

(1963) 08 KL CK 0020
In the High Court Of Kerala
Case No : S.A. No. 943 of 1959

Ganapathy Iyer

APPELLANT

Vs

Sreenivasa Iyer and Others

RESPONDENT

Date of Decision : 06-08-1963

Acts Referred:

Limitation Act, 1908 — Section 21(3)(b)

Citation : (1964) KLJ 272

Hon'ble Judges : S. Velu Pillai, J

Bench : Single Bench

Advocate : T.S. Venkiteswara Iyer, for the Appellant; A.S. Krishna Iyer, A.K. Ramaseshadrinathan For 1st Respondent and N.S. Lekshminarayana Sarama . For Respondents 4, 5, 8 and 9, for the Respondent

Final Decision : Dismissed

Judgement

S. Velu Pillai, J.—This second appeal arises in a final decree for partition of a joint Hindu family which consisted of the plaintiff and his son, the first defendant. The suit was filed on the 5th February, 1952. Earlier, on the 31st March, 1949, the first defendant had mortgaged his undivided share of the family properties to the 3rd defendant-appellant in this second appeal. The second defendant had purchased the first defendant's undivided share subject to the mortgage, at an execution sale which took place on the 26th May, 1951. The preliminary decree provided that in making the partition, the debts of the family also be taken into consideration, having regard to their reality and their binding character. In due course the plaintiff filed a petition for passing the final decree, on impleading the creditors. Defendants 2 and 3 contended that the debts were not real and were not binding on the joint family; this contention has been negated by the two courts below. The District Judge has found, that the debts amounted to Rs. 7,675/- and that they are binding on the joint family and has decreed, that the plaintiff and the second defendant in whom the share of the first defendant is vested by purchase, do bear them. This appeal was pressed for the 3rd

defendant only with respect to those debts which were renewed or might be held to have been contracted after the date of the mortgage, for according to him, his mortgage cannot be affected by debts which came into existence or were kept alive afterwards. The particulars of the debts with respect to which the second appeal was pressed may be stated as briefly as possible. By way of preface it may be observed, that the findings of the two courts that the debts were real and binding on the joint family were not disputed. The debts which are the subject of controversy are items 2, 3, 6, 7 and 10 in schedule B of the plaint. - Item 2 has reference to a promissory note Ext. A 39 for Rs. 2,000/- executed on 30th April, 1946, by the plaintiff and the first defendant in favour of one Seshadri Iyer, the balance under which, amounting to Rs. 300/- was discharged by payment by the plaintiff, on his borrowing afresh on a promissory note Ext. A 43 on the 10th September, 1952, in favour of one P. Subramonia Iyer. Item 3 is the debt under Ext. A 26 promissory note executed on the 1st May, 1946 by the plaintiff in favour of the 5th respondent, R. W. 2. There have been four endorsements on it, of payment of interest in the handwriting of the plaintiff, which have served to keep it alive on the date of suit. Item 6 relates to a promissory note Ext. A 29 dated the 27th October, 1947, executed by the plaintiff and the first defendant in favour of one Ambi Iyer and renewed afterwards as found by the two courts, in favour of the 8th respondent, R. W. 4, by Ext. A 30 dated the 15th December, 1951. Item 7 has reference to two promissory notes Ext. A 31 dated the 8th October, 1946, and Ext. A 32 dated the 5th March, 1947, for the balance under which a promissory note Ext. A 33 dated the 14th November, 1950, was executed, all by the plaintiff in favour of one Venkitachala Iyer. The balance outstanding, amounting to Rs. 210/- was paid by the plaintiff, by his borrowing under a promissory note Ext. A 44 dated the 23rd March, 1953, from the 4th respondent. Item 10 relates to a promissory note Ext. A 36 dated the 20th October, 1949, executed by the plaintiff in favour of one Seetharama Vadhyar, the 11th respondent, for Rs. 500/- the amount under which was utilised for payment under a previous promissory note Ext. A 27 dated the 28th December, 1946.

2. Thus it will be seen, that items 3 and 10 were kept alive by acknowledgments made by the plaintiff before the suit was filed, items 2 and 7 debts were discharged by the plaintiff by raising funds by way of loan to him subsequent to the institution of the suit, and item 6 was renewed before the date of the suit. Learned counsel relied for his contention, that the undivided share of the first defendant must be ascertained as on the date of the mortgage, on *Chinnu Pillai v Kalimuthu Chetti* (21 M. L. J. 246), by which a full bench of the Madras High Court held that the alienee of the interest of an undivided coparcener in a joint Hindu family takes the coparcener's interest as it stood on the date of the alienation. The decision was on the question whether the undivided share mortgaged was affected by a subsequent birth in their family. On this point, there is no need to go behind the law which is summarised thus by Mulla on Hindu Law, 12th edition, page 395, paragraph 261 (5):

The share to which an alienee is entitled on partition is the share to which the alienor was entitled at the date of alienation, and not at the date when the alienee seeks to reduce his interest into possession.

but the learned author proceeded to state:

But this principle applies only to the fraction representing the share of the alienor. As to the actual items of property in which the purchaser is entitled to a share, it has been held that the family property as existing on the date of the suit, is to be taken.

The authority in support of this is Muthukumara Sthapathiar Vs. Sivanarayana Pillai (deceased) and Another, , in which, after referring to the right of the purchaser of an undivided share to compel a partition, the learned Judge observed:

Even if I agree with Chinnu Pillai v Kalimuthu Chetty (21 M. L. J. 246), that the share ceases to fluctuate from the date of alienation, I should not be prepared to go further and say that there must be a hotchpot hooked to the same date. Such a theory would be every combersome to work out in practice, for the court might have to take into account transactions which had long passed beyond the memory of the parties. It is troublesome enough dealing with the present day actualities of a partition suit. I therefore hold that the appellant is entitled to take the family property as existing on the date of his suit.

Applying this, it must follow, that though the mortgage to the 3rd defendant was earlier, the hotchpot available for division, that is, the assets minus liabilities, must be taken to be what existed on the date of the suit, that is, the date on which the partition or the severance in status took place. Thus the purchaser of an undivided interest of a son in the joint family property takes that interest subject to the liability attaching to that interest to pay his father's personal debts not tainted with immorality. See Mulla on Hindu Law, page 395, paragraph 261 (8). These principles apply mutatis mutandis to a mortgagee of a joint family property from a coparcener . (Mulla on Hindu Law, paragraph 263).

3. So far as items 3 and 10 were concerned, the acknowledgments were made at a time when the family was undivided, and the plaintiff as the manager of the family was the person competent to make them u/s 21 (3) (b) of the Indian Limitation Act. They were made before the date of the suit, though this is immaterial in the case of a son, according to the decision in Thadi Murali Mohana Reddi, minor by guardian, Sabbella Rami Reddi and Another Vs. Medapati Gangaraju and Others, . With regard to item 6, Ext. A 30, the renewal was also before the date of the suit, when as manager, the plaintiff's competency is not open to doubt. It is true, that under items 2 and 7 the original liability had ceased to exist by payment; but there was no case for the contesting defendants in their counter that these debts were cleared with joint family funds, the positive evidence being to the contrary, that the plaintiff raised funds for making payment by fresh borrowings for which the joint family is not sought to be

burdened. So at the time of the severance in status, the plaintiff had a valid claim against the joint family estate for reimbursement. I am not prepared to accept the contention, that this is not a claim which can be taken into account at the time of partition. For the above reasons, the judgment and decree under appeal are hereby confirmed; this second appeal is dismissed with costs to the 1st respondent.