

Chidambaraiyer and Others

Vs

P. S. Renga Iyer and Others

Civil Appeal No. 200 of 1963

(K. Subba Rao, Raghavar Dayal, R. S. Bachawat JJ)

06.05.1965

JUDGMENT

SUBBA RAO, J. –

This appeal by certificate raises the question of the applicability of s. 9-A(10) (ii) (b) of the Madras Agriculturists Relief Act (Madras Act IV of 1938), hereinafter called the Act, as amended by Act XV of 1943 and Act XXIII of 1943, to a mortgage in respect whereof a petition for scaling down the said mortgage debt under the provisions of the Act was filed.

On August 18, 1930, the predecessors-in-interest of the appellants executed a registered deed of usufructuary mortgage in favour of the family of Samu Pattar for Rs. 31,000. No interest was stipulated in the document, but the mortgagee was put in possession of the mortgage property. The mortgagee had to enjoy the income from the said property, and after appropriating interest due on the mortgage and after paying the revenue and the jenmi's purappad, he was to pay to the mortgagors one edangali of paddy every year within the 30th of Makarom. The mortgage was redeemable after the expiry of 60 years from the date of the mortgage. The 11th appellant and his deceased father, Narayana Iyer, filed O. P. No. 43 of 1949, on the file of Court of Subordinate Judge, Palghat, under s. 9-A and 19-A of the Act for scaling down the mortgage debt thereunder. To that petition, appellants 1 to 10 and other mortgagers were impleaded as respondents 2 to 14, and the mortgagee, as the first respondent. As the said first respondent

The contesting respondents, inter alia, raised two pleas, namely, (1) the mortgage property was transferred in trust to the charity for valuable consideration and, therefore, s. 9-A(10) (ii) (b) of the Act was attracted the hence the mortgage was not liable to be scaled down under the Act; and (2) the said mortgage right was the subject-matter of a partition amongst the several members of the joint family consisting of respondents 1, 15, 16 and others and, therefore, the said mortgage was exempted under s. 9- A(10) (ii) (c) of the Act from its operation.

On the first question the learned Subordinate Judge held that "The transferee, viz., the charity, not being a transferee for valuable consideration" the proviso to s. 9-A(10) (ii) (b) did not apply; and on the second question he held that the partition of the family in the sense of division in status was effected before the relevant period and, that apart, as the mortgage interest of the family was not allotted to some or one of the members of the family but a trust was created in respect thereof in favour of a charity, s. 9-A(10) (ii) (c) had no application. In the result he allowed the petition and granted a certificate to the petitioners and respondents 2 to 14 to the effect that the amount due under the mortgage on the date he made the order was Rs. 8,788-14-10.

As the first respondent died pending the proceedings in the Court of the Subordinate Judge, the 17th respondent, his younger brother, was brought on record in his place.

Against the order of the learned Subordinate Judge, the 17th respondent preferred an appeal to the High Court of Judicature at Madras, being A. A. O. No. 557 of 1952. To that appeal, the petitioners and other respondents were made respondents. On the first question, the High Court held that the family transferred the mortgage interest for valuable consideration in favour of the charity within the meaning of para (b) of s. 9-A(10) (ii) of the Act; and on the second question it held that the expression "partition" in s. 9-A(10) (ii) (c) meant partition by metes and bounds and though it was effected during the relevant period the mortgage interest in the property was not the subject of partition and, therefore, the said provision was not attracted to the mortgage in question. In the result, the High Court, disagreeing with the view expressed by the learned Subordinate Judge, set aside the order made by him and dismissed the petition filed by the mortgagors for scaling down the debt. Against the said order the

Mr. Prasad, learned counsel for the appellants contended that (i) there was no transfer of the mortgage property in trust for a charity but the said property continued to be the property of the joint family, though a charge was created on its income for some charitable purposes; and (ii) there was no transfer of the mortgage interest for valuable consideration.

Mr. Rajagopala Sastri, learned counsel for the respondents, apart from attempting to sustain the finding of the High Court that there was a transfer of the mortgage property for valuable consideration, contended that the transfer of the mortgage property in trust was an integral step in the process of partition and, therefore, in law and in fact it must be held that the said property was also subject of partition within the meaning of para (c) of s. 9-A(10) (ii) of the Act.

At the outset it will be convenient to read the relevant provisions of s. 9-A(10) (ii) of the Act.

"Nothing contained in this section, except sub-sections (1) and (2), shall apply to any mortgage -

(ii) in respect of property situated in any other area in the cases mentioned below :-

(a) Where during the period after the 30th September 1937 and before the 30th January 1948. ....

(b) Where during the period aforesaid, the mortgagee or any of his successors-in-interest has interest belonged to, or devolved on, two or more gagee's rights in the property bona fide and for valuable consideration, then, to the whole or such part, as the case may be :

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(c) Where the mortgagee's interest in the property subject to the mortgage or any part of such interest belonged to, or devolved on, two or more persons and during the period aforesaid, a partition has taken place among such persons, then, to the whole or such part of the interest, as the case may be.

It will be seen from the said provisions, so far relevant to the present enquiry, that the mortgagee's rights under para (b) or mortgagee's interest in the property shall have been bona fide transferred for

valuable consideration or shall have been partitioned among the joint owners during the period between September 30, 1937, and January 30, 1948, in order to earn the exemption from the operation of the provisions of s. 9-A(10) (ii) of the Act. As we agree with the High Court that the mortgage interest was transferred for valuable consideration within the meaning of para (b) of s. 9-A(10) (ii) of the Act, we are relieved of the necessity to consider either the scope or the applicability of para (c) of the said section to the mortgage in question.

Under para (b) of s. 9-A(10) (ii) of the Act two questions arise, namely, (1) whether the mortgage rights in the property were legally transferred in trust in favour of the charity; and (2) if so, whether the transfer was for valuable consideration. If there was such a transfer, it is not disputed that it was effected during the relevant period mentioned in the section.

Exhibit B-1 is an agreement dated August 22, 1934, executed between the members of the mortgagee-family. The relevant part of the document reads :

"All of us have out of our free will and consent set apart on this day the sum of Rs. 36,988-9-8 found entered against the date 30th Meenom 1109 M. E. (12th April 1934) in the ledger book under the head "kulathoorayyan" in the accounts maintained in respect of our common family business, the interest accrued thereon from the aforesaid date, the sum of Rs. 1,490 found entered in the ledger under the head "Patasala",..... (other properties are mentioned)..... for charitable purposes for the welfare and prosperity of our family. And it is stipulated that the under- mentioned ceremonies shall be performed with the income derived from the aforesaid properties.

..... (specific amounts to be spent for different purposes are given).....

It has been stipulated that the management of the aforesaid properties endowed for purposes of charity shall be conducted by the seniormost male members of the respective branches for each year by rotation, commencing from first Kanni 1110 M. E. (17th September 1934) and the accounts shall be rendered to the satisfaction of the members of the rest of the branches at the end of the year."

The recitals of this documents are clear and unambiguous. Under this document the members of the family set apart a specific amount and other properties for charitable purposes. Under the scheme of administration the seniormost male members of the different branches of the family were constituted the managers any they were directed to pay specified amounts for specific religious purposes. The members of the family were the authors of the trust. The seniormost male members of the respective branches were the trustees. The charity was the beneficiary. The subject-matter of the trust was the said amount and the properties. All the necessary ingredients of a trust are present in the document. It is, therefore, clear that the document created a valid trust of the said amount.

Exhibit B-2 dated September 3, 1939, is a part of "schedule, of partition allotted to the members of the E. N. A. S. family". It reads :

"Particulars regarding the properties that have been set apart for charity from our joint family. -

1. Properties situate in Kunisseri Amsom which belong to N. C. Sivarama Ayyar of Nellisseri Grammom and others and which belong to our family in (usufructuary

mortgage) right for a sum of Rs. 31,000 and which are held benami in the name of Appathura Pattar alias Seshan Pattar of Melkode Grammom."

The document contains other items of properties set apart for charity.

Exhibit B-3, the registration copy of the partition deed dated September 9, 1939, shows that the schedule was prepared in connection with the oral partition agreed upon on September 3, 1939. After orally dividing the properties among the members of the family and setting aside the said mortgage interest and other properties for charity, on September 9, 1939, the said registered partition deed was executed embodying the terms of the oral partition. It is common knowledge that before a regular registered partition deed is effected, there will necessarily be a stage when the terms embodied in the registered document are agreed upon orally between the parties. It is a necessary prelude for executing the formal document. It is a necessary prelude for executing the formal document. Ex. B-3 appears to be such a document embodying the terms orally agreed upon between the parties at an earlier stage. This document governs the rights of the parties. The relevant recital in the document reads :

"Out of the immovable properties which were set apart previously as mentioned in paragraph 2 above, which were reserved in common at that time and which were acquired subsequently, some immovable properties were set apart under schedule 1 for our common family "private trust" for the purpose of charity. Under the oral partition effected on 3rd September 1939 all the immovable properties belonging to our common family excluding those set apart for charity as stated above were partitioned into 9 schedules from A to I in accordance with our proportionate shares..... But whereas we have all agreed that the management in respect of the properties in the aforesaid schedule I set apart for charitable purpose and the expenses, etc. to be met with the income shall be conducted and cased to be conducted without default as set out in the aforesaid agreement entered into between us on 22nd August 1934 and that we shall also conduct ourselves in future in accordance with the terms of the said agreement, no special sti

This registered partition deed in terms affirmed the earlier creation of trust.

From these documents it can be reasonably held as follows : (1) On August 22, 1934, the family created a trust in respect of a sum of Rs. 36,988-9-8 for charitable purposes; (2) on September 3, 1939, the usufructuary mortgage right of the family in Ex. A-1 was given to the charity in discharge of the obligation undertaken under Ex. B-1; and (3) the dedication of the said property was affirmed in the regular partition deed. In short, under the said documents the family transferred to the charity their interest in the usufructuary mortgage, Ex. A-1, in discharge of their obligation to pay the trust a sum of Rs. 36,988-9-8. Indeed the High Court, on a consideration of the said documents arrived at exactly the same finding. The learned Judges of the High Court observed :

"On a comparison of the charity properties mentioned in Exhibits B-1 and B- 2, we find that item No. 3 in Exhibit B-1 is the same as item No. 2 in B-2. Similarly item No. 4 in Exhibit B-1 corresponds to item No. 3 in Exhibit B-2. Item No. 5 in Exhibit B-1 is admitted to be item No. 4 in Exhibit B-2 and item No. 6 in Exhibit B-1 is the same as item No. 5 in Exhibit B-2. Items Nos. 1 and 2 in Exhibit B-1 are not mentioned in Exhibit B-2, but they are replaced by item No. 1 in Exhibit B-2 which is the mortgage. It is seen that items 1 and 2 in Exhibit B-1 are credit entries of the

aggregate amounts in the family business accounts but what is done by Exhibit B-2 is the replacement of those amounts by the mortgage in question No.1 evidence has been let in as to what has become of those two amounts. Evidently being credit entries they have been converted into tangible immovable assets for the purposes of conducting the charity. It is more or less in the nature of substituting a credit entry by means of some prop

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Later on the learned Judges proceed to state :

"We are unable to accept the arguments for the reasons stated already. It is clear as we have referred to already that for the amounts entered as credit in the family business account which was a liability payable by the family from and out of the interest under Exhibit B-1 the religious functions have to be performed and that there was a substitution of the mortgage amount under Exhibit B-3. Mr. Ramchandra Aiyar contends that there is no oral evidence about that substitution; nor is it possible to conclude from the meagre and scanty documentary evidence let in that there has been any such substitution. The answer to this argument is that the credit amount in favour of Kolathu Iyen is only a ledger entry making the liability on the family with regard to sum of money out of which certain charities have to be performed. In Exhibit B-3 we do not find any credit entry in the name of Kolathu Iyen as well as patasala account. Those liabilities must be deemed to have been discharged by item I in Exhibit B- 2, name

These observations also make it clear that the learned Judges clearly held that the mortgage interest in Ex. A-1 was transferred in discharge of the liability undertaken under Ex. B-1. But strong reliance was placed by the learned counsel for the appellants on the following concluding observation of the learned Judges :

"In the present case the joint family has lost the mortgage interest and the trust has gained the interest. Therefore the transfer under Ex. B-3 must be deemed to be for valuable consideration."

Relying upon this observation the learned counsel commented that the learned Judges held that a mere transfer of an interest in favour of another was in itself a transfer for valuable consideration. To accept this argument is to ignore the elaborate discussion that preceded the said observation and the relevant extracts from the judgment we have extracted earlier. In the context of the preceding discussion the said observation can only mean that the transfer in favour of a charity in discharge of the earlier obligation is a transfer or valuable consideration. Agreeing with the High Court, we hold that there was a transfer of the mortgage interest under Ex. A-1 in trust to a charity in discharge of an earlier obligation undertaken by the family to set apart a sum of Rs. 36,988-9-8 in favour of the charity. Under para (b) of s. 9-A(10) (ii) of the Act, to attract that provision the transfer shall be for a valuable consideration. The short question, therefore, is whether the transfer in trust of a property in d

"A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other."

Section 2(d) of the Contract Act defines consideration thus :

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise."

So far as is relevant to the present enquiry, the content of the two definitions is practically the same, though the expression "valuable" is implied under s. 2(d) of the Contract Act, for consideration shall be "something which not only parties regard but the law can regard as having some value". From the definitions it is apparent that consideration may be negative or positive. In the present case the mortgage interest was transferred in trust to the charity. What was the consideration that passed from the charity to the family ? The family was under an obligation to pay to the charity the amount set apart to it under Ex. B-1. The mortgage interest was transferred in discharge of that obligation. That is to say, the charity agreed as a consideration for the transfer of the mortgage interest not to enforce its right to recover that amount from the family. The charity gave up that right in consideration of the mortgage interest acquired by it. We, therefore, hold that the family transferred the mortgage inte

In the reply the learned counsel for the appellants sought to raise another plea, namely, that there was no valid transfer of the mortgage deed in favour of the charity inasmuch as the said transfer was not effected by a registered document. This plea was not raised at any stage of the litigation, presumably because Ex. B-3 was a registered document. We cannot, therefore, permit the appellants to raise the plea for the first time before us.

In this view it is not necessary to express our opinion on the question whether para (c) of s. 9-A(10) (ii) of the Act was attracted to the mortgage in question.

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

Appeal dismissed.

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