

(1924) 02 MAD CK 0083
In the Madras High Court

Ammakannu Ayi

APPELLANT

Vs

Murugayya Odayar

RESPONDENT

Date of Decision : 06-02-1924

Acts Referred:

Contract Act, 1872 — Section 233

Citation : AIR 1924 Mad 716

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

Bench : Full Bench

Judgement

Ramesam, J.—The facts have been stated by ray learned brother whose judgment I have had the advantage of reading and need not be repeated.

2. A preliminary question of law raised by the defendant in the Court below and repeated here has first to be dealt with. He contends that, as the plaintiff filed her suit against Ritnathayi in 1914 and obtained a decree, she has elected her remedy and the present suit is not maintainable He relies on Scarf v. Jardine 7 A.C. 345; Moorel v. Earl of Westmoreland [1904] A.C. 11; and Moore v. Flanagan [1920] 1 K.B. 919. He also relies on Kendall v Hamilton 48 L.J. C.P. 705. Scarf v. Jardine 7 A.C. 345 is a case of a customer of an old firm of partners selling goods to a new firm consisting of an old partner and a new partner and carrying on business under the old style without notice of the change. In that case, the old firm was liable only on the ground of estoppel and after the plaintiff sued the new firm, it was held that he disavowed the estoppel and could not set it up again (see Lord Selbourne, L.C., at 350). It was a case where either firm (but not both) could have been held to be legally liable, The present case is not a case where either Rathnathayi or the present 1st defendant can be legally held to be liable on the mortgage. If Rathnathayi is the owner of the mortgaged properties, only Rathnathayi is liable on the mortgage and not the 1st defendant. If, however, the 1st defendant is the owner of the suit properties, and if it is held that Rathnathayi did not represent him in executing the mortgage bond, she is personally liable and on the mortgage neither is liable If it is held that

Rathnathayi represented him in executing Exhibit A, the 1st defendant is liable on the mortgage and Rathnathayi is not liable. Thus, on no version of the facts, do we get a case where plaintiff, at his option, can hold one or other of two persons (but not both) liable. The alternation of the liabilities of Rathnathayi and 1st defendant arises on different views of the facts. I am, therefore, of opinion that the case in *Scarf v. Jardine* 7 A.C. 345 does not apply. The cases of *Morel v. Earl of Westmoreland* [1904] A.C. 11 and *Moore v. Flanagan* [1920] 1 K.B. 919 are similar. It was held in each of those cases that it was not a case of joint liability but only of alternative liabilities and *Scarf v. Jardine* 7 A.C. 345 applied.

3. The other case relied on by the appellant *Kendall v. Hamilton* 48 L.J.C.P. 705 was a case of agent and principal. u/s 233 of the Contract Act the liability of the principal and agent is joint and several. The question how far the principle of *Kendall v. Hamilton* 48 L.J. C.P. 705 will apply in India has been the subject; of difference between the Indian High Courts and cannot be regarded as quite settled see *Shivlal Motilal v. Birdichand Jivraj* [1917] 19 Bom. L.R. 370 and *Kendall v. Hamilton* 48 L.J. C.P. 705 and *Muhammad Askari v. Radha Ram Singh* [1900] 22 All. 307 unless the decision in *Bhagwati Prasad v. Radha Kishen Sewak Pande* [1893] 15 All. 304 can be regarded as settling it. That was a case of an agent and undisclosed principal and the Privy Council reversing the decision in *Bir Bhaddar Sewak v. Sarju Prasad* [1887] 9 All. 681 in which the High Court dismissed the suit against the principal following *Priestby v. Fernie* 3 H. & C. 977 and referring to the notes to *Thompson v. Davenport* 9 B. & C. 78 gave an equitable charge against the principal. The fact that, *Bir Bhaddar Sewak v. Sarju Prasad* [1887] 9 All. 681 was reversed by the Privy Council in *Bhagwati Prasad v. Radha Kishen Sewak Pande* [1893] 15 All. 304 was evidently not noticed by that High Court in *Muhammad Askari v. Radha Ram Singh* [1900] 22 All. 307.

4. The point need not be pursued in this case as it does not arise.

5. It has been never held that a wrong suit followed by a wrong decree bars a correct suit and we therefore hold the suit is maintainable.

6. It now remains to find, on the facts, whether Rathnathayi, in executing Exhibit A, intended to act on behalf of the minor or not. The cases cited by the appellant (viz., *Hanuman Persad Pandey v. Mt. Baboojee Munraj Koonwaree* [1854-57] 6 M.I.A. 393, *Jadunath Chakerbutty v. Mr. James Tweedie* 11 W.R. 20, *Makundi v. Sarabsukh* [1884] 6 All. 417, *Watson and Co. v. Sham Lal Mitter* [1887] 15 Cal. 8, *Murari v. Tayana* [1895] 20 Bom. 286, *Venkataramanachari v. Thirunarayanachari* [1914] 2 L.W. 212, *Velayudham Pillai v. Perumal Naicker* [1915] 2 L.W. 1210, can help her only if, on the facts of this case, we can find that Rathnathayi did not set in her own right and intended to act on behalf of the minor. *Ammani Ammal v. Ramasami Naidu* [1918] 37 M.L.J. 113 and *Balwant Singh v. R. Clancy* [1912] 34 All. 296. I may observe that the personal covenant in Exhibit A, by itself, has, in my opinion, no bearing on the matter as that is the form of the document whatever the intention of the document might have been. If the plaintiff was an entire stranger to the family, I would not attach any

importance to the allegations in paragraph 11 of the plaint where she denies the adoption. But, seeing that plaintiff, though an assignee from the original mortgagee, is not a stranger to the family, her attitude in the said paragraph, throws a good deal of light on that of Rathnathayi and Doraiswami Odayar at the time of the execution of Ex. A. Now, not only is the plaintiff the mother of Rathnathayi, but her husband (who was also her maternal uncle) was a cousin of Doraiswami Odayar, and she was also a sister of Doraiswami's wife. She must have known the transactions of her daughter from the time of the latter's husband's death. On an examination of the prior transactions mentioned in Ex. A it strikes one that, while the first three represented by Exs. B, C & D, are genuine (this is conceded and admitted by defendant whose witnesses D.W. 1, 2 & 3 prove them), the rest are all spurious items intended to swell up the consideration of the document to Rs. 3,000 (see D.W. 7) for some motive of their own (see D.W. 6). What these motives are, it is difficult to determine now. The consideration and motive of Ex. A are shrouded in mystery. Seeing that the deed of adoption Ex. I makes the 1st defendant continue to be the son of Doraiswami (see also Ex. CC, the deed of partition in Doraiswami Odayar's family and Ex. EE) it is possible that Rathnathayi entered into Ex. I on the understanding that the adoption of the 1st defendant was to be regarded as sham or bogus. It may be that she was allowed to deal with properties for some time in her own right. But Ex II and the events that have since happened make it too late so far as she is concerned, to question the adoption though it may still be open to the reversioners of her husband, if any, to question it within 12 years after Rathnathayi's death. In 1908, Rathnathayi dealt with the properties thinking they were her own (Ex. W.) In 1909, misunderstandings seem to have arisen between Doraiswami Odayar and Rathnathayi (see D.W. 6) and possession of the properties of Thambuswarni was obtained by the minor in 1910 (Ex. X & C). In 1914, the plaintiff filed her suit on Ex. A (O.S. No. 37 of 1914) (Ex. XV). It is obvious this suit was a friendly suit so far as she and Rathnathayi were concerned but their attitude was adverse to the minor and Doraiswami contested the suit. That plaintiff and Rathnathayi continue to be on friendly terms is clear from the fact that the latter has been examined as P.W. 3 in this case. Rathnathayi admits that she, her brother P.W. 1 and plaintiff are living together. In her examination, she was not asked a single question to show that she executed the document on behalf of the 1st defendant nor was Doraiswami (D.W. 6) cross-examined on the matter. It is clear that the adverse attitude of Rathnathayi continues to this day and this explains why plaintiff made the allegations in para. 11 of the plaint. I therefore agree with my learned brother that Rathnathayi never intended to execute Exhibit A on the minor's behalf nor can any decree be given against the minor on any other ground in the circumstances of the case.

7. The appeal fails and is dismissed with costs.

Jackson, J.

8. Suit for a declaration that defendant is bound to pay plaintiff Rs. 7,237-9-9 both under the decree obtained by plaintiff in O.S. No. 37 of 1914 on the file of the Court of the Subordinate Judge of Mayavaram against one Rathnathayi and also as being due under a hypothecation bond executed on plaintiff's behalf. The lower Court dismissed the suit and plaintiff appeals.

9. The facts are as follows: Thambuswarni Odayar (vide genealogy Ex. M.) died on 2nd August 1905 leaving a widow Rathnathayi. On 23rd August 1905 (Ex. I) she adopted Palani Odayar, a son of her husband's uncle Doraisami Odayar. On 5th August 1906 she hypothecated property belonging to her late husband to this same Doraiswami (Ex. A.). On 3rd January 1907 he transferred this deed of hypothecation to his wife's sister Ammakannu Ayi, who is also the mother of the mortgagor, Rathnathayi. In 1914 Ammakannu Ayi sued Rathnathayi and Doraisami on this deed. In the plaint Ex. XV she recites that Thambusami died leaving no heir whatsoever. For discharging his debts and necessary expenses Rathnathayi hypothecated certain property of his. If she should fail to recover the amount claimed from Rathnathayi, Doraisami should be made responsible. She obtained preliminary and final decrees against Rathnathayi alone, Exs. G, and G 1, on the 15th September 1914 and 15th November, 1916. The plaint in the present suit is dated 13th August 1917. It sets forth how Rathnathayi hypothecated her husband's property and how plaintiff obtained a decree. Execution was pending and plaintiff, when about to bring the property to sale, learnt that for some time past it had been in the possession of Palani, the present defendant, who was adopted as son of Thambusami by registered deed in August 1905. This deed was executed without Thambusami's permission, and the adoption was not really made (paragraph 11 of plaint). Palani, however, is bound to satisfy the decree obtained against Rathnathayi, since she bona fide executed the hypothecation in order to pay off her husband's debts, and Palani has enjoyed the benefit of her action.

10. On these pleadings the Subordinate Judge framed among other issues, Issue U, whether the suit mortgage bond is supported by consideration, and is true, valid and binding on the defendants. He found (paragraph 16) that the suit document was genuine and supported by consideration, and was not binding on the defendants. Accordingly he dismissed the suit.

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