M. Devaiah Vs. Raja Singh

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SooperKanoon Citation : sooperkanoon.com/382334

Court : Karnataka

Decided On : Mar-07-1985

Reported in : ILR1985KAR1892

Judge : Jagannatha Shetty and ;Chandrakantaraj Urs, JJ.

Acts : Code of Civil Procedure (CPC), 1908 - Order 34, Rule 6

Appeal No. : RFA No. 55 of 1975

Appellant : M. Devaiah

Respondent : Raja Singh

Advocate for Def. : K.I. Bhatta, Adv. for M. Rama Bhat, Adv.

Advocate for Pet/Ap. : Padubidri Raghavendra Rao, Adv.

Judgement :

Jagannatha Shetty, J.

1.This is an appeal by defendants 3, 4, 5 and 7 against the judgment and decree dated October 19, 1974 made by the Civil Judge, Coorg, Mercara in O.S. No. 30 of 1969 on his file.

2. M.P. Rajasingh was plaintiff. M. Kuttappa was Defendant-1. Defendant-2 is the elder brother of Defendant-1 ; Defendant-4 is his wife ; Defendants 3, 5 and 7 are

sons and Defendant-6 is his daughter.

3. Plaintiff instituted the suit on the following averments: Defendant-1 for the purpose of liquidating antecedent debts and for necessities of his family borrowed from plain-tiff a sum of Rs. 30,000/- securing the suit properties under a simple mortgage deed dated June 6, 1959. He undertook to repay the principal amount with interest at 5% per annum by May 30, 1961. He has described the properties as if they were his personal properties. Defendant-2 joined theexecution of the deed since his name was found entered in the Jama Bandi records. Defendant-1 did not repay the loan neither the principal nor interest inspite of several requests and notices. All the defendants, however, are liable to pay the debt due under the mortgage deed.

Plaintiff has claimed in all Rs. 45,750/- inclusive of Rs. 30,000/- as principal, Rs. 15,700/- as interest at 5% from June 6,1959 upto the date of the suit and Rs. 50/- as notice charges.

4. Defendant-1 in his written statement has admitted execution of the mortgage deed. His case, however, was that he was paid only a portion of the loan taken. He has narrated the various circumstances under which the mortgage deed came into existence. He has referred to some speculative timber business carried on by the father of plaintiff along with others. He has stated that out of Rs. 30,000/- shown in the mortgage deed, he received only Rs. 7.000/- and the rest was distributed to agents and employees of the plaintiff's father who were involved in the timber business. His next contention relates to his non-liability even to pay theadmitted loan. He said that there was a transaction for Rs. 25,000/-in respect of which a pronote dated April 11, 1960 was executed by him along with three others. That pronote was executed in favour of Dr. Gopalakrishna who is the brother-in-law of plaintiff, the condition being that the mortgage deed should be returned after endorsement of discharge. The pronote was the subject matter of a suit O.S. No. 11 of 1963 instituted against defendant-1 and others in the Court of the District Judge, Calicut in which an exparte decree was obtained. Consequently, the secured debt under the mort-gage stood merged with the decree made on the pronote. With these and other averments defendant-1 prayed for dismissal of the

suit.

The plea of defendant-2 was simple and straight forward. He has stated that he was made to sign the mortgage deed because his name appeared in the jamabandi but he was not liable to pay the suit claim, since he received no benefit.

The plea of Defendant-3 in his written statement are various and varied. He has challenged the validity of themortgage transaction. He has contended that the properties secured under the deed of mortgage are the joint familyproperties and not separate properties of Defendant-1. Defendant-1 has no right to alienate the family properties without the consent and concurrence of other members of the family. The alienation was neither for legal necessity nor for benefit of the estate. It was not binding upon the children ofDefendant-1. Plaintiff cannot bring the suit for sale of the joint family properties and the suit was not maintainable as against the children of defendant-1.

The other defendants have sailed with defendant-3 by adopting more or less the above contentions.

5. Arising out of these pleadings, the Trial Court framed the following issues:

(1) Whether the 1st defendant proves discharge of the entire mortgage amount for the reasons alleged by him ?

(2) Whether the 1st defendant proves a part consideration of Rs. 7,000/- only ?

(3) To what reliefs if any are the parties entitled to ?

ADDITIONAL ISSUES :

(4) Whether there was antecedent debt as alleged in para 3 of the plaint to the extent of Rs. 30,000/- ?

(5) Whether the mortgage is supported by legal necessity ?

(6) Whether the suit properties are the absolute properties of the 1st defendant ?

(7) Whether the mortgage amount binds the defendant's share in the property ?

6. In support of the suit claim, plaintiff has examined two of his managers as P.Ws. 1 and 2. He has not stepped into the witness box. It is said that he was down with a paralytic stroke. The defendants in their turn have examined defendant-1 as D.W. 3 and defendant-3 as D.W, 4. They have also examined three other witnesses as D.W. 1, D.W. 2 and D.W. 5. The documentary evidence produced by the defendants consists of Exhibits D-l and D-2 as against P. 1 to P. 13 produced by plaintiff.

7. On a consideration of the above evidence, the Trial Court decreed the suit holding as follows :

(i) That the properties mortgaged by defendant-1 under Exhibit P-3 dated June 6,1959 were joint family properties of defendants 1, 3, 5 and 7 and not separate properties of defendant-1.

(ii) The mortgage debt was contracted for discharging antecedent debts though not the whole of it.

(iii) Defendant-1 was liable to discharge the mortgage debt and on his default the secured properties could be brought for sale.

and

(iv) Defendants 3, 5 and 7 are also liable to discharge the mortgage debt under the doctrine of pious obligation.

Being aggrieved by the judgement and decree defenders 3, 4, 5 and 7 have appealed to this Court.

8. The mortgage deed Exhibit P-3 expressly refers to two crop loans obtained by plaintiff from the Coorg Coffee Growers Society Limited. The total loan thereunder was Rs. 7,000/- which was payable by instalments. Exhibit P-4 dated July 5, 1957, is one such loan transaction from the Society under which Rs. 4, OOO/- was taken at 12 1/2 per cent interest and Exhibit P-5 dated July 24, 1958, is another loan transaction by which Rs. 3,000/- was obtained. A couple of instalments prescribed for repayment appear to have been paid by defendant-1 by the time the deed

Exhibit P-3 was executed. One or two last instalments provided thereunder did not fall due on the date of Exhibit P-3. Mr. Raghavendra Rao, Counsel for the appellants, therefore, urged that there was absolutely no pressure on the estate for defendant-1 to mortgage all the family properties for Rs. 30,000/- as against the two tiny crop loans

9. Mr. K. I. Bhatta, Counsel for the first Respondent-Plaintiff, was not very much concerned with the purpose behind Exhibit P-3 or with the pressure on the family estate justifying the alienation. According to him, even if defendant-1 had alienated the properties without legalnecessity and without any antecedent debt, the liability of the sons of defendant-1 to discharge the debt due cannot be avoided or evaded. The doctrine of pious obligation runs after them since the debt was incurred by their father and that debt was not tainted with illegality or immorality.

10. In the light of these submissions and on the material on record, the principal question that arises for consideration is whether the debt due under Exhibit P-3 is binding upon son's interest in the properties secured.

This question, in our opinion, presents no problem. The consideration paid under Exhibit P-3 has not been seriously disputed by defendant-l. Indeed, it cannot be disputed in view of the cheque for Rs- 30,000/- drawn in favour ofDefendant-1 on the Cochin Nayar Bank at Calicut. The Trial Court has also found that a sum of Rs. 30,000/- was paid by cheque to Defendant-1 under Exhibit P-3. In view of this finding which is supported by unimpeachable evidence, it is unnecessary to examine the contention urged by Mr. Raghavendra Rao that Exhibit P-3 was not for legal necessity or for discharging the antecedent debts. It may not be necessary to examine the legal necessity or antecedent debt to justify the liability of the sons to discharge their father's debt out of the entire ancestral estate.

The passage from Mulla on Hindu Law, Fifteenth Edition, at page 412 (Para-296) reads thus :

'But though the alienation as such does not bind the son's interest, the son being under a pious obligation to pay his father's debt not tainted with immorality, and the whole of the ancestral estate being liable for the payment of such debts, the

alienee is entitled to realise the debt, that is the money paid by the alienee to the father in consideration of the alienation, out of the entire ancestral estate.'

In Venkatesh Dhonddev Deshpande -v.- Sou, Kusum Dattatraya Kulkarni and Others : [1979]1SCR955 the observations of the Supreme Court as seen from the head note are as follows ;

'Whether father is the Karta of a Joint Hindu family and the debts are contracted by the father in his capacity as manager and head of the family for family purposes, the sons as members of the joint family are bound to pay the debts to the extent of their interest in the coparcenery property. Further, where the sons are joint with their father and the debts have been contracted by the father for his own personal benefit, the sons are liable to pay the debts provided they are not incurred for illegal or immoral purposes. This liability arises from an obligation of religion and piety which is placed upon the sons under the Mitakshara law todischarge the father's debts, where the debts are not tainted with immorality. This liability of the sons to pay the father's debts exists whether the father be alive or dead.'

In the light of these principles, the sons of Defendant-1 cannot, at any rate, contend that their interests in the suitprogenies which are the joint family properties are not liable to be sold in execution of the mortgage decree. The alienee is entitled to realise the debt, that, is the money paid under Exhibit P-3 out of the entire estate.

11. That, however, is not the end of the matter. We must now deal with the terms of the decree in a case like this. The decree must provide the following in this order. Themortgagee in the first instance must proceed against the interest of the father in the secured property. If the net proceeds of the sale of the father's interest are found to be insufficient, then there should be a personal decree against the father under Order 34 Rule 6 of the Code of Civil Procedure, and a decree for sale of the entire estate including the sons' interest therein. This is how the passage from Mulla on Hindu Law, Fifteenth Edition, at page 413 reads :

'Where a suit is brought against the father and sons on a mortgage executed by the father neither for legal necessity nor for payment of an antecedent debt, the

mortgagee in Madras is entitled to (1) a mortgage decree against the father for the saleof his interest, and (2) if the net proceeds of the sale of the father's interest are found to be insufficient to pay the amount due to the mortgagee, also to a decree against the father personally under Order 34 Rule 6 of the Code of Civil Procedure, 1908,and a decree for the sale of the entire joint family property including the sons' interest therein.'

The decisions of the Madras High Court are also to the same effect. [See (i) Saroi Ayyangar -v.- Ponnammal and (ii) Venkataramanaya Pantulu -v.- Venkataramaua Doss Pandulu.]

12. Before we modify the decree, we must consider the last contention urged by Mr. Raghavendra Rao. The Counsel urged that the Trial Court was in error in awardinginterest at 6 per cent per annum upto the date fixed for payment. Since the contractual rate of interest payable under Exhibit P-3 was only 5 per cent per annum, the subsequent interest to be awarded under Order 34 Rulell (b) of the Code of Civil Procedure cannot in any event exceed the contractual rate. The Counsel in our opinion is right in his submission, The parties having agreed to the terms of Exhibit P-3 cannot claim any thing in excess thereof. Nor the Court would be justified in granting interest more than the contractual rate. We, therefore, direct that the interest payable from the date of suit should be reduced to the contractual rate at 5 per cent.

13. Accordingly, we affirm the judgment, but modify the decree in the terms above mentioned. The amount decreed shall be paid by defendant-1 within six months from today, In the event of defendant-1 failing to pay the decretal amount, his interest in the mortgaged properties shall be brought for sale and if the net proceeds of the sale thereof are found to be insufficient to satisfy the decretal demand, then there shall be a personal decree against Defendant-1 under Order 34 Rule 6 of the Code of Civil Procedure and also a decree for sale of the interests of the sons of Defendant-1, i.e., Defendants 3, 5 and 7.