

(1939) 01 MAD CK 0018
In the Madras High Court

D.A. Kalandar Rowther and Others

APPELLANT

Vs

Sivapunyam Chettiar and Others

RESPONDENT

Date of Decision : 19-01-1939

Acts Referred:

Citation : (1939) 1 MLJ 751

Hon'ble Judges : Wadsworth, J

Bench : Division Bench

Judgement

Wadsworth, J.—The appellants in this case are the legal representative's of a mortgagee from the first and second defendants and from the

first defendant as guardian of his minor brother, the plaintiff, who attacks the mortgage as not binding on his interest in the joint family property. The

family of the plaintiff followed the ancestral occupation of dealing in oil seeds and working country oil mills. The father Dharmalingam started a rice

mill and ran it for some little time but for about a year before his death in 1916 the rice mill was not worked. After his death the two major sons,

first and second defendants kept the rice mill idle. That at best is the finding of the Courts below. It is however contended that this finding ignores

the evidence to the effect that the rice mill was worked for a short time after the death of the father; but it seems to me that I cannot go behind the

findings of the Courts below on a question of fact. In 1922 this rice mill which had been lying idle for years was sold and the bulk of the sale

proceeds appears to have been utilised for discharging family debts. Five years later in 1927, the first and second defendants decided to purchase

a new rice mill and they borrowed money for that purpose, which borrowings have led up to the mortgage transaction now impugned by the minor

brother, plaintiff. The question is whether the plaintiff is bound by the mortgage, the main basis of which was borrowings connected with the

purchase and equipment of the new rice mill. The law on the subject is in my opinion fairly well settled, whatever may have been the difference of

opinion in the past. The Privy Council in *Sanyasi Charan Mandal v. Krishnadhan Banerji* (1922) 43 M.L.J. 41 : L.R. 49 IndAp 108 : ILR 49 Cal.

560 , had to deal with the case of a family which had two ancestral businesses in rice. The adult members of the family started a third business in

rice which was held to be not ancestral or an extension of the ancestral business. The Judicial Committee held that the adult brothers were not

entitled to bind the interest of their minor brother by borrowing for the purpose of this new business. Their Lordships point out that:

The distinction between an ancestral business and one started like the present after the death of the ancestor as a source of partnership relations is

patent. In the one case these relations result by operation of law from succession on the death of an ancestor to an established business with its

benefits and its obligations. In the other they rest ultimately on contractual arrangement between the parties.

2. Their Lordships go on to point out the inability of a karta to impose on a minor coparcener the risks and liabilities of a new business started by

himself. This was a case under the Dayabhaga but the applicability of the principle to families under the Mitakshara system has been established in

the decision of the Privy Council in *Benares Bank, Ltd. v. Hari Narain* (1932) 63 M.L.J. 92 : L.R. 59 IndAp 300 : ILR 54 All. 564 , where the

Judicial Committee point out that even a father as manager of a joint family cannot impose upon his minor sons the risk of a new and speculative

business. This decision affects the decision of this Court in *Venkatasami Naiker v. Palaniappa Chettiar* (1928) 56 M.L.J. 380 : ILR 52 Mad. 227,

where it was held that a Hindu father governed by the Mitakshara law can start a new trade with the aid of family funds and make that a family

business binding on his sons who would be bound by an alienation made by the father for raising funds for carrying on that business. The decision

in *Venkatasami Naiker v. Palaniappa Chettiar* (1928) 56 M.L.J. 380 : ILR 52 Mad. 227, rests largely on an earlier decision in *The Official*

Assignee of Madras and as such the assignee of the property and credits of V.P.L.R.M. Palaniappa Chetty, the 2nd insolvent and Another Vs.

V.P.L.R.M. Palaniappa Chetty, . Now it has been held in at least two recent decisions, Krishnaswami Aiyar v. Ramanadhan (1934) 68 M.L.J.

251 and Nataraja Aiyar v. Lakshman Aiyar (1936) M.W.N. 871, that the decision in Venkatasami Naiker v. Palaniappa Chettiar (1928) 56

M.L.J. 380 : ILR 52 Mad. 227, is no longer good law after the Privy Council decision in Benares Bank, Ltd. v. Hari Narain (1932) 63 M.L.J. 92

: L.R. 59 IndAp 300 : ILR 54 All. 564 . It is of some importance in the present case because the appellants rely very largely on the decision in

Damodaram Chetty v. Bansilal Abeerchand (1926) 55 M.L.J. 471 : ILR 51 Mad. 711, which does not appear to have been expressly dissented

from but in which the learned Judges quote with approval the decision in The Official Assignee of Madras and as such the assignee of the property

and credits of V.P.L.R.M. Palaniappa Chetty, the 2nd insolvent and Another Vs. V.P.L.R.M. Palaniappa Chetty, , followed in Venkatasami

Naiker v. Palaniappa Chettiar (1928) 56 M.L.J. 380 : ILR 52 Mad. 227. The decision in Damodaram Chetty v. Bansilal Abeerchand (1926) 55

M.L.J. 471 : ILR 51 Mad. 711, related to a case in which the family had an ancestral trade in piece goods carried on by the grandfather for a time

and then closed down and revived by the father who pledged the credit of his sons, including a minor. The learned Judges hold in the

circumstances of that case that the break in the continuity of the business would not prevent it from being a family business. They observe that:

Trade and commerce are largely dependent upon time, place and conditions and it seems to us monstrous to require that a person should be under

an obligation to continue his business under any conditions whatsoever, and even though loss maybe anticipated or certain, under the penalty of the

business carried on by him ceasing to be regarded as an ancestral or family business.

3. They also observe that too narrow a construction should not be allowed to be placed on such expressions as family trade or business and that it

is absurd to suppose that if a family business should be found to have consisted in the purchase and sale of one commodity, the purchase and sale

of another commodity should be. held to be outside the scope of the family business; and that the question whether the business was or was not a

family business was to be determined in each case with regard to the recognised business, profession, means of livelihood or what is called the

kulachara of the family in order to decide whether the particular enterprise or embarking was only within the reasonable limits of the exercise

thereof or really, having regard to its nature or extent, a new speculative enterprise. After these observations the learned Judges quote with

approval the pronouncement in *The Official Assignee of Madras and as such the assignee of the property and credits of V.P.L.R.M. Palaniappa*

Chetty, the 2nd insolvent and Another Vs. V.P.L.R.M. Palaniappa Chetty, , regarding the right of a Hindu father to begin a business as a joint"

family business binding himself and his minor sons. To the extent to which this decision relies upon *The Official Assignee of Madras and as such the*

assignee of the property and credits of V.P.L.R.M. Palaniappa Chetty, the 2nd insolvent and Another Vs. V.P.L.R.M. Palaniappa Chetty, , it

must, I think, be held to be of doubtful validity in view of the decisions already referred to declaring that *Venkatasami Naiker v. Palaniappa*

Chettiar (1928) 56 M.L.J. 380 : ILR 52 Mad. 227 which follows *The Official Assignee of Madras and as such the assignee of the property and*

credits of V.P.L.R.M. Palaniappa Chetty, the 2nd insolvent and Another Vs. V.P.L.R.M. Palaniappa Chetty, , is no longer good law. But I see no

reason to doubt the correctness of the general proposition laid down in *Damodaram Chetty v. Bansilal Abeerchand (1926) 55 M.L.J. 471 : ILR*

51 Mad. 711, regarding the continuity of a business which is stopped for a short period and has been re-started on the lines of the ancestral trade

of the family the stoppage being merely incidental to commercial necessities. I am of opinion, that, when there is an existing business carried on by

the father, after his death that business in the hands of his sons will be an ancestral business in which the sons by operation of law acquire rights and

liabilities. One of the incidents of the family relationship is the right of the manager to pledge the credit of the family including the minor coparceners

for purposes necessary to the continuance of the business which itself is one of the sources of the family income. If the business for reasons purely

incidental to ordinary commercial practice should cease to function for a short period and then be revived in such circumstances as would justify

the inference that there was continuity between the old business and the revived business, then I see no reason why the revived business should not

be treated as an ancestral business, carrying with it the incidental rights and obligations of an ancestral trade. The question whether a break of

continuity does or does not bestow Upon the revived business the character of a new enterprise started by the adult members in their individual capacity, is substantially a question of fact.

4. In the present case, so far as the facts are established, it would appear that the father started a rice-milling business which was different from the customary trade carried on by the family. That fact, however, does not to my mind decide the question of the nature of the trade in the hands of the sons. If the rice-milling business had been continued by the father up to his death and on his death had been carried on by the sons as part of the joint family estate yielding the joint family income, it would, to my mind, quite clearly have been ancestral property in the hands of the sons and would have carried with it the incidents of an ancestral family trade and there would have been no question as to the power of the manager to borrow money for the necessary purposes of that trade. But the fact is that this business started by the father stopped in his lifetime. Its assets were not liquidated until after his death, but there was apparently a complete termination of the business by the sale of all the plant followed by an interval of five years in which no rice-milling business of any kind was done by the family. Then there was the purchase of a new rice mill largely financed by borrowed money. In such circumstances it seems to me difficult to hold that the new rice mill was a continuation of a pre existing ancestral family trade or that by operation of law the minor son acquired liabilities in this new business according to the discretion of the manager in raising money for purposes which he thought to be necessary for starting this new trade. In this view I must agree with the decision of the Courts below and dismiss the appeal with costs.

5. Leave refused.