
(1969) 09 MAD CK 0024
In the Madras High Court
Case No : Appeal No. 217 of 1963

Muniswamy Reddiar and Others

APPELLANT

Vs

S. Ramamurti and Others

RESPONDENT

Date of Decision : 04-09-1969

Acts Referred:

Provincial Insolvency Act, 1920 — Section 53

Citation : AIR 1970 Mad 406 : (1970) ILR (Mad) 153 : (1970) 83 LW 171

Hon'ble Judges : Sadasivam, J;K.N. Mudaliar, J

Bench : Division Bench

Advocate : D. Ramaswami Iyengar and R. Krishnamachari, for the Appellant;
V.V. Raghavan and P. Bhaskaran, for the Respondent

Final Decision : Allowed

Judgement

Sadasivam, J.—Appeal by defendants 2 to 4 in the mortgage suit, O. S. 51 of 1957 on the file of the Sub-Court, Vel-lore, against the final

decree passed against them. The suit mortgage was executed by the first defendant, Rama-chandra Reddiar, the father of the appellants, on 16-

10-1948, for Rs. 30,000 in favour of Abdul Hadi and Azeesullah Basha Saheb, in discharge of two prior promissory notes executed by him for

Rs. 10,000 and Rs. 5,000 on 17-8-1946 and 9-10-1946, and a sum of Rs. 15,000 alleged to have been reserved with the mortgagees, which

was not actually received by him. Ramachandra Reddiar was adjudged insolvent in I.P. 13 of 1947, Sub-Court, Vellore in January 1947. The

Official Receiver filed I.A. 12 of 1951 on 8-1-1951 under Sections 53 and 54 of the Provincial Insolvency Act, and the Subordinate Judge set

aside the transaction u/s 53 of the Provincial Insolvency Act But on appeal by the mortgagees, the District Judge in C.M.A. 38 of 1955 on the file

of the District Court, Vellore, set aside the order of the Subordinate Judge. But this court in C.R.P. 1211 of 1957 set aside the order of the

District Judge and restored the order of the Subordinate Judge. The important portion of the order is as follows:

What appears to have happened is that the mortgagee coming to know of the embarrassed circumstances of the insolvent took a mortgage of all

his properties for his past debt for a sum of Rs. 30,000 of which he never had the intention of paying the sum of Rs. 15,000. This certainly would

not be a bona fide conduct. Admittedly the insolvent was in embarrassed circumstances at that time. He had creditors whose claims exceeded his

assets. The mortgagee was evidently aware of the same. He, therefore, wanted to secure his rights to the prejudice of the other creditors. He never

made any cash advance with the bona fide object of improving the business of the insolvent. The mortgage was obtained by him for a sum of Rs.

30,000 in respect of which, as subsequent events clearly show, he never had the intention of paying Rs. 15,000. Such a transaction cannot be said

to be a bona fide transaction.

Azeema Bi, Receiver in O.S. 80 of 1952, Sub-Court, Vellore, representing the estate of the mortgagees, filed O.S. 51 of 1957, on the file of the

Sub-Court, Vellore, on 17-4-1957 against the mortgagor Ramachandra Reddiar, the first defendant in the suit, the appellants, defendants 2 to 4, in

the suit, the sons of the mortgagor and the Official Receiver representing the estate of the mortgagor Ramachandra Reddiar. It should be noted at

that time C.R.P. 1211 of 1957, on the file of this court was pending. The only contention put forward by the Official Receiver in that suit was that

the order in C.R.P. 1211 of 1957, on the file of this court, against the order of the District Judge, in C.M.A. 38 of 1955, should govern the

decision in the suit. It was found in that suit that as the first defendant executed the suit mortgage in discharge of antecedent debts to the extent of

Rs. 15,000, the mortgage was binding on his sons defendants 2 to 4 to the extent of the said debts. In the result, a preliminary mortgage decree

was passed against the defendants in the suit on 29-10-1958. Since the decision in C.R.P. 1211 of 1957, on the file of this court went against the

first defendant, his sons sent a notice on 2-10-1960 to the Official Receiver stating that they are divided in status from the first defendant and that

the Official Receiver should not sell their shares in the properties. The plaintiff in O.S. 51 of 1957 applied for a final decree in the mortgage suit,

and, in view of the order of this court in C.R.P. 1211 of 1957, his advocate conceded that he could not ask for a final decree against the first

defendant, but claimed that he was entitled to a final decree as against defendants 2 to 4. This was allowed by the Principal Subordinate Judge of

Vellore and hence this appeal.

2. The suit mortgage was executed by the first defendant Ramachandra Reddiar alone. Two of his sons, defendants 3 and 4, were minors at that

time. Ramachandra Reddiar did not purport to execute the suit mortgage on behalf of his sons. The liability of the appellants as the sons of

Ramachandra Reddiar is the liability of the undivided sons of a Hindu family to discharge the antecedent debts of their father, which are not tainted

by immorality or illegality. The principles of law are clearly enunciated in paragraph 326 at page 409 of Mayne's "Hindu Law and Usage" 11th

Edn. and the following passages in the said paragraphs are relevant:--

The creditor has not as was once supposed two distinct remedies against the son in respect of his father's debt, one to enforce the claim against

him during the father's life and the other to sue in respect of it after the father's death. It may be taken as established that there is only one cause of

action which arises equally against the father and the son at the time when the debt is due and payable The proceeding against the son is only

an additional method of reaching the property, as in execution of a decree against the father himself, the son's interest can be seized and sold. The

fact that the son's obligation is confined to debts which are not immoral or illegal does not make it a different liability.

3. The sons alone cannot be sued in respect of a debt incurred by their father during their father's lifetime. In Section 292(3) at page 329 of

Mulla's Hindu Law, 13th Edn. it is stated--

Where a debt has been contracted by the father for his personal benefit, he is primarily liable to discharge it. Such being the case, the son alone

cannot be sued during the father's lifetime.

Again in Section 269(3) at page 307 of the same book, the learned author has stated that an alienation which does not bind the share of the alienor

himself cannot bind even the share of a coparcener consenting thereto. The

order passed in C.R.P. 1211 of 1957, on the file of this court, really dates back to the date of I.A. 12 of 1951, that is, 8th January 1951 which is long prior to the filing of the mortgage suit. It is anomalous to contend that the fraud of the mortgagor Ramachandra Reddiar and the mortgagees would disentitle the mortgagees or their representatives to get a mortgage decree against the fraudulent mortgagor alone, but would enable them to get a mortgage decree against the innocent sons of the mortgagor, who are not parties to the mortgage and whose liability arises out of the mortgage executed by their father. If the mortgagees or their representatives cannot get a decree on the suit mortgage against the father as they colluded with the mortgagor in fraudulently obtaining the security for their loan, they cannot obviously get any mortgage decree against the snares of the sons. It is true the sons are bound to discharge the antecedent debts of their father, but their liability is co-existent with the liability of their father. It is clear from the order in C.R.P. 1211 of 1957, on the file of this court, already referred to, that the mortgagor was in insolvent circumstances at the time of the execution of the suit mortgages and the mortgagees were fully aware of the same. The fact that the appellants have given notice to the Official Receiver that they are divided in status could only prevent the Official Receiver from exercising the power of sale which the insolvent father could have exercised. But it cannot prevent the Official Receiver from enforcing in a properly laid suit against the appellants his right to recover the pre-parti-tion debts of the first defendant to the extent of the family properties and administer the estate of the first defendant-mortgagor. Such a suit would be for the benefit of all the creditors of the first defendant, who has advanced loans when the fifth defendant was the manager of the joint family. It should be noted that the insolvency petition in this case was filed when the appellants were members of the joint family of which their father was the manager. The right of the mortgagees whose mortgage has been set aside is only to prove the claim in respect of the debt owed by the mortgagor before the Official Receiver and hence his position cannot in any way be better than the other simple creditors of the first defendant-mortgagor.

4. In the The Official Receiver of Coimbatore Vs. Palaniswami Chetti alias Ponnuswami Chettiar and Another, it has been held by a Bench of this

court that the right of the secured creditors to realise their security is not affected by the Provincial Insolvency Act and hence the adjudication of the mortgagor as an insolvent does not operate as a stay of further proceedings in a suit instituted against him to realise the mortgage amount. It has also been held in the decision that even an application by the Official Receiver u/s 53 of the Provincial Insolvency Act to set aside the mortgage as void against the creditors cannot operate as a stay of the mortgage suit, pending the decision of the application. It is clear from the decision, that if the application u/s 53 of the Provincial Insolvency Act to which the mortgagee would be a party eventually succeeds, his mortgage decree will ipso facto become unenforceable. It is needless to restate the principles of Hindu Law already referred to that an alienation which does not bind the share of the alienor himself cannot bind the share of a coparcener consenting thereto. It is conceded that there can be no final mortgage decree against the first defendant as mortgagor and it follows that there can be no final decree against the appellants, who are not parties to the mortgage but who were impleaded in the mortgage suit only as the undivided sons liable to discharge the antecedent debts of their father.

5. The learned Principal Subordinate Judge has merely referred to three decisions and observed that there is much force in the claim of the plaintiff for a final decree against the appellants, and he has not even cared to discuss the principles enunciated in the said decisions. In the first decision in *M. Thirumaleshwara Bhatta Vs. Balike Govinda Bhatta and Others*, it has been held that where prior to the sale the son sends a notice demanding partition of the property there will be a division in status which will prevent the Official Receiver from exercising the power of sale. We fail to see how this principle will help the respondent-plaintiff in the mortgage suit to get a final mortgage decree against the appellants. The effect of the appellants sending a notice to the Official Receiver on 2-10-1960 is only to prevent the Official Receiver from exercising the power of sale which he could otherwise exercise as representing the insolvent father. We have already pointed out that the remedy available to the Official Receiver is to institute a suit to enforce the obligations of the sons to discharge the pre-partition debts of their father, which are not tainted by immorality or illegality.

6. The third decision referred to by the learned Principal Subordinate Judge, Abdul Rahim v. Swaminatha Odayar, AIR 1956 Mad 19, really helps

the claim of the appellants. It has been held in that decision that if a transfer is set aside u/s 53 of the Provincial Insolvency Act, it becomes

ineffective only from the date of application for setting it aside, and it cannot affect the rights of the transferees from the transferee prior to that date

who were not made parties to the application. We have already referred to the fact that the order in C.R.P. 1121 of 1957 on the file of this court

passed on 1-4-1959 will really date back to the date of the application in I.A. 12 of 1951 dated 8-1-1951 which is long prior to the date of the

mortgage suit, and this is supported by the principles enunciated in the above decision.

7. The reference to the second decision is incorrect. The decision relied on is Chennappa Chetty Vs. Official Receiver, Salem and Others, . The

question that was considered in that Divisional Bench was whether when an alienation by a father is set aside u/s 54 of the Provincial Insolvency

Act, the setting aside of this alienation affects merely the interest of the insolvent, or whether the interest of the sons also is divested from the

vendee. It was held in that decision that on the adjudication of an insolvent what vests in the Official Receiver is the interest of the insolvent and

when a transaction entered into by the father of a joint Hindu family not merely in his own behalf but on behalf of others, namely, the two minor

sons in that case, who are not adjudicated and whose property does not vest in the Official Receiver is set aside, what vests in the Official

Receiver as the result of such setting aside is merely the interest of the insolvent father and not that of the non-insolvents. It has been held in that

case that in so far as the insolvent's share of the property is involved in the alienation, the Official Receiver would get it back when the alienation is

set aside, but if under the power vested in the insolvent father under the general law he alienated the interests of his sons who were not insolvents

and were minors, no order of the Insolvency Court u/s 54 of the Provincial Insolvency Act could get it back from the alienee and vest in the

Official Receiver the interests of persons who had not been adjudicated. It has also been pointed out in that decision that the power vested in the

Official Receiver for discharging antecedent debts of father enacted in Section 23-A of the Provincial Insolvency Act is irrelevant for consideration

of a question like the one in that case where the father instead of the Official Receiver had sold the properties on his own and his sons' behalf. The decision in this case is hardly relevant to the facts of the present case. The insolvent father in that case had sold his properties not only for himself, but also on behalf of his sons. Thus the sons of the alienor insolvent in that case were parties to the document. The alienation was attacked in the insolvency proceedings u/s 54 of the Provincial Insolvency Act, as a fraudulent preference and not u/s 53 of the Act as a fraudulent transfer. The question whether the Official Receiver could exercise the power of sale of the father is irrelevant even in this case. The decision in this case rests on the principle that when a mortgage decree could not be passed on a fraudulent deed of mortgage executed by the father, a mortgage decree could not be passed against his sons who are not even parties to that mortgage document.

8. The learned advocate for the appellants relied on the decision in *Narayana Chettiar v. Veerappa Chettiar*, ILR Mad 581 : AIR 1917 Mad 989

where it was held that the extinguishment of the debt by the Bankruptcy law of Singapore operated as a discharge of it everywhere and the

creditor had no right to sue in India the debtor and his undivided sons for the balance of the debt as if it was still subsisting. It has been pointed out

in that decision that under the Hindu law a Hindu son is not jointly bound with his father to pay the debts contracted by the father. This decision

has been followed by Venkatadri J. in *Kumarappa Chettiar v. Ramana Gounder*, (1968) 8L Mad LW 270. In *Nathuni Prasad and Others Vs.*

Firm Radha Kishun Dutt Rai, it has been held that the son's pious obligation arises on account of the existence of father's debt and that if the

debt itself is extinguished by an order of discharge of the father, the very foundation of the pious obligation is gone.

9. Sri V. V. Raghavan for the respondent referred to several decisions in support of his contention that once a decree has been passed both

against the father and against his sons the liability of the sons is under the decree and it is no longer necessary to consider their liability under the

general principles of Hindu law. But it should be noted that in the present case the passing of the final decree against the appellants is itself

questioned. If the contention of the learned advocate for the respondent is sound that on the strength of the preliminary decree he is entitled to get a

final decree, he can get a decree not only against the appellants, but also against their father. But it is conceded by him that in view of the decision

in C.R.P. 1211 of 1957 on the file of this court, he can no longer get a final mortgage decree against the mortgagor, the first defendant. It follows

from what we have already stated that he can get no final mortgage decree even against the sons. In *M.V. Maya, Nadan and Brothers Vs.*

Arunachalam Chettiar and Others, it has been held that when the insolvent father is discharged and his obligation is ended, that of the son also goes

with it. It is pointed out in that decision that it would be different if a decree had been obtained against the son or even against the father prior to the

insolvency in which case it may be possible for the creditor to seize the joint family property in the hands of the son in execution proceedings. Thus,

if prior to the insolvency of the first defendant, a money decree had been obtained against the first defendant and his sons, it is open to the creditor

to prove the claim against the insolvent in insolvency court and proceed to execute the decree against the sons. But it pre-supposes that there is a

valid decree against the first defendant and his sons. In the present case, the right to pass a decree against the appellants, when no such decree

could be passed against the first defendant is in question.

10. We shall proceed to consider the several other decisions relied on by *Sri V. V. Raghavan* for the respondent. In *Jagadesan and Another Vs.*

Saraswathi Ammal and Others, it was held that the son's liability would depend on the subsistence of the debt and not the availability of a

particular form of remedy against the father. It is clear from the decision that a transaction by way of a mortgage is a transfer of property and the

existence of a debt and that in spite of the fact that the personal liability of the mortgagor to repay the debts is barred, the debt would nevertheless

exist and it can be recovered from out of the property on the principle that so long as there is the debt, the doctrine of pious obligation would

import an obligation on the part of the son to pay and a right of the father to convey family property for its discharge. It cannot be disputed that the

appellants are bound to discharge the antecedent debts incurred by their father. But no mortgage decree could be passed against the appellants

when such a decree could not be passed against their father.

11. *Desayi Venkatranga Reddi and Others Vs. Paraku Chinna Sithamma and*

Another, relates to a case where a decree for mesne profits had been passed against a Hindu father and his undivided minor sons, directing recovery of the profits from the father personally and from the family properties of all of them. In regard to the sons it has been held in that decision, that whatever may be the position, if the decree had been obtained against the father alone, since in fact the sons had been impleaded in the suit and a decree obtained against their shares the decree-holder cannot claim to proceed against such shares, in execution of the decree against the father, when it can no longer be directly executed against them owing to the bar of limitation. Sri V. V. Raghavan relied on certain passages in the judgment that the matter is no longer governed by the Hindu Law, but by the relevant provisions of the Civil Procedure Code. But, as already pointed out, the decree in that case was not in dispute, unlike in the present case, where the appellants resist a decree being passed against them on the foot of the mortgage. In *Padarty Balayya Vs. Darapureddi Parvateeswararao and Others*, the sons were joined with the Hindu father in a suit on a promissory note and a decree was passed against the father and the sons as well as the joint family property in their hands. It was held that the claim against the sons must be deemed to have been put in suit and merged in the decree and the only mode of enforcing such claim is by executing the decree against the sons. The actual decision in that case is that the period during which the insolvency proceedings against the father were pending cannot be excluded in computing the period of limitation for execution of the decree against the sons. In *Chadalavada Seetharamayya Vs. Velivolu Kesavayya*, it has been held that the effect of decree passed against the son along with his father is to make the son jointly liable along with his father to discharge the debt. It is pointed out in that decision that whatever might be the position prior to the decree when the obligation of a Hindu son to pay his father's debts fructifies into a decree, it imposes a joint liability on the son along with the father and the former is jointly bound along with latter within the meaning of Sub-section (3) of Section 44 of the Provincial Insolvency Act. In *Sunkavadli Subbarao Vs. Vuppalapati Narasimharao*, it has been held that in a case of a debt by a Hindu father, if partition takes place after a creditor institutes a suit for its recovery, the decree in such a suit cannot be executed u/s 53,

C.P.C. against the sons who were not made parties to the suit, as on severance of the joint family the father loses the power to alienate the joint

family property for the debts incurred by him. It is pointed out that the creditor has to institute a separate suit against the sons for giving effect to the

principle of pious obligation. It has been further held in that decision that the sons are liable to pay the decree debt in spite of the fact that the father

was adjudged insolvent and an annulment order u/s 39 of the Provincial Insolvency Act was passed and a composition or a scheme was prepared

under which the creditor would have been entitled to recover a fraction of his debt and not the entire debt. The decision in ILR Mad 581 : AIR

1917 Mad 989) has been clearly distinguished and that in Seetharamayya v. Kesavayya, AIR 1952 Mad 1088 has been followed in that case. The

principles of the above decisions relied on by Sri V. V. Raghavan as already stated, can have no application to the present case where the question

is whether a final mortgage decree could be passed against the sons, the appellants herein, when no such decree could be passed against their

father the first defendant on account of the fact that the mortgage executed solely by the father has been set aside u/s 53 of the Provincial

Insolvency Act as a fraudulent transaction long prior to the mortgage suit it is clear from what we have stated that no such final mortgage decree

could be passed against the appellants, when such a decree could not be passed even against their father, who alone was a party to the mortgage.

12. In the result, the decree and order of the lower court are incorrect and they are set aside and I.A. 29 of 1962 is dismissed with costs and the

appeal is allowed with costs.