
(1911) 12 MAD CK 0007
In the Madras High Court

S.A. Anantanarayana Iyer and Others	APPELLANT
Vs	
Savithri Ammal	RESPONDENT

Date of Decision : 14-12-1911

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 43

Citation : (1913) ILR (Mad) 151 : (1912) 22 MLJ 231

Judgement

1. The suit out of which this second appeal arises was instituted on a pro-note executed in favour of the plaintiff's husband by the first defendant on behalf of himself and as guardian of the second defendant, who is his natural son given away in adoption to a brother of his. There were four brothers in an undivided Hindu family, namely, the plaintiff's husband Aiyasawmi Iyer, the first defendant, the second defendant's adoptive father and one Subramania Iyer. Disputes arose between them in connection with the partition of their family property. Aiyasawmi Iyer, the plaintiff's husband, was burdened with 6 daughters, only two of whom had been given away in marriage. Several daughters of some of the other brothers had been married at the expense of the family. Aiyasawmi Iyer made a claim that he was entitled to have an allotment towards the expenses of the marriage of his other daughters. The other brothers in settlement of this claim agreed to pay him Rs. 5,000. This agreement is one of the stipulations contained in the partition Karar (Exhibit C) dated the 5th September 1901. According to Exhibit C they were bound to make the payment within three months, by which time apparently the parties intended the partition would be completed. Lists of properties to be allotted to each of the co-parceners were drawn up on the 11th January 1902. As payment of the Rs. 5,000 promised had not been made to the plaintiff, two pro-notes

were executed for the amount-one of them (Exhibit A) for Rs. 3,333 5-4, and the other, by Subramania Iyer, for the balance, on 10th January

1902. The lower courts have held the plaintiff entitled to a decree for the amount due on the pro-note (Exhibit A). The defendants ,object to the

decree on three grounds : (1) that there was no consideration in law for the promise to pay Rs. 5,000 ; (2) that the promise was not of such a

character as would be binding on the minor second defendant when made by his guardian the 1st defendant, and (3) that the suit is barred by

Section 43, C.P.C.

2. The first contention may be disposed of in a few words. The appellant's argument is the agreement to pay Rs. 5,000 was not one of the terms

of the agreement between the parties for the division of the family properties but an independent promise; that there was no obligation under the

Hindu law on Aiyasawmi's brothers to contribute towards the expenses of his daughters' marriage and that there was therefore no legal

consideration to support the promise. We are entirely unable to accede to this argument. Paragraph 13 of Exhibit C says: "'As it has been settled

that for the expenses of marriage, etc., that have to be celebrated for the daughters of Aiyasawmi Iyer one of us the other three co-parceners shall

pay Rs. 5,000 in a term of three months from now, the said sum of Rs. 5,000 shall be accordingly paid off in the aforesaid term.'" The natural

construction of the clause is that the parties agree under the instrument, Exhibit C, to pay the sum, but assuming that it had been previously settled

that Rs. 5,000 should be paid to Aiyasawmi Iyer that fact would certainly make no difference for the effect of the clause is to make the previous

agreement about the payment of Rs. 5,000 part of the agreement of partition which the parties were at perfect liberty to do. Mr. Rangachari

attempted to perform the impossible feat of separating the promise contained in Clause 13 from the other terms of Exhibit C and he would regard

the statement in paragraph 13 as a mere recital of an independent promise even if the promise was made at the same time as the other terms in

Exhibit C were agreed to. He contends that the plaintiff himself so treated the matter in the plaint, but we can find nothing in the plaint to support

the argument. He also relies on a sentence in Exhibit B, a letter written by the first defendant and Subramania Iyer on the same day as they

executed the pro-notes, in which they say: "" Even though other matters relating to partition among us may not be settled, we shall pay off the said amount without raising any objection."" But this does not show that the pro-note was a transaction independent of the agreement of partition. The object of the latter was merely to prevent the executants of the property, in case litigation should ensue with regard to the enforcement of the agreement of partition, from resisting the payment of the amount of the pro-notes until the other terms of the partition agreement were also fulfilled by the various parties thereto. In other words, the object was to prevent them from raising the plea that no term of Exhibit C could be enforced prior to the fulfilment of the other terms. This does not show that the promise was not to be enforced as one of the terms of Exhibit C. It is not contended that the defence of absence of consideration could be set up if the promise be regarded as one of the terms of the contract of partition as Aiyasawmy Iyer's agreement to the other terms of the contract would then be sufficient consideration.

3. With regard to the second contention that the first defendant had no right to bind the minor second defendant by such a promise, the argument is that, according to Hindu law, there is no obligation on the part of co-parceners to provide at a partition for the marriages of the daughters of one of them out of the general family fund;, and that it was therefore beyond the powers of the first defendant, as a guardian, to bind his ward for a purpose which created no legal obligation on the ward. But it is clear that Aiyasawmy made a claim that he was legally entitled to a provision for his daughters' marriages. Three daughters of the 1st defendant had been married at the expense of the family estate and the only daughter of Subramania Iyer had been married and provided for out of joint family funds. There is no reason for supposing that Aiyasawmy Iyer did not believe that he had ground for making the claim or that the 1st defendant did not believe that there was some ground for the claim. Nor can we assume that the claim was altogether unfounded according to Hindu law although the plaintiff's pleader in the court of first instance seems to have conceded that the claim could not be enforced by a court of law. Further it appears from paragraph 12 of the Subordinate Judge's judgment that there were other matters in dispute between Aiyasawmy Iyer and his brothers. All of them were settled by Exhibit C, and it is impossible to

separate the promise contained in paragraph 13 from the other terms of exhibit C and to question its validity by a consideration merely of the

abstract legal question which is raised to resist the promise. We must uphold it as one of the terms of a bona fide compromise constituting a

settlement between the members of the family.

4. We now proceed to the consideration of the last question, whether the suit is barred by Section 43 of Act XIV of 1882. The defendant's

contention is that the plaintiff should have included the present claim in the suit No. 31 of 1904, on the file of the Additional Subordinate Court of

Tanjore instituted by the plaintiff's husband against the defendants and Subramania Iyer for division of the family properties. The learned vakil for

the appellants contends that the cause of action was the same in both suits, namely, agreement of partition, Exhibit C, and that the suit is therefore

barred by Section 43. The argument is fallacious for several reasons. In the first place the present claim is one against the 1st and 2nd defendants

only while the right to division of the properties was against all the members of the family including Subramania Iyer--see *Nannu v. Raman* ILR

(1892) M. 335 and 1890 Punjab Reports, 32. Secondly, the parties agreed to execute separate pro-notes for the sum of Rs. 5,000, Exhibit A

being executed by defendants Nos. 1 and 2 and another pro-note by Subramania Iyer for the remainder of the amount. The original agreement to

pay Rs. 5,000 was thus split up into two contracts. In Exhibit B, the letter already referred to, the first defendant and Subramania Iyer say: "'As we

have not found it convenient to settle it now"' (that is the payment of Rs. 5,000) "' according to the aforesaid arrangement"' (that is to pay the amount

within three months from the date of Exhibit C.) "' we have on this date separately executed promissory notes to you for the said amount and

thereby the said matter has been settled.'" In other words the obligation created by Exhibit C is regarded as discharged by the execution of two

different pro-notes. There can, therefore, be no doubt that the promise contained in paragraph 13 of Exhibit C became separated from the other

obligations contained in that instrument and was split up into two different obligations by two pro-notes. Each pro-note, therefore, furnishes a

separate cause of action different from the obligation existing under Exhibit C. Thirdly, even apart from the effect of Exhibit B, we have no doubt

that although the original obligation may be single and entire, if the parties agree to execute a separate document for a part of the obligation, that document will constitute a distinct cause of action.

5. In *Sesha Iyer v. Krishna Iyengar* I.L.R (1900) M. 96 a sum of Rs. 10,500 was found due by a debtor and for this amount two mortgage bonds

were executed by him, one for Rs. 10,000 and the other for Rs. 500 on the same date. It was contended that a suit instituted on the bond for Rs.

10,000 was barred by a previous suit on the one for Rs. 500. Shephard and Davies JJ. held that it was not. The learned Judges say: "" It may be

true that the term cause of action is used in that section in a peculiar way, but we do not think that when parties for whatever reason choose to

agree that there should be two instruments and two obligations the courts are justified in saying that there is only one obligation."" The same view

was held in *Umad Dholchand v. Pir Saheb Jiva Miya* ILR (1883) B. 134. There for the amount due on a previous bond two different bonds were

executed by the debtor. Sargent C.J. and Melville J. held that the bonds furnished different causes of action for the purposes of Section 43. Their

Lordships say : "" There can be no doubt that the two bonds and the default in payment of them constitute, in any way of the expression, " cause of

action", two distinct causes of action and there is nothing, we think, in the language of the section (which would appear to have been mainly

designed to discourage multiplicity of suits) which would justify the court in going behind the bonds to consider the circumstances out of which they

sprung, albeit those circumstances might themselves at the time have constituted a cause of action."" See also *Sundara Singh V. Bholu* ILR (1898)

A. 322 and *Moro Raghunath v. Balaji Trimbak* ILR (1888) . B. 45. It is immaterial as pointed out by the Bombay High Court for the decision of

an objection u/s 43 to consider whether the suit could have been instituted on the original in--debtedness apart from the pro-notes. It is often the

case, no doubt, where a pro-note is executed for a previously existing debt that an action may be maintained on the debt apart from the pro-note.

And it is sometimes necessary to do so, when the pro-note is unenforceable for defect of stamps, or otherwise. But this does not show that the

pro-note itself is not a cause of action. There are two causes of action in such a case, on either of which a suit may be maintained. The presumption

would ordinarily be that the cause of action for the debt is merged in the pro-note. But there would be no effective legal merger where the pro-note

cannot be sued on. If several pro-notes are executed for portions of the same debt each pro-note creates a cause of action and this would be so

even if it is assumed that a suit might be instituted for the whole debt on the original cause of action. If the creditor, neglecting one of the pro-notes,

institutes a suit for the amount secured by it on the original cause of action, then no doubt he would not be entitled to maintain another suit for the

remaining amount on the original debt. In such a case he could claim no more than the amount secured by the particular pro-note. That pro-note is

not a cause of action on which he could claim the value of the debt. Section 43 compels a person only to include the whole of the claim arising

from the same cause of action. It does not require him to include what he could claim on the cause of action distinct from that which he sues on.

Mr. Rangachari has referred to three cases in support of his contention *Appasawmi v. Ramasawmi* ILR (1886) M. 279, *Shanmugam Pillai v. Syed*

Ghulam Ghose ILR (1903) M. 116 and *Preonath Mookerjee v. Bishnath Prasad* ILR (1906) All 256. In the first of these, *Appasawmi v.*

Ramasawmi ILR (1886) M. 279, upon a settlement of accounts a sum of money was found due to a creditor upon which the debtor agreed to

pay." He gave the creditor an order on his agent to pay a portion of this amount from the profits of certain lands and promised to pay the balance

within a month. The agent having failed to make payment two different suits were instituted on the same day against the debtor for the amount

which he had directed the agent to pay and for the balance respectively. It was contended that both suits were barred by Sections 42 and 43.

Brandt and Parker, JJ. held that the giving of the order on the agent was not similar to the execution of a pro-note so as to give the creditor a

separate cause of action for the amount of the order and. that the cause of action for the whole amount remained the same, They distinguished

Umed Dholchand v. Pir Saheb Jiva Miya ILR (1883) B. 134 and held that one of the suits must be held to be barred. That case is clearly not

analogous to the present one where a distinct source of obligation was created by the execution of the pro-note. In the second case *Shanmuga*

Pillai v. Syed Ghulam Ghose ILR (1903) M. 116 an inamdar obtained separate *muchilikas* from the occupying ryot of his land for two different

years. He first instituted a suit for rent for the later year and subsequently instituted another for the rent of the earlier year. Benson and Bashyam

Iyengar JJ. held that the second suit was barred. The judgment was based on the ground that the muchilikas did not furnish the cause of action for

rent. They apparently regarded a muchilika as merely evidence of the terms of the tenancy between the landholder and the ryot. They observe :

Though there were separate muchilikas for faslis 1306 and 1305 yet there was but one cause of action, namely, non-payment of rent by a tenant

to his land-lord. Though the rents became payable under different documents and at different times, they are only different claims under the same

cause of action or tenancy. The case is very similar to the case where several articles are sold in succession by A to B. If the vendor sues for the

price, he must sue for the price of all the goods sold up to the date of his suit, and cannot sue separately first for one and then for another." In

Preonath Mookerjee v. Bishnath Parsad I.L.R (1906) A. 256. "A, a doctor, agreed with B, to accompany B to Hardwar, as his medical attendant

on a fee of Rs. 100 a day. After 7 days B gave A promissory note for Rs. 700 representing 7 days' fees. B who was a vakil also promised to

assist A professionally in certain litigation. B however, died before he could fulfill his agreement to render professional services: A sued B's son on

the promissory note, first and subsequently brought a separate suit for the balance of his fees for attendance at Hardwar under the alleged

agreement and for fees for later attendance at Benares." It was held that the second suit was barred by the provisions of Section 43 of the CPC so

far as the fees for attendance at Hardwar were concerned though not in respect of the other fees claimed. The learned judges Stanley C.J. and

Burkitt J. say that the cause of action for medical fees was the same in both cases and that it was in reality the breach of the agreement to pay a fee

of Rs. 100 per day for attendance on the deceased." They observed: "It is true *Raghunath Prasad* executed a promissory note to secure the

payment of Rs. 700 on account of fees for 7 days but the fact that this security was given does not take the case out of Section 43 because of the

proviso to that section which is in the following terms: "For the purposes of this section an obligation and a collateral security for its performance

shall be deemed to constitute but one cause of action. The contention, therefore, that the cause of action on the promissory note is one cause of

action and the cause of action for the recovery of the balance of Rs. 600 forms another cause of action is not well founded."" With ail deference we

are unable to agree with the learned Judges that a pro-note executed for payment of a debt is ordinarily to be regarded merely as a collateral

security for the debt. The deposit of title deeds or mortgage as security is only an accessory right to secure the rendering of the main right, namely,

the debt. But the promissory note is prima facie to be regarded as the record intended by the parties of the obligation to pay the debt. The decision

is not in accordance with the cases already referred to above including the judgment of the Allahabad High Court (Sundra Singh v. Bholu ILR

(1898) A. 322 which is not referred to in the judgment.

6. For the reasons mentioned above, we hold that the present suit is not barred by Section 43 of the Civil Procedure code.

7. We dismiss the second appeal with costs.