(1956) 08 AP CK 0002

In the Andhra Pradesh High Court

Case No : Appeal No. 55 of 1950

Koutarapu Venkata Chenchayya APPELLANT

Vs

Koutarapu Ramalingam and Others RESPONDENT

Date of Decision : 06-08-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12
Transfer of Property Act, 1882 — Section 38

Citation : (1956) 08 AP CK 0002

Hon'ble Judges : Krishna Rao, J;Chandra Reddy, J

Bench : Division Bench

Advocate : Neti Subrahmanyam, for the Appellant; Konda Kotiah, for the Respondent

Judgement

Krishna Rao, J.—This is an appeal by the Plaintiff from die judgment and decree of die Subordinate Judge, TenalL. dismissing O. S. No. 7 of 1948 a suit for partition, and recovery of possession of a half share in 16 items, of Immovable properties, which had been alienated by die Plaintiff''s father. The relationship between, the main parties to the suit will be conveniently seen-from the following genealogical table:

Panakalu Gangayya died about 1898 died 190 Adisubramanyam Venkatalingam Ramalingam (2nd Deft.) (1st Delt.) Venkata Chenchayyssi | (Plaintiff) Panakala Rao (17th Delt.) Gangadhararao (18 Deft.) The Plaintiff is the son of the first Defendant and: was bom on 12th January, 1927. The prope: ties were part of the properties acquired for die family by the first Defendant''s senior paternal uncle Panakalu, except item 15 which was purchased by Defendants 1 and 2 under Exhibit A-8 dated 4th October, 1926. Panakalu and the first Defendant''s father Gangways were undivided brothers belonging to the community of weavers and living at Add palled. Gangayya died. first in or about 1898 and Panakalu died issueless about ten years later in October, 1908.

The family properties then devolved on the dire sons of Gangayya, viz., one

Adisubrahmanyam, the second Defendant Venkatalingam and die first Defendant Ramalingam. In 1921, they divided the properties and the plaint schedule items 1 to 14 and 1 fell to the shave of the first Defendant. On 8th July, 1926, the first Defendant executed a sale deed Exhibit B-24 conveying items 9 & 10 out of these properties to did seventh Defendant who is a stranger to the family. The consideration was the discharge of a promissory note debt of the second Defendant amounting to Rs. 1463-11-3 and cash Rs. 736-4-9.

On 11th October, 1926, the first Defendant executed a second sale deed Exhibit B-34 conveying all the other plaint schedule items including item 15 to his brother the second Defendant. The consideration. was the discharge of a number of debts mentioned as payable by the first Defendant amounting to Rs. 16,034-10-10 and cash Rs. . 705-5-2. Subsequently, there were alienations of various items by Defendants 2 and 7 and at the time of the institution of the suit,, the only plaint schedule item that remained in the possession of the members of the family was item .16, a terraced house in which the Plaintiff and Defendant 1 and 2 were residing, Defendants 3 to 16, 19 and 20 were impleaded as being the ultimate alienees, and Defendants 17 and sons of the second Defendant. The Plaintiff''s case, was that the sale deeds Exhibits 13-24 and B-34 were executed nominally and with false recitals of consideration by the 1st Defendant under the influence of the second Defendant. On this footing, he sought to ignore both the alienations and to recover his half reshape together with past and future profits. He instituted the suit on 22nd December, 1947, within three years after attaining majority.

2. The first, Defendant supported the Plaintiff''s case, while most of the other Defendants including the .second Defendant contested. Their defence was twofold, firstly that the Plaintiff was not entitled-to claim a share in the properties as they were the separate property of the first Defendant and secondly that first . Defendant''s alienations under Exhibits B-24 and B-34 were genuine and binding upon the Plaintiff.

On the first question, the case of the contesting Defendants was that the plaint schedule properties "were part of the self-acquisitions of Panakalu, that Janakalu devised his properties by an unregistered will Exhibit B-9 dated 24th October, 1908, on the .first Defendant and his brothers, and that the plaint schedule properties which fell to the first Defendant''s share at the partition of 1921 constituted his separate property. It was also alleged by them that the Plaintiff was born in 1924 and that the suit was therefore barred by limitation. On the second question, their case was that both the sales were real and were binding upon the Plaintiff as they were executed for the discharge of the first Defendant''s debts.

3. The learned Subordinate Judge found against die contesting Defendants on the first question. His -conclusions were that the Plaintiff was born on 12th January, 1927, that the properties were joint family [properties although they were acquired in the name of Panakalu, that Panakalu''s will Exhibit B-9 was

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

therefore invalid in respect of them and that the first Defendant held the properties as ancestral property in; which the Plaintiff was entitled to a share birth. On, the second question, however, he found, in favour of the Defendants, consequently dismissed, -die .suit.

4. Sri Neti Subrahmanyam, the learned Counsel for the. Appellant, conceded before us that the sales in question were genuine and that It was impossible to support, the plaint allegation that they were nominal. He impugned them only on the ground that. the consideration for,them was either false or not binding upon the Plaintiff.

5. Sri K. Kotayya for the contesting Respondents reiterated their contention, which was negatived by the lower Court, that the properties alienated under Exhibits B-24 and B-34 were not ancestral property hut constituted the separate property of the first Defendant. We are of opinion that diis contention has no merits. The foundation for this part of the Respondents'' case is the undisputed fact that the only ancestral property got by Panakalu and Gangayya was an old dwelling house which did not yield any income. There was no ancestral nucleus with the help of which the properties could have been ac-.- squired. That being so, as urged by Sri K. Kotayya on the authority of AIR 1948 108 (Privy Council) , the onus is heavy on the Appellant to establish how the family came to own considerable Joint family properties.

Aeeosaung to mss ssspoaaenis, altnauga fianakalu and Gangayya were undivided, Panakalu was carrying on a cloth trade, if which Gangayya did not participate and with the income from Which he acquired properties. On the other hand, according to the Appellant, both the brothers carried on the cloth trade and the properties were acquired by their exertions. It is well settled since the decision in Suthersanam Maistri v. Narasimulu Maistri ILR Mad 149 (B), that property acquired by members of a joint family by their joint labor or in their joint business would be their'' joint family property, in the absence of a clear indication of a contrary intention to hold the property as co-owners between themselves.

Therefore, the question reduces to whether the cloth trade, which was the admitted source of the acquisitions of the properties, was the joint business of both the brothers or the. exclusive business of Papal. In this connection, the fact that Panakalu made the purchases in his own name, as instanced by Exhibits B-l to B-7, the title deeds relating to plaint items 1, 3, 4,''7, 9, 10, 1,3 and 16, is clearly of no consequence. Panakalu being the elder brother was naturally the manager of die family and properties acquired for the family would have, naturally been purchased in his name.

6. On the side of the Appellant, P. Ws. 1 to 4 and 7 gave evidence that both Panakalu and Gangayya participated in the cloth trade and that it was their joint concern. For the Respondents, D. Ws. 1 and 3 to 5 isaid that Panakalu alone conducted the cloth business and that Gangayya had no interest in it. ''These D.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

Ws. appear to have given biassed and artificial evidence in favour of the alienees. D. W. 1 conceded that the two brothers had" joint cultivation and were jointly enjoying die lands but D. W. 4 went to the length of saying that Gangayya did not even go to, the fields and attend to the cultivation.

Admittedly, the brothers belonged to the weavers'' community and it was elicited from D. Ws. 1. and 3 that Gangayya used to, weave cloth. The brothers loved each other: and were living as members of a joint family.- In this setting, the story of P. "Ws. 1 to 4 and 7 seems more probable than that of D. Ws. 1 and 3 to 5. It is not likely that Gangayya was an idler in the family and that Panakalu got the proper-tics by his own exertions and kept them for himself as die D. Ws. would have it. We agree with the learned Subordinate Judge in accepting the evidence on the Appellant''s side on this aspect of the controversy and holding that the cloth trade, which was the admitted source of the acquisitions, was carried on by both, the brothers as members of their joint family.

7. Sri K. Kotayya strongly relied on the fact that Panakalu executed a will Exhibit B-9 in respect of the properties held by him, reciting that they were all his self-acquisitions. Exhibit B-9 is an unregistered will and its genuineness was disputed by the plaint tiff. The main ground of. attack was .that it purports to have been executed on 24th October, 1908, whereas according to the entry Exhibit A-32 in the death register, Panakalu died on 23rd October, 1908. But Exhibit B-9 contains the signatures of no less thanj.4 persons as attesters, several of whom are conceded by the Plaintiff''s witnesses to be respectable persons.

The third attester alone happened to be surviving at lire time of the trial, and ho gave evidence as D. W. 1 that Panakalu duly executed the will at about noon and died on the same night. The scribe of the will was one Nagabhushanayya who died in 1919 and his son D. W. 2 identified his handwriting. We agree with the learned Subordinate Judge in accepting the evidence of D. Ws. I and 2 and holding that the entry Exhibit A-32, which would show that Panakalu died on the day prior to the execution of Exhibit B-9 was due to some mistake. Under the will, Panakalu gave all his properties to his three nephews, except for some minor bequests and a bequest of Rs. 5,000 for constructing a country. As the nephews were minors, their brother-in-law Ramayya was appointed the guardian to manage the estate until they attainted Taprity. The testator has recited in-the preamble to the document:

Since the death of my undivided brother, his sons, daughter and wife are under my care and protection........... Except my ancestral house and site, I have earned with God''s grace the rest of the moveable and Immovable properties as my sell-acquisition. Adi Subrahmauyani, Vcukalalingam and Ramalinga, who are'' my brother''s sons and who are under my protection are minors. 1 have regarded them as my sons and 1 have decided to pass on my whole estate to them.

Sri K. Kotayya argues that unless the properties were in fact his self-acquisitions,

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

Panakalu would not have made such a recital in Exhibit B-9. But the will was executed a lew hours before Panakalu''s death and its main purpose appears to have been to provide for the construction of a choultry and the management of the estate during the minority of his nephews. The recital that the properties were his sell-acquisitions did not prejudice them, as the properties were devised on them. It was probably made with a view to give effect lo the purpose of the will, although it was not strictly correct. We agree with the learned Subordinate Judge that it amounts only to a self-serving recital which cannot prevail against the positive evidence of P. Ws. 1 lo 4 and 7. We thereforo confirm the lower Court''s finding that all the properties held by Panakalu were the properties of his joint family.

8. Sri Neti Subrahmanyam has argued that even if the properties were Panakalu''s self-acquisitions, the intention of Exhibit B-9 was that his nephews should enjoy them as joint family properties and that the properties took the character of joint family properties in the hands of the 1st Defendant and his brothers. We are not inclined to agree with this contention, but we consider it unnecessary to pronounce! upon it, in view of our findings that the properties were joint family properties. Panakalu was incompetent to dispose of the properties of his joint family by will. They passed by survivorship to his nephews, and were ancestral property in the hands of the latter.

9. With regard to the date of birth of the appel lant, the extracts Exhibits A-l and A-14 from the birth register taken along with the evidence of P. Ws. 5 and 6 establish that he was born on 12th January, 1927. No doubt, a son was born to the 1st Defendant in 1924 as seen from the birth register extract Exhibit A-33, but this relates to another child which died on 17th July, 1924, as proved by die death register extract Exhibit A-34. We find that the Appellant was born on 12th January, 1927 and was therefore in his mother''s womb on the dates of the alienations under Exhibits 5 24 and B-34. Under the Hindu Law, a son en ventresa mere at the time of an alienation by his father is deemed to be in existence as much as a son born before the alienation and has the same right to challenge it. It follows that the Appellant'' would be entitled to a half share in the plaint schedule properties, which admittedly fell to his father''s share at the partition of 1921, unless the father''s alienations under Exhibits B-24 and B-34 are proved to be binding upon him.

10. We now proceed to the main question whether the alienations under Exhibits B-24 and B-34 are binding on the plaudit. It is well settled that a father''s alienations of joint family property are binding on the sons, provided that they were effected for legal necessity or for the benefit of the family for lialisiying antecedent debts which were not incurred for immoral or illegal purposes. Antecedent debts mean debts which originated independently of and were contracted prior in time lo the alienation impeached. (As the power of alienation is a limited and qualified one, the burden of proof is on the alienee is low that the transaction came within that power. But in discharging the burden, the alienee is

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

entitled to the benefit of equitable principle protecting bona fide purchasers for value. The impact of these principles was explained in Hunooman Pershaud Pandey v. Mt. Babooee Mundray Kunweree, 6 Moo Ind App 393 (PC) (C) and has become a statutory presumption u/s 38 of the Transfer of Property Act. That alienee is bound to inquire into the purpose of the alienation. He is entitled to succeed if he proves:

(1) either that there was in fact legal necessity or benefit the family or discharge of anteccdeut'' debts justifying the alienation.

(2) or that he honestly satisfied himself after pro-1 per and bona fide inquiries as to their existence.

11. Sri K. Kotayya, contended that the test for upholding an alienation is whether the bulk of the consideration was for a binding rmrpose. In this connection he cited a number of cases in which such alienations by managers were upheld, Krishnan v. Govindan 41 MLJ 381 : AIR 1921 Mad 677) (D); Mrs.N. Johnstone v. Gopal Singh, AIR 1931 Lah 419 AIR 1949 18 (Orissa); AIR 1927 121 (Privy Council) We do not consider it necessary to explain how the principle followed in these decisions was entirely different from that adumbrated by the learned Counsel, because the point ol view for which he stands has been expressed by Sadasiva Iyer J., in Rukmani Sundaianunal v. Mu-Iha Animal 1915 Mad WN 8 at p. 10 : AIR 1916 Mad 239 at p. 240) (H), another decision cited by him, as follows:

Where a substantial portion ol the purchase money was not required for the Plaintiff''s interests or benefit, then the whole sale is set aside on condition of the Plaintiffs paying to the purchaser the remaining portion; where, however, a very substantial portion of the purchase money was utilized for purposes binding on the Plaintiff, the sale is upheld, but the Plaintiff is given a decree for recovery of the small portion of the purchase money not utilised for his benefit.

12. This was precisely the point which was elaborately considered and negatived by the Judicial Committee in AIR 1927 37 (Privy Council) The Judicial Committee said:

In their decision the learned Judges of the High Court rely on the authority ol the case of Giidharee Lall v. Kantoo Lall, l''lnd ARI 1874 CRI 821 , and especially on the head note which contains this passage.

Where a father has sold ancestral property for die discharge of his debts, if the application of the bulk of the proceeds is accounted for the fact that a small part is not accounted for will not invalidate the sale.'' While this is in itself a correct statement of the law so tar as it goes, it does not by any means follow, AS the learned High Court Judges seem to have thought, that it is a complete statement of the law or that the sale will be invalidated wherever the part of the consideration not accounted for cannot be described as small. If this were sound the question (would in each case be a matter of arithmetical calculation, and

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

opinions would necessarily vary as to r what constituted the ''bulk of the proceeds'' or ''a: tuialiparf of the same in each particular case. The learned Judges seem to be answered in such cases, viz., whether the sale itself was one which was justified by legal necessity. This is the point of view from which the-matter is approached in the earliest case cited at the Bar of 6 Moo and App 393 (PC) (C) decided by the Board in 1856.

13. Sri K. Kotayya urged that die criterion whether the sale itself was one which was justified by legal necessity" is satisfied when it is shown that the sale by a father was necessary for the discharge of antecedent debts, in other words, that the antecedent debts could not be discharged otherwise than by the sale. This argument is misconceived because it would construe the words "justified by legal necessity" as equivalent to "caused or occasioned by legal necessity". What the Judicial Committee was emphasising in AIR 1927 37 (Privy Council) , was that the application of the consideration for the alienation was a minor matter. The alienee could rarely control the actual application of the consideration which lit paid to the manager or the father.

Nor can he be reasonably expected to see that the manager or father alienated only so much of the property as would meet the necessity, because that would mean that the alienee should undo take what was properly the function of the manager or die father (n managing''the affairs of the family. So far as the application of the consideration is concerned, in the absence of evidence a bona fide alienee who made due enquiry could invoke a presumption of law that it has been expended for proper purposes and for the benefit of the family. The question in such cases is not whether the receipt of the consideration, for the. alienation was justified by legal necessity but is whether the sale was justified by presumptive legal necessity.

14. 1 The principles deducible from 54 Ind App AIR 1927 37 (Privy Council) , which followed 6 Moo Ind |A''p]tt'' 393'' (PC; (C) are these. The alienee must and dress himself the question whether the alienation is lone which a prudent owner would enter into, in order to meet the legal necessity or antecedent debts or for the benefit Of the estate. He should make reasonable inquiries for this purpose. It, after making such inquiries, he is satisfied that the father or manager is-acting within his powers and he himself acts honestly in the transaction the question, whether he was deceived and the legal necessity or benefit or antecedent debts really did not exist and the further question whether the consideration was applied for them-are immaterial, and it is a case of the sale itself "being justified by legal necessity or benefit. No general rule can be laid down as to die extent to which an alienee should pursue his inquiries, or as to the evidence necessary to prove that he acted in good faith. These are questions of fact to be determined on the circumstances of each case including the previous relationship or dealings between the alienee and the alienor, the obliterations of evidence owing to lapse of time and the like.

15. The ratio decided in AIR 1927 37 (Privy Council) was reiterated and applied

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-...

by the Judicial Committee in Ram Sunder Lai v. Lachmi Narain ILR All 430 : AIR 1929 PC 143) (K). The rights of alienees of joint family property in different categories of suits were exhaustively considered by a Full Bench of the Madras High Court in K. Peramanayakam Pillai Vs. S.T. Sivaraman and Another, . Satyanara-yana Rao J., who deliveied the leading judgment, has summarised his conclusions thus:

(1) A coparcener of a joint Hindu family governed by Mitakshara obtaining in the State is entitled to alienate his undivided share either in the whole of the property or in a certain specific item of the property or even the whole of a specific item. In all such cases the only right which the alienee acquires is to stand in the shoes of his vendor and to work out his rights by a suit for partition and in such a suit, if without prejudice to the rights of the other members of the family, it is possible to have the share alienated allotted to the alienor, it may be allotted to the alienee in the right of the alienor. The alienee has to bear the proportionate share of the common burden of the family proportionate to the value of the share alienated to him.

(2) Where an alienation is made by a father or manager of a joint Hindu family and if either the alienation is fully supported by necessity or supported by necessity except to a small extent, the alienation has to be upheld.

(3) If, however, the alienation made by the father or manager of a joint family is supported only by partial necessity, the alienee would be entitled in a suit for partition instituted either by him or by other co-parceners, impugning the alienation to have the alienor''s share allotted to him and also to have the binding portion of the consideration distributed equally having regard to the interest of the alienor and the value of the property alienated.

(4) If the non-alienating coparcener challenges the sale made by the father or manager of the joint family property on the ground that it is not binding on him but institutes a suit only to recover his share in the property alienated thereby admitting the right of the alienee to the other share in that property, and if it is found that the alienation is supported by partial necessity, the common burden discharged from and out of the consideration should be distributed proportionately in the same suit on the principle of Vadivalam v. Natesam, ILR Mad 435 : AIR 1914 Mad 582) ''(M).

16. The first alienation here was under the sale -deed Exhibit B-24 which was executed by the 1st . Defendant on 8th July, 1926 and was got registered -on 10th July, 1926. The vendee was the 7th Defendant, a resident of Chirala, and the property sold was plaint schedule items 9 and 10 consisting of about "2 acres of wet land. The consideration was a sum of Rs. 2,200 and is recited as made up of (1) Rs. 1,463-1.1-3 due as principal and interest on a promissory note dated 22nd November, 1924, executed fcy the 2nd Defendant in favour of the vendee and (2) Rs. 736-4-9 received in cash on the date of the document for tire purchase of other lands. The document has been attested by the 2nd Defendant

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

and by the vendee''s brother-in-law D. W. 11.

The main ground of attack by Sri Neti Subrah-.manyam against this alienation is that the promissory note debt contracted on 22nd November, 1924, was not one payable by tire 1st Defendant but was a debt of the 2nd Defendant who had divided from the 1st Defendant in 1921. Sri Kotayya''s answer is that Defendants 1 and 2 were undivided until 1926 and were jointly liable for debts incurred until they divided in 1926. On this question, Exhibit B-24 recites that at the time of the execution of the promissory note on 22nd November, 1924, Defendants 1 and 2 were living jointly and the 2nd Defendant was in management of their family.

In this connection, reference may also be made to the recitals in the subsequent sale deed Exhibit B-34, dated 11th October, 1926, the bulk of the consideration for which was mentioned as the discharge of tlie 1st Defendant''s half share of the joint debts due by Defendants 1 and 2 to 13 creditors. It is stated in Exhibit B-34 that the eldest brother Adisubrahmanyam alone separated at the partition of 1921, that Defendants 1 and 2 combined to live jointly with the 2nd Defendant as manager and that the division between Defendants 1 and 2 due to some household disputes took place only in August, 1926. " consistently with the recitals in Exhibits B-24 and B-34, die story put forward by the contesting Defendants in their written statements was that Adisubrahmanyam alone became divided in 1921 and that Defendants 1 and 2 constituted members of a joint family which was under the 2nd Defendant''s management until 1926.

17. But there can be no doubt that this story of a partial disruption of the joint family in .1921 is ; false. The 2nd Defendant himself admitted in his evidence as D. W. 8:

There was no document evidencing the partition All the properties including debts and outstanding were divided into three shares in 1921. '' After that partition each member was selling and purchasing lands separately......... In the division in 1921 certain liabilities of the family fell to my share. " First Defendant also got some liabilities to his share and three separate lists of debts were prepared.

18. Exhibit B-36 is a promissory note, dated 2nd . June, 1921, executed by the 1st Defendant for Rs. 841-7-0 in favour of D. W. 9 Damarla Subbayya. The .recitals therein are to the effect that the amount re-, presented the 1st Defendant''s one-third share of the debt due by Adisubrahmanyam under katha and under a promissory note dated 8th. January, 1920. The promissory note, dated 8th January, 1920, executed by Adisubrahmanyam has been marked as Exhibit B-35 and there is no dispute that he executed it OR behalf of the joint family while he was the manager. Thus Exhibit B-36 clearly indicates that the debts of the joint family were equally divided between the three brothers some time prior to 2nd June, 1921.

Exhibit B-6 is a promissory note, dated 23rd March, 1923, executed by the 2nd

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

Defendant for a sum of Rs. 657-1-9 in favour of one Punnamma. The recital is that it was executed in renewal of an earlier promissory note, dated 25di March, 1920, which had been executed by thj3 2nd Defendant''s elder brother and which fell to the 2nd Defendant''s share at the partition. Exhibit A-2 is a sale deed, dated 11th April, 1924, executed by Adisubrahmanyam. The schedule of property therein states that it was mentioned in the lists relating to the partition effected between the vendor and his younger brothers on 9th May, .1921. Although the partition lists have not been filed, it is clear from these documents that there must have been a complete division of the family properties and debts into three shares between the three brothers in May, 1921.

19. It appears further from the 2nd Defendant''s evidence that after the partition of 1921, tlie 1st Defendant carried on separate business with his brother-in-law P. W. 5 and similarly die 2nd Defendant carried on a motor business and a cloth business in the course of which both of them incurred debts. The separate dealings and business are prima facie inconsistent with a reunion. To constitute a reunion, the Parties must have assented to reunite in estate and interest with the intention of remitting themselves to their former status as members of a joint family.

Such an agreement has to be proved by the party setting up the reunion. The mere fact that the members lived together or that one member undertook the responsibilities of management would not be sufficient to prove a reunion, because these arrangements might have been made merely for convenience and are not inconsistent with an intention to remain separate in interest after the partition. In the instant case, the evidence is totally inadequate to show that there was a reunion between Defendants 1 and 2 after the partition of 1921.

20. It is clear, however, that for some reason or other the 1st Defendant willingly lent himself as a party to false recitals in Exhibits B-24 and B-34 regarding the joint status of himself and the 2nd Defendant. The reason was probably that he became heavily indebted and hoped to screen some of his properties from his creditors by obliging the 2nd Defendant. In fact he subsequently got himself adjudicated insolvent by filing a debtor''s petition Exhibit B-55 on 9th August, .1929.

But it cannot be inferred that all his earlier transactions are colorable transactions, whenever the 2nd Defendant was a party to them. Sri Neti Subrahman-yam has drawn our attention to the remark made by the Subordinate Judge about the 1st Defendant in Exhibit B-55 in connection with the insolvency petition:

From the way in which he answered questions put to him, his intelligence (sic) to be far below that of an average man of his age.

He has argued that the 1st Defendant is so unintelligent that he must have been entirely in the hands of the 2nd Defendant throughout. But the learned Subordinate Judge who tried the present suit had also an opportunity to observe

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

the 1st Defendant in the/witness box and his remark in paragraph 32 of the judgment; that the 1st Defendant is cunning and capable Of managing his own affairs is entitled to equal weight. All that can be said is that recitals in Exhibits B-24 and B-34 should not be readily accepted at their face value and that their truth should be scrutinised in the light of the other evidence.

21. The 2nd Defendant has produced the joint account books of himself and the 1st Defendant and they appear to be genuine and generally maintained in the regular course of business. Exhibits B-100 and A-17 are the day book and ledger for the period 1921-23. Exhibits B-104 and B-113 are those for 1923-24, and Exhibits B-25 and B-96 are those for 1924-25. As regards the subsequent periods, for 1925-26 the ledger Exhibit B-lll alone has been produced without the corresponding day book and for 1,920 to 1930, the day book Exhibit B-30 alone has been produced without the corresponding ledger. These books contain individual kathas as well as joint kathas for Defendants 1 and 2.

The entries in them establish that the brothers had joint transactions, altirough they were not members of a joint family after the partition; of 1921. No doubt as ledger pages can be written up at any time, implicit reliance ought not to be placed on the entries in the ledger Ext. B-lll in the absence of the day book for die period. So far as the day book Exhibit B-30 is concerned, in view of the 2nd Defendants admission that they had no joint transactions after August, 1926, it cannot be relied on as against the 1st Defendant and the Appellant for tire subsequent period. At pages 1 to 5 of Exhibit B-30 is found a consolidated list, dated 1.5th March, 1926, which has been marked as Exhibit B-99. We are inclined to agree with Sri Neti Subrah-manyam that the special compiling of this list a few months before the brothers ceased to have joint'' transactions is artificial and suspicious and that the entries in Exhibit B-99 cannot be accepted at their face value. Subject to these considerations, it appears to us that the account books furnish valuable material for checking up the recitals in Exhibits B-24 and B-34.

22. As we have already observed, it is no longer the Appellant''s case, that the sales under Exhibits B-24 and B-34 were nominal transactions. It is therefore unnecessary for us to refer to the evidence which was dealt with by the Subordinate Judge to show that the sales were genuine and that possession of the properties was delivered thereunder. Witir regard to the promissory note, dated 22nd November, 1924, mentioned in Exhibit B-24, there are the entries Exhibits B-26 and B-28 of that date in the day book and ledger concerned, showing the receipt of the principal amount of Rs. 1,200 from the 7th Defendant. 1 The ledger entry Ext. B-27, datrd 21st November, 1924, shows that the amount was utilised to repay through the 1st Defendant a loan advanced by the branch of the Imperial Bank at Repalle. Although the promissory note was executed by the 2nd Defendant alone, it is clear from those entries that the debt ?was treated from outset as a joint liability of Defendant 1 and 2. The day book entry Exhibit B-31,. dated 12th July, 1926, shows that Rs. 263-1,1-3 was-

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

the interest which had aefcrued on the promissory note. Thus, the truth of the first item of consideration is established and the only further question relating to-it is whether tire 1st Defendant could bind the Appellant by taking on himself the entire liability for this joint debt instead of only for a moiety of it. '' As regards the second''item of the consideration,. the day book entry Exhibit B-97 dated 13th July,, 1926, shows that only a sum of Rs. 386-4-9 was received in cash from the 7th Defendant. The 2nd Defendant''s story is that after paying Rs. 736-4-9 in-cash, the 2nd Defendant took back a portion of the amount as a loan and subsequently repaid Rs. 300-therofor as shown by the entry Exhibit B-98, dated 9th October, 1926, in the day book Exhibit B-30. No doubt, the story appears unconvincing, but as-observed by the learned Subordinate Judge, it is unreasonable to expect the 2nd Defendant to recollect the details of a transaction which took place 22 years prior to his giving evidence or to say anything more than what appeared in the account books. The 7th Defendant was a mere creditor and not a relation and the 1st Defendant would not have acknowledged in Exhibit B-24 the receipt of the cash consideration unless it was actually paid by the 7th Defendant to him.

The 7th Defendant is not responsible for how Defendants 1 and 2 made entries relating to the cash in their account books. We would, therefore, find in agreement with the learned Subordinate Judge, that the truth of the second item of consideration is also proved. Sri Neti Subrahmanyam takes the point that the amount is not proved to have been utilised for the purchase of lands as recited in Exhibit B-24. He relies on the decision in Sengoda Goundan Vs. Muthuvellappa Goundan by next friend and maternal grandfather Palani Goundan and Others, , a case in which the alienation of certain unproductive family properly was sought to be justified on the ground of actual benefit to the family, and it was held that as the. sale proceeds were not utilised for the purchase of other income-yielding property, the alienations were not for the benefit of the family.

23. With regard to this attack on both items of considerations, Sri K. Kotayya''s answer is that the 7th Defendant was a stranger who made the purchase bona fide relying honestly on the representations of the 1st Defendant. The 7th Defendant himself did not go into the witness box and the explanation given is that he was an old man aged 80 years. He died after the appeal was filed. His brother-in-law was examined as D. W. 11 and Sri Neti Subrahmanyam has not presented his evidence at all before us nor made any comment upon it.

The materials available show that enquiries on the part of the 7th Defendant, who belonged to a different place, could not have led him to suspect the truth of the representations made regarding the consideration for Exhibit B-24. No doubt, the description of the property in Exhibit B-24 mentions that it fell to the 1st Defendant''s share at a partition. But the date of the partition was not mentioned and the 7th Defendant might well have believed that it was subsequent to 22nd-November, 1924, the date on which the 2nd Defendant was represented to have executed the promissory note as the manager of the joint family.'' To all

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

appearance, the 1st Defendant was the sole coparcener entitled to the properties, as the Plaintiff was only a foetus of about 4 mouths in his mother''s womb at the time. Therefore it is not reasonable to expect the 7th Defendant to have made a searching inquiry -.''is to the purpose and necessity lor the,alienation. The 1st Defendant was involved at the time in several other debts as will be seen when we deal with Exhibit B-34. Whether or not he intended to purchase lands as he represented in Exhibit B-24, the cash consideration was a fraction of the amount necessary for discharging his antecedent debts. Further, as to the purchase of lands, there was in fact a subsequent purchase by Defendants 1 and 2 under Exhibit A-8, dated 4th October, 1926, for a consideration of Rs. 1200 and the only lacuna is that the consideration for Exhibit A-8 is not shown to be connected with the cash received under Exhibit B-24.

It has not been suggested that the sale under Exhibit B-24 was for an inadequate price nor has it been suggested that the 1st Defendant who was heavily in debts could have discharged his debt to the 7th Defendant which he acknowledged as his own antecedent debt, otherwise than by effecting a sale of his properties. In these circumstances, we are of opinion that the alienation under Exhibit B-24 was one that was itself justified by a binding purpose, the alienee having acted honestly after making such inquiries as he might reasonably be expected to make. It is protected by the principles enunciated in AIR 1927 37 (Privy Council) . It follows that the Appellant is entitled to no relief in respect of the properties alienated under Exhibit B-24.

24. The second sale deed, Exhibit B-34, was executed on 11th October, 1926, by the 1st Defendant in favour of the 2nd Defendant for a consideration of Rs. 16,800. This consideration is recited as having been made up of five items:

1. Rs. 765-5-2 paid to the 1st Defendant in cash en the date of the document;

2. Rs. 3,685-4-5 payable by the 1st Defendant personally to the 2nd Defendant in respect of their joint katha'', 3. Rs. 1,369-10-2 due to Damarla Subbayya, under a promissory note, dated 2nd June, 1921, executed by. the 1st Defendant and undertaken to be paid by the 2nd Defendant:

4. Rs. 600 due to Damarla Subbayya by the 1st Defendant'' and undertaken to be paid by the 2nd Defendant; and 5. Rs. 10,379-12-3, the 1st Defendant''s half share of the joint debts due by Defendants 1 and 2 to 13 named creditors, which the 2nd Defendant: undertook to discharge.

With regard to the first four items to talling Rs. '' 6,420-3-9, they are found mentioned in the entry, Exhibit B-110, dated 10th October, 1926, which was made in connection with the sale deed, in the day book Exhibit B-30. In this entry, the first item of Rs. 765-5-2 is mentioned as "Cash paid to the 1st Defendant to the agricultural account (Vyavasaya katha) as per sale obtained from the 1st Defendant.

The entry merely reads as a book the agricultural account. It is dated 10th

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

October, 1926, while Exhibits B-34 recited payment of cash oil 11th October, 1926. The agricultural account has not been filed to elucidate the nature of-the adjustment. The result is that the cash payment of Rs. 765-5-2, the first item- of the consideration, is not proved.

25. Exhibit B-110 also mentions Rs. 3,685-4-5,. the second item of the .consideration, as having been adjusted on account of the 1st Defendant''s joint katha debt. This amount includes Rs. 1,339-4-5, representing interest, as seen from the entry Exhibit b-109, dated 9th October, 1926, in the same day book. the principal in respect of the joint katha debt Was therefore Rs. 2,346. Sri Neti Subrab manikin disrmtes the correctness of the principal and the Plaintiff''s liability for payment of interest. The entries Exhibits B-101 to B-103 and B-105 to'' B-109 in the prior day-books show the particulars o? the principal. Exhibit B-1,01 dated 8th August, 1921, in the. day book, Exhibit B-100, shows that the 1st Defendant was debited with a sum of Rs. 1,000 which was mentioned as having been paid to his-brother Aid Subrahmanyam. Out of this, Rs. 900 represented the sum which the 1st Defendant- had: to pay to Adi Subrahmanyam for equalisation of share at the partition of 1921, on account of a terraced house having been allotted to the 1st Defendant''s share. The remaining Rs. 100 represented the sum which the 1st Defendant owned Adi Subrahmanyam in respect of an adjustment in the prices or bulls that were divided. We have to determine what was the amount owed by the 1st Defendant to the 2nd Defendant on account of payment of Rs. . 1,000 to Adi Subrahmanyam. Exhibit B-100 was. the joint day book of Defendants 1 and 2 and the payments entered therein were admittedly made out: of their common fund, in which each of them had an equal share, ''lire 2nd Defendant''s admission in the witness box further shows that there was no settlement of accounts between him and the 1st Defendant and1 that Exhibit B-34 came into existence only because the 1st Defendant expressed his inability to discharge their joint debts. In these circumstances, the 1st Defendant could owe the 2nd Defendant only a moiety of the sums paid out of the common fund towards his individual debts. The amount properly due by him to the 2nd Defendant under this head in the joint katha is not Rs. 1,000 but only Rs. 500.

26. Exhibit B-102, dated 21st August, 1,921, is the debit entry in the day book Exhibit B-100, in respect of Rs. 900 which the 1st Defendant had to pay to the 2nd Defendant for equalisation of shares on account of having been allotted the terraced house at the partition of 1921. It is agreed that this amount was due in full by the 1st Defendant to the 2nd Defendant,.

27. The entry Exhibit B-103, dated 14th June, 1922, in the same day book shows that Rs. 60 was paid out of the common fund on account of what the 1st Defendant owed Adi Subrahmanyam in respect of the purchase of land for a channel. For the reasons given in dealing with the entry Exhibit B-101 the 1st Defendant had to pay only a moiety of this amount i.e., Rs:30 to the 2nd Defendant under this head.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

28. Exhibit B-105, dated 20th July, 1923, Exhibit B-10J, dated 10th December, 1923, Exhibit B-107, dated 1st April, 1924 and Exhibit B-108. dated 7th July, 1923,'' are entitles in the daybook

Exhibit B-104 showing that Rs. 200, Rs. 60, Rs. JJ3-6-0 and Rs. 82-10-0 respectively were paid out *ai the common fund for various specified individual liabilities of the 1st Defendant. The 1st Defendant was liable to pay the 2nd Defendant only half the amount, i.e., Rs. 100, Rs. 30, Rs. 11-11-0 and Rs. 41-5-0 under these heads. We see no reason why the 1st Defendant should not be held liable to pay interest at a reasonable rate cm the extra .amounts which were paid out of the common .fund for his individual liabilities. It is agreed .that 5 1/2 per cent, per annum would be a reason--able rate of interest. Instead of Exhibit B-109 .amount, interest calculated at 5 1/2 per cent, per .annum up to 11th October, 1926, will have to be added to ;the aforesaid principals of the 1st Defendant''s liabilities, .

29. The third item of consideration relates to the promissory note; Exhibit B-36, dated 2nd June, 0L921,. which was executed by the 1st Defendant, to X). W.:9,) Damarla Subbayya. The 1st Defendant Executed, Exhibit B-36 for Rs. 841-7-0, being his tone-third share of the pre-partition debt under katha and .ailpromissory note Exhibit B-35, dated 8th January 1920. The endorsement of discharge Exhibit B?56;(a), dated 11th October, 1926, shows that the 2nd Defendant discharged this debt of the 1st Defendant as undertaken in Exhibit B-34. The fact was also spoken to by D. W. 9 in his oral evidence. This, item of consideration is therefore established.

30. Regarding the 4th item of consideration, there is only D. W. 9''s obliging oral evidence that 4he 1st1 Defendant owed him Rs. 600 on a handloan and that the 2nd Defendant paid off the amount on 11th October, 1926. D. W. 9 is an interested witness as he is the 2nd Defendant''s father-in-law and was also admittedly standing surety for the 2nd Defendant''s borrowings. There is no independent evidence nor anything in writing to proves the truth of the alleged hand loan. The entry Exhibit B-110, accepted by the learned Subordinate Judge as corroborative evidence of repayment by the 2nd Defendant, is merely a book entry pursuant to the sale deed. D. W. 9 has not signed against it in token of having received payment and it is of no value to show that the 2nd Defendant did pay cash to D. W. 9. This item of consideration is therefore not proved.

31. The 5th item of consideration is made up of debts stated to be jointly payable by Defendants 1 and 2 to 13 creditors. It will be convenient to dege with each debt as a sub-item.: t35) The first sub-item is a sum of Rs. 620-15-2 being the balance due in respect of D. W. 9 Damarla Subbayya''s katha. The question is whether such a joint liability existed. In the ledger Exhibit B-11,1, the amount due to D. W. 9 is shown as Rs. 600 and odd. But the day book for the period has not been produced. The ledger entries could have been written up at any time and cannot be accepted as sufficient proof of the liability, when it concerns a person like D. W. 9, in whom the 2nd Defendant was interested. Reliance is also

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

placed on the mention of Rs. 697-1-4 as the debt due to D. W. 9, in the consolidated list Exhibit B-99. But we have already indicated that Exhibit B-99 is of no evidentiary value. The liability is sought to be connected with a promissory note, Exhibit B-43, which was jointly executed on 9th September, 1926, by Defendants 1 and 2 in favour of D. W. 9 for a sum of Rs. 620-15-0 carrying interest at 12 the cent, per annum.

Admittedly there was no entry about Exhibit B-43 in the account books. Therefore, it might have been created for the purpose of Exhibit B-24, just as some other promissory notes were created, as we shall see presently when dealing with the 1.1th sub-item. The subsequent history of Exhibit B-43 confirms this suspicion. D. W. 9''s evidence is that the 2nd Defendant alone discharged Exhibit B-43. But the endorsement of discharge, Exhibit B-43 (a), whick bears the dated 31st October, 1933 is not signed by him. It is only signed by both "Defendants 1 and 2. The 2nd Defendant''s story is that Exhibit B-43 (a) was written in order to satisfy the 1st Defendant that the debt had been discharged in pursuance of Exhibit B-34 when the 1st Defendant wanted to file a pauper Suit O. P. No. 24 of 1932 against him. But this explanation for the 1st Defendant''s signing Exhibit B-43 (a) is unconvincing.

If the story were true, it should have been got signed only by D. W. 9. ''. Sri Neti Subrahmanyam points out another cirqumstance to improbablise the truth of the debt under Exhibit B-43. Exhibit B-49 is a sale deed executed on 20th May, 1927 by the 2nd Defendant to D. W. 9 for a cash consideration of Rs. 2,000. It appears unlikely that D. W. 9 would have paid the entire consideration for Exhibit B-49 in cash to the 2nd Defendant, if the latter owed him the large amount under Exhibit B-43 at the time. The least inference is that the debt under Exhibit B-43 was not subsisting on 20th May, 1927, the debt of Exhibit B-49. Nevertheless it was revived for the, purpose of the endorsement Exhibit B-43 (a) on 31st October 1933. In our opinion, Exhibit B-43 was no less nominal than Exhibit B-43 (a). It follows that this sub-item of consideration of Exhibit B-34 is not proved.]

33. The second sub-item is a balance of Rs. 506-10-0 due under a promissory note to one Mane-palle Subbarayadu. The discharged promissory note has not been produced, but reliance was placed on the recital in Exhibit A-3, a sale deed, dated 23rd June, 1928, executed by the 2nd Defendant to one Alivelu Mangamma, that the vendee paid Rs. 764-10-0 towards a promissory note, dated 2nd June, 1928, executed by the 2nd Defendant in favour of Manepalli Subbarayudu. The 20th Defendant, who has deceased Manepalli Subbarayudu''s son, was examined as D. W. 12. lie spoke to the discharge of the promissory note of 1928, which is corroborated by the entry Exhibit B-133, dated 26th June, 1928, in his day book. But, his evidence and the entries in his account books go to show that the debt was a liability of the 2nd Defendant alone.

There are no entries relating to the debt in the joint account-books of Defendants 1 and 2 except Exhibit B-99, which is of no evidentiary value. The 2nd Defendant had his own individual dealings and the promissory note mentioned by D. W. 12

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

might have been one of them". Tin this state of evidence, we are unable to hold that there was a promissory note debt due jointly by Defendants 1 and 2 to Mane-pallf Subbarayudu and that the second sub-item refers to that debt. An antecedent debt by the 1st Defendant is not established and we therefore find that the second sub-item is not proved.

34. The third sub-item of consideration is a $um pi Rs. 3,000 due to the branch of the Imperial bank at Repalle. The learned Subordinate Judge again, relied on Exhibit B-99 to prove this liability, but,ass we have already indicated, we are not pro-pared to attach any weight to Exhibit B-99. However, the transactions with the Imperial Bank are entered in a number of joint account books of Defendants 1 and 2 such as the day book Exhibit B-104, and the successive ledgers Exhibit B-113, Exhibit B-96 and Exhibit B-lll. On 15th March,1926, die balance due to the Imperial Bank was Rs. 2,986-5-0 as shown at page 7 of Exhibit B-lll. It is therefore quite probable that Rs. 3,000 was the amount jointly due by Defendants 1 and 2 to the Bank on 11th October, 1926, the date of Exhibit B-34. This sub-item is proved.

35. The fourth sub-item is Rs. 307-8-0 due under a promissory note to one Kollu Subbayya. The promissory note is mentioned as one, dated 11.th August, 1926, for Rs. 300 at page 16 of the day book Exhibit B-30. The promissory note debt was therefore evidently a joint liability of the two brothers. In renewal of the debt, the second Defendant alone executed Exhibit B-47 on 10th August, 1929, mentioning the earlier promissory note, dated 11th August, 1926. Exhibit B-47 (a), dated 16th August, 1929, is the endorsement of discharge made by the creditor on Exhibit B-47. This sub-item is proved.

36. The fifth sub-item is Rs. 1,020-13-3 due on a promissory note to one Sogrnul Jetmal. The relevant promissory note in Exhibit B-41 executed by the second Defendant for Rs. 1,000 on 21st August, 1926. Exhibit B-120 is the entry for the receipt of the cash relating to it at page J 6 of the day book Exhibit B-30. As the borrowing has been duly entered in the joint account book, the debt was evidently contracted as a joint liability of Defendants one and two, although the promissory note was executed by the second Defendant alone. Exhibit B-41 (a), the endorsement of discharge, shows that the debt was discharged by D. W. 9, through whom the amount is said to have been sent by the second Defendant.

Sri Neti Subrahmanyam relies on the recital in the preamble to Exhibit B-34 that the first Defendant effected a division from the second Defendant about two months previously, and also on the answers in ''cross-examination of the . second Defendant as D. W..8 on 22nd March, 1949 "After August, 1926, there are no joint transactions of myself and first Defendant. The account books after that date are not common." He argues therefore that Exhibit B-41 which same into existence on 21st August, 1926, could not be a joint transaction. But Exhibit B-41, dated 21st August, 1926, cannot be said to be a transaction "after August, 1926", by which phrase the second Defendant clearly meant after the end of August, 1926. We therefore hold that the debt due to Sogmaletmal was a joint

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

liability and that fifth sub-item is proved.

37. The sixth sub-item is Rs. 1,225-1,0-10 due on, a promissory note to one Chodavarapu Yella-mandachari. For the balance due in respect of this debt, the second Defendant executed a promissory note.. ExhibitJ8-46 dated 19th November, 1927, which mentions the earlier; promissory note as one, dated 24-1M924, Exhibit B-46(a) is the endorsement of discharge, daterjj20tb July, 1929. Ext. B-121 is the relating to the promissory note of 1924 in the concerned ledger, Exhibit B-96, at page 150. There are also entries relating" to the debt in the corresponding day book, Exhibit B-24, at page .132. It is therefore clear .that the debt was the joint liability of Defendants 1 and 2. This sub-item is sufficiently proved.

38. The seventh sub-item is mentioned in Exhibit B-34 as Rs. 4,919-3-6 due under two promissory notes to Matur Panakalu who has been examined as D. W. 14. But only one of the promissory notes has been produced. It is Exhibit B-38 executed on 21st October, 1926, by Defendants one and two for Rs. 4,042-15-6, carrying interest at 13 1/2 per cent, per annum. Exhibit B-38 (b) is an endorsement of payment of Rs. 900, on 21st June, 1926 made by Defendants one and two. Exhibits B-125 and B-126 are entries in the day book, Exhibit B-30, relating to the payment of this Rs. 900. The amount due on 11th, October, 1926, after giving credit to the payment of Rs. 900 works out to Rs. 3,000 and odd.

The promissory note was discharged by the second Defendant on 28th February, 1927, as seen from the endorsement of discharge, Exhibit B-38 (a) and D. W. 14''s evidence. The order promissory note has not been produced. D. W. 14 says that Rs. 1,600 was due under it. But, it is not clear whether it was a liability of the second Defendant alone or of both the brothers. Sri K. Kotayya relies on the entry, Exhibit B-127, dated 9th September, 1923, in the day book Exhibit B-104, which mentions a borrowing of Rs. 1,600 from D. W. 14 under a promissory note executed on that date. But this entry by itself is not sufficient to show that the debt was subsisting on the date of Exhibit B-34. He also relics on the mention in the list, Exhibit B-99, that Rs. 5,295-14-0 was due to D. W. 14. But as we have already stated, we are unable to attach any weight to Exhibit B-99. We therefore find that this sub-item is proved only to the extent of Rs. 3,000 and odd.

39. The 8th sub-item is a promissory note debt of Rs. 999 duo to one Vemula Santhamma. The promissory note concerned is Exhibit B-39, dated 1st March, 1926, for Rs. 900 executed by Defendants 1 and 2 but, it is not found entered in the account boots at all. Moreover, even after the execution of Exhibit B-34, the endorsements of payments in 1929 and 1932 on this promissory note have been signed by both the Defendants. The final endorsement of discharge, Exhibit B-"39 (a), dated 31st October, 1923, has also been signed by both the Defendants. The second Defendant''s unconvincing story in respect of Exhibit B-39 (a) is the same as in respect of Exhibit B-43 (a), namely, that it was written in connection with the pauper suit O. P. No. 24 of 1932 threatened by the first Defendant. The least inference is that both the Defendants discharged it from

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

their funds and not the second Defendant alone in pursuance of Exhibit B-34. This sub-item is therefore not proved.

40. The 9th sub-item is recited as aggregate promissory note debt of Rs7 2,050-7-0 due to the firm of Karpurji Vegraj. The relevant promissory notes are Exhibits B-40, dated 18th June, 1926 and B-42, dated 3rd October, 1926, each for Rs; 1,000 carrying/interest at 15 per cent, per annum executed by the second Defendant alone. Exhibits B-40(a) and1 B-42 (a) are the endorsements of discharge showing that these debts were discharged by the fecond Defendant. Although both the borrowings have been entered in the day-book, Exhibit B-30, we consider it extremely unlikely that the second Defendant would have borrowed for the joint trade of himself and the first Defendant even in October, 1926. The second Defendant''s own evidence is that he and the first Defendant had no joint transactions after August, 1926. Therefore, the debt under Exhibit B-42 was not a joint liability. This sub-item is proved only to the extent of the liability under Exhibit B-40 upto 11th October, 1926.

41. The 10th sub-item is a katha debt of Rs. 528-11-9 due to D. W. 10, Kandula Nagalingam. The only evidence in respect of this debt besides that of the second Defendant himself is the oral evidence of D. W. TO and the mention in Exhibit B-99 that Rs. ; 554-11-9%as due to him. D. W, 10 was unable to give any "particulars of the debt and stated that it was advanced by his maternal grand-father while he was a minor. No doubt, he spoke to having received Rs. 500 and odd from the second Defendant- in discharge of the debt; but, this is quite insufficient to show that there was a joint liability by Defendants one and two. We have already mentioned that we are unable to place any reliance on Exhibit B-99. This sub-item is not therefore proved.

42. The 11th sub-item is mentioned as a hand-loan of Rs. 1.000 due to P. W. .13 Dokku Adeyya for payment to the Imperial Bank at Add pall For proving this debt, reliance is placed on the entry Exhibit B-117 dated 3rd October, 1926 at page 20 of the day book Exhibit B-30, by which P. W. 13 was credited with Rs. 1,000 for a hand loan Exhibit B-45 is put forward as the promissory note for Rs. 1,000 in respect of the debt, but the promissory note has been executed on 15th October, 1926 in favour of P. W. 13 by both Defendants one & two and recites that Rs. 1,000 was borrowed in cash on the date of the execution. This recital appears inconsistent with the mention of the debt as subsisting on loti October, 1926, the date of Exhibit B-34. It also appears inconsistent with the account entry Exhibit; 3B-1T7 according to which the amount was borrowed by 3rd October, 1926.

Moreover, as the debt was to be discharged by the second Defendant in pursuance of Exhibit B-34, there was no reason for the first Defendant joining in the)Bisection of Exhibit B-45. Besides joining in the executon of Exhibit B-45, the first Defendant joined the second Defendant in renewing it by executing another promissory note Exhibit A-7 on 2nd August, 1929. Exhibit A-7 is in favour of one Mangamma who is said to have taken a transfer of Exhibit B45. An endorsement

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-...

of Exhibit A-7 of payment of ;Rs. 10 on 1st August, 1932 is signed by both Defendants one and two. Exhibit B-45 (a) dated 30th; October, 1933 is an endorsement of discharge on Exhibit B45 Signed by Defendants 1 and 2.

With regard to Exhibit B-45 (a), the second Defendant''s unconvincing story is the same as in respect of Exhibits B-39 (a) and B-43 (a), viz., that it was-''written in connection with the pauper suit threatened by the first Defendant in O. P. No. 24 of 1932.

It is also explained that the discharge was written on Exhibit B-45 as the subsequent promissory note Exhibit A7 was not available at the time. But in view of the fact that the second Defendant alone had to discharge the debt as per Exhibit B-34, there was no reason for the first Defendant joining in the execution of either Exhibit B45 or Exhibit A7. Further, on the second Defendant''s own admission, he and the first Defendant had no joint (transactions after August, .1926, and even the account entry Exhibit B117 dated 3rd October, 1926 is therefore of no-avail to show that the debt was the joint liability of Defendants one and two. Exhibits B-45 and A-7! support the criticism of Sri Neti Subrahmanyam that the first Defendant lent himself for creating vouchers for buttressing up the recitals in Exhibit B-34. Rs. fact P. W. 13 said that the debt of Rs. 1,000 was not due to him as recited in Exhibit B-34 and that Exhibit B-45 was concocted to support Exhibit B-34. The learned Subordinate Judge was not justified in disbelieving P. W. 13 on the point. It is clear that Exhibits B117, B45 and A7 are of no avail to prove the debt mentioned as die 11th sub-item in Exhibit B-34.

43. Another piece of evidence put forward by the contesting Defendants was the humid Exhibit B-44 dated 5th July, .1926 executed by P. W- 13 in favour of the branch of the Imperial Bank at Guntur. But P. W. 13''s evidence is that he executed as a surety for the second Defendant and that the latter had his own motor and cloth business and that'' the first Defendant had nothing to do with the borrowing. This was also the evidence of the second Defendant himself. It is not shown that Exhibit B-117, dated 3rd October, 1926 or Exhibit B-45 dated 15th October, 1926 are in any way connected with Exhibit B-44, dated 5th July, 1926. In the result, we find that the 11th sub-item of consideration is not proved.

44. The 12th sub-item is a debt of Rs. 3,000 due on a promissory note and katha of one Tammana Veerayya: The promissory note has not been produced, but reliance is placed on the recital in Exhibit B-68, a mortgage deed executed on 25fh June,. 1930 by the second Defendant in favour of Veerayya, which mentions that a sum of Rs. 4,40fr was due under a promissory note, dated 27th June, 1926-executed in favour of Veerayya by Defendants one and two. We have not been shown any entries in the account books of Defendants one and two in respect of the alleged promissory note of 27th June, 1926. In J view of the second Defendant having been party to several other false recitals that we had occasion to notice in the course of this judgment, we are unable to attach any weight to the recital in Exhibit B-681as-proof of the existence of the joint

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-...

promissory note debt.

The ledger pages-relating to Veerayya in the ledger Exhibit B-96 for the period 1924-25 have been marked as Exhibits B-131 and B-116 and the similar page 121 in the next ledger Exhibit B-11T for the period 1925-26 has been marked as Exhibit B-130. Page 142 in Exhibit B-lll also relates to Tammana Veerayya. But" the entries appear disjointed and Exhibit B-130; bears, no date. We are therefore unable to attach any weight to the cresit balance of Rs. 2,980-U-0; shown in Exhibit B-130* which has been repeated ''in the list of debts Exhibit B-99. The second Defendant was also unable to explain how the debt amounted to a round sum of Rs. 3,000''on the October, 1926 if the sum due was Rs. 2,980-11-0 on 15th March, 1926 as per Exhibit B99. Exhibit B-131 shows that the balance due '' to Veerayya was Rs. .1,636-3-0 and we are of opinion that, it is not proved that a larger amount was due to him by Defendants 1 and 2 by the date of Exhibit B-34. We find that this item is proved only to the- extent of Rs. 1,636-3-0.

45. The 13th sub-item is a balance of Rs. 1,580-0-9 due under promissory note and katha to D. W. 7 Venigala Rattayya. The debt is traced to the promissory note Exhibit B-37, which was executed by Defendants 1 and 2 on 1st June, 1923 in favour of D. W. 7 for borrowing a sum of Rs. 2,100 carrying interest at Rs. 1-5-0 per cent, per month. Exhibits B-128 and B-115 are tin; corresponding entries in the day book Exhibit B-104 and the ledger Exhibit B-113. These entries bear the earlier date 27th May, 1923, but the discrepancy appears immaterial. The rate of interest is mentioned as only 15 annas per cent, in Exhibit 15-128, but: it is quite possible that this lower rate was agreed to be, although a higher rate was mentioned in the promissory note. D. W- 7''s evidence shows that the second Defendant executed a mortgage in 1944 in final renewal of the debt and that the mortgage is subsisting. In view of the above evidence, the mention of Rs. 1,580-0-9 as a joint liability due to D. W. 7 on the date of Exhibit B-34 appears to be true. This sub-item is proved.

46. Sri K. Kotayya has filed a memo, of calculation in accordance with our findings above, the gist of which we informed counsel on 18th April, 1956 and 19th April, 1956 at the conclusion of the arguments relating to each item and sub-item of consideration for Exhibit B-34, The memo, shows that the total of the second Item works out to Rs. 2,111-1-11. The third item is Rs. 1,369-10-2 and the fifth item works out to Rs. 6,793-11-11 being one half of the total of sub-items 3 to 7, 9, 12 and 13 therein. Thus the aggregate portion of the consideration for Exhibit B-34 which is binding upon the Plaintiff works out to Rs. 1,0274-6-0. Sri Neti Subrahmanyam has not disputed the correctness of Sri K. Kotayya''s calculation and has filed a memo, on 27th June, 1956 in which he accepts the figures of Rs. 10,274-6-0.

We accordingly find that Exhibit B-34 is supported by consideration binding on the Plaintiff to the extent of Rs. 10,274-6-0.

47. From the foregoing discussion with regard to the consideration for Exhibit

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-…

B-34, it is manifest that the second Defendant-alienee cannot possibly claim to have acted honestly and in good faith in respect of the transaction. He was fully aware of the nature of the various items of consideration for tlie sale and it is by no means a case of his having been deceived by the first Defendant''s representations. His own evidence with regard to the circumstances in which Exhibit B-34 came to be executed is:

By the date of Exhibit B-34, no suits were filed against us.......first Defendant told me at the time of Exhibit B-34 that he had personal debts, that he was not able to discharge joint debts and that I should take a sale and discharge joint debts. The creditors pressed ''me for payments after Exhibit B-34.

The sale was not the result of any pressure by creditors, but was merely an arrangement made by the first Defendant for satisfying the creditors through the second Defendant who was a co-debtor. The second Defendant seems-to have taken advantage of the situation to swell the amounts of the consideration by false recitals and to fasten the first Defendant with liability for his own debts. In the circumstances it cannot be said that the sale itself under Exhibit B-34 was justfied by necessity. Sri K. Kotayya points out that almost all the properties covered by Exhibit B-34 are now in the possession of alienees from the second Defendant, either under private sales or under Court sales in execution against the second Defendant.

He also points out that the main allegation in the plaint was that the sales were nominal. But the Defendants, who were the alienees from the 2nd Defendant, cannot get a better title than the second Defendant himself, and no special equities in their favour have been urged before us. There was a .separate issue as to whether the alienation under Exhibit B-34 was binding on the Plaintiff if it was not nominal, and the parties went to trial on that issue.

This is therefore a case of an alienation by a father, which is supported only by partial necessity, and which is covered by the conclusion No. 4 enunciated by Satyanarayana Rao J., in K. Peramanayakam Pillai Vs. S.T. Sivaraman and Another, It follows that the Appellant is entitled to partition and recovery of possession of a half share in .the plaint schedule items 1 to 8 and 11 to 16 covered by Exhibit B-34, subject to the payment by him of a total sum of Rs. 5137-3-0 proportionately to the ultimate alienees in possession of these items.

49. In the result, the appeal is allowed to the extent stated above, and the parties will pay and receive proportionate costs throughout. The suit is remitted to the lower Court for apportioning Rs. 5,137-3-0 payable by the Plaintiff between the several items and Defendants and passing a final decree for partition accordingly. The apportionment will be on the basis of the values of the respective items on the date of Exhibit B-34, which will be determined after taking evidence. The Appellant is awarded mesne profits on his share of the properties from the date of deposit of Rs. 5,137-3-0 by him in the lower Court or the date of the final decree whichever is later. The mesne profits will be

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-...

determined after enquiry under Order 20, Rule 12, CPC by the lower Court.

50. Eight months time is allowed" from this date for the deposit.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/koutarapu-venkata-chenchayya-...