

(1924) 07 MAD CK 0014
In the Madras High Court

Pondicherry Kokilambal

APPELLANT

Vs

Pondicherry Sundarammal and Others

RESPONDENT

Date of Decision : 25-07-1924

Acts Referred:

Transfer of Property Act, 1882 — Section 41

Citation : AIR 1925 Mad 902 : (1925) 21 LW 259

Hon'ble Judges : Kumaraswami Sastry, J;Kumaraswami Sastri, J

Bench : Division Bench

Judgement

Kumaraswami Sastry, J.—This is a suit by the plaintiff for partition, for a delivery to her of her share in the plaint property, for declaration

that the mortgage by the 1st and 2nd defendants, in favour of the fourth defendant is not valid and binding on Let for the appointment of a receiver,

for costs and for further reliefs. The plaintiff and defendants 1 to 3 are dancing girls. The first defendant is the mother of the plaintiff, the second

defendant is the daughter of the plaintiff and the third defendant is the daughter of the second defendant. The fourth defendant is the mortgagee of

the property from the 1st defendant the second defendant having stood surety for the first defendant in the transaction. The case for the plaintiff is

that the house which is mortgaged is the joint family property of the plaintiff and defendants 1 to 3, that there was a house, 58, Iyappah Chetty

Street, Madras, which was inherited by the first defendant from her mother and grand-mother that the suit property was purchased by the first

defendant, while it was subject to a mortgage, in favour of Annaduraier, that for purposes of paying off that mortgage, house No. 58, Iyappah

Chetty Street, was also mortgaged, by the plaintiff and the first defendant, and that with the monies raised on the mortgage and sale of their jewels

the suit house was purchased, that subsequently to discharge that mortgage house No. 58 was sold by the plaintiff and the first defendant, that in

1913, one Alwar Chetty was the paramour of the second defendant, that there were quarrels in 1914 between the plaintiff and the first defendant

and the plaintiff left the suit house and lived separately, that in order to help this Alwar Chetty, defendants 1 and 2 borrowed Rs. 15,000 from the

fourth defendant, that Alwar Chetty became insolvent, that Sampath Ayya, who was the brother-in-law and agent of the fourth defendant, knew

Alwar Chetty and the fact that he was the paramour of the second defendant, that the loan of Rs. 15,000 was really borrowed for the purpose of

helping Alwar Chetty, who was in difficulties and that the mortgage is not consequently binding on the plaintiff and her share of the properties. The

1st defendant filed a written statement supporting the allegations of the plaintiff and stating that she entered into this transaction, in the belief that

Alwar Chetty would liquidate the debt borrowed on his behalf and he has not done so. The second defendant filed a written statement also

admitting the various allegations of the plaintiff. She says that she was induced to stand surety, that she was the mistress of Alwar Chetty and was

under his influence and that it was represented that money was required for his benefit. The third defendant's guardian ad litem filed a Written

statement stating that she is entitled to one-eighth share in the property, that the mortgage is not binding on her, as it was not for any antecedent

debt, or for family necessity. The fourth defendant filed a written statement putting the plaintiff to proof of the allegations in the plaint, as to the joint

nature of the family and as to the property being joint family property. She says that the property mortgaged is the absolute property of the first

defendant, that there were various mortgages and transactions, in which the first defendant represented to be the absolute owner of the property,

that the debt was borrowed for necessary purposes and that she is a bona fide lender, without notice of the rights of any other party and must be

protected.

2. The following issues have been framed:

1. Do the plaintiff and defendants 1 to 3 form members of an undivided family of Devadasies, possessed of properties ancestrally or jointly

acquired?

2. Was the house and ground No. 58 Ivappa Chetty Street, Madras, the ancestral family property of the plaintiff and the 1st defendant?

3. Was the house and ground No. 76 Perumal Mudali Street, George Town, Madras, purchased out of, or with the aid of joint-family assets, or

was it purchased by the 1st defendant out of her self-acquisitions?

4. Was the mortgage in favour of the 4th defendant created for any legal necessity or for any family benefit and is the same binding on the shares of

the plaintiff and the defendants 2 to 3?

5. Is the house No. 76, Perumal Mudali Street liable to be partitioned among the plaintiff and defendants 1 to 3, and if so, what are the shares to

which they are entitled respectively?

6. Is the plaintiff estopped from impeaching the mortgage, in favour of the 4th defendant, for the reasons set forth in paragraphs 12 and 14 of the

4th defendant's written statement?

7. Is the 4th defendant & bona fide mortgagee and is she entitled to the protection afforded by Section 41 of the Transfer of Property Act?

8. What reliefs are the parties entitled to?

3. His Lordship here held on the evidence that the parties were living as members of a joint family, that the suit property was their joint property

and that the Rs. 5,000 out of the mortgage debt had been borrowed for purposes binding on a joint Hindu family.

4. A question has been raised in this case, as to the law applicable to dancing girls. In the present case the mother, daughter, and grand-daughter

all lived together, put their earnings together and behaved in all respects as if they were members of a joint family. The contention of Mr.

Guruswami Chetty for the plaintiff is that in such cases, the entire law of the joint family, including right by birth," has to be applied, the only

difference being that daughters took the place of sons and are entitled to such rights, as the sons would have in a joint family. If this view is correct

the position will be that the plaintiff would have all the rights and liabilities of sons in a joint family. If you concede the right by birth, and apply the

law of the ordinary Mitakshara joint family, you must also concede pious obligation of the daughter to discharge her mother's debts. The recent

Privy Council decision is to the effect that the debt should be antecedent in the real sense of the term and that money advanced on mortgage would

not be antecedent debt, go far as the loan contemporaneous with the mortgage is concerned. Mr. Radhakrishnayya contends that, so far as these

dancing girls are concerned, there can be no question of a joint family in the Mitakshara sense of the term, where persons acquire right by birth. So

far as the authorities go, it seems to me clear from the cases reported in Chalakonda Alasani v. Chalakonda Ratnachalam 2 M.H.C. 56 Kamakshi

v. Nagarathnam 5 M.H.C. 161, Boologam v. Swornam [1882] 4 Mad. 330 Venku v. Mahalinga [1888] 11 Mad. 393 and Muttukannu v.

Poramasami (1889) 12 Mad. 214 that there can be a co parcenary of dancing girls, with rights of survivorship. There is however no case which

goes to the length of saying that daughters of dancing girls acquire by birth an interest in the ancestral property; but Mr. Guruswami Chetty

contends that once you grant a co-parcenary, right by birth is a necessary corollary and that there can be no co-parcenary without-right by birth

acquired by co-parceners Mr. Radhakrishnayya relies upon Niras Purbe v. Tetri Pasin 20 C.W.N. 103 and Sant Singh v. Lachhmi [1918] 126

P.W.R. 1918 to show that in such cases you have to apply the law of usage and that the daughters inherit the property absolutely as stridhanam.

These cases unfortunately were not cases, where there was any question of joint living or title acquired, by dancing girls, who lived as members of

a joint family. In this state of the authorities, the question as to the acquisition of a right by birth is one of very considerable difficulty but in the

present case, I do not think it is necessary to decide that question, as the view I take is that the daughter and grand-daughter were living with the

first defendant in the house, as members of a joint family, and giving their earnings to her and they were living together meeting their expenses out of

the, joint earnings and the house must be treated as joint property, especially as it was acquired at least in part, out of the monies raised on a

mortgage executed by both the mother and daughter. I treat this case entirely as a case where the property has been treated as co-parcenary

property by conduct and becoming co-parcenary property by such conduct. In the view I take, the loan of Rs. 5,000 and the interest thereon

would certainly be binding on the plaintiff. So far RS she is concerned, she will have only 1/4th share in the property, her daughter, the second

defendant getting the remaining 3/4th share. Her daughter the second defendant, has stood surety in the mortgage document itself and she is

certainly bound. I do not believe her statement that she knew nothing of the transaction and that she was forced to sign the; document. There can be no doubt that she wanted to help her paramour at the time and that she willingly consented to help him, especially as he was very generous to her and had given her a lot of jewels.

5. As regards the question of estoppel, I do not see how the plaintiff can be estopped. Assuming that she consented to her mother receiving Rs.

1,000 under Ex. II and attested that document that would not bind her for ever from deputing the subsequent transactions without her consent. All

that can be said is that she allowed the first defendant to state in one document that the property was her mother's property. As regards Section

41 of the Transfer of Property Act, the question is whether the 4th defendant was led to believe bona fide that the first defendant was the absolute

owner of the property. So far as the documents go, the Collector's certificate is in the name of the first defendant and the sale-deed is in her name

and she has executed Exs. II to V, stating that the property was hers. In cases where members of a family live together as co-parceners, it has

been held that the fact that the property stands in the name of the eldest member does not by itself create any title in him, to the exclusion of the

others and that persons who are dealing with such family have to make enquiries and satisfy themselves, that the person who deals with the

property has absolute power to do so. In the present case, I have little doubt on the evidence that Sampathiah, who in this transaction was

admittedly the agent of the 4th defendant and conducted all the affairs, knew Alwar Chetty very well. It is admitted by both Sampathiah and

Odyavarlah that they made no enquiries of the plaintiff. According to the evidence, the plaintiff, at the date of the mortgage, was living in 14,

Veerappan Street, along with the first defendant and second defendant. Curiously enough, the deed of mortgage, Ex. VI, does not mention the

name of the 2nd defendant's mother, but only her grand daughter and the first defendant and her mother's name seems to have been ascertained

and inserted in the Registrar's office. Where in such cases the lender makes no enquiries of the members of a family and there is nothing to suggest

that representation was made that no other member was in existence, I do not think Section 41 would apply, so as to deprive a co-parcener of his

rights to the property. In the present case, there was no reason given why the plaintiff was not asked whether she would consent and, her existence was known to the fourth defendant's agent. It seems also probable on the evidence that the fourth defendant's agent knew that Alwar Chetty was really in need of money at the time and that this transaction was really to help Alwar Chetty. I doubt very much whether the fourth defendant would have advanced Rs. 10,000 on the mere statement that money was needed for repairs And improvements. This statement was put in, to give some colour to the transaction. I do not think that the fourth defendant is a bona fide mortgagee for value 5 because if she or her agent had made enquiries they should have known of the existence of the second defendant, or the plaintiff and her right.

6. So far as the third defendant is concerned she is now a young girl, 7 or 8 years old, and it is not suggested that she contributed to the earnings of the family, or that any property was purchased out of her contributions.

7. My findings on the issues are:

Issue 1 - Plaintiff and defendants 1 and 2 are members of an undivided family of davadasies and the plaint house was their joint property.

Issues 2 and 3 - House No. 58 was got by the first defendant from her ancestors and it was mortgaged by the first defendant and plaintiff together,

as joint property and sold as such, the mortgage being for the purpose of paying off part of the consideration of the suit house. I think it is proved

that Rs. 1,500 out of this mortgage money went to pay off the consideration of house No. 76.

Issue 4. - I find that the mortgage in favour of the 4th defendant was binding on the plaintiff, to the extent of Rs. 5,000 and the interest thereon up

to date, aggregating to Rs. 7,373-7-0 and also further interest till payment and that it is also binding in its entirety on the second defendant, who

has stood surety and that only plaintiff's 1/4th share would be exonerated for the balance after paying Rs. 5,000 and interest due till date of payment.

Issue 5. - I find house No. 76 is liable to be partitioned subject to the payment of the principal and interest on Rs. 5,000 to the fourth defendant, as

I have stated above and that plaintiff is entitled to 1/4th share of the balance.

Issue 6. - I find there is no estoppel.

and Issue 7. - I find that the fourth defendant was not a bona fide mortgagee.

8. As the evidence shows, this is the only property available for partition. The mortgage in favour of the 4th defendant has to be met and the only

way to meet it is to direct the property to be sold. The amount due to the fourth defendant upto date is Rs. 20,875-3.3 and the fourth defendant

will be entitled to this sum, together with interest at 12 3/4th per cent-per annum from this date to date of payment. Out of this mortgage debts the

amount which I found binding on the plaintiff is Rs. 5,000 with interest upto date and future interest at 12 3/4th per cent, per annum on Rs . 5,000

upto date of payment.

9. Out of the sale proceeds of the house, this sum which is binding on all parties will be paid to the 4th defendant. Out of the balance 1/4th will be

paid to the plaintiff, and 3/4th to the fourth defendant, in respect of the amount due on the mortgage; if there is any surplus, it will be divided

between plaintiff and defendants 1 and 2. If there is no surplus, there will be a personal decree against the 2nd defendant for the balance. The

conduct of the sale will be given to the 4th defendant. In the circumstances, each party will bear their own costs.