
(1967) 01 MAD CK 0020

In the Madras High Court

Case No : Letters Patent Appeal No. 3 of 1964

Loganathan and Others

APPELLANT

Vs

Ponnuswami Naicker and Others

RESPONDENT

Date of Decision : 23-01-1967

Acts Referred:

Contract Act, 1872 — Section 23

Citation : AIR 1969 Mad 15

Hon'ble Judges : M. Anantanarayanan, C.J; Natesan, J

Bench : Division Bench

Advocate : V. Vedantachari and G.C. Kanniah, for the Appellant; Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Natesan, J.—This is an appeal under the Letters Patent from the decision of our learned brother Venkatadri, J., confirming the judgment of

the court of first instance, plaintiffs 1 and 2 are the appellants. The facts of the case are within a narrow compass. The suit statedly one for partition

is in fact and substance an attempt by a Hindu son to free his share in the family properties from a debt incurred by his father. Defendants 1 and 2

in the suit are brothers and members of a joint Hindu family. The first plaintiff is the son and the second plaintiff, the daughter of the second

defendant. The third plaintiff is the wife of the second defendant while the fourth plaintiff is the wife of the first defendant. A daughter of the first

plaintiff figures as the fifth plaintiff. The tenth defendant in the suit is the Official Receiver in the Insolvency of defendants 1 and 2 and the remaining

defendants are creditors and decree-holders. The only debt that is really under challenge is the decree debt in O.S. 392 of 1955 on the file of the

Subordinate Judge's Court, Coimbatore for a sum of Rs. 15000 in favour of defendants 3 to 5. These defendants are the sons of one Rangaswami

Naicker, brother of the mother of defendants 1 and 2. It emerges from the evidence that on the death of Rangaswami Naicker in or about 1946

leaving defendants 3 to 5 minors defendants 1 and 2, in view of their close relationship, assumed the management of the properties of defendants 3

to 5 but failed duly to account for the income and profits from the properties of defendants 3 to 5. It is common ground that defendants 1 and 2

were in possession of the properties of defendants 3 to 5 for about six years. It is stated for these defendants that by unauthorised application of

their funds defendants 1 and 2 added to their own wealth and acquired the suit house and improved their dry lands, sinking a well at a heavy cost.

Later on defendants 3 to 5 coming of age and insisting upon an accounting for the assets handled by defendants 1 and 2 at a mediation it was

decided that defendants 1 and 2 should take all the then standing crops, retain the cattle and moveables in their possession and pay defendants 3 to

5 a sum of Rs. 20000. It is this liability that formed the consideration of a promissory note which resulted in the decree of court in O.S. 392 of

1955. in the suit on the promissory note defendants 1 and 2 raised various contentions; but eventually settled the claim for a sum of Rs. 16000

taking three months" time to pay. The mediation was on 1-6-1962 and the promissory note for the sum of Rs. 20000 which defendants 1 and 2

had to pay was executed on 9-7-1962. It transpires that shortly after the mediation there was a criminal complaint by the third defendant charging

the present second defendant with offences under Sections 324, 325, 404 and 384 I.P.C. Actually the complaint was taken on file only under

Sections 404 and 384 I.P.C. in his sworn statement then recorded the third defendant stated that the accused the present second defendant, was

managing his affairs and properties after the death of his father, and that he took over the stock of timber the deceased had left and made use of it

for construction of his own house. The complaint set out that at a panchayat held on 1-6-1962 the accused had agreed to execute a security bond

over his terraced house and dry land in a sum of Rs. 20000 the amount being payable to defendants 3 to 5 within a year. From the calendar and

judgment of the criminal case in C. C, No. 837 of 1962, on the file of the Third City Sub-Magistrate, Coimbatore, it is seen that the case was

taken up for trial on 11-10-1952 and the accused discharged u/s 253(1), CrI.P.C. finding that no case was made out. The accused is shown to have been apprehended only on that date i.e. on 11-10-1952. The order shows that the complainant examined himself as P.W. 1 and deposed that the accused was his uncle, and that the matter being a family dispute the relatives were unwilling to take part in the case. The complainant deposed also about the panchayat. He stated that the panchayatdars were refusing to depose in the matter, and that he had no other witnesses to examine. It is in this background that the appellants question the validity of the debt under two counts; first it is contended that the promissory note came into existence while a prosecution had been launched against the second defendant, that the promissory note was intended to stifle the pending criminal prosecution, and that so it was vitiated as opposed to public policy. Secondly it is contended that the debt incurred was an Avyavaharika one and that therefore the debt cannot bind the son. The plaint of course, contains the usual reckless and meaningless allegations particularly in the context of the case that defendants 1 and 2 neglected their family, that they colluded with defendants 3 and 4, and that the suit O.S. 392 of 1955 was itself a collusive suit on a promissory note without any consideration. The Subordinate Judge found that the promissory note was binding on the plaintiffs, that the suit was not collusive, and that the decree was not vitiated in any manner. Our learned brother, Venkatadri, J., has on an elaborate consideration of the law applicable in the matter and in the light of the facts that emerged from the record, affirmed the decree of the trial court and dismissed the appeal. It is held that there is absolutely no evidence to connect the criminal prosecution with the execution of the promissory note. The only witness for the plaintiff in the suit, the mother of the plaintiffs as P.W. 1 does not even whisper a word about the circumstances under which the promissory note came into existence. It is pointed out by the learned Judge that she does not depose to any coercion, undue influence or pressure being brought upon the second defendant to Ret him execute the promissory note. The fourth defendant has spoken in detail about the management of the estate by defendants 1 and 2, the circumstances under which the promissory note came to be executed, the suit thereon and the compromise decree. One of the Panchayatdars had been examined as D.W. 4. Defendants 1 and 2 have not

gone into the witness box. In these circumstances, our learned brother, remarked that there was no direct evidence to connect the promissory note with the criminal prosecution.

2. Before us learned counsel for the appellants, the son and daughter of the second defendant, strenuously contended that as it has been made out

that a criminal prosecution was pending against the second defendant and the promissory note had been executed pending the criminal prosecution,

it was not only a legitimate but a necessary inference that the promissory note was executed in consideration of dropping the criminal prosecution,

scuttling it by not prosecuting it. Learned counsel contended that the proper inference in this case should be that the launching of the prosecution

and the execution of the promissory note related to each other as cause and effect. According to learned counsel the fact that the complainant had

appeared at the trial of the criminal case and examined himself as P.W. 1, was not of much significance; nor the fact that the Sub-Magistrate had

discharged the accused holding that no case was made out, as material factor in the examination of the question whether the promissory note was

given in consideration of withdrawal of the prosecution. Learned counsel points out that in the very nature of things there will not be direct

evidence, and that it is a matter for inference from circumstantial evidence. According to learned counsel the sequence of events and the bland

admission of the complainant in the Criminal Court that his witnesses would not help him are tell-tale and indicative that the prosecution was not

pressed for the reason that the complainant had consideration for the same.

3. Agreements for stifling prosecutions, are well known classes of agreements which the court refuses to interfere as falling u/s 23 of the Contract

Act. It is based on the principle that no man shall trade on a felony. If the accused person is innocent, the law is abused for, the purpose of

extortion, and if he is guilty in fact, the law is eluded by a corrupt compromise screening the criminal for a consideration. The offences for which the

complaint was taken on file are under Sections. 384 and 404, I.P.C. which are not compoundable and an agreement made for the purpose of

stifling the prosecution in the case, if made out, would certainly invalidate the promissory note. But for Section 23 of the Contract Act to apply the

dropping of the criminal prosecution must be at least a part of the consideration

for the promissory note. It is pointed out by Venkataramana Rao, J., in *Veerayya v. Sobanadri*, ILR (1937) Mad 471 , AIR 1936 Mad 656-

But I think the true rule is that where there is an existing debt or an obligation, a creditor is not precluded from taking any security therefore by

threat of a criminal prosecution and the security is not vitiated by the fact that he has induced to abstain from prosecuting the debtor. But if it is a

part of the bargain that the creditor should not prosecute the debtor, the security taken for the debt will be invalid.

The test is, did the dropping of the criminal prosecution form a part of the bargain for the agreement or giving of the promissory note. The giving up

of the prosecution need not necessarily be the sole consideration. There may be an antecedent obligation. It is enough if while giving security for the

antecedent obligation the dropping of the criminal prosecution is made a part of the bargain. In *Kamini Kumar Basu v. Birendra Nath Basu* where

there was a dispute as to title to a property and there was also a pending criminal prosecution relating to the same, the Judicial Committee in

invalidating a reference to arbitration observed thus:--

The real question involved in this appeal on this part of the case is whether any part of the consideration of the reference or the ekrarnama was

unlawful and.....if it was an implied term of the reference or the ekrarnama that the complaint would not be further proceeded with, then in their

Lordships' opinion the consideration of the reference or the ekrarnama, as the case may be, is unlawful".

When there is no pre-existing obligation, the inference that the security or note was given in consideration of dropping the prosecution may in a

given case be patent. But when there is a pre-existing legal obligation and the security or note is given for it, it must be made out from the evidence,

true the evidence will normally be circumstantial and it may be by necessary implication that it is a part of the consideration to drop the criminal

proceedings. In *Jones v. Marionotheshire Permanent Benefit Building Society*, (1892) 1 Ch. 173, Bowen L. J. points out that reparation for an

obligation is a duty which the offender owes quite independently of his fear of prosecution or otherwise and that it would be absurd to lay down as

an impossible counsel of perfection that the obligee or the relatives of an offender and his friends are not justified in making reparation to the party

injured. The learned Lord Justice emphasises that the abstention from or the dropping of the criminal prosecution should not be made a matter of

bargain. If reparation takes the form of a bargain the bargain is one which the court will not enforce. Lord Atkin refers again to this principle in AIR

1941 95 (Privy Council) and points out-

But it is also of course necessary that each party should understand that the one is making his promise in exchange or part exchange for the

promise of the other not to prosecute or continue prosecuting"".

Lord Atkins also points out that undue weight should not be given to the fact of the existence of a real obligation. It is observed-

In this class of cases that fact seems irrelevant if the agreement to abandon a prosecution is part of the consideration for payment of the debt. In

most cases of this kind there is a debt or a liability. Indeed if there were not, a demand and receipt of money in consideration of refraining from or

withholding a prosecution would apparently in itself be a criminal offence"".

These principles are again the subject of detailed restatement in the Supreme Court by Gajendragadkar, J., (as he then was) in V. Narasimha Raju

Vs. V. Gurumurthy Raju and Others, , where it has been pointed out that all that is required of the parties to impeach the validity of an agreement

to settle the criminal proceedings is to give evidence from which the inference necessarily arises that part of the consideration was unlawful, and

that the consideration for the agreement was withdrawal and none prosecution of a criminal complaint.

4. Learned counsel for the appellants has not made out in this case circumstances so clinching as to necessarily warrant the inference that it is a part

of the bargain when the promissory note was executed that the criminal prosecution should not be proceeded with. True the criminal complaint was

filed on 10-0-1952, and the promissory note was executed on 9-7-1952. The case was heard only on 11-10-1952. The record shows that the

accused was apprehended only on that date. It is not made out in the evidence that the second defendant was even aware of the fact that a criminal

complaint had been filed and was pending when he executed the promissory note. To avoid the promissory note, it has to be established that it is a

part of consideration that the criminal proceeding should be discontinued. That cannot be made out and there can be no consensus ad idem for a

bargain if the second defendant had no knowledge of the pendency of the criminal proceedings. Unless he is aware of the pendency of the criminal proceedings, withdrawal of the same cannot be held to form part of the consideration for the promissory note. In the present case defendants 1 and 2 have remained ex parte and have not been examined. No attempt has been made to show that the second defendant was aware of the pendency of the criminal proceedings when the promissory note was executed. There is another aspect of the matter and it has a material bearing on the question under consideration. The defence that the promissory note was unenforceable as secured in consideration at least partly for stifling a criminal prosecution was as much available to the second defendant as to the plaintiffs. It would have been, if tenable on the merits, a strong and powerful plea in defence to the action on the promissory note in the suit, O.S. 392 of 1955. The plaintiffs have attempted in the plaint to get round the reasonable inference following from the decree on the promissory note by pleading inter alia that defendants 1 and 2 had been prevented by defendants 3 to 5 in substantiating their defence in that suit by using wrongful means and pressure and threatening defendants 1 and 2 to consent to a decree. But these charges have not been made out in the evidence, and even the written statement in that case has not been placed on record now. Learned counsel strongly relied on an observation in the judgment of the Subordinate Judge, that it was clear that the complainant did not prosecute the complaint. The learned Subordinate Judge rejected the evidence of the 4th defendant as D.W. 1 that the complaint was dismissed because the complainant was not able to prove the same. For one thing the inference of the learned Subordinate Judge is not a necessary inference on the facts. No doubt the complainant had pleaded his inability to let in further evidence. It does not necessarily follow that the complainant abstained from proceeding further in the matter as a part of the bargain he had with the second defendant. Even assuming that the third defendant was lukewarm in the prosecution after having secured the promissory note, that would not be sufficient to vitiate the promissory note. His subsequent attitude or his motive in not proceeding further with the prosecution after launching it will not render the promissory note unenforceable if withdrawal of the prosecution was not a part of the bargain. In V. Narasimha Raju Vs. V. Gurumurthy Raju and Others, this distinction is

noticed. It is observed-

This is not a case where It can be reasonably said that the withdrawal of the criminal case may have been a motive and not the consideration by the impugned transaction".

The sequence of events in the present case is not so clear nor is the withdrawal of the prosecution so interlinked with the execution of the promissory note as to lead to a reasonable inference that one must have been the consideration at least in part of the other. The first point therefore fails.

5. Coming to the plea that the debt is an avyavaharika debt and therefore not binding on the son, here again we see no reason to differ from the conclusion of our learned brother. When the father of defendants 3 to 5 died leaving them minors, defendants 1 and 2 took possession of the properties for the purposes of management. It has not been made out in the evidence nor is such a case pleaded in the plaint that the original entry on the properties by the defendants was unlawful and in trespass. They entered on the properties to manage the same on behalf of and for the benefit of the minors. Only they have failed to duly account for the proceeds from the properties and it is this liability that was settled at the Panchayat in a sum of Rs. 20,000. The promissory note was for this amount of Rs. 20,000. We can see nothing Avyavaharika in this liability.

Colebrooke's translation of the expression "Avyavaharika" as meaning debts for a cause repugnant to good morals has been generally accepted as the nearest approach to the true conception of the term. Under the Hindu Law, a son is under a pious obligation to discharge his father's debts out of his ancestral property even if he had not been benefited by the debts, provided the debts are not avyavaharika. The sons get exonerated from their obligation to discharge the debt of their father from the family assets only if the debt was one tainted with immorality or illegality. The duty that is cast upon the son being religious and moral, the liability of the son for the debt must be examined with reference to its character when the debt was first incurred. If at the origin there was nothing illegal or repugnant to good morals, the subsequent dishonesty of the father is in not discharging his obligation will not absolve the son from his liability for the debt. In AIR 1943 142 (Privy Council) the Judicial Committee observes-

It also appears to be clear on principle and on authority, that examination of the nature or character of the debt should be made with reference to

the time when it originated in other words, when the liability was first incurred by the father. If, on such examination, it is found that at the inception

the debt was not tarnished or tainted with immorality or illegality, then it must be held that it would be binding on the son"". In *Natesayyan v.*

Ponnusami, I.L.R.(1893) Mad 99 which finds approval in AIR 1943 142 (Privy Council) a decree was passed against a Hindu for money

dishonestly retained by him from the plaintiff's family to which he was accountable in respect of it. The judgment debtor having died, the decree-

holder sought to attach in execution, property of the family which had passed into the hands of his sons by survivorship. The sons objected to the

attachment challenging the debt as immoral and illegal in the suit to which the creditor was referred. While terming the action of the father in not

accounting for the sums which he had collected as dishonest, it is observed in that case that dishonesty was not of such a nature as to absolve the

defendants, that is, the sons, from their pious obligation to discharge their father's debts. The learned Judges observe in I.L.R.(1893)Mad 99,

Upon any intelligible principles of morality a debt due by the father by reason of his having retained for himself money which he was bound to pay

to another would be a debt of the most sacred obligation and for the non-disclosure of which punishment in a future state might be expected to be

inflicted, if in any. The son is not bound to do anything to relieve his father from the consequences of his own vicious indulgences, but he is surely

bound to do that which his father himself would do were it possible, viz., to restore to those lawfully entitled money, he has unlawfully retained"". In

AIR 1943 142 (Privy Council) above cited the Judicial Committee expressed their concurrence with the aforesaid view and with reference to the

case before them their Lordships observe--

The subsequent dishonest conduct of *Danapal*, which led to the suit and the decree so much relied upon by the courts in India and made the basis

of their decision, cannot in their Lordships' view affect the nature of the father's debt which at its inception was a just and true debt. As no such

immorality or illegality in the nature of the original debt as would absolve them from the obligation to discharge it has been shown by the

respondents, the debt, sought to be realised is not an Avyavaharika debt..." in Gurunatham Chetty v. Raghavalu Chetty, I.L.R.(1908) Mad 472 , a

Bench consisting of Sir Arnold White, C.J. and Wallis, J.: with reference to a case where an undivided Hindu father acted as the administrator of

an estate and was made liable for moneys received by him and not properly accounted for, affirming the liability of the son for the debt, it is

observed-

The evidence is not in our opinion sufficient to warrant us in holding that the failure by the third defendant to account as an administrator amounted

to a criminal offence".

The question has received a detailed consideration by a Full Bench of the Andhra Pradesh High Court in Sri Venkateswara and

Channakeswaraswami Temple Upputur and Another Vs. Bendapudi Radhakrishna and Others, . Chandra Reddy, C. J., who delivered the

judgment of the Bench, summarised the position thus:--

What emerges from these rulings is that a son could claim immunity only where the debt in its origin was immoral by reason of the money having

been obtained by the commission of an offence; but not where the father came by the money lawfully but subsequently misappropriated it. It is only

in the former case that the debt answers the description of an Avyavaharika debt. If originally the taking was not immoral, i.e., if it did not have a

corrupt beginning or founded upon fraud, it could not be characterised as an Avyavaharika debt and the son could not be exempted from satisfying

that debt. The supervening event, namely, the misappropriation later on would not change the nature of the debt. The vices should be inherent in

the debt itself".

6. When examined in the light of the abovesaid principles, it is impossible to hold that the liability evidenced by the decree debt in O.S. 392 of

1955 is avyavaharika in character. It is not even pleaded in the plaint that the original entry by defendants 1 and 2 on the properties of defendants

3 to 5 was trespass or otherwise unlawful and illegal. They had taken up management of the properties for all appearances and ostensibly bona

fide in the interests of the defendants 3 to 5 who were minors, and closely related. They had been in management of the properties for over six

years and their accountability for the management was settled at a panchayat.

They were found liable to account for a sum of Rs. 20,000. Ex facie it is a civil liability to account, which was quantified and settled by a panchayat. The origin of the liability is not repugnant to good morals. The second defendant appears to have acted as a de facto guardian for the minors. As and when the second defendant assisted by the first defendant realised money from the estate, his obligation to account to the minors arose. His later failure to account may be dishonest, but that cannot alter the original character of the obligation and make it criminal even initially. We agree in the circumstances with the conclusion of our learned brother confirming the judgment of the trial court that the promissory note was executed for amounts lawfully due and payable by defendants 1 and 2 to defendants 3 to 5, that the debt at its inception was lawful and therefore binding on the plaintiffs. In the result the appeal fails and is dismissed with costs.