

Parvathi Amma Vs. Makki Amma

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Court : Kerala

Decided On : Aug-30-1961

Reported in : AIR1962Ker85

Judge : S. Velu Pillai,; T.C. Raghavan and; M. Madhavan Nair, JJ.

Acts : Debt Laws; Kerala Agriculturists' Debt Relief Act, 1958 - Sections 2;
[Transfer of Property Act, 1882](#) - Sections 55(4)

Appeal No. : A.S. 616 of 1958 and 47 of 1959 and C.M.A. 218 of 1958

Appellant : Parvathi Amma

Respondent : Makki Amma

Advocate for Def. : T.N. Subramonia Iyer and; P.R. Balachandran, Advs. (in A.S. 616/58),;

Advocate for Pet/Ap. : V.P. Gopalan Nambiar and; P.C. Balakrishna Menon, Advs. (in A.S. 616/58),;

Disposition : Appeals allowed

Judgement :

Madhavan Nair, J.

1. These appeals have been referred to a Full Bench because of a common question arising in them viz., whether owelty is a debt within the purview of the Kerala Agriculturists' Debt Relief Act, 1958.

2. 'Owelty' is defined in Black's 'Law Dictionary' (2nd Edn., page 865) thus :

'Owelty. Equality. This word is used in law in several compound phrases, as follows:

1. Owelty of partition is a sum of money paid by one of two coparceners or cotenants to the other, when a partition has been effected between them, but the land not being susceptible of division into exactly equal shares, such payment is required to make the portions respectively assigned to them of equal value.

2. (Owelty of services)

3. Owelty of exchange is a sum of money given, when two persons have exchanged lands, by the owner of the less valuable estate to the owner of the more valuable, to equalize the exchange.' Ballentirie's "Law Dictionary" (1948 Edn., page 923) defines :

'Owelty of partition, A sum paid or secured, in the case o partition in unequal proportions, by him who has received the larger portion to him who has the less, for the purpose of equalizing the portions; it is pecuniary compensation decreed, by the court in actual partition to adjust an inequality of the shares not justified by the interests of the parties in the, estate. The application of the term is confined to the partition of lands.' Freeman in 'Co-tenancy and Partition" describes owelty thus ;

'Owelty : When an equal partition cannot be otherwise made, Courts of equity may order that a certain sum be paid by the party to whom the more valuable property has been assigned. The sum thus directed to be paid to make the partition equal is called 'owelty'. It is a lien on the property on account of which it was granted. The law cannot contemplate the injustice of takingproperty from one person and giving it to another without an equivalent, or a sufficient security for it.'

The above summary by Freeman is quoted with approval and adopted by our Supreme Court in Swaminatha Odayar v. Official Receiver of West Tanjore, (S) AIR 1957 SC 577. Their Lordships observed further :

'While effecting a partition of joint family properties it would not be possible to divide the properties by metes & bounds there being of necessity an allocation of properties of unequal values amongst the members of the joint family. Properties of a larger value might go to one member and properties of a smaller value to another and therefore there would have to be an adjustment of the values by providing for the payment by the former to the latter by way of equalisation of their shares. This position has been recognised in law and a provision for such payment is termed 'a provision for Owelty or equality of partition'.....

It therefore follows that when an owelty is awarded to a member on partition for equalisation of the shares on an excessive allotment of immovable properties to another member of the joint family, such a provision of owelty ordinarily creates a lien or a charge on the land taken under the partition."

3. Owelty, therefore, represents the value of the excess of landed property allotted on partition to a co-sharer over his due share, and enures to the person who was given less properties than are due to him on an equal division. In Freeman's words, it is 'the sum directed to be paid to make the partition equal'. It is virtually the price of property 'taken from one and given to another' at partition; as such, in general law it is always a charge on the share that has the excess. The observation of the Supreme Court in the passage quoted above is also that 'owelty awarded on partition of immovable properties creates a charge on the land taken.

4. In English law the security given to an unpaid vendor is an equitable Hen; in Indian law a Charge. (See Webb v. Macpherson, 30 Ind App 238 (PC).) The charge provided under Section 55(4)(b) of the Transfer of Property Act is the vendor's charge for unpaid price. But to attract the charge, it is not necessary that the transaction concerned should be a formal sale.

In Somu Acbari v. Singara Achari, AIR 1945 Mad 407, Somayya J. had to consider the availability of a vendor's charge for the unpaid consideration of a release. The

learned Judge observed :

'.....the lower Courts have held that the document is only a release and not a sale and that therefore the provisions of Section 55, T. P. Act, are not applicable. I am unable to agree with this conclusion. The document which has been set Out clearly says that in full quit of the executant's right to a share he was to be paid Rs. 150. The definition of the sale contained in Section 54, T. P. Act, is satisfied in this case. Under Section 54, 'sale' is a transfer of ownership in exchange for a price paid or promised or part-paid or part-promised. In the present case a sum of Rs. 150 promised to be paid is the price. The price must no doubt be in money and that requirement is satisfied in this case.

The answer would have been different if what was promised to the plaintiff under the document was some other property or something which is not money. Here, it is Rs. 150 which is the consideration and this part of the definition is therefore satisfied. Then it is said that the, expression used is, release and that a release is a mere relinquishment and does not operate as a transfer. It has been pointed out repeatedly by this Court that what we have to do is to see all the terms of the document and consider whether there is not an intention that what was till then the right of the executant is being conveyed to the person in whose favour the document is executed.

The word release is not conclusive. *Doraisami, Pillai v. Chinnia Goundan*, 34 Mad LJ 258 : (AIR, 1918 Mad 272) is in point. In that case, the plaintiff filed the suit on the footing that his father was adopted by the widow of the last male-holder. The adoption was denied by the defendants and thereupon the plaintiff armed himself with a document from a person who would be entitled, to succeed to the property if the adoption of the plaintiff's father was not true or valid. The document was produced in Court and marked as Ext. R. By that document the executant released all his rights in favour of the plaintiff. It was contended' that the document was only a release and not a conveyance. The learned Judges in dealing with this contention say at page 261 (of Mad LJ) : (at p. 273 of AIR) :'

'By that document the heir released all his rights in favour of the plaintiff. We cannot agree with the Subordinate Judge that Ext- R does not purport to be and is

not a conveyance. The word used is 'release' but the intention to transfer any rights which the executant of the document has is clear and we see no sufficient reason why it should not be treated as a 'conveyance.'

'In the present case, the right of the executant was to a half share in the entire family properties That is made over to Singara Achari in consideration for a sum of Rs. 150. I hold that the document satisfies the terms of Section 54, T.P. Act. There is nothing in the Hindu Law to prevent a member of a joint family from selling his share to another member of the family, and Ext. P. 1 appears to me to be a sale of this nature. Consequently Section 55, T. P. Act, applies and the plaintiff had a charge for the unpaid purchase money."

The ease of owelty is, in our view, very similar to the consideration for a release of the kind mentioned above. The co-sharer who accepts the lesser properties gives a part of his share to the other co-sharer in consideration of a sum of money which is called 'owelty'. In other words, owelty represents the unpaid price of the excess land taken from one co-sharer and given to another on partition; it is as if a portion of the property that really belonged to B has been assigned to A, and A is made to pay the price therefor to B. B is therefore entitled to a vendor's share for the price remaining unpaid.

5. Strictly speaking, the above-mentioned charge ought to have been on the excess land of which owelty is the price, But, in the deed of partition there will invariably be no indication of the specific property which is the excess taken from one and given to another. Any one property in his share may well be within, but the aggregate of all be above his due share. The allocation may indicate only that the share given to A is in excess of his due share to the extent of so much value, that the share allotted to B is deficient to that extent, and that therefore A has to give to B the value of the excess, so as to equalise the value that each gets on partition. It is as if the excess property has merged in A's share and become unidentifiable; As the specific property which is the counter-part of owelty is not knowable, a charge thereon is in the nature of things, impossible. The charge for Qwelty is therefore spread over the entire share that comprises the excess property; but that does not, in our opinion, change the basic nature of the charge. Owelty is, therefore, a

liability for which a charge as provided in Section 55(4)(b) of the Transfer of property Act does enure.

6. Shri Madhava Prabhu for the creditor in A. S. No. 47 of 1959 contended that owelty is not a debt at all. The argument was that the allottee of excess property had no right to any such excess, and would not therefore get the same until he had paid the owelty when alone the excess would vest' in him as his purchase, that the allottee was not bound to accept the excess and incur liability to pay owelty, that the option remained with the sharer who was allotted lesser share to claim that excess at any time before he accepted the owelty and that therefore the liability for owelty was only an inchoate liability not amounting to a binding debt. In our view, this contention has no merit. It is not correct to say that title does not pass till owelty is paid. As soon as the partition is executed by the parties concerned, the title to the properties allotted to each sharer vests in him, exclusively and absolutely. To quote the words of the Supreme Court,

'While effecting a partition properties of a larger value might go to one member and properties of a smaller value to another and therefore there would have to be an adjustment of the values by providing for the payment by the former to latter.',

It is clear therefore that the property does vest as soon as the allotment is made and the deed of partition is executed. Even in a normal sale, the passing of title does not depend' on the payment of consideration. (See Mulla's 'Transfer of Property Act', 4th Edn. 1956, page 284). The argument that the title to the excess property allotted to a co-sharer on partition does not arise until the owelty has been paid and therefore Owelty is not a debt, in the sense of a sum which the debtor is obliged to pay to the creditor, does not therefore appeal to us. Being a liability in a definite sum due from the co-sharer who took excess property to another who was given less than his due on partition, owelty is a debt in the general sense of the term.

7. The word 'debt' is defined in the Kerala Agriculturists Debt Relief Act thus ;

'Debt means any liability in cash or kind whether secured or unsecured, due from or incurred by an agriculturist on or before the commencement of this Act, whether payable under a contract or under a decree or order of any Court, or otherwise, and includes....., but does not, include :

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'(vii) any liability for which a charge is provided under Sub-clause (b) of Clause (4) of Section 55 of the [Transfer of Property Act, 1882](#);

As we have found owelty to be the price of land taken from one co-sharer & allotted to another on a partition', and that the charge for owelty is in substance, a vendor's charge for unpaid price, it is within the exception (vii) in the above definition and is therefore outside the purview of the Kerala Agriculturists Debt Relief Act, 1958.

8. The amounts concerned in A. S. No. 610 of 1958 and A. S. No. 47 of 1959 are owelties awarded to co-sharers for equalising the shares, in a final decree in partition of immovable properties. The Subordinate Judge has held that owelty is a debt within the purview of Act 31 of 1958. As we have held the contrarywise, the order impugned in these appeals have to be reversed and the decree-holders held entitled to realise the entire owelties unaffected by the provisions of Sections 4 to 7 of the Act 31 of 1958.

9. Turning to C. M. A. No; 218 of 1958, the debts have arisen in the course of a partition in a joint family. An elephant, that belonged to the family, was sold in auction and purchased by defendants 1 to 10 for Rs. 10,000/- who were therefore directed to pay the share of the value to the other members of the family. The provision in the award, which was incorporated in the final decree, is :

'(3) That defendants 1 to 10 do pay within one year from the date of the award as a charge on the respective shares of properties allotted to them, to plaintiffs 1 to 4 a sum of Rs. 1,904-12-0 and to plaintiffs 5 to 11 Rs. 3,333-5-6 being the plaintiffs' share of the price of the elephant belonging to the tarwad purchased by defendants 1 to 10 at auction sale.'

The amounts therefore represent the plaintiffs share of the price of an elephant sold in auction, Not being concerned with an allocation of shares in partition of any landed property, the amounts cannot be called owelties. It is not disputed that if the elephant was sold to a third person, and that person be directed to pay the price to the co-sharers proportionately, the amounts that might then be due to each would be debts within the purview of Act 31 of 1958. The fact that the purchaser at the auction happened to be a sharer or certain sharers cannot affect the position in this respect. We hold therefore that the debts involved in. C. M. A. No. 218 of 1958 do come within the purview of Act 31 of 1958. The Subordinate Judge has held the amounts to be owelties and therefore exempt from the Act. In the view that we have taken above, the order has to be and is reversed and the debtors, defendants 1 to 10, are held entitled to the benefits of Act 31, of 1958 in regard to the amounts concerned.

10. Costs will follow the event in all these appeals.

Baghavan, J.

11. have perused the judgment of Madhavan Nair J., and I agree with his conclusion regarding A. S. Nos. 616 of 1958 and 47 of 1959, that they are to be allowed with costs, but on grounds different from those which weighed with my learned brother. For the same reasons my conclusion in C. M. A. No. 218 of 1958 is that it also relates to owelties and therefore the provisions of the Kerala Agriculturists Debt Relief Act have no application to that case either, with the result that the C. M. A. has to be dismissed with costs.

12. The facts of the cases are not in dispute and therefore I do not propose to recapitulate them, According to me, there are clear and sufficient indications in the judgment of Bhagwati J. in the decision of the Supreme Court in (S) AIR 1957 SC 577 in support of the view I am taking in these cases. I therefore confine my discussions to a consideration of those indications in the judgment of Bhagwati J.

13. The term 'owelty' means equality and it is used in law in several compound phrases, of which I am concerned with the expression 'owelty of partition'. Bhagwati J. in the Supreme Court decision already referred to quotes passages

from Story on Equity, Lawrence on Equity Jurisprudence, Freeman's Co-tenancy and Partition and Corpus Juris Secundum. I shall extract only two of those passages, the first being from Corpus Juris Secundum, Vol. 68, Section 15 :

'Section 15. Owelty and Lien therefor.

(a) In General

(b) Lieng

(a) In General.

The parties to a voluntary partition may agree to pay owelty to equalise the shares allotted.

Owelty is the difference which is paid or secured by one coparcener or co-tenant to another for the purpose of equalising a partition. The power to award owelty has, from the earlier times, been regarded as necessary to the act of partitioning property; and' the parties to a voluntary partition may agree to the payment of owelty in order to equalize the shares allotted; and, where the matter of making the partition is delegated to commissioners, they have the power to award owelty, as a necessary incident to the partition.

(b) Liens.

An agreement for owelty in a voluntary partition of land ordinarily creates a lien or charge on the land.

An agreement for owelty ordinarily creates a lien or charge on the land taken under the partition and this lien may exist because of an express agreement between the parties providing for it or it may be implied in the absence of such express agreement.'

This passage shows that the award of owelty is not confined to cases of partition of land only, but applies generally to all partitions to equalise shares. If the provision for owelty is made in a partition of land, such agreement for owelty necessarily creates a lien or charge on the land. Therefore, in my judgment, the

provision for owelty can arise in partitions even of properties other than land.

14. I shall next extract a passage, which Bhagwati J. has extracted in his judgment with approval and that is from Freeman's Co-tenancy and Partition (1886 Edition) page 676, Para 507 :

' 'Owelty': When an equal partition cannot be otherwise made, Courts of equity may order that a certain sum be paid by the party to whom the most valuable property has been assigned. The sum thus directed, to be paid to make the partition equal is called 'owelty' It is, a lien on the property on account of which it was granted. 'The law cannot contemplate the injustice of taking property from' one person and giving it to another without an equivalent, or a sufficient security for it.' The lien for owelty has precedence over prior mortgages and other liens existing against the co-tenant against whom the owelty was awarded.'

This passage also shows that the provision for owelty is construed as a lien which the co-sharer who is awarded owelty is deemed to acquire on an excessive allotment of property to the other co-sharer and that the lien for owelty has priority over previous mortgages existing against such co-sharer.

15. Now I would advert to another passage in the judgment of Bhagwati J. in paragraph 18, which reads:

'The member to whom excessive allotment of property has been made on such partition cannot claim to acquire properties falling to his share irrespective of or discharged from the obligation to pay owelty to the other members. What he gets for his share is therefore the properties allotted to him subject to the obligation to pay such owelty and there is imported by necessary implication an obligation on his part to pay owelty out of the properties allotted to his share and a corresponding lien in favour of the members to whom such owelty is awarded on the properties which have fallen to his share.'

The same idea is repeated by the learned Judge in paragraph 28 in the following terms :

'Even if no express charge was created there-was in equity a lien or a charge created on the properties falling to the share of the third defendant's branch and he did not acquire the properties which fell to his share on such, partition irrespective of or discharged from the obligation to make payment of such sum out of the same'.' (underlining (here into ' ' is mine)).

16. The aforesaid passages clearly indicate that what the member, to whom a smaller allotment, is made, gets by way of owelty is not the price of the property he lost and that the provision for owelty creating a charge on the excessive allotment is not by way of a vendor's lien on the property sold to him. On the other hand, the extracts show that owelty is a portion of the share of the member to whom the smaller or insufficient allotment is made as is clear from the words that 'the member to whom excessive allotment of property has been made on such partition cannot claim to acquire properties falling to his share irrespective of members'. That means; looking from the 'point of view of the member to whom the excessive allotment is made, that his share is the excessive allotment diminished by the owelty; and looking from the side of the sharer to whom an insufficient allotment is made, that his share is the insufficient allotment increased by the owelty. In other words, the share of the member to whom the excessive allotment is made is that excessive allotment minus the owelty and the share of the member to whom the smaller allotment is made is that smaller allotment plus the owelty.

Putting the idea again differently- the share of the member with the excessive allotment is that excessive allotment less the, owelty carved out of it and the share of the other member is the lesser allotment added with the owelty carved out of the excessive allotment. This again means that owelty is only part of the properties partitioned; it may not be part of the original properties; but, if I may borrow the expression of Maclean C. J. in the Calcutta case which I shall hereinafter refer to, 'it is the substituted property which, the sharer gets in the partition.'

17. This conception of owelty is reinforced 'by the decision of the Calcutta High Court in Shahebzada Mohomed Kazim Shah v. R. S. Hills. SLR 55 Gal 388, which has been approved by the Supreme Court in the aforesaid judgment of Bhagwati J. In that Calcutta case two sums of Rs. 37,000/- and Rs. 9,500/- had been

awarded to the appellants by way of owelty on partition. At the date of the partition there was a mortgage, executed by some of the sharers, subsisting on a partition of the property, which was the subject-matter of the partition and the learned Judges of the Calcutta High Court held that the provision for owelty had priority over the prior mortgage. The reasoning of the learned Judges appears in the following two passages, which have been extracted with approval in the Supreme Court decision. The passage from the judgment of Maclean C. J. runs.

'Then arises the question of priority. To determine that question it becomes necessary to ascertain what was the substituted property which the mortgagor took under the partition.. It is clear that all he took was the house No. 52-2 Park Street, subject to the charges of Rs. 37,000/- and Rs. 9,500/- in favour of the appellants; and it can only be upon that, that the Roy mortgagees can rank as mortgagees, that is upon No. 52-2 Park 'Street subject to the charges created by the decree.'

And the passage from the judgment of Stephen J, is;

'It is quite plain that the appellants' claim which is a charge upon the property, constitutes a deduction from the corpus of the property and is not affected by any dealings with the possession of the property on which the decision of the Judge of the Court of the first instance is based.'

These two passages show that the priority for the charge for owelty is not based on the Owelty being the unpaid purchase money for the sale of the excess of allotment to one of the sharers; but it is based on the conception that what the member, to whom the excessive allotment is made, gets as his share is the excessive allotment subject to or less the charge or lien for the owelty or the conception, in the words of Stephen J. that the charge for owelty constitute a deduction from the corpus of the property allotted to the sharer who gets the excessive allotment.

18. The foregoing considerations establish that owelty is really part of the properties partitioned, that is, owelty is the substituted property and that it is neither unpaid purchase money, nor any liability in the sense in which a debt is

understood to be a liability.' The appeals before me relate to owelties of partition and therefore they do not relate to debts and consequently, the Kerala Agriculturists Debt Relief Act has no application to them. In that view, I allow A. S, Nos. 616 of 1958 and 47 of 1959 with costs and dismiss C. M. A. No. 218 of 1958 with costs as well.

19. BY COURT : In the result, A. S. No. 616 of 1958 and A. S. No. 47 of 1959 are allowed with costs, and in view of the majority judgment C. M. A. No. 218 of 1959 is also allowed with costs.

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