

(1986) 06 MAD CK 0027
In the Madras High Court

Sivakumar and Another

APPELLANT

Vs

V. Somasundaram and Others

RESPONDENT

Date of Decision : 18-06-1986

Acts Referred:

Citation : (1986) 99 LW 662 : (1987) 1 MLJ 132

Hon'ble Judges : Ratnam, J

Bench : Division Bench

Judgement

Ratnam, J.—Plaintiffs 1 and 3 in O.S. No. 32 of 1978, Sub-Court, Chengalpattu, have preferred this appeal against the judgment and decree therein in so far as the Court below declined to grant the relief of partition and separate possession as regards items 1 to 8 of A schedule properties. The appellants and the third respondent are the sons of the first respondent and all of them constituted members of a joint Hindu family, which owned the properties described in Schedules A to C to the plaint. The first appellant was born on 15th May, 1958, while the date of birth of the second appellant is 5th October, 1972. According to their case, their father, the first respondent herein, for more than ten years prior to the institution of the suit, was indifferent to the affairs of the family and had been leading a wayward and fast life. The appellants claimed that they had been cultivating the landed properties with the assistance of their mother and by living in the ancestral house. The further case of the appellants was that surcharge proceedings were initiated" against the first respondent by the Deputy Registrar of Co-operative Societies for recovery of a sum of Rs. 24,000 and odd on the ground that the first respondent fraudulently retained amounts collected from the members of the Mamandoor Co-operative Society of which he was the President and misappropriated the moneys so collected and that pursuant to a decree, the properties belonging to the joint family were sold for the realisation of the amounts recoverable from the first respondent. The appellants stated that the debt alleged to be due by the first respondent to the Mamandoor Co-operative Society is an avyavaharika debt and they are not bound either by the decree or by the sale of the properties pursuant to the decree. The appellants further

stated that provision for the marriage of their sister has also to be made from out of the joint family properties. The appellants further claimed that though they called upon the first respondent to amicably divide the family properties and give the appellants and the third respondent their shares therein, the first respondent evaded. It was under these circumstances, that the appellants and the third respondent instituted O.S. No. 32 of 1978 praying for partition and separate possession of their three-fourth share in A to C schedule properties and for mesne profits and other incidental reliefs.

2. The first respondent, the father of the appellants and the third respondent, remained ex parte. The suit was resisted by the second respondent herein on the ground that when the first respondent was the President of the Mamandoor Multipurpose Agricultural Credit Society, he owed large amounts to the second respondent, which led to an enquiry u/s 65 of the Tamil Nadu Co-operative Societies Act by a Special Officer duly appointed for that purpose. The further case of the second respondent was that by a special resolution dated 30th November, 1965 it was decided to take action against the first respondent and he was summoned to appear for an enquiry. However, the first respondent, despite receipt of notices regarding the enquiry, did not appear and an award was passed on 29th July, 1966 for a sum of Rs. 24,016.27. But the properties were attached even before the passing of the award, on 17th December, 1965. Despite the award, the first respondent did not pay any amount and hence the properties were brought to sale in execution. The sale was adjourned from time to time and stood posted to 20th June, 1973. A day prior to that, the wife of the first respondent claimed the attached properties as belonging to her. That application was, however, returned on the ground of non-compliance with rules and the sale was adjourned to 25th June, 1973. On that day, the sale was held and the second respondent bid at the auction and purchased items 1 to 18 of A schedule, and one fourth share in item 19 of A schedule for Rs. 37,300. Again, on 19th July, 1973, the first respondent, through his wife, presented a petition under R.76 of the Rules framed under the Tamil Nadu Co-operative Societies Act which was dismissed on 13th August, 1973. Meanwhile, the sale in favour of the second respondent, was confirmed on 25th July, 1973. On 24th August, 1973, the wife of the first respondent instituted O.S. 629 of 1973, District Munsiff Court, Cherigalpattu for a declaration that the suit properties and other properties belong to her under a will executed by Vedagiri Mudaliar, the father of the first respondent. The plaintiff in that suit also obtained an injunction. That suit was also dismissed on 30th March, 1977. Against that, an appeal was preferred in A.S. No. 55 of 1977. Sub-court Chengalpattu, and that appeal eventually stood dismissed on 31st December, 1977. Meanwhile, the second respondent applied for delivery of possession of the properties purchased and delivery was ordered on 16th April, 1977 and delivery was also effected through Court on 17th April, 1977 which was recorded on 31st December, 1977. The second respondent thus claimed to be in possession of the properties purchased. The claim of the appellants and the third respondent that the first respondent was leading a

wayward life and not taking any interest in the affairs of the family was denied. The debt was binding on the appellants and the third respondent as it was not an avayavaharika debt, according to the second respondent. Claiming that the second respondent is a bona fide purchaser for value, who had taken delivery of possession of the properties also, the second respondent characterised the suit for partition as yet another step in the dilatory tactics adopted by the first respondent. The cultivation of the properties by the appellants and the third respondent was also denied. The second respondent disputed the cause of action for the institution of the suit and prayed for its dismissal.

3. On the basis of the aforesaid pleadings, after framing the necessary issues and after considering the oral as well as the documentary evidence let in by both sides, the Court below found that the first respondent had every right to collect the amounts from the debtors and ryots in his capacity as the President of the Co-operative Society and having thus lawfully collected the amounts, his subsequent act in not properly accounting for or remitting the amounts will not absolve the appellants and the third respondent of their responsibility for the payment of the debt incurred by the first respondent on the theory of pious obligation. The Court below thus found that the award against the first respondent is binding on the appellants and the third respondent and therefore, the sale of the joint family properties in favour of the second respondent is valid and binding on the appellants and the third respondent. On that conclusion, the appellants and the third respondent were granted a preliminary decree for partition and separate possession of their three-fourth share in B and C schedule properties and the remaining share in item 19 of A schedule and their claim in respect of other items was negatived; It is the correctness of this that is challenged by the appellants in this appeal.

4. The Learned Counsel for the appellants first contended that a consideration of the totality of the circumstances right from the inception clearly made out the criminal intention of the first respondent to misappropriate and, therefore, the debt in question could only be avyavaharika, not binding on the appellants and the third respondent. In this connection the Learned Counsel submitted relying on Ex. A1, that the first respondent lent money in the names of dead persons, to persons whose whereabouts were not known or traceable, to close relations etc., and that established the criminal intention even at the inception. It was also further pointed out that the amounts collected by the first respondent and not credited to the account of the Society and in respect of which an award was passed against him were also of the same character so that they could not be said to be binding upon the appellants and the third respondent justifying the sale of their interest also in the joint family properties. On the other hand, the Learned Counsel for the second respondent contended that there is no evidence of any criminal intention on the part of the first respondent even at the inception and that the award passed by the Deputy Registrar of Co-operative Societies, Chengalpattu in proceedings against the first respondent cannot be looked into for the purpose of substantiating any criminal intention on the part of the first

respondent. Reliance "in this connection was placed by the Learned Counsel for the second respondent upon the decision of the Supreme Court in S.M. Jakati and Another Vs. S.M. Borkar and Others, .

5. None of the appellants had been examined in support of their case that the debt in question is an avyavaharika debt. At the time of the initiation of proceedings against the first respondent, the first appellant was a tender boy of about 8 years, while the second appellant was not even born. The third respondent also was a boy of tender years as he was about 6 years old. Obviously, therefore, they could not have known anything about the criminal intention of the first respondent in the matter of not accounting for the collections made by him in his capacity as an office-bearer of the Co-operative Society. That, however, would not enable the appellants and the third respondent to claim that the debt was an avyavaharika debt. That the debt was an illegal or immoral debt or was repugnant to good morals should have been made out by the other evidence. The appellants relied upon only two documents, Exs. A1 and A 2 and the oral testimony of P.W. 1. A careful scrutiny of the testimony of P.W.1 does not in any manner assist the appellants and the third respondent in making out a case that the first respondent had entertained a criminal intention to misappropriate even at the time of the collection of the amounts from the several persons. There is no evidence of any prosecution having been launched against the first respondent in respect of the amounts collected and not accounted for by him. Thus, there is no acceptable evidence to show that the debt in question was an illegal or an immoral debt. However, the Learned Counsel for the appellants placed considerable reliance upon the contents of the notice Ex. A1 to contend that the criminal intention of the first respondent to misappropriate the amount is clearly established. In Ex. A1, which is the summons issued by the Deputy Registrar of Co-operative Societies, Chengalpattu, four items are listed out. The first item relates to moneys collected by the first respondent from members after issuing printed receipts and not brought into account. There is nothing in this which indicates that even at the time of collecting those amounts the first respondent had entertained the idea of misappropriating the amounts collected. Likewise, the collection of the proceeds of fertilizer sale not remitted would not establish that there was any intention on the part of the first respondent to misappropriate the amounts even when received. Items 3 and 4 relate to loan to relations and deceased persons. Merely from the circumstance that relations had been issued loans, it cannot be inferred that the first respondent did so only with a view to appropriate those amounts to himself. Likewise, issue of loans to deceased persons would not also establish that the amounts were intended to be misappropriated, especially when it does not appear whether the loans advanced were to persons who were not in existence even on the date of advance. It might well be that those persons ceased to exist after the advance of loans. Thus, from the contents of the summons, Ex. A1, it is rather difficult to infer any criminal intention on the part of the first respondent to misappropriate the funds of the Society even at the inception. The attempt of the Learned Counsel for the

appellants to establish a criminal intention to misappropriate from the contents of Ex. A1 cannot, therefore, be countenanced. Ex. A2 is the order dated 29th July, 1966 passed by the Deputy Registrar of Co-operative Societies, Chengalpattu u/s 71 of the Tamil Nadu Co-operative Societies Act 53 of 1961. In the course of that order, the Deputy Registrar of Co-operative Societies has found that amounts had been paid by several persons to the first respondent against receipts issued and that those amounts had been fraudulently retained and misappropriated. It was also further found that breach of trust had been committed by the first respondent in relation to the Society and that he had also cheated members bringing misery and financial crisis to several poor families and that the total of the amounts so misappropriated comes to Rs 24,015-27. In accordance with" those conclusion, the Deputy Registrar of Co-operative Societies ordered the first respondent to pay a sum of Rs. 24015-27 to the Mamandoor Co-operative Society at once. It was also further directed that the amount should be recovered from the properties of the first respondent attached, or from his other properties or from both. Ex.A2 is thus an order passed by the Deputy Registrar of Co-ioperative Societies in the course of an enquiry under the Tamil Nadu Co-operative Societies Act. The question, is whether this adjudication would enable the appellants and the third respondent to prove the truth of the facts stated therein regarding misappropriation and breach of trust. On this question of the admissibility of the adjudication by the Deputy Registrar of Co-operative Societies, in evidence for the purpose of establishing misappropriation and breach of trust, the Supreme Court in S.M. Jakati and Another Vs. S.M. Borkar and Others, , laid down that the order for payment on. the findings given by the Deputy Registrar of Co-operative Societies cannot be relied upon as evidence for the determination of the question whether the debt was avyavaharika or otherwise. In the case before the Supreme Court, reliance was placed upon the payment order and the findings given by the Deputy Registrar of Co-operative Societies to support the claim that the debt was an avvyavaharika debt. In repelling this contention, the Supreme Court observed at page 286 as follows

In the case now before us the appellants have attempted to prove that the debt fell within the term "avyavaharika" by relying upon the payment order and the findings given by the Deputy Registrar in the payment order where the liability was Inter alia based on a breach of trust, any opinion given in the order of the Deputy Registrar as to the nature of the liability of defendant No. 1 M.B. Jakati cannot be used as evidence in the present case to determine whether the debt was "avyavaharika" or otherwise. The order is not admissible to prove the truth of the facts therein stated and except that it may be relevant to prove the existence of the judgment itself, it will not be admissible in evidence.

In view of this clear pronouncement of the Supreme Court, regarding the inadmissibility in evidence of the proceedings of the Deputy Registrar of Co-operative Societies, except for the very limited purpose indicated therein, the appellants cannot be heard to rely upon the contents of the order in Ex. A2, to

make out a case of either misappropriation or breach of trust of the funds collected by the first respondent. Thus, on the evidence available, the appellants have not made out that the debt in question is an avyavaharika debt and, therefore, it will not be binding upon them or their shares in the family properties. That would suffice to uphold the conclusion of the Court below that the appellants and the third respondent cannot impeach the validity of the sale in execution of the award of the Deputy Registrar of Co-operative Societies passed against the first respondent herein.

6. Though counsel on both sides invited my attention to a large number of decisions regarding the modern trends in the concept of avyavaharika debt as well as a debt as such, it may not be necessary to advert to them in detail, for, it is now well settled that the receipt of money by a person lawfully entitled to do so creates a debt binding upon the sons as well and the subsequent misappropriation of the amounts so collected by the person who received it would not make any difference to the binding nature of the debt upon the sons or their shares in the joint family property. It would suffice in this connection to refer to the decision in Loganathan and Others Vs. Ponnuswami Naicker and Others, , where all the leading decisions on that subject have been noticed. Therein it has been pointed out that under the Hindu Law a son is under pious obligation to discharge his father's debts out of his ancestral property, even if he had not been benefited by the debts, provided the debts are not avyavaharika and the sons would be exonerated from the obligation to discharge the debt of their father only if the debt was one tainted with immorality or illegality and that must be examined with reference to its character when the debt was first incurred. It was also further laid down that if at the inception or origin there was nothing illegal or repugnant to good morals the subsequent dishonesty of the father in not discharging his obligation will not absolve the son from his liability for the debt. In this connection the decision in Natesayyan v. Ponnusami ILR (1893) 16 Mad. 99 : 3 AIR 1943 142 (Privy Council) and Sri Venkateswara and Channakeswaraswami Temple Upputur and Another Vs. Bendapudi Radhakrishna and Others, , have been referred to. Finally, it was laid down that as the origin of the liability was not repugnant to good morals, the later failure to account may at best be dishonest, but that cannot alter the original character of the obligation and make it criminal even initially. On the facts and the available evidence in this case, the first respondent, in his capacity and as an office bearer of the Co-operative Society, was empowered and entitled to receive moneys from the members and issue receipts therefor, which he did. The receipt of moneys by the first respondent when they were received was perfectly in order and created -a. debt in favour of the Society payable by the first respondent. Thus, at the time of the receipt of the moneys by the first respondent and the creation of a debt by such receipt against the first respondent in favour of the Society, the debt was legally incurred and binding on the sons of the first respondent as well as on the theory of pious obligation. The circumstance that subsequently the amounts so collected were misappropriated or not accounted for by the first respondent

would not, in the light of the principles laid down by a series of decisions of Division Benches of this Court, make any difference to the binding nature of the debt on the sons. Earlier, it has been pointed out how there is absolutely no evidence at all to establish that the debt in question was an avyavaharika debt. Even on the footing that the first respondent had, after collecting these amounts, misappropriated or did not account for the collections, that would not in any manner absolve the appellants and the third respondent of their liability to discharge the debt which was lawfully incurred when the moneys were received by the first respondent. Thus, the appellants and third respondent cannot escape their liability to repay the debts incurred by the first respondent" even on the assumption that there was a subsequent misappropriation by the first respondent of the amounts collected by him.

7. Lastly, the Learned Counsel for the appellants submitted that if at all, even as per the order passed by the Deputy Registrar of Co-operative Societies, under Ex. A2, only the share of the first respondent in the properties would be liable and not the shares of the sons. No doubt, it is seen from the concluding paragraph of Ex. A2 that the amount of Rs. 24015.27 has to be recovered from the properties of the first respondent. This does not mean that the amount is recoverable only from the share of the properties of the first respondent. Admittedly, till the institution of the suit out of which the present appeal has arisen, the family continued to be joint and that was why the appellants and the third respondent wanted to avoid their liability with reference to a debt which otherwise would have been a binding debt, by contending that the debt in question is an avyavaharika one. Thus, even the appellants and the third respondent have understood the nature of the debt as one which would be ordinarily binding upon the members of the family, but for its avyavaharika nature. If the debt incurred by the receipt of moneys by the first respondent at its inception was a lawful one then, undoubtedly, the shares of the appellants and the third respondent in the family properties would be liable to discharge that debt on the theory of pious obligation. Precisely, with a view to avoid this, the appellants and the third respondent contended that the debt was an avyavaharika debt. That case of the appellants and the third respondent having been earlier negatived, it follows that the sale of the shares of the appellants as well as the third respondent for payment of a debt due by the first respondent would be quite in order and "cannot be taken exception to.

8. Consequently, the appeal fails and is dismissed. There will be no order as to costs.