
(1911) 11 BOM CK 0019
In the Bombay High Court
Case No : Second Appeal No. 769 of 1910

Abdul Kayam Amadajibhai

APPELLANT

Vs

Bahadur Vithoba

RESPONDENT

Date of Decision : 13-11-1911

Acts Referred:

Contract Act, 1872 — Section 62
Registration Act, 1908 — Section 49

Citation : (1912) 14 BOMLR 26 : 13 Ind. Cas. 858

Hon'ble Judges : Russell, J;Chandavarkar, J

Bench : Division Bench

Judgement

Russell, J.—This case raises a novel point. The present suit was brought on two money bonds for Rs. 200 each said to have been passed by the defendants to the plaintiff on the 7th April 1905. Later, however, a mortgage-bond dated the 3rd July 1905 was executed for Rs. 2,500 by which it appears arrangements were made to extinguish the bonds now sued on and for other considerations mentioned. It appears, however, that the plaintiff did not register the mortgage-deed, and the question put shortly which has been raised is : Can the plaintiff rely upon these two antecedent promissory notes having regard to this subsequent deed of mortgage ?

2. Both the lower Courts have held that he cannot. But it appears to us that they have overlooked what is the real point in the case.

3. Mr. Rele for the respondents first of all relied upon the doctrine of novation. "Novation" is defined in Section 62 of the Contract Act, which of course binds us, as follows:—"If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed".

4. Now what is the definition of " contract"? " Contract" is defined in Section 2 of the Contract Act, Clause (h) thus :—" An agreement enforceable by law is a contract." We read that as meaning " enforceable by law " for all the purposes contained therein. Therefore an agreement only partly enforceable does not

come within this. That being so the question arises: Is this mortgage-deed a contract within the meaning of Section 2 of the Contract Act 1 In our opinion it is not, because it does not come within the definition. It is not a contract enforceable by law. It is a document, having regard to the terms of the Registration Act, Section 49, which the Court cannot look at so as to charge the property comprised in it. This is the view taken in *Nundo Kishore v. Musst Ramsookhee* ILR (1879) Cal. 215. It is true that the mortgage-deed includes an express waiver of the old debt but that was on the assumption that the contract in the mortgage-deed would be one which was enforceable in law in all respects. Further there would be no consideration for the waiver of the plaintiff's rights under the former notes if he did not obtain a contract fully enforceable by law. The plaintiff cannot be said to be taking advantage of his own wrong by not having registered the deed as it was really within the power of the defendant to have done so.

5. If, however, the case does not depend the doctrine of novation, it depends, it is contended, upon the doctrine of "merger". But it appears that the respondents' contention on the point also cannot be upheld. "Merger" is thus defined in the *Encyclopaedia of the Laws of England*, p. 193, Vol. 9: "Merger is the destruction or "drowning" by operation of law of the less in the greater of two estates coming together and vesting without any intervening estate in one and the same person in the same right". Then it cites (2 Black. Corn. 177):- "Whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated, or in the law phrase is said to be merged, that is, sunk or drowned in the greater".

6. But here, as we have endeavoured to point out, there is no "greater estate," because the only document we have by which the greater estate could be said to be created is the document which this Court is not for all purposes entitled to look at. Therefore, no novation or merger applies.

7. For these reasons, the decree of the Court below must be reversed and the case remanded for trial on the merits.

8. Costs to be costs in the cause.