
(1940) 10 MAD CK 0017
In the Madras High Court

Subbayyan Chettiar and Another

APPELLANT

Vs

T.R. Ponnuchami Chettiar

RESPONDENT

Date of Decision : 29-10-1940

Acts Referred:

Contract Act, 1872 — Section 23

Citation : AIR 1941 Mad 727 : (1941) 1 MLJ 807

Hon'ble Judges : Abdur Rahman, J

Bench : Division Bench

Judgement

Abdur Rahman, J.—Kamayan Chetti suspected the fidelity of his first wife. He had two sons by her. These are the plaintiffs in the suit out of

which this appeal arises. He married a second wife Alagammal, but did not have any children or expect to get any by her. He married a third one,

Veerammal by name, some time in 1919. She is the second defendant in the present litigation. A settlement deed was executed by Kamayan Chetti

on the 15th April, 1919, (Ex. 1-a). Under this deed he settled some property on his second wife, some on the third and some on the third wife's

father Ramalingam Chetti. The deed contains the following recital:

As per agreement entered into at the time of the said marriage between the said third wife Veerammal,, the aforesaid person No. 3, Ramalinga

Chetti, the father of the said person Veerammal and myself, the third wife, Veerammal shall during her life live in and enjoy for her maintenance the

B schedule properties out of the undermentioned properties worth Rs. 1,500;the second wife Alagammal shall during her life enjoy for her

maintenance the A schedule properties, and the aforesaid Ramalinga Chetti shall look after the aforesaid properties in the A and B schedules. If a

male child is born to any one of the second and third wives, individual No. 3 Ramalinga Chetti shall, as remuneration for his labours enjoy the dry

land bearing Survey No. 1610, Letter A, having an extent of one acre and 7 cents and dry land bearing Letter B, the said Survey Number having

an extent of one acre and seven cents, making in all two acres and fourteen cents of dry land in the aforesaid properties mentioned in the schedule.

The remaining properties in the A and B schedule shall be enjoyed by the male children to be born hereafter. If no issue is born to the second or

third wife, after their life (lives) and that of mine, the aforesaid Ramalinga Chetty shall get the entire property in the A and B schedules and enjoy

them. I shall live by turns for one year with each of the second and third wives, look after their affairs and get on with my livelihood. If they do not

properly feed and maintain me or live amicably with me, I shall take out Rs. 500 from the properties in the A and B schedules for the said

maintenance.

2. Veerammal incurred certain debts and first defendant obtained a decree against her. In execution her interest in the properties given to her under

the above stated deed of settlement was attached. The plaintiffs and their father Kamayan Chetti objected to the attachment. The execution Court

held that the transfer under the settlement deed was not binding on the plaintiffs. Their objections were consequently accepted to the extent of their

two thirds share on the 30th June, 1933 (Ex. E). The father's petition was, however, dismissed in regard to his share. The decree-holder made a

default subsequently and the execution was dismissed with the result that the attachment effected on his application was raised. Kamayan died on

the 3rd July, 1933. Another application for execution (E. P. No. 1793 of 1933) was presented after his death by the decree-holder, but in view of

what had happened in the objections raised by the plaintiffs and their father to the earlier attachment, the decree-holder only asked for the

attachment of Kamayan's one third share in the property this time. An objection was put in against this attachment on behalf of the plaintiffs but it

was rejected on the ground that the matter had been already decided in June 1933 (Ex. B.). This led to the institution of the present suit with the

object of getting the claim order Ex. B vacated and a declaration to the effect that the properties attached by the first defendant were not liable to

be sold in the execution of his decree granted to the plaintiffs. They alleged in their plaint that the deed of settlement was a gift in fact and did not for that reason bind them. It was also attacked on the ground of the second defendant's unchastity in consequence of which the grant in her favour, it was urged, should be held to have been, as it was for her maintenance, forfeited. The plaintiffs mentioned other grounds for the invalidity of the deed of settlement also but being questions of fact, the decision in regard to those has become final and has not been questioned before me in this appeal. The suit was decreed by the District Munsif of Periakulam but his judgment was reversed by the learned Subordinate Judge of Dindigul on appeal and the suit was ordered to be dismissed. Aggrieved by that judgment and decree the plaintiffs have come up to this Court in second appeal.

3. The first question to decide in this appeal relates to the validity of the deed Ex. 1-a. Learned Counsel for the appellant contends in the first instance that there was no evidence on the record to show that there was an ante-nuptial arrangement between his client's father Kamayan Chetti and the second defendant, in consideration of which this document could have been executed in her favour. Since the alienation was by the plaintiff's father and was only maintained by the execution Court in June, 1933 to the extent of his one-third share, it was not disputed that it would be binding on the plaintiffs if it were found to be for a valid consideration. Nor was it, in view of the Full Bench decision in *Madam Pillai Vs. Badrakali Ammal and Another*, disputed that the bargain "to receive the land" by the second defendant "in discharge of the claim to future maintenance" would not be for an illegal or invalid consideration; but it was urged by learned Counsel for the appellants that the burden of proof in respect of such an agreement would be on the party who asserted it and that the recital in the deed would not, in so far as his clients were not parties to the same, shift the onus to them. Had the plaintiffs not been defeated in the execution Court and had they not brought this suit to get the order passed by the execution Court vacated, there might have been some justification for this contention. But having regard to the decision of the execution Court disallowing their objection, it was for them to establish that the agreement executed by their father was invalid. It is true that the

execution Court had not decided the objections raised by in case the to is It for claim a that it an Kyin Ba Maung Firm M. R. A. E. V. Lordships

their of decision on Rao Sitarama Mr. by placed was Reliance so. this establish them therefore agreement. ante-nuptial no there words other or

consideration want invalid settlement deed alleged plaintiffs The dispute?. property claims he which right ?establish 63 Rule within him, him. prayed

relief secure asserts allegations proving discharge only can And lie obviously would dismissed been have not should his onus suit, bring claimant

defeated upon incumbent When point. doubt leave seem couched Code, Procedure Civil 03, 0.21, terms effect. decree getting succeeded and

year one aside set get sued unless made whom against party conclusive merits, passed although order Such delayed. unnecessarily designedly

having objections account but previous had Court if different very position again. once manner same considered be they necessary 1933, June,

decided heard because merits; death, Kamayan?s after> I.L.R.(1927) Rang. 852, but it was explained by me in Mahomed Kassim Sahib v.

Subramanian Chettiar (1940) 51 L.W. 34, when I, sitting with my esteemed brother Venkataramana Rao, J., drew attention to the observations

which fell from their Lordships "during the course of arguments in that appeal. The facts of the Privy Council decision have been given in a

somewhat cryptic manner and, unless they are closely examined, one is liable to be led astray. It is quite sufficient to say that it does not support

the contention advanced on behalf of the appellants. Nor is it possible to accept the contention put forward by learned Counsel for the appellants

that the recitals in the deed Ex. 1-a would not bind his clients as they were not parties to the document. It might have been otherwise if they were

claiming their own shares but they are not doing so. Their shares were released in June, 1933. The claim in the present suit is in respect of their

father's share; and to that extent at least, whether they are suing as heirs or as co-parceners, they would be bound, prima facie anyhow, by the

recital in the deed. In either case it was incumbent on the plaintiffs to prove that there was no ante-nuptial agreement and the statement by their

father in the deed was not correct; or in other words that the deed of settlement was really a deed of gift and was not binding on them. There is no

evidence on the record on this point, and the plaintiffs must consequently fail. The observations in Muthusami Goundan Vs. Palani Goundan and

Others and Subbaraya Goundan and Others, , support the view in regard to onus which I have taken. I would therefore agree with the lower

appellate Court that the plaintiffs have failed to establish that the deed, Ex. 1-a was invalid for want of consideration.

4. The property was stated in Ex. 1-a to have been given to the second defendant to "live in and enjoy for her maintenance." Since it was

established that she had become unchaste after the lifetime of her husband, the second contention put forward by learned Counsel for the plaintiffs

was to the effect that the life estate must be taken to have been forfeited by her on account of her misconduct and she would not have been entitled

to retain the property that was given to her by her husband for the purpose of her maintenance. Reliance was placed in support of this contention

on the decisions in Nagamma v. Virabhadra I.L.R.(1894)Mad. 392, Lakshmichand v. Anandi (1935) 69 M.L.J. 380 : L.R. 62 IndAp 250 : ILR

57 All 672 , Muhammad Muin-ud-din v. Jamal Fatima I.L.R.(1921) All. 650 and Sita Devi Vs. Maharaja Kumar Gopal Saran Narayan Singh, .

The right of a Hindu widow to maintenance is conditional upon her leading a life of chastity. Unchastity on her part would disentitle her to any

maintenance at least until such time that she did not mend her conduct and return to better ways; but the question to be decided here is different. It

cannot be disputed that the property mentioned in Ex. 1-a had on its execution, come to vest in her. The question to decide is if she should be held

to have been divested of the same on account of her subsequent unchastity. The cases on which reliance was placed by learned Counsel for the

appellant are authorities for the general proposition but do not touch the real question that arises in this case for decision. There is no suggestion

even, not to say proof, that the second defendant was unchaste at the time when she came to hold the life estate under Ex. 1-a or even during her

husband's life time. Had she been proved to have been unchaste at the time when the estate was going to be vested in her, her unchastity would

have prevented it from doing so. But she has been found to be unchaste only after the death of her husband. It would therefore follow that she was

in possession of the property given to her by the deed Ex. 1-a for as long as her husband lived after its execution and even for sometime after his

death. Can she be held then to be divested of that property on the ground of her immoral conduct after his death? The answer to that question

must be in the negative. It was held by their Lordships in (1880) L.R. 7 I.A. 115 (Privy Council) that a widow, who not having been degraded or

deprived of caste had inherited the estate of her deceased husband," would not be . "liable to forfeit that estate by reason of subsequent acts of

unchastity". In the face of this authority it is impossible to contend otherwise. The decisions cited by learned Counsel for the respondent Parami v.

Mahadevi I.L.R.(1909) 34 Bom. 278 and Bommaya Hegade Vs. Srinivasa Hebbara and Jalayakshi, minor by her guardian Anandram Madi,

although to some extent relevant to show that the principle enunciated by their Lordships in (1880) L.R. 7 I.A. 115 (Privy Council) was perhaps

borne by the learned Judges when deciding those cases in mind, do not carry me any further. I would agree with the learned Subordinate Judge

and hold that in the absence of any dum casta clause in the deed Ex. 1 (a) under which the estate had come to vest in the second defendant for her

life, no forfeiture can be found to have been incurred by her on the ground of her subsequent unchastity.

5. The third and the last contention raised by learned Counsel for the appellant was that the deed of settlement should be held to be void as the

grant to the said second defendant's father Ramalinga was--being in consideration of his giving his daughter in marriage--immoral and opposed to

public policy u/s 23 of the Indian Contract Act and if a portion of the deed Ex. I (a) was found to be invalid or void, the remaining portions of the

deed of settlement would have to share the same. fate under the principles contained in Section 24 of the Indian Contract Act. The objection on

behalf of the respondent that the transaction was carried out in this case was met by the plea that Kamayan's estoppel would not bind his sons the

present plaintiffs and that any property being joint family property could be sued for and recovered by them if it was found to have been conveyed

under a deed which is found to be void. It was also urged on behalf of the appellants that the onus to establish that the transaction was a valid one

would be on the alienee or one who was supporting her cause and it would be for the defendants to establish that the alienation was for a valid

consideration and therefore binding on the family. Since a Hindu co-parcener's right in Madras has been held to be transferable merely on

equitable grounds, it was contended that any transfer without a legal or for an insufficient consideration must be held to be invalid.

6. I have in an earlier portion of this judgment determined the question of onus and I see no reason to change that view even if the contention is, as it has been, put more plausibly. It is really the same contention as was advanced before although clothed in a different garb this time. A person who asks an agreement or a conveyance to be declared invalid, on account of its being opposed to public policy has to prove the grounds which would bring it u/s 23 Indian Contract Act. The apparent tenor of the document is against this contention.

7. The contention in regard to the invalidity of the deed Ex. 1 (a) on the ground of its being against public policy and hence wholly void was not raised either in the pleadings or before the lower appellate Court. It was not even mentioned in the grounds of appeal taken on behalf of the appellants in this Court. Their learned Counsel does not dispute these facts but contends that the point raised by him is purely one of law and he is entitled to do so even at the hearing of this appeal. Reliance was placed by him in this connection on the decision in *Alice Mary Hill v. William*

Clarke . I.L.R.(1904) All. 266 where following certain English decisions it was held by a learned Judge of the Allahabad High Court that when the consideration for a contract which is asked to be enforced is found by a Court to be either wholly or in part unlawful, such Court is bound to take notice of that fact and give effect to the same, notwithstanding that the contract appeared on the face of it to be legal or that the unlawfulness of the consideration therefor was never pleaded by the defendant. No exception can be taken to the statement of the law as contained in this decision;

but the point to determine is whether the objection taken by learned Counsel for the appellant raises a pure question of law or a mixed question of law and fact. No party can be allowed to spring surprises on his opponent in a Court of law and it would be tantamount to springing a surprise, if it were possible for the respondent to show that he could have pleaded and proved something that would have met the appellant's contention but

cannot do so as the objection is being raised in appeal. The whole of the argument advanced by Mr. Sitarama Rao, learned Counsel for the appellants, on the question of illegality of Ex. 1-a assumes that the alienation to Ramalingam Chetti was in consideration of his daughter's marriage.

There is nothing in the deed which would lead me to infer this beyond any reasonable doubt. There is a mention of the agreement with Ramalinga

having been arrived at in the deed at the time when the marriage contract between his daughter Virammal and Kamayan Chetti was entered into,

but this does not necessarily show that the two contracts were really parts of the same transaction. It is quite possible that the two agreements

between these three parties were separate and independent and did not constitute to be two terms of the contract of marriage although the fact that

they were entered into at or about the same time does give rise to a certain amount of suspicion that they might have been interdependent. But

there is no evidence or even a suggestion on the record that the agreement with Ramalinga formed a consideration for the agreement of his

daughter's marriage with Kamayan Chetti and this was presupposed by learned Counsel for the appellant as a basis for his arguments. Mr.

Venkatachari on behalf of the respondent urged--and I am inclined to agree with him--that, if this question had been raised on behalf of the

plaintiffs in the trial Court, it would have been open to his client to show that the grant was really made in favour of Ramalinga Chetti for the

services that he was called upon to render in regard to the management of Kamayan Chetti's property. There is a reference to that fact in the deed

itself. In view of these facts I am of opinion that the contention raised by learned Counsel for the appellants is one of mixed law and fact and should

not be permitted to be raised at this stage.

8. It is unnecessary in these circumstances to consider what the decision would have been if it were found that the conveyance to Ramalinga Chetti

was made in consideration of his daughter's marriage and not on account of any other duties to be rendered by him. Learned Counsel for the

respondent contended that this case would have to be, in view of the facts that it was a completed conveyance and executed even according to the

plaintiff for an illegality or immorality which had been already committed, governed by the principle on which the cases in *Mt. Mahtab-un-Nissa*

Vs. Rafaqat Ullah and Others, , *Ram Sumran Prasad v. Gobind Das* I.L.R. (1926)Pat. 646 and *Nanjundaswami Chetti v. Kanagaraju Chetti*

(1918) 36 M.L.J. 242 : ILR 42 Mad, 154, were decided. But having regard to what I have said before, it does not appear to be necessary to go

into this question now. For the above reasons the appeal fails and is dismissed with costs.

(Leave to appeal is refused).