

**(2009) 11 MAD CK 0199**

**Madras High Court**

**Case No:** Appeal Suit No. 130 of 2005 and C.M.P. No. 9247 of 2006

T. Bhaskaran

APPELLANT

Vs

Vidhya Nathan

RESPONDENT

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**Date of Decision:** Nov. 17, 2009

**Citation:** (2010) 2 BC 112 : (2010) 7 RCR(Civil) 761

**Hon'ble Judges:** C. Nagappan, J

**Bench:** Single Bench

**Advocate:** S. Raghavan, for the Appellant; M. Balasubramanian, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

C. Nagappan, J.

The defendant has preferred this Appeal against the Judgment and Decree, dated 5.9.2003 in O.S. No. 1013 of 2002, passed by the VI Additional Judge, City Civil Court, Chennai.

2. The respondent/plaintiff filed the Suit against the appellant/defendant seeking for a preliminary decree directing the defendant to pay the plaintiff a sum of Rs. 7,16,250/- due on the loan amount with subsequent interest at 15% per annum; for a decree for Rs. 23,000/- being the auction and legal charges; in the event of failure on the part of the defendant, to sell the mortgaged property and the proceeds to be applied towards the payment of the amount and if the sale proceeds are not sufficient, to pass a decree against the defendant directing to pay the plaintiff the deficient amount with interest 6% per annum and for costs of the suit.

3. Briefly the case of the plaintiff is that the defendant borrowed a sum of Rs. 3,00,000/- repayable with interest at 15% per annum and executed a Mortgage Deed dated 24.7.1992 and it was registered on 24.7.1992 in Document No. 2141/ 92 in the office of the Sub-Registrar, Purasawalkam for securing the repayment of the loan amount. It is further stated in the Plaint that the mortgaged property is an undivided half share in the house and ground of an extent of 3170 sq. ft., bearing

premises Nos. 52 and 53, Strahans Road, Perambur Barracks, Chennai-600 012. According to the plaintiff, the defendant also filed the Suit in O.S. No. 7806/1983 against Karpagambal and others for the relief of partition and for rendition of accounts and the defendant paid a sum of Rs. 3,750/- towards interest in the year 1994 on the mortgage loan. It is further stated by the plaintiff that the defendant failed and neglected to pay the interest every month as per the terms and conditions in the Mortgage Deed and the plaintiff took out an Application in LA. No. 17822/ 1997 for impleading herself as party 12th defendant in the Suit and the same was allowed and the defendant obtained an interim injunction against the plaintiff in the partition suit from selling the mortgaged property by auction. The plaintiff has further stated that in spite of repeated demands the defendant failed and neglected to repay the loan amount and the plaintiff demanded payment by issuing notice to the defendant through her Counsel and the defendant acknowledged the notice but failed and neglected to pay the amount. Hence the Suit.

4. The defendant, in the written statement, has stated that what was mortgaged to the plaintiff was only an undivided share in the premises bearing Door No. 52/ 53, Strahans Road, Perambur Barracks, Chennai-12 and the final decree has not so far been passed in the Suit for partition in O.S. No. 7806 of 1983. It is further stated by the defendant that no consideration was received by him pursuant to the Suit mortgage deed and though a cheque was drawn favouring the defendant, no amount was paid to the defendant as alleged and having obtained the mortgage the plaintiff took back the money from the defendant. The defendant has further stated that an Agreement dated 27.7.2002 was entered into by the plaintiff with the defendant whereby the plaintiff granted and assigned leasehold rights of the English Movie by name "The Stranger and The Gun Fighter" for distribution, exhibition and exploitation in the city of Chennai, North Arcot, South Arcot, Chengleput and Pondicherry for a period of 5 years and the mortgage itself was created with mala fide intention and the defendant did not have the benefit of the agreement dated 27.7.1992 as the picture could not be screened successfully and no consideration was ever passed under the suit mortgage deed to the defendant and therefore the Suit is not maintainable in law.

5. The Trial Court framed two issues and the plaintiff examined herself as P.W. 1 and marked Exs.A-1 to A6 and the defendant examined himself as D.W. 1 and no document was filed on his side. On a consideration of oral and documentary evidence, the Trial Court held that there was consideration for the suit mortgage deed and the plaintiff has proved the Suit claim against the defendant and granted preliminary decree on mortgage as prayed for with costs. Challenging the judgment and Decree, the defendant has preferred the present Appeal. For the sake of convenience, in this judgment, the parties are referred to as arrayed in the Suit.

6. The Points for determination in this Appeal are:

(1) Whether no consideration was received by the defendant under the Suit Mortgage deed.

(2) Whether the plaintiff is entitled to the relief sought for.

Point Nos. 1 and 2:

7. The learned Counsel for the appellant submits that the plaintiff did not produce her Bank Pass Book or statement to show that the cheque for Rs. 3 lakh had been encashed by the defendant and the Trial Court erred in shifting the burden of proof to the defendant regarding passing of consideration and the Trial Court had failed to note that Mortgage Deed was executed only as security for the lease of the English movie and the judgment and Decree of the Trial Court are liable to be set aside. In support of his submission, the learned Counsel for the appellant relies on the decision of the Supreme Court in [Bharat Barrel and Drum Manufacturing Company Vs. Amin Chand Payrelal](#), .

8. Per contra, the learned Counsel for the respondent/plaintiff submits that the defendant in his written statement has stated that the plaintiff took back the money from the defendant and therefore no consideration was passed and he has failed to substantiate the said plea by adducing any evidence and the defendant has not even replied to the suit notice sent by the plaintiff and having admitted the execution of the registered Mortgage Deed, burden is upon the defendant to show that there was no consideration passed under the deed and he has failed to discharge the burden to disprove the passing of the consideration or to disprove the recitals contained in the mortgage deed and the conclusion of the Trial Court is sustainable. In support of his submission, the learned Counsel relies on the decision of the Division Bench of this Court in [Kanagambaram Ammal Vs. Kakammal, Govindasamy, Pachammal, Subramaniam, Vasantha and Munuswamy](#), .

9. Ex.A1 is the registered Suit Mortgage Deed, dated 24.7.1992, executed by the defendant in favour of the plaintiff and in the recitals, it is stated that the consideration of Rs. 3 lakh paid to the Mortgagor by Mortgagee by cheque No. 084076, dated 24.7.1992, drawn on Union Bank of India, Egmore Branch, Madras and the receipt of the said sum the Mortgagor do admit, acknowledge and confirm.

10. The defendant, in the written statement, admits that he executed Ex.A1-Mortgage Deed in favour of the plaintiff, but states that no consideration was received by him and though a cheque was drawn favouring him for a sum of Rs. 3 lakh, no amount was paid to him and the plaintiff took back the money from the defendant. The plaintiff examined herself as P.W.I and has testified about the borrowing of a loan of Rs. 3 lakh by the defendant from her and executing Ex.A1 -Mortgage Deed in her favour.

11. Having admitted the execution of the mortgage deed, the burden is upon the defendant to disprove the passing of the consideration. The contention of the

learned Counsel for the appellant is that the Court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as existence of negative evidence is neither possible nor contemplated. There is no dispute on the proposition of law, but the bare denial of the passing of the consideration apparently does not appear to be any defence and something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff and to disprove the presumption the defendant has to bring on record such facts and circumstances, upon consideration of which the Court may either believe, that the consideration did not exist or its non-existence was so probable that a prudent man would under the circumstances of the case, shall act upon the plea that it did not exist.

12. In the present case, the defendant has stated that the plaintiff granted and assigned leasehold rights to English movie by name "The Stranger and The Gun Fighter" in five districts for a period of five years and an Agreement dated 27.7.1992 was executed by the defendant to the plaintiff and it was the plaintiff who pitched upon the idea of immovable property security for leasing of the picture and the mortgage itself was created with mala fide intention for the said purpose. The alleged agreement dated 27.7.1992 was not filed by the defendant in this case. It is contended on behalf of the defendant that the plaintiff in her testimony as P.W.I has admitted the said agreement. It has to be borne in mind that the Us in the present case is as to whether the consideration mentioned in Ex.A1 -Registered Mortgage Deed was passed on or not to the defendant.

13. Except the interested oral testimony of the defendant as D.W. 1, no other evidence was adduced by the defendant to probablise the case pleaded by him. In this context, it is relevant to note that the defendant though received Ex.A5 Suit notice as evident from Ex.A6-Postal Acknowledgement Card, did not choose to send any reply to the demand made by the plaintiff. The defendant has pleaded that the plaintiff took back the money from him, but he has not substantiated the said plea by adducing any evidence. In this context, the decision of the Division Bench of this Court in Kanagambaram Ammal's case, relied on by the learned Counsel for the respondent and referred to supra, is relevant and for better appreciation, the relevant portion of the Judgment is extracted below.

12. ...As seen from the written statement filed by the second defendant, the execution of the mortgage deed is admitted which reads:

The Suit mortgage was executed without consideration under the circumstances stated below.

Therefore, the burden is upon the defendants, especially upon the second defendant, who is a party to Ex.A-1, to prove that the mortgage came into existence, under the circumstances stated in the written statement, that too, without any consideration, though there are some recitals in the deed, regarding the passing of

consideration. We are conscious of the fact, that Ex.A-1 is not a negotiable instrument, armed with presumption, under the Negotiable Instruments Act. In this view, it could be said, the initial burden is upon the plaintiff, to prove the passing of consideration. In this case, in view of the admitted position the execution of Ex.A-1 is admitted, in our considered opinion, the oral evidence of P.Ws. 1 and 2, supported by the recitals in the registered document viz., Ex.A-1, to which some of the defendants are parties, are sufficient to discharge the initial burden, thereby shifting the burden upon the defendants, to disprove the passing of consideration, or to disprove the recitals contained in Ex.A-1, thereby to establish the fact, if it is a fact, that Ex. A-1 is not supported by consideration. In a mortgage deed, if there are recitals, that the mortgage money was given as loan to the mortgagor, either on that date, or previous to that date, affirming that the mortgagor received the amount, then the burden is on the mortgagor to prove, that no consideration was in fact paid. This proposition is laid down by the Apex Court of this land in R.S. Kothari v. Smt. Anar Dei 1968 (1) S.C.W.R. 235.

14. The above decision is applicable to the facts of the present case. Having accepted the execution of Ex.A1-Registered Mortgage Deed, it is for the defendant to establish the circumstance stated by him in the written statement to disprove the passing of consideration and he has failed to discharge the burden. The Trial Court has rightly appreciated the oral and documentary evidence and held that Ex.A1-Mortgage Deed is supported by consideration and the plaintiff is entitled to the suit claim. The Point Nos. 1 and 2 are determined accordingly.

15. There are no merits in the Appeal and the same is dismissed. However, there shall be no order as to costs. Connected C.M.P. No. 9247 of 2006 is also dismissed.