

(1936) 02 MAD CK 0036
In the Madras High Court

T.S. Venkatarama Iyer and Others

APPELLANT

Vs

Balayya Yesuthasan and Others

RESPONDENT

Date of Decision : 11-02-1936

Acts Referred:

Contract Act, 1872 — Section 247, 65

Citation : AIR 1936 Mad 595 : 165 Ind. Cas. 478 : (1936) 44 LW 725

Hon'ble Judges : Varadachariar, J;Mockett, J

Bench : Full Bench

Judgement

Varadachariar, J.—This is an appeal by a mortgagee against so much of the lower Court's decree as dismissed the suit against defendants 4 and 5. The mortgage bond sued on was executed by defendant 3 who was the mother of defendants 4 and 5 as their guardian. It is admitted that the property mortgaged belonged to the father of defendants 1, 2, 4 and 5 and that the parties are governed by the Indian Succession Act. It is also admitted that defendant 5 was a minor at the time of the suit mortgage, and as regards defendant 4 the lower Court has found that she had in fact attained majority on the date of the suit mortgage though the mortgage purports to be executed on her behalf by her mother as her guardian. The amount was borrowed mainly for the purpose of a trade in timber, leather etc., which defendants 1 and 2, the sons, were carrying on. There is some evidence to show that the deceased father was undoubtedly carrying on business in timber, but there is some conflict in the evidence as to whether he carried on business in leather also. The terms of Ex.-A suggest that the parties, as often happens in such cases, proceeded very much on the assumption that the defendants constituted a kind of joint family though unfortunately this conception is legally erroneous. The lower Court has rightly held that among Christians there is no scope for the application of the Hindu law theory of ancestral trade devolving on the joint children of the ancestor and being treated as the joint family business of the children including the minor members. Mr. T. L. Venkatarama Iyer who appeared for the appellant had in view of this difficulty to rely mainly upon Section 247, Contract Act, to make the shares of defendants 4

and 5 liable. He also invoked the aid of the doctrine of estoppel so far as defendant 4 was concerned.

2. The lower Court has pointed out that the case u/s 247 was not pleaded either in the plaint as originally filed or in the additional statement filed by the plaintiff after the defendants had put in their statement. Mr. Venkatarama Iyer tried to persuade us that something like a case u/s 247 might be gathered from some allegations here and there. We do not think that anything like this is fairly gatherable from the plaint. But even assuming that the plaintiff is not to be shut out from relying upon a case of this kind for want of pleading, there are not sufficient materials on record to enable him to claim a decree on that basis giving the widest interpretation to Section 247, Contract Act. There must be some positive conduct from which the Court can infer that the regular partners intended to admit to the benefit of the partnership certain minor members. The mere fact that everybody concerned assumed by some error of law that all the children in the family, whether majors or minors, were in some manner interested in the business does not, it seems to us, suffice to bring Section 247 into operation. The decision of the Judicial Committee in *Jafferli Bhalaw v. Standarad Bank, South Africa* 1928 PC 135, to which Mr. Venkatarama Iyer drew our attention will not help him in the circumstances of this case. Their Lordships there found a positive request by the guardian of the minors that the minors should be treated as interested in the business, and their Lordships also held that both under the Muhammadan Law and under the terms of the father's will appointing the guardian such an act was within the power of the guardian. A passing reference to Section 247 cannot in the circumstances be held to make the decision applicable to a case like the present.

3. The appellant has a further difficulty in his way in relying on Section 247, because even if the Court should be prepared to hold that the minors have been admitted to the benefits of the partnership that can only involve the liability of the minors share in the partnership assets. The question will still remain as to what are the partnership assets. We are not prepared in the circumstances of this case to presume that all the properties which are covered by the mortgage must be held to be partnership assets. In this view it is unnecessary to consider whether the fact of defendant 4 being dealt with as a minor in connection with the mortgage while in fact she was a major makes the document unenforceable against her share. Even if we treat her as effectively represented by the mother the mortgage cannot for the reasons we have above set out be held binding either on defendant 4 or on defendant 5.

4. As regards the plea of estoppel, the additional statement filed by the plaintiff raises the plea of estoppel against defendant 4 only in so far as her objection based upon her attaining majority at the time of the suit mortgage is concerned. Mr. Venkatarama Iyer now asks us to go further and hold that defendant 4 is estopped from contending that she was not a partner in the business for whose benefit the loan under Ex.-A was borrowed. Apart from the absence of a pleading

of this kind, we do not find any basis for such estoppel in the evidence in the case. Our attention was drawn to portions of the oral evidence suggesting that defendant 4 was in the house at the time when the Registrar came to the house for getting the mortgage deed registered by defendant 3 who was then ill. There is also some evidence that defendant 4 was present at the time of the execution of the suit mortgage by defendant 3. Defendant 4 was aged about 19 years and a few months at the time and we do not think there is any justification for imputing to her knowledge of every statement made in Ex-A, the suit mortgage; nor were the statements such as to call upon her to repudiate any statement therein contained. There is very little in the recitals beyond a general statement that all were interested in the business; the mortgage deed did not contain any specific statement committing her to any particular kind of legal liability. We do not therefore see any reason for founding any estoppel on the mere omission of defendant 4 to raise any objection or protest at the time. The case does not seem to fall u/s 245, Contract Act.

5. Mr. Venkatarama Iyer rightly complained of the non-production of the accounts relating to the business carried on by defendants 1 and 2. He read the evidence of defendant 4 herself to show that she and her brothers are quite friendly and that the two sets of defendants are making common cause to suppress the accounts. But we do not see how far we can carry any presumption from the non-production of accounts so far as defendant 4's liability is concerned. The accounts not having been traced to her possession, we cannot treat her as a party in contempt. The mere fact of her sympathising with her brothers is no doubt a circumstance to be taken into account in drawing any legitimate presumption, but the circumstances of the family and the business, so far as they appear from the evidence in the case, do not enable us to draw merely by way of an inference from non-production the presumption that the plaintiff is entitled to a decree against defendant 4. The utmost that can be presumed is that the brothers perhaps made no distinction between the property that they inherited from their father and the moneys that they made in the business; and that these young girls were looked after by their mother and maintained and protected out of the funds consisting of the income of the father's estate as well as of the business. We do not see anything to carry the presumption further than the above. But a presumption to this effect will not suffice for the purpose of supporting the plaintiff's case.

6. It was finally contended that even if the mortgage should be held not binding on defendants 4 and 5, the plaintiff was entitled to some kind of relief on the principle of Section 65, Contract Act. Here again there is no plea nor evidence on which the plaintiff can get any relief. The recitals in the document suggest that the money is likely to have been applied to pay off the business debts and not applied in any other manner for the benefit of defendants 4 and 5. There is therefore no occasion for the application of Section 65, Contract Act. The appeal fails and is dismissed with costs.

Mockett, J.

7. I entirely agree and I only wish to add that with regard to the plea of estoppel, apart from the fact whether it has been pleaded or not, or is or is not a good plea at all, I agree with the finding of fact by the lower Court that there is no evidence to support it.