
(1947) 03 MAD CK 0014
In the Madras High Court

Puppala Ramamurthi

APPELLANT

Vs

Kandulapati Kanakaratnam and Others

RESPONDENT

Date of Decision : 14-03-1947

Acts Referred:

Transfer of Property Act, 1882 — Section 39

Citation : AIR 1948 Mad 208 : (1948) ILR (Mad) 335 : (1947) 60 LW 586 : (1947) 2 MLJ 281

Hon'ble Judges : Govindarajachari, J

Bench : Division Bench

Judgement

Govindarajachari, J.—This appeal is by the third defendant in a suit for maintenance filed by the first respondent, the junior widow of one

Gopalam, who died on the 8th June, 1931. Gopalam's senior widow, Mahalakshamma, is alive, but is not a party to the suit or appeal. The first

defendant was adopted to Gopalam by Mahalakshamma on the 20th October, 1931. Shortly after Gopalam's death there were disputes

between his widows culminating in a suit for partition (O.S. No. 578 of 1931) on the file of the District Munsiff's Court of Ellore. The present first

respondent was the plaintiff in that suit and the senior widow was the defendant. The adoption of the present first defendant would appear to have

been made during the pendency of that suit, to which, however, the adopted son was not a party. That suit resulted in a decree in favour of the first

respondent for a half share in Gopalam's estate. Possession in pursuance of the decree was given to her on 17th May, 1936. From 1931 to 1936,

the estate was in the possession of a receiver appointed by the Court. The present first defendant filed O.S. No. 40 of 1937 in the Court of the

Subordinate Judge, Ellore, against the two widows and certain others for

recovery of possession of Gopalam's estate as Gopalam's adopted son.

A decree was passed in his favour and he obtained possession of the estate on 23rd November, 1938, and 25th November, 1938. The principal

contestant in that suit was the present first respondent. There was an appeal to the High Court against the decree in O.S. No. 40 of 1937 which

was finally dismissed in 1941 vide ILR 1942 Mad. 173 . The present suit was filed by the first respondent in forma pauperis on 12th April, 1943,

claiming maintenance at the rate of Rs. 200 per month from the date of suit, arrears of maintenance at the rate of Rs. 100 per month from 1931,

Rs. 500 for Vratams and pilgrimages and Rs. 300 for value of utensils and a provision for her residence. There was also a claim for certain jewels

which was rejected by the lower Court. There is no appeal or memorandum of cross-objections with regard to that claim. As already stated the

first defendant is the adopted son, the truth and validity of whose adoption was established in the previous litigation. The second defendant is his

minor son and the fourth defendant is his wife. The third defendant, the appellant in the present appeal, claims to have purchased items 1 to 8 of the

plaint schedule for Rs. 6,000 under Ex. D-9 dated 25th March, 1939, during the minority of the first defendant from his natural mother who is said

to have been his guardian-de-facto. This sale was ratified by the first defendant after attaining majority by a deed dated 25th September, 1940

(Ex. D-10). The third defendant also obtained a mortgage (Ex. D-11) for Rs. 4,000 in respect of the suit items 9 to 19 on 4th August, 1941, from

the first defendant after he attained majority. Defendants 4 to 7 were impleaded on the ground that items 20 to 25 of the plaint schedule were

alienated to them. But none of them attempted to support those alienations in the lower Court which treated them as volunteers and held that the

properties alleged to have been alienated to them would be liable for the plaintiff's maintenance.

2. Apart from the plea that the maintenance claimed by the plaintiff is excessive and that the plaintiff would not be entitled to arrears for a portion of

the period for which they are claimed, the principal contest on behalf of the third defendant is that the properties sold to him in 1939 were

altogether exempt from the plaintiff's claim and that the properties mortgaged to him in 1941 can be made liable for the plaintiff's maintenance only

subject to his mortgage. The lower Court held that the third defendant was aware of the plaintiff's claim for maintenance and "" that he did not really obtain these alienations and that the documents were simply written up to defeat and delay as far as possible the plaintiff's claim even for her maintenance."" This finding is challenged on the third defendant's behalf.

3. The sale deed in favour of the third defendant recites five items of consideration. The first three are certain sums paid for the discharge of debts

alleged to have been borrowed during the minority of the first defendant by his natural mother for the expenses of litigation, for his maintenance and

for the payment of kist. The creditors, who are said to have advanced the amounts as per items 1 and 2 are examined as D. Ws. 7 and 8

respectively. They are described as maternal uncles of the first defendant. One of them perhaps is the first defendant's mother's cousin and not her

brother, but that is immaterial. These two items which are Rs. 2,391-1-0 and Rs. 2,593-13-q respectively constitutes the bulk of the consideration

for the sale deed. They are sought to be proved by the production of Exs. D-20 and D.19 which are said to have been the accounts maintained by

these two creditors for the amounts which they respectively advanced to the first defendant's natural mother during the minority of the first

defendant. Two receipts, Exs. D-14 and D.-15 were passed by the creditors in favour of the vendee in token of the amounts recited in the sale

deed having been paid to them. The learned Subordinate Judge was not impressed with the evidence of these witnesses and they do not impress us

either. They both admit that they maintain accounts in their respective trades ; but admittedly those accounts would not show the lending of any

money to the first defendant's mother. Each of them asserts that he is carrying on trade in tobacco to the extent of about Rs. 10,000. There was

some cross-examination with a view to elicit that they do not have the capacity to lend the amounts which are alleged to have been lent by them.

Apart from this, however, it is, in our opinion, rather unbelievable that if fairly large amounts were withdrawn from trade there would not be any

entries in their trade accounts in token of such withdrawals and that separate accounts would be maintained for the purpose of showing the loans

given to the first defendant's mother. Exs. D-19 and D-20 consist each of a few sheets of papers stitched together. They do not contain any

entries relating to any transactions with persons other than the first defendant's mother. From time to time the first defendant's mother's thumb

impression was obtained in these accounts and finally all these loans were totalled up and an entry was made that the creditors received payments

from the vendee of the entire amounts lent by them. These accounts do not impress us as accounts kept in the regular course of business and

having regard to the circumstances already referred to we are in substantial agreement with the learned Subordinate Judge in his view as to these

two items. The third item of consideration is the payment of a debt alleged to have been advanced by one Seerla Subba Rao who, however, has

not been examined about the loan. This borrowing is sought to be proved by the production of an account book, Ex. D-21, which is just like Exs.

D-19 and D-20 and the receipt Ex. D-16 is said to have been passed by Subba Rao in favour of the third defendant when his loan was

discharged. The truth of this loan again has not in our opinion been satisfactorily established. The fourth item of consideration for the sale deed is

the discharge of Ex. D-17 a promissory note for Rs. 300 executed on 12th August, 1938 in favour of one Varanasi Suryakanthamma by the

natural mother of the first defendant as his guardian. There is an endorsement of discharge dated 29th March, 1939 on this promissory note

reciting a payment of Rs. 300 to Suryakanthamma towards the principal amount of the promissory note in full satisfaction of it. This endoresement

is attested by Y.S itaramayya who, we are told, is a pleader. The creditor would appear to have remitted the interest which had accrued, so that

though a provision was made in the sale deed for the payment of Rs. 311-9-9 to Suryakanthamma, only Rs. 300 was paid to her and the balance

of Rs. 11-9-9 was Paid to the first defendant's natural mother who passed a receipt for it (Ex. D-18). There is no reason to doubt the genuineness

of this item of consideration ; but it obviously forms a small and unimportant part of the consideration for the sale-deed. The fifth item of

consideration is a sum of Rs. 345-5-6 said to have been settled to be paid to the vendor before the Sub-Registrar at the time of the registration of

the sale deed. This amount is said to be for expenses in the High Court. It does not appear whether this amount was actually paid to the vendor or

not. In any view this item like the previous item forms a minor part of the consideration. The property sold under the sale deed is 19 acres of delta

wet land in the West Godavari District, and even assuming that part of it is liable to submersion under the Kollair, there is considerable suspicion

whether the amount of Rs. 6,000 recited as consideration in the sale deed is not an undervalue. It is again not possible to avoid the impression that

this is part of an attempt to render a large slice of the property unavailable for the satisfaction of the plaintiff's claim for maintenance. That the third

defendant was interesting himself in the affairs of the first defendant and his adoptive mother is evident from the fact that he obstructed the receiver

appointed in O.S. No. 578 of 1931 from taking possession of the estate. The receiver who is P.W. 5 deposes to this and we have no hesitation in

accepting his evidence in preference to the denial of the third defendant. The third defendant is also related to Gopalam though the details of the

relationship do not appear. He is the first defendant's neighbour and as the first defendant himself deposes, the third defendant knew well about the

family affairs of the first defendant. We do not attach any importance to the deed of ratification executed by the first defendant concerning the sale

having regard to the view that we are inclined to take in respect of the latter.

4. It is argued for the appellant with some plausibility that the first defendant was out of possession of the estate till 1938, that he had to conduct a

costly litigation for the purpose of establishing his rights between the years 1937 and 1941 and that money must therefore have been borrowed for

the expenses of litigation, for his own maintenance and for paying the kist due to the Government on his lands. It must be noticed, however, that his

adoptive mother was in possession of a half portion of the estate in 1936 and 1937 and that she was, besides, being paid between 1931 and 1935

by the receiver who was then in possession, certain amounts which amounted approximately to a half share in the income of the estate, and that the

defendant himself obtained possession of the entire estate in November 1938. Apart from this, it seems to us that it is idle to speculate as to

whether there was any borrowing, and if so, from whom, when we are unable for reasons already given to accept the case put forward by the third

defendant, namely, that considerable amounts were advanced by D.W. 7 and D.W. 8.

5. Reliance has also been placed on behalf of the third defendant on Ex. D. 22 series and D. 23 series which are leases granted by him for the

lands covered by the sale deed and on an admission of P.W. 2 that the third defendant "" is actually in possession of about 20 acres of the plaintiff's

late husband's lands."" This question of possession again seems to us to be immaterial if as we are inclined to hold, the sale deed is not binding on

the plaintiff and the properties covered by it were not therefore immune from the claim of the plaintiff for maintenance.

6. Turning to the mortgage deed Ex. D-11, the third defendant's case stands on a different footing. The aggregate amount of Rs. 4000 advanced

under the mortgage is made up of ten items. The first two represent, together with subsequent interest, the amounts advanced by the third

defendant for the discharge of two decrees obtained against the first defendant's father. Items 3 to 7 are the amounts borrowed for the purpose of

paying the Court-fee due to the Government on the plaint in O.S. No. 40 of 1937 which was filed in forma pauperis. Item 8 is an amount of Rs.

800 said to have been borrowed in cash on 1st August, 1941 for the expenses of the appeal in the High Court against O.S. No. 40 of 1937. That

was about the time when the appeal was finally disposed of in the High Court. Having regard to the status of the Counsel engaged in the High

Court there is no reason to doubt this borrowing. The 9th item is Rs. 700 which the mortgagee is said to have undertaken to pay on behalf of the

mortgagor towards the stamp duty payable to the Government in O.S. No. 40 of 1937 and the last item is a small sum of Rs. 17-9-0

acknowledged to have been paid before the Sub-Registrar at the time of the registration. In our opinion the truth of these several items is

satisfactorily established by documentary evidence which seems to us to be unassailable. The two decree debts against the first defendant's

adoptive father, the truth of which is not denied, were discharged by the third defendant as is evident from the receipt passed by the creditors, Exs.

D-12 and D-2. The latter decree was one obtained by the plaintiff's brother, and the truth of that debt was acknowledged by her in the list of

debts appended to her plaint in the partition suit. Though the decree-holders have not been examined to prove the payments evidenced by the

receipts there is no reason to doubt the truth of these payments. In regard to items 3 to 7 and 9 there is ample documentary evidence consisting

principally of endorsements made by the Government Pleader on the applications filed on behalf of the first defendant from time to time for staying

the execution which the Government was taking out against him. By these endorsements the Government Pleader acknowledged the receipt of

amounts in part satisfaction of the Government's claim. As would appear from the execution petition, Ex. D-24, the total amount due to the

Government from the first defendant by way of stamp duty was Rs. 1934-14-0. The payments made towards this amount are acknowledged in

Ex. D-24 series mostly by the endorsements made by the Government pleader as already mentioned and in almost all the cases by the orders of

the executing Court directing part satisfaction to be entered up for the amounts paid from time to time. There are also receipts passed by the first

defendant to the third defendant every time that the third defendant advanced amounts for the purpose of paying the Court-fee due to the

Government. We have therefore no hesitation in holding that all the amounts recited in items 3 to 7 and 9 of the mortgage deed represent true

borrowings of the first defendant from the third defendant. The 9th item of Rs. 700 was not advanced at the date of the mortgage, but it was

subsequently advanced as is clear from the receipt dated 29th October, 1941 by the Court Amin to the third defendant in token of having received

from the latter Rs. 709-11-0 towards the amount due as per E.P. No. 103 of 1940, which the Government had filed.

7. The mortgage being thus fully supported by consideration, it is argued for the appellant that having regard to the purposes for which it was given

it is binding on the family and will take precedence over the plaintiff's claim for maintenance, which would ripen into a charge only when such a

charge is declared or created by act of parties or by a decree or order of Court. There can be no dispute that the discharge of the debts of the 1st

defendant's father and the expenses of the litigation which the first defendant had to conduct in order to establish his rights as the adopted son of

Gopalam, principally, it will be recalled, against the plaintiff herself who was stoutly denying his status as such adopted son, are purposes which

would render the mortgage binding on the entire family consisting of the plaintiff, her co-widow, the first defendant, his wife and his minor son.

8. It seems to be equally beyond dispute that the claim of the widow of a deceased coparcener to be maintained out of the family estate is not

charged on such estate till by agreement of parties or decree of Court, a charge is created on a specified portion of such estate, and if before it is

so created, any portion of the family estate is sold or mortgaged for the discharge of debts which have precedence over the widow's claim for

maintenance, she cannot enforce her claim against the properties which are sold and can only enforce her claim against the properties which are

mortgaged subject to such mortgage. The latest pronouncement of the Judicial Committee of the Privy Council in *Mussamat Dan, Kuar v.*

Mussamat Sarala Devi (1946) 2 M.L.J. 420 makes this position abundantly clear. The principle was stated as early as *Lakshman Ramchandra*

Joshi v. Satyabhama Bai I.L.R.(1877) 2 Bom. 494 was affirmed in two leading decisions of this Court in *Ramanadan v. Rangammal* I.L.R.(1888)

Mad. 260 and *Jayanti Subbiah Vs. Mangamma*, , and so far as we are aware has never been challenged in this Court. On behalf of the plaintiff

appellant *Datatraya v. Tulsabi* ILR (1943) Bom. 646 has been quoted as holding that in view of the amendment made in Section 39 of the Transfer

of Property Act by Act XX of 1929 a person having a right to receive maintenance from the profits of Immovable property must be taken to have

a charge over such property. We do not read that decision as laying down any such proposition. After setting out Section 39 as it stood before the

amendment, the learned Judges point out that it was amended in 1929 so as to eliminate the necessity of proving the intention to defeat the right of

maintenance and that all that a person having a right to receive maintenance has now to prove is that the transferee has notice of such right or that

the transfer is gratuitous. We do not find in that decision any expression of dissent from the view taken in *Lakshman Ramchandra Joshi v.*

Salyabhamabai I.L.R.(1877) 2 Bom. 494 which has been consistently followed in the later decisions of that Court. The amendment to Section 39

was not intended to create a charge where none existed previously. The rule of Hindu Law that though a Hindu widow has a right to be maintained

out of the family estate, she has no charge in respect of such right over any portion of the estate till one is created by agreement, or by a decree of

Court or by getting a part of the Immovable property assigned to her for her maintenance, is not, in our opinion, intended to be affected by the

amendment of Section 39, so that any alienation made for purposes which would have precedence over the widow's claim for maintenance would,

in the absence of any charge created as indicated above, bind the widow and her right to have her maintenance charged upon an appropriate

portion of the family estate can be enforced only subject to such alienation. The amendment of Section 39 is intended to deal only with transfers

which do not come under the Hindu Law rule, just referred to, in other words with transfers which are not for purposes which would take

precedence over a widow's claim to maintenance. Such transfers may be either gratuitous or for consideration. u/s 39 as it stood before the

amendment, a Hindu widow having a right to receive maintenance could enforce such right against the transferee, if the transfer was made with the

intention to defeat her right with the added requirement that if the transfer was for consideration, the transferee should have had notice of such

intention. The only effect of the amendment of Section 39 is to make it unnecessary for the widow to prove that the transfer was made with the

intention of defeating her right. If the transfer is gratuitous, there is nothing for her to prove beyond her right to receive maintenance. If, on the other

hand,, the transfer is for consideration, she has only to prove, besides her right to receive maintenance, that the transferee had notice of her right. In

this view therefore the plaintiff's claim to maintenance is enforceable subject only to the mortgage created by Ex. D-u. It has, however, been

contended on behalf of the respondent that the property mortgaged being admittedly worth Rs. 15,000 and the mortgage being only for Rs. 4,000,

the security given is excessive and the mortgage is, by reason of that circumstance not entitled to precedence over the plaintiff's claim to

maintenance and in any event not entitled to such precedence to the extent of the entire mortgage security. No authority has, however, been cited

in support of this contention. In (1919) ILR 41 571 (P.C.) (Privy Council) it was held that a mortgage admitted or proved to be for purpose

binding on a joint Hindu family may, where the interest stipulated is in excess of what is properly chargeable, having regard to the circumstances of

the case, be unenforceable in regard to such excess against the family property. In Benares Bank, Ltd. v. Hart Narain it was similarly held that if a

mortgage is only partly for a purpose binding on a Hindu joint family it would be enforceable only to the extent of such part. These cases, however,

are in our opinion, distinguishable because in both of them the burden of the family estate is sought to be enlarged either by the inclusion in the

mortgage of a debt which is not binding on the family or by the stipulation for payment of interest at a rate higher than is justified by the exigencies

of the borrowing. It seems to us that in legal theory the burden of the debt is in no way rendered heavier by a mortgage being given over a larger extent of property than need be so given. We recognise that it is possible that by the creation of a mortgage over an unnecessarily large extent of family property it may be rendered more difficult for a Hindu widow to enforce her right to maintenance. There is no doubt some suspicion in this case that a considerably larger extent of the property than need have been included in the mortgage might have been so included in order to defeat the plaintiff's right to enforce her maintenance. We cannot however so find as there was no point clearly raised in the lower Court that the amount could have been raised by mortgaging a lesser extent of property, and there was therefore no enquiry as to the circumstances, if any, which necessitated the creation of a mortgage over so large an extent. We are further not prepared to hold that where a mortgage is proved to be for the purpose which would have precedence over the widow's claim for maintenance it is unenforceable against her by reason of the inclusion in the mortgage of an unnecessarily large extent of family property and the practical difficulty thereby created in enforcing her right to maintenance, nor do we think there is any justification in such a case for a Court to split the mortgage and hold that it is enforceable only against a portion of the hypotheca and unavailable against the rest as between the mortgagee on the one hand and the claimant for maintenance on the other. In this view it must be declared that the mortgage in favour of the third defendant is binding on the plaintiff and that the plaintiff can enforce her right to maintenance against the mortgaged properties only subject to the mortgage.

9. It has next been argued for the appellant that the maintenance awarded is excessive and that the arrears of maintenance should not have been awarded for the entire period for which they have been. The lower Court assessed the net income of the family at 400 bags of paddy per year after making proper allowances for taxes and expenses of cultivation. On this basis it decreed maintenance to the plaintiff at 50 bags of paddy and Rs. 300 per year and also arrears at the same rate from 1932 to 1935 and 1938 to 1943. It is true that during the period of the management of the receiver between 1931 and 1936, the income was rather low, but this was mostly due to inefficient management and there is no reason to doubt

the substantial accuracy of the estimate of the net income made by the Subordinate Judge. It is not easy to assess the exact income from the estate

from the meagre materials that are available but from Ex. P-2 (b) which is a memorandum filed by the Receiver on 16th January, 1932, it would

appear that 477 bags of paddy were realised in that year. This may be adopted as a safe criterion making proper deductions for taxes and

expenses of cultivation out of it. The net income may thus be assessed at approximately the figure adopted by the learned Subordinate Judge.

10. As regards the arrears it is pointed out on behalf of the appellant and on behalf of defendants 1, 2 and 4 who are the appellants in the

connected appeal A.S. No. 2 of 1945 that the first defendant was out of possession of the estate till November, 1938, that in the years 1932 to

1935 the Receiver was in possession and that whatever was realised by him must have been distributed between the plaintiff and her co-widow

and that the first defendant cannot consequently be held liable for the maintenance of the plaintiff during the time he was not in possession of the

estate. The plaintiff admits in her plaint that she received Rs. 1,000 from the receiver in instalments of Rs. 100 . What further amounts she received

is not clear, nor is it established as well as it could be that what was paid to the plaintiff and her cowidow represented the entire income of the

estate during those years. We, however, consider that it is highly probable that the plaintiff received half of the net receipts of the estates during this

period, as we find the Receiver reporting to the Court in 1934 that there was no money in the estate for the payment of kist due to Governmerit

and also because when the Receiver's accounts were presumably settled and he was discharged, whatever was left in the estate must have been

paid over to the plaintiff and her co-widow who were the sole parties to the partition suit of 1931. In this view we do not see any justification

whatever for the decree passed in favour of the plaintiff for the years 1932 to 1935. As regards the years 1936 and 1937 the plaintiff was

admittedly in possession of a half share of the estate, and the lower Court therefore refused to grant her a decree for maintenance for those years.

It is suggested for the defendants that she must be accountable for what she received during those years and the maintenance awardable to her

should be set off against such receipts and the balance carried forward against her claim for subsequent years. In the absence of any definite

materials placed before the Court below, we do not think we should make any such direction. The directions in regard to the payment of Rs. 200

for vrathams and Rs. 300 for expenses of pilgrimages and the plaintiff's residence are not challenged in the appeal.

11. The result is that the appeal is allowed to the extent of disallowing the plaintiff's claim for maintenance for the years 1932 to 1935 and there

will also be a declaration that the plaintiff can proceed for the recovery of her maintenance past and future against the properties covered by Ex.

D-11 subject only to the mortgage. In other respects the decree of the lower Court is confirmed.

12. As the appeal has partly failed and partly succeeded there will be no costs in the appeal. The decree of the lower Court as to the costs in that

Court will stand.

13. Judgment in Appeal No. 2 of 1945. - For the reasons given in our judgment in A.S. No. 578 of 1944, this appeal will be allowed to the extent

of disallowing the plaintiff's claim for arrears of maintenance for the years 1932 to 1935. Otherwise the appeal is dismissed. The memorandum of

cross-objection is also dismissed. There will be no costs either in the appeal or in the memorandum of cross-objections.