

(1901) 08 MAD CK 0014
In the Madras High Court

Sivaswami Chetty and Others

APPELLANT

Vs

Sevugan Chetty

RESPONDENT

Date of Decision : 22-08-1901

Acts Referred:

Citation : (1902) 12 MLJ 17

Hon'ble Judges : Benson, J

Bench : Division Bench

Judgement

1. Plaintiff sues on a hypothecation bond, Exhibit J, dated 31st October 1897, purporting to be made between the plaintiff on the one part and the

1st, 2nd and 3rd defendants as well as one Pothu Chetty, now deceased, on the other part, and to be executed by the 1st defendant for himself

and for the 2nd defendant, his minor son. The 3rd defendant and the deceased Pothu Chetty are as described in Exhibit J, the younger brothers of

the 1st defendant. Exhibit J recites that the 1st and 3rd defendants and Pothu Chetty execute the document on their behalf respectively and the 1st

defendant also on behalf of the 2nd defendant a minor.

2. The 1st defendant on behalf of himself and the 2nd defendant denied the execution by him of the hypothecation bond, and also contended that

no suit could be brought upon the bond apparently on the ground that it was not completed. The 3rd defendant also denied the genuineness of

Exhibit J, and contended that the loans recited in Exhibit J were not contracted for his benefit, and that even if Exhibit J were genuine, he was not

liable to be sued thereon inasmuch as the 1st defendant did not execute the same on his behalf, or of the deceased Pothu Chetty, and that no suit

could be brought on Exhibit J, as it was not completed, and neither ho nor the

deceased Pothu Chetty executed or agreed to execute the same.

Both the 1st and 3rd defendants also alleged in their written statements that the 1st defendant was not the managing member of the family.

3. The Subordinate Judge found the Exhibit J to be genuine, and that the consideration therein recited was real and binding upon the family, and

passed a" decree in favour of the plaintiff against defendants 1, 2, 3 and the property hypothecated under Exhibit J.

4. Against this decree defendants 1, 2 and 3 have preferred Appeal No. 102 of 1900; and it is contended on their behalf that Exhibit J is not

genuine, that a portion of the consideration for Exhibit J is not real, and that Exhibit J not having been completed, it cannot bind either the

defendants 1, 2 and 3 jointly or any one of them.

5. I concur with the Subordinate Judge in holding that Exhibit J was signed by the 1st defendant and that the consideration for the mortgage bond,

i.e., Rs. 5,470-0-0, was real and such as would bind the family. Negotiations were going on for some time 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 pro-notes mainly to the 1st defendant and partly to the 3rd defendant, and the 1st 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 1st defendant that 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 1st defendant, the 1st 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 was executed by the 1st defendant

directed its registration. I am satisfied upon the evidence in the case, that Exhibit J was executed by the 1st defendant, and no ground has been

made out for allowing the 1st 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 1st defendant to be

executed by all the members of the family, and that it was not intended that the 1st 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 1st defendant when he executed Exhibit J, is that it was to take effect only on the 3rd defendant and Pothu Chetty as 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 1st defendant but also by the 3rd defendant and Pothu Chetty. The pro-note, Exhibit G, for Rs. 700, which forms a portion of the consideration for Exhibit J, was given by the 3rd defendant and Pothu Chetty and the pro-note Exhibit H for Rs. 100, also a part of the consideration for Exhibit J was given by the 3rd defendant only. Neither in Exhibit J, nor in Exhibit D, nor in any of the promissory notes, is the 1st 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 1st defendant is therein referred to only as representing the 2nd defendant. If Exhibit J is to be given effect to, as contended on behalf of the respondents as a mortgage bond executed by the 1st defendant as the managing member of his branch of the family, the result, so far as the 1st 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 1st 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 1st defendant, both he and the plaintiff endeavoured their best, but in vain, to prevail upon the 3rd defendant and Pothu Chetty to execute the document. Under all these circumstances, it will be unreasonable to conclude that the 1st 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 amounting to a proposed agreement which was never perfected, the plaintiff himself contracted on the faith that the brothers would join and the 1st defendant executed the documents upon the understanding that his brothers also would join in executing the same.

6. The principle of law applicable to the case is clearly laid down in *Latch v. Wedlake and Louis Thomas* 11 A. & E. 959. In that case it was held by Lord Penman, C.J., that notwithstanding that the contracting party 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 two defendants by their executing the instrument intended that the 3rd 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 3rd 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 the others, there is a right of contribution against his co-obligees; if his intention be carried out, but if he become a mere several obligee, he has no right of contribution. *Underhill v. Horwood* 10 Ve. 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 1st 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.

7. 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 2nd defendant, was minor.

8. In Charlton v. the Earl of Durham 4 Cases 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 no 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.

9. 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 1st

defendant as managing member of the family, yet effect should be given to it as against the 1st 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.

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

Benson, J.

11. I concur.