

(1901) 08 MAD CK 0022
In the Madras High Court

Sivasami Chetti and Another

APPELLANT

Vs

Sevugan Chetti

RESPONDENT

Date of Decision : 22-08-1901

Acts Referred:

Citation : (1902) ILR (Mad) 389

Hon'ble Judges : Bhashyam Ayyangar, J;Benson, J

Bench : Division Bench

Judgement

Bhashyam Ayyangar, J.—(After stating the facts already set out): I concur with the Subordinate Judge in holding that exhibit J was signed by

the first defendant and that the consideration for the mortgage bond, i.e., Rs. 5,470 was real and such as would bind the family. Negotiations were

going on for sometime between the defendants and the plaintiff, in view to the plaintiff advancing a further loan and obtaining a mortgage bond for

Rs. 10,000 from the defendants, hypothecating all their property. Owing, apparently, to disagreement as to rate of interest, the negotiations fell

through, but, the plaintiff being anxious to obtain security for the various sums advanced by him on promissory notes, mainly to the first defendant,

and partly to the third defendant, and the first defendant too, being desirous that the debts thus contracted by him should be undertaken by his

brothers also, it was arranged between the plaintiff and the first defendant that the exhibit J should be executed by all the members of the family,

which at that time, was in an embarrassed state of circumstances. But as the remaining members of the family declined to sign exhibit J after it was

signed by the first defendant, the first defendant refused to register the document so far as he was concerned by falsely denying its execution by

him. The District Registrar, after being satisfied that it was executed by the first defendant, directed its registration, I am satisfied, upon the evidence in the case, that exhibit J was executed by the first defendant, and no ground has been made out for allowing the first defendant to re-open the settlement of accounts embodied in exhibit J. But, in my opinion, the appellant's contention that exhibit J was intended both by the plaintiff and the first defendant to be executed by all the members of the family, and that it was not intended that the first defendant alone, by signing it, was to bind himself, or, in his capacity as managing member, bind the whole family, is well founded. When a document is intended to be executed by several persons, but is executed only by some of them, the question whether it takes effect as against those who have executed it, notwithstanding that the rest have declined to join in the execution of the document, rests upon the intention of the parties. Without laying down as a general proposition that whenever an instrument is drawn, up making every member of an undivided Hindu family party to it by name, it will not take any effect if one or more of them do not join the rest in executing it, I am clearly of opinion that, under the circumstances of the present case, the only reasonable inference to be drawn as to the intention of the plaintiff and of the first defendant when he executed exhibit J is that it was to take effect only on the third defendant and Pothu Chetti also joining in its execution. More than one-half of the consideration for exhibit J is the amount of the unregistered hypothecation bond, exhibit D, dated 20th April 1896, which was executed not only by the first defendant, but also by the third defendant and Pothu Chetti. The promissory note, exhibit G, for Rs. 700, which forms a portion of the consideration for exhibit J, was given only by the third defendant and Pothu Chetti and promissory note, exhibit H, for Rs. 100--also a part of the consideration for exhibit J--was given by the third defendant only. Neither in exhibit J nor in exhibit D, nor in any of the promissory notes, is the first defendant referred to as the managing member and, in fact, not a single document has been produced which was executed by him, as representing his branch of the family. Exhibit J clearly names each of the three brothers as a party to the document and they are not even described as undivided brothers; and the first defendant is therein referred to only as representing the second defendant. If exhibit J is to be given effect to, as contended on behalf of the respondent, as a

mortgage bond executed by the first defendant, as the managing member of his branch of the family, the result, so far as the first defendant is concerned, would be, that he will be personally liable for the whole debt as also his share in the property mortgaged, and the shares of the brothers will also be liable only if the consideration for exhibit J is proved to have been incurred for purposes beneficial to the family. If the brothers also join as party executants, the creditor will be entitled to recover the debt from all the brothers, jointly and severally, without having to establish that the debt was incurred for family purposes, and in case the debt be recovered from the first defendant alone, he will be entitled to contribution from his brothers. In the present case, the plaintiff advanced but a trivial sum, at the time when exhibit J was executed, as a part of the consideration for the mortgage bond. After it was signed by the first defendant, both he and the plaintiff, endeavoured their best, but in vain, to prevail upon the third defendant and Pothu Chetti to execute the document. Under all these circumstances, it will be unreasonable to conclude that the first defendant, when he executed exhibit J intended to bind himself or his brothers, if they did not execute the document. In my opinion exhibit J simply amounts to a proposed agreement, which was never perfected; the plaintiff himself contracted on the faith that the brothers would join and the first defendant executed the document, upon the understanding that his brothers also would join in executing the same.

2. The principle of law applicable to the case is clearly laid down in *Latch v. Wedlake* 11 A.& E. 959. In that case, it was held by Lord Denman, C.J., that, notwithstanding that the contracting parties, were three partners, any one of whom, alone, could by his contract bind the rest, yet the question must have been submitted to the jury,--Whether the second defendants by their executing the instrument intended that the third partner should be bound, though he did not join in the execution, or, at all events, they intended to make themselves liable on the instrument, and whether the intention of all the parties was not that the third partner should also be an actual party to the agreement. If one intends to be a joint and several obligee or only a joint obligee with others there is a right of contribution against his co-obligees, if his intention be carried out, but if he becomes a mere several obligee, he has no right of contribution *Underhill v. Horwood* 10 Ves. 209. It is contended, on behalf of the respondent, that there is

a recital in exhibit J that the debts mentioned therein, were incurred for meeting the expenses of suits and for family expenses; and that the

document should therefore be treated, as executed by the first defendant as managing member of the family. If the parties intended that all the

members of the family should execute the document, it cannot take effect by reason that the person who alone executed the document happens to

be the managing member and that the debt is recited to have been incurred for the benefit of the family.

3. Moreover, in the present case, the recital in exhibit J that the debt was contracted for the benefit of the family, may be referred to the

circumstance that one of the parties to the instrument, viz., the second defendant, was a minor.

4. In *Charlton v. Earl of Durham* L.R. 4 Ch. App. 433 which was cited on behalf of the respondent, all that was held was that if a discharge

purports to be signed by the two executors and the debtor intended to have the receipts of both, the discharge will be valid, notwithstanding that

the signature of one of the executors was not genuine, and that the receipt of one executor would operate as a valid discharge The principle of that

case is clearly inapplicable to a case like the one under consideration.

5. It has not been contended, on behalf of the respondent, that though effect may not be given to exhibit J, as a mortgage bond executed by first

defendant as managing member of the family, yet effect should be given to it as against the first defendant personally and his share in the property

hypothecated under it. I need hardly say that in the view which I have taken of exhibit J, viz., that it was simply a proposed agreement which was

never perfected, such contention would be untenable.

6. I would therefore allow the appeal and dismiss the plaintiff's suit with costs throughout.

Benson, J.

7. I concur.