APPELLATE CIVIL.

Before Mr. Justice Srinivasa Ayyangar and Mr. Justice Jackson.

1927, November 11.

KONDURU DASARATHARAMA REDDI AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

INDOOR NARASA REDDI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Joint Hindu family—Release by manager of a portion of a mortgage debt due to the family for no consideration—Release whether binding on minor members of the family—Right of the family to recover the amount released on foot of the mortgage.

The manager of a joint Hindu family has no right to waive or give up a substantial portion of a mortgage debt due to the family, merely out of charity to, or sympathy with, the mortgagors, and such waiver is not binding on the minor members of the family and therefore on the family as a whole; a suit on the mortgage is maintainable by the manager and the other members for the recovery of the amount given up, by the sale of the property remaining in the hands of the mortgagors or their alienees whose alienations were not made for the discharge of the mortgage.

SECOND APPEAL against the decree of the District Court of Nellore in Appeal Suit No. 27 of 1927, preferred against the decree of the Court of the Temporary Subordinate Judge of Nellore in O.S. No. 41 of 1915.

The material facts appear from the judgment.

S. Varadachari and *K. S. Champakesa Ayyangar* for appellants.

T. V. Muthukrishna Ayyar for sixteenth respondent.

* Second Appeal No. 1872 of 1926.

The JUDGMENT of the Court was delivered by

SRINIVASA AYYANGAR, J.—It is to be regretted that having regard to the points that finally emerged and were argued in this second appeal on behalf of the appellants, the only parties interested, namely, defendants-respondents 1 and 2 should not have been represented before us and we should have had to hear this second appeal practically *ex parte*. We are however obliged to Mr. T. V. Muthukrishna Ayyar, the learned vakil, who appeared for the 16th respondent for his having as *amicus curiae* placed before us the arguments on behalf of those parties.

We have come to the conclusion that the appeal should be allowed and that, the dismissal of the plaintiffs' suit being set aside, a decree should be passed in favour of the plaintiffs-appellants with regard to part of their claim.

The plaintiffs' suit was on a mortgage for the sale of the mortgage securities. The facts either as admitted or as finally established are these: The mortgage was jointly in favour of the plaintiffs' family called in these proceedings the Kondur family and the family of defendants 3 to 16 called the Bezwada family. The family of defendants 1 and 2 were the mortgagors. About July 1903 the family of defendants 1 and 2 having become reduced in circumstances, executed in favour of the Kondur family of the plaintiffs and the Bezwada family certain sale deeds. The mortgage amount having been advanced by both the mortgagee families and those families being entitled to proportionate shares in the amount under the deed of mortgage, no question arises in this case with regard to the amount due to the Bezwada family, because it is admitted that the amount due to them had been paid off and discharged. We are therefore only concerned with the amount due to the Kondur family of the plaintiffs. The finding of both

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the Courts below was clearly to the effect that the 1st plaintiff did accept the sale-deed, Exhibit G-1 in the case, in full satisfaction and discharge of the mortgage. Mr. Varadachari, the learned vakil for the appellants, did not wish to contest that finding. His argument was merely to the effect that the amount due to the plaintiff's family at that time was considerably over Rs. 5,000 and that Exhibit G-1 was merely a deed of conveyance in favour of the plaintiff's family of property worth Rs. 3,000, that the 1st plaintiff was not in law entitled to grant a discharge to the mortgagors accepting only a portion of the amount due and waiving the balance, because though as a waiver it might be binding personally against the 1st plaintiff, still as the two other members of the family at that time were minors, it was beyond the power of the manager to waive such a large amount without any consideration whatever and that therefore the members of the family who were minors at the time were now entitled to seek to recover such balance from the mortgaged properties or such of them as have not been validly disposed of.

It was not argued that the manager of the *joint* family has no right to settle accounts or in the course of such settlement of account to grant any reductions and accept a smaller account in full discharge. But it was maintained that it must appear as a *bona fide* settlement of account and not be a case of mere giving up a valid and substantial claim.

It was not also argued that if the 1st plantiff had merely accepted the sale and conveyance of certain properties without fixing or estimating the value in full satisfaction and discharge of the mortgage debt it would still be open to the plaintiffs to question the same apart from any question of fraud. But the contention that was advanced was that in a case where we find that the

property of which a conveyance is accepted is agreed and estimated to be of certain value, there is no question at all of something being accepted in lieu of entire debt and the position would only be the same as in the case of a payment of an amount equal to the value towards the debt.

The question therefore merely resolves itself into whether the manager of a joint family can validly give up a valuable claim of the family and extinguish it without any return or consideration. There can be no doubt that if in such a case a defence should have been put forward and proved such as that the mortgage securities were insufficient to pay the entire mortgage debt, that there were no other properties of the mortgagor and that therefore the acceptance of an absolute conveyance of some of the items of the mortgage security could be regarded as a prudent transaction, there cannot possibly be any question of mere waiver, nor could there be any such question if in respect of the agreement to waive there had been valuable consideration alleged and proved, such as even an agreement on the part of the other creditors similarly to reduce their claims, provided of course that such reduction by other creditors could be regarded in the circumstances as enuring in some manner for the benefit of the mortgagees. But unfortunately, and we say unfortunately, because we cannot help suspecting that having regard to the circumstances it might have been possible to make good some such plea, no attempt has been made in this case to allege or prove any such consideration.

We must therefore regard the case as a simple case of the manager of the family waiving or giving up a sum of about Rs. 1,500 due to the family merely out of charity to or sympathy with the mortgagors who had become reduced in circumstances.

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From the very statement of the question it would seem to follow that no such waiver or giving up by the manager could be regarded as binding on the minor members of a family and therefore on the family as a whole.

The lower Courts were therefore clearly wrong in holding that the act of the first plaintiff as manager was binding on the other members of the family who were minors.

The lower Appellate Court also came to the conclusion with reference to the sixth issue that the plaintiff's suit was barred by the law of limitation. The learned District Judge held that there was no acknowledgment of liability in the deed of sale executed in favour of the plaintiffs Exhibit G-1. He was clearly wrong in that conclusion. In that sale deed the debt due by the mortgagors is clearly referred to and acknowledged and it is towards such debt the sale deed is alleged to be taken. We must therefore hold that apart from other contentions the document contains a sufficient acknowledgment of liability so as to give rise to a fresh starting point for limitation. That was in July 1903 and the plaint was put into Court within twelve years thereof, namely, in January 1915. If therefore the lower Courts were wrong in dismissing the plaintiff's action altogether, the next question for consideration is in respect of what properties the plaintiffs are entitled to a decree.

It may be observed that the main object of the plaintiffs' suit appears to have been to obtain a decree in respect of certain properties sold by the family of defendants 1 and 2 to the fifth defendant and sold by him in turn to the seventeenth defendant and by him again to the eighteenth and other defendants. These deeds of sale were impeached by the plaintiffs to be

merely benami and it is on that basis that the plaintiffs have prayed for a decree against those items of property.

The most curious feature in this case is that the fifth and seventeenth defendants have admitted that the sales in respect of those items were as alleged by the plaintiffs benami. But the eighteenth defendant has repudiated the allegation and it has been found by the lower Courts that so far as the eighteenth defendant is concerned the properties of which he obtained a sale of were not purchased by him benami for the family of defendants 1 and 2. That finding has not been questioned before us. It therefore follows that even though the plaintiffs may be entitled to decree for the amount they cannot have such a decree in respect of any of the properties covered by the sale deed to the eighteenth defendant or obtained from or through him by any of the other defendants. But what was argued on behalf of the appellants was that having regard to the admitted—by benami sales in favour of the fifth and seventeenth defendants, if they are still in possession of any of the properties covered by the suit deed of mortgage, a decree would have to be passed in respect of such items and also against such of the mortgage items as may still be in possession of defendants 1 and 2.

We may observe in this connexion that the case on behalf of the real contesting defendant, namely, the eighteenth defendant was that the plaintiff's suit was a collusive action for the purpose of recovering for the family of defendants 1 and 2 fraudulently the items in the hands of eighteenth defendant and the alienees from him. Having regard to the pleadings in this case there appears to be considerable basis for such a contention. But the attack against the eighteenth defendant having now been abandoned before us by the learned vakil for

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the appellants, it would almost seem that the remedy now asked for in respect of the other properties is one for which the plaintiffs never seriously cared, but it may be that such a remedy is now applied for not for purposes of the actual enforcement of any rights but merely to save the face of the plaintiffs'. We have however nothing to do with such considerations. As the plaintiffs want such a decree they would be entitled to one. The appeal must therefore be allowed and the decree of the lower Courts dismissing the plaintiffs' action must be reversed and set aside. Instead there will be a decree in favour of the plaintiffs, the usual mortgage decree for the amount claimed in the plaint with further interest on the principal amount till the date fixed for redemption. Time for redemption six months from the date on which the preliminary decree is finally passed as hereinafter provided. The decree will only be against the items of property included in the deed of mortgage and at present, if any, in the hands of defendants 1, 2, 5 and 17 or in the hands of any alienees from defendants 1 and 2 under any alienations not made for the discharge of the suit mortgage. As these items however have not been ascertained, the case will have to be remitted to the Court of First Instance for ascertaining those items and on such ascertainment a preliminary mortgage decree for sale will be passed in favour of the plaintiffs in respect of these items. There will be no personal decree. The plaintiffs, appellants, will be entitled to add their costs throughout and recover the same from the properties in respect of which a decree is to be passed. There will be no personal decree in respect of costs. The appellants should pay the respondents in this second appeal who have appeared, their costs—one set.

K.R.