

ANDHRA PRADESH HIGH COURT

Venkateswarlu

Vs.

Venkata Narasimham

Appeal No. 172 of 1951

(Viswanatha Sastry and Satyanarayana Raju, JJ.)

20.04.1950. 18.09.1956

JUDGMENT

Viswanatha Sastry, J.

1. This is an appeal from the decree of the Subordinate Judge of Bapatla dismissing a suit filed by two plaintiffs for recovery of Rs. 6,200/- with interest from the first defendant personally and the properties of the joint family in his hands. The second defendant, the minor son of the first defendant, got himself impleaded as a party to the suit so as to enable him to contest the claim of the plaintiffs. The first plaintiff is the daughter's son of the 2nd plaintiff the latter being alleged to be a benamidar for the former. The first plaintiff is the appellant before us, the second plaintiff being the 3rd respondent.

2. On 22-2-1945 the first defendant sold under Ex. A-1 an ancestral house belonging to himself and his minor son to the 2nd plaintiff for Rs. 4,000/-. The minor son, the present second defendant, brought O. S. No. 56 of 1946 on the file of the Sub Court, Bapatla, for recovery of possession of the house impeaching the sale under Ex. A-1 as being devoid of consideration and not binding on the joint family, impleading his father and the purchaser as defendants to the suit. The trial court declared the sale not to be binding on the joint family and ordered it to be cancelled and its decree was affirmed by the District Court on appeal in A. S. No. 189 of 1948. There is good reason to think that the father was behind his minor son in starting and conducting the suit. The present suit was then brought for recovery of Rs. 6,200/- and interest as upon a failure of consideration for Ex. A-1. The suit was dismissed by the Court below on two grounds (1) that Ex. A-1 was in fact not supported by consideration and (2) that the finding in the prior litigation that there was no consideration for Ex. A-1 operated as *res judicata*. The appellant challenges the correctness of this conclusion. The advocate for the contesting respondents having reported that he had no instructions to conduct case, we have gone into the evidence fully. The point of *res judicata* will first be dealt with.

3. According to the court below there was an adverse decision in the previous litigation to which the second plaintiff was a party, that Ex. A-1 was not supported by consideration and that though the second plaintiff and first defendant were ranged as co-defendants in that suit, the decision on

the issue as to consideration nevertheless operated as *res judicata* between them. On the admission of the first plaintiff that the second plaintiff, who was a party to the prior litigation, was his benamidar, it must be held that the second plaintiff fully represented him in the prior litigation and the first plaintiff, the person claiming to be beneficially entitled, though not a party, is fully affected by the rule of *res judicata*. *Gur Narain v. Sheolal Singh*¹, is sufficient authority for the view that a benamidar represents the real owner. The further question is, what was the decision in the prior litigation that could be relied upon as *res judicata*. The Court below went wrong in its discussion on this point. It is true that in the trial court evidence was adduced and a decision was given on the issue as to the existence of consideration for Ex. A-1 and the decision was adverse to the present 2nd plaintiff, the benamidar. But then the matter went up on appeal. The appeal destroyed the finality of the judgment of the trial court and the appellate judgment superseded that of the trial court. It is the appellate judgment that has to be looked to determine the question of *res judicata*. *Annamalai v. Thornhill*², *Sheosagar v. Sitaram*³, *Abdullah v Ganesh Das*⁴, Now the appellate court rested its conclusion not on the ground that Ex. A-1 was unsupported by consideration but on the ground that the transaction was such as not to bind the joint family. Though the trial court found that the consideration for the sale Ex. A-1 was wholly fictitious, the appellate court did not give a finding upon that question but confirmed the decree of the trial court on the ground that the sale was for a consideration not binding on the joint family. This is not a case where the relief granted by the appellate court would have been possible only on the findings of the trial court, which though not referred to, should be deemed to have been adopted by the appellate court. There are observations in the judgment of the lower appellate court throwing doubt on reality of the debts alleged to have been discharged out of the consideration for Ex. A-1 but the only point for determination set out in its judgment and decided in the negative by the appellate court was whether Ex. A-1 "was for valid consideration binding on the joint family or plaintiff and third defendant." There was no final decision on the question whether Ex. A-1 was supported by any consideration at all and if so, to what extent. In this view it is unnecessary to consider in what circumstances a finding on an issue operates as *res judicata* between co-defendants.

4. The question that falls to be answered is whether Ex. A-1 was supported by consideration and if so, to what extent. It was argued for the appellant that the admission of the father as to the receipt of consideration was binding on the son and that the onus lay upon him to disprove consideration for Ex. A-1. Reference was made so the recent decision of this court in *Nagayya Gowdu v. Chenganna Gowdu*⁵, in support of this contention. Umamaheswaram, J., in his order of reference to a Division Bench and Bhimasankaram, J., delivering the judgment of the Division Bench have referred to the decisions of the Privy Council in *Bhagwan Singh v. Bishambar Nath*⁶, Abdur Rahman J., in *Sreeramulu v. Thandavakrishnayya*⁷, Somayya, J., in *Muthachi v. Kandaswami*⁸, and Chandra Reddy J., in *D. Subrahmanyam v. Bhavanarayana Rao*⁹, To this list may be added the judgment of Kuppuswami Iyer J., in *Vellai Goundan v. Rajagopala Mudaliar*¹⁰,

¹ ILR 46 Cal. 566

³ ILR 24 Cal 616 (PC)

⁵(1956) 2 And WR 65

²61 Mad LJ 420

⁴ ILR 45 Cal 442

⁶(1940) 2 Mad LJ 452

⁷(1942) 2 Mad LJ 462

⁹1955 And WR 28

⁸(1945) 1 Mad LJ 207 : AIR 1945 Mad 135

¹⁰(1947) 1 Mad LJ 68

5. In considering the question regard be had to certain well settled rules of law. Ordinarily and apart from status, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them. *Banga Chandra v. Jagar Kishore*¹¹, *Shriniwas v. Meherbai*¹²,

*Aukula Sanyasi v. Ramachandra Rao*¹³, Even as regards parties and their privies an admission is not conclusive proof of the matters admitted and its effect is to shift the burden of proving the contrary to the party making the admission. What a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted, the fact admitted can be taken to be established : *Chandra Kunwar v. Chandhrui Narpal Singh*¹⁴, Recitals as regards receipt of consideration for a sale or mortgage are regarded as admissions by the vendor or mortgagor which shift the onus of proving want of consideration to the executants or those who claim under them. *Ihtisham Ali v. Jamna Prasad*¹⁵, *Maganlal v. Darbari Lal*¹⁶, Where, however, strangers who are neither parties to the transaction nor their privies, deny the consideration, the onus is on the mortgagee or vendee to prove the passing of consideration notwithstanding the recitals in the deed. Otherwise, as observed by the Judicial Committee in ILR 44 Cal 186 : (ILR 1916 PC 110), the rights of persons like reversioners, non-alienating coparceners and minors, could always be defeated by the insertion of carefully prepared recitals in deeds to which they are not parties. It may be that a father has a greater interest in his undivided son than an uncle in his nephew or a widow in the reversioner and is therefore less likely to injure him by the introduction of fictitious recitals of consideration to sales or mortgages of family property but this is a factor that is relevant to an appreciation of the evidence and does not affect the burden of proof as a matter of law and pleading.

6. Under the Mitakshara law sons have by birth an equal ownership with the father in ancestral immoveable property and the sons could enforce their right by a partition even against their father's wishes. The sons have independent coparcenary rights of their own in ancestral property. They do not claim through the father nor are their rights derived from or through their father. This principle has been modified to a large extent by another rule of Hindu Law that a son is bound to discharge the debts of his father if not tainted with immorality, to the extent of his interest in the family property. Before, however, a creditor enforces the pious obligation of the sons to pay their father's debts by proceeding against the sons' interest in ancestral property, he must prove that there was a real debt of the father in existence, if the factum of the debt is denied by the sons. The burden of establishing that there was a real debt of the father rests upon the creditor who seeks to make the sons' interest liable and recitals in documents executed by the father have not the same probative value against the sons that they have as against the executant. For instance, the special presumptions and rules as to consideration under sections 118 to 122 of the Negotiable Instruments Act, apply only to the parties to the instrument and cannot be invoked against the sons who are not parties to a promissory note executed by their father. Consideration will not be presumed but will if disputed have to be proved as against the sons if the creditor sues upon the debt and seeks to recover it from their shares in ancestral property. *Narayanrao v. Venkatappayya*¹⁷, (Q); *Nagireddi v. Somappa*¹⁸, at p. 4)

¹¹ ILR 44 Cal 186

¹³ 51 Mad LJ 73

¹⁵ AIR 1922 PC 56

¹² ILR 41 Bom 300

¹⁴ ILR 29 All 184 (PC)

¹⁶ 54 Mad LJ 203

¹⁷ ILR (1937) Mad 299 : (AIR 1937 M. 182)

¹⁸ ILR (1943) Mad 248 at p. 264 AIR 1943 Mad 1

(R); *Lakshmanswami v. Raghavacharyulu*¹⁹, Where a sale of ancestral property is made by the father alone or where a mortgage of the property is created by him and the property is sold in execution of a decree on the mortgage, the sons, not being parties, are entitled to have the factum and nature of the debt tried in a suit of their own. The existence of a real debt is a pre-requisite of the son's liability. *Lakshmadu v. Ramudu*²⁰, view of these considerations, it is difficult with great

respect, to accept the view of Chandra Reddi J., in (1955) Andhra WR 28 , that the onus is on the persons pleading want of consideration to prove it although they are not parties to the deed and do not claim under the executant. Nor do we read the judgment in (1956) 2 Andhra WR 65 : AIR 1957 Andhra Pradesh 264, as accepting the view of Chandra Reddy J., The following observations of Bhimasankaram J., are relevant in this connection :

"It has never been laid down that a person attacking a transaction of this nature above referred to (a sale by a father of ancestral property) can add to burden of the alienee by an additional plea that the transaction he impugns is altogether devoid of consideration. It is difficult to conceive that an alienee, who seeks to establish actual necessity, benefit or antecedent debt can succeed, unless he proves that the necessity for benefit or the antecedent debt was met or paid out of the money that the alienor received from him by way of consideration for the deed in dispute. To that extent the burden as to consideration is necessarily involved in the initial burden that rests on him."

7. This passage recognizes that the alienee has to prove (1) that there was in fact consideration for the alienation and (2) that the consideration went to discharge antecedent debts of the father or to meet the necessities of the family. The passing of consideration for the alienation lies at the threshold of the enquiry and it is only if that fact is established, the further question of its binding character on the sons of the alienor arises. We cannot therefore treat the decision in (1956) 2 Andhra WR 65 , as an authority for the position that the second defendant, the son, is bound by his father's admission of the receipt of Rs. 4000/- as consideration for the sale, Ex. A-1. The plaintiff has to establish how much was paid as the price of the sale.

8. The first plaintiff's father was a money lender and merchant at Ongole and he left some cash and outstanding when he died. The first plaintiff, his only son, was then a minor and his mother Ranganayakamma, was his guardian. The consideration for Ex. A-1 was recited as Rs. 4000/- received by the vendor as shown below :- (1) Rs. 354-12-0 due under a promissory note for Rs. 300/-Ex. A-3 dated 7-2-1942 executed by the first defendant in favour of Ranganayakamma; (2) Rs. 443-3-0 due on a promissory note for Rs. 400/- Ex. A-4 dated 4-5-1943 executed by the first defendant to Ranganayakamma; (3) Rs. 1063-12-0 due on a loan advanced by an entry in the account of the plaintiff, Ex. A-10 (d), signed by the first defendant; (4) Rs. 500/- paid as advance for the sale on 1-10-1944; (5) Rs. 1638-5-0 paid by the agent to the plaintiff to the vendor before the Sub-Registrar at the time of the registration of the sale. The three debts due from the first defendant to the mother and guardian of the plaintiff amounting to Rs. 2,361-11-0 were discharged out of the consideration for Ex.

¹⁹ ILR 1943 Mad 717

²⁰ ILR (1940) Mad 123 at pp. 133-138 : (AIR 1939 Mad 867 at pp. 871 and 873)

A-1. The first defendant admits the execution of the pronotes Exts. A-3 and A-4 and the execution of the letter Ex. A-5 and the endorsement of discharge Ex. A-5 (a) with regard to the loan of Rs. 1000/-. There is the endorsement of the registering officer evidencing the payment to the first defendant of Rs. 1638-5-0 at the time of the registration of Ex. A-1. Ex. B-12 dated 20-5-1944 evidences the payment of an advance of Rs. 500/-to the first defendant. These payments are found in the account book Ex. A-10 produced by the first plaintiff. The plaintiff has examined the attestors of Exs. B-12, A-3 and A-4 as P. W. 2, P. W. 3 and P. W. 6 respectively. Ex. A-5 (a) is attested by P. W. 4. There is thus ample evidence to prove that Ex. A-1 was supported

by consideration to the extent of Rs. 4000/- as recited in the deed.

9. In addition to the sum of Rs. 4000/- the consideration recited in the sale deed, Ex. A-1, the plaintiff claims to have paid a further sum of Rs. 2100/- to the first defendant as the price of the property. An entry Ex. A-10 (f) dated 10-10-1944 in the account book, Ex. A-10, is shown in support of this plea. This entry is not signed by the first defendant, though a smaller loan of Rs. 1000/- is acknowledged under his signature in Ex. A-10 (a). There is no promissory note or letter to evidence the loan. Reliance is placed on Ex. A-2 executed by the first defendant in favour of the 2nd plaintiff wherein the former agreed to pay a penalty of Rs. 2200/- if, as a result of a suit by Bommiseti Lakshmayya or others, the vendee under Ex. A-1 lost title to the property.

This Bommiseti Lakshmayya was a person in whose favour the first defendant had agreed to sell the same property for Rs. 4500/- under Ex. B-5 dated 19-3-1944 and from which he resiled. The first defendant, of course, denies the receipt of Rs. 2100/-. The plaintiff's case really comes to this, that in order to avoid the risk of a suit for damages by Bommiseti Lakshmayya, the consideration for Ex. A-1 was shown to be Rs. 4000/- with a secret arrangement for payment of a further sum of Rs. 2100/- as the price of the property. If so, some receipt or voucher would have been taken from the first defendant but none was taken. We are unable to accept the plaintiffs' case as regards the payment of Rs. 2100/- in addition to the sum of Rs. 4000/- shown as the price in Ex. A-1.

10. The father, the first defendant, is now dead and his interest in the joint family properties has now survived to his son, the second defendant. When the sale Ex. A-1 was set aside at the instance of the son, the father came under an obligation to refund the purchase money to the disappointed vendee. The liability of the father to make a refund of the purchase money is quasi ex contractu and it is in accordance with good morals, justice and common honesty that this debt of the father should be discharged by the son out of the joint family properties in his hands. In *Natesayyan v. Ponnuswami*²¹, the court observed that the

"son is surely bound to do that which his father himself would do were it possible, viz., to restore to those lawfully entitled, money, which he has unlawfully retained."

This observation of the Madras High Court was approved by the Judicial Committee in *Hemraj v. Khem Chand*²², where it was held that sons were liable to satisfy a

²¹ ILR 16 Mad 99

²² ILR (1943) All 727

decree passed against the father for loss caused by his negligence or wrongful act. That is the question here. The learned advocate for the appellant relying upon Section 55, Clause 6 (b) of the Transfer of Property Act, claims a charge on a moiety of the property conveyed under Ex. A-1 for realization of the sum of Rs. 4000/-with interest at 6 per cent. per annum from 20-1-1948 till realization. We are of opinion that, in the circumstances of the case, the first plaintiff is entitled to a charge for the amount claimed by him on a moiety of the property covered by Ex. A-1. The 2nd defendant who is the only surviving defendant on record will have three months' time for payment of the decretal amount. In default of such payment, there will be a final decree for sale of moiety of the property covered by Ex. A-1. Since both parties have to adduce untenable pleas and unacceptable evidence in support of their case, we direct that they should pay and receive proportionate costs both here and in the court below. The second defendant, who got himself impleaded as a defendant in order to contest the plaintiff's claim, will be personally liable for the

costs awarded to the plaintiff.

Order accordingly.