

(1956) 03 MAD CK 0005

In the Madras High Court

Case No : Second Appeal No. 332 of 1953

Adiraja Ariga and Others

APPELLANT

Vs

K. Beeranna Rai

RESPONDENT

Date of Decision : 01-03-1956

Acts Referred:

Contract Act, 1872 — Section 25, 25(3)
Limitation Act, 1908 — Article 132, 4

Citation : AIR 1957 Mad 14

Hon'ble Judges : Krishnaswami Nayudu, J

Bench : Single Bench

Advocate : M.K. Nambiar and C.F. Louis, for the Appellant; T. Krishna Rao, for the Respondent

Final Decision : Dismissed

Judgement

Krishnaswami Nayudu, J.—This second appeal arises out of a suit on a mortgage executed by defendants 1 to 3 in favour of the plaintiff on

9-6-1941, Ex. A-1. The suit properties belonged to one Padmayya Kottari and he mortgaged the properties with the predeces-sors-in-interest of

the plaintiff under Ex. A-2, dated 12-4-1927 for a sum of Rs. 5000.

The date of the death of Padmayya Kottari is not in evidence but it is stated that he died sometime between 1927 and 1941. He made a

testamentary disposition of his properties by his last will and testament Ex. A-3 dated 9-7-1925 giving defendants 1 to 3, his three sons, a life

estate in the properties and the vested remainder absolutely to his daughters, defendants 4 to 7.

The plaintiff as the heir of one of the mortgagees under Ex. A-2 became entitled to a moiety of the mortgage amount and obtained the suit

mortgage from defendants 1 to 3 and laid the suit on that mortgage.

2. The defence was that the Suit mortgage was not supported by consideration since the consideration under Ex. A-1 is a moiety of the amount

due under the earlier mortgage Ex. A-2 and since on the date of the execution of Ex. A-1, namely, 9-6-1941, Ex. A-2 had already become barred

by time and that Section 25(3), Contract Act was not applicable since the claim under Ex. A-2 was a debt which defendants 1 to 3 were under no

personal obligation to pay.

The trial Court accepted the defendants'- contention and dismissed the action. In appeal the learned District Judge held that Ex. A-1 was not in

renewal of a barred claim under Ex. A-2 since on the date of Ex. A-1, Ex. A-2 had not become unenforceable by reason of lapse of time under

the law of limitation. He however did not consider the question whether in any event Ex. A-1 could be a fresh contract u/s 25(3), Contract Act.

3. It is now urged by learned counsel for the defendants-appellants that period of limitation prescribed for a suit on a mortgage under Article 132

being 12 years when the money sued for becomes due and that 12 years from the date when the money had become payable under Ex. A-2

having expired, a period of two years being provided as the period for payment, on the date of Ex. A-1 the claim had become barred.

The question for determination is whether it could be said that the claim under Ex. A-2 had become barred under the law of limitation and had

become unenforceable and therefore Ex. A-1 was in renewal of a barred debt? Section 3, Limitation Act provides that every suit instituted, appeal

preferred, and application made, after the period of limitation prescribed therefore by Schedule 1 shall be dismissed, although limitation has not

been set up as a defence. The period of limitation prescribed in Schedule 1", in so far as the suit on a mortgage is concerned, is 12 years under

Article 132.

There can be no doubt that in this case the 12 years" period from the date when the mortgage amount had become payable under Ex. A-2 had

expired on 12-4-1941. The period of limitation prescribed for a suit had therefore expired on the date of Ex. A-1 which was 9-6-1941. But the

question that still remains to be considered is whether the claim under Ex. A-2 had become barred by the law of limitation. Section 4 provides that

where the period of limitation prescribed for any suit . . . expires on a day when the Court is closed, the suit . . . may be instituted..... on the day

that the Court reopens"". It is found that the Sub-Court in which the suit, on Ex. A-2 could ordinarily be instituted was closed on the date of the

expiry of the period which was on 12-4-1941. and the reopening date was some time after 9-6-1941. It was therefore open to the mortgagees

under Ex. A-2 to have enforced the mortgage claim by instituting the suit and in that view the debt could not be considered to have become barred

on 0-6-1941, when Ex. A-1 was executed.

It is not the period of limitation that is prescribed under Schedule 1 that will be relevant in considering the present question but the fact or otherwise

whether the mortgage debt had become barred on the date when the fresh document Ex. A-1 was executed. There can be no doubt that the claim

had not become barred and there is no question of executing a document in respect of a barred debt, and the question of absence of consideration

does not therefore arise.

4. Reliance was placed on the decisions reported in -- N.A.S.T. Chidambaram Chettiar Vs. Venkatasubba Naik, and -- "Shivjiram Dhannalal v.

Gulabchand Kalooram", AIR 1941 Nag 100 In the first of these cases the question as to whether the period of limitation prescribed in Section 19,

Limitation Act could also include the extension given by Section 4 for filing a suit and it was held that it does not so include as Section 4 itself can

come into operation only after the period of limitation prescribed had already expired and the terms of Section 19 require the acknowledgment to

be made before the period prescribed had expired.

The language of Section 19 is clear. It says that the acknowledgment of the liability must be before the expiration of the period prescribed for a suit

or application in respect of any property or right, The ""period prescribed"" could only be the period prescribed in Schedule 1 and not the extended

period by which institution of a suit may be made by virtue of the application of Section 4 if the Courts are closed on the date the period of

limitation expires.

On the language of Section 19, there can be no difficulty in holding that the period referred to in Section 19 could not include the extension given

by Section 4 for filing a suit as if acknowledgement had to be made before the

expiration of the period prescribed.

To similar effect is the decision in AIR 1941 Nag 100 . That a claim does not become barred merely after the expiration of the period of limitation

provided in Schedule 1 and could be considered barred only after the period of extension provided in Section 4 is also the view taken by a Bench

of this Court in -- Ghadiyam Subbareddi Vs. Tokala Venkatramayya and Another, .

The learned District Judge was therefore correct in observing that there was no question of the consideration for the suit mortgage being the revival

of a barred debt and in such circumstances the contention that Ex. A-1 is not supported by consideration could not be sustained. In this view the

learned District Judge rightly observed that since it is found that the suit mortgage is supported by consideration, the question of the application of

the provisions of Section 25(3), Contract Act does not arise.

5. Since arguments were addressed on the other, point also, it becomes necessary to express an opinion as to whether, assuming that the claim

was barred by limitation and became unenforceable on the date of Ex. A-1, Ex. A-1 could be supported u/s 25(3), Contract Act.

Section 25 deals with agreements without consideration. If the debt under Ex. A-2 had become barred when Ex. A-1 was executed (the

consideration for Ex. A-1, the suit mortgage is the debt under Ex. A-2) there can be no doubt that Ex. A-1 must be considered to be agreement

made without consideration, and such agreements are void u/s 25 unless they come within the exceptions under the section.

Clause (3) of Section 25 provides that if it is a promise, made in writing and signed by the person to be charged therewith, or by his agent,

generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law of

limitation of suits, it would not be void. That in the present case it is a promise made in writing and signed is conceded.

But it is however urged that it is not signed by the person to be charged therewith and is not a promise made in writing to pay the whole or in part a

debt of which the creditor might have enforced payment, and for the purpose of this argument the debt must be deemed to have become

unenforceable under the law of limitation.

6. Relying on -- Pestonji Manekji Mody Vs. Bai Meherbai, it is urged that the debt

must be one which the person who promises in writing must be under an obligation to pay, that is, the debt must be one which could be enforced against him personally and if there is no personal liability it would not come within the meaning of a debt and in the present case defendants 1 to 3 were not personally liable under Ex. A-2 since it was a document executed by Padmayya Kottari and there was no liability cast on defendants 1 to 3 to pay that mortgage debt.

But the fact remains that after the death of Padmayya Kottari, under the will they had become entitled to an interest in the property which interest they accepted & also took possession of the properties, had the patta transferred, been paying assessment and enjoying the property, as could be seen from the recitals which were made in the suit mortgage deed, Ex. A-1.

Having accepted the legacy and having become the owners of the property, being in possession and enjoyment of the same, and which property had already been charged with the liability of the mortgage amount under Ex. A-2, the only question that has to be examined is whether the fact that there was no personal obligation but the obligation to pay is derived by reason of their accepting the legacy, is sufficient to take it away from the category of a debt u/s 25(3).

The short point is whether the debt referred to in Section 25(3) refers to a debt which the person agreeing to pay must have been personally liable or is a debt for which he may be proceeded against in respect of his properties.

In AIR 1928 Bom 539 (D), a single Judge of the Bombay High Court held that Section 25, Excep. (3) implies that the person making the promise is the person against whom the liability might have been enforced and a promise therefore made by a person who is under no obligation to pay time-barred debts of another, is not within this exception to the general rule. The learned Judge observes after extracting Clause (3) of Section 25

at page 542 :

It seems to me that these words imply that the person making the promise is the person against whom the liability might have been enforced. And if that is the case, a promise made by a person who is under no obligation to pay the debts of another, even though they, are time-barred is clearly not within the exception to the general rule.

The learned Judge does not proceed to consider the ""leaning of the word ""debt"" in Clause (3) but assumes that the promise must be by a person

who is under an obligation to pay the debts of another. The meaning of the word ""debt"" in Section 25(3) has however come up for consideration

by this Court in -- P. Rama Pattar Vs. A. Viswanatha Patter, Lakshmi alias Ammu Ammal, V. Anantarama Patter and Parameswaran, minor by

guardian, .

On a reference to Kumaraswami Sastri J. Krishnan and Odgers JJ. differing, it was held that a debt contracted by a Hindu father for the benefit of

the joint family is nonetheless a ""debt"" within Section 25(3), Contract Act, binding on the son, because his liability to pay his father's debt is not

personal but limited to the extent of the family assets.

Krishnan J. took the view that ""debt"" is a sum payable in respect of a liquidated money demand, recoverable by action, and there is no reason why

a liability to have one's joint property sold for a sum due, could not be a debt within the meaning of Section 25(3). Odgers J., however, did not

accept that view but observed that the debts not being the debts of the sons, the case did not fall within Section 25(3), Contract Act.

Kumaraswami Sastri J. in dealing with the question stated ""as follows :

A debt is nonetheless a debt because the remedies open to the creditor are circumscribed by the joint family assets. I can find no authority for the

view that the debt contemplated by Section 25, Contract Act is a debt which can be enforced against the person and properties of the debtor. The

rest is whether at the time the promise to pay is made, the person making the promise could have been sued for the recovery of the debt but for

the law of limitation, however circumscribed, the remedies for the recovery of the debt in execution may be owing to the personal law governing

the debtor.

The fact that the sons are not personally liable for the debts of the father but only to the extent of the joint family assets in their hands, would not

however prevent the creditor from proceeding against them for the recovery of the debt, though not personally but against the property in their

hands.

The debt in the present case being a mortgage debt, the persons who are in possession of the property having become the owners by reason of the

legacy which they obtained under the will, could be proceeded against for the recovery of the mortgage debt, though it could not be recovered

from them personally, but only out of the properties in their hands. I am in respectful agreement with the view of Kumaraswami Sastri J. of the

meaning of the word ""debt"" in Section 25(3).

The fact that that decision related to the liability of the members of a joint family, namely, the sons, in respect of debts of the father would not make

any difference since in either case the property is sought to be proceeded against and not the person. If a person who is in possession of the

property is liable to be proceeded against in an action, that would be sufficient to put him under an obligation to pay the debt for the purposes of

Section 25(3), Contract Act The obligation therefore need not be personal but an obligation in the sense of action being maintainable against the

person in respect of the property in his hands.

7. The question would then arise as to whether the words ""the person to be charged therewith"" in Section 25(3) must necessarily mean a person

who is liable initially or would be wide enough to cover the case of a person who agrees for the payment of the debt due by another.

It was held in -- Puliath Govinda Nair Vs. Parekalathil Achutan Nair, that it need not be limited to the person who was indebted from the

beginning but it would also cover the case of a person who agrees to become liable for the payment of the debt. The expression ""the person

charged therewith"" must necessarily be given a wider meaning and in this case the person by reason of becoming the owner of the property is a

person who has become liable to pay the debt on the mortgage becomes the person to be charged therewith.

Therefore a ""person charged therewith"" in Section 25(3) need not refer only to a person who was initially or originally liable but may refer also to

third parties who have undertaken the liability, though not personally, but as in this case by reason of their owning the properties. Applying Section

25(3), on the assumption that the suit mortgage Ex. A. 2 was in renewal of a barred debt, Ex. A. 1, it could be supported as a promise made in

writing u/s 25(3) and therefore enforceable. In either view the plaintiff must succeed.

8. This second appeal is dismissed with costs. No leave.