

Sama Row Vs. Doraisami Chettiar

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Court : Chennai

Decided On : Nov-21-1912

Reported in : (1913)24MLJ266

Appellant : Sama Row

Respondent : Doraisami Chettiar

Judgement :

Miller, J.

1. In this case the mortgagor and mortgagee are divided brothers. The finding is that out of the sum of Rs. 900 and odd which appears as the sum secured by the mortgage, some Rs. 540 were debts due by the mortgagor and Rs. 400 and odd represents nothing really due by the mortgagor but is a fictitious sum arranged in order apparently to make the amount secured by the mortgage equal or more than equal to the whole of the property mortgaged, and the finding of the Subordinate Judge as I understand it, is that this was done in order that the mortgagee might hold the surplus amount for the mortgagor in order to save it from his creditors. In these circumstances it seems to me that the Subordinate Judge was certainly right in holding that the whole mortgage was voidable as against the creditors represented by the 2nd defendant in this case. The only case decided in this Court which was referred to in support of the contention that the transaction may be declared voidable only to the extent to which the amount secured by the mortgage

is found to be fictitious is a case, decided recently by Mr. Justice Sundara Aiyar, In re Jaladanki Ghinna Pitchia (1911) 2 M.W.N. 132. There as I understand the learned Judge's judgment, he did not arrive at the conclusion that between the mortgagor and the mortgagee in that case there was an arrangement whereby the fictitious sum was to be held by the mortgagee to defeat the creditors of the mortgagor. It is not clear at any rate that that was the case before him, and on that ground possibly it may be that that case may be distinguished from the present. A similar distinction on the findings of fact may perhaps be drawn between this case and Rajani Kumar Das v. Gour Kishore Saha (1908) 7 C.L.J. 586. There the learned judges say 'If the consideration for the mortgage could not be separated from each other, there would be good grounds for holding that the transfer evidenced by the deed is fraudulent. In that case the failure of consideration to the extent of Rs. 3647 taken with other proved facts would lead to a reasonable conclusion that the mortgagee intended to help the mortgagors to defeat the realisation of the debt covered by the hatchitta in favor of the 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 authorities on the point that the two parts of the consideration stated in the mortgage are separable.' It must therefore be I suppose that the learned Judges did not in that case consider that the mortgagees were shown to be, as they put it, acting in collusion. Here it will of course be perfectly clear on the finding that the two brothers were acting in collusion in order to defeat the creditors of one of them. That being so, this case comes within the principle laid down in Chidambaram Chettiar v. Sami Aiyar I.L.R. (1906) M. 6, although that case was not a case of mortgage. I am prepared to follow that case which I think proceeds on the true principle on which this question of fraudulent transfers are to be dealt with. I would therefore dismiss the appeal with costs.

Sadasiva Aiyar, J.

2. I express my entire concurrence in the judgment just now delivered except that I think that the decision in Rajani Kumar Das v. Gour Kishore Saha (1908) 7 C.L.J. 586 cannot be supported. As I understand that judgment, the learned Judges find collusion between the mortgagors and mortgagees and that the latter 'intended to

help the mortgagors to defeat 'creditors-(defts.) and yet the learned Judges think that 'the two parts of the consideration are separable.' With the greatest respect, I am clear that, on the authorities the two parts of such a single transaction are not separable and ought not to be separated in order to favor a creditor who has been guilty of fraud against his fellow-creditors. Part, at least, of the consideration for the debtor giving a mortgage security to this one dishonest creditor is presumably the help given by the latter in defrauding the other and that part cannot be separated from the remaining part. The correct principles have been in my opinion discussed and laid down after full discussion in *Hokum Lal v. Mooshahar Saha* I.L.R. (1907) C. 999 and the observations in that judgment are fully in accordance with the decision in *Chidambaram Chettiar v. Sami Aiyar* I.L.R. (1906) M. 6 and are not in accordance with the decision in *Rajani Kumar Das v. Kishore Saha* I.L.R. (1907) C. 999. I agree that the second appeal must be dismissed with costs.

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