

(1926) 12 MAD CK 0019
In the Madras High Court

Damodharam Chetty

APPELLANT

Vs

Bansilal Abeerchand and Others

RESPONDENT

Date of Decision : 21-12-1926

Acts Referred:

Citation : AIR 1928 Mad 566

Judgement

1. The suit from which this appeal arises was instituted by respondent 1 to recover the amount due under an equitable mortgage made by deposit

of title-deeds and evidenced by a registered instrument. The amount to secure which the equitable mortgage was made had admittedly been

advanced to a business carried on in partnership by defendants 1 to 3, the original defendants in the action.

2. The property over which the equitable mortgage was given as security belonged, however, to defendant 1 or his family. Defendant 4 in this suit,

the appellant before us, was added as a party on his own application, apparently with a view to have determined in this action itself the question

whether or not the equitable mortgage made by defendant 1 was binding on his half-share in the property.

3. It has thus come about that the pleadings in the case, so far as the liability of defendant 4 was concerned, were not as accurate as otherwise they

might have been. On behalf of defendant 4, it being denied that the mortgage was binding on him, the parties went to trial on that issue generally,

and Mr. Justice Krishnan who tried the case found it was so binding and granted a decree accordingly. It is from that judgment that defendant 4

has filed the present appeal.

4. In appeal it has been contended before us that the learned Judge was wrong

in holding that the mortgage was binding on the plaintiff's share in the property. The argument was based on two grounds by the learned vakil for the appellant. The first was that the property, the subject of the mortgage, being admittedly joint family property of defendants 1 and 4, defendant 1 had no right to alienate the property inclusive of the son's share except for purposes properly binding on the family or for bona fide antecedent debts of his own. It was contended that at the time when the suit mortgage was created, though there was a personal debt of defendant 1 for goods purchased for the business to the extent of Rs. 25,000, still that debt had not yet become payable, the goods having been purchased on credit and the credit period of 70 days not having then expired.

5. It was argued that if goods should be purchased by a person on credit there is no debt due till the expiry of the credit period. This argument was obviously due to a confusion between debts due and debts due and payable. A debt may conceivably be both due and payable even though not demandable or enforceable at law. It is, however, well known that in the piecegoods market at Madras the 70 days' credit generally signifies merely that the price payable carries interest at the rate that may be stipulated from the expiry of 70 days, and that if the purchaser should make the payment earlier he would be entitled to a discount also at a stipulated rate calculated proportionately for the unexpired period of credit before which the payment is made. The contention, therefore, cannot be accepted that there is no debt due by the father before the expiry of the credit period, and in any case, it would have been obviously to the interest of defendant 1 to pay up the amount due even before the expiry of the credit period and earn a discount.

6. The learned vakil for the appellant referred in the connexion to the case of *Bandhu Ram v. Ramkishun Sonar* AIR 1923 All. 535. It was held in that case that the amount secured by a mortgage not being payable for some considerable time could not be regarded as a pressure on the estate or the family as to justify an immediate alienation for the purpose of discharging it. But a trade debt cannot possibly be regarded in the same light and more especially when it is really payable even though not demandable and when, on such payment being made, proportionate discount can also be obtained.

7. The second contention argued on behalf of the appellant was that the amount now sued to be recovered was really not the original debt of Rs.

15,000 borrowed for paying off an antecedent debt of the father, but represents only moneys borrowed subsequently from time to time by the

father and that, as regards the purposes for which these later amounts were borrowed, there is no evidence whatever on behalf of the plaintiff or on

the record to show that they can be regarded as debt borrowed for paying off any antecedent debts. There is no doubt some room for such a

contention. But at the same time it must be remarked that the appellant became a party to the suit on his own application and it was only on the

pleas raised by him that the issues were raised. In this connexion it must be observed that on behalf of defendant 4 no such question was raised or

even suggestion made either in the defence filed or in the cross-examination of the plaintiff's witnesses. The learned vakil for the appellant

strenuously contended that the onus is on the plaintiff supporting the alienation to establish affirmatively the circumstances under which the father,

defendant 1, was entitled in law to effect a valid alienation. The argument put forward was as follows: No doubt the original sum of Rs. 15,000

may be held to have been borrowed for paying off antecedent debts; but that is only the first item in the account; since then defendant 1 has paid

into the credit of the account several sums of money. These payments would, according to the rules relating to the appropriation of payments, have

reduced considerably the amount of the original debt; the amount now sued to be recovered, therefore, represents only moneys borrowed by

defendant 1 subsequently: there is no evidence with regard to the purposes for which these later amounts were borrowed and, therefore, the suit

mortgage cannot be supported in the absence of any evidence to show that these later borrowings were for the purpose of discharging the father's

antecedent debts.

8. There would have been considerable force in this argument and great difficulty in deciding in favour of the plaintiff on the evidence before us, if

the original contract between the parties had not been one of the security, by way of mortgage, having been intended in the very first instance to be

security for a floating account. In the case of a floating account, where security is intended to cover the maximum contemplated by the parties, it is

not possible, as pointed out by the learned Judge in the Court below, that, after the maximum amount is once borrowed and drawn, subsequent

payments in, can be regarded as payments made to reduce the maximum amount of liability without any reference to or any contemplation of

subsequent drawings or borrowings.

9. After all, all the rules relating to appropriation of payments and the rule formulated by the Master of the Bolls in Clayton's case are rules based

on the intention of parties actual, presumed or even imputed. If so, the payments made by a debtor who has already drawn the maximum amount

cannot be attributed to any intention on his part either to reduce the maximum available or even permanently to reduce the liability but is only

ascribable, as pointed out by the Judge, to keep down the interest and make the amount available for being drawn out again.

10. It follows from this that the decision of the learned Judge could not be held to be wrong on any such hard-and-fast application of the rule

relating to appropriation of payments.

11. The view that we have thus taken on the two points argued before us would be sufficient to dispose of the appeal. But it seems to us that the

decision of the learned Judge can be supported on a much broader ground.

12. It is admitted that defendants 1 and 4 belong to a caste or community of traders and that defendant 1's father was himself during his life time

carrying on business in piecegoods. It is not contended before us that if the deceased father of defendant 1 had carried on such business till his

death and defendant 1 had continued it subsequently he would not have been entitled to borrow moneys for the purposes of such business. But it

appears that the business which was carried on by the father was stopped by him for some years before his death and that defendant 1, did not

begin such business till a few years after his father's death. On this it was strenuously contended on behalf of the appellant that a business would

cease to be a family business if it should cease to be carried on for such considerable time. But it seems to us that there is no warrant for any such

contention, much less for such contention based on the length of the period of limitation.

13. After all trade and commerce are largely dependent on time, place and conditions and it seems to us monstrous to require that a person should

be under an obligation to continue his business under any conditions whatsoever and, even though loss may be anticipated or certain, under the

penalty of the business carried on by him ceasing to be regarded as ancestral or family business. Such a requirement would obviously not be in the

interests of family estates. Having regard to the general principles of Hindu law it must be held that the substance and subsistence of family are

inter-related and that the family estate and the family business or profession, that is, the kulachara are closely related and almost interdependent.

On the one hand it is the family business or profession that is the origin of the health and the means by which it continues to be maintained and

improved. On the other hand it is the family estate or wealth that makes the conduct of the family business or profession possible.

14. From this it would also follow that too narrow a construction should not be allowed to be placed on such expressions as "" family trade or

business "" and that with changes of civilizations and conditions what should be applied is not a rigid rule of law but the principle on which it is

based. It seems to us absurd to suppose that if a family business should be found to have consisted in the purchase and sales of one commodity,

purchase and sale of another commodity should be held to be outside the scope of the family business. The reductio ad absurdum of such a rigid

rule may be seen if the rule is pushed to its logical extreme and it should be sought to be contended that the ancestral business consisted only on the

purchase and sale of 100 bags of rice per year and that, therefore, the purchase and sale of 150 bags of rice was a speculative extension of such

business. Generally speaking, therefore, each case will have to be determined only with regard to its particular facts. The question to be determined

in each case should be whether having regard to the recognized business, profession., means of livelihood or what is called ""kulachara "" of the

family, the particular enterprise or embarking., was only within the reasonable limits of the exercise thereof or really, having regard to its nature or

extent, a new speculative enterprise. In this connexion we may state that we entirely approve of the dictum of Sadasiva Iyer, J., in the case of the

Official Assignee of Madras v. Palaniappa Chetty [1918] 41 Mad. 824:

I think that the right of a Hindu father belonging to a trading community to begin a lawful and ordinary trade business as a joint family business in

which himself and his minors sons were partners cannot be disputed.

15. In this ease it being not disputed that the family business has been one of purchase and sale of piecegoods the mere circumstance that the father

of defendant 1, ceased, for some reason, to carry on such business for a few years before his death, is not sufficient to make a similar business

started by the son some time afterwards any the less a family business. If it be a family business, it cannot be argued that defendant 1 had no right

to borrow the moneys, the subject of the claim, for the purposes of carrying it on. The decree of the learned Judge is, therefore, right and the

appeal fails and is dismissed with costs.