KUPPA REDDIAR v. KING-EMPEROR.

and ties his hand, I am clearly of the opinion that the offence as proved does involve a breach of the peace.

Several authorities were cited, but I do not think that any useful purpose will be served by my discussing the various conflicting rulings bearing on the subject and opposite and different interpretations placed upon the words in the section but however I would add that I follow *Ramaswami Thevan* v. *King-Emperor*(1), a decision of SPENCER, J., and that I respectfully dissent from *In re Thirumal Reddy*(2) decided by KUMARASWAMI SASTRI, J.

The order therefore directing the accused to execute a bond for keeping the peace was rightly made.

As regards the merits of the case some points were urged before me, but I am not prepared to uphold any of the contentions and in the result the Criminal Revision Case fails and is dismissed.

D.A.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

1924, February 6.

AMMAKANNU AYI (PLAINTIFF), APPELLANT,

v.

A MALE CHILD NOT NAMED, BY GUARDIAN MURUGAYYA ODAYAR (2ND DEFENDANT), (SON AND LEGAL REPRESENTATIVE OF DECEASED 1ST DEFENDANT, PALANI), RESPONDENT.*

Suit and decree on a cause of action against a wrong person—Subsequent suit against the right person—No estoppel—Suit on a mortgage executed by a Hindu widow in her own capacity and not as guardian of her adopted son, but for purposes binding on estate—Adopted son's liability.

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(1) Crl. A. No 1600 of 1922 (Unreported). (2) (1922) 30 M.L.T., 348.

* Appeal No. 160 of 1921.

A judgment obtained against a person in the belief that he executed a document in his own right does not bar a subsequent suit against the rightful owner, when it is subsequently learnt that he executed it on the latter's behalf.

A Hindu widow who was consistently denying an adoption alleged to have been made by her executed a mortgage of her husband's estate in her own capacity and not as guardian of the adopted son but chiefly for purposes alleged to be binding on the estate. The mortgagee and his assignee knew of the denial and the assignee alleging that there was no adoption first sued the widow on the mortgage and got a mortgage decree against her. Then he sued the alleged adopted son on the mortgage and the decree, and prayed for a decree against him alleging that the debt was binding on the estate.

Held, (1) that the plaintiff was not by reason of the previous suit against the widow estopped from filing this suit against the adopted son who claimed to be the owner of the estate; *Scarf* v. *Jardine* (1882) 7 App. Cas., 345, distinguished, and (2) that even if there be consideration and bona fides, the suit should be dismissed as the widow executed the mortgage only in her own capacity and not as guardian of the defendant.

APPEAL against the decree of A. NARAYANA PANTULU, Subordinate Judge of Māyavaram, in Original Suit No. 46 of 1917.

The facts are given in the Judgment of JACKSON, J.

C. Krishnaswami Rao (with *K. S. Jayarama Ayyar*) for appellant.

A. Krishnaswami Ayyar (with *V. Sundaram Ayyar*) for respondent.

RAMESAM, J.—The facts have been stated by my learned brother whose judgment I have had the advantage of reading and need not be repeated.

A preliminary question of law raised by the defendant in the Court below and repeated here has first to be dealt with. He contends that, as the plaintiff filed her suit against Rathnathayi in 1914 and obtained a decree, she has elected her remedy and the present suit is not

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maintainable. He relies on *Scarf* v. *Jardine*(1), *Morel Brothers & Co., Limited* v. *Westmoreland (Earl of)*(2) (per COLLINS, M.R.), on appeal *Morel Brothers & Co., Limited* v. *Westmoreland (Earl of)*(3), *Moore* v. *Flanagan and wife* (4), and on *Kendall* v. *Hamilton*(5). *Scarf* v. *Jardine*(1) is a case of a customer of an old firm of partners selling goods to a new firm consisting of an old partner and a new partner and carrying on business under the old style without notice of the change. In that case the old firm was liable only on the ground of estoppel and after the plaintiff sued the new firm, it was held that he disavowed the estoppel and could not set it up again (see Lord SELBOURNE, L.C., at page 350). It was a case where either firm (but not both) could have been held to be legally liable. The present case is not a case where either Rathnathayi, or the present first defendant can be legally held to be liable on the mortgage. If Rathnathayi is the owner of the mortgage properties only Rathnathayi is liable on the mortgage and not the first defendant. If, however, the first defendant is the owner of the suit properties, and if it is held that Rathnathayi did not represent him in executing the mortgage bond, she is personally liable and on the mortgage neither is liable. If it is held that Rathnathayi represented him in executing Exhibit A, the first defendant is liable on the mortgage and Rathnathayi is not liable. Thus, on no version of the facts, do we get a case where plaintiff, at his option, can hold one or other of two persons (but not both) liable. The alternation of the liabilities of Rathnathayi and first defendant arises on different views of the facts. I am, therefore, of opinion that the case in *Scarf* v. *Jardine*(1) does not

(1) (1882) 7 App. Cas., 345.
(2) [1903] 1 K.B., 64.
(3) [1904] A.C., 11.
(4) [1920] 1 K.B., 919.
(5) (1879) 4 App. Cas., 504.

apply. The cases of *Morel Brothers & Co., Limited* v. *Westmoreland (Earl of)*(1) and *Moore* v. *Flanagan and wife*(2) are similar. It was held in each of those cases that it was not a case of joint liability but only of alternative liabilities and *Scarf* v. *Jardine*(3) applied.

The other case relied on by the appellant, *Kendall* v. *Hamilton*(4), was a case of agent and principal. Under section 233 of the Contract Act, the liability of the principal and agent is joint and several. The question how far the principle of *Kendall* v. *Hamilton*(4) will apply in India has been the subject of difference between the Indian High Courts and cannot be regarded as quite settled, [see *Shivlal Motilal* v. *Birdichand Jivraj*(5) following *Priestly* v. *Fernie*(6) and *Kendall* v. *Hamilton* (4) and *Muhammad Askari* v. *Radhe Ram Singh*(7)] unless the decision in *Bhagwati Prasad* v. *Radha Kishen Sewak Pande*(8) can be regarded as settling it. That was a case of an agent and undisclosed principal and the Privy Council reversing the decision in *Bir Bhaddar Sewak* v. *Sarju Prasad*(9) [in which the High Court dismissed the suit against the principal following *Priestly* v. *Fernie*(6) and referring to the notes to *Thomson* v. *Davenport*(10)] gave an equitable charge against the principal. The fact that *Bir Bhaddar Sewak* v. *Sarju Prasad*(9) was reversed by the Privy Council in *Bhagwati Prasad* v. *Radha Kishen Sewak Pande*(8) was evidently not noticed by that High Court in *Muhammad Askari* v. *Radhe Ram Singh*(7).

The point need not be pursued in this case as it does not arise.

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(1) [1903] 1 K.B., 64, on appeal, [1904] A.C., 11.
(2) [1920] 1 K.B., 919.
(3) (1882) 7 App. Cas., 345.
(4) (1879) 4 App. Cas., 504.
(5) (1917) 19 Bom. L.R., 370.
(6) (1865) 3 H.C., 977.
(7) (1900) I.L.R., 22 All., 307.
(8) (1893) I.L.R., 15 All., 304 (P.C).
(9) (1887) I.L.R., 9 All., 681.
(10) (1829) 9 B. & C., 78; 109 E.R., 30.

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It has been never held that a wrong suit followed by a wrong decree bars a correct suit and we therefore hold the suit is maintainable.

It now remains to find on the facts, whether Rathnathayi in executing Exhibit A, intended to act on behalf of the minor or not. The cases cited by the appellant [viz., *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonureree*(1), *Judoonath Chuckerbutty* v. *Mr. James Treedie*(2), *Makundi* v. *Sarabsukh*(3), *Watson & Company* v. *Sham Lal Mitter*(4), *Murari* v. *Tayana*(5), *Venkataramanachari* v. *Thirunaranachari*(6), *Velayudham Pillai* v. *Perumal Naicker*(7)], can help her only if, on the facts of this case, we can find that Rathnathayi did not act in her own right and intended to act on behalf of the minor [see *Ammani Ammal* v. *Ramasawmi Naidu*(8), and *Balwant Singh* v. *R. Clancy*(9)].

I may observe that the personal covenant in Exhibit A by itself, has, in my opinion, no bearing on the matter as that is the form of the document whatever the intention of the document might have been. If the plaintiff was an entire stranger to the family I would not attach any importance to the allegations in paragraph 11 of the plaint where she denies the adoption. But, seeing that plaintiff, though an assignee from the original mortgagee, is not a stranger to the family, her attitude in the said paragraph throws a good deal of light on that of Rathnathayi and Dorasami Odayar at the time of the execution of Exhibit A. Now not only the plaintiff, the mother of Rathnathayi, but her husband (who was also her maternal uncle) was a cousin of Dorasami Odayar, and she was also a sister of Dorasami's wife.

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(1) (1856) 6 M.I.A., 393.
(2) (1869) 11 W.R., 20.
(3) (1884) I.L.R., 6 All., 417.
(4) (1888) I.L.R., 15 Cal., 8 (P.C.).
(5) (1896) I.L.R., 20 Bom., 286.
(6) (1915) 2 L.W., 212.
(7) (1915) 2 L.W., 1210.
(8) (1919) 37 M.L.J., 113.
(9) (1912) I.L.R., 34 All., 296 (P.C.).

She must have known the transactions of her daughter from the time of the latter's husband's death. On an examination of the prior transactions mentioned in Exhibit A it strikes one that, while the first three represented by Exhibits B, C, D are genuine (this is conceded and admitted by defendant whose witnesses D.W. 1, 2, 3 prove them), the rest are all spurious items intended to swell up the consideration of the document to Rs. 3,000 (see D.W. 7) for some motive of their own (see D.W. 6). What these motives are, it is difficult to determine now. The consideration and motive of Exhibit A are shrouded in mystery. Seeing that the deed of adoption, Exhibit I, makes the first defendant continue to be the son of Dorasami (see also Exhibit CC, the deed of partition in Dorasami Odayar's family and Exhibit EE), it is possible that Rathnathayi entered into Exhibit I on the understanding that the adoption of the first defendant was to be regarded as sham or bogus. It may be that she was allowed to deal with properties for some time in her own right. But Exhibit II and the events that have since happened make it too late so far as she is concerned to question the adoption though it may still be open to the reversioners of her husband, if any, to question it within twelve years after Rathnathayi's death. In 1908 Rathnathayi dealt with the properties thinking they were her own (Exhibit W). In 1909, misunderstandings seem to have arisen between Dorasami Odayar and Rathnathayi (see D.W. 6) and possession of the properties of Thambusami was obtained by the minor in 1910 (Exhibit X, etc.). In 1914, the plaintiff filed her suit on Exhibit A (O.S. No. 37 of 1914) (Exhibit XV). It is obvious this suit was a friendly suit so far as she and Rathnathayi were concerned, but their attitude was adverse to the minor and Dorasami contested the suit. That plaintiff and Rathnathayi continue to be on friendly terms is clear

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from the fact that the latter has been examined as P.W. 3. In this case Rathnathayi admits that she, her brother P.W. 1, and plaintiff are living together. In her examination, she was not asked a single question to show that she executed the document on behalf of the first defendant, nor was Dorasami (D.W. 6) cross-examined on the matter. It is clear that the adverse attitude of Rathnathayi continues to this day and this explains why plaintiff made the allegations in paragraph 11 of the plaint. I therefore agree with my learned brother that Rathnathayi never intended to execute Exhibit A on the minor's behalf, nor can any decree be given against the minor on any other ground in the circumstances of the case.

The appeal fails and is dismissed with costs. There is no reason why the respondent should be deprived of his costs in the Court below. The memorandum of objections is therefore allowed, but there will be no order as to costs here.

JACKSON, J.

JACKSON, J.—Suit for a declaration that defendant is bound to pay plaintiff Rs. 7,237-9-9 both under the decree obtained by plaintiff in O.S. No. 37 of 1914 on the file of the Court of the Subordinate Judge of Māyavaram against one Rathnathayi and also as being due under a hypothecation bond executed on defendant's behalf. The lower Court dismissed the suit and plaintiff appeals.

2. The facts are as follows: Thambusami Odayar (vide genealogy, Exhibit M) died on 2nd August 1905 leaving a widow Rathnathayi. On 23rd August 1905 (Exhibit I) she adopted Palaniya Odayar, a son of her husband's uncle Doraisami Odayar. On 5th August 1906 she hypothecated property belonging to her late husband to this same Dorasami (Exhibit A). On 3rd January 1907 he transferred this deed of hypothecation

to his wife's sister Ammakannu Ayi, who is also the mother of the mortgagor, Rathnathayi. In 1914 Ammakannu Ayi sued Rathnathayi and Dorasami on this deed. In the plaint (Exhibit XV) she recites that Thambusami died leaving no heir whatsoever. For discharging his debts and necessary expenses Rathnathayi hypothecated certain property of his. If she should fail to recover the amount claimed from Rathnathayi, Doraisami should be made responsible. She obtained preliminary and final decrees against Rathnathayi alone (Exhibits G and G-1) on 15th September 1914 and 15th November 1916. The plaint in the present suit is dated 13th August 1917. It sets forth how Rathnathayi hypothecated her husband's property and how plaintiff obtained a decree. Execution was pending and plaintiff, when about to bring the property to sale, learnt that for some time past it had been in the possession of Palani, the present defendant, who was adopted as son of Thambusami by registered deed in August 1905. This deed was executed without Thambusami's permission, and the adoption was not really made (paragraph 11 of plaint). Palani, however, is bound to satisfy the decree obtained against Rathnathayi, since she bona fide executed the hypothecation in order to pay off her husband's debts, and Palani has enjoyed the benefit of her action.

3. On these pleadings the Subordinate Judge framed among other issues, Issue V, whether the suit mortgage bond is supported by consideration, and is true, valid and binding on the defendants. He found (paragraph 16) that the suit document was genuine and supported by consideration, and was not binding on the defendants. Accordingly he dismissed the suit.

4. Plaintiff urges that although the suit hypothecation deed contains no recital that Rathnathayi was

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acting as guardian of her adopted son, she must nevertheless be presumed to have so acted. The question for determination is whether there is any ground for making such a presumption. Rathnathayi has consistently ignored the adoption. It is evidenced by the registered deed Exhibit I, dated 23rd August 1905, and Palani was admittedly in enjoyment of Thambusami's estate. Yet on 26th November 1905, Rathnathayi executed a pronote, Exhibit F, for discharging a debt of her husband's with no mention that she was acting as guardian of her adopted son. In the present suit document Exhibit A, dated 5th August 1906, there is not the smallest indication of the existence of an adopted son and Rathnathayi acts entirely in her own right. It cannot even be said that the husband's debts exhaust the consideration, for Rs. 301-1-0 is received for Rathnathayi's domestic expenses and Rs. 283-6-9 for her prospective journey to Benares. Moreover, she makes a personal covenant to pay interest.

In June 1908 Rathnathayi leased out property as belonging to herself alone, Exhibit W. In June 1914 when she was sued on Exhibit A her obvious defence would have been that she acted merely as guardian of her adopted son, but so far from raising this plea, she remained ex parte and admitted the mortgage sued upon—vide Exhibit G-2. She has been examined as plaintiff's witness 3 in the present suit, and if plaintiff wished to establish that she acted on behalf of her adopted son, something might have been elicited about this adoption. No such question was put and at this stage of the case plaintiff seems to have been relying solely on the alternative plea that irrespective of the adoption the bond is binding on the defendant inasmuch as it was executed bona fide and for proper consideration (paragraph 13 of plaint). If some stranger to the family had bona fide

advanced money to discharge the father's debts under a misapprehension of Rathnathayi's title and in ignorance of the adoption, a Court might be justified perhaps in not demanding very rigid proof that the bond was actually executed on the adopted son's behalf. But in this case the parties were alive to all the facts. The original mortgagee is the adopted son's natural father and his transferee, the present plaintiff, is mother of the mortgagor and sister of the mortgagee's wife. Nobody could have been deceived as to the facts. Besides, however much a Court may feel constrained to help a bona fide mortgagee for consideration, there must be some ground upon which to base the presumption that a document executed in the sole name of the mortgagor is really executed in a fiduciary capacity. In *Watson & Company* v. *Sham Lal Mitter*(1) it was urged that a widow had not professed to act as guardian of her son, but it was found that after her name in the document there were these words "mother of Sham Lal Mitter minor" which were held to justify the view that she was acting as the guardian of her son. *Murari* v. *Tayana*(2) affords stronger support to the plaintiff because the document in question contained no mention of the minor and was an outright sale by the widow in order to discharge her husband's debts. But there it was found that the widow had the intention to sell *qua* guardian and a case was cited where it was held that a manager may sell with necessity and be accounted manager even though he has not described himself as such ; *Judoonath Chuckerbutty* v. *Mr. James Tweedie*(3). In the present case such intention can hardly be presumed because as set forth above Rathnathayi has consistently exhibited the

(1) (1868) I.L.R., 15 Calc., 8 (P.C.). (2) (1896) I.L.R., 20 Bom., 286.
(3) (1869) 11 W.R., 20.

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contrary intention to deal with the property in her own right and to ignore the adoption, which intention both plaintiff and Doraisami assumed as a fact in Original Suit No. 37 of 1914 when the hypothecation deed was first brought to court. And even if it were established that the husband's debts were discharged from pressing necessity, there still remains that part of the consideration which was entirely personal to Rathnathayi herself.

"In each case the language of the deed and the circumstances in which it was executed have to be considered" *Murari* v. *Tayana*(1).

Here neither the language nor the circumstances warrant any presumption that Rathnathayi acted as guardian. Therefore, the latter part of Issue V has been correctly decided by the lower Court, and there is no necessity to go into the question in Issue IV whether if plaintiff had established that Rathnathayi executed Exhibit A as guardian of Palani he would be estopped from suing Palani by the judgment obtained in Original Suit No. 37 of 1914 against Rathnathayi in her individual capacity.

When a plaintiff has the choice of suing two persons on the same cause of action it may happen that if he elect to sue one and obtain a decree he is estopped from suing the other. If the present plaintiff had sued Rathnathayi as agent of Palani and had obtained a judgment it might be argued that he was estopped from suing Palani. But when in the belief that Rathnathayi had executed the hypothecation in her own right, plaintiff has obtained a judgment against her, and has then learnt that Rathnathayi could only have executed it as guardian of Palani, there is no question of estoppel. It is simply as if she first sued the wrong person and subsequently sued the right person.

(1) (1896) I.L.R., 20 Bom., 286.

The bare facts that there was full consideration and bona fides cannot make the defendant liable.

The appeal accordingly fails and is dismissed with costs.

JACKSON, J. I agree with my learned brother as regards the memorandum of objections.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Wallace.

1924, January 22.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF SALEM (DEFENDANT), APPELLANT

v.

T. V. RAGHAVACHARIAR (PLAINTIFF), RESPONDENT.*

Madras Act (VII of 1865), sec. 1, and Madras Act (III of 1905), sec. 2—Water-cess—Ryotwari lands—Natural stream or channel passing through patta lands of a ryotwari pattadar—Channel, not separately demarcated as poramboke—Water taken by the ryot for irrigating dry lands—Right of Government to levy water-cess—Ryotwari patta, nature of.

A natural stream or channel, which passes through the patta lands of a ryotwari pattadar, although it is not demarcated as poramboke, is the property of the Government; and if the ryot takes water from the channel to irrigate dry lands in his patta, the Government is entitled to levy water-cess therefor.

Kalianna Mudali v. *Secretary of State* (1915) 31 *I.C.*, 982, distinguished;

A ryotwari patta is not a document of title or a deed of grant but is only a record of demand by Government that a certain amount is due as land revenue on a certain area. *The Secretary of State for India in Council* v. *Kasturi Reddi*, (1903) I.L.R., 26 Mad., 268; *Muthu Veera Vandayan* v. *The Secretary of State for India in Council*, (1906) I.L.R., 29 Mad., 461, referred to.

* Second Appeal No. 334 of 1921.