

(1931) 09 MAD CK 0029
In the Madras High Court

Akolla Suryanarayana Rao and Others	APPELLANT
Vs	
Dwarapudi Basivireddi and Others	RESPONDENT

Date of Decision : 08-09-1931

Acts Referred:

Citation : AIR 1932 Mad 457

Hon'ble Judges : Walsh, J; Jackson, J

Bench : Full Bench

Judgement

Jackson, J.—Suit to recover Rs. 35,776-4-9 on the plea that the mortgages on the properties cited in Schedule A of the plaint executed by

defendants 1 and 2 in favour of defendants 5 to 7, as well as the attachment by defendant 8 and Court purchases by defendants 9 and 10 are

subject to the first charge created in favour of plaintiff by the family partition deed of 9th January 1920, Ex. O.

2. This family derives from one Basivireddi, who died in 1915. He was a rich man and his son-in-law, Venkayya, the father of the plaintiff, left

considerable sums in his hands, which he acknowledged by a pro-note. After his death, the estate was in the hands of a receiver who renewed the

note. This is the basis of the plaintiff's claim and the reality of the debt is not disputed. Issue 1 as to its validity was found in the affirmative by the

lower Court and that finding stands.

3. The question for our determination is whether this debt was secured in 1920 when the members of Basivireddy's family, who were involved in a

partition suit, came to a compromise which was embodied in a decree [see order at foot of compromise Ex. O (p. 194). The actual decree is not

exhibited but is admitted].

4. In the compromise certain properties were given to certain branches to which also were allotted certain debts, as set forth in para. 13 of the

documents, and then it was provided

that until the debts mentioned above are fully discharged the properties allotted to the shares of the respective persons shall be liable in the first

instance.

5. We prefer to read this as the similar deeds in the Madras Law Journal cases *Sesha Ayyar v. Srinivasa Ayyar* A.I.R.1921 Mad.459 and *Imbichi*

v. Anukoyi Haji [1917]39 I.C.867 were read simply as a contract of indemnity conferring no benefit upon the creditors.

6. This finding rebuts the plaintiff's claim and there is no real necessity for the appellants-defendants to fall back upon their second line of defence

that, even supposing a charge had been created in his favour plaintiff as no party to that, contract cannot make it part of his cause of action.

However since the point has been fully argued, we will give our decision.

7. It is now recognized law that, if A contract with B that B shall pay the debt owing by A to C, C cannot sue upon that contract alone unless he

stands in the capacity of cestui que trust. The rule of Common law laid down in *Tweddle v. Atkinson* [1861] 1 B. & S. 393 is that he must have

been a party to the agreement and the rule of equity in *Gandy v. Gandy* [1885] 30 Ch.D. 57 is that he must stand as the beneficiary of a trust. It

was formerly questioned how far that rule applied in India, and the matter came before a Full Bench of this Court in *Subbu Chettiar v.*

Arunachalam Chettiar AIR 1930 Mad. 382, where the simple proposition was considered whether, if B promise A that B will pay the debt of A to

C, C can sue B upon that promise.

8. The opinion of the Full Bench, p. 287 (of 53 Mad.) is that

where all that appears is that a person transfers property to another and stipulates for the payment of money to a third person a suit to enforce that

stipulation by the third party will not lie.

9. Consequently in this Presidency, at any rate, the law in India and in England is the same. C can only sue as cestui que trust.

10. A cursory reading of the Madras reports may suggest that another special exception has been approved by this Court, viz., the creation of a

charge on immovable property by the contracting parties A and B.

11. In *Iswaran Pillai v. Taragan* 38 Mad. 753, A contracted with B that B should pay C and C sued. Two grounds were taken. That C was a

cestui que trust and that *Tweddle v. Atkinson* [1861]1 B. & S.393 did not apply to India as hold in *Deb Narain Dutt v. Ram Sudan Mondal*

A.I.R.1914Cal.129. The discussion on the first ground proceeds to p. 757, where it is held that no trust was created.

12. On p. 762 this result is reached that, unless the contract has been performed so that a trust has already been created, the suit cannot be

maintained.

13. The head-note runs:

Held: that C who was a stranger to the contract cannot sue B for the payment of his debt without joining A as a party *Mahomed Khan v. Hussaini*

Begum [1910]32 All.410 and *Deb Narain v. Ramsadhan* A.I.R.1914 Cal.129.

14. So far this is unexceptionable except that *Ramsadhan* should be *Chunilal Ghose*: and as *DebNarain v. Ramsadhan* AIR 1914 Cal. 129 was

published, a reference to a private magazine, was unnecessary.

15. But then there is interpolated between these two passages a list of our exceptions as coming *per curiam*. Inasmuch as the whole judgment is

per curiam this phrase is here otiose.

16. The second exception (b) is ""the creation of a charge on immovable property by the promisor"". In the whole of this judgment a charge is only

mentioned twice, once, the charge in *Deb Narain v. Ramsadhan* A.I.R.1914Cal.129, which A erroneously thought he had given C when the debt

originated and he deposited his *patta* with C, a matter which has no bearing on the legal question whatsoever, inasmuch as B is not concerned; and

again at the end where *Mahomed Khan v. Hussaini Begum* [1910]32 All.410, is held to refer to a specific charge for the benefit of a minor

culminating in a trust. This suggestion of the head-note that C can sue B, if B has created a charge, is absolutely and entirely, unwarranted by the

judgment. It is a pure interpolation.

17. In *Subbu Chetti v. Arunachalam Chettiar* A.I.R.1930 Mad.382 the case in question was again the simple proposition of B contracting to pay

the debt of A to C. The summary of the case-law on p. 278 quotes the head-note

to Iswaran Pillai v. Taragan 38 Mad. 753, and the final decision

on p. 287 is that a person not a party to a contract cannot sue ""unless the case falls within the exceptions indicated in the case above referred to.

These exceptions were no material part of the question before the Bench, and the reference to them is merely by the way; in fact, one might go far

to seek a better illustration of an obiter dictum, yet the head-note details all these exceptions with no reference at all to Iswaran Pillai v. Taragan 38

Mad. 753, as though they were the direct ruling of the Pull Bench.

18. Nothing so crude has ever been ruled by this Court, as that C may sue where the contract of A and B charges the money to be paid out of

some immovable property.

19. If plaintiff is to succeed, it would be necessary to find in the terms of Cunningham v. Foot [1877] 3 A.C. 974 at p. 984:

Upon the construction of the written instrument, that there is land, the trustee of the land and the cestui que trust for whose benefit in this respect

the land is to be held

and it cannot be said here that plaintiff is such cestui que trust under the terms of Ex. O. Therefore, the plaintiffs cannot derive any title under that

document so as to make it part of his cause of action.

20. The appeal must accordingly be allowed with costs throughout to the appellant payable by plaintiff-respondents. The suit is dismissed as

against defendants 5 to 7, 8 and 10 with costs to defendants below.

Walsh, J.

21. I have had the advantage of perusing my learned brother's judgment and entirely agree with it. At the host, para 13 of the compromise

agreement, Ex. O, is ambiguous and therefore the conduct of the parties to it can be looked at in order to see in what sense they understood its

terms. Their subsequent conduct leaves no room for doubt on the matters as pointed out by my learned brother. It is impossible also to see how

the terms of the compromise were "to be worked out, it they created a first charge in favour of the creditors. The word ""creditor"" does not appear

in the paragraph at all. The obligation to discharge the debts assigned to each member was a continuing one, and it is to be observed that

according to the same para 13:

if any one sharer should fail to discharge the debts mentioned above and consequently either obstruction is caused to the properties of the remaining sharers or the other sharers should be necessitated to discharge such debts, the sharer who has committed default should pay these amounts from out of his properties...to the sharers who have discharged such debts.

22. So that a more obstruction, say the attachment of a sharer's land by a creditor, brings the clause into action, and yet we must suppose, if a first charge was created in favour of the creditor on the lands allotted to the sharer who was to discharge the debt, that the aggrieved cosharer had only some sort of second charge which had to be deferred till the creditor worked out his first charge or was otherwise satisfied.

23. As ray learned brother remarks, we have authoritative interpretations of what such clauses in a partition deed mean in *Seshu Ayyar v. Srinivasa Ayyar* A.I.R.1921Mad.459 and *Imbichi v. Anukoyi Haji* [1917]39 I.C.867. I have no hesitation in holding that no charge in favour of creditors was created by Ex. O, and consequently plaintiff's suit as regards the respondents must fail.

24. As a member of the Full Bench of this Court in *Subbu Chetty v. Arunachalam Chettiar* A.I.R.1930 Mad.382. I am much obliged to my learned brother for pointing out the error which has crept into an obiter remark in that decision on a matter that was not at all directly before us.

This was in consequence of an entirely misleading and incorrect head-note in *Iswaran Pillai v. Taragan* 38 Mad. 753. There was no discussion

whatever before us as to the effect of a mere charge on property as enabling a third person not a party to the contract to sue. As the misleading

obiter dictum has, in one subsequent case at least, before a single Judge, been relied on, apparently with some success (vide S.A. 1192 of 1927), I

am glad that the error should now have been traced to its source and pointed out.