indoji Jithaji Vs. Kothapalli Rama Charlu and ors.

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Court : Chennai

Decided On : Apr-11-1919

Reported in : 54Ind.Cas.146

Judge : Abdur Rahim and ;Spencer, JJ.

Appellant : indoji Jithaji

Respondent : Kothapalli Rama Charlu and ors.

Judgement :

Abdur Rahim, J.

1. The plaintiff, appellant, sued on several promissory notes executed by one Ranga Charlu, who died about six months before the institution of the suit, asking for a decree for Rs. 3,237.80 on account of principal and interest due on the notes and seeking to recover the amount out of his assets consisting of the share which, it is alleged, Rangacharlu bad in the properties in the possession of the 1st defendant, his father, defendants Nos. 2 to 4, his brothers, and the 5th defendant, his widow. The main questions are, firstly, are the properties in dispute the ancestral properties of the family in the hands of the 1st defendant or his self-acquired and separate property, secondly, if ancestral, was there a division of status between Rangacharlu on the one hand and his father and brothers on the other, and, thirdly, is the instrument, Exhibit II, which is described as a release executed by Rangacharlu in favour of the 1st defendant, valid and operative as being made in bona fide settlement of a family dispute or is it liable to be avoided as being made to defeat Rangacharlu's creditors?

2. The 1st defendant obtained the property under a Will of his father, dated the 12th September 1910, wherein he describes the properties as his self-acquisition. He then bequeaths the properties in equal halves to the 1st defendant and to the minor son of the testator's deceased younger brother, his undivided co parcener, and some small amounts to other persons. The main bequest was to the testator's son, the 1st defendant, and to the younger brother's son in equal moieties. There can be little doubt in my opinion that upon those fasts the property would be ancestral property in the hands of the 1st defendant, according to the ruling of this Court in Tara Chand v. Reeb Ram 3 M.H.C.R. 50 and Nagalingam Pillai v. Ramachandra Tevar 24 M.P 429 : 11 M.L. 210 The question was fully discussed in the last-mentioned case, where it is laid down that 'a father may leave his self acquired property to descend to his sons as ancestral property or if he makes any disposition of it in favour of a son, he is at liberty to preserve for it the character of ancestral property. Whether in any given case, the property was intended to pass to the son as ancestral or as self acquired property is a question of intention turning on the construction of the instrument of

gift. If there are no words indicating a contrary intention, the natural inference should be that the father intended the sons to take the property as their ancestral estate.' I may mention that the property in dispute there had also been devised under a Will, so that the ruling is a direct authority on the question before us. While laying down this proposition the learned Judges were careful to point out that any observation in the case reported as Tara Chand v. Reeb Ram 3 M.H.C.R. 50. to the effect that a Hindu cannot make a free disposition of his self-acquired property by gift or by testamentary disposition, was no longer good law in the light of later decisions. The decision in Nagalingam Pillai v. Ramachandra Tevar 24 M.P 429 : 11 M.L. 210 has been followed in a recent case reported as Venkitaramiah Pantulu v. Subramaniam Pillai 26 Ind. Cas. 393 : 16 M.L.T. 489 and as I read the judgment of Sadasiva Aiyar and Napier, JJ., in Krishnaswami Naidu v. Seelhalakshmi Animal 31 Ind. Cas. 803 : 18 M.L.T. 542 : 3 L.W. 317 39 M.P 1029 I do not think that they meant to question the correctness of that ruling. I should bold, therefore, that the law on the point as enunciated in Tara Chand v. Reeb Ram 3 M.H.C.R. 50 and Nagalingam Pillai v. Ramcchandra Tevar 24 M.P 429 : 11 M.L. 210 is settled so far as this Presidency is concerned in Calcutta the rule seems to be even more absolute in favour of such property being regarded as ancestral. See Hatarimal Babu v. Abani Nath 18 Ind. Cas. 625 17 C.L.J. 38 : 17 C.W.N. 280 In Bombay, however, the law as expounded at least in the earlier cases was different. In Jugmohandas Mangaldas v. Mangaldas Nathubhoy 10 B.P 528 the matter was elaborately considered, and it was laid down that the self-acquired property of a Hindu devised by him to his son will be regarded as the self-acquired and separate property of the son and not as ancestral property. In a recent case, however, in that Court Ahmedbhoy Habibbhoy v. Sir Dinshaw M. Petit 3 Ind. Cas. 124 : 11 Bom. L.R. 545 : 6 M.L.T. 200 Beaman, J. seems to contend against the soundness of that ruling, and in any case, be understands it to lay down nothing more than that it is a question of the intention of the testator whether the property bequeathed by him is to be treated as ancestral or self-acquired in the hands of the donee. The Allahabad High Court's interpretation of the law was on the lines of the Bombay High Court. See Parsotarn Rao Tantia v. Janki Bai 29 A.P 354 : 7 A.L.J. 257 : A.W.N. (1907) 77

3. I do not think there is anything to show in this case that the 1st defendant's father intended that the property should be held by the 1st defendant as his self-acquired property. The fact that the testator did cot mention in the Will the two sons of the 1st defendant who were living at the time does not in my opinion tend to rebut the presumption that the property is to be held by the 1st defendant as ancestral. The fact that such a presumption is raised by the law would in itself account for the non-mention of the 1st defendant's sons in the Will, On the other hand, the fact that the testator divided the property equally between his son and his younger brother's son supports the inference, that he meant the property to be enjoyed as ancestral property. I, therefore, agree in the finding of the District Judge on this point.

4. The next question we have to deal with is as to the validity of Exhibit II. The circumstances in which the document came into existence were briefly these. Rangacharlu, who was the eldest son of the 1st defendant, was a reckless young man, addicted to women and drink. He borrowed money on promissory notes from Sowoars and consequently his father and the other relations were displeased with him. When the creditors clamoured for payment Rangacharlu resorted to his father, the 1st defendant, who naturally did not like to be harassed in this way and he and his friends put their heads together to devise means of meeting the situation. They then hit upon the arrangement embodied in Exhibit II.

5. The learned Judge in the lower Court upholds the arrangement in Exhibit II as having been made in bona fide settlement of a family dispute. But I am unable to accept this conclusion. No doubt Exhibit II does mention that the 1st defendant, claiming the property as his self-acquired property, denied that Rangacharlu had any share in it and that in order to settle all disputes the 1st defendant agreed to give Rs. 5,000 to Rangacharlu and in consideration therefore he abandoned his claim to the property and released all his rights and interests therein, if any. Now, in the first place, the value of the property concerned is at least a Lakh and a half. according to law, Rangacharlu had 15 share in it, which would be worth Rs. 30,000. There was no doubt as to the source of the property or how it devolved on the 1st defendant and on the date of Exhibit II the law in this Presidency, as I have tried to show, was settled. It is possible all the same that the 1st defendant believed bona fids that it was his self-acquired property in spite of the rulings of this Court. But I do not find upon the evidence, excepting the recital in Exhibit II, that there was really any dispute as to the. character of the property and the share of Rangacharlu therein. It was stated during the argument that Exhibit II was drafted by a lawyer. The lawyer has not been examined and there is no evidence that he advised the 1st defendant and Rangacharlu or either of them that the property was ancestral in the hands of the 1st defendant. In fact beyond the recital in Exhibit II there is nothing to show that the 1st defendant claimed the property as his self-acquired property. On the other hand, Exhibit II came into existence because of the pressing demands of Rangacharlu's creditors. All the circumstances show that the object of the arrangement was to protect the property from the claims of Rangacharlu's creditors. It is probable that if not the entire Rs. 5,000, the consideration for Exhibit II, a substantial amount was paid to Rangacharlu, but no portion of this amount reached the hands of his creditors : for Rangacharlu seems to have made himself scarce with the money. There can be little doubt that Rangacharlu in executing Exhibit II must be imputed with the intention of defeating his creditors, as that was the inevitable result of his act, and the 1st defendant must be held to have known this and aided his son in evading his creditors, as by the transaction evidenced by Exhibit II he would benefit himself largely at the expense of Rangacharlu's creditors, I hold, therefore, that Exhibit II is voidable at the instance of the plaintiff upon the principle enunciated in Section 53 of the Transfer of Property act.

6. The next question is whether Rangcharlu had separated himself before his death. The law on the subject is fully enunciated by the Privy Council in Girja Bai v. Sadashiv Dhundiraj 37 Ind. Cas. 321 : 43 C.P 1031 : 20 C.W. N. 1085 : 14 A.L. J. 822 : 20 M.L.T. 78 : 12 N.L.R. 113. (1916) 2 M.W.N. 66 : 18 Bom. L.R. 621 : 4 L.W. 114 24 C.L.J. 207 : 31 M.L.J. 455 : 43 I.A. 151 They say (page 1047*)' Separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the de facto division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint statue : whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable :' and at page 1050: 'The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference

derivable from conduct it will be for the Court to determine whether it was un-equivocal and explicit.'

7. In this case the oral evidence relied on in support of separation is mainly that of Pages of 43 C. Ed the 1st defence witness, a relation by marriage of the 1st defendant, who says that he (i.e., Rangacharlu) was fully determined on partition and made his father aware of it. He was not going to his father's house. During the one month it was a question of how much was to be given to him, The 1st defendant did not like to give him anything because be was a spendthrift and a rake.' The 4th witness, whose sister is married to the 1st defendant and who took a very active part in bringing about an arrangement under Exhibit II, says in examination-in-chief: 'Rangacharlu came to me and was demanding his share for a month previous to the release deed. He was demanding Rs. 10,000. I told his father and advised him to give him something. His father refused and said there was no reason why be should pay out of his property and Rangacharlu was in a bad state. We three mediators settled Rangacharlu should be paid Rs. 5,000. We told the 1st defendant and he said he could not pay so much. We, prevailed upon him and he agreed. Rangacharlu also consented to Rs. 5,000. Exhibit II was brought into existence and Rangacharlu signed it. Money was paid to him before he signed.... Sami Chetty said Rangacharlu complained he did not get food when he went to his house and was demanding his share. Then we settled, taking everything into consideration.' The learned Vakil for the appellant stated in the opening that separation took place about 12 days before Exhibit II was executed. In any case he argued that Exhibit II created a division of status as found by the District Judge.

8. Some reference was also made to Exhibit J. The District Judge, however, finds that it was not proved that the original document of which Exhibit J. is a copy was duly executed, and no serious attempt was made before us to show that that finding is wrong. Exhibit J undoubtedly would, in my opinion, show dearly that there had been a separation on or before 5th August 1914. the oral evidence I have cited may not, if it stood alone, be clear enough to show an unequivocal expression of Rangacharlu's intention to separate himself from the joint family and to enjoy henceforward his share in the joint .family property in severalty. It is quite probable that Rangacharlu, who was in need of money, might have on different occasions expressed a desire to have a partition and might have communicated that desire through common friends or relatives to his father. The law requires some unequivocal and definite expression of an intention on the part of a member of a joint family, to the effect that in future he would regard himself as a separated member, and that the expression of such an intention must be communicated , to the other members or at least to the manager of the family. From the mere fact that a member of a joint family asks for a partition it is not to be necessarily inferred that he intended a separation of status before a partition was effected. Did Rangacharlu then separate himself by executing Exhibit II? I have held that that document was executed in order to defeat creditor and the plaintiff on that very ground contends that it does not bind him. The question, however, is did Rangacharlu by executing Exhibit II express an intention to relinquish his status as a member of the joint family? If be did so, it would make no difference so far as its effect on his joint status is concerned, even if his further object was to defeat his creditors. As I read that document, though its apparent design was to settle a family dispute, its real object was that Rangacharlu should by receiving Rs. 5,000 relinquish his share in the property : and he says in so many words: 'I have...no concern with the same hereafter and excepting the tie of relationship by blood the relation through property no longer subsists as between you and me.' It is a formal

registered instrument and I bold that it contains a clear and unambiguous expression of a desire on the part of Rangacharlu to sever the joint status.

9. As I have held that Exhibit II is not binding on the plaintiff, the result will be that the judgment of the District Judge will be reversed and there will be a decree in favour of the plaintiff for the sum of Rs. 3,287.80 with interest at 6 per cent : until payment. The appellant is entitled to his costs from the respondents both in this and in the lower Court.

10. My learned brother, however, would confirm the judgment of the lower Court.

11. Under Section 98 of the Code of Civil Procedure, therefore, the appeal will be dismissed with costs as against defendants Nos. 1 to 4 and the decree will be in accordance with his judgment.

Spencer, J.

12. These suits were brought by a money-lender to recover money lent upon promissory notes, Exhibits A to F, to one Rangacharlu, a spendthrift youth, who is now dead. The 1st respondent is Rangacharlu's father, the 2nd, 3rd and 4th respondents are his brothers, and the 5th respondent is his widow. It is sought to make them liable for payment. A few months after the execution of these promissory notes, a release deed (Exhibit II) was drawn up and signed by Rangacharlu, whereby he took a lump sum of Rs. 5,000 in full quittance of his right, if any, to be given a share in the entire property, moveable and immoveable, acquired by Rangacharlu's father Ramacharlu under the Will of his father Bhujungacharlu.

13. The plaintiff impugns Exhibit II as being a fraudulent document got up to defeat Rangacharlu's creditors, while the defendants maintain that it represents a bona fide family settlement for good consideration.

14. It has been held in several cases that where land is transferred with the intention. of converting it into cash and thus putting it beyond the reach of the transferor's creditors, the transaction is obviously one calculated to defeat the creditors in a most effective manner vide Palamalai Mudaliyar v. South Indian Export Co. Ltd. 5 Ind. Cas. 33 : 33 M.P 334 : 20 M.L.J. 211 : 7 M.L.T. 167 : (1910) M.W.N. 239.

15. But we have not been referred to any case in which a partition of family property among Hindus has been treated as a transfer within the slope of Section 53 of the Transfer of Property Act. A partition is a division or an agreement among co-owners to make a division of their joint property in severalty. It effects a change in the mode of enjoyment of property, but it is not an act of conveying property from one living person to another Exhibit II is not in terms a division of property, nor is it a transfer or a release of property, but it purports to be a relinquishment of the executant's incorporeal right to have a partition. The plaintiff would have had no ground for complaint if Rangacharlu, his debtor, had been given more and had received it in a form more readily available for attachment by his creditors. The plaintiff's position may be regarded first from the standpoint of the property possessed by Ramacharlu being his self-acquired property. If the estate bequeathed under Rangacharlu's grandfather's Will was enjoyed as self-acquired property in the hands of Rangacharlu's father, then Rangacharlu could not claim as a matter of right to be given any definite portion of it. He had no more than an expectant right to succeed to

a part of it on his father's death, which has not yet occurred. Now that Rangacharlu is dead, his creditors can have no right Charlu's father and the plaintiff's suit would necessarily fail against respondents Nos. 1 to 4.

16. If, on the other hand, this property was ancestral property in the father's hands at the time when the promissory notes which are the basis of the plaintiff's, claim were executed, then Rangacharlu had no exclusive ownership in any single item of that property. He had undoubtedly a right to demand a partition of the ancestral property in the management of his father, but the plaintiff did not obtain a transfer of that right from him, as another creditor (plaintiff's 3rd witness) did by his hypothecation deed of July 31st, 1914 (Exhibit L) before Rangacharlu relinquished it under Exhibit II on August 12th, 1914. Thus the plaintiff was never in a position to insist upon an equal distribution of immoveable property being made among the members of his debtor's family. He was an unsecured creditor, and as such, he had to take his chances of getting his money whenever an opportunity occurred of attaching the debtor's property. A money-lender who lends money to a Junior member of a joint family always runs the risk of losing his money if the debtor dies before he gets a decree and attaches the debtor's undivided share.

17. If the debtor died without becoming divided, all the remaining interest that the debtor possessed in the ancestral property of his family passed to the surviving members of that family. Bat if Exhibit. II created, as it appears to have done, a severance of status between Rangacharlu and his father and brothers, then all that Rangacharlu got by the partition before his death was the sum of Its. 5,000 and that is all that became available for satisfying his unsecured creditors. Exhibit If contains these words: 'Whereas I and your other sons * * * were living as a joint family * * * * you know that I, not finding our house a suitable habitation, have taken to separate living * * * I have received Rs. 5,000 in cash from you this day. So I have hereby relinquished the entire right and interest, if any, that I may possess in respect of the entire property, moveable and immoveable, that may be in your possession, that is to say, all the immoveable properties described below, other moveables and outstanding debts due from others as per documents, etc. I have, therefore, no concern with the same hereafter and excepting the tie of relationship by blood, the relation through property no longer subsists as between you and me.' After such a clear and unequivocal statement it is impossible to conceive of Rangacharlu's continuance in the undivided family to which his father and brothers belonged. The document cannot be treated as a nullity by one who lays claim to an interest in the property of those who were parties to it. So the plaintiff has no means, apart from Section 53 of the Transfer of Property Act, of avoiding the effect of Exhibit II, and he cannot avail himself of the provisions of that section unless he shows.

(1) that the document was in substance a transfer of immoveable property;

(2) that it was intended thereby to defeat or delay the transferor's creditors, and he must fail if the defendants prove it to be an act done bona fide and for consideration.

18. I have already given reasons for thinking (hat partitions of co-parcenary property do not fall within the scope of Section 53 which deals with transfers of immoveable property, seeing that every member of a co-parcenary has before a partition takes place a common interest in and a possession of every item of ancestral property, and that the subjects of partition and settlements, though proposed to be included in the Bill of 1877, were found unsuitable and were designedly left out and a separate act

(Act IV of 1893) was enacted, in which no provision for the protection of creditors corresponding to Section 53 of act IV of 1882 is included. I think that this section must be strictly construed as it is a statutory provision, and I doubt whether Courts have the power to extend statutory provisions by analogy to transactions which do not fall within the scope of the Statute. (I refer to the definition of 'Transfer of property' in Section 5, Transfer of Property Act). Exhibit II cannot be impugned as fraudulent in a general sense, as it does not violate the legal rights of anybody.

19. On the second point the learned District Judge has come to the conclusion that Exhibit II represented a bona fide settlement and I agree with him on this point.

20. As he observes, it is not likely that Rangacharlu would have voluntarily taken less than he could get, as he had somehow to maintain himself after separation from his family. If Exhibit J, produced for the plaintiff and spoken to by P.W. No. 2 which is an uncertified copy of an unregistered document, is of any value, it only goes to help the defendants' case, by showing that Rangacharlu tried to get Rs. 30,000 as his share on partition.

21. But he only got Rs. 5,003 through Exhibit II, which, as stated in the recital of that document and as spoken to by defendants' witnesses Nos. 1, 3 and 4, was the result of the intervention of mediators, the amount being fixed at that figure, partly because the 1st defendant's elder brother had once taken a similar amount from the family chest when he became separate some years previously and partly because some doubt was felt at the time whether Rangacharlu was strictly entitled to any share in property received by his father under the Will of his grandfather, as it was regarded as the father's self acquisition.

22. The learned District Judge has held on the authority of Nagalingam Pillai v. Ramachandra Tevar 24 M. 429 : 11 M.L. 210 that 1st defendant took this property as ancestral property, although it was self-acquired property in the bands of the testator. A number of decisions have been cited by respondents' Vakil, from which it appears that while the Bombay and Allahabad High Courts have treated property acquired through the Will of a grandfather as self-acquired, the Madras and Calcutta High Courts have inclined to the view that it is prima facie ancestral.

23. Tara Chand v. Reeb Ram 3 M.H.C.R. 50 and Nagalingam Pillai v. Ramachandra Tevar 24 M.P 429 : 11 M.L. 210 have been followed by judgments of a single Judge in Venkatnramiah Pantulu v. Subramaniam Pillai 26 Ind. Cas. 393 : 16 M.L.T. 489 and Shadagopa Naidu v. Thirumalaswami Naidu 30 Ind. Cas. 272 : 18 M.L.T. 129 and not directly dissented from in Yethirajulu Naidu v. Mukunthu Naidu 28 M.K 363 : 15 M.L.J. 299. which turned on the construction of a particular Will. The decision in Mangaldas's case Jugmohandas Mangaldas v. Mangaldas Nathubhoy 10 B.P 528 though followed in Nanabhai Ganpatrao Dhoiryavan v. Achratbai 12 B.K 122 in the judgment of a single Judge, has some in for much criticism from Beaman, J. in Ahmed bhoy Habibboy v. Sir Dinshaw M. Petit 3 Ind. Cas. 124 : 11 Bom. L.R. 545 : 6 M.L.T. 200. and the case in Muddun Gopal Thakoor v. Ram Buksh Pandey 6 W.R. 71 from which the view taken in Nagalingam Pillai v. Ramachandra Tevar 24 M.P 429 : 11 M.L. 210 started, has been cited with approval by Mookerjee, J. in Hazarimal Babu v. Abani Nath 18 Ind. Cas. 625 17 C.L.J. 38 : 17 C.W.N. 280

24. After all, what was laid down in Nagalingam Pillai v. Ramachandra Tevar 24 M.P 429 : 11 M.L. 210 was that the question whether the property passed to the son as

ancestral or salt-acquired property was in every case a question of intention depending on the construction of the Will or gift deed, the bias being in favour of ancestral property in the absence of words to the contrary. Exhibit IV contains a bequest of Rs. 3,500 in favour of the children of the testator's divided eldest son, a provision of maintenance in favour of his daughter and a gift of the testator's half share in certain ancestral property for charitable purposes, bat after a preliminary statement that the entire property enjoyed by the testator is his self acquisition, the Will proceeds to an equal division of the bulk of it between his own son (1st defendant) and his younger brother's son Subbana Charyulu and closes with a protest against the equality of the division being hereafter called in question. There are no words to indicate an intention on the part of the testator that his son should enjoy his portion as self acquired property. The ammonite, which formed a kind of family idol, was left to be enjoyed by the son and the nephew in common. On the construction of the Will, the learned District Judge rightly held on the 3rd issue that the property became ancestral property in the hands of the 1st defendant.

25. But the idea in the minds of the parties to the settlement that in the eye of the law this property was the self acquired property of the 1st defendant explains to some extent why no more than Rs. 5,000 was offered to and accepted by Rangacharlu and thus throws light on the bona fides of the compromise.

26. As I think that Exhibit II should be upheld as a bona fide family settlement, the appeals in my opinion fail and should be dismissed with costs. I also observe that if for any reason Exhibit II were to be treated as a voidable document and vacated, then as it is not shown that Rangacharlu became divided at any other time, he must be taken to have lived and died undivided, in which case the whole of his share passed by survivorship to the remaining members of the joint family, against whom the unsecured creditors have no legal claim for payment of his debts, before this suit was instituted, Thus in any case the 5th respondent alone is Rangacharlu's heir after he became divided and the other respondents are not liable to be made to pay his debts by a decree of Court. In the result I would give the plaintiff a decree against 5th respondent with costs in both Courts and dismiss the appeals against the other respondents and direct him to pay their costs.