

Firm Schwebo Vs. Subbiah

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SooperKanoon Citation : sooperkanoon.com/785572

Court : Chennai

Decided On : Feb-24-1944

Reported in : AIR1944Mad381

Appellant : Firm Schwebo

Respondent : Subbiah

Judgement :

Patanjali Sastri, J.

1. This appeal has been brought by the plaintiff, a firm of Nattukottai Chetty money-lenders and bankers, from a decree of the Court of the Subordinate Judge of Sivaganga dismissing their suit for setting aside an order whereby the four-sixths share of respondents 1 to 4 in their joint family property was released from attachment in execution of an order for restitution passed by the High Court of Judicature at Rangoon. Respondent 5 was impleaded pro forma as the receiver appointed in certain proceedings which were pending between the partners of the appellant firm, and no further reference will be made to him herein. The respondent's father Subramaniam Chettiar who was carrying on business as banker and money-lender at Rangoon and other places under the name and style of 'AT. K. PL. SP. Chettiar Firm' sued the appellants and others in the High Court at Rangoon in its original jurisdiction for recovery of Rs. 20,000 and obtained a decree on 27th July 1931. The appellants preferred an appeal to the same Court

in its appellate jurisdiction on 17th August 1931, and pending the appeal deposited the decree amount in Court on 2nd December 1931, as one of its partners was arrested in execution of the decree. The money was drawn out by the decree-holder on the same day and the execution proceeding was closed. On 11th May 1933 the appeal was allowed and the suit brought by the respondent's father was dismissed so far as the appellant firm was concerned. Thereupon the latter applied for restitution of the sum of Rs. 20,000 with interest and obtained an order for payment of Rupees 22,690 with further interest at nine per cent. till realisation together with costs of the application. This order was passed on 10th July 1933. As no payment was made in compliance with the said order, the appellants applied on 27th April 1936 for leave to take out execution. The application stated that respondent's father Subramaniam Chettiar was trading under the name and style of AT.K. PL. SP. for the benefit of his family and that leave should be granted under the provisions of Order 21, Rule 50, Civil P. C, read with Order 30, Rule 10 to execute 'the decree for restitution passed on 10th July 1933 by this Honourable Court' and the decree for costs in the appeal against 'AT. K. PL. SP. Subramaniam Chettiar of Sirukudalpatti, Ramnad District.' It may be mentioned here that the combined effect of the provisions referred to above is to render it necessary for a decree-holder who has obtained against a person carrying on business in a name or style other than his own name a decree in such name or style, to obtain the leave of the Court before executing the decree against any person whose position as the proprietor to the business has not already been established. The provisions contemplate the adjudication of the liability of such person as the proprietor of the business where such liability is disputed before leave to execute is granted. As the appellant's application alleged that the respondent's father was carrying on the business under the name of 'AT. K. PL. SP. Chettiar firm' for the benefit of his family and asked for leave to execute under the provisions specified, the respondent's father filed a statement of objections contending (para. 4) that in the absence of the parties on whom the restitution order was said to be binding the Court could not adjudicate as to who are the persons liable and (para. 5) that the business of AT. K. PL. SP. Chettiar firm was not carried on behalf of and for the benefit of his family. To this the appellants filed a reply wherein they stated;

'The application is for execution against AT. K. PL.SP. Subramaniam Chettiar and no relief is claimed now against any others. The contentions do not, therefore, arise for consideration at the present stage.' On this the Court passed the following order on 12th June 1936. 'Both sides now agree that AT. K. PL. SP. Subramaniam Chettiar is carrying on business as the sole proprietor of the AT. K. PL. SP. Chettiar firm and Mr. Anklesaria (counsel for the latter) has no objection to leave being granted for execution of the order' dated 10th July 1933 against him as such sole proprietor. Mr. Venkatarama (counsel for the appellants) is satisfied with such leave. There will be an order accordingly granting leave for executing the order for restitution, etc.' Having obtained such leave, the appellants got the 'decree for restitution' transmitted to the Subordinate Judge's Court of Sivaganga, Ramnad District, for execution and filed an application in that behalf on 10th August 1936. In that application however 'the judgment-debtor against whom the decree was to be executed' was described as 'AT. K. PL. SP. Chettiar firm by proprietor Subramaniam Chettiar (as manager of his joint family),' and attachment of certain immovable properties 'which belong to the joint family of the aforesaid Subramaniam Chettiar' and other consequential relief were sought. When attachment of these properties was effected petitions were filed by the respondents herein and by their step-brother, Palaniappa Chettiar under O.21, Rule 58, Civil P. C, praying that four-sixths share of the former and the one-sixth share of the latter in the family properties should be released from attachment on the ground that, before the order for restitution was made, they had become divided from their father under a partition deed dated 12th December 1932. The Court allowed the claims of the sons and directed the release of their shares from attachment holding that the partition was not a sham transaction as contended by the appellants herein, and that the claimants were in possession of their shares. It is to set aside the order thus obtained-by the respondents releasing their four-sixths share in the family properties which were attached and to declare that the appellants are entitled to proceed against the said share in execution of the decree for restitution that the present suit has been brought. As the appellants attacked the partition not only as a mere sham and colourable transaction but also, in the alternative, as having been brought about with intent to defeat and delay the creditors of the father even if it was intended to be operative between the parties

thereto, the suit was instituted on behalf of all the creditors of Subramaniam Chettiar as required by Section 53, T. P. Act. A similar suit was filed against Palaniappa Chettiar the other son of Subramaniam Chettiar but that suit is not now before the Court. The Court below did not go into the question whether the business of AT. K. PL. SP. Chettiar Firm at Rangoon was joint family business of the respondents and their father or was carried on by the latter as his own individual concern in which his sons had no interest. Dealing with the case on the assumption that it was a joint family business, the Court below found that

(1) the partition put forward by the respondents was neither a sham and colourable transaction nor one brought about with intent to defeat or delay creditors,

(2) the liability for restitution arose only when the decree of the trial Judge was reversed on appeal and that therefore it was not a pre-partition debt,

(3) even on the footing that such liability arose at the time of the recovery of the money from the appellants and was thus a pre-partition debt, the shares allotted to the sons at the partition could not be proceeded against in execution as the order for restitution was obtained against Subramaniam Chettiar after he ceased to represent the respondents by reason of the partition, and,

(4) in any event, the appellants were precluded by the terms of the order dated 12th June 1936 whereby leave was given to execute the restitution order against Subramaniam Chettiar as the 'sole proprietor' of the AT. K. PL. SP. Firm from claiming relief against the respondents in these proceedings. The appellants contest all these findings.

2. On the question of partition, we find it difficult to accept the suggestion of the appellants that it was a mere colourable and sham transaction not meant to operate between the parties. It is true that Subramaniam Chettiar's sons were all minors at the time of the partition and that they continued to be joint even after the partition. And it is also true that there was no division of the properties by metes and bounds and that the recital as to there being no debts payable by the family was false, as there was a mortgage for Rs. 30,000 outstanding on one of the properties included in the deed. It is also in evidence that Subramaniam Chettiar

departed from British India a few months later to avoid pressure of creditors and was eventually adjudicated insolvent. But these considerations, while no doubt giving rise to a strong suspicion that the parties intended to secure, if possible, the sons' share in the family properties from the reach of the father's creditors as suggested for the appellants, do not lead to any inference that the transaction was not intended to be operative between the parties. Indeed, the very motive which according to the appellants prompted the execution of the deed at this juncture would be a strong reason for supposing that the parties intended to bring about a real partition, for a sham transaction would not serve the purpose they had in view. On the other hand, several witnesses including the writer and attestors have deposed that the partition was due to the quarrels between the two wives of Subramaniam Chettiar. The first wife, who had only one son, apprehending that the second wife who had already four sons was likely to have more, demanded that the family properties should be divided according to the number of wives, while Subramaniam Chettiar and his second wife insisted the division should be according to the number of sons. The dispute is said to have been settled in the presence of the elder brother of the first wife (D. W.2) and the father of the second wife (D.W. 5) by the father being given one and the sons five out of six shares. The Court below saw no reason to discredit the evidence of these witnesses and we are not disposed to differ from its view. We consider it unnecessary to review the evidence here as it has been considered in detail by the learned Subordinate Judge. It is sufficient to say that we agree with his conclusion that the partition was not a sham transaction intended to be inoperative between the parties.

3. But even so, urged Mr. Bhashyam for the appellants, the transaction was liable to be set aside under Section 53, T. P. Act, as one brought about with intent to defeat or delay the creditors of Subramaniam Chettiar if not those of the family. The suit is no doubt framed as a representative action so as to admit of such relief being granted if the right to such relief is established but there are obvious difficulties in dealing with a partition among the members of a Hindu joint family as a 'fraudulent transfer' coming within the section. A 'transfer of property' is defined in Section 5 of the Act as meaning 'an act by which a living person conveys property in present or in future to one or more other living persons or to himself or to himself and one and more other living persons.' Can it be said that a partition is

an act of conveying property by one living person to another? And if so, where a creditor 'avoids' it, is the division of status brought about by the deed of partition which is vacated as against the creditors also to be deemed as nullified? The first of these questions was answered in the affirmative and the second in the negative by Abdur Rahim J. and vice versa by Spencer J. in *Indoji Jithaji v. K. Ramacharlu* A.I.R. 1920 Mad. 20. in *Rasa v. Arunachala* A.I.R. 1923 Mad. 577 Oldfield and Venkatasubba Rao JJ. refused to accept the view of Spencer J. and holding that a partition was a transfer of property to which Section 53 was applicable, affirmed a declaration of its invalidity by the lower Court at the instance of a creditor. The facts do not appear from the report and it is not clear whether the creditor in avoiding the partition sought to proceed against the debtor as a divided or an undivided member. In 1937 1 M. L. J. 2493 Varadachariar J. held that a partition between a father and his sons precluded a creditor who obtained a decree against the father after the partition from proceeding against the properties allotted to the sons, although the partition was brought about for the very purpose of preventing the decree-holder from executing his decree against such properties. The learned Judge expressed the opinion that unless a smaller share than what the father was otherwise entitled to, had been allotted to him at the partition, the transaction could not be assailed as a fraudulent transfer under Section 53, however mala fide it might be in the sense that it was intended to defeat the right of a creditor holding a decree against the father to execute it against his sons' shares in the family properties. But if the partition was unequal and was consequently held not binding on the creditors of the father, the learned Judge opined that it would still be operative to bring about a division of status and that although the father's proper share would be available to satisfy his debts, his creditors could not execute against the son's interests, decrees obtained against the father alone after the partition : see also *Veerappa v. Annamalai* A.I.R. 1935 Mad. 316 and *Kuppan Chettiar v. Masa Goundan* A.I.R. 1937 Mad. 424 where the learned Judge has expressed similar views.

4. The authorities referred to above would thus seem to establish the following propositions : (a) Where the partition is unequal and the father has been allotted a smaller share than would be his due with intent to defeat his creditors, the latter can avoid the partition under Section 53 and proceed against what would be his

proper share in the family properties in execution of decree obtained against him, ignoring the allotment of the properties at the partition; (b) they cannot however proceed against the son's shares in such execution, as the division of status brought about by the partition will stand notwithstanding the avoidance of the partition as a fraudulent transfer; but (c) where the partition is fair and in accordance with the proper shares of the parties, it is not liable to be impeached under Section 53, although it was entered into with a view to prevent attachment of the son's shares in execution of decrees obtained against the father after the partition and was in that sense mala fide; and (d) a mere colourable partition not meant to operate between the parties could be ignored and the creditor could enforce his remedies as if the parties still continued to be joint. Applying these propositions to the facts of the present case, it is to be observed that the partition in question practically did no more than define and fix the shares of Subramaniam Chetti and his sons in each item of ancestral property in accordance with their rights under the Hindu law, and there was no attempt to favour the sons at the expense of the father's creditors. We have also found that it was not a sham transaction. Even assuming, therefore, that the circumstances in which the partition was effected justify the inference that it was brought about with a view to place the minor son's shares in the family properties beyond the reach of Subramaniam Chetti's creditors as far as it was possible under the law to do so, it cannot be 'avoided' as a fraudulent transfer under Section 53, T. P. Act. It follows that the appellants are not entitled to attach the respondent's four-sixths share in the ancestral properties in execution of the decree for restitution which they have obtained from the High Court of Judicature at Rangoon, even on the footing that Subramaniam Chetti's liability to make restitution arose even on 2nd December 1931, when he drew the amount from Court, and was thus a pre-partition debt.

5. Mr. Bhashyam next put forward another line of argument on the footing that the business carried on in the name of the AT. K. PL. SP. Chettiar Firm was a family business. He urged that the suit which resulted in the recovery of Rs. 20,000 from the appellants must be regarded as having been brought by Subramaniam Chetti as the manager of the family representing all the members including the respondents, that such representation implied that the persons represented were parties to the proceedings though they were not eo nomine on the record, and that

the partition in 1932, during the pendency of the appeal preferred by the appellants herein, was immaterial as it could not affect the position of the respondents as parties to the proceedings throughout including the proceedings of restitution. Strong reliance was placed in support of this argument upon the decision of a Full Bench in *Yenkatanarayana v. Venkata Somaraju* A.I.R. 1937 Mad. 610, where a decree for mesne profits passed against a Hindu father after a partition between himself and his son was held executable against the son as the latter must be deemed to have been a party to the suit which was commenced before the partition when the father must be taken to have represented the son, as he was the manager of the family and the suit arose out of a transaction entered into on behalf of the family. The learned Judges referred to various Privy Council decisions holding that decrees obtained by or against a manager of a joint Hindu family bound the other members as they must be deemed to have been represented by the manager, and argued that this could be so only on the footing that the junior members were constructively parties through the manager. Venkatasubba Rao J. observed:

The reason for holding that the members not joined should be held liable is, that they are substantially parties to the suit through the manager, in other words, they are sufficiently represented, though not *eo nomine* parties on the record. It follows from this that the decree can be executed not only against the parties whose names appear but also against those who must be deemed to be constructive parties. In the view it is immaterial whether the family continues to remain joint or became divided.' And Venkataramana Rao J. said : 'A judgment against a person sued in a representative character is a judgment against every individual member covered by the representation and therefore the bar of *res judicata* is held to apply to a member of a family not a party *eo nomine* to the litigation represented by its manager : vide *Lingangowda v. Basangowda* . When they must be held to be parties to the suit, it is immaterial what the character of the property in their hands is, whether it is still undivided property or has become separate property by division.

This reasoning, however, would seem to overlook the fact that the applicability of the principle of *res judicata* which is made applicable to such cases by Explan. 6 of

Section 11, Civil P. C, (see *Lingangowda v. Basangowda*) rests not on the theory that the persons represented by the party litigating in respect of the common right are parties to the suit, but on the ground that such persons 'shall, for the purposes of this section, be deemed to claim under the persons so litigating,' which necessarily implies that these persons are themselves not parties to the suit. However that may be, we are clearly of opinion that it is not open to the appellants in these proceedings to claim relief on the footing that the AT. K. PL. SP. Chettiar Firm at Rangoon was a joint family concern. As stated already, the appellants obtained leave to execute the restitution decree and got it transmitted to the Court at Sivaganga for execution expressly on the agreed footing that 'AT. K. PL. SP. Subramaniam Chettiar is carrying on business as the sole proprietor of the AT. K. PL. SP. Chettiar Firm,' the plea of family proprietorship of the business having been put forward by the appellants and withdrawn on objection raised by Subramaniam Chetti, the appellants stating that 'the application is for execution against AT. K. PL. SP. Subramaniam Chettiar and no relief is claimed against any others.' Mr. Bhashyam sought to explain that the reference to 'sole proprietor' in the order of the Court, Ex. D-2(c) dated 12th June 1936, and to 'any others' in the appellant's reply affidavit, Ex. D-2(b) was only intended to convey that there were no other partners in the business, but this explanation cannot be accepted as the issue then raised did not relate to any partnership with strangers but only to the proprietorship of the joint family. We are, therefore, inclined to agree with the learned Subordinate Judge that the appellants are precluded by the terms of the order dated 12th June 1936, based on the consent of parties, from claiming relief in these proceedings by way of attachment of the respondent's share in the family properties on the footing that the 'AT. K. PL. SP. Chettiar Firm' was a family business. The conclusions we have reached on the points discussed above are decisive of the appeal and it is unnecessary to say anything on the other questions argued before us. The appeal fails and is dismissed with costs.