

(1955) 07 MAD CK 0007
In the Madras High Court

V.S.T. Kadir Meeral Beevi

APPELLANT

Vs

S.P.K. Muhammad Koya and Another

RESPONDENT

Date of Decision : 27-07-1955

Acts Referred:

Contract Act, 1872 — Section 65
Specific Relief Act, 1963 — Section 41

Citation : AIR 1956 Mad 368 : (1956) 1 MLJ 307

Hon'ble Judges : Govinda Menon, J

Bench : Single Bench

Judgement

Govinda Menon, J.—The plaintiff is the appellant in this appeal which arises out of a suit on a mortgage for a sum of Rs. 14,000 executed in

favour of the plaintiff by defendants 1 and 2, their mother Syed Mitheen Beevi on her own behalf and as guardian of defendants 3 and 4, her then

minor children. The defence to the suit, was that as defendants 3 and 4 were minors on the date of the mortgage their shares in the properties

would not be bound. The learned Subordinate Judge has accepted that contention and passed a decree in favour of the plaintiff only with regard to

the shares of defendants 1 and 2 ignoring the fact that in respect of the share of Mitheen Beevi who was dead at the time of the suit, the mortgagee

will be entitled to get a decree. The facts of the case may shortly be stated thus:

2. One Gouse Muhammad was a partner in a trading business with his three brothers. At the time of the partition of the family properties between

Gouse Muhammad and his partners it was found that certain sums were due from the partnership to Amina Beevi and Sheikh Mansoor Tharaganar.

The partnership became dissolved only in 1934 by the death of Gouse Muhammad. After his death defendants 1 and 2 continued the partnership

along with the others and carried on the business as common trade. The mortgage in question, Exhibit A-1, dated 14th September, 1935, was for

a sum of Rs. 14,000 the details of consideration of which were Rs. 10,048 due to Aminal Beevi, Rs. 3,500 due to Sheik Mansoor Tharaganar and

Rs. 452 received in cash. Gouse Muhammad was liable to pay these debts. According to the learned Subordinate Judge even though the items of

consideration for Exhibit A-1 went in discharge of debts due by the father still according to the decision in *Imambandi v. Mutsaddi* (1917) 35

M.L.J. 422 : 1917 L.R. 45 IndAp 73 : I.L R. Cal. 878, the minor's shares in the properties will not be liable. It is argued by the learned Counsel

for the appellant that it is not open to a Muhammadan minor to disclaim the debts incurred by his father while taking the assets left over by him and

on the principles enunciated in Section 65 of the Contract Act, and Section 41 of the Specific Relief Act, the minor has to pay back the amounts if

he should retain his father's properties.

3. In *Rang Ilahi v. Mahbub Ilahi* ILR (1925) Lah.35, the matter has been discussed and there are observations to the effect that in setting aside a

mortgage executed by a Muhammadan mother on behalf of her minor son the Court had discretionary power u/s 41 of the Specific Relief Act to

make it a condition that the minors should refund the amount by which their estate and themselves were benefited. This decision has been followed

by Madhavan Nair, J., in *Abdul Majid Sahib v. Ramza Bivi Sahiba* (1930) 33 L.W. 312 where the learned Judge has discussed a few English

cases as well. If, therefore, we are satisfied that the mortgage was executed for the purpose of discharging the debts due by their father, then the

shares of the minor sons will be bound. It is urged by Mr. K.V. Srinivasa Iyer for defendant 3 that there are recitals in Exhibit A-1. which would

show that though the father had incurred debts they were all taken over by defendants 1 and 2 and in reality at the time of Exhibit A-1, the debts

were those of the brothers and not of the father. The document does not specifically say that defendant; 1 and 2 took over the liability. All that is

stated therein, is that the father incurred debts during the conduct of the business and that business had been continued as *pudu vyabaram* or new

business by the major sons joining with the other partners. It is difficult for us to say that if at the inception the debts were those of their father, the

mere fact that after the father's death the major sons undertook the liability would detract it from the fact that the debts were those of the father

unless it is shown that there was a novation and the creditors gave up the liability against the father's assets and looked up for payment only against

the sons. There is absolutely no such evidence in this case to show that Aminal Beevi and Sheik Mansoor Tharaganar had given up their rights

against the estate of Gouse Muhammad for recovering their dues. What happened was on the death of Gouse Muhammad his sons continued the

partnership business. It may be that they also understood personal liability but that would not detract from the fact of the liability of the father. We

are, therefore, of opinion that the debts which were sought to be paid by the execution of Exhibit A-1 were binding on the estate of Gouse

Muhammad.

4. It is then contended by Mr. Srinivasa Iyer that the plaintiff should show that even if the debts were those of the father they were not barred on

the date of Exhibit A-1 when the mother and the brothers executed the mortgage. We see from Exhibit 13 which is page 3 from Exhibit A-12, the

ledger account of Aminal Beevi and Exhibit A-14, page 2 of Exhibit A-12, the ledger page of Sheik Mansoor, that these two persons are shown

as creditors on 1st January, 1933, that is, before the death of Gouse Muhammad. There is also a recital in Exhibit B-16 entry at page 3 in the

ledger of defendants' father for 1931 to that effect in Gouse Muhammad's own handwriting. Therefore if on 1st January, 1933, Gouse

Muhammad had acknowledged in Exhibit A-12 the two sums as due to the two individuals concerned, on the date of Exhibit A-1 which is only

two years and nine months thereafter the debts would not become barred and, to put it in another way, without defendants 1 and 2 entering into

the transaction if the mother alone had executed the mortgage in respect of the minors' share to discharge the debts of the father as existing on 1st

January, 1933, it cannot be held that at the time of Exhibit A-1 the debts had become barred. We are, therefore, of opinion that on the date of

Exhibit A-1 the debts were not barred. From that it follows, that on the authorities cited above the shares of defendants 3 and 4 will also be bound

by the mortgage.

5. It is then contended by Mr. Srinivasa Iyer that the plaintiff should have

recourse to the shares of the major executants before taking steps to realise the amounts from defendants 3 and 4. We see some justice in this argument. In modification of the decree of the lower Court there will be a decree in favour of the plaintiff for the amount decreed by the lower Court as against the shares of defendants 3 and 4 as well but a direction will be added in the final decree that the shares of defendants 1 and 2 in the mortgaged properties should be exhausted before those of defendants 3 and 4 are proceeded against. The appellant will be, entitled to his costs in this appeal. The memorandum of objections is not pressed and it is accordingly dismissed. No costs.