

(1917) 10 MAD CK 0012
In the Madras High Court

Tirumalai Muthuveera Paramasiva Venkitaswami Naicker

APPELLANT

Vs

Muthusamy Pillai and Another

RESPONDENT

Date of Decision : 25-10-1917

Acts Referred:

Transfer of Property Act, 1882 — Section 72

Citation : (1918) 34 MLJ 177

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

Bench : Full 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 Ammal, a neighbouring Zamindarini 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 second defendant who is the step-mother of the 1st

defendant executed a document, which is styled a vartamanam, 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 circumstance 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.

2. 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 conducted criminal

proceedings in order to protect the estate. He also held that the document executed by the second 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.

3. 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.

4. 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 Atk. 517, *Sandon v. Hooper* (1843) 6 Beav.246, and *Fenton v. Blackwood* (1870) L.R.5 167, lay

down this proposition in clear terms.

5. The next question is whether a separate suit is maintainable in respect of the expenses. Mr. Jaganatha Aiyar 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. Balaguini* (1899) 9 M.L.J. 177, it was

held by Justice Subramania 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 in 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 Aiyar referred us to *McEwen v. Crombie* (1883) 25 Ch. D. 175. 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 a 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 ILR (1898) A. 401, impliedly holds 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.

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

7. The learned Vakil for the appellant argued that as the second defendant is only the step-mother, she was not the natural guardian of the 1st

defendant and therefore her 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 in Lukmee v. Umur Chand Deo

Chund 2 Bom.Rep 144, and another in the North Western Provinces in Nunkoolal v. Shoodra N.W.P. Sud. C. Decisions for 1847, p 115 cited in

Trevelyan on Minors, 5th Edition, p. 51, in which it has been held that a step-mother is entitled to be the guardian of her step-son. On the other

hand, we have Maharanee Ram Bunsee Koonwaree v. Maharanee Soobh Koonwaree (1867) 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 Sunder Moni Dai v. Bansidhar Patnaik (1912) 16 I.C. 900,

Mookerjee and Beachcroft, JJ. appointed the stepmother of a 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.

8. 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. Sheikh*

Masludin ILR (1887) B. 551, 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. Jagannatha Aiyar laid emphasis upon the decision of the Privy Council in *Indur Chunder Singh v. Radha Kishore Ghose* ILR

(1892) C. 507, 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 was 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 grand-mother of the infant. The description in the document is that they were the mother and grand-mother 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 Board points out, in more

than one place, that the transaction was not entered into as guardians of the minor. In page 512 it is said: "'the lessees (referring to the mother and

the grand-mother) undertook themselves to pay the rent'". In 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 *Hanooman Prasad Panday v. Mussamat Bahooee Munraj Konwaru*

(1856) 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. Radha Kishore Ghose* ILR (1892) C. 507 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 be extended to cases which are not covered by the facts proved in that case. After *Indur Chunder Singh v. Radha Kishore Ghose*

ILR (1892) C. 507 this Court had to deal with the question in a number of cases. In *Subramania Aiyar v. Armuga Chetty* ILR (1902) M. 330 it

was held that on a bond executed by the guardian the minor's estate can be made liable. *Duraisami Reddi v. Muthiah Reddi* ILR (1908) M. 458

decides the very question we have now to decide. *Regella Jogayya v. Nimusha Kavi Venkata Ratnamma* ILR (1910) M. 492, though it is not a

case of a minor, enunciates the same principle. In *Sanka Krishna-murthi v. The Bank of Burmah* ILR (1911) M. 692 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 *Krishna Chettiar v. Nagamani Ammal* ILR (1915) M. 915. It lays down that a minor's estate can be made liable for a

debt contracted by the guardian. This last case was on a promissory note 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 in *Swaminatha*

Aiyar Vs. Srinivasa Aiyar and Others, , 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 *Kumaraswami Sastri, J.* in *Ammalu Ammal alias Parvathi Ammal*

Vs. Namagiri Ammal and Others, , 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. Krishnaswami Aiyar* suggested, a trustee has the 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 Vs. Srinivasa Aiyar and Others*, , 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

Judgment 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.

Napier, J.

9. I agree.