
(1903) 10 MAD CK 0010

Madras High Court

Case No: None

Subbarow and Others

APPELLANT

Vs

Venkata Narasimhan

RESPONDENT

Date of Decision: Oct. 6, 1903

Acts Referred:

- Evidence Act, 1872 - Section 92

Citation: (1904) 14 MLJ 218

Hon'ble Judges: Subrahmaniya Aiyar, O.C.J.; Boddam, J

Bench: Full Bench

Judgement

Subrahmaniya Aiyar, Offg. C.J.

1. A usufructuary mortgage, dated the 16th May 1898, was executed in favour of one Subbarayudu who took possession of the mortgaged lands

and subsequently died. The plaintiff, who is Subbarayudu's adopted son, sues in the present suit for the recovery of the lands in dispute which

were part of the property comprised in the mortgages alleging that during his minority the first defendant took wrongful possession of the property.

The principal defence was that the mortgagor having died, the equity of redemption became vested in the first defendant and another, the

daughter's sons and heirs of the mortgagor and that the first defendant, who is entitled to a moiety of his grand-father's estate, entered into an oral

agreement with the adoptive mother and guardian of the plaintiff for a redemption of his share only and in pursuance of such agreement paid her

Us. 600, being a moiety of the mortgage amount and redeemed the lands in question, as falling to his share.

2. The District Munsif as well as the District Judge decreed possession to the plaintiff holding that the agreement set up could not be proved,

apparently on the ground that it was oral, while in their opinion, it should have been by writing registered.

3. The latter supposition is obviously wrong and the only point for determination in this case is whether the defendant is precluded from proving the

alleged agreement by the concluding part of the fourth provision to Section 92 of the Indian Evidence Act. I think he is not. No doubt, if the

agreement in question were an agreement between the parties to the mortgage or their representatives in interest within the meaning of the first

paragraph of Section 92, it could not be proved, the original transfer having been by a registered instrument while the subsequent agreement was

oral. That, however, is not the case here. Of course one party to the alleged agreement was the plaintiff who is the representative of the mortgagee,

but of the two representatives of the mortgagor, only one was party, acting merely with reference to his own interest in the property. Doubtless it

being open to the plaintiff to split the mortgage, the agreement, if true, had the result of bringing about a change in the rights of the plaintiff and the

rights of the mortgagor's representatives (inclusive of the one not party to the agreement) as they originally stood under the mortgage, inasmuch as

the plaintiff's rights would be confined to the lands retained by him while the rights of the representative of the mortgagor not party to the

agreement was merely to recover his share of the mortgaged land on payment of the proportionate share of the debt, with a right to contribution or

other remedy as against the first defendant, in case the circumstances entitled him to such. It is not agreements of this sort, however, that come

within the provision under consideration. Only those agreements come within the section, which affect the terms of the previous transaction--not

indirectly, as here, as a consequence of an independent and valid contract between some only of the parties, but directly by virtue of the consensus

of those who alone are competent to rescind or modify the original contract, viz., all the parties concerned or all their representatives.

4. The lower Courts were therefore in error in disallowing proof of the agreement. I would set aside their decrees and remand the case for

disposal according to law. Costs will abide and follow the result.

Boddam, J.

5. I agree. It is not necessary for me to restate the facts of this case as they have already been stated in the judgment of the learned acting Chief

Justice.

6. At the hearing of this appeal, the only argument raised before us was that, as the agreement sought to be proved was an executed agreement,

the exception at the end of proviso 4 to Section 92 of the Evidence Act did not apply; that it only applied to executory agreements and not to

executed agreements. The words of the proviso are perfectly clear and in my opinion apply to any agreement whether executory or executed. The

rule is stated in the first part of the proviso. The rule is that "" The existence of any distinct subsequent oral agreement to rescind or modify any such

contract, grant or disposition of property may be proved."" This applies equally to any agreement whether executed or executory. Then comes the

exception ""except in cases in which such contract "" grant or disposition of property is by law required to be in writing or has been registered

according to the law in force for the "" time being as to the registration of document."" This being an exception to the rule stated in the earlier part of

the. proviso applies also in the same way to any agreement whether executed or executory. The intention of the legislature being as it seems to me

to make an exception from the general rule that a subsequent oral agreement to rescind or modify any contract may be proved when the original

contract is of such a nature as that the law requires it to be in writing or where its execution has been followed by the formality of registration. In

such cases the only way of proving the rescission or modification of the original contract must be proof of an agreement of the like formality and not

by an oral agreement and this whether the agreement has been executed or is executory.

7. There is, however, another aspect of the case which has not been argued before us though the facts alleged on the part of the defendant clearly

raise it; and as the suit has not been heard but has been determined upon the preliminary question, whether the defence raised by the defendant can

be proved, it is right that we should deal with it.

8. The real question is whether the defendant is precluded by any provisions of law from proving the alleged oral agreement made between himself

and the plaintiff's adoptive mother and guardian whilst the plaintiff was a minor. If the agreement between the defendant and the plaintiff's adoptive

mother and guardian rescinds or modifies the original contract of mortgage, it cannot be proved because it is oral and the original contract of

mortgage is registered. If, however, it does not rescind or modify it, it can be proved as there is no provision of law to prevent it. No contract can

be rescinded or modified except by the consent of all the parties to it or their representatives, i.e., all their representatives and the section and the

4th proviso to it only applies "" as between the parties to any such instrument or their representatives in interest"" that is, necessarily all their

representatives. It is only the parties to a contract (or all their representatives) who can "" contradict, vary, add to, or subtract from, its terms "" or

who can "" rescind or modify such contract"" and it is only when the contract is to be rescinded or modified, that the proviso (and the exception to

the proviso) applies. Here the defendant does not contend that the original contract is rescinded or modified by the subsequent oral agreement

which he alleges was made between himself alone and the plaintiffs' adoptive mother and guardian, for he does not pretend that it was made

between all the representatives of the original parties to the contract but only between the representative of the mortgagee and himself and he is

only one of the representatives of the mortgagor and cannot act for and bind the other representatives of the mortgagor. The original contract

remains and is not rescinded or modified; but he says that by an oral agreement made between himself alone and the plaintiff's adoptive mother

and guardian (that is the plaintiff's representative) a new and separate agreement has been made between them whereby it has been agreed that he

should be permitted to redeem half the mortgaged property by paying off half the mortgage money and receiving back possession of half the lands

mortgaged. What he alleges is that as between himself and the plaintiff he is discharged from the contract so far as that is possible.

9. It is clear that without rescinding or modifying a contract some of the parties to the contract may agree that some one or more of the parties to

the contract may be discharged from it and Section 44 of the Contract Act provides for such a case and safeguards the rights of the other parties

to the original contract. This section provides that where two or more persons have made a joint promise, a release of one of such joint promisors

by the promisee does not discharge the other joint promisor or joint promisors neither does it free the joint promisor so released from responsibility

to the other joint promisor or joint promisors"" that is because the original contract remains and is not rescinded or modified by such a release.

10. Now unless there is some provision of law which prevents proof of an oral agreement to discharge one promisor from the contract there is no

reason that the defence set up should not be proved. The 92nd section of the Evidence Act does not apply to such a case. It only applies where

the original contract is contradicted, varied, added to or subtracted from and the proviso only applies where the original contract is rescinded or

modified and does not apply where a subsequent contract is made independent of the original contract that one party shall be discharged from it so

far as that can be done as between the parties to the subsequent contract and I know of no provision of law which prevents such a subsequent

contract being proved even though it be an oral contract only.

11. In these circumstances, as the plaintiff's suit is for trespass and to recover possession of the land which the defendant alleged has been

redeemed under the oral contract which he sets up, I agree that the decrees of the lower Courts are wrong and should be set aside and the suit

should be remanded to the Munsif's Court for hearing and disposal according to law.

12. The costs throughout should abide and follow the result.