

Gujarat High Court

State Bank Of India vs Smt. Kusum Vallabhdas Thakkar on 23 January, 1991

Equivalent citations: (1994) 1 GLR 655

Author: R Mehta

Bench: R Mehta, D Karia

JUDGMENT R.A. Mehta, J.

1. The appellant-plaintiff filed a suit for specific performance of the agreement to mortgage and in the alternative for damages. The suit having been dismissed, the plaintiff-State Bank of India has preferred this appeal.

The appellant-State Bank of India had advanced a loan to one Vallabhdas L. Thakkar who was the proprietor of Nitin Pharmaceuticals factory at G.I.D.C. Vapi. The respondent-defendant is the wife of the said Vallabhdas L. Thakkar. The loan facilities aggregated Rs. 5,50,000/- This was in August, 1972.

2. On June 6, 1972, the respondent-defendant wife of the debtor Vallabhdas L. Thakkar executed the suit writing Ex. 20 which is titled "agreement to mortgage" and it recites that in consideration of the advances already made to M/s Nitin Pharmaceuticals by the State Bank of India and/ or to be made from time to time, the respondent-defendant wife of Vallabhdas L. Thakkar undertook that so long as M/s. Nitin Pharmaceuticals is indebted to the Bank, to execute by way of a collateral security a legal mortgage with or without possession at the option of the bank in favour of the bank of the immoveable property, namely, flat No. A/17, 9th floor, Ballard View, Tardev, Bombay, which belonged to her absolutely with no encumbrances or charges. She agreed to do so within 14 days of the issuance of written requisition by the bank calling upon her to execute such mortgage to secure all monies due or that may become due from M/s. Nitin Pharmaceuticals to the bank. By notice dated 17-11-1977, the appellant-plaintiff called upon the respondent-defendant to execute the mortgage as per the agreement Ex. 20. This notice is at Ex. 21 issued to her which is proved by Ex. 22. Ex. 25 is her reply refusing to execute such mortgage. The reply is dated 23-11-1977. Thereafter, Special Civil Suit No. 174 of 1978 is filed on 29-4-1978. The plaintiff examined an officer of the bank Ulhas D. Pundlik at Ex. 19 and was cross-examined by the defendant. The defendant has not led any evidence and has not examined herself.

3. The learned trial Judge dismissed the suit holding that the writing Ex. 20 is admittedly not disputed but it is without consideration and the interest of the defendant in the flat in a co-operative housing society is incapable of being transferred or mortgaged. The learned trial Judge has also held that the plaintiff has divided causes of action and the respondent's husband-debtor is not made a party to the suit and the suit is not in proper form and is bad for non-joinder of the principal debtor. The learned trial Judge also observed that the plaintiff has failed to prove that the husband had diverted the funds borrowed from the plaintiff towards the purchase of the flat benami in the name of his wife, the present defendant.

4. The learned Counsel for the appellant has challenged all these points and submitted that the suit is in proper form and is maintainable and there is no need to join the principal debtor in the present

suit and no relief is claimed against him and he is not a necessary party. It is also submitted that the plaintiff has stated in his evidence that the borrowed fund was diverted by the husband for the purchase of flat in the name of his wife and that evidence was not rebutted and the defendant has not dared to step into the witness box to state anything to the contrary. It is also submitted that the agreement Ex. 20 has been proved and it is further proved that she has refused to act according to that agreement, the trial Court should have granted the decree for specific performance. It is also submitted that a member in a co-operative housing society has attachable proprietary and transferable interest in the flat of the society and, therefore, the learned trial Judge was in error in not holding to that effect. It is also submitted that there was real consideration for the agreement and it was not bad on the ground of lack of consideration. It is submitted that the advances already made to her husband itself is a consideration for the wife to offer the security. It is also submitted that the finding of the trial Court that the agreement was without consideration is incorrect. It is also submitted that the trial Court has erred in holding that there has to be a relationship of debtor and creditor in order that a mortgage is created.

5. For holding that the suit is not in proper form and that there was non-joinder of necessary parties, the learned trial Judge has observed that if the suit is filed against the present defendant to declare the defendant as a guarantor for her husband and if it is the case of the plaintiff that the flat is benami, then her husband is necessary party in the suit and the suit should be for declaration that the flat be held to be benami and the husband should be joined as a party and the husband should be directed to execute mortgage as a real owner.

6. In the present suit, there is a limited relief claimed against the defendant only of execution of the mortgage of the flat which stands in the name of the defendant and the defendant who has agreed to give that immoveable property as mortgage is sought to be sued for specific performance thereof wherein there is no relief claimed against the husband. The husband is neither necessary nor a proper party. Here, the suit is a suit simpliciter for specific performance of the agreement. In such a suit, the husband or the principal debtor is neither necessary nor a proper party and the suit is not bad for non-joinder of party. The suit is also not for recovery of the dues from the husband. In fact, such suit was separately filed and that suit is referred to in the suit notice itself. The learned Counsel for the appellant states that the suit against the husband has been dismissed on the ground that the husband has filed insolvency proceedings. The husband could be said to be necessary party if any relief was claimed against him or if in his absence, no decree could be passed against the present defendant. In this case, no relief is claimed against husband and there is no difficulty in adjudicating the claim of the present plaintiff against the present defendant even in absence of husband who is said to be the principal debtor. Therefore, the learned trial Judge was in error in holding that the suit was bad for non-joinder of party.

7. The learned trial Judge has also held that the agreement to mortgage is not capable of specific performance and for this purpose, he has relied on the following quotation from Mulla on the Transfer of Property Act:

Agreement to mortgage :- An agreement to mortgage may in English Law amount to an equitable mortgage which can be enforced according to its terms, but no such mortgage is recognised in

Indian Law. (c) An agreement to mortgage gives rise only to a personal obligation which does not constitute either a mortgage or charge. An agreement to mortgage is not capable of specific performance for the Court will not enforce an agreement to make a loan of money whether on security or not.

However, this is incomplete statement and incomplete quotation. That paragraph from Mulla further reads as under:

(e) In *South African Territories Ltd. v. Wallington* (f) Lord Macnaghten said that specific performance of a contract to lend money cannot be enforced is so well established, 'and obviously so wholesome a rule, that it would be idle to say a word about it' The remedy for the breach of an agreement to mortgage is damages (g). The measure of damages is the interest for the time the money is likely to lie idle, plus actual expenses incurred (h). But when the lender has advanced the money either in whole or in part on an agreement to mortgage and the borrower is not willing to repay the same at once, the Court will specifically enforce the agreement (i). In the converse case of a mortgagor who has executed a mortgage, but has not been paid the full amount of the consideration, the mortgagor cannot sue for the balance, but he may sue in damages or sue to redeem.

Therefore, in an agreement to execute mortgage, if there is any promise by the creditor to advance monies on creation of such mortgage, there cannot be specific performance of the contract to lend money. But when the lender has advanced the money and the debtor has agreed to create a mortgage, that agreement is specifically enforceable. This proposition has been laid down in the case of *Meenakshi Sundara v. Rathnaswami* AIR 1919 Madras 322 and in the case of *Hukamchand Kasliwal v. Radha Kishan*. Privy Council held that the document in that case did not constitute a mortgage or a charge, but that agreement created a right to obtain another document, i.e., regular deed of mortgage. These are the observations of Privy Council although the question was not directly for consideration in that case.

8. Section 14(1) and (3) of the Specific Relief Act reads as under:

Section 14: Contracts not specifically enforceable:

(1) The following contracts cannot be specifically enforced, namely:

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the Court cannot supervise.

(3) Notwithstanding anything contained in Clause (a) or Clause (c) or Clause (d) of Sub-section (1), the Court may enforce specific performance in the following cases:

(a) where the suit is for the enforcement of a contract;

(i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once;

xxx xxx xxx Thus, there is an express provision in Sub-section 3(a)(i) of Section 14 of the Specific Relief Act that the Court can enforce specific performance where the suit is for the enforcement of contract to execute mortgage. In the case of *Jewanlal v. Nilmani Chaudhari* AIR 1928 PC 80, the Privy Council held that the suit to enforce agreement to mortgage for the amount of indebtedness was not one to compel the defendant to accept the loan but was one to obtain security for the money already advanced by the plaintiff and the specific performance was decreed. Thus, an agreement to create a mortgage is specifically enforceable and the learned trial Judge was, therefore, in error in holding to the contrary.

9. The next question that arises is whether such promise to create a mortgage, if given by a third party and not by the borrower or the principle debtor, is for consideration and is valid. The learned trial Judge has held that for creating mortgage, the mortgagor must be a debtor and must have right to redeem mortgage on payment of the debt and since the present defendant was not the debtor; she could not create a mortgage in respect of that debt and that the mortgagor should be a debtor and there must be a relationship of debtor and creditor, the mortgage being a security for the debt. The learned trial Judge has also held that there was no consideration for giving this promise of executing the mortgage. Both these aspects are interrelated. By making the promise by Ex. 20, defendant has agreed to provide collateral security of a legal mortgage to secure repayment of all the monies due from M/s. Nitin Pharmaceuticals. Thus, the defendant has promised to discharge the liability of a third person (the debtor) in case of his default. This guarantee is limited to the security offered by the promisor, namely, the mortgage and no further or personal liability is taken by the promisor. Thus, the promisor has become a surety and this would be an agreement to offer security for due performance of that promise and to that extent. Sections 126, 127 and 128 of the Contract Act read as follows:

126. A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety', the person in respect of whose default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written

127. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

128. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

The liability of the surety is co-extensive with that of the debtor. However, in the present case, the liability of the surety is as otherwise provided by the contract Exh. 20. Therefore, the liability of the defendant is as provided in the agreement and to that extent of securing dues by a creation of mortgage, no personal liability is accepted by the surety. It is, therefore, fallacious to say that the defendant is not a debtor and, therefore, the defendant could not have created a mortgage in favour of the creditor. The defendant has rendered herself liable for the dues of M/s. Nitin Pharmaceuticals by agreeing to provide security in the form of mortgage for the dues. Just as the principal debtor can create a mortgage of his immovable properties, a third person can also agree to create a mortgage so as to secure the dues of the principal debtor. In that manner, he becomes a surety to the extent of the security or the mortgage. If that were not so, the present commercial and banking transactions would not be possible and would be hampered to a great extent. In the present day world of commerce, a person may not have sufficient security to offer for obtaining advances from financial institutions even though satisfying the requirements. In such cases, he draws upon resources of others by asking them to give guarantee and also security for the performance of that guarantee and it is a perfectly legitimate and legal way of conducting such commercial transactions. In fact Chapter VIII of the Contract Act deals with indemnity and guarantee and provides for this kind of tripartite arrangement.

10. As regards consideration, it is true that no direct consideration flowed from the plaintiff to the defendant who has made the promise to create a mortgage. But in such tripartite arrangement, anything done for the benefit of the principal debtor is a sufficient consideration to the surety for giving guarantee as expressly provided in Section 127 of the Contract Act. Thus, even though there is no consideration to the third party-surety for mortgage, the consideration of having done anything for the benefit of the principal debtor is a sufficient consideration.

11. The learned trial Judge has relied on an illustration (c) to Section 127 for holding that in the present case there was no consideration. That illustration (c) reads as follows:

A sells and delivers goods to B.C. afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

This kind of illustration would apply to a total stranger and volunteer who for no consideration whatsoever, agrees to pay in default of payment by the principal debtor. Obviously, in such cases, agreement would be void for being without consideration.

12. In the present case, the consideration that anything done for the benefit of the principal debtor is a sufficient consideration to the surety. Anything done in the present case is that the loans advanced to the principal debtor who is the husband of the present defendant. She has agreed to give collateral security to secure the dues in default of payment by her husband. Apart from the close relationship of husband and wife, there is substantial consideration by having advanced the loan.

13. The contention of the defendant seems to be that the loan was already advanced and at the time of giving promise of creating the mortgage, there was no consideration whatsoever and anything done in the past for the benefit of the principal debtor is no sufficient consideration to the surety for giving guarantee or promise of security at a later date. Apart from the fact that Section 127 itself provides that "anything done" for the benefit of the principal debtor is a sufficient consideration, there is other present consideration to forbear to sue and press the recovery of loan from the principal debtor. Even though this forbearance to sue is not expressly mentioned between the parties, it is clear from the facts of the case. The advance was made in August 1972 and this agreement Exh. 20 was executed in April 1975 when the account of the principal debtor seemed to be irregular. In the cross-examination paras 7 and 8 of the cross-examination of plaintiffs witness Bank Manager Exh. 19, it is shown that the account of the principal debtor was irregular and the principal debtor (husband of the defendant) had suggested that his wife the present defendant was prepared to give 'collateral security of the flat and it is at the instance of her husband that Exh. 20 was executed.

13A. In the case of *M. Gulam Husain v. Faiyaz Ali* AIR 1940 Oudh 346, the Division Bench had an occasion to consider similar question and interpret Section 127 of the Contract Act and it was held that the word "done" in Section 127 shows that past benefit to the principal debtor can be good consideration for a bond of guarantee. In that case also, the surety bond was given subsequent to the incurring of the liability by the principal debtor and it was held that it cannot be said to be without consideration and reliance was placed on the observation of the Privy Council in the case of *Kali Charon v. Abdul Raheman* AIR 1918 PC 226 where a defence was raised by the sureties that their bond was without consideration and the Privy Council observed as follows:

This was an idle defence. There was ample consideration for the bond. Anything done or any promise made for the benefit of the member may be a sufficient consideration to a surety for giving a guarantee.

14. A reference has been made to "Chitty on Contracts-General Principles", 25th Edition, paras 176 and 177 under the heading "Forbearance to Sue" and the relevant portion reads as follows:

176. Promise to forbear:

A promise not to enforce a valid claim against a debtor or a third person may be sufficient consideration for a counter-promise by the debtor or third person (e.g. to give security for the debt or to do some other act). The consideration for the counter-promise is that by such forbearance the creditor is delayed and the debtor or third party is or may be benefited.

The promise to forbear may be made absolutely, or for a certain time or for no specified time at all. If no time is specified in the promise, the promise is construed as one to forbear for a reasonable time.

177. Actual forbearance:

A creditor, who without making any express promise, simply forbears from enforcing a debt or other claim may be held to have impliedly promised to forbear. For example, the acceptance of a cheque in payment of a debt may be evidence of a promise not to sue the debtor so long as the cheque is not dishonoured, or at least for a reasonable time.

An actual forbearance may, moreover constitute consideration even though the creditor has not made any express or implied promise to forbear.

Thus, the plaintiff not enforcing the claim against the principal debtor or even the third person may be sufficient consideration by the debtor or third person to give security for the debt and the consideration for such promise is that by such forbearance, the creditor is delayed and the debtor or third party is benefited. It is also seen that even in absence of express promise to forbear, a simple forbearance from enforcing the claim can be held to have been implied in the present case. This promise and agreement was given in 1975 and it is clear that thereafter for two years, the claim was not pressed which shows that there is actual forbearance against the principal debtor after this Ex. 20 was executed. Thus, even under the English Law, this consideration is held to be good and sufficient consideration.. Under Indian Law, which is significantly different from English Law of Contract, past consideration or the consideration towards third person is statutorily held to be good consideration as defined in Section 2(d) and as mentioned in Section 127 of the Contract Act. The observation of the learned trial Judge that as the husband of the defendant had to pay Rs. 5 lacs to the plaintiff, the writing Ex. 20 which is subsequently obtained is without consideration, is patently erroneous. In the present case, it is amply clear that the principal debtor was a defaulter in meeting his financial obligations to the bank and the bank had noticed the irregularities in his accounts and the bank could have proceeded against the principal debtor to effect recovery. At that stage, at the instance of the principal debtor-husband, wife comes forward and agrees to give collateral security obviously to secure forbearance against the principal debtor. Thus, at the desire of the promisor (defendant) the bank has abstained from enforcing its claim against the principal debtor and has forborne itself from suing the husband. Such forbearance is sufficient and valid consideration for the promise made by the defendant to agree to create mortgage and give collateral security. The learned trial Judge is in error in observing that "an act done at the desire of third party is not a consideration." It must, therefore, be held that the suit agreement Ex. 20 is for sufficient and valid consideration and is valid and enforceable.

15. The learned trial Judge has also held that the flat which is the subject-matter of agreement to mortgage is in a co-operative housing society and the member has a limited right and, therefore, the defendant cannot be said to be the full owner of the flat and she had not acquired proprietary interest therein and, therefore, the flat cannot be mortgaged without entering into the procedure of bye-laws of the society. This question is concluded by the judgment of the Supreme Court in the case of *Ramesh Shah v. H.J. Joshi*. In that case, the question was under Section 60 of the Civil Procedure Code as to whether such interest of a member could be attached and sold in execution against the allottee of a flat in a co-operative housing society. Bombay High Court held that the member did not have any attachable or transferable interest in such flat as an allottee member of the co-operative housing society. However, the Supreme Court reversed the judgment of the Bombay High Court and held that such flat is liable to attachment and sale in execution of a decree against a member in

whose favour or for whose benefit the same has been allotted by the society. The Supreme Court observed that right to occupy a flat of this type assumes significant importance and acquires under the law, a stamp of transferability in furtherance of the interest of commerce and the Supreme Court held that there is no absolute ban on the sale ability or transferability of the flat. The Supreme Court went to the extent of holding that even the right or interest of the allottee to occupy the flat is the right which is attachable in execution and can be sold. The Court held that merely because certain procedural formalities may have to be undergone, that does not render the interest of the member in such flat incapable of transfer or mortgage. Therefore, the learned trial Judge was clearly in error in holding that the defendant could not mortgage the flat.

16. In the result, none of the contentions raised by the defendant in the suit can succeed and the judgment and decree of the trial Court are required to be quashed and reversed and the suit of the appellant-plaintiff is required to be decreed.

17. The suit of the appellant-plaintiff is decreed and it is directed that the defendant do execute the legal mortgage and get it registered in respect of the property being flat No. A/I 7, 9th floor, Ballard View Co-operative Housing Society, Tardev, Bombay within a period of six months from today. If the defendant fails to execute such mortgage within that period, the trial Court shall appoint an officer of the Court to execute the same on behalf of the defendant and such officer shall execute the same on behalf of the defendant. Suit is decreed with costs and appeal is also allowed with costs.