
(1959) 07 MAD CK 0042
In the Madras High Court
Case No : Appeal No. 74 of 1953

Meenakshi Achi

APPELLANT

Vs

N.M. Manikkam Chettiar and Others

RESPONDENT

Date of Decision : 29-07-1959

Acts Referred:

Transfer of Property Act, 1882 — Section 38

Citation : AIR 1960 Mad 99 : (1959) ILR (Mad) 1046 : (1959) 72 LW 651

Hon'ble Judges : Ramachandra Iyer, J;Rajagopalan, J

Bench : Division Bench

Judgement

Ramachandra Iyer, J.

(1) This appeal is against the decree and judgment in O. S. No. 14 of 1950 on the file of the Sub Court, Pudukottai. The second plaintiff is the appellant. The suit was laid for recovery of a sum of Rs. 30,236-2-0 on the foot of a mortgage executed by the first respondent in favour of Lakshmanan Chettiar, the husband of the appellant, for a sum of Rs. 10750 with subsequent interest at 9 per cent per annum compoundable every 12 months. It was stated that Lakshmanan Chettiar was a benamidar for the appellant. Both Lakshmana Chettiar and the appellant filed the suit impleading the mortgagor as well as his two sons as parties thereto. Respondents 2 and 3 are the sons of the mortgagor. Respondents 4 and 5 are the subsequent encumbrancer and purchaser. The first plaintiff, Lakshmanan Chettiar died, pending the suit.

(2) At the time of the mortgage the first respondent was a member of a Hindu joint family consisting of himself and his younger brother. The mortgage, Ex. A. 1, created a security over three items of properties: (1) a half share in a house on Pudukottai, (2) lands in the village of Rangiyam and (3) a half share in the certain lands situated in Ammampatti village. Subsequent to the mortgage, there were disputes between the mortgagor and his brother, which resulted in the filing of O. S. No. 816 of 1938 on the file of the then Chief Court of Pudukottai, for partition of the joint family properties. The mortgagee, Lakshmanan Chettiar,

was also made a party to the action. In the final decree, the first respondent did not get items 1 and 2 mentioned above for his share but was allotted the whole of item 3, besides certain other properties.

(3) In the mortgage suit, out of which this appeal arises the appellant and her husband claimed that the amount due should be made recoverable on the security of the other items that fell to the share of the first respondent under the partition decree, as they should be properly held to be a substituted security. The defence to the suit was substantially threefold: (1) that the mortgage was not binding on the interests of the second and third respondents, as the money was advanced neither for the necessities of the family nor for the actual discharge of any antecedent debt of the first respondent, (2) that the mortgagor was entitled to reliefs under the Madras Agriculturists Relief Act, IV of 1938, and (3) that the mortgagee would not be entitled to a charge on the other properties allotted to the first respondent's branch in the partition except to an half share of the lands in Ammampatti village which was secured to him under the mortgage.

(4) The learned Subordinate Judge found that the amount advanced under Ex. A 1 was in discharge of the antecedent debt of the first respondent only to the extent of Rs. 3750, and that the balance was utilised in connection with the expenses of a bus service, a new business started by the first respondent. On that finding, he held (1) that the mortgage would be binding on respondents 2 and 3 only to the extent of Rs. 3750, (2) that having regard to the value of the properties mortgaged, the ends of justice and equities of the case would be sufficiently met if a charge were created over the other half share in the Ammampatti lands, that is, the entire lands in Ammampatti village which fell to the share of the first respondent, and (3) that the respondents were entitled to relief under the Madras Agriculturists Relief Act, and that after applying the provisions of the Act, the amount due under the mortgage would be only Rs. 18600-7-9.

On those findings, he passed a preliminary mortgage decree against the first respondent for Rs. 18600-7-0 and respondents 2 and 3 were declared liable for a sum of Rs. 3750 therein with subsequent interest according to the provision of Madras Act IV of 1938. The 2nd plaintiff has preferred this appeal in so far as the decision of the lower court went against her, namely, (1) in regard to the liability of respondents 2 and 3 for the entire amount under the mortgage, and (2) for the liability of the other properties allotted to the first respondent as substituted security. Mr. T. R. Srinivasa, the learned advocate for the appellant did not argue the second of the two questions mentioned.

(5) In this appeal we are concerned only with the question as to how far the claim under the suit mortgage can be enforced against the sons of the first respondent. Ex. A. 1 is the deed of mortgage. That recites that a sum of Rs. 10750 was received by the mortgagor in cash to discharge the claim in a suit filed against the mortgagor by Messrs. A. S. Manickam and Co, and for the expenses relating to the motor service. There is no specification, in the

document, of the respective amounts required for discharging the obligations to Messrs. A. S. Manickam and Co, and that which was required for the bus service.

It is not disputed that there was a decree against the mortgagor in the suit (O. S. No. 35 of 1957, Chief Court, Pudukottai) filed by Messrs. A. S. Manickam and Co., that the mortgagor was having a bus service which was wound up 15 days after the date of the mortgage, and that the bus service was a new business started by the first respondent. It appears from the evidence that the bus service was run by the first respondent in partnership with a stranger, and the claim of Messrs. A. S. Manickam and Co. in O. S. No. 35 of 1937 was for an amount due in respect of motor accessories supplied to Manickam Chettiar.

The liability was, evidently, incurred in respect of the bus service started by Manickam Chettiar, the first respondent. It is needless to point out that, while the first respondent might not have been able to alienate the family property so as to bind his sons for the purpose of the new business, the liability incurred by him therein could support a subsequent alienation. In the latter case the liability of the father having accrued already, the alienation made by him to secure payment or for the discharge of such a debt would be justified on the footing that it was for the purpose of securing or paying off antecedent debts.

(6) Ex. A. 8 shows that on 3-9-1937 an interim decree was passed in O.S. No. 35 of 1937 by consent for a sum of Rs. 3500 and the amount was to be paid in two instalments of Rs. 1750 each before October 1937. A subsequent decree was passed in the same suit on 6-10-1937 for an additional sum of Rs. 6411-11-7 with interest at 6 per cent per annum, and another sum of Rs. 1629-9-9 for costs. It cannot be disputed that the amount due under the decree was more than Rs. 10750 by the time when the mortgage came to be executed. The learned advocate for the respondents contended that a sum of Rs. 1750 had been paid under the decree sometime before the appellant's husband advanced monies on the mortgage.

There is no satisfactory evidence about it. But it is unnecessary to investigate the question, as the balance of the amount due under the decree on the date of mortgage Ex. A. 1 would very nearly come to the amount lent thereunder. The learned Subordinate Judge found that out of the sum of Rs. 10750 the mortgagor would have utilised only a sum of Rs. 3750 for the discharge of the liability under the decree in O. S. No. 35 of 1937, and that the balance would have been utilised in connection with the bus service. There is however no evidence for coming to the conclusion that the major portion of the money was utilised for the bus service.

There is no proof either that the entire money went in actual discharge of the liability under the decree. The case for the appellant rests not on the ground that the mortgage money was in fact applied to discharge an antecedent liability, but on the ground that the creditor made bona fide enquiries before he lent the money and was satisfied about the existence of an antecedent debt sufficient

very nearly to exhaust the amount lent. According to the appellant, the loan was advanced after making bona fide enquiries regarding the existence of an antecedent debt, namely, that under the decree in O. S. No. 35 of 1937. In support of the case, Ex. A. 8, a certified copy of an extract from the suit register in O. S. No. 35 of 1937 was filed and the mortgagee gave evidence as P.W. 1.

He stated that the loan under the mortgage was advanced for paying the decree and that he made due enquiries as to the existence of that liability. Nothing was suggested in the cross examination to discredit the testimony. It was argued on behalf of the respondent that as there was no evidence or even a recital in Ex. A 1 as to the exact amount which went in discharge of the respective purposes, it must be held that the appellant had failed to prove how much of the loan was for binding purposes. But the question in the present case is not as to the extent of the loan which is supported by necessity but whether the lender was satisfied after bona fide enquiry that the amount was required to pay off an antecedent debt of the father.

We are satisfied on the evidence that the mortgagee made sufficient enquiries in regard to the existence of a decree against the first respondent in O. S. No. 35 of 1937. That decree showed that the amount was very nearly equal to the amount advanced under the mortgage. Thereafter, it was unnecessary for him to ascertain what exactly was the amount that was intended to be utilised for the bus service, as he would have been satisfied that almost the entire amount to be borrowed would have to go for discharge of the decree. The recitals in Ex. A-1 show that there was a representation that there was a debt to be paid by him, and the enquiries revealed that the debt for the discharge of which the first respondent borrowed under Ex. A-1 was in a sum very nearly equal to the amount lent. The mortgagee should have been satisfied that the amount of the mortgage was for the discharge of an antecedent debt of the first respondent.

(7) The question to be considered is whether the lender could enforce the mortgage as against the sons of the first respondent by reason of the fact that he made bona fide enquiries and was satisfied to the existence of the antecedent debt for the discharge of which the amount under the mortgage was ostensibly borrowed, he being not bound to see to the actual application of the money. The learned Subordinate Judge held that a lender or alienee would be protected by bona fide enquiry only in a case, where it was represented that the monies were required for a necessity of the family, and that the rule would not apply to a case, where liability was sought to be fastened on the theory of pious obligation. This view of the law was sought to be supported before us on behalf of the respondents.

(8) Mr. R. Viswanathan, appearing for the respondents, contended that where an alienation of joint family properties by a Hindu father was sought to be justified not on the ground of any necessity but by the reason of the exercise of a power vested in the father to alienate the properties for the discharge of his personal debts, there should be an actual discharge of the debts, and the alienees would

not be absolved by the mere evidence that he made bona fide enquiries, and was satisfied about the existence of the debts. He contended that the principle on which alienation of joint family properties was justified on grounds of necessity was on the ground of an implied agency of the manager or father, and that when he purported to act as a manager he would be deemed to be a person in ostensible authority and if the alienee made bona fide enquiries, the members of the family should be held bound by the principle analogous to estoppel.

On the other hand, the principle underlying the power of the father to validly alienate family property for the discharge of his debts was based on the pious duty of the son to relieve him of his debts and save him from the purgatory which would await him if he died with his monetary obligation undischarged. Pursuing this line, it was contended that where an antecedent debt was not actually discharged, the father would not be saved, and there would be no justification for the alienation. It was said that actual discharge of the debt would be necessary and would be the consideration for the sale of the son's share, and a mere bona fide enquiry could not support the alienation, as there would be no consideration for the sale.

We cannot agree with this contention. The validity of an alienation of joint family properties in a case where the alienee proved that he made bona fide enquiries as to the existence of necessity is not based on any theory of ostensible authority. An alienation by the father to discharge his antecedent debt is by virtue of a power vested in him to alienate in certain circumstances and not for the reason that there would be sufficient consideration from the point of view of his sons. In either case it is a power vested in the manager or father to lawfully alienate family property if certain circumstances exist. The alienee has to prove that those circumstances existed in order to justify the alienation. It is not always that he would be able to do so. In *Hanooman Pershad Pandey v. Mt. Babooee Mundraj Koonweree*, 6 Moo Ind App 393 (PC), Lord Justice Knight Bruce observed:

"Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that under the circumstances, he is bound to see to the application of the money..... The purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

(9) Thus, the rule as to enquiry is not based on any theory of agency, or there being consideration to the person whose interest in the family property is

alienated but on the inability of the lender or alienee to control the disposition of the money once it leaves his hands. On principle we do not see how, that rule would not or could not apply to the case of an antecedent debt.

(10) But in the actual application of the rule between a case of necessity and a case of antecedent debt there will be a difference. In the former case, the existence of necessity would itself be a matter of representation and enquiry (e.g. marriage of a coparcener) and if a bona fide lender satisfied himself as to the existence of necessity, it would not be necessary that the necessity should have actually existed (that is, the marriage need not have been performed). But in the case of an antecedent debt, the existence of debt should be proved, as, otherwise, it would not be held that the enquiry was full or bona fide.

(11) The learned advocate for the respondents relied on the decision in Pulavarthi Lakshmanaswami (deceased) and Others Vs. Srimat Tirumula Peddinti Tiruvengala Raghavacharyulu by maternal grandmother and guardian, Molugu Tiruvengalamma and Others, as supporting his contention that mere bona fides of the lender could not avail him in the absence of actual discharge of an antecedent debt. In that case the father of a joint Hindu family borrowed moneys for the needs of his concubine. A question arose as to the liability of the sons in regard to such debts. The learned Judges observed at page 725 (of ILR Mad); (at p. 295 of AIR),

"But when he (father) borrows for his own private purposes without any representation, express or implied; that he is borrowing for the family, he does an act on behalf of his family, and no question of his acting beyond the scope of his authority can arise and no question, therefore, of any bona fide lending. The Hindu law no doubt casts a pious obligation on the son to discharge his father's debts except those falling within certain categories which are usually referred to as illegal or immoral.

But this obligation it is well to remember, was based on the religious duty of the son to relieve the father from the evil consequences arising from the non-payment of his debts and was not designed for the benefit or the protection of his creditors; and, similarly, an examination of the Smrithi texts relating to the excepted categories shows that they are based solely on the impropriety of the father's conduct in contracting the debt, and, have no reference to the propriety or otherwise of the creditor's conduct in advancing the loan.

The position therefore, is that, if the father's debt is free from taint, a pious duty is laid on the son to rescue the father from the penalties of indebtedness, the resulting advantage to the creditor being purely incidental; if, on the other hand, the debt originates in the father's misconduct the pious duty ceases to operate and the son is not bound to pay the debt, however bona fide the creditor may have been in advancing the loan."

(12) It is apparent that that case was concerned with an avyavaharika debt, and the learned Judges held that once it was proved that the debt incurred by the

father was an avyavaharika debt, no amount of bona fides on the part of the creditor would entitle him to sue the son in respect of the obligation. An Avyavaharika debt is taken out of the categories of debts for which a son could be held to be liable on the theory of pious obligation. So, an enquiry could not convert an illegal debt into a legal one. This would be so even if he was misled by such enquiry into thinking that the debt was not an avyavaharika debt, for the simple reason that if it were an avyavaharika debt no question of liability of the son will at all arise, and there would be no cope for the application of the rule as to bona fide enquiry.

Further, enquiry, if properly, conducted (in which case alone it could be said to be bona fide) would have revealed that the debt was a tainted one for which the sons would not be liable. The decision in *Pulavarthi Lakshmanaswami (deceased) and Others Vs. Srimat Tirumula Peddinti Tiruvengala Raghavacharyulu by maternal grandmother and guardian, Molugu Tiruvengalamma and Others*, was not concerned with avyavaharika debt which could justify an alienation. In our opinion, in case of a father's debt not tainted with illegality or immorality, the question of bona fides of the lender would be material, if it were found necessary to justify an alienation on the basis of a bona fide enquiry as to the existence of the antecedent debt.

(13) The rule as to enquiry found statutory recognition in S. 38 of the Transfer of property Act, That provision has been made applicable to the Hindus. Section 38 states:

""Where any person, authorised only under circumstances in their nature variable to dispose of Immovable property, transfer such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and the other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith."

One of the circumstances, which would entitle a Hindu father to sell a property, is discharge of his own debts. It follows that an alienation by a Hindu father for payment of antecedent debt could be justified if the transferee proved that the debt existed and that after an honest and proper enquiry he was satisfied that monies were required for the discharge of the same.

(14) In *Chandra Deo Singh v. Mata Prasad*, ILR 31 All 176, it was held that a creditor, suing the sons on a mortgage executed by their father in respect of joint family properties would be bound to prove that the loan secured under the mortgage was taken to satisfy an antecedent debt, or was justified by some family necessity, or at least that he had before advancing the loan, made an enquiry which reasonably led to the belief that the loan was required for family's necessity or to pay off antecedent debts.

(15) In *Saheb Singh v. Girdharilal* : AIR 1924 All 24, it was held that, where a

vendee had before taking the sale deed, made reasonable and sufficient enquiries to satisfy himself that antecedent debts were existing, and there was necessity to transfer the property in order to pay off the debts, there was no further need for him to prove how the money advanced by him was actually applied to discharge those debts.

(16) This question was considered by Venkataramana Rao J. in Mannava Rama Rao Vs. Mannava Venkata Subbayya and Others, . The learned Judge held that all that was necessary to prove in such a case would be the fact of debts subsisting against the father at the time of alienation, and that the belief in the representation that money was needed for the discharge of such debts would be quite sufficient to justify the alienation. In that case proof of existence of such a debt was given, and it was held that the alienation was valid.

(17) In the present case the existence of antecedent debt has been proved. There was a representation by the mortgagor that moneys borrowed under the mortgage were required for the purpose of paying off that debt; the mortgagee did not merely rely upon the representation made by the mortgagor, but made bona fide enquiries and satisfied himself that the money was required for discharge of the antecedent debt. Under those circumstances, we do not consider that it was further necessary for the mortgagee to see to the application of the money, He, having proved to have made bona fide enquiries as to the existence of the antecedent debt for discharge of which the moneys were borrowed ostensibly, would be protected, notwithstanding the fact that the moneys borrowed were not proved to have been actually utilised for the discharge of the entire amount due under the decree.

We cannot agree with the conclusion arrived at by the learned Subordinate Judge that protection given to a bona fide alienee who satisfied himself as to the existence of necessity, would not be available to the case of one whose moneys were ostensibly required for the discharge of antecedent debts of the father, but such moneys were not so utilised. Respondents 2 and 3 would, therefore, be liable for the entire amount due under the mortgage. The appellant would be entitled to a mortgage decree for the amount of Rs. 18,600-7-9 with subsequent interest against the interests of the sons in the Ammampatti lands. Time for redemption 3 months.

(18) This appeal is allowed with costs which will be included in the mortgage decree.

(19) Appeal allowed.