AVANASI GOUNDEN v. NAGAMMAL.

Overruling *Subbammal* v. *Huddleston* (1), *Ahmed* v. *Moidin*(2) and *Raja Simhadri Appa Row* v. *Ramachandrudu*(3) in so far as the last case relies on *Ahmed* v. *Moidin*(1) we hold here that the decision in the former suit does not operate as *res judicata* and the fact that the former suit was one of a small cause nature prevents the decision therein from operating as *res judicata* in the present suit.

The appeal came on for final hearing in due course before Davies and Benson, JJ., when the Court delivered the following

JUDGMENT:—The opinion of the Full Bench is to the effect that the case was not *res judicata*. We set aside the decrees of the two lower Courts and remand the suit to the Court of the District Munsif for trial according to law. Costs in this and in the lower Appellate Court will abide the result.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar, and Mr. Justice Davies.

1905 August 22. November 9, 10 December 6.

VENKATARAMANAYA PANTULU AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

VENKATARAMANA DOSS PANTULU AND OTHERS (DEFENDANTS), RESPONDENTS *

Hindu Law-Liability of son for father's debt-Sale or mortgage by father binding only when there is a debt existing prior to the sale or mortgage.

A sale or mortgage of joint family property by a father is binding on the son's share only when there is an antecedent debt *i.e.*, a debt, existing prior to and independently of the sale or mortgage.

Where the debt is incurred at the time of sale or mortgage, it is not an antecedent debt within the meaning of those words as used in the judgment of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Pershad*, (I.L.R., 5 Calc., 148). *Chidambara Mudaliar* v. *Koothaperumal*, (I.L.R., 27 Mad., 326), dissented from; *Sami Ayyangar* v. *Ponnammal*, (I.L.R., 21 Mad., 28), approved.

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(1) I.L.R., 17 Mad., 273. (2) I.L.R., 24 Mad., 444.
(3) I.L.R., 27 Mad., 63.

* Second Appeal No. 704 of 1903, presented against the decree of E. B. Elwin, Esq., District Judge of Ganjam at Berhampore, in Appeal Suit No. 180 of 1902, presented against the decree of M.R.Ry. N. R. Narasimmiah, District Munsif of Berhampore, in Original Suit No. 213 of 1901.

SUIT to recover Rs. 166-6-6, the principal and interest due on a registered mortgage document executed on the 3rd April 1895 by the deceased father of defendants Nos 1, 2 and 3. by defendants Nos. 4 and 5 and the deceased father of defendants Nos. 6 and 7 in favour of the plaintiffs' deceased father. The bond was not executed in consideration of any antecedent debt.

The District Munsif dismissed the suit on the ground that there was no consideration for the mortgage. On appeal the District Judge passed a decree in favour of the plaintiffs, but defendants Nos. 1 to 3 and 6 and 7 and their shares in the family property were not made liable.

Plaintiffs preferred this second appeal.

The question involved in the appeal was whether the shares of defendants Nos. 1 to 3 and 6 and 7 in the family property were bound by the mortgage.

The case came in the first instance before Davies and Benson, JJ., who made the following

ORDER of REFERENCE TO FULL BENCH:— "The decision relied on by the District Judge [*Sami Ayyangar* v. *Ponnammal*(1)] has been dissented from in the subsequent decision of a Division Bench in *Chidambara Mudaliar* v. *Koothaperumal*(2). That being so, we think that the question ought to be authoritatively settled by a reference to the Full Bench.

"We, therefore, refer this question whether in order to justify a sale or a mortgage of joint family property by a father so as to bind the son's share there must be, in fact, an antecedent debt, *i.e.*, a debt, prior to the mortgage or sale."

The case came on for hearing in due course before the Full Bench constituted as above.

K. S Ramaswami Sastri for *P. R. Sundara Ayyar* and *A. S. Bala Subrahmania Ayyar* for the appellants.

V. C. Seshachariar for the eighth and tenth respondents.

The Court expressed the following

OPINION:—The question for determination in this case is—Is a sale or a mortgage by a father of joint family property binding upon a son's share if there is no antecedent debt due by the father. *i.e.*, no debt prior to the mortgage or sale.

(1) I.L.R., 21 Mad., 28. (2) I.L.R., 27 Mad., 326.

VENKATA-RAMANAYA PANTULU v. VENKATA-RAMANA DOSS PANTULU.

In *Sami Ayyangar* v. *Ponnammal*(1), it was held that in order to justify a sale or a mortgage by a father so as to bind his son's share of the property, there must be in fact an antecedent debt. In the judgment in that case it was pointed out that, as regards the liability of the son's share for the debt of the father as a mere money claim, there could be no question in a case where the mortgage was for consideration and was not illegal or immoral; but it was held, following the rule which had been previously acted upon by this Court, that the son's share was not bound by the sale or mortgage unless there was an antecedent debt.

In *Chidambara Mudaliar* v. *Koothaperumal*(2), it was held that as regards the effect on the son's share there was no distinction in principle between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred. That case was a case of mortgage and not of sale, but the language of the judgment indicates that the Court was of opinion that in the case of sales and mortgages alike the same principle was applicable.

The question for us really is—Was the case [*Sami Ayyangar* v. *Ponnammal*(1)] rightly decided? We are of opinion that it was. The question appears to us to be governed by authorities which are binding upon this Court. In *Suraj Bunsi Koer* v. *Sheo Persad Singh and others*(3), the Privy Council in discussing *Muddun Thakoor* v. *Kantoo Lall*(4), observe that that case was an authority for the proposition that "where joint ancestral property has passed out of "joint family, either under a conveyance executed by a father in "consideration of an antecedent debt, or in order to raise money "to pay off an antecedent debt, or under a sale in execution of a "decree for the father's debt, his sons, by reason of their duty to "pay their father's debts, cannot recover that property, unless "they show that the debts were contracted for immoral purposes, "and that the purchasers had notice that they were so contracted." In a later Privy Council case we find the phrase 'antecedent debt' adopted by Lord Hobhouse. In delivering the judgment of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun*(5), Lord Hobhouse observes "destructive as it may be of the principle of "independent co-parcenary rights in the sons, the decisions have, for "some time, established the principle that the sons cannot set up

(1) I. L. R., 21 Mad., 28.
(2) I.L.R., 27 Mad., 326.
(3) I. L. R., 5 Calc., 148.
(4) L. R., 1 I.A., 333.
(5) I.L.R., 13 Calc., 21.

"their rights against their father's alienation for an antecedent "debt, or against his creditor's remedies for their debts if not "tainted with immorality." In *Bhaghut Pershad Singh* v. *Ginja Koer and others*(1) the debt was in fact antecedent in the sense that it existed prior to the sale. Sir Barnes Peacock in delivering the judgment of the Privy Council cites the passage in the judgment delivered by Lord Hobhouse referred to above. In the Privy Council case of *Mahabir Pershad* v. *Moheswar Nath Sahai*(2) the debt was, in fact, antecedent to the sale It seems to us that it is impossible to adopt the view taken in *Chidambara Mudaliar* v. *Koothaperumal*(3) although, on principle, we might be disposed to do so, without ignoring, or placing a forced and unnatural meaning on the word 'antecedent' as used in the judgments of the Privy Council in the cases referred to, and we do not think we are warranted in so doing.

So far as the decisions of the other High Courts in this country are concerned, there are, no doubt, decisions to the effect that a mortgage may be binding on the son's share even when the debt is the debt created by the mortgage transaction itself. These decisions proceed upon the ground that in such a case the debt is an antecedent debt within the meaning of the Privy Council rulings. This was the ground of the decision in *Khalilul Rahman* v. *Gobind Pershad*(4) in which the Calcutta High Court followed a Full Bench decision of that Court [See *Luchmun Dass* v. *Giridhur Chowdhry*(5)]. In the Bombay case [*Chintaman Rav* v. *Kashinath*(6)], the judgment proceeded upon the same ground. In the Allahabad case [*Debi Dat* v. *Jadu Rai*(7)], the Allahabad High Court held, without discussing the rulings of the Privy Council, that the sons could only dispute the validity of a mortgage by the father (and by 'validity' the learned Judges meant the binding effect as regards the sons' shares) either on the ground that the debt was never incurred, or was no longer in existence, or that it was tainted with immorality.

As regards this High Court, the view taken in the cases of *Chinnayya* v. *Perumal*(8) and of *Sami Ayyangar* v. *Ponnammal*(9)

(1) I.L.R., 15 Calc., 717.
(2) I.L.R., 17 Calc., 584.
(3) I.L.R., 27 Mad., 326.
(4) I.L.R., 20 Calc., 328.
(5) I.L.R., 5 Calc., 855.
(6) I.L.R., 14 Bom., 320.
(7) I.L.R., 24 All., 459.
(8) I.L.R., 18 Mad., 51.
(9) I.L.R., 21 Mad., 28.

and in *Srinivasa Ayyangar* v. *Ponnammal*(1) was that when the debt was incurred at the time of the sale or mortgage it was not an antecedent debt within the meaning of those words as used in the judgment of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh*(2). As regards the question of sale there does not appear to be any decision either of the Privy Council or of the Courts of this country that a sale is binding on the son's share when the debt was not antecedent in the sense that it existed prior to, and independently of, the sale.

We are of opinion that the answer to the question referred to us must be in the affirmative.

The appeal came on for final hearing in due course before Davies and Benson, JJ., when the Court, after the expression of the opinion of the Full Bench, delivered the following

JUDGMENT:—It is now urged that the District Judge has not clearly and distinctly held that the debt was not contracted for the marriage expenses of the sister of the defendants Nos. 1, 2 and 3. There cannot, in our opinion, be any doubt as to the meaning of the District Judge's judgment as to this. He finds that the debt is said to have been contracted for marriage expenses, but that there is, as a matter of fact, no evidence as to whether the money was spent on a marriage or when that marriage took place. The District Judge might in fact have gone further and stated that there is no evidence on the record that there ever was any marriage. The decision of the Full Bench, on a reference in this second appeal passed on the 6th December 1905, removes all doubt as to whether the decision in *Sami Ayyangar* v. *Ponnammal*(3) or that to be found in *Chidambara Mudaliar* v. *Koothaperumal*(4) should be followed by this Court in deciding this second appeal and lays down clearly that in order to justify a sale or mortgage of joint family property by a father so as to bind the son's share there must be an antecedent debt, *i.e.*, a debt prior to the mortgage or sale. The vakil for the plaintiffs (appellants) now that the above-mentioned points have been decided against him, tries to raise certain further questions as to the liability of defendants Nos. 6 and 7. It is perfectly clear that these questions were not raised or argued before the District Judge in the lower Appellate

(1) L.P.A., No. 12 of 1893 (unreported). (2) I.L.R., 5 Calc., 148.
(3) I.L.R., 21 Mad., 28. (4) I.L.R., 27 Mad., 326.

Court, and such being the case we are decidedly of opinion that we should not allow them to be raised now for the first time in second appeal. This second appeal is dismissed. The plaintiffs (appellants) will pay their own costs and those of the tenth defendant. There will be no order as to the costs of the other parties.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

VENKATARAMIAH PANTULU (PLAINTIFF, APPELLANT,

v.

RAMAKRISHNA PANTULU (DEFENDANT), RESPONDENT.*

1905. January 19.

Right of suit—Agreement in subsequent deed to pay balance due on a prior document, gives no fresh right of suit when previous obligation not discharged.

Where a promissory note had been executed by the defendant in favour of the plaintiff and some time afterwards the defendant by another document assigned certain decrees to the plaintiff and the document provided that the amounts realized by executing the decrees should be credited towards the amount due on the promissory note and that the defendant should pay any balance that may remain due after the decrees had been realized but the original promissory note had not been cancelled or returned to the defendant or otherwise discharged :

Held, that the plaintiff's only claim was on the promissory note and that the subsequent document conferred no fresh right of suit and that the plaintiff's suit brought after the expiry of the period of limitation for a suit on the promissory note was barred.

Barker's claim, (1894), 3 Ch.D., 290), referred to and applied.

THE defendant borrowed from the plaintiff Rs. 12,500 for which, on the 23rd day of November 1895, the defendant executed in favour of the plaintiff an on-demand promissory note carrying interest at the rate of 12 per cent. per annum.

On the 2nd July 1898 the defendant after looking into and settling his account with the plaintiff executed and delivered to the plaintiff a registered deed for Rs. 16,465-12 0.

The material portion of the deed is as follows :—

I have hereby assigned and given over the aforesaid decree to you. As I have transferred to you all the right title and interest

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* Original Side Appeal No. 42 of 1905, presented against the judgment and decree of Mr. Justice Boddam in Civil Suit No. 42 of 1904.