(1910) 01 MAD CK 0029

Madras High Court

Case No: None

Ramaswamy minor by his Next friend Mookayi alias Karuppayi and Others	APPELLANT
Vs	
Muniandy Servai	RESPONDENT

Date of Decision: Jan. 5, 1910

Citation: 5 Ind. Cas. 343

Hon'ble Judges: Arnold White, C.J; Krishnaswmai Aiyar, J

Bench: Division Bench

Judgement

1. The suit is for a declaration that the sale of a pangu of melvaram right by the second to the first defendant and the redemption of another pangu mortgaged to the predecessors-in-interest of the plaintiffs and defendants Nos. 2 to 7 by a payment to the 2nd defendant are not binding on the plaintiffs. The pangus in question are found by the District Judge to have been under attachment by the Head Assistant Magistrate and in the possession of a receiver appointed by him in proceedings under Chapter XII of the Code of Criminal Procedure. The suit is dismissed by the District Judge on the grounds that it was barred by limitation having been instituted more than three years since the dates of sale and redemption, and that consequential relief in the nature of possession not having been prayed for, Section 42 of the Specific Relief Act operated as a bar. The plea of limitation is obviously untenable. And the respondent''s Vakil did not attempt to support it. The article applicable is 120 of Act XV of 1877 and the suit is in time. It is also conceded that the District Judge was wrong in holding that the plaintiffs were bound to sue for possession. The defendants were not in possession at the date of suit and it is well settled that where the defendants are not in possession, the plaintiff''s are not entitled to further relief in the nature of possession and are, therefore, not bound to ask for it against them. But Mr. Sundara Aiyar argues that on the plaintiffs'' own case, they were entitled only to a share in the pangus in question and that they were, therefore, bound to ask for a partition of their share as

further relief to which they were entitled in addition to the bare declaration of title. This contention was not raised in either of the Courts below. And even if there is any force in it, we are not inclined to allow the respondent to raise if for the first time in second appeal. The plaintiff''s averted that they and defendants Nos. 2 to 7 were divided in interest, though originally members of an undivided, family. The 8th defendant admitted this allegation in paragraph No. 8 of his written, statement. The parties in occupation of the property are the Kudivaramdars. The melwaram is enjoyed in Markkal Kuttu and the share of the melwaram due to the plaintiffs and defendants Nos. 2 to 7 is alleged to be enjoyed according to the partition in accordance with the respective interests of the divided members. Division being admitted in the family, we cannot accede to Mr. Sundara Aiyar''s contention raised for the first time in second appeal that so far as the suit property is concerned, it has been kept undivided, the presumption of law being in favour of a complete division. Holding then that the melwaram right has been divided amongst the sharers, we are not prepared to allow that in every case of divided enjoyment by division of the produce there must necessarily be a further physical division of the property by metes and bounds. We must, therefore, decline to entertain Mr. Sundara Aiyar''s contention that further relief was claimable in this case by the plaintiffs.

2. The District Judge also finds upon the 8th and 9th issues that the redemption and sale are binding upon the plaintiffs. It is not clear on what grounds he has arrived at this conclusion. The 2nd defendant according to the plaintiffs'' case is only one of several tenants-in-common interested in the suit properties. The District Judge has not found to whom the two pangus belonged on the dates of sale and redemption. In one part of his judgment he speaks of the 5th plaintiff as possibly a major in June 1898. In another place he says the 2nd defendant executed the document as guardian of the 5th plaintiff. These statements are not reconcilable. The decision of the Court below on the issues Nos. 3 and 4 being clearly erroneous and there being, in our opinion, no evidence to support the findings on the 8th and 9th issues, we must reverse the decision of the Court below. But Mr. Sundara Aiyar raises another question on behalf of the respondent that the 2nd defendant as a tenant-in-common entitled to the mortgage along with the plaintiffs was legally competent to receive payment of the mortgage money and give a valid discharge to the,1st defendant as regards one pangu under mortgage, A1 though the validity of the redemption is made the subject of the 8th issue it is perfectly plain that the contention was merely that the 5th defendant was solely interested in the mortgage and that the 2nd defendant was competent to accept payment on his behalf. This, no doubt, is entirely different from Mr. Sundar''a Aiyar''s present contention. But being purely one of law arising out of the plaintiffs'' own case, we have allowed it to be argued.

3. The point is not one free from difficulty. It was held in Barber Maran v. Ramana Goundan 20 M. 461, by Collins, C.J. and Shephard J., that where the mortgagor paid one of two co-mortgagees the whole mortgage money the payment was a valid

discharge of the mortgage and the unpaid mortgagee was not entitled to sue for his share. This decision has been recently followed in S.A. No. 419 of 1906 by Benson and Sankaran Nair, JJ. In Ahinsa Bibi v. Abdul Kader Saheb 25 M. 26, however, Mr. Justice Bhashyam Aiyangar doubted the correctness of the decision in Barber Maran v. Ramana Goundan 20 M. 461, though the case before him was distinguishable from the earlier one and he rested his decision on the ground that the payment pleaded was to one of the representatives of the mortgagee and did not come within the rule enunciated in Barber Maran v. Ramana Goundan 20 M. 461 as to the validity of payments to one of the co-mortgagees. The opinion expressed by Mr. Justice Bhashyam Aiyangar in this case has been followed in Sitaram Apaji Kode v. Shridhar Anant Prabho 27 B. 292 and apparently quoted with approval in Jagat Tarini Dasi v. Naba Gopal Chaki 34 C. 305 : 5 Cri.L.J. 270. Mr. Justice Shephard who took part in the decision in Barber Maran v. Ramana Goundan 20 M. 461, has further considered the question in his notes to Section 84 of the Transfer of Property Act, see pages 381 to 384, and reaffirmed his view with some additional arguments in its support. In the decision in Barber Maran v. Ramana Goundan 20 M. 461, he followed the decision in Wallace v. Kelsall 7 M.& W. 264 : 8 D.P.C. 841 : 10 L.J. Ex. 12 : 4 Jur. 1064 and apparently doubted the correctness of Steeds v. Steeds 22 Q.B.D. 537 : 38 L.J. Q.B. 302 : 60 L.T. 318 : 37 W.R. 378. The latter case has been followed and explained in Powell v. Brodhurst (1901) 2 Ch. 160 : 70 L.J. Ch. 587 : 49 W.R. 532 : 84 L.T. 620 : 17 T.L.R. 501. The decision in this last case has not shaken Mr. Justice Shephard in the conclusion arrived at by him in Barber Maran v. Ramana Goundan 20 M. 461 though it has led him to reconsider the matter in, his commentaries on the Transfer of Property Act. It must be observed, however, that the doubts thrown on the decision in Steeds v. Steeds 22 Q.B.D. 537 : 38 L.J. Q.B. 302 : 60 L.T. 318 : 37 W.R. 378 must now be regarded as of no validity. All these English cases, moreover, have been quoted in recognised text books, without a word of adverse comment and as fully authoritative: see Leake on Contracts pp. 298 and 626, Chitty on Contracts p., 744, Coote on Mortgages pp. 556 and 733. Mr. Justice Shephard himself does not appear, to adhere to his doubts as to the correctness of Steeds v. Steeds 22 Q.B.D. 537 : 38 L.J. Q.B. 302 : 60 L.T. 318 : 37 W.R. 378. But he seems to rely on Wallace v. Kelsall 7 M. & W. 264 : 8 D.P.C. 841 : 10 L.J. Ex. 12 : 4 Jur. 1064, as still good levy notwithstanding the later cases and raises a doubt as to the applicability of the English law to this country. The principal ground of the decision in Barber Maran v. Raman Goundan 20 M. 461, is the provision in the last clause of Section 38 of the Indian Contract Act "that an offer to one of the several joint promisees has the same legal consequences as an offer to all of them." But an offer of performance is not a discharge of the obligation. The consequence of a tender is merely that the promisor is not responsible for non-performance; nor does, he thereby lose his rights under the contract. Interest will cease to run on the debt from the date of tender. The offer then not amounting to a discharge, it is difficult to see why the fact of tender to one of two joint promisees being good for certain purposes such as the preventing of farther interest running should, override the provisions of Section 45

of the Indian Contract Act, which in express terms, says, "that the right to claim performance rests as between the promisor and the joint promisees with them during their joint lives and after the death of any of them with the representatives of such deceased person jointly with the survivor or survivors and after the death of the last survivor with the representatives of all jointly." There is, of course, the qualification that the above rule only holds good unless a contrary intention appears from the contract.

4. The rule as to the effect of a tender to one of two or more joint, promisees is taken from Douglas v. Patrick 3 T.R. 683 : 1 R.R. 793, see Halsbury''s Laws of England, Vol. VII, Section 863. But that as well as the rule in Wallace v. Kelsall 7 M.& W. 264 : 8 D.P.C. 841 : 10 L.J. Ex. 12 : 4 Jur. 1064 is merely the result of the jointness of the obligation with its incident of survivorship. As stated by Wills, J. in Steeds v. Steeds 22 Q.B.D. 537 : 38 L.J. Q.B. 302 : 60 L.T. 318 : 37 W.R. 378, "the reason why the defence is a good one at law is that the two creditors are treated as having a joint interest in the debt with its incident of survivorship and the satisfaction to one of the parties of a joint demand due to himself and others puts an end to the joint demand and he cannot afterwards by joining the other parties with him as plaintiffs recover the debt. Nor can a right of action be supposed to exist, which, if it existed, might survive to the very person who had already received full value. In equity, however, it would appear as if the general rule with regard to money lent by two persons to a third was that they will prima facie be regarded as tenants-in-common and not as joint tenants both of the debt and of any security held for it." It is obvious from the foregoing passage that as it was a presumption in Equity that the mortgagees were tenants-in-common in the absence of a stipulation to the contrary, payment to one of two joint mortgagees was not a good discharge of the whole, i.e., even of the share of the other mortgagee. This rule of Equity prevails over the rule of the Common Law after the enactment of Sub-Section 11 to Section 25 of the Judicature Act of 1873. Sections 60 and 61 of the Conveyancing Act of 1881 have now laid down special rules in the case of obligations for sums of money expressed to be advanced on joint account as regards the effect of payment to the survivor or the representatives of the last survivor etc., see Hood and Challis on Conveyancing, pp. 156 and 157. With the exception, therefore, of the special cases provided for by that enactment, the rule in Equity of a presumption of a tenancy-in-common now prevails in England with its consequence of a payment to one of two joint creditors operating only as a discharge of the share due to him. Wallace v. Kelsall 7 M. & W. 264 : 8 D.P.C. 841 : 10 L.J. Ex. 12 : 4 Jur. 1064 is still authority only to the extent that if the right to the debt is joint so as to rebut the presumption of the equitable rule, payment to one of the joint creditors is a discharge of the joint debt. To quote the words of Farwell, J., "there was no possible conflict of any equitable rule with this (before the Judicature Act of 1873) because no bill would lie in Chancery to recover a mere money demand." Under the law in India, however, there being no distinction between the jurisdiction at law and in equity and the Courts in India being Courts

administering the rules of justice, equity and good conscience, there could be no difficulty in the application of; the equitable rule. But the whole foundation of the rule at law being the jointness of the right and that being expressly varied by the Indian Contract Act into a tenancy-in-common, it seems to us impossible to apply the rule in Wallace v. Kelsall 7 M.& W. 264 : 8 D.P.C. 841 : 10 L.J. Ex. 12 : 4 Jur. 1064 as to the discharge of joint rights by performance to one of the joint obligees.

5. Our attention was drawn to the special rule contained in Section 165 of the Indian Contract Act relating to the validity of delivery by the bailee to one of several joint bailors. As regards this, it is not irrelevant to point out that Dr. Whitley Stokes regards it as a departure from the Civil law, the English law and the Hindu, and Mahomedan laws. The English cases have made various distinctions with regard to the nature of this contract, and its consequences. See Broadbent v. Ledward 11 A. & E. 209, May v. Harvey 13 East 197 : 12 R.R. 322, Atwood v. Ernest 22 L.J. C.P. 225 : 13 C.B. 881 Jur. 603 : 1 C.L.R. 738 : 1 W.R. 436; Brandan v. Scott 26 L.J.Q.B. 163 : 3 Jur. (N.S.) 362 : 5 W.R. 235 : 7 E1. B1. 234. It is'' unnecessary to pursue the history of the provision contained in Section 165. Any special rule thereby enacted has not the-force of a general principal of the law of contracts. No similar rule is laid down in the Transfer of Property Act.

6. It remains to notice one further remark in Shephard''s Commentaries to Section 84 of the Transfer of Properly Act that the adducing of evidence at variance with a joint right under the contract to show that the interests was several would violate the provisions of; the Indian Evidence Act. It is not easy to appreciate this criticism for it is not by oral evidence that joint obligees under a contract are shown to be entitled to their respective interests but by the force of Section 45 of the Indian Contract Act. The recital of the advance being joint is not part of the contract to pay the joint obligees and may, therefore, be varied by evidence of several interests in amount advanced. We are, therefore, constrained to express our dissent from the decision in Barbar Maran v. Ramana Goundan 20 M. 461. We should have felt bound to refer this case to the Full Bench hut for the circumstance that on the facts it is more akin to the case in Ahinsa Bibi v. Abdul Kader Saheb 25 M. 26, than to the casein Barbar Maran v. Ramana Goundan 20 M. 461. The promisee was only one person. He took the mortgage on behalf of an undivided Hindu family. That family has become divided. The promisee himself is dead and the payment is said to have been made to one of the divided, members of the family of the promisee. Such a payment, it appears to us, cannot discharge the entire mortgage in which other members of the family have their several interests. We must, therefore, overrule Mr. Sundara Aiyar''s contention that the redemption of the mortgage can bind the plaintiffs if they had a several interest in the mortgage at the date of the redemption. The decree of the Court below is reversed and the C.S.D. remanded for disposal according to law. Costs will abide and follow the result.