APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

RAJANI KUMAR DASS
v.
GAUR KISHORE SHAHA.*

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Feb. 5.

Mortgage bond—Transfer of Property Act (IV of 1882), s. 53—Consideration —Partial failure of consideration, effect of.

Where in a mortgage bond two considerations are stated, one of which is valuable and is separable from the other, effect may be given to the instrument to the extent of the amount of the consideration that is valuable, and to that extent the transaction cannot be regarded as fraudulent.

APPEAL by the defendants Nos. 6, 7 and 8, Rajani Kumar Dass and others.

This appeal arose out of an action brought by the plaintiffs to enforce a mortgage bond, alleged to have been executed by the first five defendants on the 18th March, 1901, in consideration of Rs. 3,647 advanced to them in cash and Rs. 4,853 due by them in respect of the *karbar*, which they carried on with the plaintiffs. Defendants Nos. 6 to 8 were attaching creditors of the mortgagor-defendants, and they were as such made parties to the suit on their application. The mortgagor-defendants did not enter appearance.

The defendants Nos. 6 to 8 pleaded, *inter alia*, that they had no knowledge as to the execution of the bond propounded by the plaintiffs, that the document was executed by the plaintiffs without consideration, and that therefore the plaintiffs were not entitled to any relief.

The Court of first instance overruled the objection of the defendants, and decreed the suit. Against this decision the defendants Nos. 6 to 8 appealed to the High Court.

* Appeal from Original Decree, No. 288 of 1906, against the decree of Jogendra Nath Mookerjee, Subordinate Judge of Tipperah, dated March 18, 1905.

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Mr. Caspersz (*Babu Baikunta Nath Das*, *Babu Sarat Kumar Mitra* and *Babu Gunoda Charan Sen* with him), for the appellants.

Babu Nilmadhub Bose (*Babu Golapchandra Sircar* and *Babu Sarat Chunder Dutt* with him) for the respondents.

Cur. adv. vult.

MITRA AND CASPERSZ JJ. This is an appeal in an action to recover Rs. 8,500 on a mortgage bond, dated the 18th March, 1901. The plaintiffs, who carry on business at Ramchandrapur in District Tipperah by the name and style of "Kibalkrishna Mohan Raj Krishna Shaha," are the mortgagees; the Deb defendants (except the minor, Bipin Behary Deb, who has been exonerated by the lower Court, from liability under the mortgage) are the mortgagors, and the Dass defendants, *i.e.* defendants Nos. 6, 7 and 8, are attaching creditors of the mortgaged premises under a decree obtained by them against the Deb defendants. The Deb defendants carry on business at Ramchandrapur and Brahmanberia, in brass and bell-metal utensils, and they used to purchase such utensils on credit from the firm of the plaintiffs as well as the firm of the Dass defendants, which was established at Brahmanberia.

The business of the plaintiffs at Brahmanberia, which was called *bhasan karbar*, was closed in the year 1304 B. S., and the accounts as they were adjusted at the end of that year showed that the Deb defendants were indebted to the plaintiffs in the sum of Rs. 2,004-4-6. It appears that the adjusted accounts were duly signed by these defendants. *Hatchittas* for this sum were also duly signed by these defendants, in acknowledgment of their debt, in the succeeding years 1305 and 1306 B. S. On the 5th Choitra, 1307 B. S., the plaintiffs gave up their claim for 4 annas 6 pie, and a finally adjusted account was signed by the Deb defendants showing a debt of Rs. 2,004.

The Ramchandrapur accounts of the plaintiffs with the Deb defendants were also duly adjusted in successive years, and on the 5th Choitra, 1307 B. S., the amount payable by the Deb defendants to the plaintiffs was found to be Rs. 2,849. The

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Subordinate Judge has found, and we agree with him, that, on the 5th Choitra, 1307 B. S., which corresponds with the 18th March, 1901, the Deb defendants were indebted to the plaintiffs in the sum of Rs. 4,853, being the total of Rs. 2,004 and Rs. 2,849. The mortgage bond in suit covers this sum together with another sum of Rs. 3,647 which, it is alleged, was advanced in cash by the plaintiffs to the mortgagors on the execution of the mortgage. We, however, have very grave doubts as to the actual advance of the latter sum.

The story told on the side of the plaintiffs is that the Deb defendants asked for and obtained this loan of Rs. 3,647 to enable them to pay certain sums to some of their other creditors, and that they executed the mortgage bond in suit for the total sum of Rs. 8,500, *i.e.* Rs. 4,853 and Rs. 3,647. They say that out of the latter item Rs. 1,500 went towards the satisfaction of the debt due to the Dass defendants in respect of another of their firms and that Rs. 500 and Rs. 800 were paid respectively to Durga Charan and Ram Narayan. The evidence, however, as regards these payments is meagre and unsatisfactory. Durga Charan and Ram Narayan have not been called, none of the Deb defendants have been examined, and no attempt has been made to produce their books or the books of the creditors showing these or any payments made. The plaintiff Ram Kanye Shaha did not himself see any of these payments being made, and we cannot place full reliance on the testimony of the Gomastha, Guru Charan Shaha. The payments, if they had really been made, were capable of very satisfactory proof, but such proof is wanting. The defendants, it is true, might have rebutted the testimony of Guru Charan by examining Brindaban Chandra Shaha; but though the weakness of the evidence for the Dass defendants might afford some strength to the plaintiffs, the evidence on the side of the latter is too weak for even a *primâ facie* case, and the plaintiffs cannot legitimately derive advantage from the shortcomings of their adversaries. Even if Brindaban Chandra did receive Rs. 1,500 from the Deb defendants after the execution of the mortgage, there would be nothing to show that this sum was a part of Rs. 3,647 covered by the mortgage. It is not the case of the plaintiffs that they themselves made any payment to

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Brindaban. The payments of Rs. 1,500, Rs. 500, and Rs. 800 to the other creditors of the Deb defendants have not at all been proved.

In the absence of proof of appropriation by payments to creditors of either the whole or part of the sum of Rs. 3,647, the plaintiffs must fall back on their own books and the oral testimony of their witnesses. We, however, are unable to accept the books produced in Court as books kept in the ordinary course of business. Shib Chandra Shaha, who gave his testimony in the lower Court and who, under our directions, has been examined in this Court also to clear up, if possible, certain doubtful matters in the account books, has admitted interpolations in the books. He has also failed to explain the suspicious entries to which our attention was drawn by the learned Counsel for the appellants. It is very doubtful on their books, whether the plaintiffs were in a position on the 18th March, 1901, to pay to the Deb defendants Rs. 3,647 in cash. The accounts admittedly were kept in an unusual and awkward way, and the corroboration that they could have afforded to the oral testimony is wanting. It seems to us that the books, instead of affording corroboration, throw discredit on the transaction.

The oral testimony, consisting of the depositions of the plaintiff, Ram Kanye Shaha, and some of his assistants, is interested and unconvincing. Kali Kamal Chakravarti, on whom the lower Court has placed considerable reliance as an independent witness, came to the scene of the mortgage transaction by mere chance, and he contradicts the other witnesses on material points.

The probabilities also are against the case made by the plaintiffs. The Deb defendants were largely indebted at the time, and their business was not in a satisfactory condition. On 21st Falgoon 1306, corresponding with the 4th March, 1900, they executed a *hatchitta* in favour of the Dass defendants admitting a debt of Rs. 5,482-9-10. They failed to pay this debt in due time, and it was outstanding on the 18th March, 1901. Their immoveable properties were not of any considerable value. The plaintiffs themselves were their creditors and the debts due to them were annually increasing. No part of the sum of Rs. 2,004-4-6 due on the Brahmanberia account had been paid within three years.

The mortgage had evidently been in contemplation for some time before the transaction actually took place. The stamp for the deed was purchased on the 19th February, and though it was executed on the 18th March, the document was not presented for registration until the 2nd May, 1907. The deed makes the amount covered by it repayable in six months. The case of an advance of a large sum of money to debtors, who were on the verge of bankruptcy in the circumstances we have stated, wears an air of improbability. The meagreness and untrustworthy character of the evidence adduced to prove payment is not redeemed by any natural feature in the transaction, and, on the other hand, the patent improbability of the story casts additional discredit on it. We cannot, therefore, accept the finding of the Subordinate Judge on this point.

The conclusion we arrive at is, that the real consideration for the mortgage was the original sum of Rs. 4,853, and that the item of Rs. 3,647 alleged to have been advanced on the 18th March, 1901, was not actually advanced, and that the entry to that effect in the books of the plaintiffs is fictitious.

It might be that there was a secret understanding between the mortgagors and the mortgagees that the sum of Rs. 3,647 would be retained by the latter as security for subsequent transactions or for payment to other creditors, if necessity arose. Such a case, however, was not attempted to be made. The case put forward is that payment was actually made simultaneously with the execution of the mortgage bond. There was thus a partial failure of consideration.

We have next to consider whether we should give the plaintiffs a decree on the footing of the mortgage being really one for Rs. 4,853, and direct a sale of the mortgaged premises as against all the defendants, thus giving the plaintiffs a preference over the claim of the Dass defendants, or dismiss the suit so far as it is based on the mortgage.

The Dass defendants instituted a suit on their *hatchitta* about the time the mortgage was registered. That suit was numbered 448 of 1901. The suit was contested by the debtors, the Deb defendants. They failed in their opposition and a decree was made on the 18th December, 1903. The debtors appealed to this

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Court, but unsuccessfully. The Dass defendants in the meantime executed their decree. The plaintiffs waited until then, notwithstanding that the mortgage money was due in 1901. They instituted the present suit on the 23rd February, 1905. These are circumstances of grave suspicion and raise doubts as to the *bonâ fides* of the entire mortgage transaction.

Did the plaintiffs enter into a covinous agreement with the Deb defendants to delay or defeat the creditors of the latter, including their creditors the Dass defendants, and does the case come within Section 53 of the Transfer of Property Act (IV of 1882), which follows the Statute 13 Eliz. c. 5? The peculiarity in the present case is that the consideration for the mortgage was partly valuable. The case does not come within the scope of the Bankruptcy Laws and no question of undue preference directly arises.

Section 53 of the Transfer of Property Act enacts—"Every transfer of immoveable property made with intent to defraud prior or subsequent transferees thereof for consideration or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed." The section, however, saves the rights of transferees in good faith and for consideration. The section also says that "when a transfer, which has the effect of defrauding, defeating or delaying creditors is made gratuitously or for a grossly inadequate consideration," the intention to defraud, defeat or delay may be presumed. A contrary presumption would necessarily arise, if the consideration is meritorious or valuable. In *Copis* v. *Middleton*(1) Sir Thomas Plumer, Vice-Chancellor, observed with reference to the Act of Elizabeth:—"A conveyance, therefore, to be affected by the Act, must be shown to be feigned, covinous and fraudulent and made with an intent to delay, hinder or defraud creditors." *In re Johnson Golden* v. *Gillam*(2) Fry J. said:—"The fact that there is valuable consideration shows at once that there may be purposes in the transaction other than the defeating and delaying of creditors, and renders the case, therefore, of those, who contest the deed, more difficult." This was also the view adopted in *Harman* v. *Richards*(3), in which Lord Justice Turner observed:—"Those, who undertake to impeach for *mala*

(1) (1817) 2 Maddock 410. (2) (1881) L.R. 20 Ch. D. 389.
(3) (1852) 10 Hare. 89.

fides a deed, which has been executed for valuable consideration, have, I think, a task of great difficulty to discharge. [See also *Holmes* v. *Penny*(1) and *Freeman* v. *Pope*(2).]

It has not been shown by any evidence, which may be said to be cogent, that the transaction of mortgage between the plaintiffs and the Deb defendants was entirely fraudulent, or for a grossly inadequate consideration and was intended only to defeat or delay the realization of the dues of the Dass defendants. If the considerations for the mortgage (we use the plural number, to include the two different sums, which make up Rs. 8,500) could not be separated from each other, there would be good grounds for holding that the transfer evidenced by the deed was fraudulent. In that case the failure of consideration to the extent of Rs. 3,647 taken with the other proved facts would lead to a reasonable conclusion that the mortgagees intended to help the mortgagors to defeat the realization of the debt covered by the *hatchitta* in favour of the Dass defendants. Such conduct on the part of the mortgagees and mortgagors would lead to the inference that they were acting in collusion.

We think, however, in the absence of direct authority on the point, that the two parts of the consideration stated in the mortgage are separable, and that effect may be given to the instrument to the amount of the consideration that was valuable. To that extent, the transaction cannot be regarded as fraudulent. The mortgagees did not with reference to the sum of Rs. 4,583 do any act not warranted by law to the prejudice of the Dass defendants. Their action might be crafty and deceitful in one sense and morally wrong, but the law does not prevent them from taking proper security for the advances actually made by them. It might also be that the plaintiffs had a *bonâ fide* intention of advancing the additional sum for enabling the mortgagors to carry on their business, that they put off payment until the money was needed or until registration of the deed, but that as the Dass defendants either commenced their suit, or were about to do so for a larger sum than Rs. 3,647, the plaintiff withheld payment of the additional sum. They might not have had any such intention as would invalidate the instrument under section 53 of the Transfer

(1) (1856) 3 K. and J. 90. (2) (1870) L. R. 5 Ch. Ap. Cas. 538.

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of Property Act. Their moral turpitude in making a false case afterwards in the present proceedings would not be sufficient to deprive them of their legal rights, though a false case might reflect discredit on the original transaction.

We are supported in our conclusion by the views expressed in two Indian cases. In *Ishan Chunder Das Sarkar* v. *Bishu Sirdar*(1) it was observed that "mere knowledge of an impending execution against a transferor is not sufficient to make the transferee a transferee otherwise than in good faith." When it is not shown that the intention of the transfer was to defeat or delay the creditors of the transferor or where the transferee is a creditor of the transferor and accepts the transfer in satisfaction of the debt due to him, although with the knowledge that his doing so would have the effect of defeating other creditors of the transferor, the transfer may come within the last paragraph of section 53 of the Transfer of Property Act. In the present case the plaintiffs may have made a good bargain in their own interest, but no such knowledge has been brought home to them as would make the transaction a mere sham. In *Narayana Pattar* v. *Viraraghavan Pattar*(2) it was said:—"No doubt a mere preference of one creditor to another and *à fortiori* a *bonâ fide* security given to a creditor to the extent of his debt, is not within the English Statute 13 Eliz. c. 5; and we also think it is not within Section 53 of the Transfer of Property Act. But where a document given by way of such security goes further and secures debts not due, the effect is, *quoad* such fictitious debts, to defeat or delay the creditors." This principle, it seems to us, is exactly applicable to the exclusion of the item of Rs. 3,647 improperly made a part of the consideration (Rs. 8,500) in the mortgage bond in suit.

So far as the debts were real the mortgage may be regarded as a good transaction; so far as they were fictitious, that is so far as valuable consideration failed to pass, the mortgage must be held to be inoperative.

We are, therefore, of opinion that the decree of the lower Court should be set aside, and that in supersession thereof a decree should be passed by this Court on the footing of the original mortgage-debt being Rs. 4,853.

(1) (1897) I. L. R. 24 Calc. 825. (2) (1893) I. L. R. 21 Mad. 184.

As regards costs, the proportion of loss and gain to the contending parties is such that we cannot but direct that the parties should bear their own costs in both the lower Courts and this Court, but the amount of Court-fees payable on the mortgage money calculated on the above basis at the date of the institution of the suit and the hearing fee in the lower Court according to the ordinary scale on the said sum, should be added to the mortgage debt and there will be a direction for sale of the mortgaged premises for the entire amount so found.

Appeal allowed; Decree varied.

S. C. G.