according to the learned counsel for the appellant. He also points out that there is an admission about the execution of Exs.A.1 and A.2. The learned counsel relying upon ***Alapati Sivaramakrishnayya v. Alapati Kasiviswanatham***[1] argued that once there is an admission and the party admits his signature, due execution of the document is proved. He therefore argues that when once the contesting party himself admitted the execution of the document, the lower Court committed a fundamental error in disbelieving the evidence. He pointed out that the part payments and endorsements on the deeds are also accepted. So he argues that the deeds are proved as validly executed. He therefore urged that the judgment and decree of the lower Court is totally wrong. He prayed that the appeal should be allowed.

11. In response thereto, the learned senior counsel for the respondents strongly contended that the documents Exs.A.1 and A.2 are not supported by consideration. It is his contention that if Exs.A.1 to A.2 are not supported by consideration, the further documents executed viz., Exs.A.3 and A.4 cannot be held to be valid documents. Alternatively, he also submitted that Exs.A.3 and A.4 are also not supported by

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[1] (1956) 2 An WR 1004

consideration. The learned counsel also relied upon Sections 10 and 25 of the Indian Contract Act and argued that these agreements are void.

12. This Court also notices the written statement of the 1st defendant, wherein in paras-17, 18, 20 and 27 the lack of consideration of Exs.A.1 and A.2 was pleaded. The defendants 2 and 4 also denied the mortgage and also transfer. The 5th defendant, who is sailing with the plaintiff and who supposedly transferred the deeds, however supported the plaintiff. In the pre-suit notice also, the consideration was denied.

13. Therefore, in the light of this clear denial about the consideration for the A1 and A2 deeds a) in the written statement and b) prior to the suit itself in Ex.A.16-lawyers notice, this Court is of the opinion that a greater burden is cast upon the plaintiff to prove the due execution and the payment of consideration of the mortgage deeds.

14. The facts which are not in dispute are as follows: Ex.A.1 dated 23.12.1974. Ex.A.2 is dated 21.05.1975. Exs.A.3 and A.4 are dated 09.09.1987. The contents of Ex.A.1 make it clear that in certain suits and EPs the amounts were specified which the mortgagee is supposed to have discharged. The contents clearly show

that she has paid certain amounts in the suits and EPs, which are described in the said deed and she has obtained receipts for the same. The consideration under this document is the debts that are supposedly discharged. As mentioned earlier, in the written statement of first defendant, it is very specifically mentioned that these debts were not discharged at all and the 1st defendant stated that no consideration passed under Exs.A.1 and A.2. The receipts said to have been obtained by mortgagee are not filed in the court.

15. These facts are being mentioned since a lot turns on these aspects and the most important issues that arise in this case are issues 1, 2 and 5. Therefore, the first point that arises for consideration is whether Exs.A.1 and A.2 are supported by consideration and similarly whether the transfer deeds are supported by consideration.

16. As far as Exs.A.1 and A.2 are concerned, it is only PW.2 who has knowledge of Exs.A.1 and A.2 because PW.1 has come into the picture later when Exs.A.3 and A.4 were executed and the debts were supposedly transferred to the plaintiff. The examination of PW.2 who is the original mortgagee makes it clear that she does not have much knowledge about the

transaction. She clearly states that there is a difference of three years between Exs.A.1 and A.2 which is contrary to the dates the documents bear. She also states very clearly in her cross-examination that after the discharge of debts due by the first defendant to the persons mentioned in her cross-examination, she got executed Ex.A.1. Therefore, her evidence is clear that after she discharged the debts due by the 1st defendant to those persons, she got Ex.A.1 executed. She also admits very clearly that she did not go to the Registrar's office and only her husband went to the Registrar's office. In her chief examination, she states that she did not know what happened to the receipts, which were supposedly given to another counsel. In the cross-examination, she denies a suggestion that no receipts were given. She also states that her husband died 16 years prior to her deposition and two or three years after the death of her husband, she brought back the registered documents. Therefore, it is clear that for about 13 to 15 years she was in possession of the document. She also clearly admits that she was paid Rs.8,000/- under both the documents Exs.A.3 and A.4.

17. Coming to next document Ex.A.2, the evidence of PW.3 is important. He deposes in his chief-

examination that under document Ex.A.1, no consideration was paid at all on date of his attestation. As far as Ex.A.2 is concerned, he clearly admits that no amount was paid in his presence for Ex.A.2. He also admits in the cross-examination that certain receipts were taken from the creditors by the husband of PW.2.

18. Therefore, a reading of the oral evidence regarding these two documents makes it clear that the plaintiff did not discharge their burden of proving the payment of consideration under Exs.A.1 and A.2. The receipts which are supposedly obtained from the creditors are not filed. The creditors are also not examined to prove the discharge of their debts.

19. On the contrary, after taking specific plea that he himself discharged the debts, the 1st defendant filed Exs.B.1 to B.4, which are the suit registers extracts of the various suits which are mentioned in Ex.A.1. Ex.A.1 was executed on 13.12.1974 and discharge of these debts occurred prior to this date, as per PW.2 and as per the contents of document. But the contents of Ex.B.1 to B.4 run contrary to the document and the evidence of PW2. Ex.A.1 refers to the EPs filed in OS No.114 of 1971. The EPs in this case were dismissed much later and the part satisfaction were being recorded on 10.12.1975,

31.12.1975 etc. In EP No.86 of 1975, full satisfaction was recorded and the EP was dismissed on 16.02.1976. Similarly, in OS No.115 of 1979 in the first EP No.181 of 1973 part satisfaction was recorded on 10.12.1975, 31.12.1975, 02.01.1976 and so on and ultimately till the full satisfaction was recorded on 15.07.1976. In the second EP No.87 of 1975, part satisfaction was being recorded up to 21.04.1976 and EP was finally dismissed on 07.07.1976. Therefore, it is clear that the debts were not discharged prior to Ex.A.1 (dated December 1974) and Ex.A.2 (May 1975). As per proviso (1) of Section 92 of the Evidence Act, want or failure of consideration can be proved as it will invalidate a document; including a registered document also. This is an exception to the general rule under Section 92 of the Indian Evidence Act. ***Man Kaur (Dead) by Lrs. v. Hartar Singh Sangha***[2] is a case that is relevant here.

20. This Court also notices that Exs.B.1 to B.4 were filed during the course of chief examination of DW.1. There is virtually no cross-examination on the contents of Exs.B.1 to B.4. The law is very clear that if the witness is not examined on material aspects, it amounts to a clear admission of the contents and

[2] (2010) 10 SCC 512

nothing further can be urged, as per the decisions of ***Mohd. Ibrahim v. Smt. Munni***[3] and ***Traders Syndicate v. Union of India***[4].

21. Therefore, this Court is of the opinion that because of the contents of Exs.B.1 to B.4; the admissions in the evidence of PW.2 and PW.3 and the failure to cross-examine on the material aspects particularly on the contents of Exs.B.1 to B.4 makes it clear that the plaintiff has completely failed to prove the payment of consideration under Exs.A.1 and A.2. In addition, PW.1 himself admits that he filed a suit OS No.1494 of 1981 against the 1st defendant for recovery of the debt due. This admission is made during the course of cross-examination of PW.1 by 5th defendant. If the loans were discharged; what prompted PW.1 to file this suit is not explained. PW.4 in the course of the chief examination states that Rs.8,000/- was paid under each document, whereas PW.2 states that Rs.8,000/- was paid under both the documents Exs.A.3 and A.4. A reading of Ex.A.3 on the other hand shows that a sum of Rs.8,000/- was paid earlier (edivaralo). Therefore, the document itself mentions prior to 09.09.1987, a sum of Rs.8,000/- was paid. This runs contrary to the oral evidence of the

[3] 2007 (2) ALD 393
[4] AIR 1983 Calcutta 337

witnesses. The document itself shows that a money was paid earlier and not on the date of the document. There is also no endorsement on the document that a sum of Rs.8,000/- was paid in the presence of Sub-Registrar.

22. In this view of the matter, this Court concludes that Exs.A.1 and A.2 are not supported by consideration. There is no documentary proof or credible oral evidence to prove that they are supported by consideration. Despite the clear plea taken by the defendants, the plaintiff did not take any steps to prove the payment of consideration. Even the consideration under Exs.A.3 and A.4 is not clearly proved. As Exs.A.1 to A.2 are not supported by consideration, they are not valid in the eye of law. The further transfers under Exs.A.3 and A.4 are also not valid in the eye of law. In this view of the matter, this Court is of the opinion that issues 1, 2 and 5 are to be held in favour of the defendants/respondents and against the appellant/plaintiff. The mortgage deeds Exs.A.1 and A.2 are not supported by consideration. Exs.A.3 and A.4 are held to be created for the purpose of this suit. They are also not supported by consideration and so all the four documents are void, as per Section 25 of the Contract Act.

23. As far as issues 3 and 4 are concerned, this Court is of the opinion that the lower Court rightly decided these two issues. The payments made are in May and December, 1975. They were made under the belief that as 5th defendant was discharging his debts, part payment was made. As the lower Court came to the conclusion that 5th defendant did not discharge the debts as mentioned in Ex.A.1, the fact that there is an endorsement on the document is not very relevant. As the documents are not supported by consideration, this Court holds that the endorsement cannot be relied upon for the purpose of fastening the entire liability on the 1st defendant.

24. Issues 6 and 7 pertain to interest. As this Court is concurring with the finding of the lower Court that Exs.A.1 and A.2 are not binding, this Court is of the opinion that the issue does not survive for consideration. Issue No.9 is given up in the lower Court. Issue No.8 is about the liability of defendants 1 to 4 under the two mortgage deeds. In view of the earlier finding that the documents are not supported by consideration, this Court concurs with the finding of the lower Court. Similarly, with regard to additional issue No.1 also, this Court concurs with the finding of the lower Court.

25. For all these reasons, this Court holds that there are no merits in the appeal and accordingly the same is dismissed. The judgment and decree dated 23.07.1996 passed in O.S.No.50 of 1995 by the III Additional District Judge, Visakhapatnam is confirmed in all respects. In the circumstances of the case, there shall be no order as to costs.

26. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 08.10.2018
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