

(1968) 01 MAD CK 0051
In the Madras High Court
Case No : A.A.O. No. 331 of 1964

D. Satyavel and Others

APPELLANT

Vs

Kota Ranga Ramanujiah and Others

RESPONDENT

Date of Decision : 24-01-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 5, Order 33 Rule 6, Order 33 Rule 7

Citation : AIR 1969 Mad 434

Hon'ble Judges : Venkataraman, J

Bench : Single Bench

Advocate : N. Subramania Sarma, for the Appellant; C. Veeraraghavan, R. Thirumalal Thathachari and C.N. Ramaswami, for the Respondent

Final Decision : Allowed

Judgement

Venkataraman, J.—This appeal has been filed against the order of the learned judge of the City Civil Court, Madras, dismissing the application filed by the appellants under Order 33, Rule 1, Civil P. C. for permission to file the suit as paupers. The application was dismissed on the ground that prima facie the appellants had no cause of action. Evidently the learned judge meant to reject the application under Order 33, Rule 5 (d) which says that the Court shall reject an application for permission to sue as a pauper where the allegations do not show a cause of action But the learned Judge overlooked that for this purpose what mattered were only the allegations in the application. Unless the allegations themselves do not show at cause of action, the learned judge was not justified in dismissing the application. It is true that Order 33, Rules 6 and 7 provide that, even where the Court itself does not reject the application under Order 33, Rule 5, it can still reject the application on the grounds mentioned in Order 33, Rule 5, after enquiry in the presence of the respondents to the application.

But even after the enquiry the criterion to be satisfied is Order 33, Rule 5 (d), and for that purpose it is only the allegations in the application which must be taken into account. What, however, the learned judge did in this case was to

discuss the case of the appellants in the light of two documents marked on the side of the respondents. In effect, he discussed the merits of the case, though he purported to do so only in a prima facie manner. This is plainly illegal. The position is really well settled and is covered by a number of authorities which could be found collected in any text book for instance, Mulla (latest Edition) Order 33, Rule 5, Note 6. at pages 1406 and 1407 and A. I. R. Commentaries (latest edition) Order 33. Rule 5, note 5, and Order 33, Rule 7, note 1, pages 3738 & 3748. Of the decisions it is sufficient to refer to two, one of the Supreme Court and the other of our High Court. In Vijay Pratap Singh Vs. Dukh Haran Nath Singh and Another, their Lordships of the Supreme Court observed (at pp. 681 and 682) (of SCR) - (at pp. 943, 944 of AIR):

"By the express terms of Rule 5, Clause (d), the Court is concerned to ascertain whether the allegations made in the petition show a cause of action. The Court has not to see whether the claim made by the petitioner is likely to succeed; it has merely to satisfy itself that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims..... the jurisdiction does not extend to trial of issues which must fairly be left for decision at the hearing of the suit."

2. In Subramaniam Pillai and Another Vs. Kavundappa Goundan and Others, , Horwill, J. pointed out--

"It is true that under the present Rule 6 of Order 33, Civil P. C., the Court is bound to admit evidence dealing with any of the questions that may be raised under Rule 5; but Rule 6 cannot have the effect of altering the meaning of Clause (d) of Rule 5. So whatever evidence may be let in, the Court must consider whether there is a cause of action or not only upon the allegations in the plaint together with the documents referred to in it."

I shall therefore, consider the question on the allegations in the plaint contained in the application. Paragraphs 3 and 4 of the application state thus--

"The property, house and ground bearing present municipal door No. 103, Karaneswarar Koil Street, Mylapore, Madras, more particularly described in the schedule hereunder, is the ancestral property of the plaintiffs who are now having at least a 3/8th share in the same. The said property originally was purchased by the plaintiff's paternal great grandfather Kuppuswami Gramani in 1911. There was a family arrangement and division of the property in 1923, when the several properties of the family were each allotted to and settled on each of his four sons (1) Munuswami (2) Batcha Gramani (3) Dakshinamurthi and (4) Punyakoti. The aforesaid property No. 103, Karaneswarar Koil St. was allotted to and settled on Punyakoti who being deaf and dumb, was living under the care and protection of Batcha Gramani, the paternal grandfather of the plaintiffs, as a member of the family, notwithstanding the division between the others. Punyakoti Gramani died unmarried and issueless in 1946 and the aforesaid property devolved on Batcha Gramani by right of survivorship and also by inheritance as by the time of the

death of Punyakoti the other brothers of his were dead. Though the said Batcha Gramani had two other sons besides Doraiswami Gramani the father of the plaintiffs, he executed a gift settlement deed on 28-4-1949 in favour of the 4th defendant his wife, and the fifth defendant the father of the plaintiffs, as the plaintiffs' father had a number of children to maintain with the avowed object of maintaining the family and for the benefit of the plaintiffs herein. The 4th defendant was also included as beneficiary in the said gift deed by the paternal grandfather of the plaintiffs, so that she may also be a check on the fifth defendant and so as to prevent him from alienating the property in any manner.

By virtue of the aforesaid gift settlement dated 28-4-1949 half of the said property No. 103, Karaneswarar Koil St, vested in the fifth defendant, the father of the plaintiffs and he took it as ancestral property and the same was joint family property in which the plaintiffs had at least a $\frac{3}{8}$ th share in the entire property, their father getting $\frac{1}{8}$ th share, as the object of the settlement and gift was for the family benefit and for their Maintenance,"

Thus it is alleged that the property which was ancestral came into the hands of Batcha Gramani, the paternal grandfather of the plaintiffs as ancestral property and when he in turn settled it on his wife the 4th defendant, and on his son the fifth defendant (father of the plaintiffs), the half share settled on the plaintiffs' father was ancestral property and consequently the plaintiffs, who are the three sons, would be entitled to $\frac{3}{4} \times \frac{1}{2}$ i.e., $\frac{3}{8}$ th share. Then it is alleged that the fifth defendant, the father of the plaintiffs, led an immoral and evil life by keeping concubines and gambling, and contracted debts for the purpose, and executed a mortgage deed, dated 27-1-1952 in favour of Kota Srinivasiah, the father of defendants 1 to 3, for a sum of Rupees 12000. The debt was contracted for illegal and immoral purposes and was not for any legal necessity and therefore, the mortgage was not binding on the plaintiffs 1 to 3. The said Kota Srinivasiah filed O. S. 1301 of 1956 on the file of the City Civil Court Madras, for recovery of the mortgage amount and obtained a decree on 5-2-1957. Kota Srinivasiah died and his sons, defendants 1 to 3, as his legal representatives filed E. P. 293 of 1961 and the first defendant with the leave of the Court purchased the property in Court auction for a low price of Rupees 22000, though the property was worth more than Rs. 35000. Defendants 1 to 3 were attempting to take possession of the property including the share of the plaintiffs. The decree and the sale were not binding on the plaintiffs and therefore, they resisted delivery of their share.

They, therefore, brought the suit for a declaration that the mortgage decree was not binding upon them in respect of their share and for an injunction restraining defendants 1 to 3 from interfering with possession of their $\frac{3}{8}$ th share. They valued it firstly u/s 25 (b) of the Madras Court-fees and Suits Valuation Act 1955, at half the market value of their $\frac{3}{8}$ th share i.e., Rs. 6757-50 (the value of the entire house being Rupees 360400). A court-fee of Rs. 473-50 was payable. Secondly they prayed for partition and separate possession of their $\frac{3}{8}$ share

and, since they were in joint possession of the property, a court-fee of Rs. 200 was payable u/s 37 (2) of the Act.

3-4. It will be seen that the case of the plaintiffs rests on two bases (i) that the house in the hands of Batcha Gramani (paternal grandfather of the plaintiffs) was ancestral and (ii) that the half share gifted by Batcha Gramani to the father of the plaintiffs was ancestral in the hands of the father of the plaintiffs. So far as the first base is concerned, it is curious that the plaintiff allegations are inconsistent, because they say that the property which was allotted to Punyakoti devolved on his death on Batcha Gramani by right of survivorship and also by inheritance. Devolution by survivorship is inconsistent with devolution by inheritance. If it was survivorship Batcha Gramani should already have been owner or coparcener of the property with Punyakoti; but, if he got it only by inheritance Batcha Gramani could not have been owner along with Punyakoti. If we take only the allegation of survivorship into account, it may be taken (tentatively) that the property in the hands of Punyakoti and Batcha Gramani was ancestral and therefore, when Batcha Gramani got it by survivorship it was ancestral in his hands. But, if he got it only by inheritance, it could not be ancestral; it would be the self-acquired property of Batcha Gramani.

It is permissible for the respondents to invite the Court to take into account the latter allegations of Batcha Gramani getting the property by inheritance, because that is part of the allegations in the plaint. But this would not entail dismissal of the application automatically, because, even if the property was the self-acquired property of Batcha Gramani, it is alleged in the plaint that under the gift deed by Batcha Gramani dated 28-4-1949 the half share gifted to the father of the plaintiffs became ancestral in his hands as between him and his sons, the plaintiffs. Now, according to the passage in the decision of Horwill, J., extracted already, it may be permissible to look into the settlement deed dated 28-4-1949, to see whether, as contended by the respondents, the father of the plaintiffs got an absolute estate in the half share and that it is not ancestral property in his hands as between him and his sons. But the question cannot be readily answered and, as pointed out by their Lordships of the Supreme Court in C.N. Arunachala Mudaliar Vs. C.A. Muruganatha Mudaliar and Another, , the intention of the donor would have to be gathered from the language of the document taken along with the surrounding circumstances. I am of the opinion that this question must according to the criterion indicated by their Lordships of the Supreme Court in Vijay Pratap Singh Vs. Dukh Haran Nath Singh and Another, be left for decision at the hearing of the suit and is not capable of being decided at this preliminary stage.

5. I may add that if that question has to be tried at the hearing of the suit, the appellants might also be permitted at the hearing of the suit to prove, if they could, that the property, when it came into the hands of Batcha Gramani, was ancestral, in the sense that he could not make a gift of it to his wife and son (father of the plaintiffs) to the detriment Of his grandsons, the plaintiffs.

6. Sri V. C. Veeraraghavan, the learned counsel for the respondents, has however, urged that the application must be rejected on the ground that the reliefs which are required in law have not been prayed for. What is submitted is this, that even assuming that the mortgage dated 27-1-1952 in favour of Kota Srinivasiah by Doraiswami (father of the plaintiffs) was not for legal necessity and was not binding as a mortgage, once a decree was passed thereon, the decree could be executed even against the shares of the sons and the sale would be binding on the sons, unless they could prove that the mortgage debt was contracted for illegal and immoral purposes. This is on the well-recognised principles of Hindu Law that the son is liable, on the theory of pious obligation to his father, to discharge the debts of his father not tainted with illegality or immorality. The learned counsel cites the decisions in *Abdul Hameed Sait and Another Vs. The Provident Investment Co. Ltd. and Others*, ; *Jagadesan and Another Vs. Saraswathi Ammal and Others*, . *Faqir Chand V. Harnam Kaur*, AIR 1967 SC 727, and AIR 1925 18 (Privy Council) and *Mulla's Hindu Law*, Section 294 (b); to which may be added *Pannalal and Another Vs. Mst. Naraini and Others*, ; *Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Others*, and *S.M. Jakati and Another Vs. S.M. Borkar and Others*, .

7. The learned counsel submits that there is no prayer in the plaint for setting aside the Court auction sale and that on that sole ground the application must be rejected. This contention found favour with judge of the Court below. In my opinion, however, the plaint contains the necessary allegations. The allegations really mean that the mortgage, the decree obtained thereon and the sale in execution of the decree do not bind the 3/8th share of the appellants. The prayer portion no doubt merely prays for a declaration that the mortgage decree in O. S. 1301 of 1956 does not bind the plaintiffs, but the allegation that the Court sale also does not bind them is also implied. But, even if that allegation is added expressly, that would not influence the valuation of the court-fee payable. Section 25 (b) of the Court-fees Act would still be the section applicable and the valuation of the suit would be the same. Section 25 (b) says;

"Where the prayer is for a declaration and for consequential injunction and the relief sought is with reference to any Immovable property, fee shall be computed on one-half of the market value of the property or on Rupees three hundred, whichever is higher."

Since, according to the allegations in the plaint, the plaintiffs continue to be in possession of their 3/8th share, it is sufficient if they ask for a declaration that the mortgage, the decree and the sale do not bind them and for consequential injunction. There is no provision in the Court-fees Act dealing with suits for, cancellation of a sale. Section 40 dealing with suits for cancellation of decrees states that fee shall be computed on the value of the part of the decree sought to be cancelled. But here that provision would not seem to apply in terms to the Court auction sale, and, so far as the decree is concerned, it is unnecessary for the plaintiffs to set aside the decree, because they were not parties to it. So far

as the sale is concerned, it would seem to be sufficient for them to ask for a declaration that it does not bind their share and for consequential injunction. Though, as I have pointed out, there is no material defect, the plaintiffs can be permitted to amend the plaint extending the scope of the declaration to the Court sale as well as not binding on them. The allegations are there, and just because there is a small omission in the relief portion, it cannot be said that the allegations do not show a cause of action so as to warrant a rejection of the application under Order 33, Rule 5 (d).

8. It is then urged by Sri V.C. Veeraraghavan that, according to the decisions he has cited, it is necessary for the plaintiffs to allege and prove that the debt was contracted for illegal and immoral purposes to the knowledge of the mortgagee, Kota Srinivasiah, and that it is not sufficient to say that the debt was contracted for illegal and immoral purposes. It seems to me, however, that it could be left to the stage of evidence. However, even here the plaintiffs may be permitted to amend the plaint by including a recital that the debt was contracted for illegal and immoral purposes to the knowledge of Kota Srinivasaiah, if that is necessary.

9. In the result, the order of the learned Judge is set aside, and the application for permission to sue as paupers is granted. The appeal is allowed. The parties will bear their, own costs in the appeal.