

(1893) 09 MAD CK 0012
In the Madras High Court

Lakshmana Ayyan

APPELLANT

Vs

Rangasami Ayyan

RESPONDENT

Date of Decision : 19-09-1893

Acts Referred:

Citation : (1894) ILR (Mad) 78

Hon'ble Judges : Muttusami Ayyar, J; Best, J

Bench : Division Bench

Judgement

Muttusami Ayyar, J.—Appellant and respondent are the sons of two brothers. On the 25th October 1887 the latter and the father of the

former entered into a partition. An appeal was then pending in the High Court from the decision of the Subordinate Court of Negapatam in Original

Suit No. 63 of 1884: which had been brought by them on a hypothecation bond executed in their favour by one Chokkammal Annee of Kulik&rai.

The partition deed provided, inter alia, that appellant's father should take for his share all the debts due to the joint family including the amount of

the hypothecation bond, and that, if the appeal then pending was decided against them, appellant's father should pay all the costs of that litigation

both in the Original and Appellate Courts. The appeal was dismissed in January 1889, and both the appellant's father and respondent were

directed to pay Chokkammal's costs. One of her judgment-creditors took out execution against the judgment-debtors in Original Suit No. 63 of

1884, and recovered the costs from the respondent. The respondent's case was that he was entitled to recover the money paid by him from the

appellant, and both the Courts below decreed the claim. It is urged in second appeal that the decree for contribution recognises a claim contrary to

public policy, and that the present suit is in the nature of a suit for contribution brought by one wrong doer against another. Original Suit No. 63 of 1884; was dismissed on the ground that the hypothecation bond was executed without consideration, and that it evidenced a fraudulent transaction. It is no doubt a clear proposition of law that one tort-feasor cannot recover contribution from another, but it is subject to this important qualification, viz., that where the loss arising from the illegal contract is adjusted, so that the adjustment is equivalent to a payment, the adjustment cannot be disturbed. It was so held in *Owens v. Denton* 1 C.M. & R. 712 In that case, the price due for malt illegally sold by plaintiff was included in an account stated and settled between the parties, and it was held by Lord Abinger that the adjustment was equivalent to payment in cash, and that it came within the rule that money paid in pursuance of an illegal contract shall not be claimed back again. No contribution is allowed between joint tort-feasors because the community of wrong between them is the foundation of the action, but the same community of wrong precludes the defendant from recovering what he has paid in consequence of the illegal act. If the loss arising from the wrongful act is adjusted by an account stated between the parties or by a partition deed, as in this case, it is equivalent to payment since it is no longer necessary for the plaintiff to rely on the community of wrong in support of his claim.

2. The same community of wrong that would prevent the plaintiff from claiming contribution if there were no adjustment by partition likewise prevents the defendant from disturbing the adjustment which is equivalent to payment. The loss arising from the decision in Original Suit No. 63 of 1884 was a loss which devolved on the coparcenary family, and the partition deed under which the party who took all the debts due to the family agreed to bear the loss, if any, arising from the failure of the suit brought by the family to recover one of those debts is an adjustment which the defendant is not at liberty to go behind for raising a defence from the community of wrong in which he participated. The fact that the partition was made pending the decision of the appeal makes no difference in principle.

3. No other question is argued on appeal, and I would dismiss the second appeal with costs.

Best, J.

4. The point urged before us is that plaintiff's suit is not maintainable, as the agreement sued on is opposed to public policy and therefore void.

5. The agreement sued on is part and parcel of the partition deed, under which plaintiff and his uncle, the father of the appellant (defendant) divided the family property.

6. This division took place pending Original Suit No. 50 of 1887 in this Court.

7. That was an appeal against the decree of the Subordinate Judge of Negapatam, which dismissed a suit brought by plaintiff and his uncle (the

father of defendants) for the recovery of a sum of Rs. 4,000 and interest as due under a hypothecation bond executed by one Murugattal Annee,

This Murugattal Annee (as first defendant) admitted the then plaintiff's claim, but one Chockkammal Annee who was the second defendant, denied

the executant's right to encumber the property, and pleaded that the hypothecation bond was fictitious. The finding of this Court was that the

hypothecation sued on was a colorable transaction. The appeal was therefore dismissed with costs.

8. As already observed, it was, while that appeal was pending, that this plaintiff and the father of defendant effected a partition of their family

property; and in the deed of partition after mentioning the pending appeal, and after allotting the debt in question to this appellant's father

exclusively, it is stipulated that the latter shall pay the entire costs of that suit in both Courts in case the appeal should fail, and it is further stipulated

that "" if Naranappien (appellant's father) does not pay the same, and if any sums are collected from Ramasawmi Iyen (present respondent) in

execution proceedings, those sums shall be collected from Naranappien by Ramasawmi Iyen amicably or through the Court."" It is this contingency

that has happened; and the question is whether plaintiff is debarred from recovering the costs paid by him by reason of the same having been

incurred in a suit brought on a bond which was found to be a colorable transaction.

9. This is not a suit for ""contribution"" like *Manja v. Kadugochen* ILR 7 Mad. 89 and *Suput Singh v. Imrit Tewari* ILR 15 Cal. 720; but for the

enforcement of one of the terms of the partition deed, appellant's father would have been exclusively entitled to the whole of the amount then sued

for had the appeal succeeded, and he could not have been allowed to disclaim his

liability for the costs merely because the appeal failed. The contract is part and parcel of the partition deed from which it is inseparable, and, unless the partition can also be set aside, it is not open to the appellant to deny his liability for the amount now sought to be recovered from him.

10. This appeal must be dismissed with costs.