
(1936) 03 MAD CK 0040
In the Madras High Court

Ambalavana Pillai and Others

APPELLANT

Vs

Gowri Ammal and Others

RESPONDENT

Date of Decision : 06-03-1936

Acts Referred:

Evidence Act, 1872 — Section 34

Citation : AIR 1936 Mad 871 : (1936) 44 LW 467

Hon'ble Judges : Varadachariar, J

Bench : Division Bench

Judgement

Varadachariar, J.—This appeal arises out of a mortgagee's suit for sale. The appellants (defendants 1 to 4) are the sons of one Muthuvelayudham Pillai who died early in 1910, when the eldest son defendant 1 had just attained majority. It is said that Muthuvelayudham left a will whereby he appointed his wife's brother Arunachala to be the guardian of his minor sons. According to the decision of the Full Bench in Chidambara Pillai v. Rangaswami Naicker 1919 41 Mad 561 this appointment of Arunachala as guardian must be held to be invalid as the father and sons were members of a joint Hindu family and the property was ancestral. The evidence establishes that Muthu Velayudha was indebted to the extent of about Rs. 10,000 at his death and some of the creditors pressed for payment. A sum of Rs. 8,000 was accordingly borrowed in October 1910 under the suit mortgage to pay off the creditors named in the mortgage bond Ex. A. The mortgage bond was executed by defendant 1 and by Arunachala as testamentary guardian of defendants 2 to 4. Various contentions were raised before the lower Court, some of them, we regret to say, reckless and frivolous in view of the facts established by the evidence. The appellants went so far as to say that their father left no debts, that there was no necessity to borrow, that no money was borrowed under Ex. A and that the document must be the result of collusion between plaintiff and Arunachala. These points were all found against the defendants in the lower Court and were not: argued before us. The principal question pressed in appeal was the plea of limitation; but before dealing with it, we may briefly dispose of one other contention advanced by the learned Counsel

for the appellants.

2. Out of the sum of Rs. 8,000 borrowed under Ex. A, the lower Court found that Rs. 7,300 odd had been shown to have been applied in discharge of debts due by the father. This finding was accepted by Mr. Venkatachariar; but he argued that in the absence of proof as to the application of the remaining sum of Rs. 600 odd, the mortgage could not be held to that extent binding on defendants 2 to 4. There are two answers to this contention. It has generally been recognized that when the proper application of a substantial portion of the consideration amount has been proved, the Court might in the absence of circumstances creating suspicion presume that the small balance is also likely to have [been required and applied for proper purposes. There is no reason for drawing a distinction between a sale and a mortgage, in the application of this rule of evidence. Secondly it is a well established rule that once circumstances of necessity are shown, a bona fide lender is not bound to see to the actual application of the money lent. The evidence in this case establishes that there were debts to the extent of about Rs. 10,000 at the time of the suit mortgage. Ex. L is one of the promissory notes referred to in the suit mortgage. But for their own convenience the mortgagors did not wholly discharge Ex. L, but utilised part of the mortgage-money for discharging the debts due under Exhibits D and E and repaid only a portion of the debts due under Ex. L. In these circumstances, there is no reason to doubt that the mortgagee bona fide believed that the amount borrowed was required to meet debts due by the father.

3. The Subordinate Judge observes in paragraph 14 of his judgment that at the trial the defendants did not seriously dispute the payment of consideration or the binding character of the purposes for which the loan was borrowed. The question of limitation arises under the following circumstances: The mortgage bond fixes a period of 5 years for payment. The period of limitation for a suit on the mortgage would thus have expired in the ordinary course in October 1927. An extreme contention put forward on behalf of the plaintiff that under the terms of the document limitation would commence to run only from the date of demand by the plaintiff and that such demand in respect of the principal amount was for the first time made only in August 1928 was rightly rejected by the lower Court.

4. To save the suit from the bar of limitation, the plaintiff relied (1) upon a payment of Rs. 4,900 by Arunachala in April 1917 as for interest accrued due on the bond up to October 1916, and (2) upon a payment of Rs. 1,000 on 10th August 1928 towards interest due under the mortgage-deed. The second payment is endorsed on the mortgage-bond itself and the endorsement has been marked Ex. A-2. The entry is signed by defendants 1, 2 and 4. Its genuineness was not disputed; but it was said (a) that no money was in fact paid, (b) that the endorsement was obtained by misrepresentation, and (c) that as the endorsement had not been signed by the third defendant, it could not avail to save the suit from the bar of limitation so far as his share of the mortgaged property was concerned. The payment alleged to have been made by Arunaohala

in 1917 is also endorsed on the mortgage-bond and the endorsement has been marked Ex. A-I. The appellants contend (a) that this endorsement is not genuine, the signature of Arunachala being a forgery, (b) that there was in fact no such payment, and (c) that in any event the payment or the endorsement cannot avail to save the bar of limitation, as Arunachala was not authorised to make the payment. These various points have been strenuously pressed before us. It will be noticed from the dates that unless both the payments are found to be true and effective, the plaintiff cannot escape the bar of limitation.

5. Dealing first with the factum of payment of Rs. 4,900 in 1917, the evidence relating to it apart from the endorsement A-I, consists of the testimony of P.W. 4 and an entry in Ex. H. If the entry in Ex. H is genuine and admissible, it certainly goes a long way to prove the truth of the payment. Appellant's learned Counsel accordingly contended that Ex. H is not admissible and has not been properly proved. P.W. 4 who has been a gumastah of the plaintiff's husband from before 1910 and P.W. 6 who is a well-to-do person, a nephew of the plaintiff's husband, whom the Subordinate Judge considered to be quite trustworthy deposed that Ex. H was in the handwriting of the plaintiff's husband who died somewhere in 1918. Appellant's learned Counsel has not thought fit to controvert this fact. Ex. H contains an entry in the writing of the plaintiff's husband against 16th April 1917, that a sum of Rs. 4,900 was received in respect of the interest due under the suit mortgage up to the 4th October 1916. One of the contentions urged by Mr. Venkatachariar was that it was not sufficient to prove the handwriting of the entry but the entry must be spoken to by somebody who saw it being made. "We are unable to accede to this contention. His main argument however was that Ex. H was not "a book" at all and much less "a book kept in the course of business" and it will not therefore come u/s 32, Clause (2), or, u/s 34, Evidence Act. He referred in this connection to certain observations in *Mukundram v. Dayaram*, 1914 Nag 44 : 23 IC 893, 13 C LJ 139 and *Ningwa v. Bharmappa* (1899) 23 Bom 63.

6. We do not think it necessary or useful to attempt an exact definition of "a book." We may take it that a collective unity of sheets even at the time that the entries came to be made is implied in the conception of "a book." We may also assume that it connotes an intention that it should serve as a permanent record. Beyond these two ideas, it is not necessary that it should consist of a particular number of sheets or that it should be bound in a particular way. Judged by the standards prevailing amongst Indians who keep private books of accounts not meant for trade purposes Ex. H is a decent enough book though stitched. The nature of the entries makes it clear that the books must have been stitched before the entries began to be made, because each entry covers both the sheets, that is, the entry begins on the left page and runs on into the right page. At the top of the first page, there is a heading "account of V.M.G.'s (plaintiff's) cash receipts and disbursements" and this heading is proved to be also in the handwriting of the plaintiff's deceased husband. We have therefore no hesitation in holding that Ex. H is a book within the meaning of Sections 32 and 34.

7. There is however room for argument as to what the course of business referred to in Sections 32 and 34 is, that is, whether a person's private account of his domestic receipts and expenses will fall under those sections or whether they relate only to business books in the commercial or professional sense. On behalf of the respondents Mr. Sreenivasa Iyengar maintained that even private books of account not relating to a trade or business are covered by these sections and that the expression course of business merely corresponds to what may be called routine or to the expression "course of public and private business" in Section 114, Alternatively, he maintained that as under the Indian law it is not necessary for the purpose of admissibility under Sections 32 and 34, that the book should have been maintained as a matter of duty, Ex. EC might be held to be maintained in the course of business even in the stricter sense, because it was kept by plaintiff's husband exclusively in respect of his dealings with his wife's money's during a period when he was dealing with those moneys. The evidence shows that he kept separate books in respect of his own family affairs.

8. In support of this distinction, Mr. Sreenivasa Aiyangar relied on some observations in *Ningwa v. Bharmappa* (1899) 28 ER 36. We do not however think it necessary to come to a decision in this case on the meaning of the expression "course of business" in Sections 32 and 34, Evidence Act, because Sub-clause (2), Section 32 also makes relevant any "acknowledgment written or signed by a deceased person of the receipt of money, goods, securities or property of any kind". Illustrations (e) and (g) to the section indicate that the pieces of evidence made relevant by the latter part of Clause (2) are not restricted to what is done in the course of business if the word "business" is to be understood in a narrow sense. The entry in Ex. H is undoubtedly an entry of the kind contemplated by the words above quoted from Clause (2), Section 32. It need not necessarily be against the pecuniary interest of the person making the entry, because that kind of entry is separately provided for in Clause (3). We therefore hold that the entry in Ex. H is admissible; and, if it is admissible, there can be little doubt as to the weight to be attached to it. As the entry must have been made before 1918 (when the plaintiff's husband died) it was made at a time when there was no motive whatever for making a false entry of a payment of such a large amount towards interest due under the suit bond. There was then no question of any danger of limitation to be provided against. In this view, it is unnecessary to consider whether or not Ex. W, the corresponding ledger, is admissible in evidence. (Their Lordships after discussing the evidence of P.W. 4 regarding Ex. H proceeded.) Under the law as it stood prior to 1927 no writing signed by the person making the payment was necessary u/s 20, Lim. Act, where the payment was made as for interest, It is therefore not necessary for us to decide whether the endorsement Ex. A-1 is genuine or not. (Their Lordships after discussing the evidence found that Ex. A-1 was genuine and that Ex. A-2 was payment made by defendant 1 who was admittedly manager of the joint family of defendants 1 to 4 and then proceeded.) Mr. Venkatachariar finally contended that as a matter of

law the part payment and the endorsement made by defendant 1 in 1928 cannot, in the circumstances of this case, avail to save limitation as against defendant 3, and the payment by Arunachala in 1917, even if it had been made under the directions of defendant 1, could not avail as against defendants 2 to 4. His point was that a payment by the manager of a joint Hindu family would avail to save limitation as against the other members only when the contract of loan had been entered into by the manager alone, but that in cases where the other members of the family were also parties to the original contract of loan, the manager would only be in the position of one of several joint contractors and that by reason of the express provisions of Clause (2), Section 21, Lim. Act, a payment by him could be of no avail as against the other parties to the contract. The authorities and considerations bearing upon this question have been referred to in *Lakshmi Naidu v. Gunnamma* 1935 58 Mad 418; but it is not necessary for the purposes of this case to decide that question.

9. In view of the decision in *Chidambara Pillai v. Rangaswami Naicker* 1919 41 Mad 561. Arunachala was not in law the guardian of defendants 2 to 4, and they cannot therefore be regarded as parties to the mortgage in their individual capacity. According to the decision of the Privy Council in *Gharibullah v. Khalak Singh* (1903) 25 All 407, the suit mortgage must, in the circumstances, be regarded as one, entered into by defendant 1 as manager of the family. In this view the question of the effect of Clause (2), Section 21, will not arise. Another answer to the argument is furnished by the provisions of the clause added to Section 21, by Act. 1 of 1927. It provides that where a liability has been incurred by or on behalf of a Hindu undivided family as such, an acknowledgment or payment made by or by the duly authorised agent of the manager of the family for the time being shall be deemed to have been made on behalf of the whole family. Mr. Venkatachariar suggested that these words should be understood to relate only to cases in which, the original contract had been entered into by the manager alone. Neither the statement of objects and reasons appended to the bill nor the recommendation of the Civil Justice Committee with reference to which this clause was added warrants this limitation of the effect of the clause. On the other hand, the expression "liability incurred by or on behalf of the family, suggests that the family as a whole might be a party to the contract or the managing member on behalf of the family might have entered into the contract.

10. It was next argued that the mere fact of the payment having been made by a person who happens to be the managing member is not sufficient but the payment must purport to be made by him as such manager. Neither the language of the clause nor anything in the decided cases supports this contention. Reliance was placed on some observations in *Scholey v. Walton* (1844) 12 M&W 510, to the effect that it did not appear in that case whether the payment relied on was made by an executor in the capacity of executor. As explained in *In re MacDonald : Dick v. Eraser* (1897) 2 Ch 181, the fact in the *Meesan & Welsby* case was that the same account contained two sets of debits, some relating to the transactions of the testator and some to the personal

transactions of the executor; and when all that appeared was a credit entry in favour of the person who was also the executor, the Court observed that in the absence of further information it could not be said whether the credit related to the executor's personal transactions or to the transactions of the testator's estate. There is no question of any such two fold liability in the present case. The plea of limitation must accordingly be overruled.

11. With reference to the provision for interest in the mortgage bond, a point was sought to be raised that it was improvident and excessive and therefore not binding on defendants 2 to 4. No such point was raised in the Court below and, as pointed out in *Kruthiventi Perraju Garu Vs. Sri Nallapuraju Mirja Sitaramachandraraju Garu and Others*, , it cannot be held a priori that a provision for compound interest at a rate by no means uncommon in this country is so improvident or excessive as to throw upon the mortgagee the onus of justifying it even in the absence of a plea by the defendants. After all, the rate in the present case is only 8 per cent in the first instance and 9f per cent in the event of default after 5 years. A plea was no doubt taken by some of the alienee defendants that this is a penal provision within the meaning of Section 74, Contract Act. But even taking it to be penal, the rate is not so excessive or the difference so unreasonable as to call for our interference with the decision of the lower Court on this point. The appeal consequently fails and is dismissed with costs. Time for payment extended to 6 months from this date.