SUPREME COURT.

S.C.†
1949
April 4.

A.S.P.S.K.R. KARUPPAN CHETTYAR AND ONE (APPELLANTS)

v.

A. CHOKKALINGAM CHETTIAR (RESPONDENT).*

Hindu law—Hindu Joint Family business—Money borrowed for—Subsequent partition—Effect of—One case set up in the plaint—New case in appeal.

Held: According to Hindu law if a joint family incurs trade debts and that family is subsequently dissolved, the liability for debts continue against the former co-parceners severally unless there is a discharge either by payment or by novation or release.

Subramania Ayyar v. *Sabapathy Aiyar*, I.L.R. 51 Mad. 361 ; *Bankey Lal and others* v. *Durga Prasad*, I.L.R. 53 All. 863, followed.

When sued by the creditor, it was incumbent on the debtor to plead such discharge and prove the same. The question whether a creditor of two or more persons has released one of them and converted the others into his sole debtors by what is called novation is a question of intention. To succeed on this ground the debtor has to prove conduct inconsistent with the continuance of his liability from which conduct an agreement to release him may be inferred.

Rouse v. *Bradford Banking Company*, L.R. (1892) (2 Ch.) 32 at p. 53' followed.

A party should be allowed to win or lose on a case set out in his pleading and it is not the function of a trial or an appellate court to make out a case different from the one set out in pleadings.

Shivabasava Kom Amingavda v. *Sangappa Bin Amingavda*, 31 I.A. 154 at p. 159 ; *Sreemutty Dossee and others* v. *Ranee Lalunmonee and others*, 12 Moore's Indian Appeals 470 at p. 475 ; *Mohummad Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer and others*, 11 Moore's Indian Appeals 468 at p. 473 ; *Mussumat Chand Kour and others* v. *Partab Singh and others*, 15 I.A. 156 at p. 157, followed.

What particulars are to be stated in the plaint depends on the facts of each case but it is absolutely essential that the pleading in order that it may not be embarassing to the defendants should state those facts which would put the defendants on their guard and tell them what case they have to meet when the case comes up for trial.

Phillips v. *Phillips*, L.R. (1878) 4 Q.B.D. 127 at p. 139, followed.

Where the defendant knew what the case was that he had to meet and raised a defence but failed to prove the same the appellate court was justified in giving a decree on the basis of the case and facts set up by the defendant in his defence.

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* Civil Appeal No. 2 of 1948.

† Before the Hon'ble SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

P. K. Basu for the appellants.

Horrocks for the respondent.

The judgment of the Court was delivered by

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SIR BA U, C.J.—This appeal arises out of a suit filed by the respondent, A. Chokkalingam Chettiar, against the two appellants, A.S.P.S.K.R. Karuppan and Avudiappa Chettyars, and Karuppan's father, Subramanian Chettiar, who died during the pendency of the suit in the trial Court. The 2nd appellant, Avudiappa, is the son of the 1st appellant Karuppan. All the three defendants, Subramanian, Karuppan and Avudiappa, were members of a joint undivided Hindu family. They carried on business as bankers and money-lenders under the firm name and style of A.S.P.S. at Rangoon. Some time prior to 1926 the plaintiff had some money with the defendants' firm on two separate accounts. One was a Thavanai account and the other was a Nadappu account. We are no longer concerned with the Nadappu account in this appeal. The only account with which we are concerned is the Thavanai account.

The plaintiff, Chokkalingam, had over Rs. 5,000 at the credit of his Thavanai account in the books of the defendants' firm at the end of 1925. In 1926 the status of the joint Hindu family of the three defendants was severed, and the joint-family properties were divided among them. The Rangoon business fell to the share of the deceased Subramanian. The plaintiff knew of the severance of the status of the joint Hindu family of the three defendants and the partition of the joint-family properties, and he also knew that the Rangoon business fell to the share of Subramanian. In spite of that he continued to keep his Thavanai and Nadappu accounts with the A.S.P.S. firm of Rangoon. In 1932 he filed the present suit, claiming Rs. 7,873-15-0 as

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being due on the 11th March 1931 as principal on his Thavani account from the three defendants as co-parceners of a joint Hindu family. He also claimed interest at one anna over and above the Rangoon Chettiars' Thavanai rate, amounting to Rs. 860-6-0 from the 11th March 1931 to the 10th July 1932.

The defence of the deceased Subramanian was that the plaintiff knew of the severance of the status of a joint Hindu family of himself and the other two defendants, followed by the partition of the joint-family properties among themselves and that the Rangoon business of the firm fell to his (Subramanian's) share. The further defence of Subramanian was that after the severance of the joint Hindu family and the partition of the family properties, the monies belonging to the plaintiff were at his (plaintiff's) direction and, with his consent, knowledge and acquiescence, continued to be kept in deposit with his firm of A.S.P.S. at Rangoon. The 1st defendant accordingly admitted that he alone was liable for the amount sued for.

The present two appellants, Karuppan and Avudiappa, set up the same defence as the deceased Subramanian, and pleaded that they were not liable.

So far as the severance of the family status was concerned, the plaintiff, through his counsel, admitted for the purpose of the present case, that there was a severance as alleged. The learned trial Judge therefore directed himself mainly to the consideration of the question whether the partition effected after the severance of the family status was a real one or not. And the learned Judge held that the partition was a real and effective one, and that the plaintiff knew of the said partition.

The next question that arose out of this finding was whether the two appellants still remained liable for the

amount standing at the credit of the plaintiff's Thavanai account with A.S.P.S. Firm of Rangoon in spite of the severance of the joint Hindu family and the partition of the family properties. On this question the learned Judge made the following observations :

> "He (plaintiff) knew that the 1st defendant alone was carrying on the business of A.S.P.S. of Rangoon, and when he could have withdrawn the whole of his moneys he chose instead to allow such moneys to remain in deposit in the business. * * * * Therefore there is substantial foundation for the defence that the plaintiff's moneys in deposit with A.S.P.S. Rangoon were at his direction and with his consent, knowledge and acquiescence kept with the concern after the plaintiff knew that the deceased 1st defendant alone would be liable for repayment. In a sense it was a novation, but one which the plaintiff himself was responsible in bringing about."

On appeal the learned Judges of the appellate Court observed :

> "It is clear that the learned trial Judge did not really consider whether the 2nd defendant had been discharged by conduct from which an agreement to release him might be inferred. He stressed the fact that the partition was a genuine one and that the plaintiff knowing of it still chose to keep his moneys with A.S.P.S. at Rangoon : and concluded that this is 'in a sense' novation. * * * But the question appears to me not to be whether those jointly liable to the plaintiff made a *bona fide* agreement that one of them alone should pay him all; it is rather whether the plaintiff by his conduct must be held to have discharged the old contract and released the respondents from liability."

The learned Judges then set aside the decree of the trial Court as against the appellants and decreed the suit as against them also, after winding up the judgment as follows :

> "The real question here therefore is whether after the partition in 1926 the plaintiff exonerated and discharged the 2nd and 3rd defendants; or whether, continuing to deal with

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the 1st defendant, he nevertheless held them to their continuing liability under the original Thavanai agreement. * * * * *

The fact that the plaintiff was fully aware of the partition between the 1st and 2nd defendants does not with respect appear to me to warrant the importance given to it by the learned trial Judge. Though novation was not pleaded, I am satisfied that if it had been pleaded it would have been impossible for them to show (as they attempted to show in this Court) that there were any sufficient evidence of a novation having taken place. On this issue the learned Judge appears to me to have misdirected himself. The vital question was whether the plaintiff assented to a new contract so far as the Thavanai account was concerned which restricted the liability to the 1st defendant alone ; it is not enough to say that he stood by and did anything, * * * * *. The fact that they chose to effect a partition of the joint family in no way releases them."

We respectfully agree with the views thus expressed by the learned Judges of the appellate Court.

According to the personal law applicable to the parties to this suit, what is clear is that if a joint Hindu family incurs trade debts and is subsequently dissolved, as in this case, the liability for the debts continues against the former co-parceners severally unless there is a discharge either by payment or novation [*Subramania Ayyar* v. *Sabapathy Aiyar* (1) and *Bankey Lal and others* v. *Durga Prasad* (2)]. Therefore, the liability of the two defendant-appellants to the plaintiff-respondent would still continue in spite of the dissolution of their joint Hindu family and the partition of their family properties if the plaintiff-respondent did not agree to release them. It may be that the two defendant-appellants and the deceased Subramanian Chettiar agreed among themselves at the time of the partition of their joint family properties that the monies due to the plaintiff-respondent on his Thavanai account should be paid by Subramanian Chettiar alone. But

(1) I.L.R. 51 Mad. 361. (2) I.L.R. 53 All. 863.

the question is whether the plaintiff-respondent agreed to this arrangement and agreed to accept Subramanian Chettiar alone as his debtor for payment of monies due to him on his Thavanai account. Without the consent of the plaintiff-respondent there could be no valid substitution of a new contract for the old one as contended. Sections 44 and 62 of the Contract Act are quite clear on this point.

It is, therefore, incumbent on the defendant-appellants, not only to plead that the plaintiff-respondent agreed to release them from their liability and accept the deceased Subramanian Chettiar as his sole debtor after the partition of their family properties, but must prove it also. Further, they could have raised an alternative plea, if they wanted to, as provided by Order VIII, Rule 2, of the Code of Civil Procedure, that though they were not released from their liability by the plaintiff-respondent, his claim as against them was barred by time. They did not, however, raise this plea.

But now, what was pleaded by the defendant-appellants was "that the monies belonging to the plaintiff were at the direction of and with the consent, knowledge and acquiescence of the plaintiff, continued to be kept in deposit with the A.S.P.S. Firm of Rangoon, which belonged absolutely to the 1st defendant". What this plea amounts to is that the plaintiff knew of the partition of the family properties among the three defendants, and that the Rangoon business fell to the share of the 1st defendant, Subramanian Chettiar, but in spite of that he continued to keep his monies in the firm of the 1st defendant. This is not pleading the substitution of one contract for another. If this plea means anything at all, it means, at the most, a plea of estoppel by conduct. But then, on the facts of the case, this plea will be of no avail to the defendant-appellants.

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On the other hand, if it is intended by this plea that an inference should be drawn from the conduct of the plaintiff that he agreed to look to the deceased Subramanian Chettiar alone for repayment of the family debt, then in reply we might quote what Lindley, L.J., said in *Rouse* v. *Bradford Banking Company* (1), the Lord Justice said :

> " First as to novation. The question whether a creditor of two or more persons has released one of them and converted the others into his sole debtors by what is called novation is a question of intention, and an intention to look to them for payment, especially when requested to do so by their co-debtor is quite consistent with an intention to look to them as mere matter of convenience without releasing him. To succeed on this ground what the plaintiff has to prove is conduct inconsistent with a continuance of his liability, from which conduct an agreement to release him may be inferred. "

In the present case, as pointed out by the learned Judges of the appellate Court, it was the defendant-appellants who must prove the conduct of the plaintiff-respondent, from which an inference to release them from liability to him might be inferred. The fact that the plaintiff-respondent continued to keep his Thavanai account with the A.S.P.S. Firm at Rangoon even after it had been allotted to the deceased Subramanian Chettiar as his share, does not carry the case of the defendant-appellants much further in that it is equally consistent with the intention to look to Subramanian Chettiar for payment as a mere matter of convenience without releasing the appellants from their liability. Exhibit 2 C (2), which is an extract from the statement of accounts taken from the books of the deceased Subramanian Chettiar, cannot be made use of, as it was never put to the plaintiff-respondent in the course of

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L.R. (1892) (2 Ch.) 32 at p. 53.

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his cross examination. If it had been put to him, the plaintiff-respondent might have been in a position to explain it.

In view of all these circumstances, what the learned counsel for the appellants submits strenuously is that the plaintiff-respondent should either win or lose on the case as set out in his plaint, but not on a case which he has made out only in the appellate Court. According to the learned counsel for the appellants, the case as set out in the plaint is that the two appellants and the deceased Subramanian Chettiar were members of a joint undivided Hindu family on the 11th March 1931, that on that date he had monies amounting to Rs. 7,837-15-0 in his Thavanai account in the books of A.S.P.S. Firm at Rangoon of the two appellants and the deceased Subramanian, and that, therefore, the two appellants and the deceased were liable to pay to him the said amount and the interest due thereon at Thavanai rate. The learned counsel, therefore, contends that once it is proved that the two appellants and the deceased were not members of a joint undivided Hindu family on the 11th March 1931, but that the family was dissolved as long ago as 1926, followed by a partition of the family properties, the suit as against the appellants should be dismissed, as was rightly dismissed by the trial Court. But the case as made out by the appellate Court was that the suit of the plaintiff, as framed, was a suit for recovery of a debt due by the appellants and the deceased Subramanian before the dissolution of their joint family and the partition of their family properties.

We agree that a party should be allowed to win or lose only on a case as set out in his pleadings. It is not the function of a trial or an appellate Court to make out a case different from the one as set out by a party in his pleadings and decide the suit thereon :

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But, then, what must be stated by a plaintiff in his plaint in order to constitute a cause of action against the defendant ? As observed by Cotton, L.J., in *Phillips* v. *Phillips* (5), " what particulars are to be stated must depend upon the facts of each case. But * * * * it is absolutely essential that the pleadings, not to be embarrassing to the defendants, should state those facts which would put the defendants on their guard and tell them what they have to meet when the case comes on for trial. "

If we now examine the plaint in the light of these observations, what do we find ?

Paragraph 2 of the plaint states :

" That for several years past and up to date the relationship between the plaintiff as a constituent and the defendants' firm of A.S.P.S. as Bankers was and is subsisting, the plaintiff's moneys being held by the defendants' firm as Bankers according to the customs among Chettiar community on Thavanai and Nadappu accounts bearing interest accordingly. "

Paragraph 3 states :

" That at Rangoon on the 28th day of the month of Masi of the year Pramodutha corresponding to 11th March 1931 the plaintiff had and has still to the credit of his Thavanai account in the books of the defendants' firm and due and owing by the defendants' firm to the plaintiff the sum of Rs. 7,873-15-0 for principal bearing interest at one anna over and above Rangoon Chettiars' Thavanai rate. "

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(1) 31 I.A. 154 at p. 159.
(2) 12 Moore's I.A. 470 at p. 475.
(3) 11 Moore's I.A. 468 at p. 473.
(4) 15 I.A. 156 at p. 157.
(5) L.R. (1878) 4 Q.B.D. 127 at p. 139.

In our opinion, what these two paragraphs mean is that for several years prior to the date of the institution of the suit the plaintiff had been dealing with the defendants' firm as a constituent and the bankers, and that on the 11th March 1931 the amount due to him was Rs. 7,873-15-0.

The fact that the plaintiff had been dealing with the defendants as a constituent and bankers prior to the date of the dissolution of the defendants' family was not in dispute. Not only was it not in dispute, but it was in a way admitted by the defendant-appellants by their written statement that at the time of the dissolution of the family and the partition of the family properties a certain amount of money was due to the plaintiff by the defendants' family.

Therefore, taking the pleadings as a whole, the suit, as rightly held by the appellate Court, was a suit for recovery of what has been termed by the appellate Court "a pre-partition debt", and the defendant-appellants knew that that was the case against them, and that they must meet it. Reading their pleadings it is quite obvious that they endeavoured to meet it but failed to raise appropriate defences such as novation and limitation.

In this view of the case, it is unnecessary to go into the question as to what is meant by a Thavanai account; and whether the claim of the plaintiff-respondent as against the appellant is barred by time.

But the plaintiff-respondent is not entitled to get interest at a rate higher than the Thavanai rate which is a contract rate. To that extent the decree of the Lower Appellate Court will be modified and we accordingly modify it by granting a decree for the principal sum of Rs. 7,873-15-0 together with interest at Thavanai rate from the 11th March 1931 up to the date of realization. As the plaintiff-respondent has won substantially, he will get the costs of the appeal.