
(1928) 11 AHC CK 0008
In the Allahabad High Court

Chakhan Lal and Others

APPELLANT

Vs

Kanhaiya Lal and Others

RESPONDENT

Date of Decision : 05-11-1928

Acts Referred:

Citation : AIR 1929 All 72

Judgement

1. This is a defendants' appeal arising out of a suit on the basis of a mortgage deed dated 25th July 1918. This appeal was originally connected with first appeal No. 187 of 1925 which has already been disposed of. It is on the paper book of this latter appeal that all the relevant documents are to be found. Chakhan Lal was a contractor carrying on business at Agra and in the course of his business he borrowed money on hundis from the present plaintiffs. On 2nd October 1917 he executed a mortgage deed as security for the payment of the amounts due from him on the hundis previously executed. The total amount due on the hundis aggregated to Rs. 10,000. It was mentioned in the deed that the old hundis would be renewed from time to time. Subsequent to this deed certain hundis were executed jointly by Chakhan Lal and his brother Balak Ram, the principal amount advanced on such hundis being Rs. 2,800. After this on 25th July 1918, a fresh mortgage deed was executed jointly by Chakhan Lal and Balak Ram, acting for themselves and as guardians of their minor sons. The consideration for this deed was the sum of Rs. 10,000 due on the previous deed of 12th October 1917 executed by Chakhan Lal, Rs. 2,800 due on the hundis executed jointly by the two brothers totalling Rs. 12,800 and a further sum of Rs. 7,200 out of which part was paid at the time and Rs. 5,400 were actually left in the hands of the creditor for subsequent payment.

2. As there has been some controversy as to the correct interpretation of this document it is necessary for us to recite its terms briefly. In the opening portion of the document there is a recital that although the previous deed of October 1917, was executed by Chakhan Lal alone yet Balak Ram also was liable by means of the hundis in lieu of which it was executed. The two brothers then declare that they have borrowed Rs. 20,000 and shall pay the said sum to the

creditor within three years and promised that they shall continue to pay interest on the said sum after every two months without fail and further declare that for the satisfaction of the aforesaid creditor they, the executants, pledge and hypothecate in lieu of that debt the property specified in the document. Reading these clauses together there can be no doubt that initially there was a joint liability undertaken by both the brothers for the payment of the entire amount of the mortgage-debt. There is, however, a clause towards the end of the document which declares that Balak Ram had joined in the execution of the document and mortgaged his share of the property simply as surety; that the creditor should realize his money first from Chakhan Lal's share of the property, but if he failed to realize it from the said share he should realize it from the share of Balak Ram. There was a further provision that if Balak Ram would pay Rs. 10,000 together with interest his share of the property would be considered to be released. These provisions undoubtedly indicate that the liability of Balak Ram at least for the bulk of the consideration was not that of a principal but of a surety only.

3. The Court below has decreed the claim in full except as regards the costs of a previous suit which had been claimed by the plaintiffs. Several points are urged on behalf of the defendants in this appeal. Taking up the case of Chakhan Lal, it is contended that the consideration for the mortgage deed in suit has not been established. Stress is laid on the fact that the plaintiffs have not produced their regularly kept account books. We are, however, of opinion that this contention cannot prevail. The original hundis in lieu of which the bond was executed have been produced from the custody of the plaintiffs and they are admittedly signed by Chakhan Lal. Being negotiable instruments there is a presumption of the passing of consideration. The fact that they are still in the possession of the plaintiffs also suggests that they were not paid till the mortgage deed was executed. Lastly there is the acknowledgment by Chakhan Lal himself in the deed that the amounts due on those hundis are outstanding. Chakhan Lal has not gone into the witness box to rebut all this evidence and we find it impossible to hold that the mortgage deed was without consideration. The plaintiffs admitted, however, that Rs. 5,400 which had been left in their hands for subsequent payment were not paid. There is no point in the suggestion that Rs. 600 which were paid before the Sub-Registrar should be deducted. Even if the amount was required for the expenses of the execution and registration of the document and remuneration for legal advice, the mortgagors undertook to pay it. The payment of the sum of Rs. 1,200 evidenced by the promissory note is also fully established. There is no force therefore in the appeal preferred on behalf of Chakhan Lal.

4. As regards Chakhan Lal's sons also we are of opinion that their appeal must fail. The amounts due on the previous hundis and pronote were undoubtedly antecedent debts, the payment of which was binding on the joint family property. There is no suggestion that these debts were in any way illegal or immoral. A valid charge was therefore created on the family property of Chakhan Lal and the Court below was right in passing a decree for sale not only as against Chakhan

Lal but as against his sons.

5. As regards Balak Ram, it was first contended that there was no consideration for his undertaking to be a surety. This contention in our opinion cannot be accepted. In the first place there was the outstanding liability of Chakhan Lal himself which was re-acknowledged by him and a fresh bond was going to be executed by him in lieu of his previous hundis. If as the deed recites the creditor was not willing to give further credit to Chakhan Lal and Balak Ram stood surety for that purpose there would be good consideration for his undertaking. In the second place the previous hundis for Rs. 2,800 had been executed jointly by the two brothers and they would form some consideration for the deed. Lastly there was a promise to pay a further sum by the creditor and that promise also would be good consideration. Even if therefore Balak Ram did not personally benefit from any of the advances made, it cannot be said that his undertaking was without consideration and therefore void as against him.

6. It was next contended that according to a correct interpretation of the mortgage-deed Balak Ram was not jointly liable for the whole amount but that he undertook the liability only for the sum that might be subsequently paid by the plaintiffs. We have already set forth the principal provisions of the bond and have indicated that in our opinion this interpretation of the bond is not correct. There was a joint liability undertaken by both the executants who made themselves jointly liable for the payment of the whole debt. No doubt the deed made it clear that the position of Balak Ram was that of a surety and that he would be liable if the property of Chakhan Lal was proved to be insufficient to pay the amount. There was a further provision that if Balak Ram paid Rs. 10,000 with interest he would be released from all further liability. We are therefore of opinion that so far as Balak Ram is concerned he cannot successfully urge that he is not bound by the deed.

7. The last point to consider is the liability of the sons of Balak Ram, The learned advocate for these sons has strongly contended that there was no legal necessity for Balak Ram to charge the family property and that if there was no actual debt due from him he was not entitled to hypothecate joint family property and accordingly there is neither a debt due from Balak Ram and his sons nor is there any valid charge created on the family property. That it is open to a father to undertake liability as a surety for the payment of a debt due by another person cannot be disputed. The contention, however, is that there is no such liability in respect of a debt which is not already due but which is promised to be advanced subsequently. In the Mitakshara there is a separate section in Chap. 6 devoted to the obligations of sureties. Suretyship is described as being of three classes, viz., for appearance, for confidence and for payment. It is expressly provided that on failure of a suretyship for payment the sons have to pay the amount. The commentary on the original text of Yajnavalkya is clearer still for it expressly lays down that where a person promises to pay the amount in case the principal debtor does not pay the sons are liable to pay it. The contention that the text

and the commentary refer only to a case where the amount has been previously paid and exists as a debt was repelled by this High Court in the case of the Maharaja of Benares v. Ram Kumar Misser [1904] 26 All. 611. That case was followed by the Calcutta High Court in the case of Rasik Lal Mandal v. Singheswar Roy [1912] 39 Cal. 843. The same view has been accepted in Madras. There can therefore be no doubt that the undertaking given by Balak Ram to pay the debt due to the plaintiffs in case Chakhan Lal failed to pay the amount was a liability which was binding not only on Balak Ram but also on his sons.

8. A subsidiary question as to whether the liability is as regards the principal only or also interest due on the amount has also been raised. We are, however, of opinion that the undertaking given by the surety was for the whole amount due, viz; for the principal and interest and the sons are liable to pay the whole amount. Had the liability been confined to a fixed sum the sons could not have been liable to pay interest on that principal sum.

9. The last question to consider is whether a valid charge has been created by Balak Ram on his joint family property. So far as the sum of Rs. 2,800 evidenced by the hundis executed jointly by Balak Ram and Chakhan Lal is concerned, we are of opinion that they are in the nature of antecedent debts in lieu of which Balak Ram was entitled to alienate the property. Even if it be assumed that the liability of Balak Ram for this amount was that of a mere surety there is no doubt that the Mitakshara treats such an obligation as a "debt" incurred by the surety on account of his having become a surety. We may quote in this connexion note No. 10 in Section 4.

Likewise the sons shall pay an amount equal to his father's debt incurred by his becoming surety, without any interest,

10. The previous hundis executed by Balak Ram created an obligation in the nature of a debt and the sons are bound by his alienation in order to secure it. As regards the balance of the amount viz., the previous sum of Rs. 10,000 and a further sum of Rs. 1,800 the liability of the father as surety did not entitle him to alienate the family property.

11. Their Lordships of the Privy Council in the famous case of Brij Narain Rai v. Mangla Prasad AIR 1924 P.C. 50 have summed up the various propositions as a result of the authorities considered. They must be taken to have laid down exhaustively the law relating to the power of the manager of joint Hindu family as regards the alienation of the family property. No manager can alienate or burden the joint estate except for purposes of necessity or for an antecedent debt. It follows therefore that even as a surety he cannot charge the family property so as to effect a valid alienation. We must therefore hold that no valid charge on the family property of Balak Ram was created for this balance. But his liability as surety stands and that liability the sons cannot repudiate.

12. We accordingly dismiss the appeals preferred by Chakhan Lal and his sons and also the appeal of Balak Ram. But we allow the appeal of the sons of Balak

Ram in part and direct that a mortgage decree for the payment of the whole sum due should be passed against Chakhan Lal and his sons, the amount to be realized by sale of the property mortgaged by them, with a further liability under Order 34, Rule 6, if necessary. We further declare that the shares of Balak Ram and his sons are also liable for the payment of Rs. 2,800 together with interest in case the whole amount has not been satisfied by sale of the property belonging to Chakhan Lal and his sons. As regards the balance of the amount we declare that the liability of Balak Ram and his sons would arise only if the property mortgaged by Chakhan Lal and his sons is proved to be insufficient to pay the amount of the mortgage "debt. In case of such deficiency the claim would be decreed against Balak Ram personally, and against Balak Ram's sons to the extent of joint family property in their hands, the creditor having the remedy to realize the amount by attachment and sale of any joint family property in the hands of Balak Ram and his sons as well as any other property that may belong to Balak Ram personally. We further declare that if Balak Ram and his sons pay in all Rs. 10,000 with interest they would be released from all further liability. As the appeal fails substantially we direct that the appellants will bear their own costs and pay the costs of the respondents.