

Alwar Naidu and another - - - - - *Appellants*

v.

Kothandapani Naidu and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 19TH JULY, 1927.

Present at the Hearing :

VISCOUNT DUNEDIN.

LORD SHAW.

LORD SINHA.

SIR JOHN WALLIS.

[*Delivered by* SIR JOHN WALLIS.]

In this case either the plaintiffs are suing to recover a mortgage debt already discharged, or the defendants are setting up a false case of discharge, relying on the fact that the mortgage deed has come into their possession and purports to bear an endorsement of discharge by the plaintiffs' father, who had admittedly lent money to the first defendant and taken a mortgage bond in the name of his son, the second plaintiff. The Subordinate Judge of Trichinopoly found on a full consideration of the evidence that the plaintiffs' case was true and the defence totally false, while the learned Judges of the High Court held that the possession of the document bearing an endorsement of discharge threw heavily on the plaintiffs the onus of proving that the document was stolen from them and the endorsement forged, and that they had failed to discharge it. The respondents were not represented at the hearing of this appeal, and their Lordships unfortunately have not had the advantage of hearing counsel on their behalf. They have, however, very carefully considered the evidence, and have come to the conclusion that the Subordinate Judge was right in finding in favour of the plaintiffs.

On the 1st August, 1916, the first defendant (who was the father of the second and third defendants), for the consideration recited in the deed executed a mortgage bond in favour of the second plaintiff, making the mortgage debt repayable on or before the 31st August, 1918. At the same time he deposited with the plaintiffs the title deeds of the mortgaged property, which are still in possession of the plaintiffs, and the fact that he did not get them back at the time of the alleged discharge when, his case is, the document itself was returned to him, in their Lordships' opinion considerably weakens the presumption in his favour arising from the possession of the mortgage document. The first defendant, no doubt, endeavoured to explain this on the ground that the plaintiffs' father insisted on retaining them until payment of a promissory note for Rs. 500, by which according to the endorsement alleged to be forged, the balance of the mortgage debt was discharged. He also endeavoured unsuccessfully to show that some of the deeds had been returned to him. Apart, however, from the question of onus, their Lordships are satisfied that the defendants' story of discharge is false. In coming to this conclusion they have necessarily disregarded the finding of the learned Subordinate Judge, based on comparisons of handwriting, that the Tamil endorsement of discharge on the mortgage deed was not in the handwriting of the plaintiffs' father, inasmuch as the learned Judges of the High Court do not accept this conclusion, and the question is one as to which necessarily their Lordships are not in a position to form any opinion of their own.

The mortgage deed (Ex. 1) contains two admittedly genuine endorsements of payment of interest 1(b) and 1(c) of the 6th and 7th September, 1916, which are not in the first defendant's handwriting, but signed by him according to the usual practice, thus affording a fresh starting point for limitation. These endorsements are said to be in the writing of the second plaintiff. On the other hand, the next six endorsements of payments of principal and interest, on which the first defendant relies, are all in his own writing, as well as signed by him, and could therefore have been made by him at any time after obtaining possession surreptitiously of the deed.

The plaintiffs' father, who is alleged to have made the endorsement of discharge on the deed on the 10th May, 1917, died on the 21st June, 1917, and the plaintiffs' case is that they first missed the mortgage deed in the following September. There is the evidence of their relation, Mr. Sadagopa Naidu, then a Subordinate Judge, who was examined on commission but was not cross-examined, owing to the defendants not having taken the necessary steps, that the plaintiffs informed him of the loss and asked his advice; and Ex. G series shows that, in pursuance, they say, with his advice, at the end of October, 1917, they endeavoured to publish

a notice of the loss in the "Trichinopoly District Gazette," but that their application was returned as not in accordance with the rules.

We have next certain notices of the 29th November and 28th December, 1917, and the 3rd March, 1918, which are alleged to have been sent by the first plaintiff to the first defendant, warning him not to make any payment of principal or interest except upon the joint receipt of himself and his younger brother, the second plaintiff. These notices, it is said, were sent by registered post; and the two first were returned as the addressee could not be found, while there is a postal acknowledgment by the first defendant of a letter from the first plaintiff, said to relate to the third notice. The learned Judges have criticised the plaintiffs' evidence as to the sending of these notices, but, as they do not mention the loss of the deed—according to the first plaintiff's evidence the omission was deliberate—they really throw very little light on the case.

The mortgage debt, as already stated, was repayable by the 30th August, 1918, and it was not until a year later, on the 25th August, 1919, that the plaintiffs instituted the present suit. As observed by the Subordinate Judge, it cannot be said that there was anything unusual in such delay. On the other hand, it is certainly unusual to find a mortgagee paying off a mortgage little more than nine months after the execution of the deed, and more than fifteen months before the date fixed for repayment. The plaintiffs' explanation is that, as the fictitious payment was alleged to have been made to their father, it was necessary to fix on some date before his death on 21st June, 1917. To meet this case the plaintiffs endeavoured to prove that before the 21st May the first defendant had been disabled by paralysis and was not in a position to make the endorsement. The learned Judges have not accepted this evidence in view of his having subsequently made a fatiguing pilgrimage, but the point is immaterial because, in their Lordships' opinion, the first defendant's conduct and evidence shows that his story is false.

Under the Code the plaintiffs were required to file the mortgage sued on with the plaint, and, as they were unable to do so, they filed a copy of the mortgage from the Registrar's Office, stating that they did so because the original was lost.

In his written statement of the 4th November, 1919, the first defendant pleaded in paragraph 5, "There having arisen a necessity for this defendant to discharge the suit bond and redeem the suit properties mentioned therein even some time prior to the due period fixed in the suit bond . . . this defendant collected the amount in several ways, paid it to the plaintiffs' father, completely discharged the suit bond, and got the suit bond with the said person's indorsement; further, the said bond was given in support of an agreement which this defendant had to execute

in favour of another party even at that time. I am ready to produce it through summons at the time of hearing." On the same day he put in a supplemental statement: "The discharged suit bond is with Pulivalam Sandaram Pillai. I have executed an agreement in his favour on a stamp paper. I have given that bond as a title deed. That Sundaram Pillai is at Pulivalam. I do not know his father's name."

It appears from an affidavit (Ex. J) filed by the first plaintiff on the 29th January, 1920, that P. Sandaram Pillai was summoned to produce the document in Court on the 2nd December, 1919, and that he did not come himself, but sent the document by one Gopalswami Nayudu, by whom it was lodged in Court. According to the plaintiffs the production by the first defendant of the mortgage deed and the reliance placed upon it made it apparent how the deed had disappeared. Their elder brother Namberumal was admittedly on bad terms with his father, and had been expelled from the family house and disinherited by his father because he was guilty, or suspected to be guilty, of an intrigue with his step-mother, the father's second wife. His own wife remained in the house under his father's protection, and after the father's death he was frequently at the house, and it is suggested by the plaintiffs that the abstraction of the document and its delivery to the first defendant were due to the enmity of the elder brother. Having regard to the extremely unsatisfactory nature of the evidence for the defence, this appears to be not unlikely.

In the first defendant's evidence we find nothing about the necessity of discharging the bond before it was due, which was mentioned in his written statement. He merely says he paid it more than fifteen months before it was due because his creditor asked him to do so, which is very unconvincing. In cross-examination he says he had not filed his accounts, and that the payments in discharge of the mortgage were not entered in them. He had, however, received receipts for these payments, which were not produced. He says he borrowed the Rs. 2,000 from Sandaram Pillai on the security of the returned mortgage deed (Ex. 1), and executed a promissory note and an agreement relating to his house, which was item 1 in the mortgage deed (Ex. 1). If this was true, Sandaram Pillai should not only have been able to speak to the advance of Rs. 2,000 which was paid in discharge of the suit mortgage, but also to the fact of the mortgage deed having been handed over by the plaintiffs' father before he died to the first defendant. However, he was not called, or apparently even summoned, and the first defendant only called three witnesses besides himself. One of these, who spoke to a part payment of Rs. 1,000 in his presence, and to the handwriting of plaintiffs' father, appears to have been opposed to the plaintiffs in litigation, and his evidence is not entitled to any weight. In default of Sandaram the first defendant only called Abdul Rahiman, a cartman, who would appear to have been in his service, to speak to the alleged discharge. The only remaining witness was called to rebut the plaintiffs'

case that the plaintiffs' father was suffering from paralysis and unable to transact business at the date of his death. Whether he was or not in their Lordships' opinion, is immaterial. They agree with the finding of the learned Subordinate Judge that the case of discharge set up by the defendants is false, and they will accordingly humbly advise His Majesty that this appeal be allowed and the suit decreed with costs in the Courts below and before this Board.

In the Privy Council.

ALWAR NAIDU AND ANOTHER

v.

KOTHANDAPANI NAIDU AND OTHERS.

DELIVERED BY SIR JOHN WALLIS.

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