

APPELLATE CIVIL.

Before Mr. Justice Cornish and Mr. Justice Stodart.

MUTHU K. R. A. R. P. L. ARUNACHALAM CHETTIAR
AND ANOTHER (PLAINTIFFS), APPELLANTS,

1935,
September 30.

2.

RENGASWAMI CHETTIAR AND SIX OTHERS
(DEFENDANTS), RESPONDENTS.*

*Estoppel—Mortgage—Suit to enforce—Plea in, of mortgage
being a sham transaction intended to defraud a third party
—Mortgagor's right to set up—Estoppel against.*

Where the object of a mortgage is to defraud a third person and the mortgagee is cognisant of and indeed a party to that intended fraud, the mortgagor is not estopped from pleading and proving against his mortgagee seeking to enforce the mortgage that it was a sham transaction, a device to defeat a possible attachment of the properties by a creditor.

Ram Surun Singh v. Mussamut Pran Peary, (1870) 13 Moo. I.A. 551, referred to.

APPEAL against the decree of the District Court of Madura in Appeal No. 61 of 1930 preferred against the decree of the Court of the Subordinate Judge of Dindigul in Original Suit No. 14 of 1928.

D. S. Venkatachari for *P. S. Sarangapani Ayyangar* for appellants.

K. Rangaswami Ayyangar for *M. R. Venkatarama Ayyar* for respondents.

JUDGMENT.

CORNISH J.—This second appeal arises out of a mortgage suit which was dismissed, both the lower Courts holding that the mortgage was not supported by consideration. It has been suggested before us that the burden of proving want of

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consideration had been wrongly put upon the plaintiff mortgagee. If this was so, it would be a ground for interfering in second appeal, for there can be no doubt that, in a suit by a mortgagee against his mortgagor to enforce a mortgage, the onus of proving a plea of no consideration rests on the mortgagor. But we are satisfied from a perusal of the judgments that in the discussion of the evidence in the case this rule has not been lost sight of. It appears to us that the lower Courts have accepted the defendants' evidence that the mortgage was not supported by consideration and have rejected the plaintiffs' evidence to the contrary. The point which has been strenuously argued on behalf of the appellants relates to the competency of the defendants' plea. The mortgage, Exhibit N, was executed on 22nd May 1923 and registered three days later, on 25th May. The consideration is said to be Rs. 2,000 for discharging debts contracted for the expenses of the father's obsequies and for discharging sundry debts contracted for the expenses of the mortgagors' family. And the money is stated to have been received on that day, that is, on the date of the mortgage instrument, from one Muthuswami Iyer, the mortgagee's agent. Paragraph 6 of the written statement runs thus :

“ These defendants state that, shortly prior to the execution of the plaint mortgage bond, they had entered into the contract with Palaniappa Chetty (plaintiffs' father) for securing to him all the properties of the defendants' family for accommodating them with the loan of Rs. 25,000 and, as certain creditors threatened to attach the family properties, the late Palaniappa Chetty and his agent Muthuswami Iyer, . . . advised the said defendants to execute several documents in respect of the various family properties for the purpose of safeguarding the same against the said creditors by preventing the

attachment and thus facilitating the carrying out of the contract of the loan of Rs. 25,000 aforesaid.”

In paragraph 7, they state that in pursuance of such advice they

“executed the suit mortgage document with all kinds of recitals which the said agent proposed in order to give an air of reality to the mortgage which was an entirely fictitious and sham transaction, and not intended to be enforced at all, but only intended to scare away creditors”.

In short, the defendants set up the plea that the mortgage was a sham transaction, a device to defeat a possible attachment of the properties by a creditor. As a matter of fact, a creditor filed a suit on 23rd May 1923 on a promissory note executed by the defendants, but he was persuaded not to attach and no attachment before judgment was made. It has not, however, been proved that the creditor was induced not to attach by reason of Exhibit N, the suit mortgage deed. The question is whether the defendants are estopped from setting up a case which rests on their fraudulent conduct. It has been argued that this is a fit case to apply the maxim *Nemo allegans turpitudinem suam est audiendus*. This maxim has been applied in a number of cases, for example, *Kamayya v. Mamayya*(1), *Subbaraya Chetty v. Subbaraya Chetty*(2) and *Parthasarathy Reddiar v. Kandaswami Mudaliar*(3). But can it stand in the way of a mortgagor's right to plead and prove against his mortgagee that the mortgage which is sought to be enforced against him was without consideration because it was a sham transaction? The question appears to be answered by the Privy Council ruling in *Ram Surun Singh v. Mussamat Pran Peary*(4). It was held there that

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(1) (1916) 32 M.L.J. 484.
(3) (1923) 45 M.L.J. 161.

(2) (1926) 24 L.W. 500.
(4) (1870) 13 Moo. I.A. 551.

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it was competent to the defendant in a foreclosure suit to plead that the statement made by him in a previous suit relating to the mortgage was false and intended as a fraud on a third party. The law on the subject has been succinctly laid down in authoritative text-books, such as Taylor on Evidence and Smith's Leading Cases. In Taylor on Evidence, Vol. I, section 93, it is stated :

“It seems now clearly settled that a party is not estopped by his deed from avoiding it by proving that it was executed for a fraudulent, illegal, or immoral purpose.”

And later on there is this passage :

“Indeed, the better opinion seems to be that where both parties to an indenture either know, or have the means of knowing, that it was executed for an immoral purpose, or in contravention of a statute, or of public policy, neither of them will be estopped from proving those facts which render the instrument void *ab initio*.”

It seems to us that that passage is very appropriate to the facts of the present case. From the evidence it is clear that the object of this mortgage deed was to defraud a third person and that the mortgagee was cognisant of and indeed a party to that intended fraud. But we are of opinion that this circumstance will not operate to estop the mortgagor from pleading the real nature of the transaction against the claim of the mortgagee upon the instrument.

For these reasons, we think that this is not a case in which we should interfere in second appeal. The appeal is accordingly dismissed with costs.

STODART J.—I agree and I have nothing to add.