

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Stone.

MINOR MUNUSWAMI MUDALIAR AND TWO OTHERS
(PLAINTIFFS), APPELLANTS,

1934,
September 13.

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GOVINDARAJA CHETTIAR AND ANOTHER (DEPENDANTS
4 AND 5), RESPONDENTS.*

Release—Oral—Part of mortgaged property by mortgagee in favour of intending purchaser who is a stranger to the mortgage—Validity of—Admissibility in evidence of such oral release—Indian Evidence Act (I of 1872), sec. 92 (4)—Indian Registration Act (XVI of 1908), sec. 17 (2) (xi).

An oral release of a part of the mortgaged property by a mortgagee in favour of an intending purchaser, who is a stranger to the mortgage, is valid.

Semle: It may be that this result cannot be arrived at if the agreement of release is after the purchase, for, in such a case, the purchaser would be a representative of the mortgagor.

APPEAL against the decree of the Court of the Subordinate Judge of Chingleput, dated 4th February 1928, in Original Suit No. 46 of 1925.

N. Muthuswami Ayyar and *N. S. Sundaram* for first appellant.

P. S. Ramaswami Ayyar for *P. S. Ramaswami Ayyangar* for second and third appellants.

T. M. Krishnaswami Ayyar for respondents.

The JUDGMENT of the Court was delivered by RAMESAM J.—The facts out of which this appeal arises are as follows:—The first defendant executed a deed of mortgage (Exhibit A), dated 30th October 1913, for Rs. 3,515 and odd in favour of

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Subbaraya Mudaliar and Ekambara Mudaliar. The two mortgagees afterwards died, each leaving a minor son. The mortgagor afterwards sold half of the mortgaged property to the fourth defendant under Exhibit I, dated 27th March 1916. The amount of consideration for sale was paid to the mortgagees. The suit is now brought for the balance due on the mortgage. But the property sold under Exhibit I is also sought to be sold along with the other property. The fourth defendant in his statement pleaded that some time before the sale he and the first defendant went to the sons of the original mortgagees, who were at that time minors represented by mothers as their guardians, and offered to pay them half the mortgage amount then due to them in consideration of their accepting it in full satisfaction of their claim against the properties intended to be purchased by him. The mortgagees agreed not to proceed against the property sold if the consideration was duly paid to them. Accordingly, the property was purchased under Exhibit I and the consideration amount was paid to the mortgagees. A receipt was also taken which is Exhibit II, dated 7th November 1916. The fourth defendant therefore contended that the property purchased by him under Exhibit I had been released from the mortgage.

In the Court below a question arose as to whether Exhibit II was admissible in evidence. The learned Subordinate Judge who tried the case held that it was admissible under section 17(2) (xi) of the Registration Act and therefore dismissed the plaintiff's suit so far as the property purchased under Exhibit I is concerned. He gave a decree against the rest of the property. The

plaintiff appeals seeking to make the property purchased by the fourth defendant also liable.

In so far as Exhibit II is a receipt, no doubt it is admissible in evidence. But there are certain parts of the document which show that it is something more than a mere receipt. It says :

“Rs. 1,900 has been received by us, we have released only the lands purchased by you from our mortgage deed.”

In so far as this portion of it is concerned, it is also a release and, from this point of view, the document is not admissible in evidence. But apart from Exhibit II we have got the oral evidence of defendants' first and second witnesses. According to defendants' second witness, some time before the sale deed the purchaser and the first defendant, with the help of an intermediary, Thangavelu, went to the mortgagees and the mortgagees promised them to release half of the property if the purchaser paid the price into the hands of the mortgagees. The payment was to be made partly in discharge of the mortgage amount and Rs. 625 in discharge of another unsecured debt due by the mortgagor to the mortgagees. We think this evidence shows that there was a binding contract between the parties, the effect of the contract being that, if the purchaser paid down the amount to the mortgagees, they should give him a release. Afterwards, when the amount was paid, the mortgagees accepted the amount and at the time of the acceptance they did not show by their conduct that they wished to resile or go behind the contract already made. The only meaning that could be attributed to the acceptance of the amount is that they thereby released the property from the mortgage. If

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according to law the release of a part of the mortgaged property from the mortgage requires to be in writing and registered, then this will not be enough. But if this is enough to amount to a complete release, we do not see any reason why the conduct of the mortgagees does not amount to a complete release. It has been held by KRISHNAN J in Second Appeal No. 797 of 1921 that there is no law in India whereby a release of mortgage should be in writing and registered. If there is a contract of release between a mortgagor and a mortgagee, it may be that under section 92 (4) of the Evidence Act it should be in writing, and then it should also be registered under the Registration Act. But where the contract to release is not between a mortgagor and a mortgagee but between a mortgagee and a stranger as in this case, neither the Transfer of Property Act nor the Evidence Act applies, but the decision of KRISHNAN J. applies; that is, there may be an oral lease of the property purchased from the mortgagee. It may be that this result cannot be arrived at if the agreement of release is after the purchase, for, in such a case, the purchaser would be a representative of the mortgagor. But in the present case the contract to release half of the property was prior to Exhibit I. In such a case there is no legal difficulty in the way of holding that there can be an oral release of part of the mortgaged property. Accordingly, we hold that in this case with the acceptance of the purchase-money there is a complete release under Exhibit I and the plaintiff is not entitled to seek a decree for sale as against the property sold. The appeal is therefore dismissed with costs. As the first appellant is a

minor, he will not be personally liable but only his estate will be liable.

The lower Court disallowed costs to defendants 4 and 5. In the view we have taken we do not see any reason why they should be deprived of their costs. The memorandum of objections is allowed but there will be no order as to costs on the memorandum of objections.

G.R.

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APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice King.*

KOTTAPALLI LAKSHMINARAYANA, MINOR BY MOTHER
AND GUARDIAN RAJALAKSHMAMMA (SECOND RESPONDENT),
APPELLANT,

1934,
September 20.

v.

KANUPARTI HANUMANTHA RAO (SECOND PETITIONER),
RESPONDENT.*

Hindu Law—Joint family—Father—Surety debt of—Son's liability for—Guarantee "for confidence" or "for honesty"—Guarantee that a judgment-debtor will file an insolvency petition, if a—Son's liability in case of.

A Hindu father executed a surety bond undertaking that a judgment-debtor would file an insolvency petition within a specified period. The insolvency petition was not filed and the father died. On a question arising whether his sons were liable on that bond,

held that the guarantee that the judgment-debtor would file an insolvency petition was a guarantee "for confidence" or "for honesty" and that the sons were not liable on the bond.

APPEAL under Clause 15 of the Letters Patent against the judgment and order of PAKENHAM WALSH J., dated 31st March 1933 and made in

* Letters Patent Appeal No. 72 of 1933.