

(1959) 09 MAD CK 0067

In the Madras High Court

Case No : Second Appeal No. 90 of 1958

B. Ananthayya

APPELLANT

Vs

B. Subba Rao

RESPONDENT

Date of Decision : 07-09-1959

Acts Referred:

Contract Act, 1872 — Section 74

Transfer of Property Act, 1882 — Section 6

Citation : AIR 1960 Mad 188

Hon'ble Judges : Subrahmanyam, J

Bench : Single Bench

Judgement

(1) The appellant and the respondent are brothers. They have two other brothers. The respondent is the eldest. The appellant is the youngest. Their father died in 1927. The appellant was then 10 or 11 years old. He was a student in the First Form in the school in their village in the South Kanara Dt. After the father's death, the respondent placed himself in the position of a father in relation to the appellant. The respondent got the appellant educated. The appellant passed the High School examination. He had been endowed by nature with intelligence of a high order. He was admitted into College and passed Intermediate in the first class.

He then secured admission in the Engineering College at Guindy. The respondent was looking after all the pecuniary and other material needs and comforts to the appellant. Scholarship was secured for him from the Government. Contribution towards the expenses of education was secured also from the Madhwa association. Some friends too helped. The respondent contributed the balance needed for the appellant's expenses and maintenance out of his (respondent's) meagre salary of about Rs. 30. They had some small ancestral property in the South Kanara Dt. The respondent was a cook in the Cosmopolitan club.

(2) In 1938, the appellant completed three years of his course in the Engineering College. He had another year to do at College and a year of practical course

ahead of him before he could hope to secure an appointment and earn a living. At that stage, the respondent considered that the appellant should agree to make some provision for the respondent's own maintenance after the appellant began to earn a livelihood for himself and the members of his family. Just as the respondent had taken care of the appellant in his boyhood and youth, the respondent thought that it was the appellant's duty to take care of the respondent in his old age. The appellant agreed. As a result, the appellant executed an agreement in favour of the respondent on 17-6-1938.

That agreement said that, in consideration of moneys spent by the respondent on account of the appellant out of the respondent's earnings and in consideration of the moneys that would be spent by the respondent in future and out of natural love and affection, the appellant relinquished in favour of the respondent the appellant's interest in the joint family properties and that the appellant would further, pay the respondent on account of the maintenance of himself and the members of his family after the appellant began to earn a salary or income, sums which would represent a percentage of his monthly income.

So long as the appellant's income was only Rs. 50 per month, he should pay the respondent Rs. 5 per month; when the income rose to Rs. 90, he should pay the respondent Rs. 13 per month, when the appellant's income rose above Rs. 100 per month, the appellant should pay the respondent Rs. 15 for the first hundred and 12 1/2 per cent of the balance. Payments at that scale should continue until 1953. If the respondent died before 1958, payment should be made till the end of 1958 to the respondent's dependents. If the respondent survived 1958, payments should thereafter be made to the respondent at the rate of only 5 per cent of the income of the appellant in case the appellant's monthly income continued to be more than Rs. 300.

(3) The suit which has given rise to this second appeal was instituted by the appellant in the City Civil Court for a declaration that the agreement was void and unenforceable. It was pleaded that the agreement had been procured by fraud, coercion and undue influence. The trial Judge as well as the Judge who heard the appeal in the lower appellate court have both held that the agreement was not vitiated by fraud, undue influence or coercion and that the appellant's consent to the agreement was free. That is a finding which I see no reason to disturb in second appeal.

(4) The appellant's learned counsel contends that the agreement was void as opposed to public policy. The appellant is at present an officer in the Public Works Department in Madhya Pradesh. When the suit was instituted, his salary was Rs. 410 per mensem.

(5) An officer in the Public Works Department in Madhya Pradesh is the holder of a public office. Section 6(f) of the Transfer of Property Act enacts "A public office cannot be transferred nor can the salary of a public officer, whether before or after it has become payable." The appellant's learned counsel contends that the

agreement dated 17-5-1938, though it was entered into long before the appellant became the holder of a public office, amounts to assignment of a portion of the salary of a public officer and is therefore void under S. 6(f) of the Transfer of property Act, or should, in any event be declared void on grounds of public policy.

(6) In relation to that agreement, the first point to note is that the agreement does not purport to deal with the salary of a public officer. It relates to the income which the appellant might earn after becoming a B. E. of the Madras university. The income might be earned either as salary attached to a public office or as salary in private employment, or as income in independent practice of the profession. The agreement by itself has nothing directly to do with any public office. Under the agreement, no head of a department could be requested to deduct for the benefit of the respondent, any sum payable to the appellant. The agreement placed the appellant under an obligation to pay the respondent a specified sum of money every month after the appellant began earning money. The payment was to be made for the maintenance of the respondent and persons dependent on him.

(7) The second thing to note in relation to the agreement is that the appellant is not bound to pay the amount payable under the agreement out of the salary or income that he earns every month. He could pay it out of his savings or he could pay the money out of any dowry that he might get--he was a bachelor at the time of the agreement--or out of gifts of any other kind. The money that he had to pay had to be fixed on some basis. The basis chosen was the amount of his monthly earnings either by way of salary from an employer or otherwise.

(8) I do not think that the cases cited by the appellant's learned counsel have any bearing on the facts of this case. In *Grenfell v. (Dean and Canons) Windsor* (1840) 48 ER 1292, it was held that the security granted by a canon over his share of the profits of his office was valid. In the course of his judgment, the Master of the Rolls (Lord Langdale) observed that if the security had been in any way connected with public service, it might have been necessary to attend seriously to the argument that the remuneration was not assignable and salaries and pensions attached to a public office could not be alienated because a public office must not be allowed to fall into such a situation as to make it difficult for him, in consequence of any pecuniary embarrassment, to maintain the dignity of his office. Since there is no assignment of salary in this case, these observations have no application to the facts before us.

(9) In the *Corporation of Liverpool v. Wright* (1859) 28 LJ Ch 868, the facts were: Certain categories of fees were attached to the office of a clerk of the peace. From a person appointed to that office the Corporation took an agreement that he would accept a salary and would account for the fees. It was held that the agreement was void on two grounds of public policy, first, because a person accepting an office of trust can make no bargain in respect of that office; and, secondly, because the law presumes that all the fees prescribed in relation to the

office are required for the purpose of enabling the officer to uphold the dignity and perform properly the duties of this office. Since, in this case, there has been no agreement directly relating to any part of the salary which the appellant expected to draw or draws as an officer of the Government, that case can have no application.

(10) In the case considered in *Postmaster General, Bombay v. Chenmal Mayachand* ILR 1941 Bom 415 : AIR 1941 Bom 389, the judgment debtor who was a postman was arrested in execution of a money decree. In order to earn his liberty, he agreed with the decree-holder that his officer should withhold every month Rs. 6 out of his salary of Rs. 40 until the decree debt was satisfied. But for that agreement no part of his salary of Rs. 40 could be attached. It was held that the agreement was void as opposed to public policy. The policy of the law as enunciated in S. 60 C.P.C. is to ensure to a public servant the enjoyment of his salary in full if it is below the attachable limit. That policy could not be permitted to be defeated by private agreement that a part of the salary below the attachable limit be paid over by the disbursing officer to a creditor of the public servant. On the facts here, the appellant is in receipt of a salary which permits of attachment, if there was a decree, of sums in excess of the sums payable to the respondent. No question of public policy as stated in that ruling could come into play.

(11) The other cases cited by the learned counsel for the appellant relate to agreements to permit attachment which the law prohibits under S. 60 of the C.P.C.

(12) I find that the agreement dated 17-5-1938, did not of its own force assign, or effect a transfer of, any part of the salary of the appellant and that therefore the agreement is not void under S. 6(f) of the Transfer of Property Act or on any ground of public policy.

(13) The appellant's learned counsel then contends that the payment provided for the benefit of the respondent and the members of his family is the nature of a penalty and that this court should grant relief to the appellant so as to make the terms of the contract equitable. I am unable to see anything unconscionable or inequitable in the terms of the agreement. The respondent had stood to the appellant in the position of a father, when the respondent was a young man needing the assistance which a person in the position of a father can alone give. The respondent naturally desired that, in his old age, he should be able to live in a state of comfort commensurate with the position which it was expected his younger brother would attain. A father might be entitled under the Hindu law to maintenance at the hands of his son. But an elder brother has no such rights.

The respondent could therefore not call on the younger brother to pay for the respondent's maintenance in his old age, in the absence of an enforceable agreement. The appellant too realised the reasonableness of the respondent's desire and request and executed the agreement. The moneys payable were

payable not by way of return for benefits received, but for the respondent's maintenance. In paying money for the appellant's maintenance and education, the respondent was not acting as a lender of money. He was acting as an elder brother discharging his obligation as the eldest member of the family to persons whom the father would have looked after if he had been alive. Therefore, in promising to pay to the respondent moneys for his maintenance in the future, the appellant was not making a promise to return moneys received, but to discharge his own obligations as a younger brother to an elder brother.

It would not be correct--that is what both the brothers thought--that, after the appellant began earning money either as an officer of the Government or as an officer in private employ, the respondent should live as an ex-cook. They thought that it was altogether proper that, after the appellant started earning money, the respondent should live as the elder brother of an engineer. For that purpose, they agreed that the appellant should pay money on the scale provided for in the agreement. The money that has been paid by the respondent to the appellant formed rather the motive for his promise than the consideration for the promise. The basic consideration was natural love and affection which then subsisted between the brothers. No "consideration", is necessary for the effectiveness of a promise made, out of natural love and affection, by one brother to another.

Under the agreement, if the appellant was getting a salary of Rs. 400, he would have to pay the respondent Rs. 52-8-0 for his maintenance. By the time the appellant rose to a position in which he was able to earn Rs. 400, he was bound to have saved some money out of his prior earnings. In any event, Rs. 52-8-0 out of Rs. 400 could not be regarded as unconscionable or inequitable to pay to the elder brother, who had enabled the younger brother to complete his education and secure a position in life. After 1958, the appellant is liable to pay only Rs. 15 a month so long as the respondent is alive. Even that sum is not payable if the appellant's income does not exceed Rs. 300 a month. The money is not necessarily to be paid out of the salary or income earned every month. The amount is determined with reference to the monthly income or salary.

(14) Learned counsel for the appellant cited a case where relief was given on the ground that the bargain was unconscionable, viz. *Sundara Reddy Vs. Jagannathan and Another*, . In that case, under a bond for Rs. 26, executed by a father and son in favour of a lender, the son undertook to discharge the interest on the amount by working at Rs. 2-8-0 a month. After getting a year's work from the son, the lender instituted a suit to recover the principal and Rs. 34 by way of interest. The District Munsif worked out the rate of interest at about Rs. 175 per annum. This court held that the contract was unconscionable and that the lender had received adequate compensation for the money lent. The relationship between the appellant and the respondent was not at the time of the agreement and is not at present the relationship of a lender and borrower. There is no case for the application of S. 74 of the Contract Act.

(15) The appeal is dismissed. In view of the relationship of the parties, I direct

them do bear their own costs in the second appeal.

(16). Appeal dismissed.