

(1955) 04 OHC CK 0015
In the Orissa High Court
Case No : First Appeal No. 35 of 1950

Ananga Bhusan Samant Singhar Mohapatra	APPELLANT
Vs	
Uchhab Sahu and Others	RESPONDENT

Date of Decision : 20-04-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 4

Citation : AIR 1955 Ori 179 : (1955) 21 CLT 328

Hon'ble Judges : P.V.B. Rao, J; Narasimham, J

Bench : Division Bench

Advocate : S. Mohanti, B.N. Mohanti, S.K. Ray and C.K. Ghose, for the Appellant; M.S. Rao, for the Respondent

Final Decision : Dismissed

Judgement

P.V.B. Rao, J.—This appeal in forma pauperis is filed by the plaintiff against the judgment arid decree of the learned Additional Subordinate Judge of Puri dismissing the suit for a declaration of his rights to the suit properties and for setting aside the mortgage decree and the court sale in favour of defendants 7 and 8 and for delivery of possession or in the alternative for a claim of Rs. 16,000/- against all the defendants.

2. The plaintiff's case is, briefly as follows: The suit properties were the ancestral properties of the plaintiff and his father defendant 9, and the latter mortgaged these properties to defendants 7 and, 8 for Rs. 3200/- on 18-9-36. A suit for sale was filed by defendants 7 and 8 against defendant 9 on the said mortgage bond without impleading the plaintiff in Original Suit No. 9 of 1939 in the Court of the Subordinate Judge, Puri and in execution of the mortgage decree the suit properties were purchased by the decree-holders for a sum of about Rs. 4000/-.

The plaintiff alleges that the above said mortgage was not for legal necessity; that defendant 9 made false recitals in the mortgage deed; that the properties were mortgaged by defendant 9 for expenses incurred for his immoral habits and

illegal purposes; that the properties at the time of sale were worth its. 20,000/- but were sold for the above amount of Rs. 4000/-; and that defendants 7 and 8 did not implead the plaintiff in the mortgage suit.

Consequently the plaintiff contends that the mortgage decree is not binding on him and that defendants 1 to 6 who purchased those properties from defendant 8 as they fell to his share in a partition between defendants 7 and 8 with full knowledge of the collusive decree and illegal mortgage are bound to restore possession of the same to plaintiff.

3. Defendants 1 to 6 and 8 contested the suit. They contended that the mortgage suit was filed against defendant 9 only as he was the manager or the family; that the mortgage was executed for legal necessity and was not tainted with any illegality or immorality; that defendant 9 originally contested the mortgage suit but afterwards became ex parte; that he filed a petition to set aside the ex parte decree which was dismissed by the trial Court as well as by the appellate Court; that defendants 7 and 8 purchased the suit properties at a court auction and obtained delivery of possession and the latter who got those properties towards his share sold the same to defendants 1 to 6 who were in possession of the same; and that defendants 1 to 6 were bona fide purchasers without any knowledge of the alleged illegality or immorality of the mortgage debt, if any.

4. The learned Additional Subordinate Judge dismissed the suit holding that the plaintiff signally failed to prove that the mortgage amount or any portion of it was spent for any illegal or immoral purposes; that the plaintiff was bound by his father's alienation for legal necessity; and that the plaintiff was not entitled to claim Rs. 16,000/-being, the difference in prices between the court sale and sale for which the properties were subsequently sold by defendant 8 in favour of defendants 1 to 6.

5. Mr. M. S. Rao, the learned counsel for respondents 1 to 6 raised a preliminary objection that the appeal having abated against respondent 4, his legal representatives not having been substituted in appeal, the entire appeal abated in toto.

6. Defendants 1 to 6 purchased the suit properties from defendant 8 under a sale deed dated 18-12-43. If is a joint purchase by all the six defendants" who are in possession of the properties. Respondent 4 died on 15-9-51 and a memo was filed by the learned counsel for the respondents on 17-8-54 informing the Court of his death on 19-8-54 the learned counsel for the appellant took two weeks" time for bringing the legal representatives of the deceased respondent 4 on record.

Again on 6-9-54 further time was granted to the appellant for the same purpose. On 20-9-54 the appellant filed three applications --- one to set aside the abatement of the appeal against respondent 4, one to substitute his legal representatives, his widow and two sons who succeeded to the properties of

respondent 4 and a petition to condone the delay in filing these two applications.

On 27-9-54 there was no appearance for the appellant and the matter came up before the Registrar and even the copies of the petitions were not filed. Copies of the petitions were filed on 18-10-54 and when the matter came up before the Court on 20-10-54 none appeared for the appellant and consequently the petitions for setting aside abatement, for substitution and for condoning delay were dismissed on that day.

The matter again came up on 9-12-54 for orders regarding abatement of the appeal as against deceased respondent 4 and time was granted till Monday next. Again petitions for setting aside abatement, for substitution and for condoning delay were filed on 10-12-54 which came up for hearing on 8-2-55. The respondents objected to the setting aside of the abatement and the Court passed the following order.

"Heard Mr. Mohanty. It is represented that respondent 4 died on 15-9-51 and that 3 years later, a petition for substituting his legal heir was filed, but it was dismissed for default. He has now come up with a second petition for setting aside the abatement and condoning the delay. We see no reason why this belated application should be entertained. Mr. Rao for the opposite party objects. The petition is dismissed. The appeal abates as against respondent 4."

7. Mr. Rao contends that the appeal having abated against respondent 4 who is a joint purchaser and is in joint possession along with the other respondents 1 to 3, 5 and 6, the appeal abated in toto.

8. Order 22, Rule 4, Civil P. C. says:

"(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit.

(2)

(3) Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate as against the deceased defendant."

and under Order 22, Rule 11, Civil P. C. "plaintiff" shall be held to include the appellant, the word "defendant" a respondent and the word "suit" an appeal.

9. The effect of reading Order 22, Rule 4, Sub-rule (3) with Order 22, Rule 11 is that where within the time prescribed by law no application is made to implead the legal representatives of the deceased respondent, the appeal shall abate as against the deceased respondent and an order that the appeal abated against the deceased respondent 4 had already been made.

Though there is no provision in the Civil Procedure Code that in such, cases the

entire appeal abates as a whole, the statutory provision being only that the appeal abates as against the deceased respondent, the question whether the partial abatement leads to an abatement of the appeal in its entirety depends upon general principles of law.

These principles recognised in various decisions are that if the case is of such a nature that the absence of the legal representatives of the deceased respondent prevents the Court from hearing the appeal as against the other respondents, then the appeal abates in toto.

Whether the appeal can or cannot proceed in the absence of the legal representatives of the deceased respondent is dependent upon the principle whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same litigation with respect to the same subject matter.

A Court should not be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole. Mr. Rao in support of his contention relies upon a decision of the Calcutta High Court in the case of -- Midnapore Zamindary Co., Ltd. Vs. Amulya Nath Roy Chowdhury and Others, . In that case it was held:

"Whether or not the appeal abates as against the deceased respondent only or as a whole must depend upon the particular circumstances of each case, the test to be applied being whether in the absence of the respondent against whom the appeal has abated the appeal can proceed and the creation of an anomalous situation in passing two contradictory decrees should be avoided."

It was also held that the Court cannot proceed with the appeal by invoking the provision contained in Order 41, Rule 22, Civil P. C. as the Court already passed an order refusing to add the legal representatives. He also relies upon a decision in the case of -- Ramphal Sahu and Others Vs. Babu Satdeo Jha and Another, . It was held in this case:

"The appellate Court has no power to proceed with the hearing of an appeal and to reverse or vary the decree in favour of all the plaintiffs or defendants under Order 41, Rule 4, Civil P. C, if all the plaintiffs or defendants appeal from the decree and one of them dies and no substitution is effected within time and the application for setting aside the abatement, so far as the deceased appellant is concerned has been refused, always assuming that the decree appealed from, proceeded on a ground common to all the plaintiffs or defendants."

On these authorities Mr, Rao contends that the present appeal abates in toto as otherwise there might be two contradictory decrees -- one in favour of the deceased respondent 4 holding that the mortgage decree and court sale were valid and he could, not be dispossessed and another, in the event of the appeal being allowed, holding that the mortgage decree and court sale are valid and

directing the other respondents to deliver possession of the suit lands.

He also contends that respondents 1 to 6 are joint purchasers and are in joint possession and as such the entire appeal abates.

10. The learned counsel for the appellant Mr. S. Mohanti contends that even though the purchase is a just purchase by defendants 1 to 6 though their shares are not specified in the sale deed, their shares must be deemed to be equal u/s 45, T, P. Act and such even if the Court were to reverse the decree of the lower Court and pass a decree in favour of the plaintiff as against the other respondents, it would not be a contradictory decree.

He contends that if the alienation in favour of all the defendants 1 to 6 was an alienation by six different sale deeds, he could have filed six different suits and if the Court dismissed those six suits, he could have filed appeals only against some in which case the principle of contradictory decrees would not apply even though the appellate Court might pass a decree setting aside the alienations in those cases where appeals were filed and the trial Court holding the alienation valid in the cases against which the appeal was not filed which became final.

He relies for this contention on a decision in the case of -- "Sant Singh v. Gulab Singh" AIR 1928 Lah 572 This is a decision of a Full Bench of, five Judges. That was a case in which the facts were quite different. The reversioners of the widow instituted a suit for a declaration that the sale should not affect their reversionary rights after the vendor's death. The suit was dismissed and the plaintiffs appealed.

During the pendency of the appeal A, one of the vendees, died and his representatives were not brought on record within time. The appeal abated as against A. Though there was one conveyance in favour of the four persons, the share taken by each vendee is clearly specified in the deed. Under those circumstances it was held that the abatement of the appeal as against A did not result in a dismissal of the appeal in its entirety.

The other cases cited by him, namely -- AIR 1942 155 (Oudh) and -- "Shankarbhai Manorbhai v. Motilal Ramdas" AIR 1925 Rom 122 (E) are also cases in which the interest of the common respondents or appellants are separate. In my opinion, these decisions do not support Mr. Mohanti as far as the facts of the present case are concerned.

The suit, it may be noted, is a suit for a declaration that the mortgage bond executed by defendant 9 is invalid and that the auction sale also is invalid and for recovery of possession. The subject matter of the appellant's suit is substantially the validity or otherwise of the mortgage.

There is already the decree of the trial Court declaring the mortgage bond valid and binding upon the plaintiff. That decree has become final as far as respondent 4 is concerned and if this appeal were to be heard and a finding arrived at that the mortgage bond is not valid and binding upon the plaintiff then it would

certainly be a case of having two contradictory decrees which ought not to be allowed on principle.

The prayer for possession or alternative relief is only a consequential prayer. Even if it is considered as a suit for possession there may be two contradictory decrees if the appeal is proceeded with. The purchase is a joint purchase, the shares are not defined and ascertainable and they are in joint possession of the properties.

11. In my opinion, therefore, the appeal having abated against respondent 4, has abated as a whole and the Court cannot proceed with the, appeal. Consequently the preliminary objection raised by Mr. M. S. Rao ought to prevail. But as this is a First Appeal and the suit and appeal are valued at Rs. 16,000/-, we heard the appeal on merits and record our findings.

12. The main issue in the case argued before us by the learned counsel for the appellant is whether the mortgage decree in original suit No. 9 of 1949 on the file of the Subordinate Judge's Court, Puri and the sale held in execution of its decree are not binding on the plaintiff. The plaintiff is the only son of defendant 9. They constituted members of a joint Hindu family.

The suit mortgage was executed by defendant 9 for Rs. 3200/- on 18-9-36 in favour of defendants 7 and 8. It is not the plaintiff's case that the mortgage bond is not supported by consideration. On the other hand his case is that the money borrowed under the mortgage bond was spent for illegal and immoral purposes and as such the mortgage does not bind him.

Exhibit A is the registered mortgage bond executed by defendant 9 in favour of defendants 7 and 8. This deed recited that money was necessary for payment of the decretal dues of Natabar Swain and others in Execution Case No. 54 of 1936 on the file of the Subordinate Judge's Court, Puri, in which the properties including the mortgage were being brought to sale and for meeting the expenses of the appeal filed which was pending before the Hon'ble High Court.

The appeal referred to was a Criminal Revision filed in the High Court against the conviction of defendant 9. The attestors of the mortgage bond are late Jagabandhu Singh and Late Gadadhar Das, pleaders of the Puri Bar. Exhibit B (1) is the copy of the order sheet in Execution Case No. 54 of 1936.

This Ext. B(1) shows that on 5-1-37 the judgment-debtor, that is, defendant 9 filed a petition for setting aside the sale under Order 21, Rule 89, Civil P. C. on depositing the balance of the decretal amount of Rs. 800/- and the sale held in that case on 18-12-36 was set aside.

D. W. 1 is the law agent of defendants 7 and 8 and he stated that the money was borrowed on this mortgage for payment of the decretal amount on the disputed properties which were brought to sale in Court in Execution Case No. 54 of 1936 and for meeting the expenses in the criminal appeal in which defendant 9 was convicted.

He also deposed that the mortgagees made enquiries about the necessities and found that there were these necessities. It is also in evidence that defendant 9 actually paid the land revenue from out of this money and from Ext. B (1) we also get that at least some amounts were paid towards that decree after the execution of this mortgage.

The mortgage suit was decreed on this evidence in execution of which the properties were sold.

13. Mr. Mohanti contends that the debt under the impugned mortgage was contracted for illegal and immoral purposes. There is a general evidence of all the witnesses for the plaintiff that Padma Charan was keeping prostitutes and was addicted to wine and that he squandered away the estate, for immoral purposes. No case can be made out by the plaintiff on this general evidence as most of these witnesses did not connect the money borrowed under the mortgage with his actual expenditure for immoral purposes.

The evidence of P. W. 7 and Ext. 5 are the only pieces of evidence on the strength of which Mr. Mohanty contends that the debt is illegal and immoral.

14. On the strength of this evidence the learned counsel for the appellant contends that a major portion of the amount under Ex. A was spent for criminal litigation and not for payment of the mortgage dues in Execution Case No. 54 of 1936.

Relying on Ex. 4 which is a sale deed executed by defendant 9 on 14-1-37 and the date of actual payment of the amount due under the mortgage decree in execution case No. 54 of 1936 which was deposited into Court on 15-1-37 as seen from Ex. B(1), the learned counsel for appellant contends that the money under the impugned mortgage was not paid towards discharge of the decretal dues referred to in the said mortgage but was spent for meeting the expenses in the criminal litigation.

He refers to Ext. 5, the judgment of the Patna High Court in Criminal Revn. No. 29 of 1936 D/-7-12-36 (Pat) (F). This was the criminal case against defendant 9 referred to in Ext. A. Exhibit 5 shows that in the criminal revision a petition was also filed to grant permission for compounding the offence and both the petitions were dismissed.

On the strength of this Mr. Mohanti contends that from the dates of the impugned mortgage and the judgment of the Patna High Court, it can clearly be seen that the money borrowed went towards the expenses of the criminal litigation and as such he contends that the debt is an Avyavaharika debt.

He also relies on the evidence of P. W. 7 who deposed that Padma Charan (defendant 9) mortgaged his zamindari to Jagannath Misra for expenses required in the criminal litigation at Cuttack.

On the strength of this evidence the contention of the learned counsel is that the

amount borrowed under the mortgage having been spent for criminal litigation where defendant 9 was convicted, is not binding upon the plaintiff. The evidence adduced by the plaintiff in this case is very general, and there is no definite evidence that the amount borrowed under the mortgage was actually spent for compounding a criminal offence.

All that can be gathered from the evidence is that a major portion of this amount must have been spent in the criminal litigation.

15. Mr. Mohanti contends that the amount spent for expenses for defending the criminal case against the father is not an expense for legal necessity and that the money borrowed for that purpose is only an Avyavaharika debt.

There is no direct authority cited by Mr. Mohanti that amount borrowed for expenses to defend a criminal litigation is an illegal debt. Mr. Mohanti cites the case of -- "Nathu Rai v. Dindayal Rai" AIR 1917 Pat 504 in which it was held:

"The Manager of a Hindu joint family is not entitled to spend the family funds in his own defence to a criminal charge, nor is he entitled to hypothecate the family property in order to raise money to meet the expenses of such a defence, except upon the ground of consent of the members of the joint family or upon the ground that from the circumstances it could be inferred that the other members of the family had consented."

From the facts of the case it does not appear whether the manager concerned in that case was the father. The case of the father would be quite different from that of a manager not being the father. The principle with which we are concerned is the pious obligation of the son to discharge the father's debts which are not Avyavaharika debts.

The liability of the manager arises on the ground of legal necessity. Consequently this case does not support in any way Mr. Mohanti's contention. Mr. Mohanti next relies upon a decision of the Full Bench of the Bombay High Court in the case of -- Govindprasad Vasudevprasad Tiwari Vs. Raghunathprasad Indraprasad Manolika, . In this case it was held:

Where a person in possession of property, to which he is not entitled, disposes of that property and deprives the rightful owner of that property his conduct is dishonest and the son is not liable for the debts arising out of such conduct."

In this case the father was sued along with others for wrongful dispossession of the rightful owner for possession of the property and mesne profits amounting to about Rs. 6500/-, to which the son was not a party. The decree was sought to be executed against the son and the son raised the contest that he was not liable for the said amount as it was an Avyavaharika debt.

This case is clearly distinguishable from the facts of the case in hand, as in that case the liability for mesne profits arose expressly on the ground of file illegal act of the father. In my opinion, therefore, this case also does not support the

contention of the appellant.

Mr. Mohanti also relies upon a decision in the case of -- AIR 1934 238 (Privy Council) The Judicial Committee of the Privy Council held in that case on the evidence that the father had misappropriated part of a sum of Rs. 43,000/- as Secretary of the school committee and for that he could have been prosecuted for criminal breach of trust and accordingly the sons were not liable for that amount, but they were liable for the balance of the debt which was not shown to be tainted in any manner.

There the amount for which the sons were not made liable was the amount misappropriated. This case also does not apply to the facts of the present case.

16. On the other hand there is authority for the position that the amount borrowed for purposes of meeting the expenses of defending a criminal case against the Karta of the family is a debt for legal necessity and is also not an Avyavaharika debt.

In Mayne's Hindu Law, Edn. 11, at page 405, it is observed,

"So too, debts contracted by the" father for the expense of defending himself in suits or proceedings are repayable by the sons".

In the case of -- "Beni Rani v. Man Singh", 34 All 4 (J), it, was held:-

"The necessity of raising money to pay for the defence of the head of a joint Hindu family committed to the Court of Session on a serious criminal charge was a valid legal necessity such as would support a mortgage of the family property executed by the father and one of his sons for such purposes."

Mr, Justice Chamier observes at page 7:

"According to our system of jurisprudence and practice a man is presumed to be innocent unless his guilt is established. The question whether in such a case as this, legal necessity exists for raising money, cannot depend upon the result of the trialI doubt whether any more pressing necessity could exist from the point of view of members of a Hindu family than the necessity for raising money to defend the head of the family against a serious criminal charge."

17. The learned counsel for the appellant contended that the principle of Hindu law that the sons are not liable to pay the Avyavaharika debts of the father based -upon ancient Hindu texts should not be construed in the light of a system of criminal jurisprudence developed long after.

He therefore" says that the decision reported in the case of 34 All 4 (J)" is not an authority for the position that the debt" incurred for defending, in a criminal charge is not an Avyavaharika debt as the decision is based on the principle that the accused being presumed to be innocent in the criminal law as administered in this country, the expenses required for the defence are not Avyavaharika debt.

He contends that under the ancient Hindu law a Hindu who commits an offence

should confess and expiate the guilt by penance.

In support of his contention he relies upon, an observation made in the case of Govindprasad Vasudevprasad Tiwari Vs. Raghunathprasad Indraprasad Manolika, referred to above. In the course of the judgment, Beaumont C. J. observed:

"It seems to me repugnant to good sense to construe ancient texts in the light of a system of criminal jurisprudence developed long after".

It is on this observation though made in a different connection that the learned counsel relies upon to show that the expenses for defence in a criminal litigation are Avyavaharika debts and the reason on which Chamier J, based his decision in 34 All 4 should not be accepted in the light of the observations made by the Beaumont C. J, of the Bombay High Court in the above decision.

The observation of the learned Chief Justice of the Bombay High Court with all respect does not apply to the facts of this case. Even, in the Hindu jurisprudence there was a system of criminal law regularly administered by the law courts, and the accused was punished only on proof of guilt (Vide Hindu law and Custom by Jolly, p. 286).

18. In the case of -- "Hanumat Mahton v. Sonadhari Singh" AIR 1920 Pat 708 it was held that the sons of a Hindu are liable on a mortgage executed by their father the karta of the family to meet the expenses of defending himself against a charge under the Cattle Trespass Act, In the case of -- Dhanukdhari Singh Vs. Rambirich Singh, , it was held:

"The rule of Hindu law upon which the act of the Karta and his dealing with the family property are binding upon the other members of the family does not restrict it to the karta alone. It is wide enough to authorise any member of the family to deal with the family property, such as to incur debts provided the act is done in time of distress and for family necessity.

The defence of a member of a joint family in a criminal charge is regarded among the Hindus as a pious and necessary act in order to remove the stigma of disgrace upon the whole family, consequent upon the conviction of one member. The question whether there existed legal necessity for raising the loan cannot be made to depend upon the result of the trial,"

This decision of the Patna High Court is approved by the Madras High Court in the case of -- "Krishna Ayyar v. Muthulakshmi Animal" AIR 1934 Mad 169 . The learned Judge observes at page 171:

It is laid down in Dhanukdhari Singh Vs. Rambirich Singh, a case where money was spent in defence of criminal case against members of the family that the question whether there was legal necessity for the raising of the loan cannot be made to depend upon the result of the trial.

The same case lays down that in criminal cases against members of a joint family the legal necessity for raising a loan to defend them is binding on the

estate. Here it is a stronger case because the bond itself which Krishnammal tried to enforce and the execution of which was totally denied west part of her husband's estate. In the result she was discharged."

Consequently the money under, the suit mortgage bond as contended to have been spent by defendant 9 himself in a criminal litigation even then the said debt is binding upon the plaintiff and is not an Avyavarika debt. (Sic)

19. It is next contended by Mr. Mohanti that this amount was borrowed as seen from Exs. A and 5 at a time when he was already convicted and a revision was pending in the High Court and as such the expenditure cannot be deemed to be an expenditure for defending the criminal litigation.

I cannot accept this, contention. The Code of Criminal Procedure allows the convicted person a right of appeal and also enable him to file a revision.

In my opinion, not only the expenses incurred at the stage of trial but also expenses incurred in appeal and revision against the conviction are expenses incurred, in defending oneself in a criminal prosecution.

20. Next Mr. Mohanti contends that as defendant 9 was finally convicted in the criminal litigation, the amount spent towards that litigation is an avyavaharika debt. As already seen from the decisions of the Patna and Madras High Courts referred to above the result of the case is not the criterion, but it is only the point at which the money was borrowed that has to be looked into.

The Supreme Court in the case of --- Commissioner of Income Tax, West Bengal Vs. H. Hirjee, observes:

"No distinction can be drawn for the purpose of assessment between the illegal expenses of the unsuccessful and successful defence in criminal cases."

21. The learned counsel for the appellant lastly contends that the properties which were worth Rs. 20,000/- were sold only for Rs. 4000/- in the court sale and consequently he is entitled to claim Rs. 16,000/- from the defendants. The dates of the court sale and the sale in favour of defendants 1 to 6 are at different times when the prices of properties were different.

At the time of the purchase by defendants 1 to 6 the properties were fetching a higher price. There is no evidence as to what the price of the agricultural land was at the time when the properties were sold in court auction and further I think, the plaintiff has absolutely no cause of action to claim the difference in prices as an alternative case.

22. For all the reasons stated above, the appeal fails and is dismissed with costs. The plaintiff is to pay the court-fee to the Government.

Narasimham, J.

23.I agree.