(1931) 10 MAD CK 0025

In the Madras High Court

Muthukumaraswami Mudaliar APPELLANT

Vs

Govinda Padayachi and Others RESPONDENT

Date of Decision : 08-10-1931

Acts Referred:
Evidence Act, 1872 — Section 92

Citation : AIR 1933 Mad 218 : 137 Ind. Cas. 285 : (1932) 35 LW 145

Hon'ble Judges : Jackson, J

Bench : Division Bench

Judgement

Jackson, J.—Defendants 1 and 2 and two persons Kesavan and Mottayya Samban mortgaged to Ammani Mudali: (1) defendant 1''s items

1 to 4; (2) defendant 2''s item 5, and (3) the holding of Kesavan and Mottayya Samban.

2. Plantiff has bought the Kesavan Mottayya Samban holding.

3. Ammani Mudali''s assignee filed O. S. No. 173 of 1929, and obtained the decree Ex. F. When it was executed, plaintiff paid off the whole

mortgage debt. He now sues for contribution by virtue of Section 82, T. P. Act.

4. Defendant 2 remains ex parte. Defendant 1 pleads that in the original mortgage by an oral agreement he was only a surety and it was agreed

with the mortgagee that his property would not be liable to contribution.

5. The lower appellate Court has upheld this plea and hence the appeal.

6. When the terms of the mortgage contract were reduced as required by law to writing it is difficult to see how an oral agreement varying those

terms can be admitted in evidence. No proviso to Section 92, Evidence Act, saves what, in fact runs directly counter to its main provision. It is

hardly necessary to fortify this proposition by case law, but Krishna Chandra

Barman v. Sanat Kumar Das [1917]44 Cal. 162 is directly in point.

Also Narasimma v. Ramasami [1913] 18 I.C. 696.

7. The respondent relies upon Mulchand v. Madho Bam [1888] 10 All. 421 and its affirmation in Shamsh-ul-Jahan Beegum v. Ahmad Wali Khan

[1903]25 All.337. It is there ruled that Section 92 only applies to the parties to the instrument who are ranged on opposite sides, like vendor and

vendee, or mortgagor and mortgagee, and any exclusion of evidence varying the contractual relations between the several vendees or mortgagors

in a document would have the deplorable effect of diminishing the work of the Courts. I do not think that this distinction between the two sides can

be read into the section. If the mortgagors have undertaken certain obligations, as for instance, that the severally owned items of the hypotheca

shall be rateably liable, one mortgagor can no more sot up an oral agreement against his fellow mortgagor, for the purpose of varying the terms of

the document than he could as against his mortgagee. But in the present case the oral agreement set up is one between mortgagee and mortgagor.

The definite plea is that although defendant came into the document as an ordinary mortgagor he agreed with the mortgagee that he would bo in

fact only a surety: see D. W. 1. Even Mulchand v. Madho Ram [1888]10 All.421 will not cover these circumstances.

8. The next question is whether, supposing oral agreement can be proved, plaintiff is bound by it. The learned District Judge has been careful to

confine his finding to the existence of a contract to the contrary within the meaning of Section 82, viz., a contract between mortgagor and

mortgagee. Of course if there is such a contract provable plaintiff must be bound by it. It is as though the document in terms said that the debt must

first be satisfied against the Kesavan Mottayyan Samban holding with no rateable liability upon the other items.

9. But the argument in this Court proceeded rather as though the agreement was between the mortgagors themselves, irrespective of the mortgagee.

It is not suggested that mortgagors by themselves could alter the rateable liability under the document, otherwise ''contract to the contrary"" might

mean contract between mortgagors, and that is not so: Ramabhadrachar v. Srinivasa Aygangar [1901]24 Mad.85. But it is suggested that

mortgagors can come to an agreement by themselves that they will not bo rateably bound, and that agreement may run with the land. That would

be a distinct subsequent oral agreement under proviso 4 and would have to be in writing; and as in the present case there is nothing in writing it is

only academic to discuss whether such agreement if it had been in writing would run with the land. But it may be observed that Ramabhadrachar v.

Srinivasa Ayyangar [1901] 24 Mad. 85 is clear authority that it would not.

10. The respondent relies upon Veerabhadra Pillai Vs. (Kadambi) Ramunaja Aiyangar and Others, a complicated case which for present purpose

may be reduced to its simplest terms.

11. A and B mortgage their several properties to Z. A and B contract between themselves that A''s property shall not bo rateably liable, when A

sells it to D. C buys B''s equity of redemption. Z brings C''s property to sale. Can C demand rateable contribution from A or his vendee D u/s 82,

T. P. Act.

12. I should be inclined to hold that he can. The contract to the contrary in Section 82 is not a subsequent contract between mortgagors, and if

mortgagors are pleased to distribute their liabilities amongst themselves, that is their personal contract, which does not run with the land. If D feels

aggrieved when C comes down upon him for rateable distribution his remedy is against B and A, his vendors who made this personal contract. In

Veerabhadra Pillai Vs. (Kadambi) Ramunaja Aiyangar and Others, defendant 1''s remedy lay against his vendors defendants 2 and 3 and

Veeraraghavachari who had guaranteed in Ex. 6 that his liability u/s 82, T. P. Act, would be limited to a fixed amount.

13. But as I observe this is merely academic. There is no written contract between the mortgagors and the alleged oral agreement between the

mortgagor and mortgagee cannot be admitted in evidence.

14. The appeal is allowed, and the decree of the District Munsif is restored with costs throughout.