

(1999) 01 MAD CK 0056
In the Madras High Court
Case No : S.A. No. 1055 of 1986

R. Selvaraj

APPELLANT

Vs

State of Tamil Nadu and another

RESPONDENT

Date of Decision : 27-01-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 34, 80
Constitution of India, 1950 — Article 14, 226, 32
Tamil Nadu General Sales Tax Act, 1959 — Section 26(7)

Citation : (1999) 3 CTC 581 : (1999) 3 LW 735 : (1999) 2 MLJ 232

Hon'ble Judges : K.P. Sivasubramaniam, J

Bench : Single Bench

Advocate : Mr. M. Kamalanathan, for Mrs. Subbulakshmi, for the Appellant; Mr. K. Ravirajapandian, Special Govt. Pleader (Taxes), for the Respondent

Judgement

1. This appeal arises out of the judgment of the learned District Judge, Erode in A.S.No. 33 of 1985 confirming the judgment of the learned

District Munsif, Erode in O.S.No. 541 of 1982. The plaintiff is the appellant in the above second appeal.

2. The suit was filed by the plaintiff for a declaration that the defendant/State of Tamil Nadu by its Commercial Tax Department had no right to

proceed against the suit "A" schedule properties either by sale or by any other means, for recovery of the alleged arrears of sales tax said to be

due from the plaintiff's father late R.S. Ramasamy and for a permanent injunction restraining the defendants from selling or in any other manner

disturbing the plaintiff's rights, possession and enjoyment of the suit "A" schedule properties. Both the "A" and "B" schedule suit properties,

according to the plaintiff, originally belonged to the joint family of the plaintiff and his late father R.S. Ramasamy, being their ancestral properties.

The joint family of the plaintiff and his father was traditionally a family of agriculturists. The plaintiff's grandfather was only cultivating lands during his life time and all his ancestors were cultivating the lands in the said village. However, the father of the plaintiff appears to have started a speculative business venture by commencing a business in oil by taking on lease an oil-mill named Badusha Oil Mill, Erode and he appears to have incurred heavy loss and the said business undertaking was a complete departure from the traditional avocation of the family who were basically and traditionally a family of agriculturists. Therefore, the loss in the said business and the consequential debts incurred by the father was not binding on the plaintiff, nor his share in the joint family properties be affected. During 1976 when the plaintiff was still a minor, the Commercial Tax Department was preparing to take steps to attach and sell the entire joint family properties included in both "A" and "B" schedule properties for the recovery of alleged sales tax arrears said to be due from the father of the plaintiff. According to the plaintiff he was not bound to pay the alleged arrears of sales tax and the alleged arrears cannot be recovered as against the plaintiff's share in the property. As such, the mother who was the guardian, caused a lawyer's notice to be issued on behalf of the plaintiff on 13.9.1976 u/s 80, C.P.C. The defendants were also informed that a suit, for partition of the plaintiff's share and for a declaration that the debts of the plaintiff's father were not binding upon the plaintiff, was going to be filed with a further relief for a permanent injunction. The plaintiff would also state that his father had clandestinely disposed of certain items of the joint family properties to the third parties and all the parties described in "B" schedule were alienated by him. The remaining family properties are now in the possession of the plaintiff and he was in exclusive possession and enjoyment of the said property comprised in "A" schedule. He would further contend that after receiving the suit notice the defendants did not appear to have taken any steps to attach or sell any item of the properties. However, the second defendant, Commercial Tax Officer, Erode, appears to have caused publication in the Tamil Nadu Gazette dated 28.1.1982, a notice dated 1.12.1981 to the effect that "A" schedule properties were placed under attachment and that unless the tax arrears were paid on or before 26.5.1982, the said properties would be brought to sale in due course. According to the plaintiff, the defendant

had no right to proceed with the "A" schedule property which belongs exclusively to the plaintiff as his share in the total joint family assets covered

by both "A" schedule property which belongs exclusively to the plaintiff as his share in the total joint family assets covered by both "A" and "B"

schedule properties. Inasmuch as the alleged sales tax arrears are said to have been incurred in the oil business venture by the plaintiff's father,

neither the plaintiff nor the properties belonging to him can be proceeded against for the recovery of the alleged arrears of sales tax. He would also

further state that curiously defendants did not choose to proceed against the "B" schedule properties which were alienated by the assessee. Hence

the present suit.

3. In the written statement filed on behalf of defendants, the contentions that the plaintiffs father had started a speculative business and that the

family was an agricultural family were denied. The father of the plaintiff was doing business in oil and oil-cake during 1969-70 and 1970-71 at

Badusha Oil Mill, Erode, and he was assessed to tax under Tamil Nadu General Sales Tax and Central Sales Tax Acts for the business carried on

by him individually and for the business carried on alongwith the partner one S. Ramasamy during 1969-70. He was in arrears of tax amounting to

Rs. 25,083-06 and as he did not pay the arrears, action under Revenue Recovery Act was initiated to proceed against the landed properties of the

defaulter. As it was represented that there was a trust created over the property a notice under Form B6 was issued to the trustee who in turn

reported that he had acted as arbitrator and disposed of the movable and immovable properties without any reservation, Subsequently, action for

recovery of the arrears under Revenue Recovery Act was initiated and requirements under the said provision were complied with. However, the

defaulter expired on 20.4.1976 and the plaintiff who was then a minor represented by his guardian/mother filed a writ petition in W.P.No. 3824 of

1976 before this Court and the said writ petition was dismissed on 29.1.1979 and it was held that there was no bar to proceed against the landed

property even it was the joint family property. On receipt of the said judgment of the High Court, action was subsequently initiated under the

Revenue Recovery Act. It was further contended that the debt due to the State was neither illegal nor immoral. The State was entitled to proceed

against the property belonging to the defaulter and not against the properties which have been sold for valuable consideration to bona fide purchasers.

4. On the basis of the said pleadings and evidence both oral and documentary, the trial Court held that the plaintiff was obliged to pay tax arrears

and that the High Court in disposing of W.P.No. 3824 of 1976 had positively held that the joint family properties belonging to the plaintiff were

liable to be proceeded against. The learned District Munsif had also rejected the contention of the plaintiff that the business in oil manufacturing as

conducted by the plaintiff's father was not a speculative business and hence the objection of the plaintiff cannot be sustained. With the result, the

suit was dismissed and on appeal also the learned appellate Judge rejected the contentions of the plaintiff. Hence the present second appeal.

5. Mr. Kamalanathan, learned counsel for the appellant contends that the Courts below had ignored certain important features and had

consequently erred in law in having rejected the suit. According to him, it was proved that the family of the plaintiff was only agriculturist and as

such the plaintiff's father had deviated from the family avocation and had indulged in speculative business and as such any liability incurred in the

course of such business, cannot be fastened on the joint family properties. He would further contend that even if the joint family properties could be

proceeded against, half of the property had been alienated in favour of the third parties and the Revenue ought to have proceeded against those

items towards the share of the father/assessee.

6. Mr.K. Ravirajapandian, Special Government Pleader contends that the business conducted by the father/assessee was a joint family business

and the nature of the business was neither illegal nore immoral so as to be treated as an illegal or Avyavaharika debt so as not to bind the joint

family asset. The property had been attached long back in a manner known to law in accordance with the Tamil Nadu General Sales Tax Act,

1959 and the Revenue Recovery Act. Learned Special Government Pleader also raised an objection regarding the maintainability of the suit on the

ground that the plaintiff's mother had earlier filed a writ petition questioning the demand which had been rejected by this Court holding that the

property in question was liable to be proceeded against for the recovery of the

tax and as such the suit was also barred by res judicata.

7. With reference to the objection taken by the learned Special Government Pleader as regards the suit being barred by res judicata, Ex.B.I,

certified copy of an order rendered in W.P.No. 3824 of 1976 by S. Mohan, J. (as he then was) on 29.1.1979 has been filed. In the said

judgment, the learned Judge has held that having regard to the facts and circumstances of the case it was not open to the minor to contend that he

was not in default. All the arrears accrued while the defaulter was alive and thereby the Department had a charge over the property of the

defaulter. It was further held that even if the property was that of joint family, certainly it was no bar to proceed against the property. With the

result, the writ petition was dismissed and the said judgment became final.

8. In this context Mr. Kamalanathan for the appellant would submit that there was no fulfilled adjudication of the issues in the said writ

proceedings and that at any rate Section 11, C.P.C. cannot be invoked when the earlier decision was only in a writ petition and not in a suit.

According to him, the provisions of Section 11, C.P.C. can be invoked only if the earlier proceedings were also in a suit before the Civil Court. He

would also contend that the writ petition was not filed by the minor and hence not binding on the minor plaintiff.

9. I am unable to agree with the contentions raised on behalf of the appellant. The writ petition has been filed only by the mother in her capacity as

guardian of the minor. In fact in the present suit also, a reference is made to the lawyer's notice issued by his mother u/s 80, C.P.C. Nor has the

plaintiff taken any steps to set aside the judgment rendered in the writ petition on the ground that he was not properly represented.

10. On the question as to whether a decision in a writ proceedings can operate as res judicata or not, it is settled proposition of law that Section

11, C.P.C. is not exhaustive in the matter of principles relating to res judicata and that any previous decision by a competent forum on the matter in

controversy decided after full contest and after affording fair opportunity to all the parties, the decision will operate as res judicata in a subsequent

suit. The Supreme Court in its decision in Gulabchand Chhotalal Parikh Vs. State of Bombay (Now Gujarat), has held that there was no reason to

preclude decisions on matters in controversy in writ proceedings under Articles

226 or 32 of the Constitution of India from operating as res

judicata in a subsequent regular suit on the same matters in controversy between the same parties. The said ruling was subsequently followed in the

subsequent decisions of the Supreme Court vide its judgment reported in Union of India (UOI) Vs. Nanak Singh, , and in the judgment reported in

Gulam Abbas and Others Vs. State of Uttar Pradesh and Others, . Therefore, the contention of learned counsel for the appellant that the decision

in the writ proceedings will not operate as res judicata cannot be upheld.

11. Notwithstanding my conclusion in favour of the Revenue on the issue of res judicata and assuming that there was no fulfilled enquiry into the

liability of the appellant in the writ proceedings so as to hold that the suit is not barred by res judicata, I have also considered the merits of the

claims of the appellant in the suit.

12. In support of the contention that since the father had deviated from the family avocation, namely, being agriculturist any liability accruing from

such deviated business cannot be fastened as against the joint family properties, learned counsel for the appellant very heavily relies on the

judgment of the Privy Council reported in AIR 1932 182 (Privy Council) . That decision was with reference to a suit to enforce a mortgage against

the property belonging to a Hindu joint family where the mortgage was executed by the father for himself and for his minor sons as their guardian.

In the mortgage deed it was recited that the mortgagors were in need of money to pay off two previous mortgages. A portion of the amount so

secured from the Bank was used in theka business. With reference to the said business it was contended that it was not a traditional family

business, and the family had no interest in it and thus any liability which arose out of the business cannot bind the minors. In this context the Privy

Council held as follows:

The only other question is as to the item of Rs.3,658 borrowed for the theka business. It was urged on behalf of the bank that the business was

ancestral and that the minors were liable for the debt to the extent of their interest in the joint family property. On the other hand, it was contended

that the business was the personal business of Jagdish Narain and the family had no interest in it. Their Lordships have examined the evidence, and

they consider that the business was started by Jagdish Narain and Raghubir

Narain as managers of the family. The business therefore cannot be said to be ancestral so as to render the minors' interest in the joint family property liable for the debt.

Next it was argued that a business started by the father as manager, even if new, must be regarded as ancestral. Their Lordships do not agree. It is in direct opposition to the ruling of the Board in *Sanyasi Charan Mandal v. Krishnadhan Banerji*, AIR 1922 P.C 237 The judgment in that case proceeded on the broad ground that the manager of a joint family has no power to impose upon a minor member of the family the risk and liability of a new business started by him. That, no doubt, was a *Dayabhaga* case, but there is no distinction in principle on this subject between a case under the *Dayabhaga* and one under the *Mitakshara*. The power of the manager of a joint family governed by the *Mitakshara* law to alienate immovable property belonging to the family is defined in verses 27 to 29, Ch.1. of the *Mitakshara*. The judgment of the Board in *Hunoomanpersaud Panday v. Babooee Munraj Koonweree*, 1856 (6) M.I.A. 393, relied on by the bank, was founded apparently on those verses. A new business, their Lordships think, is not within the purview of those verses. It does not make any difference that the manager starting the new business is the father. Their Lordships find that the balance of authority in India is in accordance with this view.

It was also urged on behalf of the bank that even if the business was not ancestral, the family was liable for the debt as the bank had made reasonable and bona fide inquiries which led it to believe that the business was ancestral and that there was a necessity for the raising of money for the purpose of the business. Their Lordships are not satisfied that the bank made reasonable inquiries as to the ancestral character of the business.

13. The above extracted portion will show that on the evidence in the particular case and as a question of fact the Privy Council came to the conclusion that they were not satisfied that the Bank had made reasonable enquiries as to the ancestral character of the business.

14. It is not possible to hold from the above decision that any joint family business, if it was a new business, cannot bind the minors. We have travelled a long way from the days when the Privy Council had rendered the said judgment which was only concerned with debts incurred by the

manager of the family, and as to whether the new business started by the manager was ancestral or not. The said ruling cannot be applied to the

right of the State to recover the tax arrears. The tax liability being a crown debt, is fastened on the property by virtue of statutory provisions. u/s

26(1)(ii) of the Tamil Nadu General Sales Tax Act, 1959, liability is fixed on any person who holds or may subsequently hold money for or on

account of dealer or other persons who has become liable to pay any amount due under this Act is made liable to pay the tax. In the present case,

it cannot be disputed that the plaintiff has inherited the share of the property belonging to his father even assuming that the business as such was not

an ancestral family business. This is apart from the fact that the plaintiff has not successfully established that the business was not a joint family

business. Both the Courts below, as a question of fact have concurrently held that the business was only a joint family business. In fact in the plaint

itself a contention has been raised that the plaintiff intended to file a suit for partition of the plaintiff's share and for a declaration that the debts of

the plaintiff's father were not binding on the plaintiff. Admittedly, no such proceedings were ever taken by the plaintiff, and therefore, on the

admitted fact that the plaintiff inherited his father's share in the property, and that there being no material to hold that the business in oil was not the

joint family business, the principles stated in the judgment of the Privy Council cannot be applied.

15. Further, in the modern context it will be totally impossible and unreasonable to hold that any deviation from the traditional family avocation

would unfasten the normal obligations which arise out of conducting a joint family business. It will be totally unreasonable to expect either the

creditors or more so as in the present case, the State while enforcing recovery of tax liability to inquire into as to whether the family business was

consistent with their traditional avocation or a deviation. The liability arising out of either the Tamil Nadu General Sales Tax Act or the Central

Sales Tax Act arises out of on the registration of a firm under the provisions of the Act. By no stretch of imagination can the State be expected to

make an enquiry before such registration, into the nature of the business and as to whether the proposed business was in conformity with the

assessee's traditional avocation or not In fact, denial of registration on that ground would be violative of Article 14 of the Constitution of India.

16. Therefore, the decision of the Privy Council is neither legally relevant for considering the tax liability nor applicable in the face of the concurrent

findings recorded by the Courts below to the effect that the business commenced by the father was a joint family business and also not a

speculative business.

17. It is also needless to point out that a lease of an oil mill cannot be termed as a speculative business or as an illegal or immoral business. The fact

remains that the business was started with the funds of the joint family and the fruits of the business in oil trade was also utilised by the family.

18. The objection by learned counsel for the appellant that the Revenue should have proceeded against the properties alienated by the father,

cannot also be sustained. It is not disputed that the properties in question were duly attached in accordance with the provisions of the Act and as

such the plaintiff here to content that the Revenue should have proceeded against the properties already sold to the third parties by the assessee.

19. Mr. Kamalanathan, would also contend that in the event of the appeal being dismissed, the rate of interest chargeable on the arrears of tax may

be reduced having regard to the fact that the present proceedings have been pending for very long time. Interest on tax is a statutory incident and

fixed under the provisions of the Act itself and the Civil Court in its discretion cannot interfere with the rate of interest which is fixed under the

provisions of the Act. It is open to the plaintiff to persuade the Revenue authorities to sympathetically consider the fact that these proceedings have

been pending for a long time and to make out a case for reduction of the rate of interest.

20. In the result, I do not find any ground to interfere with the judgments of the Courts below and the second appeal is dismissed. No costs.