

Pendela Narasimham and anr. Vs. Pendela Venkata Narasimham and ors.

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Court : Andhra Pradesh

Decided On : Mar-22-1972

Reported in : AIR1973AP162

Judge : Gopal Rao Ekbote and ;Sriramulu, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 34, Rule 6 - Order 41, Rules 4 and 33; Transfer of Property Act, 1872 - Sections 73

Appeal No. : Letter Patent Appeal No. 16 of 1969

Appellant : Pendela Narasimham and anr.

Respondent : Pendela Venkata Narasimham and ors.

Advocate for Def. : N. Rajeswara Rao and ;M. Venkata Subba Rao, Advs.

Advocate for Pet/Ap. : V. Balakoteswara Rao, Adv.

Judgement :

Sriramulu, J.

1. This appeal is from the judgment of our learned brother, Sambasiva Rao. JJ., given in A.S.No. 267 of 1965, whereby the learned Judge allowed the appeal filed by the 4th defendant against the trial Court's decree in O.S.No. 52 of 1962, and exonerated him from the liability under the mortgage and substituted plaint B

Schedule property as security for A Schedule property.

2. The material facts leading to this Letters Patent Appeal may briefly be stated; Defendant No. 1 is the father of defendants 2 and 3 and 'Karta' of the joint family comprising of himself, his sons, and a coparcener, defendant No. 4. For the marriage of his minor son, defendant No. 2, the 1st defendant borrowed and received Rs. 13,000/- from the plaintiffs and as security, mortgaged plaintiff A schedule properties. At a family partition, a part of the A schedule properties, which was the subject-matter of mortgage, fell to the share of defendant No. 4, and B schedule property to defendant No. 1. The plaintiffs filed O.S.No. 52 of 1962 in the Court of the Subordinate Judge, Narasaraopet for the recovery of the money due under the mortgage and for substitution of B schedule property for A schedule property.

3. Defendant No. 1, inter alia, contended that, in O.S.NO. 72 of 1953 the 4th defendant was held liable for defendant No. 1's debts and therefore all the defendants are liable for the debt. Defendant No. 4, on the other hand, contended that the debt was neither for legal necessity nor for family benefit, and was not binding on him. Both of them objected to the substitution of B schedule property as security for A schedule property.

4. Defendants 2 and 3 remained exparte.

5. The trial Court decreed the plaintiffs' suit.

6. Aggrieved by the judgment of the trial Court, defendant No. 4 filed an appeal to this court. Our learned brother, Sambasiva Rao, J. Before whom the appeal came up for consideration, held that the debt contracted by defendant No. 1 as Karta of the family was neither for legal necessity nor for family benefit, and therefore, defendant No. 4 was not liable for payment of that debt and, in that view, exonerated defendant No. 4 from his liability. To pay the debt.

7. The correctness of the judgment of our learned brother is challenged in this Letters Patent Appeal before us, by defendants 1 and 2.

8. The counsel for the respondents- plaintiffs raised a preliminary objection that the appeal is not maintainable, in law. Since defendants 1 and 2 had not filed an appeal to this Court against the judgment of the trial Court, this Letters Patent Appeal must be considered as an appeal direct to the Letters Patent Court against the trial Court's judgment. Such an appeal cannot be filed under the provisions of the Civil Procedure Code.

9. Order XLI, Civil Procedure Code lays down the rules of procedure relating to appeals from original decrees. Order 42, Rule 1, C.P.C. says that so far as may be rules in Order XLI, C.P.C. shall also apply to appeals from appellate decrees.

10. Order XLI, Rule 4, C.P.C., provides that, where there are more plaintiffs or defendants than one in the suit, and the decree appealed from proceeds on a ground common to all the plaintiffs or the defendants, any one of the plaintiffs or the defendants may file an appeal against the whole decree and the appellate Court may reverse or vary the decree in favour of all the plaintiffs or the defendants, as the case may be.

11. Order XLI, Rule 33, C.P.C. provides that in an appeal filed before it against the decree of the trial Court, the appellate Court has power to pass a decree or make an order which ought to have been passed or made by the trial Court and such a power may be exercised in favour of any of the respondents or parties although such respondents or parties may not have appealed or filed cross-objections.

12. In the present, case there were four defendants. The suit was decreed by the trial Court against all of them on the common ground that the debt contracted by defendant No. 1 as 'Karta' of the joint family was for a legal necessity. Defendant No. 4 alone had filed an appeal to this Court against the whole decree, and defendants 1 and 2, the appellants in this Letters Patent Appeal, were also party-respondents in the appeal before our learned brother. The learned Single Judge reversed the finding of the trial Court and held that the debt contracted by defendant No. 1 as 'Karta' of the joint family was not supported by legal necessity or family benefit. On the basis of that, finding the learned single Judge exonerated the 4th defendant from his liability.

13. Since the common finding on the basis of which the trial Court decreed the suit against all the defendants, was reversed by the appellate Court, any of the parties to the appeal, under Order XLI, Rule 4 of the Civil Procedure Code, could file a Letters Patent Appeal against the appellate Court's decree.

14. If a debt contracted by a 'Karta' of a joint family is not for a legal necessity or for family benefit, it is not binding on all the coparceners and not only the 4th defendant. Refusal of the Judge to give such a relief to defendant No. 2 under Order XLI, Rule 33, C.P.C. on untenable grounds was wrongful. Hence any of the parties to the appeal could have filed Letters Patent Appeal to this Court, under Order XLI, Rule 4, C.P.C.,

15. Moreover, defendants 1 and 2 the appellants in this Letters Patent Appeal contended that, by reason of the judgment of the learned single Judge, exonerating defendant No. 4 from his liability to repay the debt, the burden to repay the entire debt has now fallen on defendants 1 to 5 and it is therefore, obvious that their burden to repay the debt has been enhanced by the appellate Court's judgment. Defendants 1 and 2 who were parties to the appeal before the learned single Judge are therefore, really aggrieved by the judgment of the learned single Judge passed in A.S.No. 267 of 1965. Hence defendants 1 and 2 are competent to file this Letters Patent Appeal.

16. We will then examine whether the decided cases relied upon by the respondents' counsel before us, go against the view we have taken.

17. In *Mohammad Khaleef v. Les Tanneries* AIR 1926 PCC 34, one K filed an appeal against L and M for the recovery of the money due under a contract of sale. Trial Judge decreed the suit against L but dismissed the suit against M, but, however, directed M to pay the costs of suit and interest thereon. Aggrieved by the trial Court's judgment, both L and M filed a joint appeal. The appellate Court allowed the appeal and dismissed the plaintiff's suit against both L and M, Plaintiff's appeal as against M because, in their opinion, it was in effect an appeal direct to the Privy Judge, which was not allowable under the provisions of the Civil Procedure Code.

18. In the present case, the trial Judge did not decree the suit against some and dismiss it against others. The suit was decreed against all the defendants on a common ground. In such a case it was open to any one of the defendants to file an appeal to the appellate Court against the trial Court's judgment, under Order XLI, Rule 4, C.P.C. If the contention of defendant 1 and 2 was acceptable in law, the learned single Judge under Order XLI, Rule 33, C.P.C., should have passed a common order exonerating all the other coparceners decision in AIR 1926 PC 34, does not , therefore, apply to the facts of this case.

19. In Poomalai Ammal, v. Subbammal, : AIR1953 Mad566 , the learned Judge, Chandra Reddi, J. In paragraph 30 of his judgment, at page 569, observed that :

'..... A memorandum of cross-objections has been filed by the first defendant who did not file an appeal against the judgment of the trial Court decreeing the suit against her. For the first time she has filed a memorandum of cross-objections here which, in effect, is only an appeal against the decree of the trial Court invoking Order 41, Rule 33, C.P.C., I do not think that provision is meant to be exercised in favour of a party who did not choose to file an appeal against the judgment of the trial Court and allowed it to become final. Therefore, Order 41, Rule, 33, C.P.C., does not avail him.....'

20. With due respect to the learned Judge, we are unable to take that view, because, in our opinion it runs contrary to the express language of Rule 33 of Order XLI, Civil Procedure Code. The other two decisions relied upon by the respondents' counsel, i.e., Punjab National Bank Ltd., v. Umadatt Hansraj, AIR 1928 Lah 599; and Arulayi v. Antonimuthu Nadan, AIR 1945 Mad 47; do not lay down any principle of law which can be applied in the facts of this case. In the former case, the learned Judge came to the conclusion that the case before them was not a proper one in which powers conferred on the appellate Court under Order XLI, Rule 33, C.P.C., could be exercised. In the latter case, the learned Judge, Somayya, J., held that a plaintiff could not be given a decree for an amount which was in excess of her claim and on which she had paid the court-fee. Therefore, those two cases do not help the respondents.

21. We, therefore, overrule the preliminary objection and held that defendants 1 and 2 are competent to file this Letters Patents Appeals, and this appeal is entertainable.

22. We will next take up the contention of appellants' counsel on merits. The learned counsel contended that a debt contracted by the 'Karta' of a Hindu joint family for a purpose which can neither be described as 'legal necessity' nor 'family benefit' is void and unenforceable, in law. Therefore, not only the coparceners but even the Karta who had actually contracted the debt, will also be exonerated from his liability to repay such a debt.

23. The correctness of the finding given by our learned brother, that the debt contracted by the 1st defendant as the 'Karta' of the family was neither for a legal necessity nor for family benefit is not challenged before us in this Letters Patent Appeal. We will, therefore, proceed on the basis that the said finding of the learned Judge is correct in law. If that is so, the question is whether such a debt is void or voidable in law.

24. The terms such as voidable or void, valid or invalid, may each be a little misleading. In *Lachman Prasad v. Sarnam Singh*, AIR 1917 PC 41, it was held that :

'..... A mortgage of a joint family property if made, neither for family necessity nor for discharging antecedent debt, is void in toto and in the absence of special circumstances like an express or implied representation that the mortgagors had the right to create the encumbrance cannot bind even their shares which they may get on partition.....'

25. We have to see how and in what manner those words 'void in toto' used by the Privy Council in the above decision, have been understood by the Courts. In *Maddali Visweswara Rao v. Maddala Surya Rao*, AIR 1936 Mad 440, considering the above decision of the Privy Council, Stone J. Observed at page 443 thus:

'..... The fact that the Privy Council have in certain cases, for example ILR 39 All 437 = (AIR 1917 PC 61) and in ILR 39 All 500 = (AIR 1917 PC 41) used

words which suggest that such a transaction is void does not assist us. Their Lordships were not deciding the question whether such a transaction is void ab initio and so incapable of ratification or merely voidable. Further, those cases were Allahabad decisions and there is a difference between Allahabad and Madras as regards the alienation by a manager of a joint Hindu family. Bearing in mind the fact that it is a commonplace that a transaction of this nature can be perfected by the subsequent consent of the sons, and that it can be repudiated and set aside by the subsequent action of the sons and that such repudiation goes back to the date of the original alienation, we think that it is preferable to regard such an alienation as perfect unless and until set aside, and one that accordingly becomes unchallenged when the power to sue to set aside is lost'.

26. Law in this regard has been expressed by Mr. Mulla at page 272, of his book, in very unambiguous terms, as follows :-

'An alienation by the manager of a joint family made without legal necessity is not void, but voidable, at the option of the other coparceners. They may affirm it or they may repudiate it.....'

27. Under the head 'Effect of father's invalid alienation'. Mr. N.R. Raghavachariar, in his book on Hindu Law, Principles & Precedents. Sixth Edition, at page 951 (in Section 306) expressed the law thus:

'..... An alienation by a father of the joint family property neither for family necessity nor for his antecedent debt has the same effect as that of an alienation by a coparcener who is neither a manager nor a father of a joint family and binds only his own interest in the property in Provinces other than Bengal and United Provinces where even this benefit is denied to the alienee.....'

28. In *Sankaranarayana Pillai v. Kandasamiah Pillai*, AIR 1956 Mad 670 (FB) a Full Bench of the Madras High Court pointed out the distinction and difference between an alienation made by the guardian of a minor, and an alienation of joint family property made by the manager of a joint family thus:

'..... in the former case the minor is eo nomine a party to the transactions and he should seek to cancel the document in which case court-fee has to be paid under Section 7(iv-A) of the Act. But where the minor was only a member of a joint family, and the transaction is on behalf of the joint family, he could always ignore the transaction as not binding on the family and seek to recover possession.....'

29. Having regard to the decision of the Madras High Court in AIR 1936 Mad 400 we only understand that what the Privy Council has meant by the use of the words 'void in toto' in AIR 1917 PC 41, is that a debt contracted by a father without legal necessity or family benefit is only voidable as against other coparceners. They may either affirm it or repudiate it.

30. Though the defendant No. 1 as the father and a manager of the joint family, borrowed the money for the purposes of the marriage of his minor son, defendant No. 2, which is not a legal necessity or a family benefit it is not void in law but only voidable at the option of his son, defendant No. 2, for whose marriage the debt was contracted. Following the Full Bench decision of the Madras High Court in AIR 1956 Mad 670; we hold that although defendant No. 1 had contracted the debt and executed a mortgage-deed for himself and on behalf of his minor son, defendant No. 2, and made defendant No. 2 an eo-nomine party to it, still the 2nd defendant can always ignore the transaction as not binding on him. The father, defendant No. 1 cannot however, escape his liability to repay the debt. His interest in the joint family property which he had mortgaged will, in any case, be liable for the repayment of the debt.

31. On the very same ground on which defendant No. 4 had been exonerated, defendant No. 2 is also entitled to be exonerated, because both of them were coparceners and the debt contracted by defendant No. 1 as the 'Karta' of the joint family comprising of both defendant No. 2 and defendant No. 4 has been found by the learned single Judge to be not supported by legal necessity or family benefit. The fact that defendant No. 2 was an eo-nomine party to the mortgage-deed, does not make any difference. Defendant No. 2, need not go to a Court of law for getting it set aside on the ground that the father's alienation of the joint family

property was not binding on him. He could simply ignore it.

32. However, the learned Judge considered that defendant No. 2 stands on a different footing than defendant No. 4 Defendant No. 2 is a son, and since the debt was not an 'avyavaharika', or a debt contracted by the father for immoral purposes it is binding on him under the doctrine of pious obligation, although the debt was neither for legal necessity nor for family benefit. In support of this finding, the learned Judge relied upon a decision of the Supreme Court in *Virdhachalam Pillai v. Chaldean Syrian Bank Ltd., Trichur.*, : [1964]5SCR647 , from the decision of the Supreme Court it is evident that t a father can, by incurring a debt, even though the same be not for any purpose necessary or beneficial to the family, so long as it is not for illegal or moral purpose, lay the entire joint family property including the interests of his sons open to be taken in execution proceedings upon a decree for the payment of that debt.

33. The father can so long as the family continues to be undivided, alienate the entire joint family property for the discharge of his antecedent personal debts, subjects to their not being illegal or immoral. In other words, the power of the father to alienate for satisfying his debts is co-extensive with the right of the creditors to obtain satisfaction out of family property including the share of the sons in such property.

34. Where a father purports to burden the estate by a mortgage for purposes not necessary and beneficial to the family, the mortgage qua mortgage would not be binding on the sons, unless the same was for the discharge of an antecedent debt. Where there is no antecedency, a mortgage by the father would stand in the same position as an out-and-out sale by the father of family property for a purpose not binding on the family under which he receives the sale price which is utilised for his personal needs.

35. 'Antecedent debt' in this context means a debt antecedent in fact as well as in time, i.e., the debt must be truly independent and not part of the mortgage which is impeached. The prior debt must be independent of the debt for which the mortgage is created, and the two transactions must be dissociated in fact so that they cannot be regarded as part of the same transaction.

36. There are recitals in the mortgage-deed, Ex. A-1, to the effect that Rupees 8300/- were received by defendant No. 1 in cash on 1.5.1952, and the balance of Rs.4700/- to make it up to Rs.13,000/- before the sub-Registrar at the time of the registration of the document. The finding of the trial Judge in paragraph 12 of his judgment is that :

'I find no reason to hold that the 1st defendant did not received cash of Rupees 8300/- on 1.1.1952'.

Thus, in view of the recitals of the mortgage-deed and the finding of the trial Judge, it cannot be said that the mortgage of the joint family property was effected for an antecedent debt. In such a case, as held by the Supreme Court in : [1964]5SCR647 , the mortgage qua mortgage would not be binding on the sons, because the debt was necessity or for the family benefit . Mr. N.R. Raghavachariar, in his book on Hindu Law, Principles & Precedents Sixth Edition, in Section 306 at Page 351, expressed the law in these terms:

'..... in such cases, if the consideration for the alienation is untainted by illegality or immorality, the creditors is entitled to invoke to his aid the son's pious obligation to pay the father's debts and recover the amount as a debt of the father by appropriate proceedings from the entire joint family property including the son's interest. Thus, though a mortgage by the father may not be binding on the sons qua mortgage on the ground that it was neither for payment of antecedent debts nor for family necessity, it is open to the mortgagee, in spite of a declaration obtained by the sons that the mortgage is not binding on them, to obtain a personal decree against the father under Order 34, Rule 6 of the Code of Civil Procedure and bring the entire property, including the sons' interest to sale in execution of the decree, unless the sons are able to show that the debt was tainted by illegality or immorality',

37. The interest of the sons in the joint family property which was mortgaged in favour of the plaintiffs, was not binding on the defendant No. 2 and the question of his personal liability did not arise at that stage. If the entire debt is not wiped out by enforcement of the right in the suit property which was mortgaged, then the creditors under Order XXXIV, Rule 6 of the C.P.C. may apply for the grant of a

personal decree against defendants 1 and 2. Subject to the statute of limitation, if the prayer is granted by the Court, then the question of personal liability of defendant No. 2 for the repayment of his father's personal debts would arise. Until that time, the question of personal liability of defendant No. 2 does not arise.

38. The learned Judge, in our opinion, therefore erred in making defendant No. 2's interest in the mortgaged property liable for the repayment of the debt, in view of his own finding that it was unsupported by legal necessity or family benefit. In view, of the finding of the learned Judge, the mortgage qua mortgage was not binding on defendant No.2, as it was not contracted by his father, defendant No. 1 for either legal necessity or for benefit of the family. We, therefore, hold that defendant No. 1's share in the mortgaged property is not liable for the repayment of the debt which was contracted by defendant No.1.

39. Then the next question, is whether there were any hurdles in the way of granting relief to defendant No. 2 in the appeal filed by defendant No.4. According to the learned Judge, there were two hurdles in the way of granting relief under Order XLI, Rule 33, C.P.C. to the 2nd defendant, and those are: (i) defendant No. 2's liability for payment of the personal antecedent debt of his father untainted by illegality or immorality; and (ii) defendants 2 and 3 remained ex parte and did not put up any defence and further, having become majors, they did not by any action avoid the mortgage. It is for those two reasons that the learned Judge felt that relief under Order XLI, Rule 33, C.P.C., could not be granted to defendant No. 2. We are unable to agree with this part of the judgment of our learned brother. As has already been pointed out by the Full Bench decision of the Madras High Court in AIR 1956 Mad 670 (FB), a son can always ignore the alienation made by his father which was neither for legal necessity nor for family benefit. It is only when the guardian of a minor ward alienates property on behalf of his minor ward, that the minor has to go to a Court of law and bring an action for avoiding the alienation. It has also been pointed out earlier that the mortgage over the A schedule property was not created by defendant No. 1 for the payment of his personal antecedent debt. Therefore, both the hurdles which, in the opinion of the learned single Judge, would make the case of defendant No. 2 stand on a different footing, are not really hurdles in this case. The grant of relief under Order LXI,

Rule 33, C.P.C. cannot be denied to defendant No. 2 merely because he had not raised any defence in the suit. We are, therefore, of the opinion that the learned single Judge had wrongly refused relief to defendant No. 2 under Order XLI, Rule 33, C.P.C., to which he was entitled in law.

40. We, therefore, hold that defendant No. 2, on the same ground on which defendant No. 4 was exonerated from liability, has also to be exonerated.

41. We will then consider whether the learned single Judge was right in substituting the B schedule properties. In this behalf the learned counsel appearing for the appellants relied upon the decision of a Full Bench of the Madras High Court in *Koru Issaku v. Gottumukkala Seetharama Raju*, AIR 1948 Mad 1 (FB). Rajamannar, J. Speaking for the Full Bench, observed that :

'..... When one of several co-sharers purports to mortgage a specific item of property to which they are jointly entitled and after the execution of the mortgage there is a partition among the co-sharers at which the item mortgaged is allotted to some other co-sharer and an item other than the mortgaged is allotted to the mortgagor-co-sharer, the other co-sharer takes the item allotted to him, in the absence of fraud, free from the mortgage and the mortgagee can proceed only against the item allotted to his mortgagor in substitution of the item mortgaged....'

42. Following this decision we uphold the order of the learned Judge substituting B schedule properties as security for A schedule properties.

43. In the result, we allow the appeal in part. Defendant No. 1's interest in the B schedule properties which have fallen to his share at the family partition and which have been substituted for A schedule properties, is liable for the payment of the debt which he had contracted from the plaintiffs. Defendant No. 1's appeal is, therefore, dismissed. Defendant No. 2's share of the substituted property is exonerated from the liability to repay the mortgage debt, in view of the learned Judge's finding that the debt was not supported by legal necessity or family benefit and was not binding on defendant No. 2. We, therefore, allow the appeal of defendant No. 2 and dismiss the plaintiff's suit as against him. In the circumstances of the case, we are of the opinion that it would be fair and just for

the parties to bear their own costs of this appeal.

44. Order accordingly.

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