(1928) 12 MAD CK 0015

In the Madras High Court

A.R. Arumugaswami Nadar (representative-in-interest of A.R. Ponnuswami Nadar) — APPELLANT

Vs

Kumara Ettapaswami — RESPONDENT

Date of Decision : 10-12-1928

Acts Referred:

Citation : (1929) 56 MLJ 295

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

Bench : Full Bench

Judgement

Reilly, J.—In this case the plaintiff has obtained a decree to enforce a charge in his favour for a maintenance allowance, and defendant 12,

who has obtained a mortgage-right over some of the property concerned, appeals. Mr. Sitarama, Rao for defendant 12 has urged two points

before us. His first argument is that neither the plaintiff nor his father was a party to the proceedings in which this charge was created. It appears

that in O.S. No. 63 of 1899 on the file of the Additional Subordinate Judge of Tinnevelly, which was an inter-pleader suit regarding the Vadimitta

Zamindari, there was eventually a decree in accordance with an arbitrator''s award; but that award merely embodied a razinamah put in by the

parties before the arbitrator. In accordance with that decree the present defendant 1 got one-fourth of the Zamindari but was bound to pay a

maintenance allowance to the plaintiff''s father and his heirs, charged upon part of the one-fourth of the Zamindari which defendant 1 obtained by

the decree. The plaintiff''s father was not a party to that suit, and therefore Mr. Sitarama Rao contends that the plaintiff cannot enforce the charge

created by that decree. For this he relies upon (1883) L.R. 11 I.A. 20 (Privy Council) . In that case under an award between other parties certain property was allotted by the arbitrator to a person who had no legal right to it and who was not a party to the arbitration. Their Lordships of the

Privy Council held that that person could not sue to enforce the award in his favour. To my mind that case embodies little more than an aspect of

the general rule that a person cannot sue on a contract to which he is not a party. If A and B contract that one of them shall make a payment to C,

C cannot sue on that contract. But it does not follow from that rule that a cesti que trust cannot sue to enforce the trust in his favour, though he had

nothing whatever to do with its creation, or that a person in whose favour a charge is created on Immovable property cannot enforce that charge

merely because he has not been a party to the transaction or proceedings in which the charge was created In (1910) L.R. 37 I.A. 152 (Privy

Council) there was an agreement between a bride''s father-in-law and her parents that the father-in-law should make a monthly payment to the

bride, and that was charged upon Immovable property. Their Lordships of the Privy Council held that, though the bride was not a party to that

transaction, she was entitled in equity to enforce the charge. They held that the principle of Tweedle v. Atkinson (1861) 1 B. & Section 393 : 121

E.R. 762 did not apply to such cases. In this Presidency in Shuppu Animal v. Subramanian ILR (1909) M. 238 : 1909 19 M.L.J. 739 it was.

decided that a mother was entitled to sue to enforce a charge created in her favour by her sons in a partition between them to which she was not a

party. It will be noticed that in both those cases not only was there any charge but a charge created in circumstances of some sort of family

settlement. The present case cannot be distinguished from those cases on that ground because the plaintiffs and his father were members of a

Zamindari family and entitled to some consideration and maintenance on that account. Other cases have been quoted before us in which persons

have been permitted to enforce claims arising out of family settlements to which they have been no parties, even though there has been no charge in

their favour; but it is unnecessary to consider them in the present case, as we have a definite charge, on which the plaintiff rests his claim. Mr.

Sitarama Rao seeks to distinguish the case to bring it within the scope of the decision in (1883) L.R. 11 I.A. 20 (Privy Council) by pointing out that

the charge here arose out of an award. I doubt whether the fact that a charge was created by an award would by itself be sufficient to prevent the charge-holder from enforcing it when he was not a party to the award. But in this case it happens that, although the decree proceeds formally on

the arbitrator''s award, the award itself merely embodies the razinamah between the parties to O.S. No. 63 of 1899. In my opinion the plaintiff is

entitled to enforce the charge.

2. Mr. Sitarama Rao''s second contention is that the plaintiff has lost his right to enforce the charge in consequence of what happened in another

suit, O.S. No. 42 of 1901 on the Sub-Judge''s file. In that case one Nachiappa Chetti sued the present defendant 1, his son and the plaintiff''s

father on the basis of a mortgage of a previous maintenance allowance by defendant 1 and the plaintiff''s father in favour of his assignor and asked

originally for a decree against defendant 1, his son and the plaintiff''s father enforcing the mortgage against certain property. In the end there was a

razinamah decree in that suit, by which Nachiappa Chetti got a decree for money and also a right to sell certain items of property. Mr. Sitarama

Rao points out that the plaintiff''s father, though he was not a party to the razinamah in that suit, informed the Court through his vakil that he had no

objection to a decree being passed in accordance with the razinamah, and in it no provision was made for this charge which the plaintiff is suing to

enforce. Mr. Sitarama Rao argues that, the plaintiff''s father having failed to get his charge reserved in that proceeding, the plaintiff cannot now

enforce it. When we examine what happened in that suit more carefully, we find that the razinamah decree eventually made a new arrangement in

favour of Nachiappa Chetti. In the razinamah on which the decree was based it is explained that Nachiappa. Chetti sued to get a mortgage decree

against certain items of property, which defendant 1 had got in his share of the Zamindari, in O.S. No. 63 of 1899. Even in regard to those items

Nachiappa Chetti did not get an ordinary mortgage decree for the sale of them on the basis of the mortgage on which he sued. He got a rather

curious decree, by which defendant 1 and his son were to pay him Rs. 7,250 in instalments spread over a considerable period and, in default, a

charge on four out of the items which he had included in his suit. It appears to me that what Nachiappa Chetti got in that case was not a decree on

the mortgage on which he was suing but a money decree and a new charge in accordance with the terms of the razinamah, which was something quite different from the mortgage on which he was suing. If that is so, then the charge which the plaintiff''s father had got through the razinamah

decree in O.S. No. 63 of 1899 was obviously prior to the charge which Nachiappa Chetti got by the decree in O.S. No. 42 of 1901. In that view

of the case the plaintiff''s father might well say that he was quite willing that such a decree should be made charging defendant 1''s property; he was

not concerned, and he had no objection because it did not affect the charge which he had obtained under the decree in O.S. No. 63 of 1899 as

indeed it did not. In that view of the case, in my opinion, this contention also of Mr. Sitarama Rao fails.

3. Therefore without going into the discussion which has been raised about the identity of the items of property in this case and the way in which

defendant 12 put his pleadings I think it is clear that this appeal should be dismissed with the plaintiff''s costs.

Jackson, J.

4. I. agree.

