

(1917) 10 MAD CK 0042
In the Madras High Court

Tirumalai Muthuveera Paramasiva Venkitasami Naicker

APPELLANT

Vs

Muthusami Pillai and Another

RESPONDENT

Date of Decision : 25-10-1917

Acts Referred:

Transfer of Property Act, 1882 — Section 72

Citation : 45 Ind. Cas. 949

Hon'ble Judges : Seshagiri Aiyar, J; Napier, J

Bench : Division Bench

Judgement

Seshagiri Aiyar, J.—The plaintiff obtained a usufructuary mortgage from the father of the 1st defendant in 1906. He was in possession for three years. After that period, the tenants whom he had let into possession colluded with one Sekhomoni Animal, a neighbouring Zemindarini, and carried away the crops on the land without paying the landlord's share. Thereupon, the plaintiff instituted criminal proceedings against the tenants and they were convicted. For "the expenses incurred in conducting the criminal proceedings, the 2nd defendant, who is the step-mother of the 1st defendant, executed a document, which is styled a Varthamanam, in December 1909. The present suit is brought against both the defendants on that document. The 1st defendant denied the right of the 2nd defendant to be his guardian and contended that the criminal litigation was not conducted bona fide and that he is not liable for the expenses incurred. The District Munsif came to the conclusion that the criminal prosecution was not necessary for protecting the interest of either the mortgagor or the mortgagee, that the expenses incurred were not covered by any of the provisions of Section 72 of the Transfer of Property Act, and that, under any circumstances, the plaintiff is not entitled to any decree against the 1st defendant who was a minor at the time of Exhibit A. He dismissed the suit. In appeal the Subordinate Judge differed from the District Munsif upon the question whether the criminal proceedings were necessary to protect the estate. His finding is that as Sekhomoni Ammal disputed the ownership of the defendants it was necessary to have fond acted criminal proceedings in order to protect the estate. He also held

that the document executed by the 2nd defendant was binding upon the 1st defendant. He gave a decree to the plaintiff for Rs. 800. The decree is personal and does not charge the property of the 1st defendant.

2. No serious attempt was made before us to impeach the finding of the Subordinate Judge that the expenses of the criminal prosecution were necessary. If we heard the case on the facts, we may not have come to the same conclusion as the lower Appellate Court has done. u/s 72, Clause (c), of the Transfer of Property Act, the mortgagee, in possession may add any moneys spent in supporting the mortgagor's title to the property. It is open to doubt whether an expensive criminal litigation carried on for the purpose of getting convicted certain persons who had reaped and carried away the crops on the land can be regarded as a proceeding necessary to support the title of the mortgagor, But, apparently the accused were set up by a rival claimant, and it appears from the evidence that the 2nd defendant requested the plaintiff to take criminal proceedings to protect the 1st defendant's title to the property. As we said before, the matter has not been seriously argued before us, and we are not prepared to differ from the Subordinate Judge on this point.

3. The further question is whether the expenses incurred were reasonable. The mortgagee in possession must act as a prudent owner. That is a question of fact, on which the Subordinate Judge has given a finding which has not been seriously attacked in this Court. We are bound by that finding. On these two findings there can be no doubt that the mortgagee is entitled to be indemnified in respect of the expenses incurred by him. The cases of *Godfrey v. Watson* (1747) 3 Act. 517; *Sandon v. Hooper* (1643) 6 Beav. 246 and *Fenton v. Blackwood* (874) 5 P.C. 167 lay down this proposition in clear terms.

4. The next question is whether a separate suit is maintainable in respect of the expenses. Mr. Jagannadha Ayyar contended that the only remedy open to the mortgagee, who has spent money, under Clauses (a) to (e) of Section 72, is to add them to the moneys due under the mortgage and to insist upon being paid those sums before redemption, and not bring a separate suit. The language of Section 72 is against this contention. The words are, "the mortgagee may, in the absence of a contract to the contrary, add such money to the principal money". It is a permissive provision and not an obligation imposed upon the mortgagee. As we read the section, it seems to us that the Legislature intended to give larger rights to the mortgagee than he would otherwise have. Every person who spends money for the benefit of another is entitled to sue for that money. The ordinary rules of contract would secure him that right. In the case of a mortgagee, the Legislature apparently intended to put him on a higher footing. He is given the liberty of adding the expended moneys to the amount of the mortgage, thereby securing to the moneys a charge upon the property. The use of the word may shows that it is an additional remedy conferred upon the mortgagee and that it is not the sole remedy. The learned Vakil for the appellant has been able to find a case which certainly supports him in his contention. In *Bavanna v. Bulagurivi* 9

M.L.J. 177 it was held by Justice Sabramania Aiyar and Justice Boddam that the only right secured u/s 72 is to add the amount to the mortgage money. This judgment has not been referred to or followed in any of the subsequent cases in this or any other High Court. With all respect to the learned Judges, we are unable to agree with their conclusions. There is no discussion of the section of the Act nor is there any citation of authorities in support of the proposition laid down by the learned Judges. Mr. Jagannatha Ayyar referred us to *McEwan v. Crombie* (1884) 25 Ch. D. 175 : 49 L.T. 499. One preliminary observation may be made as regards that case, and that is the learned Lord Justices had not to construe any Act of Parliament as we have to do. Lord Justice Cotton points out that the right of redemption is itself an indulgence granted to the mortgagor, and that he would not be allowed to exercise that right except on condition of paying the mortgagee any expenses which have been properly incurred. He adds that the mortgagee's right to bring actions for the debt is not permissible, because the condition imposed by a Court of Equity is not in the nature of a contract which can be independently enforced. As we understand the learned Lord Justice, he seems to have laid down that the Common Law Courts should not entertain an action for the debt due in a matter which is purely within the jurisdiction of the Chancery Court and which liability the Chancery Court is alone competent to impose as a condition of redemption. This principle can have no application to India. Having regard, as we said before, to the language of Section 72 of the Transfer of Property Act, we are unable to agree with the contention that the only remedy open to the mortgagee is to insist upon being paid at the time of redemption. Moreover, in the present case, it cannot be said that there was no consideration for the bond given by the 2nd defendant to the plaintiff. Undoubtedly money has been spent on her behalf and apparently at her request, and I see no reason for holding that the bond sued on is not supported by consideration. The decision of the Allahabad High Court in *Imdad Hasan Khan v. Badri Prasad* (1898) A.W.N. 90 : 9 Ind. Dec. 617 impliedly builds that there is an independent cause of action for expenses incurred under any of the clauses of Section 72. We must, therefore, overrule this contention.

5. One other minor contention may be disposed of before dealing with the principal point argued in the case.

6. The learned Vakil for the appellant argued that, as the 2nd defendant is only the step-mother, she was not the natural guardian of the 1st defendant and, therefore, the bond will not bind him. The question was not very fully argued, and therefore we do not propose to express any definite opinion upon the question whether the step-mother is a guardian under the Hindu Law. There is one case of *Lukmee v. Umur Chund Deo Chund* 2 Bom. Sud. 144 and another in the North Western Provinces in *Nunkoolal v. Shoodra* (1847) N.W.P. 115 cited in *Trevelyan on Minors* 5th edition, page 51, in which it was held that a step-mother is entitled to be the guardian of her step-son. On the other hand, we have *Maharanee Ram Bunsee Konwaree v. Maharanee Soobh Koonwaree* 7 W.R. 321 where it was held that she is not. I do not think the fact that she is not the heir

to her step-son is conclusive on the question. As at present advised, we are unable to think that in the absence of nearer relations she is not entitled to act as the guardian of her step-son. In *Sundar Moni Dai v. Bangsidhar Patnaik* 17 C.L.J. 405 Mookerjee and Beachcroft, JJ., appointed the step-mother of the minor to be his guardian. In the present case the step-mother was the sister of the 1st defendant's own mother. We, therefore, think that no valid objection can be raised on the ground that she is not entitled to act as guardian.

7. The main question is whether, on a contract by the guardian of a Hindu, the minor's person or his property can be charged with liability. We feel no doubt that the decree against the 1st defendant personally is wrong. It was pointed out by the Judicial Committee in *Waghela Rajsanji v. Shekh Masludin* 11 B.s 551 : 11 Ind. Jur. 315 that a guardian cannot enter into a transaction so as to charge the minor, on attaining majority, with personal liability. Therefore the decree is wrong, in so far as it makes the 1st defendant personally liable. But we have jurisdiction to see that a proper decree is passed, although there is no memorandum of objections or cross-appeal before us. Now the question is whether the property of the minor should be held liable. Mr. Jagannadha Ayyar laid emphasis upon the decision of the Privy Council in *Indur Chunder Singh v. Radhakishore Ghose* 19 C.a 507 : 9 Ind. Dec. 782 and argued that unless the guardian created a charge upon the property, no decree should be passed against the estate of the minor. It is necessary to examine this decision very carefully to see what it is that was actually decided by the Judicial Committee in that case. In the first place, the contract, although by the guardian of the minor, was not entered into in that capacity. A renewal of a lease was taken in the name of the mother and grandmother of the infant. The description in the document is that they were the mother and grandmother of the boy. The document does not purport to have been executed as guardians. Further it was a fresh contract entered into by the ladies and in the litigation that ensued, the minor was sought to be charged with liability for this contract. Lord Hannen delivering the judgment of the Boardpoints out, in more than one place, that the transaction was not entered into as guardians of the minor. On page 512 it is said: The lessees (referring to the mother and the grandmother) undertook themselves to pay the rent." on page 513 it is stated that the plaintiff was asking the minor "to fulfil the obligations entered into by the lessees in their own name." Referring to the earlier case of *Hanoomanpersaud Panday v. Musammatt Babooee Munraj Koonweree* 6 M.I.A. 393 His Lordship observes: "Further the managers of an infant's estate were actually dealing by way of mortgage with a portion of that estate." The view taken in *Indur Chunder Singh v. Radhakishore Ghose* 19 I.A. 90, comes to this, that, with reference to transactions entered into personally by the guardian of the minor, his estate, on his attaining age, should not be held liable. We do not think this decision should extended to cases which are not covered by the facts proved in that case. After *Indur Chunder Singh v. Radhakishore Ghose* 19 I.A. 90 : 9 Ind. Dec. 782 this Court had to deal with the question in a number of cases. In *Subramania Ayyar v. Arumuga Chetty* 26 M.

330 it was held that on a bond executed by the guardian the minor's estate can be made liable. *Duraisami Reddi v. Muthial Reddi* 31 M.s 458 decides the very question we have now to decide. *Regulla Jogayya v. Vencatarathnamma* 5 Ind. Cas. 27h 83 though it is not a case of minor, enunciates the same principle. In *Sanka Krishnamurthi v. Bank of Burma* 11 Ind. Cas. 79 : (1911) 1 M.W.N. 385 : 11 M.L.T. 56, the present Chief Justice points out that, by applying the principle of subrogation, the estate of the minor can be proceeded against for a proper debt incurred on behalf of the minor. Lastly we have *Padma Krishna Chettiar v. Nagamani Ammal* 30 Ind. Cas. 574. It lays down that a minor's estate can be made liable for a debt contracted by the guardian. Although a great deal may be said in favour of the position that the Hindu Law liability should not be extended to cases under the Negotiable Instruments Act, there can be no question that in case of bonds like the present one, the liability of the minor for debts properly incurred on his behalf can be charged against the estate. We see no reason for not following this catena of decisions in this Presidency and for referring the case to a Full Bench. In a very recent case reported as *Swaminatha Aiyar v. Srinivasa Aiyar* (1917) M.W.N. 278 Justice Abdur Rahim and Justice Spencer held that on a personal contract entered into by a trustee the minor's estate should not be held liable. This decision has been dissented from by *Kumarasami Sastri, J.*, in *Ammalu Ammal v. Namagiri Ammal* 43 Ind. Cas. 760: (1918) M.W.N. 110, but *Sadasiva Aiyar, J.* is inclined to agree with it. It is not necessary for us to express any opinion one way or the other upon the actual conclusion come to in the case. The learned Judges point out that the case of a guardian of an infant stands on a different footing from the case of a trustee. As Mr. Krishnasami Aiyar suggested, the trustee has a legal estate in him and consequently any contract entered into by him must prima facie be taken to be chargeable only against him personally or against the estate in his hands. The guardian of a minor occupies a different position, for, as he enters into a contract on behalf of the minor who is the legal owner of the property, he must be deemed to have intended to charge the estate of the minor with liability. In this view *Swaminatha Aiyar v. Srinivasa Aiyar* 38 Ind. Cas. 172 : 32 M.L.J. 259 (1917) M.W.N. 278 does not affect the present case. We are, therefore, of opinion that the estate of the minor is liable for the debt sued on. The decree of the Subordinate Judge must be modified by stating that the minor is not personally liable but only his property. With this modification the second appeal must be dismissed with costs.

8. Napier, J.--I agree.