

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

1918.
July 16
and 26.

ABDUL HASHIM SAHIB AND TWO OTHERS (PLAINTIFFS),
APPELLANTS,

v.

KADIR BATCHA SAHIB AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

*Specific Relief Act (I of 1877), Sec. 39—Mortgage-deed executed and registered—
Suit by mortgagor for cancellation on the sole ground of non-payment of
consideration—Suit, whether maintainable—Contract and executed convey-
ance, distinction between—Mortgage, whether void or voidable.*

Where a mortgage-deed has been executed and registered, a suit by the mortgagor for the cancellation of the deed, on the mere ground that the consideration for the mortgage has not been paid, is not maintainable.

When the matter has passed from the stage of contract to that of an executed conveyance, mere non-payment of consideration will not render the transaction void or voidable within the terms of section 39 of the Specific Relief Act.

Basalingappa v. Virupanappa (1903) 5 Bom., L.R., 392, and *Rashik Lal v. Ram Narain* (1912) I.L.R., 34 All., 273, referred to.

SECOND APPEAL against the decree of J. T. GILLESPIE, the District Judge of Salem, in Appeal Suit No. 105 of 1915 preferred against the decree of K. S. KOTHANDARAMA AYYAR, the Principal District Munsif of Salem, in Original Suit No. 451 of 1914.

The material facts appear from the judgment.

P. N. Marthandam Pillai for the appellants.

T. R. Venkatarama Sastri for 4th, 7th and 9th respondents.

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PHILLIPS, J.—In this case the plaintiffs sued for a declaration that the suit mortgage-deed is not supported by consideration and void, and for its cancellation. The plaint properties were mortgaged by the plaintiffs to the first defendant and it has been found that the consideration money was not paid. The first defendant however leased one of the items to the second defendant who is now in possession and it has been decided in another suit that the second defendant is entitled to retain possession and that his lease is valid. The second defendant's lease is based on

the plaintiff mortgage-deed inasmuch as he is a lessee of the mortgagee and to the extent of the possession of the second defendant, the mortgage-deed must be held to be valid.

The plaintiff's suit has been dismissed on the ground that it will not lie under section 39 of the Specific Relief Act because the document is neither void nor voidable and there is no apprehension of any injury to the plaintiff's right. It has been contended before us that the mortgage-deed is a void document inasmuch as no consideration has passed. It has no doubt been held that a suit will not lie to compel a person either to lend or to borrow money, that is to say, the Court will not decree specific performance in a suit to enforce the execution of such a contract and it is contended that if plaintiff cannot sue for specific performance he must be entitled to have the contract cancelled. In this case, however, there is something more than a contract to mortgage because the mortgage-deed has been executed and registered, and possession has been given under it. It is therefore a complete conveyance of a mortgage right to the first defendant.

This case is on all fours with the case reported in *Bashin-gappa v. Virupanappa*(1). There it was held that in a case where the mortgagee had failed to pay consideration for the mortgage-deed, plaintiff was not entitled to bring a suit under section 39 of the Specific Relief Act. The other side relied on *Ramaswami Chettiar v. Sundara Reddiar*(2) and *Kumarappan Chettiar v. Narayanan Chettiar*(3). In the first case, the suit was brought by the mortgagee to enforce his mortgage when he had not paid any consideration for it and it was held that inasmuch as there was no debt due, there was nothing to be charged on the land and the mortgagee could not enforce his charge on the land before he had paid the mortgage money. In *Kumarappan Chettiar v. Narayanan Chettiar*(3) also the plaintiff was mortgagee without possession and sued to enforce the mortgage for which no consideration had been paid. In those two cases, SPENCER, J., held that the mortgage was a nullity and was inoperative. I think the present case can be distinguished from those cases on the ground that possession has been

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(1) (1903) 5 Bom. L.R., 392.

(2) (1914) 23 I.C., 805.

(3) (1916) 35 I.C., 455.

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given under the mortgage, even if it can be held that a mortgage is void when it has merely been executed without consideration and nothing further has taken place. In *Rajai Tirumal Raju v. Pandla Muthial Naidu*(1) where only part consideration was paid, the mortgage was held to be valid, as also in *Rashik Lal v. Ram Narain*(2) where reference is made to *Tatia v. Babaji*(3) where FARREN, C.J., pointed out the distinction between a perfected conveyance and a mere contract. In *Govindammal v. Gopalachariar*(4) it was held that the execution of a sale-deed completed the contract and the fact that there was no consideration for it did not make it void. Under section 58 of the Transfer of Property Act "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," so that on execution of a registered deed in accordance with section 59, the mortgage would be complete although the mortgage money had not actually been paid to the mortgagor. It is difficult to draw a distinction between a transfer of immovable property by way of sale and a transfer by way of mortgage. If a sale is complete by the execution of the registered instrument, it appears to me that a mortgage is also complete and can be enforced. The mortgagor would not then be entitled to sue for cancellation of the instrument, but if the consideration was not paid to him, he would have his remedy in damages for breach of the contract. This view does not, I think, conflict with the principle that a suit will not lie to enforce a contract to lend or to borrow, for, in this case, the contract has been completed by the conveyance and it is not a case of suing to enforce the contract. Under section 39 of the Specific Relief Act, plaintiff cannot bring a suit because the document is not void nor is it voidable.

It is however contended that his prayer for a declaration should be granted. So far as the second defendant is concerned, it has been decided by a Court of law that he is not entitled to such a declaration. As against the first defendant a decree declaring that no consideration passed might be justifiable, but a declaration to this effect is only asked for jointly with a

(1) (1912) I.L.R., 35 Mad., 114.

(3) (1898) I.L.R., 22 Bom., 176.

(2) (1912) F.L.R., 34 All., 279.

(4) (1914) 16 M.L.T., 522.

declaration that the deed is void and it seems to me that the declaration as to consideration should not be decreed, as both the lower Courts have found that plaintiff has no reasonable apprehension of danger and plaintiff has not asked for this particular relief alone against first defendant.

The second appeal is therefore dismissed with costs.

KUMARASWAMI SASTRI, J.—The plaintiff is the appellant. He sued for a declaration that the deed of mortgage executed by him was not supported by consideration, for cancellation of the deed, and for a declaration that the lease executed by the first defendant in favour of the second defendant was not binding on plaintiff. Though there is a prayer for 'confirming the possession of item I by the plaintiff,' only the two declarations prayed for were valued and stamp duty paid thereon. The defendant executed a lease of item I in favour of the second defendant on the 7th September 1911 for a period of three years and at the date of the suit (12th June 1914) the lease had about three months to run. The second defendant filed O.S. No. 248 of 1912 on his lease alleging that plaintiff obstructed him and got a decree in his favour restraining the appellant from disturbing his possession which it is now admitted was confirmed on appeal.

Various defences were raised, but for the purpose of this second appeal it is necessary to consider only two, namely, that plaintiff's remedy was only to sue for the consideration recited in the deed, assuming that it was not paid, and that plaintiffs are not entitled under the Specific Act for the relief claimed.

Both the District Munsif and District Judge dismissed the suit on the preliminary ground that the plaintiff was not entitled to the declarations sought for, even assuming that the allegations in the plaint are true.

As regards the prayer for the cancellation of the mortgage deed, I think it must fail. A distinction has to be drawn between cases 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. See *Rashik Lal v. Ram Narain* (1), *Basalingappa v. Virupanappa* (2). The question

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(1) (1912) I.L.R. 34 All., 278.

(2) (1908) 5 Bom.L.R., 392.

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has also been fully discussed by WALLIS, C.J., in Appeal No. 64 of 1916. In the present case no fraud, misrepresentation or mistake is alleged and no case has been made out for cancellation.

Another ground for refusing the prayer is that the parties cannot be put in *status quo ante* as the mortgagee has executed a lease of one of the items of property which has been upheld as against the plaintiff. It is unnecessary to decide whether a mortgagee who pays no consideration can, by the simple expedient of transferring his mortgage right or leasing a portion of the property, plead the transfer in bar to a suit for cancellation or whether it is not competent to the Court as against such mortgagee to cancel the document in so far as it affects right not transferred to any *bona fide* third party, as the lease in this case has been held to be binding on the plaintiff in the suit filed by the lessee and the matter is concluded between the parties. It is well settled that when a contract is voidable the right to determine it is subject to the condition that an innocent third party will not be affected by the cancellation or even a wrong doer, in case of delay on the part of the party entitled to rescind, and that as a condition to a rescission there must be *restitutio in integrum* so that the parties may be put in *status quo* by the Court. See *Clough v. London and North Western Railway Co.*(1), *Addie v. Western Bank of Scotland*(2), *Erlanger v. New Sonibrero Phosphate Company*(3).

As regards the prayer for a declaration that the mortgage is not supported by consideration, it is clear that a mortgage affects the property only to the extent to which money is advanced as security—*Ramaswami Chettiar v. Sundara Reddiar*(4), *Kumarappa Chettiar v. Narayanan Chettiar*(5). If there was no consideration there would be nothing for the mortgagor to pay when a suit is filed. Though there may be cases where a Court will grant a declaration or injunction on proof of danger to the mortgagor's title to the properties, I do not think there is anything in the allegations in the plaint which would justify a court in exercising its discretion in favour of the mortgagor

(1) (1871) L.R., 7 Ex., 26 at p. 34. (2) (1867) L.R.I. H.L., 145 at p. 165.

(3) (1878) 3 A.C., 1218.

(4) (1914) 23 I.C., 805.

(5) (1916) 35 I.C., 455.

who has come to Court three years after the execution of deed of mortgage. Both the lower Courts are of opinion that plaintiffs have no reasonable apprehension of any serious injury in the future.

In the result the second appeal fails and is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

CHINNASWAMI PILLAI AND ANOTHER (PLAINTIFFS),
APPELLANTS,

1918,
July 25 and
26.

v.

APPASWAMI PILLAI AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Surrender by widow and daughter in favour of daughter's son—Deed executed by both—Stipulation for maintenance of both for their lives—Surrender, whether valid—Title of daughter's son—Title of reversioners.

Where the widow and the only daughter of a deceased Hindu surrendered their interests in the estate of the deceased in favour of the daughter's son under a deed executed by them both, stipulating therein that he should maintain them during their lifetime, and, on the death of them all, the reversioners of the deceased sued to recover the estate from the father of the deceased daughter's son.

Held, that the surrender was valid under the Hindu Law and operated to vest the estate in the daughter's son, and that the reversioners had no title to the property.

Sriramulu Naidu v. Andalammal (1907) I.L.R., 30 Mad., 145, and *Challa Subbiah Sastry v. Paluri Pattabhiramayya* (1908) I.L.R., 81 Mad., 446, referred to.

SECOND APPEAL against the decree of J. G. BURN, the District Judge of Trichinopoly, in Appeal No. 376 of 1916 preferred against the decree of K. S. VENKATACHALA AYYAR, the District Munsif of Ariyalur, in Original Suit No. 542 of 1915.

The plaintiffs sue as reversioners of one Chandram Pillai who died in 1890 leaving a widow and a daughter who had a

* Second Appeal No. 2145 of 1917.