(1953) 01 GUJ CK 0006

In the Gujarat High Court

Case No : Second Appeal No. 82 of 1952

Doshi Jayantilal Jethalal APPELLANT

Vs

Luhar Amritlal Nagji and Others RESPONDENT

Date of Decision : 29-01-1953

Acts Referred:

Citation : (1953) 01 GUJ CK 0006

Hon'ble Judges : Chhatpar, J

Bench : Single Bench

Advocate : M.U. Shah, for the Appellant; A.K. Charadva, for Respondents Nos. 1, 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

Chhatpar, J.—In this appeal I am called upon to adjudicate on the validity of a mortgage created by a Hindu father and on the consequent mortgage decree for sale against the father to which the sons were not parties in respect of an Immovable property which is alleged to be coparcenary property belonging to the father and the sons. The Appellant before me is the mortgagee and the 4th Respondent is the father who created a mortgage of the alleged coparcenary property in his favour by a deed dated 5-2-46 to secure a loan of Rs. 2000/- The first two Respondents are the sons of the 4th Respondent and the third Respondent is the latter''s wife. The Appellant obtained a mortgage decree against the fourth Respondent in 1950 and after the final decree was passed for sale of the property, an execution application was filed and sale ordered. The two sons and their mother, the first three Respondents, filed the present suit for declaration that the mortgage as also the mortgage decree were not binding upon their shares in the property. They claimed partition of their three-fourth share in the property. The fourth Respondent was evidently in collusion with the Plaintiffs and he supported their case. The Plaintiffs alleged that the mortgage was without family necessity and in order to discharge debts which were ''Avyavaharik'' i.e., immoral.

2. The Appellant raised inter alia the contention that the property mortgaged was not joint family property but the self-acquired property of the fourth Respondent. He also denied that the loan was taken in order to pay any ''Avyavaharik'' debts which were alleged by the Plaintiffs to be incurred for ''Satta'' (speculation) business of a wagering nature. Both the lower Courts have held that the property mortgaged was coparcenaly property and it was mortgaged with the Appellant to pay off antecedent debts which were ''Avyavaharik''. The suit of the Plaintiffs was decreed and the appeal of the present Appellant from the decree was dismissed by the District Judge. The learned District Judge has written a very exhaustive judgment on the question whether the property was coparcenary property and whether the mortgage was for the purpose of paying off cetain debts which were said to be ''Avyavaharik''. I entirely agree with his finding so far as the nature of the property is concerned. It is admitted that the fourth Respondent had received Immovable property plus Rs. 1000/- at a partition between himself and his brOrs. as far back as in 1918 and that at the date of the creation of the mortgage the father and the sons were living in commensality and conducting their business as gold and silversmith in which the sows were also taking interest and contributing their labour. From 1918 to the date of the creation of the mortgage, there have been several transactions of loans taken by the father and sale of the original property awarded in the partition and acquisition of other Immovable property. The learned District Judge has come to the conclusion that the property mortgaged by the father must be considered as joint family coparcenary property in which the sons had interest. Mr. Shah, the learned Advocate for the Appellant, has argued that the original property and the sum of Rs. 1000/- received by the father at the partition of 1918 could not be legitimately considered as a nucleus for the development of the joint family property. But it is clear to me that there was a nucleus and the further important fact which cannot be denied is that the father and the sons have been living in commensality and doing their ancestral business together and the sons soon after they grew up were taking part in such business. So that apart from the question whether the property mortgaged was or was not self-acquired property of the father, it was certainly thrown into common stock and considered as joint family property in which the sons would have interest under the Hindu Law.

3. The next question to be considered is as regards the loan advanced by the Appellant. It is not denied that the loan was in fact advanced. The mortgage deed recites that it was for family requirement and for the Business of the family. The finding of the learned District Judge of the lower appellate Court is that the loan was required to pay off certain antecedent debts and that in fact such debts were discharged. He has elaborately dealt with the question showing that the fourth Respondent had dealings with one Dharsi Shamji to whom he was indebted in respect of transactions in bullion and about the time the loan was advanced, the fourth Respondent did actually pay to him a sum of about Rs. 2000/-. The learned District Judge says that Rs. 200- were paid on 31-1-46, Rs. 100/- oh 1-2-46, Rs. 1000/- on 7-2-46, Rs 300/- on 8-2-46 and Rs. 300/- on

12-2-46, making a total of Rs. 1900/- from 31-1-46 to 12-2-46. The mortgage was created on 5-2-46. The learned District Judge states:

The conclusion is, therefore, inevitable that the payments must have been made to Dharsi Shamji from the loan taken from the Appellant. Respondent 4 has also admitted in his evidence in para. 9 that he had taken the loan of Rs. 2000/- from the Appellant in order to discharge the debts due to Dharsi Shamji. It is therefore clear that the debts'' due to Dharsi Shamji were antecedent to the mortgage.

Thereafter the learned District Judge considered the question whether the debts due to Dharshi Shamji were tainted with immorality and his conclusion is couched in the following words:

Therefore from the circumstances that the normal business of both Dharsi Shamji and of Respondent 4 is not of forward trading in gold and silver and considering further that Respondent 4 was in no position financially to ever take delivery of gold and silver the conclusion is obvious that both must not have the intention at any time to give or take delivery. Dharshi had also not produced his books of account to show the nature of his business, and whether it was carried on according to the rules of the Bullion Exchange. In this state of evidence, it must be held that Respondent 4 had indulged in transactions which can be characterised as wagering. If the transactions were of this character, it is obvious that no suit would lie in any Court of law to recover the amount due on such transactions.

In the succeeding paragraphs of his judgment he considered whether such debts should be considered as ''Avyavaharik'' and relied upon the case of - Bal Rajaram Padval Vs. Maneklal Mansukhbhai, and held them to be of the nature of gamble or wager and therefore ''Avyavaharik'' under the Hindu Law.

4. Mr. Shah, the learned Advocate for the Appellant, has relied upon Mulla''s Hindu Law 1952 Edn.398 and certain rulings to the effect that debts incurred in respect of ''Satta'' business are not illegal and the sons are bound to pay the'' same as a pious obligation. Such debts though speculative are good as antecedent debts to support a further mortgage as they are not repugnant to good morals. A distinction must however be drawn between merely speculative debts and debts of the nature of gamble or wager which are illegal under the Indian Contract Act. I do not wish to give any finding on this aspect of the case whether the business done by the father with Dharsi Shamji was of the nature of wager. Mr. Shah has challenged the finding as based upon no evidence and contrary to the evidence of a representative of Dharsi Shamji, who has been examined in the case and whose evidence is the only reliable evidence in the case. But I do not propose to consider the question how far this finding is assailable in a Court of second appeal, as I am clearly of the opinion that the most important point in the case has been missed by the lower Courts.

5. Now it is long since settled law on the subject of antecedent debts that when a Hindu son seeks to set aside an alienation by his father, it is for the alienee to

show that the alienation was for payment of an antecedent debt or that after due inquiries he in good faith believed that it existed. The burden is then shifted upon the son to prove that the debt was contracted by his father for an illegal or immoral purpose ''and that the alienee had notice that the debt was so contracted''. When the alienation is made to pay off an antecedent debt, it is not necessary for the alienee to show that he made a proper inquiry as to the purpose of the loan or to prove that the money was borrowed for the benefit of the family. The existence of the antecedent'' debt itself would be sufficient to justify the alienation, unless the alienee had acted mala fide, if he had notice that the antecedent debt was tainted with illegality or immorality.

6. The important question whether the mortgagee in the present case had notice that the antecedent debts, which have been proved in the present case were illegal or immoral, the burden of which would lie upon the Plaintiffs, was neither set up in the pleadings nor proved. The learned Advocates appearing before me admit that there is not an iota of evidence on this important question of notice or knowledge of the mortgagee about the alleged ''Avyavaharik'' character of the antecedent debts paid to Dharshi Shamji. Consequently since it has been proved that the mortgage in question was created in order to discharge some antecedent debts and which debts were in fact paid, the sons would not be entitled to set aside the alienation and therefore their suit must be dismissed.

7. In support of the prosecution that it is necessary for the sons to prove knowledge on the part of the mortgagee, I may refer to an early P.C. case of - ''Muddun Thakor v. Kantoo Lall 1 Ind App 321 (PC) (B), the decision wherein was approved by the subsequent case of - Suraj Bunsi Koer v. Sheo Proshad Singh 5 Cal 148 (PC) (C), wherein their Lordships of the Privy Council, while referring to the previous case at p. 171 of the report, laid down two propositions:

Ist.- That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father''s debt, his sons, by reason of their duty to pay their father''s debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and, secondly, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not beyond to make inquiry beyond what appears on the face of the proceedings.

Within the first proposition are included a case of a sale by a father as also a mortgage to raise money to pay off an antecedent debt as in the present case. In such cases it is incumbent upon the sons to prove that the alienee had notice of the debts being contracted for illegal or immoral purposes. This case has been relied upon in a number of cases. In the case of - Hanuman Singh v. Nanak Chand 6 All 193 (D), their Lordships of the Allahabad High Court at p. 199 reiterated the two propositions enunciated above and observed:

Applying the principles thus expounded to the present case, it is for the Plaintiff to establish that the sale of the 3rd November, 1876, was made by Balwant Singh, his father, in respect of past advances and a present loan for which he is not responsible, by reason of the moneys so obtained having been devoted to immoral and unnecessary purposes, and further, when he has proved this, he must go on to show that the Defendant acted ''mala fide'' in the matter, and was aware of the purpose to which the consideration he gave was to be devoted.

In the case of - Lal Singh v. Deo Narain Singh 8 All 279 (E) similarly the Allahabad High Court reiterated the same principle and applied it both to a sale or a mortgage impeached by the sons. In the well-known case of - Raja Brij Narain v. Mangla Prasad AIR 1924 PC 50 (F), wherein their Lordships laid down the five principles in connection with alienation of joint family property by the Manager and the father, the question of knowledge of the alienee was not specifically in issue, but the third proposition that if the father purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest, seems to make a mortgage for payment of an antecedent debt binding on the whole estate, irrespective of the fact whether the antecedent debt was of an illegal or immoral character. This proposition must of course be taken subject to the exception laid down in the prior cases that where the mortgagee is fixed the knowledge of the immoral or illegal character of the antecedent debt, he could not be considered a bona fide alienee which would give a binding character to the alienation in his favour. I may yet refer to the subsequent case of - AIR 1925 18 (Privy Council) , wherein questions involved were as to what effect the insolvency of the manager or father of a joint Hindu family had on the coparcenary property. ''At p. 22'', their Lordships were pleaded to observe:

When the decree which was executed was made in a suit to which the sons were not parties and the property sold was the joint property of the father and the son the sale was good on the principle of Hindu Law that it is the pious duty of a Hindu son to pay his father''s debts unless it is shown that the debt in respect of which the decree was made was contracted by the father to the knowledge of the lender for the purposes of immorality.

Their Lordship have been pleased to refer to "the knowledge of the lender", which probably appears to be a slip for "the knowledge of the purchaser at the execution sale." Patanjali Sastri J. (now the present Lord Chief Justice of India) in - Pulavarthi Lakshmanaswami (deceased) and Others Vs. Srimat Tirumula Peddinti Tiruvengala Raghavacharyulu by maternal grandmother and guardian, Molugu Tiruvengalamma and Others, , has explained this reference to the "lender" and observed that it was perhaps an inadvertent slip as it was difficult to say how the lender''s knowledge of the immoral purpose could vender the sale bad if the execution purchaser had no knowledge of such purpose and purchased the property bona fide for valuable consideration. "The knowledge of the purchaser was held by their Lordships to be the determining factor in such prior

P.C. cases as reported in - 1 Ind App 321 (PC) (B)'' and - 5 Cal 148 (PC) (C)'', discussed above. I may also refer to the Hindu Law of Mulla, latest (1952) edition at p. 383, where the author has clearly stated the proposition that in the case of a mortgage to pay off an antecedent debt of the father, the sons must prove not only the illegal or immoral character of the antecedent debt, but also that the alienee had notice that the debt was so contracted, and that it is not necessary for the alienee to show that he made proper inquiry as to the purpose of the loan, or to prove ill at, the money was borrowed for the benefit of the family. To the same effect is Mayne''s commentary on Hindu Law 1950 Edi.. 473, where it is stated:

Where it is proved that the alienation is for an antecedent debt, it is for the sons to show that the debt was contracted to the knowledge of the lender for immoral or illegal purposes.

Gupte in his book on Hindu Law, Second Edition, at pp. 181 and 182, referring to the case of - ''Sat Narain v. Beharilal'', (G), and other prior cases of the Privy Council, concludes by saying:

Whenever an alienation by the father is impeached

(1) the burden lies on the alienee to prove that the antecedent debt existed or that after due inquiries he, in good faith, believed that it existed;

(2) the burden is then shifted upon the male issue to prove that the debt was contracted by the father for an immoral or illegal purpose to the knowledge of the alienee.

The law on the subject seems to be settled beyond any doubt. Mr. Charadva, the learned Advocate for the Respondents, has however strongly relied upon the case of - Pulavarthi Lakshmanaswami (deceased) and Others Vs. Srimat Tirumula Peddinti Tiruvengala Raghavacharyulu by maternal grandmother and guardian, Molugu Tiruvengalamma and Others, , above referred to, wherein Patanjali Sastri J. has very succinctly summarised the principles at pp. 295 and 296; but he was dealing with a case where there was no question of an alienation to pay off an antecedent debt. He criticised at p. 298 the commentary of Mulla on Hindu Law in his earlier edition of 1940 at p. 339 to the effect that

it is open to the son in a creditor''s suit against father and son to show that the debt was incurred by the father to the knowledge of the lender for an immoral purpose and to resist a decree against his share on that ground.

This passage in the former Edition of Mulla did not deal with alienations or debts incurred by the father for the purpose of discharging an antecedent debt. In the same edition the subject of the antecedent debt was dealt with at p. 357 and which is me same as appearing in the latest edition of 1952 at p. 383. Patanjali Sastri J. was perfectly justified in criticising that passage in the 1940 Edition of Mulla''s Hindu Law, because it is not necessary for the sons to fix the creditor with the knowledge of the illegal or immoral character of the debt when the nature of the debt itself was in question and there was no question of its being incurred for payment of any antecedent debt. In the latest edition of Mulla''s Hindu Law the corresponding passage at p. 364 is modified. An alienation to discharge an antecedent, debt stands on a different basis; so far as proof is concerned, the sons must show that the alienee had knowledge in addition to proving that the antecedent debt was of an illegal or immoral character.

8. Under the circumstances, since the Plaintiffs in the present case have failed to establish that the Appellant had knowledge of the alleged illegality or immorality of the antecedent debts, which were discharged by the loan taken by the father from the Appellant, the Plaintiffs'' suit must fail. The result is that this appeal is allowed, the decrees of the two lower Courts are set aside and the Plaintiff''s suit dismissed. As this point about the knowledge of the Appellant was for the first time taken by the Court in this appeal and was never agitated by any of the parties in the two lower Courts and taking into consideration the other circumstances, I think this is a fit case where I should order that the parties should bear their own costs throughout. Order accordingly.