
(1936) 11 MAD CK 0019
In the Madras High Court

Sellappa Chettiar and Others

APPELLANT

Vs

Suppan Chettiar and Others

RESPONDENT

Date of Decision : 12-11-1936

Acts Referred:

Tamil Nadu Impartible Estates Act, 1904 — Section 4

Citation : AIR 1937 Mad 496 : (1937) ILR (Mad) 906 : (1937) 45 LW 340 : (1937) 1 MLJ 422

Hon'ble Judges : Venkatasubba Rao, J

Bench : Division Bench

Judgement

Venkatasubba Rao, J.—This suit has been brought to enforce a simple mortgage granted to the plaintiff on 8th January, 1916 (Ex. A) by the

first defendant and his father, the late Zamindar of Neduvasal to secure the repayment of Rs. 8,300. It may be mentioned that the plaintiff was a

usufructuary mortgagee under two earlier deeds executed in his favour on 16th December, 1910, for about Rs. 86,000. The suit mortgage

comprises six villages, of which four have been subsequently sold by the first defendant and his father to the second defendant by Ex. F dated 14th

August, 1919. The latter by Ex. H dated the 1st June, 1925, conveyed his interest to defendants 3 to 5 reciting in the deed that the original

purchase was intended to be on their behalf.

2. The only persons contesting the suit are defendants 3 to 5. The first defendant, it may however be stated, originally filed a defence, but

subsequently not only withdrew it but admitted the plaintiff's claim.

3. The villages in question are part of an impartible estate, of which the first defendant's father was the proprietor at the time the suit mortgage was

granted. Defendants 3 to 5 contend that the alienation was made without legal necessity and is consequently not binding on the estate u/s 4 of the

Impartible Estates Act (Madras Act II of 1904). The effect of that section is that the power of the proprietor in regard to alienating his estate or

binding it by his debts, is co-extensive with that of a manager of a joint Hindu family, not being a father or grandfather; in other words, the Act

does not recognise the doctrine either of antecedent debt or of pious obligation. See Venkatalingamma Nayanam Bahadur v. Arunachellam Chettiar

(1924) 19 L.W. 132. The short question therefore is, was the alienation made for a purpose which would have been held justifiable, had it been

made by a manager of coparcenary property? Before dealing with the question, we may observe (and it is conceded), that it is unnecessary to

enquire in this suit, what interest, if any, defendants 3 to 5 have acquired in the suit property by reason of the alienations mentioned above (Exs. F

and H).

4. The mortgage amount of Rs. 8,300 consists of two parts:

(1) Rs. 4,892 borrowed for the purpose of redeeming from mortgage a property at Tanjore known as ""Karnala Vilas"".

(2) Rs. 3,408 borrowed for meeting the expenses of the marriage of the late Zamindar's daughter, i.e., the first defendant's sister. In regard to the

former amount, the facts are these. The late Zamindar purchased a house known as "Karnala Vilas" on the 26th June, 1915, for Rs. 6,500. The

house had been previously mortgaged and the Zamindar undertook to discharge the mortgage debt. This amounted to Rs. 4,892, which sum was

paid from the amount borrowed from the plaintiff. If the original purchase of the house can be justified, it follows that this part of the debt must be

held to be binding. This raises the question, what is the extent of a manager's power in regard to buying property? It is not doubted that the power

of the manager can be exercised not only in a case of need but also ""for the benefit of the estate"". This has been held in numerous cases which have

followed Hunoomanpersaud v. Mussumat Babooee (1856) 6 M.I.A. 393 but as regards what is meant by the expression "the benefit of the

estate," there has been a conflict of judicial opinion. One view seems to be, that unless the transaction is of a defensive character, in the sense that

it is calculated to protect the estate from some threatened danger or destruction,

it cannot be said to be for the benefit of the estate. We are unable to place this narrow interpretation upon the words in question. If the true doctrine is that the "defensive character" is to be the test, the distinction between necessity and benefit disappears. For, suppose an alienation is made for raising funds to preserve some part of the estate from extinction, it is difficult to say in this instance whether the purpose is one of need or one of benefit, but there can be no doubt that the primary purpose is one of need. Suppose, again, money is raised for defending the estate from hostile litigation. Here again, the question whether the purpose is one of necessity or benefit presents similar difficulty. The fact is that benefit and need are so intervoven in such cases as to make the demarcation difficult. To hold therefore that the rule of benefit should be confined only to cases where both need and benefit co-exist, would be to disregard "benefit" as affording a distinct ground of justification. In *Hunoomanpersaud v. Mussumat Babooee* (1856) M.I.A. 393 the rule is stated with sufficient emphasis upon benefit as furnishing a further ground. Their Lordships say: It (the power) can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance, the charge is one which a prudent owner would make in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate.

5. In this passage the reference to "prudent owner" when considering the question of benefit, is not without significance. That seems to show that their Lordships are thinking of "benefit" as something distinct from "need". Their Lordships then go on to say:

The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded.

6. This seems to have given rise to the view that the "pressure" and the "danger" referred to here are examples of the "benefit" mentioned. In

Palaniappa v. Deivasikamony (1917) 33 M.L.J. 1 : L.R. 44 IndAp 147 : ILR 40 Mad. 709, their Lordships of the Judicial Committee point out

the difficulty of stating precisely what is meant by "benefit" used in this connection. The whole passage is worth quoting:

No indication is to be found in any of them as to what is, in this connection, the

precise nature of the things to be included under the description

"benefit to the estate". It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do

so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the production of it or portions from

injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this

connection, to be taken as benefits and what not.

7. Their Lordships recognise the difficulty (we may add, possibly also the danger) or attempting a precise statement of what are included in the

term "benefit". To infer from the three instances given in the passage that the transaction should be of a defensive nature, does not seem warranted

by the language used. These three instances are given as cases of obvious benefit, which seems necessarily to imply, far from suggesting the

contrary, that cases of less obvious benefit are not to be excluded. Indeed, it could be easily conceived what strange anomalies would arise were

the restricted view to prevail. To take a familiar example, where unproductive immovable property is sold with a view to the investment of the

proceeds in the purchase of more suitable property, we fail to see why the sale should be condemned as not being for a justifiable purpose. Other

similar cases may be supposed, in which it would be in the interests of the coparcenery to sell ancestral property with a view to make a fresh

purchase. Is it to be held that a manager cannot sell the family dwelling house situated in a slum, in order to buy a fresh property intended for the

future residence of the family? Again, is a manager to be debarred from selling the dwelling house in a remote village, when the family for educating

its children shifts its residence to a town? Or again, is it proper to hold that a manager can repair a dilapidated family house, but cannot incur a debt

for the purpose of reasonably improving and enlarging it? The Full Bench of the Allahabad High Court, in a forcible and lucid judgment, repelled

the theory that the transaction must necessarily be of a "defensive nature" Jagat Narain v. Mathura Das I.L.R.(1928) 50 All. 969 and we agree

with the opinion expressed there that the pronouncements of the Judicial Committee would not justify the narrower view being taken of the

expression "for the benefit of the estate".

8. The question then remains, whether the evidence adduced here is sufficient to prove that the purchase of the house could be said to have conferred a benefit upon the estate in the sense we have interpreted it. There was no attempt made to show in what circumstances or for what purpose the house was purchased. Mr. Sitarama Rao for the plaintiff relies upon the recital in Ex. F to the effect that on its date, namely, in 1919, the Zamindar and his family were actually residing in that house. Granting the recital to be evidence, it merely shows that the house was used for residential purposes, but that is hardly sufficient. Moreover, it ought to be shown that the house formed an accretion to the impartible estate, for, if there was no intention to incorporate it, the purpose could hardly be described as justifiable. In Ex. F it is stated that for the repair of this house, a part of the amount raised under that document was utilised. The mere fact that the money represents a portion of the proceeds of the sale of a fraction of the impartible estate raises no presumption of an intention to incorporate; beyond that, no evidence whatsoever has been adduced. We must therefore hold that the mortgage to the extent of Rs. 4,892 was not for a purpose binding upon the estate. The transaction would, however, affect the Zamindar's life interest; but as he had died before the action, the plaintiff could derive no benefit from the alienation made by the previous holder.

9. This leads us to the question whether the Zamindar's son, i.e., the present first defendant by joining in the mortgage conveyed any interest to the plaintiff. Mr. T. L. Venkatarama Aiyar strongly contends, relying upon some cases of which *Ramasami Naik v. Ramasami Chetti* (1907) 17 M.L.J.

201 : ILR 30 Mad. 255 is the most important, that in the case of an impartible joint family estate, the coparceners other than the Zamindar in possession have no right of ownership. This question has been fully considered in two recent decisions of the Judicial Committee and their

Lordships have with great emphasis repelled the contention that there was no co-ownership. In *Shiba Prasad Singh v. Prayag Kumari Debi* (1932)

63 M.L.J. 196 : L.R. 59 IndAp 331 : ILR 59 Cal 1399 their Lordships, in the judgment delivered by Sir Dinshaw Mulla, review the case-law on

the point and show that the decisions proceed upon two apparently inconsistent views; one set of decisions *Sartaj Kuari v. Deoraj Kuari* (1888)

L.R. 15 IndAp 51 : ILR 10 All. 272 the first Pittapur case (1899) 9 M.L.J. Sup. 1 : L.R. 26 IndAp 83 : ILR 22 Mad. 383 and the second

Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 proceed on the view that there is no co-ownership, while the other

line represented by Baijnath's case (1921) 40 M.L.J. 387 : L.R. 48 IndAp 195 : ILR 43 All. 228 rests upon the principle that there is a right of

survivorship, which in turn is founded upon co-ownership. Their Lordships point out that the inconsistency is apparent and not real. It is the general

law of the Mitakshara that regulates the partible and impartible property alike belonging to a coparcenery, but in the case of impartible property,

custom has superseded the general law in certain respects. As regards the right of survivorship, the general law not having been superseded by

custom, that right still remains and that is what was held in Baijnath's case (1921) 40 M.L.J. 387 : L.R. 48 IndAp 195 : ILR 43 All. 228 . To this

extent the estate retains its character of joint family property and right of co-ownership is preserved. Their Lordships cite a passage from the

judgment of Sir J. Colville in (1875) L.R. 2 I.A. 263 (Privy Council) , where the right of the junior members is referred to as a contingent right of

property, which they can part with or transfer. After full discussion, the position is this summed up by their Lordships:

Though the other rights which a coparcener acquires by birth in joint family property no longer exists, the birth-right of the senior member to take

by survivorship still remains. Nor is this right a mere spes successions similar to that of a reversioner succeeding on the death of a Hindu widow to

her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordships' view it follows that in order to

establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an

intention, expressed or implied, on the part of the junior members of the family to renounce their right of succession to the estate. Shiba Prasad

Singh v. Prayag Kumari Debi (1932) 63 M.L.J. 196 : L.R. 59 IndAp 331 : ILR 59 Cal. 1399

10. What this decision lays down is the very opposite of what has been held in Ramasami Naik v. Ramasami Chetti (1907) 17 M.L.J. 201 : ILR

30 Mad. 255. The contention was put forward that the interest possessed by the junior members, if any, was only a spes successionis and that

contention was definitely rejected. It is noticeable that in the passage quoted above, the right of the senior member to take by survivorship is

referred to as his birth-right capable of being renounced or surrendered.

11. In *Collector of Gorakhpur v. Ram Sundar Mal* (1934) 67 M.L.J. 274 : L.R. 61 IndAp 286 : ILR 56 All. 468 , their Lordships, in the

judgment delivered by Lord Blanesburgh, reaffirm this doctrine. They first point out that the *Sartaj Kuari's* case (1888) L.R. 15 IndAp 51 : ILR

10 All. 272 and the first *Pittapur* case (1899) 9 M.L.J. Sup. 1 : L.R. 26 IndAp 83 : ILR 22 Mad. 383 appeared to be destructive of the rule that

an impartible *Zamindari* could be in any sense joint family property, but they go on to say that this view, apparently implied in these cases, was

definitely negated by Lord Dunedin when delivering the judgment in *Bajinath's* case (1921) 40 M.L.J. 387 : L.R. 48 IndAp 195 : ILR 43 Mad.

228 Then they make the following significant observation:

One result is at length clearly shown to be that there is now no reason why the earlier judgments of the Board should not be followed, such as, for

instance, the *Chellapallee* case (1901) 10 M.L.J. 294 : L.R. 27 IndAp 151 : ILR 24 Mad. 147 which regarded their right to maintenance,

however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family. *Collector of Gorakhpur v.*

Ram Sundar Mal (1934) 67 M.L.J. 274 : L.R. 61 IndAp 286 : ILR 56 All. 468 .

12. After further discussion, their Lordships observe that while the power of the holder of an impartible *Raj* to dispose of it by deed or by will

remains definitely established, the right of the junior branch to succeed by survivorship on the extinction of the senior branch has also been

definitely and emphatically reaffirmed : ""nor must this right be whittled away; it cannot be regarded as merely visionary"".

13. In view of these pronouncements of the Judicial Committee we can no longer regard *Ramasami Naik v. Ramasami Chetti* (1907) 17 M.L.J.

201 : ILR 30 Mad. 255 which held the interest of the coparceners to be a mere *spes successionis*, as having laid down the correct law.

14. It is unnecessary to consider whether a member other than the *Zemindar* in possession can, by transferring his interest, bring in a stranger; nor

is it necessary to enquire whether one member can, by making a transfer, affect the interest possessed by members other than himself. See (1878)

L.R. 5 I.A. 61 (Privy Council) , dealing with Padamattur estate in Sivaganga Zemindari. For, under the Impartible Estates Act no member could

make an alienation which would enure beyond his own lifetime. We have therefore here no difficulty in holding that the mortgage in question to the

extent of the first item of the consideration affects the life interest of the first defendant by reason of his having joined in the transaction.

15. Then passing on to the next item of the consideration, namely, Rs. 3,408, we must hold that the debt to that extent was borrowed for a legal

necessity. The plaintiff has deposed that the amount was utilised in meeting the expenses of the marriage of the late Zamindar's daughter. The

evidence stands uncontradicted. The mortgage was executed in January, 1916, and the marriage had been performed in the previous July. In Exs.

D and D-1, written by the Zamindar to the plaintiff's father in June and July, 1915, he refers to the proposed marriage and applies for a loan. A

sum of Rs. 500 was borrowed under Ex. C, a promissory note executed in December, 1913, by both the father and the son. The plaintiff deposes

that they borrowed this amount for the purpose of making jewels in view of the intended marriage. The plaintiff's evidence is consistent with the

recital not only in Ex. A, the mortgage deed, but in Ex. F under which the contesting defendants claim. We must therefore hold that this extent what

has passed to the plaintiff under the mortgage is the entire estate in the properties in question and not merely the life interests of the two executants,

namely, the late Zamindar and the first defendant.

16. The only contention that remains is as regards interest. We agree with the learned Judge that the stipulation in respect of it does not amount to

a penalty and that the amount claimed is therefore due.

17. Lastly, the direction in paragraph 5 of the decree as to the passing of a personal decree, it is conceded, cannot stand and it is accordingly

deleted.

18. In the result, for recovering Rs. 3,408 and the interest thereupon, the mortgaged items can be sold, but for recovering the remaining sum,

namely, Rs. 4,892 with interest upon it, what can be sold is the first defendant's life interest alone in those properties, and we accordingly give

judgment to that effect. The lower Court's order as to the costs of the suit will stand, three-eighths of those costs being assigned to the former

amount and five-eighths to the latter.

19. As regards the costs of the appeal, our order is that the appellants (defendants 3 to 5) shall pay two-thirds of the plaintiff-respondent's costs.

These costs also will be apportioned in the manner stated above.

20. In the memorandum of objections we make no order as to costs. Time for redemption will be six months from now.