

(1956) 08 OHC CK 0004
In the Orissa High Court
Case No : First Appeal No. 25 of 1948

Vyasyaraju Venkataratanam Raju

APPELLANT

Vs

Damodar Sahu and Others

RESPONDENT

Date of Decision : 31-08-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1
Transfer of Property Act, 1882 — Section 100

Citation : AIR 1957 Ori 32 : (1956) 22 CLT 497

Hon'ble Judges : Narasimham, C.J; Das, J

Bench : Division Bench

Advocate : N.V. Ramdas, for the Appellant; S.C. Palit, for the Respondent

Judgement

Das, J.—This is a plaintiff's appeal against the original decree passed by Sri R.C. Misra, Subordinate Judge of Berhampur, dated 27-1-1948, in Money Suit No. 180 of 1946. The plaintiff's suit was based upon a handnote, (Ext. I), dated 31-8-1944, for a sub of Rs. 15,000/- payable with interest at 12 per cent per annum.

The defendants were the members of a Hindu joint family till 1943, when a partition suit, O. S. 23 of 1943 of the Court of the Subordinate Judge, Berhampur was filed. The defendants own a sugar mill and a distillery at Aska and a saw mill at Russelkonda. During the pendency of the aforesaid suit, defendants 1 and 2 were appointed as receivers and defendant-as receiver was in-charge of the above mentioned two mills along with certain other landed properties.

In the year 1944, the defendant No. 1 Receiver, was in need of depositing with the Government a sum of Rs. 15,000/- for continued work in the distillery at Aska. Accordingly, the defendant-1 filed a petition before the Subordinate Judge for permission to raise the said loan and permission was granted by the Court on 23-8-44 (Vide Ext 3).

After the permission was obtained the defendant 1 contracted the suit-loan and

executed the promissory note as mentioned above. The plaintiff deposited the said sum of Rs. 15,000/- as revenue deposit on behalf of Messrs. Damodar Sahu and Brothers on 1-9-44 (vide Ext. 2). Since the defendants did not make any payment, the plaintiff instituted the present suit on 19-11-1946 for recovery of Rs. 19,000/- from the defendants.

2. The first defendant admits the execution of the promissory note and the receipt of the consideration thereunder. He further stated that the Provincial Government in its Revenue Department directed him to deposit the amount of Rs. 15,000/- in the treasury as advance of the cost of jaggery which was then one of the controlled commodities and was being supplied to the distillery by the Government.

He, therefore, obtained the necessary permission of the Court and incurred the loan for furtherance of the family business, and as such, all the defendants are liable for repayment of the said loan. Defendants 2, 3, 20 and 23 averred that Order No. 132 dated 23-8-1944, passed by the learned Subordinate Judge while granting the permission does not authorise the receiver (defendant No. 1) to raise the suit-loan so as to bind by family.

The said loan, if any, has been incurred by the defendant No. 1 on his personal responsibility and he had spent the income collected therefrom. It was further averred that order No. 132 was superseded by an order of the Circuit Court of the High Court of Patna and that there has been no joint family in the strict sense of the term since the 6th October, 1942, when defendant No. 3 before filing the said partition suit served registered notices, demanding partition, to most of the defendants.

Accordingly, the defendant 1 has no longer the power to act as the manager of the joint family of the defendants. A specific plea was taken on behalf of the defendant No. 2 that he is not liable as receiver since he is not a party to the suit promissory note.

The defence of defendants 15 to 17 and the minor defendants 5, 8, 12 and 14 are almost in the same terms. The rest of the defendants did not enter appearance at all.

3. On the above pleadings, the two main issues raised were:

(1) Whether the order No. 132, dated 23-8-1944, authorised the 1st defendant as receiver to raise the suit loan so as to make it binding on the family estate, or the estate in the receivership of the 1st defendant?

(2) Whether the suit pronote is true and supported by consideration and binding on defendants 2, 3, and 20, 22, 23 and 24.

4. On the above issues, the learned Subordinate Judge came to the finding that the loan under Ext. J was incurred by defendant No. 1 and was undoubtedly for the benefit of the joint family. But while deciding the question, as to whether the

entire joint family assets can be held liable for this loan, he came to the conclusion that the assets of the estate, only to the extent to which the receiver has a right of indemnity as receiver, are liable. Accordingly, the learned Subordinate Judge passed a decree in the following terms:

"Plaintiff is entitled to a decree. Hence ordered that the suit be decreed on admission against defendant No. 1 and on contest against defendants 2, 3, 5, 8, 12, 15, 16, 17, 20 and 22 to 24 and ex parte against the rest with costs as follows: viz., personally against the receiver, the first defendant, and against the assets of the estate only to the extent to which the receiver has right of indemnity as receiver against that estate."

5. The defendant 1 who is respondent 1 in this appeal has preferred no appeal challenging the personal decree passed against him by the Court below, and the question, whether the terms of the instrument are such as to exclude his personal liability does not arise.

6. Mr. N.V. Ramdas, learned counsel appearing on behalf of the plaintiff-appellant objected to the form of the decree as passed by the Court below. His contention was that the plaintiff having advanced the suit loan to defendant 1 as receiver with the permission of the Court, a charge has been created on the assets of the family. "Charge" has been defined in Section 100 of the Transfer of Property Act, which runs as follows:

"Where the Immovable property of one person is, by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property, and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee, on the trust property for expenses properly incurred in execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

7. Thus, in order to create a charge, specific immovable property must be made a security for the payment of the money and must be so made in unambiguous terms. In this connection, it would be necessary to quote the relevant portion of Order No. 132 dated 23-8-44 (Ext. 3).

* * * * * "Heard lawyers present for the parties with consent of all and it being also the only reasonable solution at present it is ordered that the Receiver do raise a loan of Rs. 15,000/- for depositing with the Government at 12 per cent per annum interest with the condition that this loan with interest accruing will be discharged first from the income of the family property. This consent by the parties other than the Receiver will not amount to their admission that the loan will be binding against the whole family".

Thus, it is clear that no specific immovable property has been made a security for the payment of the suit money, and the question whether it would be binding against the whole family was left open,

8. Mr. Ramdas in support of his proposition relied upon two decisions, Mohari Bibi v. Shyama Bibi ILR 30 Cal 937 (A) and in Musammat Abbasi Begum Vs. Musammat Yaquti Begum, minor, through her guardian Syiyid Aziz-Ud-Din Hussain, . In the case reported in ILR 30 Cal 937 (A), the creditor brought a suit against the receiver appointed in an administration suit.

During the pendency of the suit, the receiver stood in need of money to carry on the business of the firm of the deceased and also for the purposes of winding up of the business. By order of the Court, leave was granted to the receiver to employ certain persons for the purposes of the business in course of which he contracted the loan in question.

Ultimately the application for letters of administration was refused and the defendant in that suit applied to be appointed as an administrative, and got the letters of administration who thereupon applied for and obtained the discharge of the receiver and the receiver was discharged.

After the discharge of the receiver, the creditor brought the suit and prayed for the realisation of his dues from out of the assets in their hands, and in case the said assets were found insufficient, then the deficiency might be ordered to be paid out of the estate of the deceased.

On the above facts, it was held that the creditor had a right to maintain such a suit founded on the just equitable principle that as the acts of a receiver so long as they fall within his authority, are the acts of the Court, and the estate cannot be permitted to enjoy the benefits of those acts without being held responsible for the obligations arising out of them.

In the Musammat Abbasi Begum Vs. Musammat Yaquti Begum, minor, through her guardian Syiyid Aziz-Ud-Din Hussain, the appeal arose out of a suit for specific performance of an agreement to assign a mortgage right, and the defendant was appointed receiver to sue on the mortgage, as it was about to become time-barred. The receiver borrowed certain sums of money for purposes of prosecuting the mortgage-suit, charging the mortgage-interest, the subject-matter of the suit, under express orders of the Court.

The latter suit was, however, eventually allowed to be dismissed, specific performance having been decreed and the assignee himself having in the meanwhile purchased the equity of redemption in the mortgaged-property and the assignor drew the money deposited in Court by the assignee as a condition to his obtaining specific performance. Thereupon the lender sued the assignee and the legal representatives of the assignor for recovery of the amount lent.

It was held that the receiver could not be made personally liable and that a decree hypothecating mortgage interest would be barred as no suit could then be

brought to enforce the mortgage and it was further held that the assets of the assignor in the hands of his representatives were liable. Both these decisions were cited in a case reported in *R.M.G. Subramania Aiyar Vs. Ulagalumperumal Sethurayar and Others*, and considered therein. Mr. Justice Patanjali Sastri (as he then was) held that the doctrine that a creditor has only a right of indirect recourse to the estate through the right of indemnity of the person who contracted the liability for purposes of such estate in course of its management, is well established in the case of trustees and executors, has been applied in England also to loans borrowed by receivers, and further held that the Patna case was a case in which the receiver borrowing the money by creating a charge on the estate and, therefore, these decisions can have no application to a case like the present one where the receiver borrowed the money without creating any charge on the estate.

Mr. Ramdas next relied upon a decision reported in *Kanhia Lal v. Muhammad Husain Khan* ILR 5 All 11 (D) in which a charge was created in respect of a specific property and so also in the case reported in *Girish Chunder Maiti v. Anundomoyi Debi* ILR 15 Cal 66 (PC) (E). The next two cases referred to by Mr. Ramdas are reported in *Chatti Chalamanna v. Pandrangi Subbamma* ILR 7 Mad 23 (F) and *Mana Vikrama v. Karnavan Gopalan Nair* ILR 30 Mad 203 (G).

In both these cases the appeal arose out of a suit for corrody, maintenance allowance, and it was found as a fact that specific properties were made a charge for payment thereof. Therefore, these cases can have no application to the present case, where no specific charge has been created by the order of Court. In this connection, reference may be made to Kerr on the Law and Practice as to Receivers (12th Edn. p. 263), where the learned author while dealing with personal liability and right to indemnity says:

"A receiver appointed by the Court is an officer of the Court: He is therefore not an agent for any person, but a principal, and as such personally liable to all persons contracting with him irrespective of the amount of assets in his hands, unless his personal liability is excluded by the express terms of the contract, subject to a correlative right to be indemnified out of the assets in respect of all liabilities properly incurred. He is entitled to its indemnity in priority even to the claims of persons who had advanced money under an order making the repayment of the advance a first charge on all the assets, and in priority to the costs of the action, and subject only to the plaintiffs cost of realisation."

9. It is, therefore, difficult to see how these decisions relied upon by Mr. Ramdas lend any support to the argument that a creditor who lends money to a court-receiver without a charge on such estate in his hands is entitled, nevertheless to a decree against such estate, to whomsoever it may ultimately be adjudged to belong.

10. The learned Subordinate Judge could not have gone into the question of relative liability in the present suit which must be decided in the partition suit

itself. Therefore, the form in which the decree was passed by the Court below is the only form in which a decree in the present suit could be made.

11. It was next contended by Mr. Ramdas that the learned Court below has not granted any interest to the plaintiff-appellant from the date of the decree. The plaintiff is certainly entitled to the interest at 6 per cent per annum on the decretal dues from the date of the decree to the date of realisation. Mr. Ramdas however, brought to our notice that the plaintiff has already recovered Rs. 16,000/- out of the decretal dues on 6-3-49 in E. P. No. 66/48 of the Court of the Subordinate Judge of Berhampur, and . this amount must be deducted from the decretal dues.

12. With the above modifications, the appeal will stand dismissed. There will be no order for costs of this Court as Mr. Chatterjee appearing for the respondents 2 and 3 entered no instructions. Mr. S. C. Palit, guardian ad litem for the minor respondents 5, 8, 9, 10, 11-B, 11-C, 11-D, 12, 16,17 and 23, however, appeared and is entitled to the costs deposited in his favour.

Narasimham, C.J.

13. I agree.