

(1932) 12 MAD CK 0027
In the Madras High Court

Thayammal

APPELLANT

Vs

Sankaranarayana Pillai and Another

RESPONDENT

Date of Decision : 14-12-1932

Acts Referred:

Citation : AIR 1933 Mad 836 : (1933) 38 LW 734

Hon'ble Judges : Curgenvén, J

Bench : Division Bench

Judgement

Curgenvén, J.—The plaintiff sued his father, defendant 1, for partition and the point arose for decision whether a mortgage bond, Ex. 7, executed by the father on 29th July 1922 for Rs. 1,000 to defendant 6 was for valid consideration which was binding upon the son. Both the lower Courts have found that the money was actually paid but they differed with regard to the question of its binding character so far as the excess over Rs. 108-5-0 is concerned, this sum having admittedly been devoted to the discharge of prior debts. Out of the balance of Rs. 891-110 the learned District Munsif has found that a sum of rather less than Rs. 400 was spent by defendant 1 upon constructing a house, a purpose binding upon the plaintiff. He has analysed such evidence as there is with regard to the amount so spent and evidently found it very inconclusive, because he concludes by saying that taking a very lenient view it may be that the expenses of restoration and improvement of the house together with the money spent in discharge of prior debts might have amounted to Rs. 500. When this finding came up for consideration on appeal the learned Subordinate Judge expressed the view that the sum arrived at by the lower Court was based purely upon a surmise and that it was incumbent upon the mortgagee to prove that defendant 1 did build a house and how much exactly he had spent in so doing. That I think, is incontestably correct, and although the learned Subordinate Judge's discussion of the evidence has been criticised on one or two points I do not think that the criticisms affect the correctness of his general position that there really is no evidence to show how much money was devoted to this object. The most that has been shown is that about that time defendant 1 did do some building, but

whether it amounted to improving an already existing house or to more than that is not clear. Still less is it clear how much of the money received under the mortgage was spent in the operation. I cannot therefore say that the lower appellate Court is wrong in describing the District Munsif's conclusion as a surmise which is only another word for guess, nor is it even possible to name with certainty, the minimum sum as having been so expended. In these circumstances, I can find no justification in second appeal for disturbing the finding upon this point of the lower appellate Court.

2. It is then urged on the authority of the Privy Council case in AIR 1927 37 (Privy Council) that if the mortgagee made due inquiry, she was not bound to account for the actual expenditure of the money. That would no doubt be the case if such a plea had been raised. There is indeed a statement by the mortgagee's husband that defendant 1 wanted to build a house with the money, but the question of any real inquiry being made as to how much was required has not been investigated by the lower Court and it is plain from para. 7 of the written statement that defendant 6 staked her case upon proving the actual application of the loan. This plea accordingly cannot be raised now. A further point is taken that even if the money is not proved to be binding upon the plaintiff, provision should be made in the partition decree for the payment of the debt, on the footing that a son is liable for his father's debt. Reference is made to the Full Bench case in Koduru Venku Reddi and Another Vs. Magunta Venku Reddi and Others, in which this principle has been given expression to. It is no doubt the case that where creditors put forward their debts for the purpose, Courts should provide in the decree for their discharge before arranging for the partition of the net assets. In this case however no such application to the Court was made and the mortgagee contented herself, with putting forward her claim in that capacity only and not in the subsidiary capacity of a simple debtor.

3. The question is whether I ought to disturb the finding now in order that this omission may be rectified. The other side has referred me to a recent Privy Council case in AIR 1932 182 (Privy Council) in which a similar point was taken in the appellate stage but the Judicial Committee refused to entertain it on the ground that it was not taken in the Courts below and might involve, as was conceded, questions of fact not yet tried. I think that the same objection exists in the present case. A necessary condition for including the debt in the decree is that it should not have been contracted for an illegal or immoral purpose, and there is no question that that point would have to be tried before the decree could be modified in the manner the appellant desires. The Full Bench judgment was passed in November 1926, and must have been available early in 1927. It is true that the decree in this case was passed in December 1926, but the appeal was not presented by the plaintiff until September 1927. The present appellant might therefore have taken steps to bring this matter to the notice of the Court in that appeal. Apart from that the Full Bench only affirmed a rule of law which was common knowledge before and will be found set forth in Mayne's Hindu Law. I cannot therefore find any sufficient excuse for the matter being only

brought up in second appeal and inasmuch as the appellate decree is not open to objection on the score of any illegality I cannot set it aside in second appeal on this ground. The second appeal is dismissed with costs of respondent1. .