

Judge so far as it gives and relief against the appellants is discharged, and the suit as against them must be dismissed with costs throughout.

WHITE, C.J.,
AND
ABDUR
RAHIM, J.

ABDUL
KHADER
v.
CHIDAM-
BARAM
CHETTIYAR

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Pinhey.

SRINIVASASWAMI AIYANGAR (DEFENDANT), APPELLANT,

v.

ATHMARAMA AIYAR (PLAINTIFF), RESPONDENT.*

1908
October 21.
November
25.

Evidence Act, I of 1872. s. 92 (4).—Evidence of oral agreement to rescind or of subsequent conduct inadmissible—Mortgagee, right of usufructory, to sue for part of mortgaged property.

Section 92 (4) of the Evidence Act precludes evidence of an oral agreement to rescind a registered contract or of subsequent conduct of parties to show that such contract was treated as non-existent.

An usufructory mortgagee may sue for possession of only a part of the properties mortgaged.

SECOND APPEALS against the decrees of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit Nos. 942 and 943 of 1906, respectively, presented against the decree of P. Aiyasami Mudaliar, District Munsif of Tiruvadi, in Original Suit No. 105 of 1905.

Suit to recover possession of the plaint land with mesne profits. The plaint alleged that the plaint land originally belonged to Madusami Govinda Rao Suriavamsi; that he usufructuarly mortgaged the plaint land and other lands to one Amba Boi Ammal for Rs. 65,000 on 14th September 1895 and received Rs. 65,535-8-11; that Amba Boi Ammal leased the plaint land and other lands and enjoyed the kar produce of 1895, that Madusami Govinda Rao trespassed upon the lands in March 1896, that the plaintiff got a decree against Amba Boi Ammal in Original Suit No. 610 of 1896, in the District Munsif's Court of Tanjore, and in execution purchased her usufructuary mortgage right on 26th September 1900 and took delivery of the property on 9th December 1903, that the defendant obstructed and applied

* Second Appeal Nos. 1440 and 1441 of 1907.

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The defendant pleaded that Amba Boi Ammal did not pay any money on the mortgage and never enjoyed the lands, that the plaintiff cannot split the mortgage; that he was not entitled to claim a charge on the property for a portion of the amount paid; that the decree in Original Suit No. 610 of 1896 was obtained fraudulently; that he purchased the plaint land from Madusami Govinda Rao on 30th November 1896 and was enjoying the land ever since, and that the mesne profits claimed are excessive.

The District Munsif found that only Rs. 6,500 was paid to the mortgagor and that by the subsequent conduct of the parties, the mortgage was treated as cancelled. He dismissed the suit.

On appeal his judgment was reversed, and plaintiff obtained a decree for possession.

The defendant appealed to the High Court.

T. Rangachariar for appellant.

G. S. Ramachandra Ayyar for respondent.

JUDGMENT.—We think the decree of the District Judge are right. The contention that the mortgage to Amba Boi never came into force is clearly unsustainable. The mortgage is evidence by a registered mortgage deed, and possession passed thereunder to Amba Boi. There is no provision in the deed that the mortgage should come into operation only on the payment of the whole sum of Rs. ₹5,000, which Amba Boi agreed to advance. The further contention that the mortgage, even if it did come into operation, no longer subsists must also fail. The registered mortgage deed has not been cancelled by any registered instrument, and evidence of any oral agreement to rescind it is shut out by section 92 (4) of the Evidence Act. The conduct of the parties as shown by exhibits B and II is relied upon as showing that they considered the mortgage was at an end. In other words an agreement to consider the mortgage at an end is sought to be inferred from exhibits B and II. Proof of such an agreement is equally shut out by section 92 (4) of the Evidence Act—*vide Mayandi Chetti v. Oliver* (1). Then it is said that the circumstances justified the mortgagor in cancelling the mortgage and that he did in fact cancel it—section 39 of the Contract Act is relied

upon. It is unnecessary to consider whether section 9 of the Contract Act would apply to a case like the present in view of the findings of the District Judge that the defendants did not make out either that the mortgagor repudiated the mortgage or would have been justified in doing so. The finding that there was no repudiation of the mortgage is attacked on the ground that the District Judge drew an adverse inference from the fact that the mortgagor was not examined, though the mortgagor was in fact dead. Even if the District Judge had not fallen into this error, his finding would clearly have been the same, as he bases it on the ground of insufficiency of proof, and the finding that the evidence is not sufficient is correct in law. On the question of estoppel we also think that the District Judge is right. There remains only one other contention to be noticed. The lands which the plaintiff in each of these suits is seeking to recover are only portions of the property, mortgaged to Amba Boi, and it is contended that the plaintiff is trying to split the mortgage. This, however, is not so. Amba Boi remained in possession of the mortgaged property for some time and then lost possession. She was entitled to sue to recover the whole of the property which under the terms of the mortgage she was entitled to enjoy in lieu of interest for 15 years. But she was not bound to sue for possession of the whole or any part of the property, and if she chose to be content with possession of a portion and to sue for that portion no one could compel her to sue for more than she wanted, though, of course, her action would in no way affect the liability of the whole of the property comprised in the mortgage for the money advanced by her under the mortgage. The plaintiff stands in the shoes of Amba Boi. The appeals fail and are dismissed with costs.

MUNRO AND
PINNEY, JJ.
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