RAMASAMI CHETTI v. ALAGIRISAMI CHETTI.

he admits that the first and second defendants are jointly entitled to possession with him. In this view the cases relied on in the Courts below, *Parbati Churn Deb* v. *Ain-ud-deen* (1) and *Koer Hasmat Rai* v. *Sunder Das* (2) are inapplicable. [The judgment then dealt at length with the other issues in the case and findings were called for.]

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Boddam.

1903. September 17. October 6.

GOSETI SUBBA ROW AND OTHERS (DEFENDANTS), APPELLANTS,

v.

VARIGONDA NARASIMHAM (PLAINTIFF), RESPONDENT.*

Evidence Act—I of 1872, s. 92 (proviso 4)—Agreement in writing registered—Oral evidence of discharge—Admissibility.

An usufructuary mortgage deed was executed in favour of S, who took possession of the mortgaged land. The deed was registered. S died, and his adopted son brought the present suit to recover a portion of the land so mortgaged, alleging that, during his minority, the first defendant had taken wrongful possession of the property. The first defendant was the heir of the mortgagor. His defence was that the equity of redemption had become vested in himself and another as the heirs of the deceased mortgagor; that he, as a person thus entitled to a moiety of the estate, had entered into an oral agreement with plaintiff's adoptive mother and guardian for the redemption of his share only, and that, in pursuance of that agreement, he had paid her a moiety of the mortgage amount, and redeemed the lands in question as falling to his share:

Held, that he was not precluded by section 92 (proviso 4) of the Evidence Act from proving this oral agreement.

SUIT for land. The facts material to the decision were stated in the judgment of the Officiating Chief Justice as follows:—"An usufructuary mortgage dated the 16th May 1898 was executed in favour of one Subbarayudu, who took possession of the mortgaged lands and subsequently died. The plaintiff, who is Subbarayudu's

(1) I.L.R., 7 Calc., 577. (2) I.L.R., 11 Calc., 396.

* Second Appeal No. 189 of 1902, presented against the decree of M. D. Bell, District Judge of Vizagapatam, in Appeal Suit No. 78 of 1901, presented against the decree of C. Bappayya Pantulu District Munsif of Vizagapatam, in Original Suit No. 387 of 1900.

adopted son, sues in the present suit for the recovery of the lands in dispute, which were part of the property comprised in the mortgage, alleging that, during his minority, the first defendant took wrongful possession of the property. The principal defence was that the mortgagor having died, the equity of redemption became vested in the first defendant and another, the daughter's sons and heirs of the mortgagor, and that the first defendant being entitled to a moiety of his grandfather's estate, entered into an oral agreement with the adoptive mother and guardian of the plaintiff for a redemption of his share only and in pursuance of such agreement paid her Rs. 600, being a moiety of the mortgage amount and redeemed the lands in question as falling to his share."

The District Munsif held that the agreement could not be proved. He decreed in plaintiff's favour. The District Judge upheld that decision on appeal.

Defendants preferred this second appeal.

P. S. Sivaswami Ayyar and *V. Ramesam* for appellants.

T. Venkatasubba Ayyar and *Narayana Sastri* for respondent.

Sir S. SUBRAHMANIA AYYAR, OFFG. C.J. [after stating the facts as above].—The District Munsif, as well as the District Judge, decreed possession to the plaintiff, holding that the agreement set up could not be proved, apparently on the ground that it was oral, while, in their opinion, it should have been by writing registered.

The latter supposition is obviously wrong and the only point for determination in this case is whether the defendant is precluded from proving the alleged agreement by the concluding part of the fourth proviso to section 92 of the Indian Evidence Act. I think he is not. No doubt if the agreement in question were an agreement between the parties to the mortgage or their representatives in interest within the meaning of the first paragraph of section 92, it could not be proved, the original transfer having been by a registered instrument while the subsequent agreement was oral. That, however, is not the case here. Of course, one party to the alleged agreement was the plaintiff, who is the representative of the mortgagee, but of the two representatives of the mortgagor, only one was party, acting merely with reference to his own interest in the property. Doubtless, it being open to the plaintiff to split the mortgage, the agreement,

GOSETI SUBBA ROW v. VARIGONDA NARASIMHAM.

if true, had the result of bringing about a change in the rights of the plaintiff and the rights of the mortgagor's representatives (inclusive of the one not party to the agreement) as they originally stood under the mortgage, inasmuch as the plaintiff's rights would be confined to the lands retained by him, while the rights of the representative of the mortgagor not party to the agreement was merely to recover his share of the mortgaged land on payment of the proportionate share of the debt, with a right to contribution or other remedy as against the first defendant, in case the circumstances entitled him to such.

It is not agreements of this sort however that come within the provision under consideration. Only those agreements come within the section which affect the terms of the previous transaction, not indirectly, as here, as a consequence of an independent and valid contract between some only of the parties, but directly by virtue of the consensus of those who alone are competent to rescind or modify the original contract, viz., all the parties concerned or all their representatives.

The lower Courts were therefore in error in disallowing proof of the agreement. I would set aside their decree and remand the case for disposal according to law.

BODDAM, J.—I agree.

It is not necessary for me to re-state the facts of this case as they have already been stated in the judgment of the learned Officiating Chief Justice.

At the hearing of this appeal, the only argument raised before us was that as the agreement sought to be proved was an executed agreement, the exception at the end of proviso 4 to section 92 of the Evidence Act did not apply; that it only applied to executory agreements and not to executed agreements.

The words of the proviso are perfectly clear and in my opinion apply to *any* agreement whether executory or executed. The rule is stated in the first part of the proviso. The rule is that "the existence of *any* distinct subsequent oral agreement to rescind or modify any such contract grant or disposition of property may be proved." This applies equally to any agreement whether executed or executory. Then comes the exception "except in cases in which such contract grant or disposition of property is by law required to be in writing or has been registered according

to the law in force for the time being as to the registration of documents." This being an exception to the rules stated in the earlier part of the proviso applies also in the same way to *any* agreement whether executed or executory, the intention of the legislature being, as it seems to me, to make an exception from the general rule that a subsequent oral agreement to rescind or modify any contract may be proved when the original contract is of such a nature as that the law requires it to be in writing or where its execution has been followed by the formality of registration. In such cases the only way of proving the rescission or modification of the original contract must be by proof of an agreement of the like formality and not by an oral agreement and this whether the agreement has been executed or is executory.

There is however another aspect of the case which has not been argued before us, though the facts alleged on the part of the defendant clearly raise it and, as the suit has not been heard but has been determined upon the preliminary question whether the defence raised by the defendant can be proved, it is right that we should deal with it.

The real question is whether the defendant is precluded by any provision of law from proving the alleged oral agreement made between himself and the plaintiff's adoptive mother and guardian whilst the plaintiff was a minor.

If the agreement between the defendant and the plaintiff's adoptive mother and guardian rescinds or modifies the original contract of mortgage, it cannot be proved because it is oral and the original contract of mortgage is registered. If, however, it does not rescind or modify it, it can be proved as there is no provision of law to prevent it. No contract can be rescinded or modified except by the consent of all the parties to it or their representatives, *i.e.*, all their representatives and the section and the fourth proviso to it only applies "as between the parties to any such instrument or their representatives in interest," that is necessarily all their representives. It is only the parties to a contract (or all their representatives) who can "contradict, vary, add to, or subtract from, its terms" or who can "rescind or modify such contract," and it is only when the contract is to be rescinded or modified, that the proviso (and the exception to the proviso) applies. Here the defendant does not contend that the original contract is rescinded or modified by the subsequent oral agreement

GOSETI SUBBA ROW v. VABIGONDA NARASIMHAM.

which he alleges was made between himself alone and the plaintiff's adoptive mother and guardian, for he does not pretend that it was made between all the representatives of the original parties to the contract but only between the representatives of the mortgagee and himself and he is only one of the representatives of the mortgagor and cannot act for and bind the other representatives of the mortgagor. The original contract remains and is not rescinded or modified; but he says that by an oral agreement made between himself alone and the plaintiff's adoptive mother and guardian (that is the plaintiff's representative) a new and separate agreement has been made between them whereby it has been agreed that he should be permitted to redeem half the mortgaged property by paying off half the mortgage money and receiving back possession of half the lands mortgaged. What he alleges is that as between himself and the plaintiff he is discharged from the contract so far as that is possible.

It is clear that without rescinding or modifying a contract some of the parties to the contract may agree that some one or more of the parties to the contract may be discharged from it and section 44 of the Contract Act provides for such a case and safeguards the rights of the other parties to the original contract. This section provides that "where two or more persons have made a joint promise a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors," that is, because the original contract remains and is not rescinded or modified by such a release.

Now, unless there is some provision of law which prevents proof of an oral agreement to discharge one promisor from the contract there is no reason that the defence set up should not be proved. The 92nd section of the Evidence Act does not apply to such a case. It only applies where the original contract is contradicted, varied, added to, or subtracted from and the proviso only applies where the original contract is rescinded or modified and does not apply where a subsequent contract is made independent of the original contract that one party shall be discharged from it so far as that can be done as between the parties to the subsequent contract and I know of no provision of law which prevents such a subsequent contract being proved even though it be an oral contract only.

In these circumstances as the plaintiff's suit is for trespass and to recover possession of the land which the defendant alleges has been redeemed under the oral contract which he sets up, I agree that the decrees of the lower Courts are wrong and should be set aside and the suit should be remanded to the Munsif's Court for hearing and disposal according to law.

The costs throughout should abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

MEPPATT KUNHAMAD (DEFENDANT), APPELLANT,

1903. January 23.

v.

CHATHU NAIR (PLAINTIFF), RESPONDENT.*

Malabar law—Revenue Recovery Act—(Madras) Act II of 1864, s. 32—Purchaser of land at Revenue sale—Liability to pay tenant for improvements before obtaining possession.

Where a kanom was granted for Rs. 5, the jenmi agreeing to pay the tenant the value of his improvements, and it was not alleged that the rent reserved was lower than the usual rent for such land, and the object of the lease was to bring waste land into cultivation:

Held, that, having regard to the small amount of the kanom, the transaction must be regarded as in substance a lease; and the engagement made by the jenmi to pay the tenant the value of his improvements was binding on the Collector under section 32 of (Madras) Act II of 1864. A purchaser of the land at a revenue sale was therefore bound to pay compensation to the tenant for improvements before he could obtain possession.

SUIT for possession of land. Plaintiff bought the land at a sale for arrears of revenue. The land was held by defendant on a kanom from the defaulter. The question was whether plaintiff was entitled to possession of the land without payment of compensation for improvements to the tenant under Act I of 1900. The kanom was filed as exhibit I and was in the following terms:—"Kanom deed executed, etc., ... I have hereby, this day, granted to you

---

* Second Appeal No. 1039 of 1901, presented against the decree of N. S. Brodie, District Judge of North Malabar, in Appeal Suit No. 241 of 1900, presented against the decree of A. Annasawmi Ayyar, District Munsif of Badagara, in Original Suit No. 551 of 1899.