APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

1891. October 1. 1892. February 23.

KANAGAPPA (PLAINTIFF), APPELLANT,

v.

SOKKALINGA AND OTHERS (DEFENDANTS, NOS. 1 TO 4), RESPONDENTS.*

Civil Procedure Code, s. 559—Parties—Joinder of respondents on appeal—Collusive discharge by one of two creditors—Mortgage.

In 1877 the plaintiff executed a deed of hypothecation to one of two partners to secure a loan obtained from them jointly. In 1881 the plaintiff sold *inter alia*, the hypothecated property to defendants Nos. 2 to 4 and it was arranged that the secured debt should be paid off by the vendees. They failed to do this, but in 1882 they executed a mortgage for the amount due in favour of the other of the two partners, and he thereupon gave a written discharge to the plaintiff, who was found to have been acting in collusion with him to the disadvantage of his partner, the holder of the hypothecation bond. The latter brought a suit in 1885 upon the hypothecation bond and obtained a personal decree against the present plaintiff who was *ex parte*, the amount of the decree being declared to be charged on the land in the possession of defendants Nos. 2 to 4. Meanwhile, defendant No. 1, who was the assignee of the mortgage of 1882, had obtained a decree upon it against defendant No. 4. This decree not having been executed, he subsequently sued upon the mortgage again and obtained a decree against defendants Nos. 2 to 4. The plaintiff now sued to have the last mentioned decree set aside and recover the balance of the purchase-money from defendants Nos. 2 to 4. The Court of First Instance passed a decree for the amount claimed and declared it to be charged on the land. Defendant No. 1 preferred an appeal in which defendants Nos. 2 to 4 were joined by the Court of First Appeal. The decree of this Court dismissed the suit:

Held, (1) that defendants Nos. 2 to 4 were rightly joined as respondents by the Court under Civil Procedure Code, s. 559.

(2) that plaintiff, having allowed a decree to be passed against him *ex parte* in the suit of the holder of the hypothecation bond, and having obtained a collusive discharge from the other partner, was not entitled to recover against the defendants.

SECOND APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in appeal suit No. 499 of 1889, reversing the decree of S. Dorasami Ayyar, District Munsif of Tiruturaipundi, in original suit No. 34 of 1887.

In October 1877, the plaintiff borrowed Rs. 500 from a firm of traders consisting of Venkatasami Pillai and Ramasami Dik-

* Second Appeal No. 1090 of 1890.

shitar and hypothecated certain land to the latter to secure the loan. The hypothecation deed was filed as exhibit D. In June 1881, the plaintiff sold the hypothecated land, together with other land to defendants Nos. 2 to 4 for Rs. 700, of which Rs. 570 was arranged to be paid by them to Ramasami Dikshitar in satisfaction of the secured debt. This arrangement was not carried out. In November 1882, Venkatasami Pillai, who was the plaintiff's father-in-law, obtained from defendant No. 4 a mortgage (which was attested by the plaintiff) on the land in question to secure Rs. 671-2-0, being the sum payable under the arrangement above referred to. This mortgage was filed as exhibit A. On the same day, Venkatasami Pillai gave the plaintiff a document which was filed as exhibit B, stating that the hypothecation of 1877 was discharged by the mortgage of 1882. At the date of the last mentioned transactions, there had been a disagreement between Venkatasami Pillai and his partner, and the Subordinate Judge held that they were the result of collusion between the plaintiff and his father-in-law.

The mortgage of 1882 was subsequently assigned by Venkatasami Pillai to his brother-in-law, defendant No. 1, who brought a suit upon it (original suit No. 53 of 1885 on the file of the Subordinate Court of Negapatam) and obtained a decree against defendant No. 4 who paid the money into Court, where however it was ordered to be "detained," because a claim by Ramasami Dikshitar was apprehended.

Ramasami Dikshitar then brought a suit in the Court of the District Munsif of Tiruturaipundi (original suit No. 295 of 1885) on the hypothecation bond of 1877 against the present plaintiff, defendants Nos. 2 to 4, and another who had purchased some of the land from them. Neither Venkatasami Pillai nor defendant No. 1 was joined as a party. The present plaintiff was *ex parte*. The District Munsif passed a decree as prayed against the present plaintiff personally and against the land.

Defendant No. 1 next brought original suit No. 56 of 1886 in the same Court against defendants Nos. 2 to 4 on the mortgage of 1882 and obtained a decree.

The present suit was brought against defendants Nos. 1 to 4 to set aside the last mentioned decree and to recover from defendants Nos. 2 to 4 Rs. 1,000, being Rs. 671-2-0, the unpaid balance

KANAGAPPA v. SOKKALINGA.

of the purchase money due in respect of the transactions of 1881-2 together with interest.

The District Munsif refused to set aside the decree, but passed a decree for Rs. 671-2-0, the amount secured by exhibit A and interest at 6 per cent. "recoverable on the charge of the immovable property mentioned in the plaint." Against this decree defendant No. 1 preferred an appeal, to which defendants Nos. 2 to 4 were not parties till they were made so under Civil Procedure Code, s. 559, by the Subordinate Judge who then passed a decree, dismissing the suit. The plaintiff preferred this second appeal.

Pattabhirama Ayyar for appellant.

Bhashyam Ayyangar for respondents.

WILKINSON, J.—Two questions have been raised for determination in this appeal. The first question is whether the Subordinate Judge rightly exercised the discretion vested in him by section 559 of the Civil Procedure Code by adding the defendants Nos. 2 to 4 and making them respondents in the appeal presented by the first defendant. The other question is whether the Subordinate Judge was right in holding that plaintiff must look to Vencatasami alone for relief. With reference to the first question, I think that defendants Nos. 2 to 4 were rightly added as respondents for there can be no doubt that defendants Nos. 2 to 4 were interested in the result of the appeal presented by the first defendant and that they were likely to be affected by the result of the suit. The suit was instituted to obtain a declaration that the transfer of a certain mortgage executed by the fourth defendant to one Venkatasami Pillai and the decree obtained thereon by first defendant against defendants Nos. 2 to 4 in original suit No. 56 of 1886 were not binding on the plaintiff, and to recover from defendants Nos. 2 to 4 and on the security of the property sold to them the sum of Rs. 1,000. The District Munsif, though he found that the prayer to set aside the decree in original suit No. 56 of 1886 was just and proper, gave the plaintiff a decree of Rs. 671-2-0 against defendants Nos. 2 to 4, and directed that, in default of payment within six months, the property conveyed to them by plaintiff should be sold. This very property had been mortgaged to Venkatasami Pillai; and first defendant, his assignee, had, in original suit No. 56 of 1886, obtained a decree against defendants Nos. 2 to 4 for Rs. 671-2-0, the property mortgaged being rendered liable for his claim. It is evident

that defendants Nos. 2 to 4, although they had not appealed against the decree, were deeply interested in the questions which had to be determined and that the decision would affect their interests very materially. The fact that an appeal by them was time-barred does not affect the question, because the discretionary power conferred on the Appellate Court is not limited by any provision of the Limitation Act (*Manickya Moyee* v. *Boroda Prosad Mookerjee*(1)).

With reference to the second question also, I think that the decision of the Subordinate Judge was right and that, after having been a party to exhibit A, and having accepted from Venkatasami the discharge (exhibit B) of his debt to Ramasami Dikshitar, plaintiff cannot now be allowed to repudiate these transactions and to recover from defendants Nos. 2 to 4 the amount of the debt due to Ramasami Dikshitar which they originally undertook to pay. It may be that Ramasami Dikshitar has, in execution of the decree, obtained, in original suit No. 295 of 1885, recovered from plaintiff the sum originally lent to him with interest, but plaintiff allowed that suit to be heard *ex parte* instead of applying to have Venkatasmi Pillai and first defendant added as parties and pleading discharge and non-liability. Plaintiff cannot rely on the allegation that exhibit A was got up fraudulently, for he was a party to the fraud, if any, and accepted from Venkatasami Pillai, the partner of Ramasami Dikshitar, a full discharge of the bond executed by him to Ramasami Dikshitar. Venkatasami Pillai, being his father-in-law, plaintiff must have been aware of the value of the discharge granted by Venkatasami Pillai, and no reason is assigned why he omitted to plead this discharge in defence in original suit No. 295. I concur with the Subordinate Judge in thinking that plaintiff cannot recover against the present defendants and would dismiss the second appeal with costs.

MUTTUSAMI AYYAR, J.—I agree.

---

(1) I.L.R., 9 Cal., 355.