

Gurusami Chetti and ors. Vs. Samurti Chinna Mannar Chetti and Sadasiva Chetti and ors.

Gurusami Chetti and ors. Vs. Samurti Chinna Mannar Chetti and Sadasiva Chetti and ors.

SooperKanoon Citation : sooperkanoon.com/773407

Court : Chennai

Decided On : Jun-03-1881

Reported in : (1882)ILR5Mad37

Judge : Innes and ;Muttusami Ayyar, JJ.

Appellant : Gurusami Chetti and ors.

Respondent : Samurti Chinna Mannar Chetti and Sadasiva Chetti and ors.

Judgement :

Innes, J.

1. These cases were heard on the 6th January. On the 8th we were prepared to give judgment, but we thought it desirable to hear argument upon a point which had been apparently overlooked. We accordingly heard Counsel again on the 15th March.

2. The plaintiff in each case got a decree against Viraragava (the father of the 2nd, 3rd, and 4th defendants in the present suit), and, on proceeding to execute against some of the property assumed to be that of Viraragava, was met by a claim made by the present 2nd, 3rd, and 4th defendants--Viraragava's sons--on the property attached.

3. Plaintiffs were eventually required to institute regular suits against the claimants and the attached property was released. Plaintiffs brought the suits 452 and 503 of 1878, out of which the appeals arise.

4. The question in appeal in each case is whether the learned Judge was wrong in finding that the interest of 2nd, 3rd, and 4th defendants in the house No. 9, Armenian Street, is liable to be seized under the attachment in execution of the decree against Viraragava.

5. The evidence, although it does not establish that the family of the 2nd, 3rd, and 4th defendants and their father and his brothers was for any length of time a trading family, is sufficient to show that since 1860, when the father and his brothers divided, the father had been engaged in mercantile transactions, and there is nothing to suggest that those transactions were imprudently carried on either before or since the birth of the infant defendants. The evidence indeed tends to show that Viraragava was a careful, saving man and devoted his savings to the support of his family. In such circumstances it must be presumed that the transactions were undertaken for the benefit of the infants as members of the joint family with whose interests the father was necessarily charged. The debt on which each suit was instituted against the father was incurred in the course of those transactions and is one on which the plaintiff might have sued and recovered against the entire joint family. A decree against the family would have enabled the plaintiff to attach, not only property still held jointly, but also the share which in 1877 the father transferred to his infant sons, because, as the infant sons would be liable to the debt, all property in their hands would likewise be liable to satisfy the debt. The plaintiff, however, did not take this course, but sued and took a judgment against the first defendant alone. In the claim subsequently made the plaintiff had an opportunity of obtaining a decree against all the coparceners, as the proceedings upon a claim amount to a reopening of the original suit with the addition of parties defendant. The defect of the original suit in not making the 2nd, 3rd and 4th defendants parties was thus cured. But the claim was allowed, and the plaintiff was referred to a suit to establish his right. The plaintiffs in the present suits ask the Court to declare that the property in question is subject to the attachments in suits 427 and 452. How can it be so if it is the property of the

infants against whom no decree has been passed?

6. It is impossible to say that the infants were substantially parties to the decrees. Nor can it be said that the transfer was merely an illusory proceeding not intended to take effect, for there is no evidence that it was so. And at the time the transfer was made the father was quite entitled to deal with his property in that manner. The father's share in the house therefore. actually passed to the infants, and, as they were not parties to the decrees in the suits in which the attachments took place, I was of opinion that we could not hold the property in their hands liable to the attachments in the former suits.

7. In the rehearing of the cases the Advocate-General contended that the plaintiffs could not have obtained any relief against the minor sons had they made them parties to the suits, because they could not be made liable personally and no specific property was pledged, and that, therefore, it was quite sufficient to sue the father, who represented the entire family. But the exemption of the minors from personal liability extends only to liability to arrest of the person; they may be made personally liable in the other sense in which the expression is used, viz., liable in respect of their own separate effects or their interest in the joint family property, and, if it is sought to make them liable in respect of their own property or their own interest in the joint family property, it is necessary to include them as parties.

8. If a suit is brought against one coparcener on an obligation entered into by him and a decree obtained against him and it is afterwards sought in another suit to extend the scope of the decree by making other coparceners liable upon the obligation, according to the authorities this course is not permissible because the cause of action on the obligation is one and indivisible, and a second suit cannot be entertained upon the same cause of action.

9. If it is sought to declare that the decree binds the whole body of coparceners, the answer is they were not parties to the suit in which the decree was passed either actually or constructively.

10. If it is sought to declare that the property of other coparceners is liable under a decree against one, the answer is, you cannot extend the operation of the decree

to property other than that which the array of parties will warrant.

11. If the 2nd, 3rd, and 4th defendants were originally liable upon the obligations which plaintiffs enforced in suits 427 and 452 of 1877 against 1st defendant alone, they might have been made parties to those suits and made liable to the decrees, but to ask the Court, in the terms of the prayer of the present suits, to declare that the property of 2nd, 3rd, and 4th defendants is liable to satisfy the decrees in suits against 1st defendant alone is, in effect, to bring against these defendants fresh suits upon the same obligations as those upon which decrees were obtained against 1st defendant, to have it established that they are liable under the same obligations. I think the principle laid down in *King v. Hoare* 13 M. & W. 494 and afterwards in *Brinsmead v. Harrison* L.R. 7 C.P. 547 which was recognized by the High Court of Calcutta in *Hemendro Coomar Mullick v. Rajendro Lall Moonshee* I.L.R. 3 Cal. 353 viz., that under a joint contract to pay a sum certain there is but one single obligation which may indeed be enforced severally, but can be enforced once only, applies a fortiori to a case in which the obligation is in form that of one person and the liability of others under it arises out of their status as members of a joint family of which he is the head. I think plaintiffs have exhausted their remedy in their suits against 1st defendant.

12. The Advocate-General called attention to a judgment delivered by me in Original Suit No. 59 of 1873, in which I refused to allow certain infant sons of the 3rd, 4th, and 5th defendants therein to recover their shares in property sold under a decree against those defendants in a suit to enforce the obligation of a mortgage of certain family property executed by those defendants. The 2nd and 3rd plaintiffs were not in being, or even in the womb, at the date of the mortgage and were therefore bound by the acts of their fathers.

13. So far as appears from the judgment, they all went to trial upon the issue arising out of the allegation upon which they based their case, that the alienations by their fathers had not been made for family purposes binding upon them. The evidence showed that the purposes for which the mortgage was made were good and binding on the entire family and that the fathers and sons were colluding to defraud the purchaser. They were not, therefore, allowed to recover. No doubt,

according to the view which we take of the appeal before us, it might be said that the plaintiffs in suit 59 of 1873 ought to have been allowed to recover on the mere ground that the decree in the suit in which the mortgaged property was ordered to be sold did not bind there as they were not parties to it. The answer to this is that they did not put the case upon that footing.

14. For the reasons already given I would reverse the decrees of the learned Judge and dismiss both suits.

Plaintiff will discharge all costs throughout.

Muttusami Ayyar, J.

15. I concur. The suits were brought against the defendants to obtain a declaration that the house and ground No. 9 situated in the Armenian Street in the Town of Madras was liable to be attached and sold in satisfaction of the decrees which the plaintiffs obtained against their father Viraragava Chetti in suits 427 and 503 of 1877 on the file of this Court. To these suits, however, the sons were no parties, and the decrees passed therein directed the repayment of debts arising out of a course of dealings between the plaintiffs and the defendants' father. The house in dispute was attached in execution of those decrees, but the defendants claimed it as their exclusive property under a family arrangement. The claim was allowed and the plaintiffs were referred to a regular suit. In support of their claims the plaintiffs relied on four grounds, viz.--first, that the house and ground in question was the self-acquisition of Viraragava Chetti; second, that the alleged transfer to the defendants was illegal and in fraud of Viraragava Chetti's creditors; third, that the debt decreed was one incurred by the managing member of a trading family in the course of a trade carried on for the benefit of the family ; and, fourth, that a decree against a Hindu father was binding on his sons unless they showed that the debt recognized by the decree was one for which they could not be held liable. It is clear upon the evidence that the house in dispute originally belonged to a joint Hindu family. Nor is there sufficient reason to think that, in the circumstances in which this debt was contracted, Viraragava Chetti acted otherwise than as the prudent Manager of a Hindu family. The questions therefore arising for decision in

this appeal are whether the plaintiffs' claims can be supported in whole or in part on the 2nd, 3rd, and 4th grounds, or on any of them.

16. As to the contention that the debts are binding on the sons, there is no doubt that they are so, but the obligations arising from the debts were enforced in suits 427 and 503 of 1877 against the father only and could not therefore sustain a second suit against the sons. At its inception each obligation was single and indivisible, though it was enforceable jointly against the father and the sons or against any of them, but the plaintiff was entitled to sue upon it but once, and, as he elected to sue one of the debtors only, it was exhausted and merged in the judgment against the father. In *King v. Hoare* 13 M. & W. 506 Baron PARKE observed that, 'where a judgment has been obtained for a debt as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party.' In *Hemendro Coomar Mullick v. Rajendro Lall Moonshee* I.L.R. 3 Cal. 353 it was held at Calcutta that this was not a mere rule of procedure, but one of principle of the Law of Contracts.' The test seems to be whether, according to the intention of the parties, a single obligation was created as against all the debtors or whether a separate obligation was created against each of the several debtors. It was also pointed out by the High Court at Calcutta that Section 43* of the Indian Contract Act only abolishes the plea in abatement and recognizes a right in the creditor to proceed against all the debtors or any one of them. I should however add, as pointed out by Mr. Justice MARKBY, that the rule in *King v. Hoare* may be productive of great hardship in India and that a similar rule of the ancient Roman law was in the course of its development superseded by the more equitable rule that, unless there was satisfaction as well as judgment, the creditor was at liberty to proceed against the debtors by separate actions. As this is however an appeal from the Original Side, I feel bound by the decision in *King v. Hoare*. There is nothing on record to show that the father transferred the house to his sons in anticipation of insolvency or that it was not otherwise competent to him to transfer it at the date of the transfer. This view brings under consideration the question whether a decree against a Hindu father ought to be taken to be a decree against him and his sons, so as to render the sons' property liable for the same. The decision in *Girdharee Lall v. Kantoo Lall* 14 B.L.R. 187 which is binding upon us according to the recent ruling of the majority

of the Court, only declares that the son is not at liberty to impugn a sale of joint ancestral property concluded by the father for the payment of his separate debts, and not that the Court is to sell the son's property in satisfaction of a decree against the father during the father's life.

17. On these grounds I am also of opinion that the suits should be dismissed.

* Any one of joint promisors may be compelled to perform.

[Section 43 : When two or more persons make a joint promise, the promisee may in the absence of express agreement to the contrary, compel any one of such joint promisors to perform the whole of the promise.

Each promisor may compel contribution.

Each of two or more of joint promisors may compel every other of joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation: Nothing in this section shall prevent a surety from recovering from his principal payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.]

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com