
(1949) 08 MAD CK 0004
In the Madras High Court
Case No : Second Appeal No. 1939 of 1946

Ramanujulu Naidu

APPELLANT

Vs

Gajaraja Ammal

RESPONDENT

Date of Decision : 03-08-1949

Acts Referred:

Contract Act, 1872 — Section 21
Transfer of Property Act, 1882 — Section 58(1)

Citation : AIR 1950 Mad 146

Hon'ble Judges : Viswanatha Sastri, J

Bench : Single Bench

Advocate : A.V. Narayanaswami Iyar, for the Appellant; S. Amudachari, for the Respondent

Final Decision : Dismissed

Judgement

Viswanatha Sastri, J.—The plaintiff whose suit on a mortgage dated 17th February 1935 has been dismissed by the Courts below is the

appellant in this second appeal. The defence of the defendant (here respondent) was that the mortgage was a nominal transaction and that in any

case there was a want or failure of consideration for the mortgage.

2. The facts are these: One Rangappa Chetty who died in 1915 was the owner of a house in Trichinopoly and an extent of 1 acre 80 cents of

cultivable land. He died leaving him surviving a widow Seshammal, his granddaughter (daughter's daughter) Gajarajammal who is the defendant

and Govindaswami, a grandson of his paternal uncle. The widow died on 21st December 1932. By that time the Hindu Law of Inheritance

(Amendment) Act, (II [2] of 1929) had come into force. In the year 1933, a Division-Bench of this Court decided in Krishnan Chettiar v.

Manikkammal, 57 Mad. 718 : A. I. R. 1934, Mad. 138 that Act II [2] of 1929 applied only in respect of succession to the property of Hindu males

dying intestate after the Act came into force. This decision was overruled by a Pull Bench in Lakshmiammal v. Anantharama Aiyangar, I. L. R.

(1937) Mad. 948 : A. I. R. 1937 Mad. 699 where it was held that when a Hindu male died intestate before Act (n [2] of 1929) leaving a limited

female heir who was alive after the Act came into force, succession to the deceased male member opened after the passing of the Act. Under the

earlier decision of this Court, Govindaswami would have succeeded and under the later decision Gajarajammal, the defendant would have

succeeded as heir to the suit properties. Between the dates of these two decisions Govindaswami sold the suit properties to the defendant for a

sum of Rs. 600 the price being paid by the execution of the suit mortgage by the vendee to the vendor for the full amount of the consideration. The

sale and mortgage were executed on 17th February 1935 each forming the consideration for the other. Exhibit p-1 is a registration copy of the

mortgage. By a series of assignments the mortgage right is now said to be vested in the plaintiff.

3. The District Munsif dismissed the suit holding that the sale and mortgage were nominal and unsupported by consideration and even if they were

real, they were vitiated by the mistake of the parties. The learned Subordinate Judge on appeal dismissed the suit on the ground that there was a

common mistake as regards the rights of the parties and therefore the mortgage was void and unenforceable. Mr. A.V. Narayanaswami Aiyar the

learned advocate for the appellant challenges the correctness of this conclusion on two grounds. He states that on the date of Ex. p-1

Govindaswami the original mortgagee was rightly considered to be the heir-at-law of the deceased Rangappa Chetty on the strength of Krishnan

Chettiar v. Manikkammal, 57 Mad, 718 : A. I. R. 1934 Mad. 138. He conveyed his interest, such as it was, to the defendant by a sale and took a

mortgage on the same property for the price payable. It is argued that Govindaswami suffered a detriment and gave up a valuable right to the

defendant who, having got what she wanted, cannot refuse to pay for the advantage gained by her. It is urged that there was no failure of

consideration merely by reason of a later decision of this Court taking a different view of the law enacted by Act (II [2] of 1929). Mr.

Narayanaswami Aiyar developed his argument in another way also. There was a doubt or dispute as to the respective rights of Govindaswami and the defendant, and the parties chose to settle this dispute by a sale of such rights as Govindaswami had in consideration of the vendee executing a mortgage for Rs. 600. This settlement of a disputed claim is according to him, sufficient consideration for the mortgage. Secondly he contended that the mistake in the present case, assuming there was one, was a mistake of law regarding the interpretation of Act (II [2] of 1929) and was therefore not available u/s 21, Contract Act as a ground for avoiding the mortgage Ex, P-I.

4. I shall first deal with the second point urged by the learned advocate for the appellant. When the sale deed was executed in 1935, the vendor and vendee both acted on the footing that the former had a good title to convey and should take the price in the shape of a mortgage on the property sold. It is said that the mistake underlying this transaction was only a mistake of law relating to the interpretation of Act II [2] of 1929) the parties having adopted the same erroneous interpretation of Act (II [2] of 1929) as the Bench of this Court which decided *Krishnan Chettiar v. Manickammal*, 57 Mad. 718 : AIR 1934 Mad. 138.

5. It is true that Section 20, Contract Act avoids an agreement only when both the parties to it are under a mistake as to a matter of fact essential to the agreement and section 21 enacts that a mutual mistake as to any law in force in India does not avoid a contract. These sections, however, have a deceptive appearance of simplicity. I do not know that attempts to define the dividing line between mistakes of fact and mistakes of law have been very successful, though help for deciding any particular problem is obtainable from the reported decisions. Sections 20 and 21 were enacted in 1872 and presumably reproduced the English law as it had been shaped and developed by the English Courts at that date. The English law, however, has not been static during the long period that elapsed since 1872 but has progressed in the direction of preventing a person from enforcing a contract against another, or retaining a benefit derived from another which, it is against conscience, that he should enforce or keep. In India, however, these liberal and modern developments of the law have to be fitted into the frame, work of the Contract Act.

6. Mistakes affecting a contract may be of different kinds and may give rise to different results. The mistake may consist in the expression given in a formal document to the real agreement between the parties, in which case the agreement is valid and the remedy is by a rectification. I am mentioning this class of mistakes merely to eliminate it from further consideration. The mistake may be such as to prevent any real agreement being formed in which case the agreement itself is void. Each party may have meant something but not the same thing as the other. There is no consensus ad idem and to use a common legal phraseology "the minds of the parties never met." In such a case, there is no agreement at all. It may also happen that the parties had a common intention which, however, was based on an assumption made by both of them as to some matter of fact essential to the agreement, such as the existence of the thing which is the subject of the contract. If there is a mistake as regards the foundation which both the parties assumed as the basis of the agreement, the agreement is nullified by that fundamental error.

7. In *Norwich Union Fire Insurance Society v. V.M.H. Prince Ltd.*, 1934 A. C. 455 : A. I. R. 1934 P. C. 171, Lord Wright stated the principle

underlying Section 20, Contract Act in these terms :

It is true that, in general, the test of intention in the formation of contracts and the transfer of property is objective; that is, intention is to be

ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention. It is, however, essential that the mistake relied

on should be of such a nature that it can be properly described as a mistake in respect of underlying assumption of the contract or transaction or as

being fundamental or basic. Whether the mistake does satisfy this description may often be a matter of great difficulty.

If an assumption of a basic or fundamental character made by the parties to an agreement is erroneous, the agreement is void at its inception, the

law regarding such errors as striking at the root of the agreement itself. To hold otherwise would be creating rights and liabilities entirely beyond

and outside what was intended by the parties when they entered into the agreement. The same result has been reached by implying a term in the

contract itself that it was conditional upon the existence of a state of things which can reasonably and properly be described to be basic or

fundamental. (Per Viscount Simon in *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.*, 1942 A. C. 154: 110 L. J.

K. B. 433. The principles above stated have been developed by Courts in their attempt to reconcile the rule as to absolute contracts with the demands of common justice.

8. It is said that a mistake of law does not vitiate an agreement as all persons are presumed to know the law. Like most maxims of the law, the

maxim, that ignorance of law does not furnish an excuse or defence, has but a limited application and it is not proper, in my opinion, to fetter the

law by maxims of this kind. There are authoritative decisions of the English Courts that a mistake as to private rights or title to property is

equivalent to a mistake of fact. In *Cooper v. Phibbs*, (1867) 2 H. L. 149 : 16 L. T. 678, the appellant, believing himself to be a stranger to a

fishery, agreed to take a lease of it from the respondents who believed themselves to be entitled to the fishery and granted the lease. It turned out

that the appellant was entitled to the fishery and not the respondents. The House of Lords declared that the contract of lease was entered into by

the parties under a mistake and in ignorance of the actually existing rights and interests of the parties in the fishery and that it was not binding in

equity upon the parties. Lord Westbury observed ;

The result, therefore, is that at the time of the agreement for the lease which it is the object of this petition to set aside, the parties dealt with one

another under a mutual mistake as to their respective rights... In such a state of things there can be no doubt of the rule of a Court of equity with

regard to the dealing with that agreement. It is said "*Ignorantia juris haud excusat*" but in that maxim the word *jus*" is used in the sense of denoting

general law, the ordinary law of the country. But when the word "*jus*" is used in the sense of denoting a private right, that maxim has no application.

Private right of ownership is a matter of fact; it may be the result also of matter of law, but if parties contract under a mutual mistake and

misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a

common mistake. Now, that was the case with these parties. The respondents believed themselves to be entitled to the property, the petitioner

believed that he was a stranger to it, the mistake is discovered, and the

agreement cannot stand.

In *E. J. Daniel v. J. Sinclair*, (1831) 6 A. C. 181, the following observations occur :

But in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn. In *Earl Beauchamp v. Winn*, (1874)

6 H. L. 223 : 22 W. R. 193, Lord Chelmsford observes, "With regard to the objection, that the mistake (if any) was one of law, and that the rule

ignorantia juris neminem excusat", applies, I would observe on the peculiarity of this case, that the ignorance imputable to the party was a matter of

law arising upon the doubtful construction of a grant. That is very different from the ignorance of a well known rule of law.

In *Allcard v. Walker*, (1896) 2 Ch. 369: 65 L. J. Ch. 660, Stirling J. observed:

It is said for the defendant Mr. Kell, that the mistake was one of law, and that relief cannot be given in respect of it. In my opinion this is not so. I

think, in the first place, that the mistake was one which related to the existing rights and interests under the settlement within the meaning of the law

as laid down by Lord Westbury in *Cooper v. Phibbs*, (1867) 2 H. L. 149: 16 L. T. 378.

There is also a dictum of the learned Judge in that case that ""it is not accurate to say that relief can never be given in respect of a mistake of law"". A

later case which, however, was not referred to in the argument appears to have cast some doubt on *Cooper v. Phibbs*, (1867) 2 H. L. 149: 16

L. T. 378. In *Bell and Snelling v. Lever Bros. Ltd.*, (1932) A. C. 161: 101 L. J. K B. 129, Lord Atkin who delivered the leading judgment of the

House of Lords on this point observed that the statement of the law in *Cooper v. Phibbs*, (1867) 2 H. L. 149: 16 L. T. 378 was too wide and

remarked as follows:

Even where the vendor has no title, though both parties think he has, the correct view would appear to be that there is a contract; but that the

vendor has either committed a breach of a stipulation as to title or is not able to perform his contract. The contract is unenforceable by him but

is not void.

There has been a great deal of critical comment on this case in the *Law Quarterly Review* and the general opinion of the profession in England

appears to be that the case must be regarded as a decision on its own peculiar and confused facts. All that I understand the learned Lord to have

held is that unless the mistake goes to the very (sic) of the contract or the whole of the consideration, as for instance where it goes to the existence

or identity of the subject-matter of the contract the common mistake of the parties will not affect the binding character of the contract. I need

hardly observe that the question whether a mistake is basic or fundamental depends on the circumstances of each case and on the construction of

the particular contract sought to be enforced.

9. The rule laid in *Cooper v. Phibbs*, (1867) 2 H. L. 149: 16 L. T. 378, has been followed by the Courts in this country. In *Pratapa Simha Raja*

Saheb v. Simji Raja Saheb, (1927) 51 M. L. J. 652: A. I. R. 1927 Mad. 150, *Spencer and Ramesam JJ.* held that an agreement entered into

between two brothers to manage a religious endowment by turns on the assumption that they were both entitled to the trusteeship by devolution

under the ordinary Hindu law, was void and unenforceable in view of a subsequent decision of the Court holding that the trusteeship was impartible.

In *Ramachandra v. Ganeshchandra*, 21 C. W. N. 404: A. I. R. 1917 Cal. 786, where both parties entered into a lease on the assumption that the

grantor was entitled to the minerals in the land it was later on judicially declared that persons in the position of the grantor were not so entitled, it

was held that the lease had become void and unenforceable. Strong reliance was placed by the appellants' counsel on *A.M. Appavoo Chettiar*

Vs. The South Indian Railway Company and Another, . That was a case of a claim to recover money, paid by a mistake of law, the law in

question being a general rule applicable to all citizens alike. *Ramesam J.* who delivered the judgment of the Court felt bound, under the impact of

the argument of the Advocate General to differ from his own obiter dictum in a previous case. The learned Judge observed that the decision of the

Court of Appeal in *Holt v. Markham* (1923) 1 K. B. 504: 92 L. J. K. B. 406, particularly the judgment of *Scrutton L. J.* had weakened the

authority of previous decisions relating to this topic. In that case there was a claim for the recovery of money alleged to have been paid by mistake

and it was found by all the three learned Judges of the Court of Appeal that there had been in fact no mistake in the payment of the money whose

recovery was sought, It is true that that distinguished common lawyer entered a protest against the disregard by his brethren in Chancery of the

time-honoured limitations of the common law by giving to the length of recognising "a right to recover money merely because it would be a right

and fair thing that it should be refunded to the payer." In actions for recovery of money paid under a mistake, ignorance of particular rights has

been put on the same footing as ignorance of the general law by English Courts. This matter is fully considered in the judgment of the House of

Lords in *Jones & Co., Ltd. v. Waring & Gillow Ltd.*, 1926 A. C. 670: 95 L. J. K. B. 913 but as I am not now dealing with a claim for money had

and received, it is unnecessary for me to pursue this topic further. The learned Judges who decided *A.M. Appavoo Chettiar Vs. The South Indian*

Railway Company and Another, while pointing out --and tightly if I may say so-- that the general observations in cases like *Cooper v. Phibbs*,

(1867) 2 H. L. 149: 16 L. T. 378 and *Earl Beauchamp V. Winn*, (1894) 6 H. L. 223: 22 W. B. 193, must yield to the specific provisions of

Section 21, Contract Act, recognise that "some kind of mistake of law may be a ground of relief". They also held that,

if the mistake of law is of such a kind that it is mixed up with certain specific facts relating to a particular individual so much so that it may be said

that as the combined effect of a party's view of the law and the facts, he made a mistake at the time of entering into the transaction as to the nature

of his pre-existing private right, it may be said that such a mistake is not a pure mistake of law and is covered by the language of Lord Westbury in

Cooper v. Phibbs, (1867) 2 H. L. 149: 16 L. T. 378.

If I may very respectfully be permitted to say so, this statement of the law is incorrect in that it omits to state that the mistake must be common to

both the parties and assumes that an unilateral mistake is sufficient. Subject to this amendment, I am in respectful agreement with the above

statement which, indeed, would govern the present case.

10. To sum up my views on this branch of the argument, I am of the opinion that the parties to the sale and mortgage both of them proceeded on

the assumption that the vendor had a good title to the property conveyed by him. The decision in *Krishnan Chettiar v. Manikkammal*, 57 Mad.

718: (A. I. R. (21) 1934 Mad. 138) which had not then been overruled was enough justification for this assumption. It was later on authoritatively

laid down by the Full Bench that the decision in *Krishnan Chettiar v.*

Manikkammal, 57 Mad. 718: (A. I. R. (21) 1934 Mad. 138) was erroneous.

But judicial decisions, unlike enactments of the Legislature, are merely declaratory of the law as it has always stood. Therefore, even at the time of

the sale and mortgage, the vendor had, in fact, no title to convey though the parties had assumed the contrary, The contract related to a subject-

matter contemplated by the parties as existing but which in fact did not exist. If the vendor had sold that which he had not, the vendee cannot be

compelled to pay for that which the vendor could not convey, Hitchcock V. Giddings, (1817) 18 R. R. 725 : (4 Price 135). The purchaser here

was purporting to take a conveyance of her own property not knowing that it was hers. There has, therefore, been a total failure of the proposed

subject-matter of the transaction for no person can buy his or her own property. In such circumstances, the vendor could not be allowed to ""run

away with the money in consideration of the sale of an estate to which he had no right"". Bingham v. Bingham, 1 ves Sen 126. The result in law is

the same as if the parties had made an agreement expressly conditional on the existence of a good title in the vendor which not existing, the

agreement falls with the title. The mortgage and sale both formed parts of the same transaction, each being the consideration for the other. They are

both un- enforceable.

11. Mr. Narayanaswami Aiyar's first contention that the mortgage, Ex. p. 1, is supported by consideration may be shortly noticed. It is true that it

is not necessary that the consideration should be of equal value with the promise in respect of which it is given. It is equally true that the

abandonment of a right bona fide, even though unfounded or the forbearance to exercise the right or to assert the claim may be a valid

consideration for a promise. The deliberate renunciation or compromise of doubtful rights is binding on the parties and ignorance of law is not an

objection to the validity of a transaction entered into, because the law itself was doubtful. It is unnecessary to refer to cases as the above

propositions of law are elementary. But there is no basis in fact in the present case for an argument based on these principles. There was here a

sale of property for a price and a mortgage on that very property given by the vendee for the price. According to the appellant himself, the title to

the property was not in dispute, much less I the subject of a bona fide dispute by

reason of the decision in Krishnan Chettiar v. Manicknmmal, 57

Mad. 718: (A. I. R. (21) 1934 Mad. 138). The sale and the mortgage are not part of the settlement of a disputed claim but stand by themselves as

business transactions. The mortgage is the consideration for the sale and once it is found that the vendor had no real title to the property conveyed,

the mortgage is devoid of consideration.

12. For these reasons, I agree with the conclusion of the lower appellate Court and dismiss this second appeal with costs. Leave refused.