
(1962) 10 AP CK 0005

In the Andhra Pradesh High Court

Case No : Letters Patent Appeal No"s. 20 and 34 of 1961

Bhupatiraju Sreeramaraju and Others

APPELLANT

Vs

Nadimpalli Pullam Raju and Another

RESPONDENT

Date of Decision : 15-10-1962

Acts Referred:

Citation : AIR 1963 AP 403

Hon'ble Judges : Venkatesam, J;Umamaheswaram, J

Bench : Division Bench

Advocate : A. Gangadhara Rao, M. Bhujangarao, P. Sitaramaraju, M. Suryanarayana Murty and Ch. Ramakrishna Rao, for the Appellant; N. Chandramouli, for the Respondent

Final Decision : Allowed

Judgement

Umamaheswaram, J.—Both these Letters Patent Appeals are directed against the judgment and decree of our learned brother Sanjeeva Row Nayudu J., in Appeals No. 214 of 1956. Defendants 21, 4 and 5 are the appellants in L.P.A. No. 20 of 1961 and the 1st defendant is the Appellant in L.P.A. No. 34 of 1961. The plaintiff and defendants 18 and 19 in O. S. No. 6 of 1954 on the file of the Subordinate Judge's Court, Amalapuram are the sons of the 17th defendant. The suit was instituted by the plaintiff as a minor represented by his maternal uncle as the guardian for partition and separate possession of one fourth share in the family properties described in schedules A and B.

The case of the plaintiff was that his father, the 17th defendant, who was an agriculturist, started a new business Viz., rice mill business and that the debts incurred by him were avyavabarika debts and that consequently the alienations effected by the father of B. schedule properties under three sale deeds Exhibits B.1 and 6.15 and B.24 were not valid and binding on him. He also pleaded that the decree obtained by the 7th defendant as against his father in O. S. No. 40 of 1952 on the file of the Subordinate Judge's Court, Amalapuram, for recovery of the partnership debt was not valid and binding on him and that the sales held in

execution of that decree and the purchase made by the defendants in execution of that decree were not binding upon him. On behalf of the defendants, it was contended that the B schedule properties were sold for antecedent debts viz., the partnership debts of the father, and that they were consequently binding on the plaintiff. It was also pleaded that under the doctrine of pious obligation the properties of the plaintiff were liable to be proceeded against in execution of the decree in O. S. 40 of 1952 on the file of the Subordinate Judge's Court, Amalapuram.

The Subordinate Judge, Amalapuram held that though the business started by the father was a new business, still the sons' shares were liable to be brought to sale in execution of the decree obtained by the 7th defendant in O. S. No. 40 of 1952 on the file of Court of Subordinate Judge's Court, Amalapuram. So far as the alienations of B schedule properties were concerned, it was held by the learned Subordinate Judge that the sales were effected for antecedent debts and that they were binding on the sons. It was also found that items 1, 2, and 5 of the Plaint A schedule and half of item 1 and items 2, 3(a) and 4 of Plaint B schedule were not joint family properties. The learned Subordinate Judge also held that it was not beneficial to the minor to have a partition. In the result, he dismissed the plaintiff's suit. The plaintiff thereupon preferred appeal No. 214 of 1956 on the file of this Court.

Our learned brother Mr. Justice Sanjeeva Row Nayudu took the view that the debts contracted in connection with the new business started by the father, the 17th defendant, were avyavaharika debts and that consequently the alienation of B schedule properties as also the Court auction purchases of A schedule properties were not valid and binding upon the minor. No appeal was preferred in respect to the items which were declared by the Subordinate Judge as the separate properties of the father. It is as against the judgment of our learned brother that the Letters Patent Appeals have been filed before this court.

2. Sri Gangadhararao, the learned Advocate for the Appellants, raised a new legal contention based on the admitted facts viz., that the rice mill business started by the father in 1946 was not a new business. He also urged that if the business was a new business even then the sons are liable under the doctrine of pious obligation and that the view taken by the learned Judge that the debts are avyavaharika was erroneous. Having carefully heard the arguments of Sri Gangadhararao as also of Sri. Chandramouli on behalf of the respondent, we are satisfied that both the contentions should prevail. Though our learned brother wrote an elaborate judgment discussing the meaning of the words "debt" and "avyavaharika debt", we think it is not necessary to dwell at length having regard to the fact that the law is well settled and is concluded by authority which is binding on us.

3. We shall take up the question whether the business started by the father is a new business within the meaning of *Sanyasi Charan v. Krishnadhan Banerji* ILR Cal 560 : AIR 1922 PC 237 and the AIR 1932 182 (Privy Council) It is clearly

admitted that the rice mill business was started by the father in 1946 when he was the sole surviving coparcener. Neither the plaintiff nor his brothers defendants 18 and 19 were born at the time of the commencement of the business. From the facts, it appears that on 1-11-1947, the 17th defendant entered into a partnership with Vissamraju, Bhavaraju and Lakshmikantham. A partnership deed was executed on 11-7-1948 and the rice mill was purchased on 25-11-1948. It is no doubt true that the debts in respect of which the properties were sold voluntarily or through court were contracted in respect of this partnership business. The identical question arose for decision before the Madras High Court in *The Canara Banking Corporation Ltd. Vs. The South Indian Bank Ltd. and Others*, Rajamannar, C.J. referred to the Privy Council decisions referred to supra and formulated the question for consideration as follows:

"The point now for determination is whether this rule would apply to a case in which a sole surviving coparcener starts a new business and subsequently a son is born to him."

4. The learned Chief Justice pointed out that in both the Privy Council cases there were minor coparceners in the family when the manager or the father started the new business. The learned Chief Justice followed the decision of the Allahabad High Court in *Angney Lal Narain Das and Others Vs. Angney Lal Munni Lal*, . The relevant passage in the Allahabad case is as follows:

"But when a business has been started by a sole surviving coparcener, or with the consent of all the members of a joint Hindu family, the members being all adults, the business becomes a family business and the minor members of the family born after the business had been started are no longer able to say that the risk and liability of a new business cannot be imposed upon them because the risk and liability have been taken by the family and new comers in the family share the risk and liability of the business along with the assets of the family."

Both these cases are cited by Mr. Mulla in his treatise on Hindu Law, 12th edition, page 349. The law is summed up as follows:

"The rule of law laid down in AIR 1932 182 (Privy Council) and in other cases of a like nature cannot apply to a new business started by the sole surviving coparcener of a Mitakshara family. Such business becomes from its origin a family business and the minor members of the family born subsequently are not competent to say that the risk of the new business cannot be imposed on them. The risk and liability having been already taken by the family the new comers must share them along with other assets and liabilities of the family."

A contrary view has no doubt been taken by the Patna High Court in *Ganpat Rai v. Sukhdeo Ram* AIR 1938 Pat 335. The learned Judges of the Madras High Court dissented from the view taken by the Patna High Court and preferred the view taken by the Allahabad High Court. We are inclined to accept the view of the High Courts of Madras and Allahabad in preference to the view taken by the Patna High Court. If this view is correct, all the other questions addressed before

the Courts below do not arise for decision. But, inasmuch as arguments were addressed in the Courts below on the footing that the business was a new business, we shall also decide that question.

5. As to what "avyavaharika" debts are, there is a full discussion of all the early texts of Hindu Law in AIR 1943 142 (Privy Council) Mukherjea J., delivering the judgment of the Supreme Court in Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Others, , has once again discussed this question. According to the learned Judge, the doctrine of pious obligation

"has its origin in the conception of Smriti writers who regard non-payment 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."

The learned judge points out that the doctrine, as formulated in the original texts, has indeed been modified in some respects by judicial decisions. He pointed out that 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, and that it is a liability confined to the assets received by him in his share of the joint family property or to his interest in the same. The obligation exists whether the sons are major or minor or whether the father is alive or dead. If the debts have been contracted by the father and they are not immoral or irreligious, the interest of the sons in the coparcenary property can always be made liable for such debts.

In S.M. Jakati and Another Vs. S.M. Borkar and Others, , Kaput J. referred to the decisions of Judicial Committee of the Privy Council in AIR 1943 142 (Privy Council) and accepted the translation of Colebrooke Of "Avyavaharika" debt as a debt for a cause repugnant to good morals and is the nearest approach to the true conception of the term used in the Smritis texts. The latest decision of the Supreme Court on this point is that reported in Luhar Amrit Lal Nagji Vs. Doshi Jayantilal Jethalal and Others, . Gajendragadkar J. stated that it would be inexpedient to consider the question purely in the light of ancient Sanskrit texts even though for more than three quarters of a century the decision in Suraj Bansi v. Sheo Persad Singh 6 Ind App 88 (PC), has apparently been followed without a doubt or dissent. He concluded the judgment in the following terms:

"We do not think that the distinction between a purchase and a mortgage made in this decision is well founded. The propositions in question treated an alienation made for the payment of the father's antecedent debt on the same footing as an alienation made in execution of a decree passed against him and in both cases the principle enunciated is that in order to succeed in their challenge the sons must prove the immoral character of the antecedent debt and the knowledge of the alienee."

The burden of proof is therefore cast upon the son to establish the debts are "avyavaharika" and that the alienee had knowledge of it. The five propositions

laid down by Viscount Dunedin in *Brij Narain v. Mangala Prasad* (AIR 1924 PC 50) were approved and those propositions are as follows:

"(1) The managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity; but

(2) If he is the father and the other members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt.

(3) if he purports to burden the estate by mortgage, then unless the mortgage is to discharge an antecedent-debt, it would not bind the estate.

(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead."

Having regard to these decisions of the Privy Council and the Supreme Court, we do not think it necessary to refer to the Oxford Dictionary as to the meaning of the word "debt" or discuss as to what "Avyavaharika" debts are on first principle or examine the Smrithis Texts de novo.

6. The question as to whether commercial debts are Avyavaharika debts came up for decision before a Bench of the Madras High Court in *Nidavolu Atchutam alias Achutaramayya and Others Vs. Ratnaji Carrying on Business under the name and Style of Ratnajee Bhootaji and Others*, The father of the appellants embarked on the hardware trade and the question that arose for decision was whether the sons were liable in respect of the debts contracted by the father in the conduct of that venture. The learned Chief Justice had to consider whether the text of Gautama, Chapter XII, 41, which runs as follows:

"Money due by a surety for a commercial debt, a fee due to the parents of a bride, debts contracted for spirituous liquor or in gambling and a fine shall not involve the sons of the debtor."

was applicable to the facts of the case. The learned Chief Justice characterised the contention that commercial debts are avyavaharika debts as a bold one. He rejected the contention and held that commercial debts are not avyavaharika debts. This decision was followed by another Division Bench of the Madras High Court in *Irukulapati Venkateswara Rao, styling himself as Kannaganti Venkateswara Rao Vs. Vemuri Ammayya and Others*, . Reliance was placed on the Benares Bank case AIR 1932 182 (Privy Council) as overruling the decision of the Madras High Court in *Nidavolu Atchutam alias Achutaramayya and Others Vs. Ratnaji Carrying on Business under the name and Style of Ratnajee Bhootaji and Others*,

Varadachariar J., delivering the Judgment of the Bench, rightly stated that there

was nothing in AIR 1932 182 (Privy Council) to lead to the conclusion that the decision in *Nidavolu Atchutam alias Achutaramayya and Others Vs. Ratnaji Carrying on Business under the name and Style of Ratnajee Bhootaji and Others*, was no longer good law. The learned Judge observed as follows:

"We find nothing in AIR 1932 182 (Privy Council) that supports this argument. Their Lordships there decided only the question of the binding character of the mortgage as such on the footing that moneys had been borrowed contemporaneously with the mortgage for the purpose of carrying on a trade started by the father. They declined to deal with the question of the son's liability for the debt under the pious obligation doctrine, on the ground that the question had not been raised in the Courts in India. We have been asked to say that the decision in *Nidavolu Atchutam alias Achutaramayya and Others Vs. Ratnaji Carrying on Business under the name and Style of Ratnajee Bhootaji and Others*, as to "commercial debts" is opposed to the Hindu Law texts. We are not prepared to accede to this contention. All that could be said against it is based upon an ambiguous text of Gauthamma which has been differently read and variously interpreted by different commentators. It is too much at this time of the day to ask the Court to hold that all debts borrowed for purposes of trade by a Hindu father are *avyavaharika* debts. The fact that on another question the decision in *Nidavolu Atchutam alias Achutaramayya and Others Vs. Ratnaji Carrying on Business under the name and Style of Ratnajee Bhootaji and Others*, must be deemed to have been overruled by the decision in AIR 1932 182 (Privy Council) does not affect the present question."

Following these decisions, we hold that commercial debts incurred by the father are not *avyavaharika* debts. The learned Judge ought to have followed these two decisions which are directly in point and held that the debts contracted for the rice mill business are not *avyavaharika* debts. If the learned Judge thought that the decisions required reconsideration he ought to have referred the matter to a Full Bench.

7. The same view was expressed by Venkatrama Ayyar J. in *Chattanatha Karayalar Vs. Ramachandra Iyer and Another*, . Dealing with the question whether the appellant was disqualified to stand for election u/s 7 (d) read with Section 9 (2) of Act XLIII of 1951, the learned Judge held at page 800 as follows:

"Under the Hindu law, there is no presumption that a business standing in the name of any member is a joint family one even when that member is the manager of the family, and it makes no difference in this respect that the manager is the father of the co-parceners.

It is no doubt true that with reference to a trade newly started there is this difference between the position of a father and manager that while the debts contracted therefore by the former would be binding on the sons on the theory of pious obligation, those incurred by a manager would not be binding on the members unless at least there was necessity for the starting of the trade, as to

which see -- Ram Nath and Another Vs. Chiranjilal and Another, , Chhotey Lal Chaudhury and Another Vs. Dalip Narain Singh and Another, and Hayat Ali v. Nem Chand AIR 1945 Lab 169 (FB)."

He proceeded to state that it is one thing to say that the sons are liable for the debts contracted by the father in the trade newly started by him and quite another thing to treat the trade itself as a joint family concern. Sri Chandramouli sought to contend that these observations are "obiter". We are not inclined to accept this contention. Those observations are entitled to the greatest weight.

8. The mere fact that the father who started the rice mill business in 1946 entered into a partnership with three others and contracted the debts sought to be attacked as *avyavaharika* debts makes no difference. In regard to this question, Venkatarama Ayyar J., delivering the judgment of the Supreme Court in *Firm of Bhagat Ram Mohanlal Vs. The Commissioner of Excess Profits Tax, Madhya Pradesh, Nagpur and Another*, , observed at page 377, column 1 as follows:

"It is not in dispute that Mohanlal was the karta of the joint family, and that he entered into the partnership on 23-8-1940 as such karta. It is well settled that when the karta of a joint Hindu family enters into a partnership with strangers, the members of the family do not "ipso facto" become partners in that firm. They have no right to take part in its management or to sue for its dissolution.

The creditors of the firm would no doubt be entitled to proceed against the joint family assets including the shares of the non-partners coparceners for realisation of their debts.

But that is because under the Hindu Law, the karta has the right when properly carrying on business to pledge the credit of the joint family to the extent of its assets and not because the junior members become partners in the business.

In short, the liability of the latter arises by reason of their status as coparceners and not by reason of any contract of partnership by them."

The same view has been taken by two single Judges of this Court in *Markandeyulu v. Suryanarayana* (1958) 1 Andh WR 313 and *Ammanabrolu Harinarayana v. Ammananrolu Prasad Rao and others*, un-reported judgment of this Court in S. A. No. 788 of 1957, DA 29-9-1959 (AP). Mr. Mulia, in his treatise on Hindu Law, 12th edition, at page 469 has correctly summed up the legal position in the following terms. Under the heading "Commercial debts" the learned author states as follows:

"The text of Gautama, Chapter XII, Section 41 to the effect that the sons are not liable for their father's commercial debts has long become obsolete, and sons are now liable for simple money debts incurred by the father in the course of business even though started by the father himself."

After referring to the Benares Bank case ILR All 564:

AIR 1932 182 (Privy Council) , Mr. Mayne, in his treatise on Hindu Law, 11th edition, stated as follows at page 386:

"The pious obligation of the son to pay the debts of 3 new business started by the father would, in any case, remain."

9. Sri N. Chandramowli the learned Advocate for the respondent, relied on the decision in V.K. Nataraja Iyer and Others Vs. S.L. Lakshman Iyer and Others, . What was held by the learned Judges in that decision was that the starting of the rice mill business in the particular case was attended with risk or danger to the family properties and that the mortgage executed by the father in respect of the new business could not be justified on grounds of legal necessity or benefit. There was no discussion in that case as to how far the doctrine of pious obligation applies to a decree obtained as against the father in respect of those particular debts.

10. The learned Judge took the view that inasmuch as the debts were incurred in connection with the partnership business, they are not personal debts of the father in respect of which the liability under the doctrine of pious obligation arises. With great respect to the learned Judge, in our opinion, it is incorrect. The partners are also personally liable for the partnership debts after the partnership assets are exhausted.

11. Before concluding the judgment, we wish to point out that the learned Judge took the view that the debts contracted for the purpose of supplying one-self with liquor or on account of race-going could not be regarded as Avyavaharika or immoral debts. The learned Judge relied on the text of Gautama for the purpose of coming to the conclusion that commercial debts are "avyavaharika" debts, but he refused to follow the Text even though according to Gautama, debts contracted for spirituous liquor or in gambling are "avyavaharika" debts. The view taken by the learned Judge is erroneous.

12. So far as the alienation of B Schedule properties are concerned it is clearly found by the Subordinate Judge that Exhibits B-1, B-15 and B-24 were executed for the discharge of antecedent debts. So, the alienations are valid according to the decision of the Privy Council in 51 Ind App 129 : AIR 1924 PC 50. The execution sales in respect of A Schedule properties as also the sales effected by the father in respect of B Schedule properties are valid and binding upon the minor sons.

13. In the result, we set aside the judgment of the [earned Judge and restore the judgment of the Subordinate Judge. The appellants will be entitled to their costs throughout. The court-fee due to the Government in Appeal No. 214 of 1956 will be paid by the respondent-plaintiff.