
(1992) 04 MAD CK 0066
In the Madras High Court
Case No : A.S. 514 of 1981

G. Rangaraju and another APPELLANT
Vs
R. Venkateswaran and 12 others RESPONDENT

Date of Decision : 01-04-1992

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 4
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90

Citation : (1992) 04 MAD CK 0066

Hon'ble Judges : Venkataswami, J;Abdul Hadi, J

Bench : Division Bench

Advocate : M. Veluswami and V. Vijayashankar, for the Appellant; T.L. Rammohan for Mr. P. Ananthakrishnan Nair, K. Jayaraman and Mr. K. Sampathkumar for M/s. A.P.S. Kasthurirangan and S. Ramanarayanan, for the Respondent

Judgement

Venkataswami, J.—This appeal is filed against a judgment and decree in O.S. No. 358 of 1978, on the file of the Second Additional Subordinate Judge, Madurai, dated 3-12-1980. Defendants 13 and 14 are the appellants. In this appeal, we are concerned only with items 2 to 4 in the plaint Schedule. For the sake of convenience, the parties will be referred to hereafter by their ranks in the Court below in the suit.

2. The plaintiff (first respondent herein) filed the said suit for partition of the properties mentioned in the plaint schedule and for allotment of his one-fourth share, and for a consequential permanent injunction restraining defendants 7 to 12 from proceeding further in respect of the suit properties in pursuance of various decrees obtained against the first defendant (second respondent herein). For the sake of completion, it may be mentioned that the first and fourth defendants died pending appeal, and legal representatives, namely, Respondents 1 and 3 to 7, who are already on record, were recorded as his L.Rs.. as per order in U.S.R. 2458/82 dt. 11-3-82 and CMP 11387/91 dated 23-9-91 respectively.

3. It is the case of the plaintiff that the properties described in the plaint schedule belong to the plaintiff and defendants 1 to 3 as joint family properties. The first defendant was the manager of the family. The members of the joint family were running transport business under the name and style of "Southern and Rajamani Transports (P) Ltd." and another petrol bunk under the name and style of B. V. Rajagopal Naidu & Co.". Out of the income of the joint family business, certain plaint schedule properties were purchased in the names of the individual members of the joint family. One such item, namely, item 2, was purchased in the name of the 5th defendant (6th respondent herein) who is the mother of the plaintiff. Likewise, the first item was purchased in the name of the first defendant, father of the plaintiff. It is the further case of the plaintiff that items 3 and 4 were ancestral properties allotted to the share of the first defendant in a partition that took place between the first defendant and his brothers. Thus all the schedule mentioned immovable properties are joint family properties, though items 1 and 2 were purchased in the individual names of the defendants 1 and 5 respectively. It was also stated that Item 2 was purchased with the joint family funds benami in the name of the fifth defendant. The plaintiff further states that he was under the impression that his father was attending the business properly, diligently the carefully. Later on (just at about the time of filing of the suit), he learnt that his father has mismanaged the entire affairs, that he had fallen into the hands of bad friends, that he had borrowed moneys from various friends, namely, defendants 7 to 12 at heavy rates of interest and executed bonds for higher amounts after receiving smaller amounts. There was no necessity for his father to borrow and the debts are not binding on the plaintiff, and consequently those debts will not bind his share in the immovable properties. It is further claimed in the plaint that defendants 7 to 14 know fully well about the sound financial condition of the family before 1972 as well as the falling of the first defendant in the company of bad friends and incurring debts on that account. It is the definite case of the plaintiff that all the debts are Avyavaharika debts and, therefore, not binding on the plaintiff. The borrowings made by the first defendant were without any legal necessity. Hence the plaintiff filed the suit for partition and other consequential reliefs, as mentioned above.

4. Defendants 1, 4, 5 and 12 remained ex parte.

5. Defendants 2 and 3, brothers of the plaintiff, supported the case of the plaintiff and they also paid court-fees for allotting their respective shares.

6. The 6th defendant, sister of the plaintiff, also supported the case of the plaintiff.

7. The 7th defendant, a Schedule Bank, and the 12th and 14th defendants (appellants herein) contested the suit by filing written statements.

8. The written statement of the 7th defendant was to the effect that on the basis of equitable mortgage created by the first and fifth defendant a suit was filed in

O.S.138 of 1975 against the first and fifth defendants and a preliminary decree was obtained in the mortgagee. Subsequently, a final decree was also obtained on 23-3-1976. Pursuant to the final decree, the Schedule mentioned properties were brought to sale in E.P. No. 2 of 1977. The properties were sold in court auction after strictly observing all the formalities. The first item of the property was purchased by the 7th defendant. The second item was purchased for proper value by the 13th defendant in the court auction and Items 3 and 4 were purchased by the 14th defendant for proper consideration, in the court auction. The 7th defendant has further stated that the first defendant, father of the plaintiff, questioning the fixation of upset price, filed C.R.P. No. 3052 of 1977, on the file of this Court, and it was subsequently dismissed. The first defendant, likewise, filed E.A. Nos. 153 and 154 of 1978 to set aside the sale under Order 21 Rule 90 of the CPC and to accept the security. Those applications were also dismissed on 19-8-1978. After all this, the first defendant has set up the plaintiff to file this suit. The 7th defendant denied all the allegations to the effect that the father had fallen into the hands of bad friends and that the debts were Avyavaharika.

9. In the written statements of defendants 13 and 14, while reiterating the stand taken by the 7th defendant, they have stated that they have purchased the properties for proper value, and the allegations that the properties were sold for a low price was not correct. Defendants 13 and 14 have also stated that the first defendant was a shrewd and popular businessman. According to them, the contention that the first defendant had fallen into bad company and contracted debts for purposes other than legal necessities, was meaningless. According to them, the debts were incurred for business purposes which business, admittedly, was joint family business, and for legal necessity only, and as such, the debts were binding on the plaintiff's share in the immovable properties.

10. At the risk of repetition, we may state that in this appeal, we are concerned only with items 2 to 4 purchased in the court auction sale by defendants 13 and 14 (appellants herein).

11. In the Court below, the plaintiff examined himself as P.W. 1 and one K. Kothandapani was examined as P.W. 2. The third defendant gave evidence as D.W.1, and the 11th and 14th defendants were respectively examined as D.Ws.4 and 5. D.Ws.2 to 4 were concerned with other alienations with which we are not concerned on the side of the plaintiff, Exs.A1 to A19 were marked. On the side of the contesting defendants, Exs.B1 to B70 were marked of which we are concerned only with Exs.B1 to B49 and B55 to B59 and B67 to B70.

12. The trial court framed as many as nine issues and found that all the schedule mentioned properties are available for partition, that the plaintiff is entitled to one-fourth share in the suit properties, that the debts incurred by the first defendant were not binding on the plaintiff, that though the purchase of items 2 to 4 of the suit properties by defendants 13 and 14 was true and valid, they are not binding on the plaintiff and that the fifth defendant was not entitled to item

No.2 of the plaint A schedule property. On these findings, preliminary decree for partition was passed as prayed for.

13 Aggrieved by the preliminary decree, the 7th defendant also filed appeal in A.S. 495 of 1981. The defendants 13 and 14 (appellants herein) have also filed this appeal. It is brought to our notice that the Learned Counsel appearing for the 7th defendant reported before the Court in A.S. 495 of 1981 that the matter was settled between the 7th defendant and the plaintiff and, therefore the 7th defendant was withdrawing the appeal as settled out of court. That appeal was, therefore, dismissed on 4-2-1991 as withdrawn, as settled out of court.

14. Mr. T.L. Ram Mohan, Learned Counsel appearing for the plaintiff (1st respondent herein) raised a preliminary objection, namely, that inasmuch as the appeal A.S. 495 of 1981 was dismissed as withdrawn as settled out of court, in which the appellants herein were respondents 13 and 14, they cannot pursue this appeal. According to Mr. T.L. Ram Mohan, the findings of the trial court have become final and the appellants are estopped by the principle of res judicata from agitating against the findings again. In support of that, he placed reliance on a judgment of the Supreme Court in Koshal Pal and others v. Mohan Lal and others AIR 1976 S.C.638a:89 L.W.118 (SC)(SN) reported in and K. Khaja Mohideen Vs. K. Muhaideen Batch and Others, . Let us first dispose of this preliminary objection.

15. The appellants herein are purchasers in court auction sale brought at the instance of the 7th defendant. In the same proceedings, the 7th defendant also purchased suit Item I. Therefore, when the suit was tried in the court below, the 7th defendant was mainly concentrating to sustain the title regarding the first item purchased by it in the court auction. Defendants 13 and 14 (appellants herein) fought in the trial court to sustain items 2 to 4 purchased by them in the court auction. Though at the instance of the 7th defendant, the suit items were brought to sale, after the purchase in the court auction, it cannot be said that the defendants 13 and 14 had not acquired any independent right. Further, the appeal of the 7th defendant was not disposed of on merits. But the same was disposed of on merits. But the same was disposed of on the basis that the matter was settled between the 7th defendants and the plaintiff. In such a situation in, the dismissal of the appeal of the 7th defendant will not in any way estop the appellants herein from agitating their right. The decisions cited by the Learned Counsel for the first respondent herein, namely AIR 1976 688 (SC) and K. Khaja Mohideen Vs. K. Muhaideen Batch and Others, was distinguishable on facts. is a case of two cross-suits relating to one subject matter and the party which failed in the trial court filed appeal only against one decree notwithstanding the fact that there were two decrees. The lower appellate court, overruling the objection of res judicata, allowed the appeal. Therefore, the party who succeeded in the trial court filed a second appeal and raised the plea of res judicata. The learned Judge, placing reliance on the judgment of the Supreme Court reported in AIR 1976 688 (SC) observed as follows:-

Miss Sridevi, cited among other decisions *Koshal Pal v. Mohanlal*. In that case, a plea of *res judicata* was raised at the stage of ultimate appeal before the Supreme Court. The judgment under appeal in that case was a common judgment of a High Court by which two second appeals had been disposed of. There were, accordingly, two decrees. But the appellant before the Supreme Court had filed only one appeal against one of the two decrees of the High Court. In these events, the respondent before the Supreme Court raised the plea of *res judicata*. The Supreme Court upheld this objection and dismissed the appeal before them without going into the merits. In the course of their judgment, the Supreme Court marked a distinction between the position that obtained in the High Court where two second appeals were disposed of together by a common judgment and the position that later obtained in the Supreme Court where one decree alone of the High Court had been carried in further appeal. The learned Judges observed that there was no question of *res judicata* at the stage of the second appeals before the High Court, but the position became different in the Supreme Court. According to the learned Judges, the position was analogous to a case where a party to two decrees passed jointly by a trial court appealed against only one of them, leaving the other to become final. The learned Judges referred to an early decision of the privy council in *Shcosagar Singh v. Sitaram Singh*, in which it was observed:

If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea of *res judicata*.

From the facts, it is clear that there were two independent suits and two separate decrees against which one appeal was filed. The facts here are not like that. Moreover, as already pointed out, the 7th defendant withdrew the appeal stating that the matter has been settled. The terms of settlement are not placed before us. There is every possibility of that settlement being only with reference to Item No. 1. In view of these facts, we do not think that the preliminary objection can be countenanced.

16. Next, we shall dispose of the contentions relating to item 2. The case of the plaintiff was that item 2 was purchased out of family funds benami in the name of the fifth defendant. Learned Counsel appearing for the appellants, Mr. M.V. Velusami, rightly submitted that the findings of the trial court that the property was purchased benami in the name of the fifth defendant and, therefore, the 5th defendant cannot claim any title and the property must be treated as joint family property, cannot be sustained, in view of Central Act 45 of 1988, namely, the Benami Transactions (Prohibition) Act 1988. He invited our attention to S. 4 of the said Act. It is not in dispute, and the Learned Counsel appearing for the first respondent also agreed that the Supreme Court has taken the view in *Mithilesh Kumar and Another Vs. Prem Behari Khare*, that the provisions of the Act apply only to pending cases. In view of the Supreme Court judgment, the appellants are entitled to succeed relating to item 2 of the schedule mentioned properties inasmuch as that property cannot be treated as a joint family property on the

basis of which alone, the suit was filed.

17. Now, the items that remain for our consideration are, items 3 and 4. There is no dispute that so far as these items are concerned, they are joint family properties. The only question that has to be considered is, whether the debts incurred by equitably mortgaging these properties for joint family business by the manager of the joint family are binding on the plaintiff or not. The trial court, though has set out the principle correctly by extracting a passage from a judgment of this Court in *Gopalakrishnan v. Balasubramania Chettiar and others* 81 Law Weekly 363 which reads as follows:-

It is well-established that the managing member of a trading family has wider powers than those of the manager of a non trading family. Of course acts done by the manager must be for the benefit of necessities of the family. But acts like the incurring of debts are necessities to a trading family. Credit is the very essence of trade and the existence of business creates the necessity for a borrowing and purchasing on credit. The power of a manager, therefore, to carry on the family trade necessarily implies a power to pledge the property and credit of the family, for the ordinary purposes of that trade. In the case of a trading family, those who deal with him the manager and to whom he incurs debts are not put upon enquiry as to whether the debts were incurred for the benefit or necessities of the family, so long as they are incidental to the family business, for the karta of a Hindu joint family which carried on a family business, has implied authority to borrow money for its purposes.

As wrongly understood the principle laid down by the Supreme Court in *Fakir Chand v. Sardami Harham Kaur* Died rep. by her L.Rs.. and others AIR 1967 S.C.727 and decided the issue against the appellants.

18. The trial court has set out in more than one place the law laid down by the Supreme Court in AIR 1967 S.C.727 (supra) in the following manner:-

However, as laid down by the Supreme Court in the decision referred to earlier, a father manager of the joint family is entitled to mortgage the joint family property only for discharging antecedent debts or for necessity. There is no adequate evidence on the side of the defendants 10 and 11 much less on the side of the 7th defendant to hold at the first defendant borrowed money for discharging antecedent debts or for legal necessity. It was contended by the Learned Counsel for the 7th defendant that the business carried on by the first defendant was ancestral joint family business. This has not been pleaded by the 7th defendant in the written statement. On the contrary in the written statement the 7th defendant has stated that it is only joint family business which was carried on by the defendant as manager and not joint family business.

The above understanding of the decision of the Supreme Court by the trial court is wrong. The relevant portion of the judgment of the Supreme court reads as follows:-

In *Bharmappa Murdeppa Soppin Vs. Hanmantappa Tippanna Belludi*, Beaumont C.J. said that the second proposition in *Brij Narain's* case. 51 Ind. App. 129:(AIR 1924 PC 50) did not apply to the recovery of a debt in its character as a mortgage debt., and a decree for payment of the debt by sale of the property could not be enforced by sale of the son's interest in it, but if a personal decree is obtained against the father then that decree might be so enforced. He, however, pointed out that this view would compel the creditor to recover the debt in two stages. A similar opinion was expressed in AIR 1947 69 (Nagpur) We are not inclined to confine the second proposition within such narrow limits. It is the existence of the father's debt that enables the creditor to sell the property in execution of the money decree against the father. Likewise, if a mortgage decree against the father directs the sale of the property for the payment of his debt, the creditor may sell the property in execution of the decree. It is thus that the procedure for the execution of a money decree is different from that for the enforcement of a mortgage decree. A money decree is executed by attachment and sale of the debtor's property. For the execution of the mortgage decree. An attachment of the property is not necessary and the property is sold by force of the decree. But this distinction in procedure does not affect the pious obligation of a Hindu son to pay his father's debt. As in the case of a money decree, under a mortgage decree also the property is sold for payment of the father's debt. The father could voluntarily sell the property for payment of his debt. If there is no voluntary sale by the father, the creditor can ask the Court to do compulsorily what the father could have done voluntarily. The theory is that as the father, may, in order to pay a just debt, legally sell the whole estate without suit so his creditor may bring about such sale by intervention of a suit: See *Ramasamayyan v. Virasami Ayyar* (1898 ILR 21 Mad. 222). Even where the mortgage is not for legal necessity or for payment of an antecedent debt, the creditor can, in execution of a mortgage decree for the realisation of debt which the father is personally liable to repay, sell the estate without obtaining a personal decree against him. After the sale has taken place, the son is bound by the sale, unless he shows that the debt was non-existent or was tainted with immorality or illegality see *Bhagbut Pershad v. Mt. Girja Koer* (1888 ILR 15 Cal.717(P.C)). In the earlier case of *Suraj Bansi Koer v. Sheo Proshad Singh* (1878 ILR 5 Cal.148 (PC)) also, the Judicial Committee had clearly laid down:

That where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted.

The later portion in the above extract clearly shows that a son is liable unless he shows that the debts were non-existent or tainted with immorality or illegality. In this case, the trial Court has given the following finding regarding the debts

incurred by the father:

According to them (P.W. 1 and D.W.1 i.e., the plaintiff and the third defendant), the debts are tainted with illegality though not with immorality and in view of the mismanagement there was not only loss in business, but also mounting debts contracted by the first defendant for his personal use and consequently the debts are not binding on the coparceners.

Even in the evidence of P.W. 1 which was not properly appreciated by the trial court, in the chief-examination, he has not stated that the debts incurred by his father were tainted with immorality or illegality. He has stated in the cross-examination that he does not know anything about the business carried on by his father. However, the trial Court was carried away by Ex. A-10, which is an income tax Assessment Order. In that a claim of deduction was rejected on the ground that that sum related to his personal expenses. What was that personal expense, was not spoken to by anybody. On the other hand, the fact that the father has readily given documents to his son (plaintiff), only shows that he was behind the suit. In the absence of anybody speaking about Ex. A-10, reliance placed by the trial court on Ex. A-10, cannot be approved. On a fair reading of the evidence, we feel that the maximum that can be said against the father was that he incurred the debts by mismanaging the business. It is not in dispute that a debt incurred by mismanagement will not come within the category of Ayyavaharika not binding on the son. Therefore, the trial Court has not properly appreciated the judgment of the Supreme Court. Presumably, the trial court looked into the first headnote in AIR 1976 688 (SC) without looking into the second headnote which led to the mistake.

19. However, Mr. T.L. Ram Mohan, by citing S.295 of Mulla's Hindu Law, submitted that the debt incurred by the father in this case will come under the category of debt not binding on the minor son. On a perusal of the said section, we find that there is nothing to help the plaintiff to come to a conclusion that the debts incurred by his father in this case will not be binding on him, as contended by the counsel.

20. The trial court rightly rejected the plea advanced on behalf of the plaintiff that the properties were sold for a low price, holding that the father has taken appropriate steps under Order 21 Rule 90 C.P.C. and, therefore that question need not be gone into in this case. Even otherwise, no argument on this aspect was advanced before us by the Learned Counsel appearing for the plaintiff. In the result, we have no hesitation to hold that the judgment and decree of the trial court in so far as items 2 to 4 are concerned, cannot be supported, and consequently, the judgment and decree of the trial court are set aside, in respect of those items and the suit is dismissed to that extent, and the appeal is allowed accordingly. However there will be no order as to costs.