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Court : Chennai

Decided On : Mar-06-1934

Reported in : AIR1935Mad33

Appellant : Mudara and ors.

Respondent : Muthu Hengsu and ors.

Judgement :

Pandalai, J.

1. The plaintiffs, of whom plaintiff 3 is the assignee, of a mortgage from the other plaintiffs, appeal against the decision of the learned District Judge of South Kanara confirming the decree of the Subordinate Judge and dismissing their suit on the mortgage Ex. A dated 6th March 1919, for Rs. 1,500 executed by defendants 1 and 2 for themselves and as guardian of defendants 3 to G and three others since deceased who were all members of an Aliyasanthana family to which the mortgaged property belonged. The defence was that the mortgage was invalid for various reasons viz., (1) that it should have been executed not only by those who executed it but also by the members of a collateral branch according to the terms of a partition deed (Ex. 2); (2) that even all the members of the mortgaging branch had not joined the mortgage and (3) that the mortgage was not for debts binding on the family. The District Munsif found that the mortgage was true in the sense that the mortgagee paid the full amount of consideration, that the objection as to

non-joinder of the other persons was not sustainable but that the debt had not been proved to be for the benefit of the defendant's family and therefore binding on it. In appeal the learned Judge took a somewhat different view but agreed with the Munsif in dismissing the suit.

2. He did not go into the question whether the debt was for purposes binding on the defendants' family because in his view the mortgage failed as it was not executed either by all the members of the defendants' branch nor a fortiori by those members together with the members of the other collateral branch. According to the learned Judge these conditions were necessary to validate the mortgage according to the stipulations of the partition deed (Ex. 2). As to the persons who did not join in Ex. A it was admitted that among the members of the defendants' branch one Kanhalva who was examined as D. W. 2 in the case had not taken part in the mortgage and it was also admitted that none of the members of the collateral branch joined in it. If the Judge's view that the mortgage is invalid because these persons did not join in it is incorrect, it will be necessary to consider the validity of the mortgage on the usual ground of the debt being binding or otherwise. The learned Judge has fallen into a mistake in thinking that Ex. 2, the partition deed, amounts only to an arrangement for maintenance which left the integrity of the entire tarwad unaffected. The facts are that one Thankaju, a lady of this family was the owner of some properties. Being issueless she gave it to the descendants of her two pre-deceased sisters, viz., two daughters of her sister Parmeswari and two grand-daughters of the other pre-deceased sister Vengamma. The gift is Ex. 1 dated 18th February 1878, and the terms of the gift are important to show what right the donees derived under it. It says,

you four and your descendants in hereditary succession shall enjoy in two equal shares.

3. It is clear that the descendants of Parameswari and those of Vengamma were given the properties in equal halves to be enjoyed by them and their descendants in absolute right. The later partition (Ex. 2) dated 14th January 1889, recites that the two branches had been enjoying this property with out division till that time, that such joint enjoyment had become inconvenient and that therefore with the

help of wise men the properties themselves wore being divided by metes and bounds. In short though there had been a division in interest before, there had not been an allotment of property in two shares which was all that Ex. 2 effected. The learned Judge's view therefore that Ex. 2 amounts to an arrangement for maintenance is against the express terms of Ex. 1 and of Ex. 2. If anything more were necessary to show the real character of Ex. 2 it is found in the provision therein that the members of the respective branches were to enjoy (the properties allotted to them) under permanent right in hereditary succession. They were to pay the assessment in equal shares. The arrangement then made as to division was in the contemplation of the parties perpetual and permanent and not a temporary one as maintenance arrangements are, i.e., till it is revised. The learned Judge was apparently misled by the fact that maintenance arrangements are common in Marumakathayam and Aliyasanthanam families and by the fact that in Ex. 2 all the persons that might have joined in it in the two branches did not join. The fact that maintenance arrangements are common cannot be allowed to overthrow the plain meaning and the express terms of the document if an outright partition was intended by them nor can the fact that every single person of both the branches did not join affect the question if everybody concerned was content to accept the partition effected by the seniors of the families. That is a matter entirely for them and if they are content their not having put their signatures to the document cannot affect its meaning. It was this misconstruction of Ex. 2 that led the learned Judge to his conclusion that the mortgage Ex. A is invalid because it infringed one of the conditions mentioned in Ex. 2, viz., that encumbrance affecting the property would not be valid unless all the members of both the branches joined in them.

4. Exhibit 2 being established beyond question to be an outright partition - and in view of Ex. 1, it could not be anything else - the question is whether the mortgage is vitiated because it in fringes the provision in Ex. 2, that all the members, of both the branches should have joined in it. On this the learned Judge has not expressed any opinion. That is the point which has been argued here. The appellant's argument is that a provision in a partition deed prohibiting alienation, including, mortgage, of the properties allotted in absolnte interest to each sharer except with the consent of the other sharers is-repugnant to Section 10, T.P. Act. The actual clause in Ex. 2 is in these terms:

The members of each branch should have no right whatever to alienate any portion whatever of this property by way of mulgenj etc., (alienation by way of Shelgeni being excepted). Such alienations if made should be invalid. If necessity arises for contracting debts on the liability of this property all the major members of both the branches should jointly do so. If the members of each branch contract debts as they please, they should be personally liable for such debts but the property should not be held liable therefor.

5. As I have found that the two sharers-had an absolute estate in their shares-conferred upon them both by Ex. 1 and Ex. 2 the question is whether these restrictions are valid. The question about, mulgeni does not now arise because it is-not the subject of the suit. But the question is whether a mortgage executed by the members of one of the two branches alone and which would be valid if it can be shown that the debt was necessary for that branch would be invalid merely because the members of the other branch did not take part in it. If the clause is valid, it would be invalid but if it is not, that ground of invalidity disappears. In the first place a provision requiring the owner of a property not to encumber it unless he can get the consent of his neighbour, who is not interested in it whatever is a restraint sufficiently absolute to fall with Section 10. Take this very case. The mortgagors said though it was not admitted, that they attempted to satisfy the clause by sending notices to the members of the other branch and that the others merely took no notice of them. What are the mortgagors to do in the circumstances? They have no power to compel the consent of a sharer who has taken his share and has no beneficial interest in the property to be mortgaged. To require such a person's consent before an owner's mortgage of his own property can be valid makes the owner's undoubted right of ownership practically valueless. Such a restriction is in my opinion in effect and substance absolute.

6. In K. Venkatamanna v. Bramanna Sastrulu (1868) 4 M.H.C.R. 345, A, B, C and D effected a partition of joint family properties and agreed that if any one of thorn should have no issue he would have no power to sell his share but should leave it for the other sharers. A sold his share and died without issue. 11, G and D sued to recover that share and the Court held that the condition was void as repugnant to one of the legal incidents of property. Similar are the decisions of the Bombay and

Allahabad High Courts in Ramalinga Khanapure v. Virupakshi Mahadapure (1983) 7 Bom. 538 and Chandar Sekhar v. Kundan Lal (1909) 31 All. 3. A decision of the Privy Council somewhat on the same line is in Jaffri Begum v. Ali Raja (1901) 23 All. 383, where the partition was effected by an arbitrator. After allotting shares to two sisters he directed that neither should have a right to claim partition. On the death of one, her son sued for partition. Their Lordships said it may have bound the parties who agreed among themselves to abide by it but as against the present plaintiff it has no effect whatever. The arbitrator had no power to make property which was divisible by law indivisible for ever. That is the practical effect of the clause against mortgages and other alienations contained in Ex. 2. We are not concerned with the of fact as between the parties to Ex. 2 because the mortgagors in Ex. A are not those parties, at any rate not wholly. The effect of the clause is to make the shares of the defendants' branch for ever inalienable except with the consent of the members of the other branch who have no interest in it at all. Such a prohibition is clearly repugnant to Section 10.

7. It was argued that this was a case not of an absolute restraint on alienation but a partial one and Mahammad Raza v. Abbas Bandi Bibi 1932 P.C. 158 was cited. That was a case where a prohibition of sales to strangers who were not members of the family was held not inconsistent with Section 10 of the Act. This is not such a prohibition. The prohibition is universal and applies to all possible alienees and for all time. The learned Judge seems to have been influenced by the fact that these provisions are frequently contained in family arrangements on the West Coast in Marumakathayam and Aliyasanthayam families, into thinking that wherever they occur they must be according to the spirit of the people and therefore not invalid. It is not an uncommon provision for members of a tarwad who naturally desire that their properties should remain among themselves and their descendants and not be dissipated by succeeding generations to make provisions of this character. But it is clear that however much people may desire to keep their property in the hands of their descendants they cannot succeed in doing so by violating the provisions of law as to transfer of property. Once the property is given absolutely to a member or branch of a family, to provide that that member of the branch shall not alienate it is to offend against the law. This prohibition does not of course apply where the member or the branch is not given the property

absolutely but is only given for enjoyment or convenience. There the question does not arise because the property is not absolutely transferred. It was on that point that the learned Judge erred.

8. The question therefore remains to be tried whether on its own merits the debt evidenced by the mortgage is one binding upon the defendants' branch. This question has not been considered by the learned Judge and the case must therefore go back to him for its determination and a fresh decision. The decree of the learned Judge is therefore reversed and the case sent back to him for the determination of the question above mentioned, and a fresh decree thereon. The appellants will have a refund of the court-fee paid on the memorandum of appeal. They will have the costs of this second appeal from the respondents. The costs in the two lower Courts will be provided for by the learned Judge in his fresh decree.

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