PRIVY COUNCIL*

1920, April 26.

VYRAVAN CHETTI AND OTHERS (DEFENDANTS),

v.

SUBRAMANIAN CHETTI AND OTHERS (PLAINTIFFS).

[On appeal from the High Court of Judicature at Madras.]

Registration Act (III of 1877), ss. 17, 49—Agreement between first and second mortgagees of the same property to share equally money realized from their mortgages—Suit by one of them to recover money realized by the other—Agreement also affecting the mortgaged property.

The appellants were the first mortgagees of certain immoveable property, and the respondents held a second mortgage of the same property; and they came to an agreement "that both parties should as regards rights, stand in the same position without claiming prior or subsequent rights, and divide and appropriate in equal halves, as per terms mentioned herein, whatever amount may be realized on the date of realization." The agreement was found to be made for valuable consideration. The appellants having realized part of the estate, the respondents sued them in order to obtain their share of the proceeds to which they claimed to be entitled by virtue of the agreement. An objection was raised by the appellants that the agreement required registration, and not being registered could not be used as evidence.

Held, on the construction of the agreement, that if the whole effect of the agreement was to provide merely that the realized money was to be divided in equal shares, there was nothing to require it to be registered and if on the other hand there were two distinct provisions, the one relating to rights of property, and the other with regard to the division of the money realized, then as the proceedings in the suit related merely to the question of the realized money, the agreement need not be registered for the purpose of being given in evidence in this suit, although it might require registration in a suit relating to the regulation of the rights against the estate itself.

APPEAL No. 96 of 1919 from a judgment and decree (28th November 1917) of the High Court at Madras, which reversed a judgment and decree (30th August 1916) of the Temporary Subordinate Judge of Rāmnād.

The suit giving rise to this appeal was instituted by the respondents against the appellants for Rs. 23,576, due under an agreement, dated 14th March 1907, and they asked for a personal decree. The appellants and respondents were

* *Present*:—Lord BUCKMASTER, Lord DUNEDIN, Sir JOHN EDGE, and Mr. AMEER ALI.

mortgagees of the same property, the appellants having the prior mortgage, and the respondents a second mortgage. The respondents having already advanced to the mortgagors Rs. 10,000 agreed to advance a further sum (to be secured on the same property) and to pay thereout Rs. 39,000 in discharge of a mortgage of 27th August 1901. On 14th March 1907 this was done, the sum due to the appellants being thereby reduced to Rs. 57,000 (of which Rs. 1,100 was only secured by a promissory note) and that due to the respondents increased to a like sum. These transactions were recited in the agreement then executed by the appellants and respondents, and clauses (3) and (4) provided as follows :—

"(3) In respect of the (total) sum of Rs. 1,15,000 and subsequent interest due to both parties under documents as per particulars aforesaid from the two persons, Udayanasami Tevan Avargal and Sundara Nachiar Avargal (mortgagors) mentioned therein, both parties should, as regards rights stand in the same position without claiming prior or subsequent rights, and divide and appropriate in equal halves as per terms mentioned herein, whatever amount may be realized, on the date of realization. If the amount realized on the same date happens to be paid on subsequent dates, it should be received after calculating interest thereon at the current (account) rate obtaining among the people of our community in Madras.

"(4) In respect of the enjoyment on lease of Thiruvattiyur village at a rent of Rs. 2,000 per fasli which alone (out of the villages) got on lease in the name of Vyravan Chetti, of the other part from Sundara Nachiar Avargal was taken possession of, both parties are to credit in each fasli towards the debt, in equal halves, the rent amount from the current fasli 1316 at the rate of Rs. 625 which is deemed at present to belong to the one-fourth share of Sundara Nachiar Avargal out of the said amount."

The suit was brought on 29th November 1915. The written statement of defence admitted the execution of the agreement but pleaded that it was unenforceable as not being properly stamped and registered, and that the claim was excessive. A question as to the consideration for the agreement was raised by the appellants before the Subordinate Judge, but was overruled, as was an objection as to the stamp, but the want of consideration was not raised on the appeal to the High Court.

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The Subordinate Judge was of opinion that the agreement required registration under section 17 of the Registration Act and that it was accordingly invalid. He dismissed the suit but without costs.

From that decree an appeal was preferred by the respondents to the High Court and was heard by Sir JOHN WALLIS, C.J., and SADASIVA AYYAR, J., who differed in opinion on the question of registration. The Chief Justice held that the agreement did not require registration. After citing clause (3) of the agreement he said—

"This last stipulation makes it clear, I think, that the agreement was only intended to operate on sums realized by either party as they were realized, and not to affect the right of realization. The document goes on to provide that the amounts realized under certain leases should be divided in the same manner, and it is in respect of this realization that the suit is brought. The document does not, in my opinion, give either of the parties a right to sue on the mortgages or leases executed in favour of the other, or to set up this agreement as affecting their respective priorities in a suit by either of them on their respective mortgages, which would of course affect immoveable properties. It was, I think, intended merely as an agreement that whatever was realized should be equally divided. In this view I do not think it was a document requiring registration under section 17."

SADASIVA AYYAR, J., was of opinion that even if the document came in some respects, as he was of opinion it did, within section 17 of the Registration Act, it was admissible in evidence for the purpose of the present suit. There was nothing, he said to prevent the plaintiffs from using it in evidence of the personal covenant to divide the realizations equally when and as realized.

The appeal was accordingly allowed, and the suit was remanded to the Subordinate Judge to try the questions relating to the amount due under the agreement, and to the interest chargeable. Against the order of remand the present appeal was brought to His Majesty in Council.

ON THIS APPEAL

DeGruyther, K. C. and *B. Dubé* for the appellants.

Sir Erle Richards, K. C. and *Kenworthy Brown* for the respondents.

The JUDGMENT of their Lordships was delivered by Lord BUCKMASTER.—Their Lordships think it unnecessary to trouble Counsel for the respondents in this case.

The appellants are the first mortgagees of certain property. The respondents hold a second mortgage upon the same estates. It is unnecessary to determine the circumstances under which those mortgages arose, or the history of the title of the mortgagor. It is sufficient to say that on 14th March 1907, an agreement was entered into between the first mortgagees and the second mortgagees which has given rise to the present dispute. The effect of that agreement was to put the first and the second incumbrances on a relative position of equality with regard to the security. The appellants having realized part of the estate, the respondents instituted the proceedings out of which this appeal has arisen for the purpose of obtaining their share of the proceeds to which they claimed to be entitled by virtue of the agreement. The answer that was raised was, first, that the agreement required registration, and not having been registered could not be given in evidence; and, secondly, that in any circumstances no consideration had even been given by which the agreement could be supported. With regard to the question of consideration it is sufficient to say that the learned Judge before whom the case was first heard found that there was consideration from the fact that contemporaneously with the execution of this agreement there had been an arrangement made by which the defendants had profited by loans that the plaintiffs had made to the extent of Rs. 42,000, and the question was not further raised in the High Court. The point therefore is not open to the appellants; but if it were, their Lordships think there was abundant evidence to support the conclusion of the Subordinate Judge.

The real question, therefore, which now arises is whether or no the agreement of 14th March 1907, required to be registered for the purpose of enabling it to be given in evidence upon these proceedings. That depends entirely upon the consideration of clause (3) of the agreement. Clause (3) of the agreement, after referring to the total amount of rupees that is owing to both the mortgagees and stating that interest is due to the first and second mortgagees under the documents, provides

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that their rights shall be arranged in the following way, that "both parties should, as regards rights, stand in the same position without claiming prior or subsequent rights, and divide and appropriate in equal halves, as per terms mentioned herein, whatever amount may be realized, on the date of realization." The clause is open to two interpretations. It may be that the provision that the rights, both prior and subsequent, should stand on the footing of equality, is explained and limited by the following words, which state that the amounts of realization shall be divided and appropriated in equal halves, or it may mean that two separate and distinct results are effected by the clause: first, that the rights should stand on a footing of equality; and, secondly, that the proceeds should be equally divided. Whichever interpretation is taken there is no objection to the lack of registration in such proceedings as those out of which this appeal has arisen, for, if the whole effect of the agreement is to provide merely that the realized money is to be divided in equal shares, then there is nothing in this agreement which requires to be registered, and if, on the other hand, there are two distinct provisions, the one relating to rights of property and the other with regard to the division of the realization moneys then, as these proceedings relate merely to the question of the realized money, it need not be registered for the purpose of being given in evidence in this suit, although it may be that it would require to be registered for the purpose of being given in evidence in a suit relating to the regulation of the rights against the estate itself.

For these reasons their Lordships think that the judgment of the High Court was quite right, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellants :—*Henry S. L. Polak.*

Solicitor for the respondents :—*Douglas Grant.*

J.V.W.