Chinnaswamy Koundan Vs. Anthonyswamy and ors.

LegalCrystal Citation : legalcrystal.com/719684

Court : Kerala

Decided On : Jul-13-1960

Reported in : AIR1961Ker161

Judge : M.S. Menon and; T.K. Joseph, JJ.

Acts : Hindu Law

Appeal No. : A.S. No. 251 of 1956 (E)

Appellant : Chinnaswamy Koundan

Respondent : Anthonyswamy and ors.

Advocate for Def. : A.S. Krishna Iyer, Adv. for Respondent 1,; P. Ramakrishna Menon and;

Advocate for Pet/Ap. : T.S. Venkiteswara Iyer,; C.S. Ananthakrishna Iyer and; K

Disposition : Appeal allowed

Judgement :

M. S. Menon, J.

1. The 1st defendant in O. S. No. 131 of 1950 of the Court of the Subordinate Judge of Chittur is the appellant before us. He challenges the correctness of the lower court's decision that the decree and sale in O. S. No. 213 of 1107 of the Munsiff's Court of Chittur are not binding on the l/4th share of the plaintiff in the propertied concerned' in that suit.

2 The prayer portion of the plaint according to the agreed translation reads as follows;

'The Court may therefore be pleased to pass a decree:

A. Setting aside, on declaring that the decree, the execution proceedings, sale, sale certificate and delivery proceedings in O. S. No. 213 of 1107 of this Court are not binding on the plaintiff or on plaintiff's one-fourth share over the plaint schedule property and are void;

B. Awarding the plaintiff separate possession of one-fourth share in the plaint schedule properties after partition by metes and bounds with future mesne profits at the rate of 1000 paras of paddy and Rs. 375/.- per annum;

C. If for any reason the court is of opinion that the plaintiff cannot obtain the reliefs stated in paras (A) and (B) above mentioned, granting the plaintiff an alternative relief by directing such of the defendants as are found to be liable, to pay the plaintiff Rs. 30,000/- as damages caused to the plaintiff as a result of the fraud in execution proceedings and sale in the above mentioned O. S. 213;

D. Ordering the 5th defendant to pay past mesne profits for the years 1109 to 1116 both Inclusive and the rest for the period from 1109 to 1123 both inclusive from the 1st defendant at the rate of 1000 paras of paddy and Rs. 375/-per annum; and

E. Granting such reliefs which the plaintiff during the course of the suit may ask for and the court deem equitable to grant.'

The decretal portion of the judgment is:

'(a) It is declared that the decree and execution proceedings which culminated in Ext. AA sale certificate in O. S. 213/1107 on the file of this Court are not binding upon the plaintiff and his l/4th share of the equity of redemption over the plaint properties.

(b) It is also declared that the hypothecation and the decree passed thereon in Ext. G suit are binding upon the plaintiff and the plaint properties.

(c) It is also declared that the plaintiff is the owner of the l/4th share of the suit properties and that he is entitled to a partition of the same by metes and bounds.

(d) The plaintiff is entitled to redeem his 174th share in the plaint properties on depositing the proportionate amount due upon the hypothecation and legally recoverable by the hy-pothecatee.

(e) From the date of deposit of the plaintiff's 1/4th share of the mortgage money, the plaintiff will be entitled to get mesne profits for his l/4th share at the rate found in para 36 above till the recovery of possession or 3 years from the date of the decree whichever event happens earlier.

(f) The plaintiff will get his costs from the 1st defendant.

(g) The plaintiff will apply for the issue of a Commission for dividing the properties by metes and bounds within two months from the date of this-decree.

3. O. S. No. 213 of 1107 was a suit by the 4th defendant, the endorsee of a promissory note for Rs. 1.500/-, Ext. F dated 11-10-1105. The payee under Ext. F was one Somasundaram Swamiyar. The-description of the executants in the promissory note-was as follows ;

'Pronote executed by Rayappa Koundan, son of Kanakappa Koundan amongst Padayachil Koundars, Klukkapara, Kodhinjampara Village, Chittur Taluk, Family Manager, and (2) the said Rayappa Koundan as guardian of his minor brother Inasi Muthu, in favour of Somasundaram Swamiyar, son of Chidam-baram Pilla, Vellalan, Nallepilly, East Street Nallepally village', (Agreed translation) 'Rayappa Koundan' is the 8th defendant, the father of the plaintiff, and 'Inasi Muthu', his father's, brother, is the 9th defendant.

4. The endorsement by the Swamiyar to the 4th defendant was on 24-3-1107. It was in the following terms:

'Since the principal and interest due as per this note is acknowledged as received in cash this day from Ramachandra lyer, son of Subbarama lyer,. Southern Village, Chittur, the above principal, interest and future interest are to be paid to the said Ramachandra lyer or his order. The balance principal deducting credits is Rs. 1,200/-. It is on Eda-vam 30, 1105 that Rs. 300/- was received. The principal and interest due as per the note has to be realised by the said Ramchandra lyer with all risks and without recourse. (Agreed translation)

5. The execution proceedings in O. S. No. 213 of 1107 culminated in the sale certificate, Ext. AA, in favour of one Harihara Subramonia lyer. It is dated' 12-3-1109. The delivery receipts granted by Harihara Subramonia lyer are Exts. II and III dated 22-3-1109.

6. Harihara Subramonia lyer assigned his rights to the 5th defendant, a brother of the 4th defendant^ by Ext IV dated. 5-5-1109. The 5th defendant became an insolvent and the Official Receiver sold his rights to the 1st defendant by Ext. XIV dated 13-7-1116.

7. The plaintiff who is the 1st respondent before us and defendants 8 and 9 belong to the Tamil' Vaniya Christian community of the Chittur Taluk. The community left Hinduism for Christianity many years ago and the personal law applicable to them is of paramount importance in this case, the main questions for determination being :

(1) Do the members of the community acquire an interest by birth in ancestral property P and

(2) Is the doctrine of pious obligation applicable-to them?

Paragraph 1 of the plaint (agreed translation) deals-with the law applicable to the community as follows:

'The plaintiff and defendants 8 and 9 are Tamil Christians residing in Chittur Taluk, the plaintiff being the son of the 8th defendant and defendant 9' being the younger brother of the 8th defendant. The-plaintiff and defendants 8 and 9 are of the Vaniya, Caste and in the matter of property rights of inheritance and succession alone they are governed by the-Hindu Mithakshara Law. (The plaintiff by birth isentitled to a share in the ancestral property and thateven during the life time of his father the son hasevery right to demand his share in the ancestral property and recover the same even by a suit. In thecommunity to which the plaintiff belongs the proparties of a man become on his death ancestral proparties in the hands of the sons and thereafter it continues for ever to be family ancestral property andtherein the son has by his birth a right to a shareeven during the Me time of the father. This customis a very ancient one and is adopted as the law fromtime immemorial, and governs the community. The!above is the customary law of the plaintiff's community accepted and followed by them from ancienttimes)'.

The portion we have put within brackets was added in pursuance of the order on M. P, No. 2695 of 1953 dated 3-11-1953.

8. In Charlotte Abraham v. Francis Abraham, 9 Moo Ind App 195 the Privy Council said:

'The profession of Christianity releases the convert from the trammels of the Hindu Law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no conern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindu law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so as either by attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom; and nothing Can surely be more just than that the rights and interests in his property, and his power over it, should be governed by the law which he has adopted, or the rules which he has observed'. It is common ground that no statutory enactment affects the controversy and that the approach we should adopt is the approach indicated by the Board.

9. The report of the Cochin Christian Succession Bill Committee stated that 'as to the Tamil Christians of the Chittur Taluk, the evidence shows that they follow the Hindu law of succession and inheritance' and recommended that they should be excluded from the proposed legislation. The recommendation was accepted and Section 2 (2) of the Cochin Christian Succession Act, VI of 1097, provided that nothing therein contained shall be deemed to affect succession to the property of 'the Tamil Christians of Chittur Taluk, who follow the Hindu law'.

10. In 4 Select Decisions 485 the Chief Court of Cochin held that the community was governed by the rules of Hindu law in matters of inheritance and succession. The decision was followed some 35 years later, in 34 Cochin 881.

11. In view of the two decisions mentioned above, it is not contended that the Vaniya Christians of the Chittur Taluk are not governed by the Hindu law in matters of inheritance and succession. The fact that they are governed by the Hindu law in those matters, however, does not mean that every branch of that law is applicable to them. In 34 Cochin 481 the Court summed up the contentions urgedbefore it as follows : '

'(1) that the 1st defendant admittedly the manager of the joint family, was not competent to represent plaintiffs 2 and 3 who were his brothers and the 1st plaintiff who is the son of a deceased brother, the contention being that even though this court has held in 4 S. D, 485 that the Vaniya Community is governed by the rules of Hindu law in matters of inheritance and succession, the 1st defendant had not the powers of a manager of a joint Hindu family under the Mitakshara Law, that he was incompetent to contract debts binding on the family, that a decree obtained against him alone was not binding on the other members and that he had no power by himself alone to alienate family properties; and

(2) that even if the 1st defendant is found to have all the powers of a manager, the assignment in the instant case to the 10th defendant of items 13 and 14 is not for family necessity 'and the pronote debt giving rise to the decree in O. S, 64/1111 is not also for family necessity'; and said,:

'It appears to us that the question as to how far the Mitakshara Law will apply to Vaniyas who are converts to Christianity from Hinduism 'requires more detailed

investigation than what appears to have been done in this case. Since we entertain no doubts on the 2nd point raised, we propose to leave this question open for further investigation if occasion arises in future'.

12. The content of the expression 'inheritance and succession' is controversial. The ambit of the word 'succession' as used in the Indian Succession Act, for example, has been sketched differently by the High Courts of Madras and Bombay. According to the High Court of Madras it will include the incident of survivorship, and according to the High Court of Bombay it will not do so. In Tellis v. Saldanha, ILR 10 Mad 69 the Court said :

'We are of opinion that coparcenership and the right of survivorship are incidents peculiar to Hindu law, which law, as far as it affected Native Christians, was repealed by the Succession Act.' In Francis Ghosal v. Gabri Ghosal, ILR 31 Bom 25 the Court said:

'We believe the decision in ILR 10 Mad 69 to be erroneous so far as it is thereby determined that the condition of co-parcenership is disturbed by the Succession Act';

and dealt with the distinction between coparcener-ship and inheritance as follows:

'In the case of inheritance property devolves on death, it survives in the case of co-parcenership; on inheritance new rights are acquired, on survivorship the enjoyment of existing rights is increased by the removal of one from the body of co-sharers'; and held:

'The Succession Act does not affect rights of co-parcenership as between those to whom it applies'. As pointed out by Raghavachariar the controversy has apparently been set at rest by the decision of the Privy Council in Kamawati v. Digbijai Singh, AIR 1922 PC 14 in favour of the Madras view to the effect that the word 'succession' in relation to the Indian Succession Act embraces both succession by inheritance and succession by survivorship. (Hindu Law, 4th Edition, Page 26). Both ILR 10 Mad 69 and ILR 31 Bom 25 proceed on the basis that there is nothing in the Christian faith which precludes par-ccnership from being a part of the law governing the rights of a Christian family converted from the Hindu religion.

13. In Hajee Aboo Bucker v. Ebrahirn Hajee Aboo Bucker, AIR 1921 Mad 571--a case relating to Cutchi Memons, old converts to Muharmnadanism from a Hindu commercial caste of Cutch--Kumara-swany Sastri, J., said:

'It has been argued that the law of joint family with its doctrine of siuvivorship is peculiar to the Hindu Law and cannot be applied to converts to Muhammadanism. If there is nothing illegal in such converts adopting the Hindu Law as regards the succession and inheritance, there is nothing to prevent them from adopting the joint family system with its doctrine of survivorship'.

He then emphasised the strong and remarkable hold of the joint family system on converts from Hinduism, pointed out the prevalence of the Marumakkathayam law among the Mappilas of Malabar and added :

'I find it difficult to assume that the Cutchi Memons on their conversion were so enamoured of the Hindu Law of inheritance that they adopted it, but were so

dissatisfied with the laws of the joint family that they discarded the rules as to coparcenary and the son's interest in the property of his grandfather'.

14. In Haji Oosman Haji Ismail v, Harroon Saleh Mahomed, AIR 1923 Boin 148 the Court said:

'After a close examination of the law relating to Cutchi Memons on this point the decisions distinctly lay down that the application of the rules of Hindu law by custom to the Cutchi Memons is limited to rules of inheritance and succession and does not extend to the rules relating to the joint family property as applicable to Hindus. They negative the view that a son has any vested interest by birth in the ancestral property of his father'.

Both the decisions proceed on the assumption that there is nothing in the tenets of Islam which preclude the application of the rules of Hindu law on the subject. The divergence is on the factum of adoption

15. In the light of what is stated above, the appellant's contention that the rule of Hindu law by which a son gets by birth a right in ancestral property is opposed to the, Christian faith cannot be sustained. The only question for decision on this aspect of the case will be whether the evidence on record is sufficient to come to the conclusion that that rule has been adopted by the Vaniya Christians o the Chittur Taluk as part of their law on their conversion from Hinduism.

16. In 12 Cochin 213 Narayana Menon, J., said that 'the rule as to the pious liability is closely connected with and is almost correlative to the rule relating to the right by birth' and that it will be 'unreasonable to disassociate the two' in the matter of their applicability. To the same effect is Lalta Prasad v. Gajadhar Shukul, AIR 1933 All 235 wherein Iqbal Ahmad, J., said :

'So far as I can see, this rule was introduced as a sort of corrective to the rule that every male mem-ber of a Joint Hindu family acquires an interest in the joint family property from the moment of his birth, and therefore no member of such a family can predicate the extent of his share or can alienate the same,. If by the mere fact of his birth the newly born son acquires an interest in the joint family property, and thus automatically reduces the extent of his father's interest in the same, it is but fair and just that he should shoulder along with the father the liabilities of the father. To make provision for the payment of debts due to a creditor far from being 'unsuited to any but a primitive and patriarchal society' is in consonance with common honesty and is, I should think, the recognized practice of the civilized world. The liability imposed on a son, to pay the just debts of his father is not a gratuitous obligation thrust on him by Hindu law but is a necessary corollary if not a salutary counter-balancing proviso, to the principle that the son from the moment of his birth acquires along with the father, an interest in joint family property'.

In Balakrishnan v. Chittoor Bank, AIR 1936 Mad 937 the Court said :

'We see no warrant for introducing one portion of the Hindu law without taking along with it the other portions which form an integral part of the whole system';

and applied it to the Ezhuva community of Palghat which follows the Makkathayam system of law. 12 Cochin 213 and AIR 1936 Mad 937 were cited and followed in 31

Cochin 247, a case relating to the Makkathayi Kaniyans of the Cochin State.

17. Counsel for the 1st respondent drew our attention to the following passage in S. M. Jakati v. S., M. Borkar, AIR 1959 SC 282:

'In Hindu law there are two mutually destructive principles, one the principle of independent coparcenary rights in the sons which is an incident of birth, giving to the sons vested right in the coparcenary property, and the other the pious duty of the sons to discharge their fahter's debts not tainted with immorality or illegality, which lays open the whole estate to be seized for the payment of such debts', and contended that the two principles cannot any longer be considered as correlative in view of the statement of the Supreme Court. So far as we can see all that the passage means is that the latter rule makes an inroad into the rights conferred by the former.

18. The further contention on behalf of the 1st respondent is that while the rule by which a son acquires by birth an interest in ancestral property is in consonance with Christianity, the doctrine of pious obligations is opposed to the tenets of that faith. We see no warrant for this submission,,

19. The origins of many of the rules of Hindu law, no doubt, are to be found in the Hindu faith and beliefs. As stated by the Supreme Court in Sidheshwar Mukherji v. Bhubaneshwar Prasad, AIR 1953 SC 487.

This doctrine, as is well known, has its origin in the Conception of Smriti writers who regard nonpayment of debt as a positive sin, the evil consequences of which follow the undischarged debtor even in the after-world. It is for the purpose of rescuing the father from his torments in the next world that an obligation is imposed upon the sons to pay their father's debts'.

But this does not mean that the doctrine has not passed into the realms of law during the progress of the centuries or that the conceptions of equity and good conscience which it symbolizes are opposed to the principles of a religion like Christianity.

20. In the decision cited above the Supreme Court continued to deal with the history of the doctrine as follows :

'The doctrine, as formulated in the original texts, has indeed been modified in some respects by judicial decisions. Under the law, as it now stands, the obligation of the sons is not a personal obligation existing irrespective of the receipt of any assets; it is a liability confined to the assets received by him in his share of the joint family property or to his his interest in the same'.

AIR 1959 SC 282 contains a full examination of the rights and liabilities of Hindu sons in a Mitakshara coparcenary family where the father is the karta as in the case before us. The following is an extract from that decision:

'According to the Hindu law-givers this pious duty to pay off the ancestor's debts and to relieve him of the death torments consequent on non-payment was irrespective of their inheriting any property, but the courts rejected this liability arising irrespective of inheriting any property and gave to this religious duty a legal character. For the payment of his debts it is open to the father to alienate the whole coparcenary estate including the share of the sons and it is equally open to his creditors to proceed

against it; but this is subject to the sons having a right to challenge the alienation or protest against a creditor proceeding against their shares on proof of illegal or immoral purpose of the debt. These propositions are well settled and are not within the realm of controversy'.

21. It follows that in the case of the doctrine of pious obligation also the main question we have to determine is whether the Vaniya Christians of the Chittur Taluk have adopted the doctrine as part of their law on their conversion from Hinduism. In considering the evidence on record, however, we will have to bear in mind the fact that the rule is a necessary corollary of a doctrine which according to the plaintiff his community has adopted and which forms the very foundation of his suit.

22. Issue No. 16 deals with the question as to whether the sons acquire a right by birth in ancestral property under the law applicable to the Vaniya Christian community. The lower court has dealt with this issue in paragraph 10 of its judgment and has come to the conclusion that they do acquire a right by birth in ancestral property. (After discussing the evidence in Paras 23-25, His Lordship agreed with the conclusion and proceeded:)

23. Issue No. 3 deals with the question as to whether the doctrine of pious obligation obtains in the Vaniya Christian community. The lower court has dealt with this issue in paragraphs 20 to 26 of its judgment and accepted the 1st respondent's contention that the doctrine does not apply to that community.

24. We find it impossible to sustain this conclusion. Apart from the fact that the doctrine of pious obligation is a necessary and logical corollary of the acquisition by a son of a right by birth in ancestral property there is the evidence of Pws. 2 and 4, which we see no reason to discredit. (His Lordship here referred to what they said in Malayalam.)

25. As pointed out by Mayne the law of debt illustrates a principle of constant recurrence in Hindu Law, the principle that legal rights are taken subject to the discharge of moral obligations (Hindu Law and Usage, 11th Edition, Page 395). The moral foundations of the duty naturally restrict the liability to debts which are not immoral or illegal. In view of our conclusion that the doctrine of pious obligation obtains in the community the further question for consideration is whether the debt is tainted with immorality as contended by the 1st respondent. The fact that Ext. F has matured into a decree can in no way preclude him from establishing that the debt was so tainted at its inception and that the debt made liable under the doctrine of pious obligation (See Bhagat Ram v. Ajudhia Parkash, AIR 1960 Punj 261).

26. Ext. F recites the consideration for the promissory note as follows :

'(The recital in Malayalam omitted--Ed.)' According to the 1st defendant this is a false recital and there is no dependable evidence to come to the conclusion that the borrowing was for any binding family purpose. We are prepared to assume that this contention is Correct.

27. Counsel for the 1st respondent also submitted that if the debt is held to be a debt for family purposes then the doctrine of pious obligation will not be attracted at all. He seeks to support this proposition by reference to the following passage in Mulla's Hindu Law, 12th Edition, Page 429 :

'Where the sons are joint with their father, and debts have been contracted by the father for his own personal benefit, the sons are liable to pay the debts provided they were not incurred for an illegal or immoral purpose'.

In the context in which the sentence occurs we do not think it means that the doctrine of pious obligation is excluded when the borrowing of the father is for a purpose binding on the family.

30. The further question to be considered is whether the liability of the 1st respondent is excluded as contended by him on the ground that the debt at its inception was tarnished with immorality. (After discussing the evidence of Pws. 19 and 20, in Paras 32-34, His Lordship concluded that the allegation that the debt was tainted with immorality had not been established.)

31. O. S. No. 213 of 1107 was filed, as already stated, by the 4th defendant who was not the payee under Ext. F but an endorsee of the promissory note. The terms of the endorsement have been reproduced in paragraph 4 above and we are prepared to accept the contention of the 1st respondent that it is no more than an ordinary endorsement and that it does not operate as an assignment of the debt.

As pointed out by Bhashyam and Adiga in their commentary on the Negotiable Instruments Act, there has been a considerable difference of opinion.

'on the question whether by an indorsement the right to the debt vests in the transferee so as to enable him to sue not only his transferor but also persons whose names do not appear on the instrument but who are in law liable for the debt': 10th edition, Page 293.

Counsel for the 1st respondent drew our attention to Maruthamuthu Naicker v. Kadir Badsha Rowther, AIR 1938 Mad 377 (FB) where the controversy has been set at rest as far as that court was concerned by holding that

'the indorsee of a promissory note executed by the managing member of a Hindu family is limited to his remedy on the note, unless the indorsement is so worded as to transfer the debt as well and the stamp law is complied with, and therefore in the case of an ordinary endorsement the Indorsee cannot sue the non-executant coparceners on the ground of their liability under the Hindu law'.

It does not follow, however, that if the decree directed the sale of the family properties in which not only the 8th and 9th defendants but the 1st respondent also was interested, the decree will be a nullity for lack of jurisdiction as contended by the list respondent. The decree will have to be considered as a valid decree and as enforceable against the 1st respondent to the extent of the ancestral property in his hands under the doctrine of pious obligation A' stated in Nanomi Babuasin v. Modhun Mohun, ILR 13 Cal 21

'if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justi-fied a sale if the sons had been brought in to oppose the execution proceedings'.

32. The purchaser is entitled to defend his title upon any ground which would have justified a sale and as the 1st respondent's share could have been reached on the

basis of the doctrine of pious obligation, his success in this suit must depend on his success in establishing his contention that the debt at its inception was tainted with immorality. We have already held that he has not succeeded in doing so.

33. Another contention of the 1st respondent is that as a matter of fact only the shares of the 8th and 9th defendants in the family property were sold in execution of the decree in O, S. No. 213 of 1107 and his share was not covered by those proceedings. (After discussing the evidence (Paras 38-41), the Judgment proceeded :)

In the light of the description of the 8th defendant as family manager, we think, it is clear that what was intended to be sold was not only the individual rights of the 8th and 9th defendants in the family property but the entire rights of the family in the items concerned inclusive of the 1st respondent's rights therein. Exts. II and III, the delivery receipts, show that the entire property was delivered to the auction purchaser. We entertain no doubt that what was proclaimed; what was sold and what was delivered Were the entire interests of the family in the items of property with which we are concern-ed, (His Lordship in Para 42 considered whether the sale and execution proceedings in O. S. No. 213 of 1107 were vitiated by fraud and held that fraud was cot established.)

34. In the light of what Is stated above the appeal has to be allowed and we do so with costs hereand in the court below. As the appeal is allowed, thecross appeal filed by the 1st respondent does not arisefor consideration, and it is hereby dismissed withcosts.