
(1912) 07 MAD CK 0006
In the Madras High Court

Habib Mahomed Marakayar

APPELLANT

Vs

Muthu Velan and Others

RESPONDENT

Date of Decision : 25-07-1912

Acts Referred:

Citation : 16 Ind. Cas. 439

Hon'ble Judges : Sundara Aiyar, J;Sadasiva Aiyar, J

Bench : Division Bench

Judgement

1. The 3rd defendant's defence to the suit was that the mortgage in favour of the 1st defendant and the sub-mortgage in plaintiff's favour were both fraudulent and colourable. The plaintiff's mortgage was found to be a bona fide document, supported by consideration. The document in favour of the 1st defendant was found to be supported by consideration to the extent of Rs. 125. In the course of the suit a witness for the 3rd defendant observed that the mortgage bond in the 1st defendant's favour had been tampered with by a portion of the document being cut out. On this, the 3rd defendant suggested that there must have been an endorsement in the portion cut out, either that the document was colourable, or that it has never been acted on or that it had been discharged. He subsequently examined the 5th witness to prove that the endorsement was one of discharge, but this witness has been disbelieved by the lower Courts. No attempt seems to have been made to amend the written statement or to frame a definite issue on the question, whether the bond had been discharged. The plaintiff had closed his case before the 3rd defendant made his discovery. The Appellate Court has acted really on the presumption of discharge drawn from the spoliation of the document, which, it considers,

must have been the act of the 1st defendant, combined with the fact that the bond was, according to him, found in the possession of the executant, Thambusawmy Velan. If a bond is found to be in the possession of the ottidar, and no satisfactory account is given as to how it went back to his possession, a Court would be entitled to draw the presumption of discharge. But still the presumption is liable to be rebutted. As there was no issue as to discharge, and the plaintiff had opportunity of adducing evidence on the question, we think the proper course in this case is to reverse the decrees of both Courts and to allow the 3rd defendant to amend his written statement by putting in a plea of discharge. An issue will be framed on the question after the amendment is made. The plaintiff will be at liberty to raise any further question arising from the plea of discharge. The defence second witness ought to have been re-called and an attempt made to get at the truth of the matter, if possible. The case will be disposed of afresh according to law. The costs in this. Court and in the lower Appellate Court incurred up to now will abide the result.