

A. Sabhapathi Mudaliar Vs. Rajarathna Mudaliar and ors.

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Court : Chennai

Decided On : Oct-16-1940

Reported in : AIR1941Mad495

Appellant : A. Sabhapathi Mudaliar

Respondent : Rajarathna Mudaliar and ors.

Judgement :

Wadsworth, J.

1. This civil miscellaneous appeal is preferred against a decision under Section 19 of Madras Act, 4 of 1938. We have been asked to treat the appeal as a civil revision petition and it has been heard on that footing. The appellant will pay the deficient court-fee. The petitioner (appellant) sought to scale down the decree on a mortgage (EX. A) dated 27th June 1933. This mortgage was the result of a long series of prior transactions. Firstly, there were three successive promissory notes executed by the petitioner's father Arunachalam, who is still living, in favour of the father of respondents 1 and 2. Then in 1919 the debt was split into two promissory notes (Exs. C and C-1) executed by the same Arunachalam, one in favour of respondent 1 and the other in favour of respondent 2, the respondents' family being undivided. In July 1920 there was a partition in the debtor's family between the petitioner and his father Arunachalam. And in 1921 the father Arunachalam executed a mortgage (EX. E) in discharge of both the promissory notes (Exs. C

and C-1), the mortgagees being the two promisees (respondents 1 and 2). This mortgage covered 64.79 acres, apparently including the property which had fallen to the share of the son (petitioner) in the partition. It is said that owing to the fact that the document of partition was unregistered, the son attested the mortgage executed by his father. Then in 1933 we have the suit mortgage deed (Ex. A) executed by the son alone in favour of the same mortgagees and binding only 28.79 acres said to be the share of the son. This mortgage discharges Ex. E and the father Arunachalam is thus exonerated from liability. In the suit on Ex. A it was held that the present petitioner was estopped from denying his liability under the previous mortgage (Ex. E) and consequently that Ex. A was binding on the petitioner's sons as having been in discharge of an antecedent debt. It is now contended that because the petitioner has been held to have been under a liability in respect of Ex. E, his own mortgage (EX. A) which discharged Ex. E must be treated as a renewal for the purpose of the explanation to Section 8 of Madras Act, 4 of 1988. It seems to us that this is carrying the theory of renewal of liability too far.

2. It would appear that the son's property was bound by the mortgage Ex. E, but it was not bound as the property of the son. The son permitted his property to be mortgaged by his father and it was, at any rate, in form a mortgage by the father of the father's property. Although it was held that the son was estopped from disputing the liability of his property under this mortgage by reason of his attestation of the mortgage, it seems to us to be going too far to say that the fresh mortgage executed by the son alone binding only his own property and discharging his father's mortgage is merely a renewal of the son's own liability. In, form Ex. A is an entirely new contract superseding the previous mortgage by a different person. The father and son were divided, and it is only by reason of an estoppel that the son is in any way connected with the previous transaction. We have held that in order to constitute either a renewal or an inclusion within a fresh document for the purpose of the explanation to Section 8, the debtor must be substantially the same. We do not consider that this criterion is satisfied in the present case and we are of opinion that there is a complete novatio which cannot be treated either as a renewal or an inclusion in a fresh document by the same debtor. It follows that the decision of the lower Court is correct. The further

question whether the earlier promissory notes can be said to be in favour of the same creditor becomes purely academic. But we may say that in our opinion the matter is covered by our previous decision reported in *Varadarajan Pillai v. Krishnamurthi Pillai*) A.I.R. 28 1941 Mad. 321. In the result therefore the appeal treated as a civil revision petition is dismissed with costs.

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