
(1945) 09 MAD CK 0021
In the Madras High Court

Thadavarthi Bapayya and Others

APPELLANT

Vs

Myneni Pundarikakshayya

RESPONDENT

Date of Decision : 12-09-1945

Acts Referred:

Citation : AIR 1946 Mad 198 : (1946) ILR (Mad) 648 : (1945) 58 LW 652 : (1945) 2 MLJ 508

Hon'ble Judges : Patanjali Sastri, J

Bench : Division Bench

Judgement

Patanjali Sastri, J.—These two second appeals arise out of two connected suits tried by the Court of the Subordinate Judge, Tenali. As the parties were differently arrayed in the suits it will be convenient to refer to them according to their description in the cause-title of the main suit, O.S. No. 61 of 1940, which was brought for possession with mesne profits of certain lands of the plaintiff sold during his minority by his natural father acting as his guardian. The first defendant was the vendee and defendants 2 to 5 are his sons.

2. The plaintiff's adoptive father, Chelamayya Chowdari, carried on dealings with the first defendant a money lender, and for the amount due in respect of such dealings executed a promissory note (Ex. D-7) for Rs. 1,465-3-5 on 5th June, 1923. He died in January, 1925, leaving him surviving his widow Srikrishnamma, whom he had authorised to make an adoption, and she accordingly adopted her sister's son, the plaintiff, who was then a minor. On 16th April, 1925, she executed for herself and on behalf of her son as his guardian a promissory note for Rs. 4,540-6-8 in favour of the first defendant. The note (Ex. D-6) recited that a sum of Rs. 2,480-6-8 was due in respect of her husband's dealings including the principal and interest due under Ex. D-7 and the balance Rs. 2,060 was advanced in cash to her on that day. The total amount was to carry interest at 12 per cent, per annum. The purpose for which Rs. 2,060 was borrowed by her was not mentioned in the note. This note was renewed by her on 6th April, 1928, by the execution of another note, Ex. D-5, for Rs. 5,416-5-11 being the principal

and interest due under the previous note Ex. D-6. Soon after, she died in June, 1928, and her sister's husband and natural father of the plaintiff, China Seshiah, assumed control and management of the plaintiff's properties and affairs and continued in such management until the plaintiff attained majority in December, 1937. On 21st September, 1928, he executed the note Ex. D-4, for Rs. 5,725-5-7 as guardian and natural father of the plaintiff in renewal of the previous note of Srikrishnamma, and Ex. D-4 was in turn renewed by Ex. D-3, dated 19th September, 1931, which was for a sum of Rs. 7,845-14-1 then found to be due.

3. As the debt had remained unpaid for a long time the first defendant began to press for payment and, as a result, the sale now impugned was arranged with a view to discharge the debt. An agreement was accordingly entered into on 24th October, 1933, between the first defendant and China Seshayya purporting to act as the guardian of the plaintiff, providing that the lands now in question, 9 acres 11 cents in extent, should be conveyed to the first defendant for Rs. 9,000 out of the sum of Rs. 9,883-3-0 found to be due that date, and for the balance Rs. 883-3-0 a promissory note should be given. Possession of the lands was delivered immediately in pursuance of the agreement, but the conveyance and the promissory note were executed on 17th August, 1934, the parties in the meanwhile having taken legal advice from a leading lawyer at Bapatla who settled the draft of the deed of conveyance. As this deed, marked as D-1, has been the subject of much argument before us, it is necessary to set out the relevant portions which have been officially translated as follows:

Deed of sale of Immovable property for Rs. 9,000 . Under the last promissory note, dated 19th September, 1931, minor Pundarikakshayya became indebted to you in a sum of Rs. 9,883-3-0 till 24th October, 1933, so you have been pressing us to discharge the said debt. Thereupon we met, with disputes myself contending to the effect that the amount of the principal and the interest due in regard to the amount borrowed in cash by Srikrishnamma Garu on behalf of the minor is not binding on the minor and yourself contending that the minor is liable to discharge the entire debt inasmuch as Srikrishnamma Garu borrowed the said amount in cash for effecting repairs to the lands of the minor and for the expenses of the family of the minor. In these circumstances as we thought that it is not fair to enter into litigation and put ourselves to expense and trouble, as the minor is not a very rich man and as the prices of lands have fallen on account of economic depression and in accordance with the advice of some mediators, yourself and myself on behalf of the minor have agreed as follows :

(1) As the debt was contracted by the father and the minor is liable in all respects to discharge the debt of Rs. 4,776, the same should be fully credited by you.

(2) As regards the debts contracted by the mother on behalf of the minor, you should not compel the minor to the effect that he should discharge the same; as consideration herefor--

(1) The land of the extent of 9 acres 11 cents belonging to the minor and described in the schedule, of the value of Rs. 3,644 according to the prevailing market value at the rate of Rs. 400 per acre, should be sold to you on 24th October, 1933, for a sum of Rs. 9,000 and the (said sale) consideration of Rs. 9,000 should be credited towards the promissory note, dated 19th September, 1931--having agreed as above the said land has been sold to you on behalf of the minor.

(2) The said land has been delivered possession of to you on 24th October, 1933, itself.

(3) The sum of Rs. 883-3-0 has been included in the promissory note executed this day in your favour on behalf of the minor.

4. All the terms of this document have been agreed to each in pursuance of the other. Therefore no one has any right whatever to separate the terms.

5. The plaintiff, besides denying everything connected with the impugned sale including his father's indebtedness, his mother's borrowing, his natural father's defacto guardianship and management of his properties, specifically alleged that the recitals in the sale deed as to disputes having been raised and settled by mediation in regard to the binding character of the borrowing by the plaintiff's mother and in regard to the value of the lands conveyed were " false and were invented in support of the sale deed dated 17th August, 1934." He also averred that his natural father China Seshayya was neither his legal nor natural guardian and that the promissory note executed by him in 1928 and 1931 were not valid and binding on the plaintiff. The defendants in their written statements pleaded, inter alia, that the various borrowings by the plaintiff's adoptive father and, after his death, by Srikrishnamma were true and binding on the plaintiff, that China Seshayya was fully competent as the de facto guardian of the plaintiff to execute renewals in respect of the pre-existing liability on behalf of the plaintiff and eventually to convey the properties in question in satisfaction of the binding debts and that the sale was therefore valid and binding on the plaintiff. They also pleaded that the recitals in the sale deed were true and that the transaction was valid as a settlement and adjustment of the disputed claims mentioned therein. The last mentioned plea was not specifically made the subject of an issue, but issue 4 which raised the question " whether the sale deed and the promissory notes executed by China Seshayya are true and supported by consideration and binding on the plaintiff," is in sufficiently wide terms to cover the plea.

6. The trial Court found that the debts said to have been incurred by the plaintiff's adoptive father were true and binding on the plaintiff, that the borrowing by his mother was mainly for repairing his lands and resulted in benefit to his estate and the plaintiff, having inherited her separate property was, in any case, bound by the debt, that China Seshayya was managing the plaintiff's estate efficiently and prudently as his de facto guardian and was competent to execute the promissory notes, Ex. D-4 and D-3, and that the sale

deed Ex. D-1, having thus been executed for the discharge of debts binding on the plaintiff was valid and could not be questioned by him. The learned Judge also found, accepting the evidence of the third defendant, the sale was the result of a settlement of disputed claims as recited in the deed. He accordingly upheld the transaction and dismissed the plaintiff's suit. As a corollary from these findings the learned Judge decreed the connected suit which was brought to enforce the promissory note for Rs". 883-3-0 executed by China Seshayya on the same day as part of the transaction.

7. From this decision, the plaintiff preferred appeals to the District Court, Guntur. The learned District Judge, while agreeing with the trial Court as regards the binding character of the debt incurred by the father, the de facto guardianship of China Seshayya and his competency to renew the anterior obligation incurred by his father, held, differing from that Court, that the borrowing of Rs. 2,060 by the plaintiff's mother on the date of Ex. D-6 was not shown to have been made for any purpose such as would bind the plaintiff. He rejected as untrustworthy the evidence of the defendant's witnesses that the sum was borrowed for repairing and reclaiming lands belonging to the plaintiff, and found that the recitals in the sale deed to that effect were most probably thought of only at that time, as it was felt necessary by the defendants to make out a case that the lending was for a binding purpose, no such purpose however having been mentioned either in Ex. D-6 or in its subsequent renewals. In this view, the Court held the sale to be binding on the plaintiff only to the extent of his father's debt which on the date of the agreement stood at Rs. 4,776 and not binding to the extent of Rs. 4,224 the balance of the consideration of Rs. 9,000 recited in the deed. That plaintiff's suggestion that this sum was the real consideration was accepted in preference to the defendant's case that the lands being worth not more than Rs. 400 per acre, the consideration was only Rs. 3,600 and odd. The Court accordingly set aside the decree of the trial Court and passed a decree directing the defendants 3 to 5 (to whose share the suit properties had been allotted at a partition in the family of the defendants) to pay to the plaintiff Rs. 4,224, with interest at six per cent. per annum, from date of plaint, on or before a specified date and, in default of such payment, to deliver possession of the suit properties to the plaintiff on the latter paying to them Rs. 4,776 with interest at the same rate from date of plaint till date of payment, with sundry directions as to costs. In the connected suit based on the promissory note, the appeal was allowed and the claim was rejected with costs. It is from these decrees that these second appeals have been brought. In S.A. No. 1342 of 1944, which arises out of the. main suit, the plaintiff has preferred a memorandum of cross-objections, claiming that an unconditional decree for possession should be passed in his favour.

8. Since the filing of these appeals an important ruling has been given by a Full Bench of this Court in A.S. No. 81 of 1944 (Myneni Pundarikakshayya Vs. Kondamudi Sreeramulu,) which also arose out of a suit by the present plaintiff to set aside another alienation by China Seshayya to a third party in the course of his management as the de facto guardian of the plaintiff. There too the sale

was for discharging debts incurred by the plaintiff's father, renewed by his mother and later renewed by China Seshayya, and it was effected within three years of the renewal by China Seshayya but beyond three years of the renewal by the mother. The Full Bench held that a de facto guardian has no power to bind a minor or his estate by his promissory note or acknowledgment of liability, and that the sale was therefore unsupported by consideration as the debts in discharge of which the sale was executed, though binding on the plaintiff, were barred and unenforceable at the time of the sale. Possession of the properties sold was accordingly decreed with mesne profits from the date of the sale. That decision applies here in full force as the facts are essentially similar and the plaintiff's suit must succeed.

9. It is however pointed out for the defendants, appellants, that the lower appellate Court has not determined the question as to whether the transaction could not be upheld as a bona fide settlement of disputed claims as recited in the sale deed and as spoken to by the third defendant in his evidence, and it is urged that we should either decide the question in exercise of our powers u/s 103 of the CPC or remit the case for a finding by the lower appellate Court on the point. It is true that the learned District Judge has said nothing on this aspect of the matter presumably because it was not put forward before him. Para. 6 of his judgment where he sets out the points for determination in the appeals makes no reference to it. But the facts found by the learned Judge in regard to the binding character of the borrowing by the plaintiff's mother would seem to conclude this point against the appellants. As already stated, he has found that the defendant's assertion that she borrowed the sum of Rs. 2,060 for repairing and reclaiming certain unproductive lands of the plaintiff was not true and was an "after thought" which it was felt necessary to introduce in the sale deed, after consultation with the lawyer who settled the draft, to make out a case that the borrowing was for a binding purpose. If this finding is accepted as it must be in these second appeals, in the absence of any suggestion that there was no evidence to support it, the defendant's plea that there was a bonafide dispute as to the purpose of the loan and that it was settled at the time of the agreement must fall to the ground. (See judgment in Appeal No. 204 of 1943.) It was said that the learned Judge expressed this opinion in considering another point in the case and that it should not be regarded as a finding of fact on the question whether the sale was not binding on the plaintiff as a bona fide settlement of disputed claims, which issue was not considered by the learned Judge. We cannot agree. A finding of fact by the lower appellate Court on a relevant issue must, in our opinion, be accepted as final even where such finding is material for the determination of a question which, though not raised in the Court below, is raised here.

10. The defendants next claimed that in any case the plaintiff should be directed to pay the defendants the sum of Rs. 4,776 being the principal and interest due on the date of the agreement of sale in respect of the debt incurred by the plaintiff's father which has been held to be binding on the plaintiff. This point is

also covered by the Full Bench decision where a similar claim was negated as the plaintiff could not be said to have derived any benefit under the sale, the father's debt having become barred and unenforceable by that time.

11. It remains only to consider the plaintiff's claim to mesne profits. It was urged for the defendants that as the sale was only voidable by the plaintiff on attaining majority and not void ab initio, mesne profits could be allowed only from the date of his plaint wherein he first repudiated the transaction, and not before. In the Full Bench decision referred to already there was no discussion of this question and so the matter was allowed to be argued before us. Reference was made to *Myneni Pundarikakshayya Vs. Kondamudi Sreeramulu, and Ramaswami Aiyar and Others Vs. A.S. Venkatarama Aiyar, ,* in support of the defendant's contention. Those cases related to sales of coparcenary property by the manager of a Hindu joint family and it was held that such alienations, where no necessity was established, being only voidable at the instance of other coparceners and not void, the alienee was accountable for mesne profits only from the date of suit if there was no earlier repudiation of the sale. It seems to us that the test of void or voidable is not always decisive on the question of liability for mesne profits. Rejecting the contention that a vendee who obtained a sale of Immovable property by practising fraud on the vendor was not liable for mesne profits until the vendor elected to avoid the transaction, the Privy Council observed in *Satgur Prasad v. Harnarain* (1932) 62 M.L.J. 451 : L.R. 59 IndAp 147 : ILR 7.Luck. 64

It was in effect a conveyance, under which the title to the properties passed to the defendant, and which had to be formally set aside. Before the institution of the suit the defendants could no doubt have made a valid transfer to an innocent purchaser, but it by no means follows from this that as between him and the person he had defrauded his possession was not wrongful." (Italics ours.)

12. Even in the case of a sale of joint family property their Lordships make a distinction between a case where the sale is set aside unconditionally and a case where it is set aside only on the payment of a certain sum of money. On the other hand, in *Kokkonda Venkata Rama Surya Gopala Krishnamurthy and Others Vs. Surabhi Satyanarayana, , Varadachariar, J.,* who delivered the judgment of the Bench held that a reversioner suing to recover possession of lands alienated by a Hindu widow without necessity was entitled to mesne profits prior to suit even where the decree for possession was conditional on payment of certain sums. The learned Judge distinguished cases of alienations by a father in a Mitakshara joint family and by the guardian of a minor pointing out that in such cases Articles 126 and 44 respectively of the Limitation Act contemplate suits to set aside the alienation whereas Article 141 which applies to suits by reversioners merely refers to a suit for possession. Explaining the decision in *Myneni Pundarikakshayya Vs. Kondamudi Sreeramulu, ,* the learned Judge pointed out that an alienation by a Hindu widow without any necessity was voidable only in the sense that it was not so absolutely void that it could not even be ratified by

the reversioner, but it was not necessary for him to seek the intervention of the Court to set it aside before he became entitled to possession. The position in the present case is closely analogous. While an alienation by a de facto guardian for necessity has been held to bind the minor, this Court has repeatedly held that he need not sue to set aside an alienation without necessity by such a person, within three years of attaining majority, but can sue for possession treating it as a nullity just like a reversioner (vide Ramaswami Aiyar and Others Vs. A.S. Venkatarama Aiyar, and Ramaswami Pillai v. Kasinatha Aiyar (1932) 62 M.L.J. 451 : L.R. 59 IndAp 147 : ILR 7.Luck. 64 . That is to say, no improper alienation by a de facto guardian is binding on the minor until it is set aside, although it may be voidable in the sense that he may elect either to ratify it or avoid it by treating it as a nullity. Here the sale to the defendants having been made by a de facto guardian without any valuable consideration to support it, the defendants should be held accountable for mesne profits from the date of the agreement for sale when possession was delivered to them.

13. In the result, the appeal (S.A. No. 1342 of 1944) is dismissed with costs. The memorandum of objections is allowed with costs and there will be a decree for possession of the properties claimed. The case will be remitted to the trial Court for ascertainment of the mesne profits. The costs of the plaintiff in all the Courts will be provided for in the final decree. S.A. No. 1343 of 1944 is dismissed but we make no order as to costs as it follows the result of the other appeal.