

(1946) 10 MAD CK 0006
In the Madras High Court

Desu Rattamma

APPELLANT

Vs

Mothey Narayana Rao and Others

RESPONDENT

Date of Decision : 28-10-1946

Acts Referred:

Citation : AIR 1947 Mad 252 : (1947) ILR (Mad) 567 : (1947) 60 LW 334 :
(1946) 2 MLJ 485

Hon'ble Judges : Govindarajachari, J

Bench : Division Bench

Judgement

Govindarajachari, J.—This is an appeal filed by the plaintiff in O.S. No. 27 of 1942 on the file of the District Judge of West Godavari at

Ellore against the judgment and decree of that Court dated 31st. March, 1944, in so far as it refused the plaintiff relief against the second

defendant's share in the hypothecated properties. The short facts necessary for the disposal of the appeal are as follows.

2. The first defendant borrowed Rs. 5,000 from the plaintiff on the 25th April, 1927, and executed a promissory note in her favour. The

promissory note, Ex. P-3, stated that the sum was borrowed ""for my benefit, i.e., for my business."" This promissory note was renewed by another

dated the 25th April, 1930, Ex. P-2, which was also for Rs. 5,000, the interest which accrued under Ex. P-3, having been paid from time to time.

Ex. P-2 referred to Ex. P-3 as a promissory note previously executed and delivered ""for my benefit,"" the maker of Ex. P-2 being again the first

defendant. On the 25th August, 1931, the first defendant for himself and as guardian of the second defendant, his aurasa son whom he had given in

adoption to his undivided paternal uncle, executed a deed of simple mortgage, Ex. P-1, for Rs. 5,700 made up of Rs. 5,639-10-0, being the

principal and interest due under Ex. P-2 and a small cash advance of Rs. 60-6-0, hypothecating some of the family properties. The plaintiff filed the present suit for recovery of Rs. 10,000 after having given up Rs. 4,929-13-0 out of the amount of principal and interest due under Ex. P-1 on the date of suit. The principal contest was by the second defendant. It was alleged by him that he and the first defendant had ceased to be members of a joint Hindu family even before 1927, that the amount for which Ex. P-3 was executed was borrowed for a business started by the first defendant and that the first defendant could not give a valid mortgage of the second defendant's share in the family property for such a debt, assuming that the first and second defendants were members of a joint Hindu family in 1927 and 1931. The lower Court gave a decree to the plaintiff against the first defendant's share in the hypotheca but dismissed the suit as against the second defendant. It held that the first and second defendants were members of an undivided Hindu family in 1927 and 1931 but that the business for which the suit debt was borrowed was a new business started by the first defendant for which he could not as manager of a joint Hindu family create a valid mortgage over the share of the second defendant, a minor undivided coparcener.

3. The finding that the first and second defendants were undivided at all material times has not been challenged before us on behalf of the second defendant, who is the second respondent in this appeal. The argument before us related only to the finding of the lower Court regarding the character of the business for which the amount was borrowed. It is argued for the plaintiff-appellant that the first and second defendants belong to a Vysia family whose hereditary avocation or kulachara is trade or commerce, that the suit debt was borrowed for the purpose of a business which should be regarded as an extension of a previously existing family business and that it is therefore within the competence of the first defendant as manager of such a family to mortgage the family property for such a debt including the share of the second defendant. Alternatively, it is argued that the plaintiff made a bona fide inquiry regarding the purpose of the loan and was satisfied on such inquiry that the first defendant was borrowing the money for a purpose binding on the family and that in this view also the mortgage is enforceable against the second defendant's share in the

hypotheca.

4. It may be stated at the outset that it is established by the evidence of D. W. 1 and P, W. 3 that the amount of Rs. 5,000 was borrowed under

Ex. P-3 principally, if not wholly, for a cashew-nut business which was being conducted under the name and style of American Indian Products

Company. D.W. 1 deposes that this business was financed entirely by the first defendant, that the first defendant had four partners in it who were

all working partners, one of them having his headquarters in America, that the head office was at Ellore with branches at Quilon, Cochin and

Trichinopoly and that the business was started in 1924 and wound up in 1929 or 1930. We see no reason to discredit the evidence of D. W. 1 to

the above extent. It is common ground that the business ended in a loss; but there is no acceptable evidence as to the extent of the loss or as to

whether the business earned any profit in its early years.

5. It is claimed for the appellant that this business is a mere extension of the business or businesses which were being conducted by the family at a

time when the branch of the first and second defendants was still joint with the other branches of the Mother family and reliance is principally

placed on the evidence of D. W. 2, an elderly member of that family. D. W. 2 deposes that there were originally three branches of the Mother

family, that he belonged to one branch, that the first and second defendants belong to another, and that at a time when all the branches were joint

the family did commission business in several commodities in partnership with strangers. In the course of his deposition D. W. 2 states as follows :

With regard to old trades, our main branches had jointly traded with Kanigolla Siva Raghaviah Garu for about 50 years. It was also a commission

business. That firm was exporting gingelly seeds, etc., to the southern districts There was joint business with Mothey Krishniah Garu in tobacco.

It had no foreign trade. Mothey Krishniah individually traded in Calcutta after the joint business was closed.

It is argued for the appellant that these statements of D. W. 2 show that the family was exporting certain commodities to other parts of the country.

It is not quite clear whether the witness means to state that the two partnerships just referred to were exporting goods on their own account to

other parts of the country, because we find him stating lower down in his

deposition that he does not know "" in the above-mentioned commission

kottus whether there was selling and purchasing. Even assuming that the deposition is read in the way in which the appellant's advocate would read

it, we do not consider that it carries the appellant's case much further. The appellant's advocate relies on the decision of one of us in D.A.

Kalandar Rowther and Others Vs. Sivapunyam Chettiar and Others, in which after discussing the previous decisions of the Privy Council and of

this High Court, it is stated:

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 undertaking was only within the reasonable limits of the exercise thereof or really, having

regard to its nature or extent, a new speculative enterprise.

The advocate for the contesting respondent does not challenge the accuracy of this statement of the law with which we are in full agreement. The

question however remains whether the business started in 1924 or thereabouts by the first defendant could be regarded as a legitimate extension of

an antecedent family business or whether it is really and in substance a new business. The evidence is no doubt rather meagre, but on such material

as is available we have come to the conclusion that the business for which the suit debt was borrowed is a wholly new type of business, altogether

different in its nature from the business or businesses which the family was previously carrying on. Sri Thakur Ram Krishna Murarji v. Ratan Chand

(1931) 61 M.L.J. 665 : L.R. 581.A. 173 : ILR 53 All. 190 (P.O.) was also cited on behalf of the appellant. This decision establishes no more than

that a business carried on for a time by a Hindu joint family in partnership with strangers cannot be regarded as a new business when after the

dissolution of the partnership, it is carried on by the family itself. It is not suggested for the contesting respondent nor do we consider that anything

turns upon the circumstance that the cashewnut business was carried on in partnership with strangers or upon the further circumstance that those partners had never traded in partnership with this family eviously. It is quite open to a joint Hindu family to discontinue trading in partnership with others or to take new persons into partnership provided however the nature of the business remains the same. In our opinion, the material consideration in such cases is whether the business in question is in its nature the same as or so closely allied or similar to the business which was being previously carried on by the family as to constitute a continuation or a permissible extension of it. It is clear from the evidence that the family with which we are concerned was never exporting any commodities to foreign countries and that the utmost that could be assumed in favour of the appellant's case is that the family was buying a few commodities in and around Ellore and exporting them either to Calcutta or to the southern districts. Buying cashew-nut in places so far apart from Ellore as Quilon, Cochin and Trichinopoly and exporting it to a foreign country like America is a new type of business wholly unlike any which the family was previously carrying on. It is obvious that export or import trade with foreign countries requires knowledge of a kind which is certainly not required for and not acquired by exporting a commodity or two to places within India. The learned District Judge held that the business started by the first defendant was a new business on the ground that the family never did any business in cashew-nut previously. We do not consider this a proper way of looking at the question. As has been pointed out in *Damodaram Chetty v. Bansilal Abeerchand* (1926) 55 M.L.J.471 : ILR 51 Mad. 711 and *D.A. Kalandar Rowther and Others Vs. Sivapunyam Chettiar and Others*, there is no objection to a family trade being extended to a commodity which was not previously covered by it. As we have already indicated, the nature or type of the business is the deciding factor, not the particular commodity which is dealt with. So viewed we have no doubt in agreeing with the conclusion of the learned District Judge on this part of the case, though not with his reasoning.

6. The alternative argument on behalf of the appellant can be shortly dealt with. The appellant herself deposes as P.W. 2 that she inquired of B. Kantayya and K. Ramachandrudu in regard to the purpose of the loan which the first defendant had asked for and that she was told by them that

she could lend him the amount. B Kantayya himself deposes as P.W. 3 that it was mentioned that the amount was principally required for the

cashew-nut partnership trade, in which business in fact it was actually utilised. The inquiries made by the plaintiff or by B. Kantayya on her behalf

the result of which was presumably communicated by him to the plaintiff, therefore only disclosed that the money was required for the business

newly started, and the plaintiff must therefore, in order to succeed, establish that it is a business for which the first defendant could as manager of

the joint family mortgage the family property. She has failed to establish this.

7. The decree of the lower Court exonerating the second defendant's share of the suit hypotheca is therefore correct and the appeal is accordingly

dismissed with costs in favour of the second respondent.