
(1959) 07 MP CK 0024
In the Madhya Pradesh High Court
Case No : First Appeal No. 11 of 1955

Firm Makhanlal Girwarlal

APPELLANT

Vs

Harnarain and Others

RESPONDENT

Date of Decision : 31-07-1959

Acts Referred:

Limitation Act, 1908 — Article 97

Citation : AIR 1960 MP 56 : (1959) 4 MPLJ 961

Hon'ble Judges : Shiv Dayal Shrivastava, J;A.H. Khan, J

Bench : Division Bench

Advocate : B.D. Gupta, for the Appellant; G.P. Patankar, for Respondent 2, (Ramjidas), for the Respondent

Final Decision : Dismissed

Judgement

Shiv Dayal, J.

This is a first appeal by the plaintiff firm whose suit has been dismissed by the Additional District Judge, Gwalior.

The facts are these. On 20-12-1952 Har Narain defendant No. 1, on behalf of himself and his minor son Ramjidas defendant No. 2, mortgaged a house in Janakganj, Lashkar for Rs. 8,000/- in favour of the plaintiff. The mortgage money was repayable within three years. There was a subsequent charge created by a deed of 30-3-1933 for Rs. 3,000/- on the same terms and conditions.

On 1-6-1942 the mortgagors sold a part of the property to one Mataprasad and the latter paid to the mortgagee firm a sum of Rs. 12,000/- on 1-8-1942 when the portion sold to Mata Prasad was released by the mortgagee.

The present suit was brought by the mortgagee on 19-12-1947 for Rs. 15,299/9/-.

Har Narain's defence was that the amount paid to the mortgagee on 1-8-1942 was in full and final satisfaction of the mortgage debt.

Ramjidas defendant No. 2 resisted the suit inter alia on the ground that his father had no right to mortgage the ancestral property as there was no legal necessity for the same.

The trial Judge has held:

That the mortgage debt was incurred for running a flour mill and other business, while the ancestral business was money-lending and letting of houses on rent.

That the undertakings of Har Narain fell in the category of "new business".

That the above could not be said to be either a legal necessity or a benefit of the estate within the meaning of the Mitakshra Hindu Law.

That the mortgage was, therefore, void and inoperative.

That the defendants were no doubt liable to pay the debt as a debt simpliciter, but for that liability the suit was barred by time.

Shri Gupta learned counsel for the appellant has faintly contended that the mortgaged property was not an ancestral property and that it was only by way of abundant caution that the name of Ramjidas was included as one of the mortgagors. Apart from anything else, such a plea cannot be permitted to be raised at this stage when it was not the case pleaded in the plaint. It is a question of fact and would have required evidence of the parties.

No other fact or finding of fact has been challenged before us.

Shri Gupta, learned counsel for the appellant has then contended that as the ancestral business of the family was money-lending and that was a sort of trade the running of a flour mill was not a "new business" but was only another form of trade. As such the father's business was not a new business and a debt incurred for that business bound the son also.

It is undoubted law that the father of a Joint Hindu Mitakshara family cannot alienate an ancestral property except for legal necessity or for benefit of the estate. And, although, the continuance or extension of the ancestral business is legal necessity, starting a new business is not so. In Jagmohan v. Ranchoddas ILR 1945 Nag 892: (AIR 1946 Nag 84), it was held:

"There is no presumption that a business carried on by a member of joint family, is joint family business. Nor is there any presumption that a business carried on by such a member with a stranger is joint family business.

A debt incurred by a manager of a joint Hindu family for carrying on an ancestral or joint family business is binding on the other members of the family to the extent of their interest in the joint property.

But a manager has no authority to impose upon a minor member the risk and liability of a new business.

A son is, however, liable under the pious obligation rule for the debt of his father incurred in carrying on the new business."

In that case reliance was placed on *Ramkrishna Muraji v. Ratan Chand*, AIR 1931 PC 136; AIR 1932 182 (Privy Council) ; *Chochalingam v. Muthu Karuppan* AIR 1938 Mad 849; *Annamalai Chetty v. Subramanian Chetty* AIR 1929 PC 1; and AIR 1943 40 (Privy Council) .

The law on the point is stated in the eminent work of Mulla on Principles of Hindu Law (1959 Edition) at page 348 in these words:

"The extension of a joint family business for the manufacture of articles, ejusdem generis with the articles previously manufactured, i.e., when the class of persons, who, manufacture the one usually manufacture the other is not a new business."

Whether a business is a new business is in each case is a question of fact. We find it difficult to hold that the starting of a flour mill is an extension of the old business of money lending. In our opinion, it was undoubtedly a "new business" and, therefore, it cannot be said to be a legal necessity for which Har Narain could mortgage the ancestral property belonging to himself and Ramjidas.

It would be repugnant to fundamental principles and incidents of the coparcenary system of Hindu Law to hold that a father can mortgage ancestral property for starting a new business. It is a basic concept of the Hindu Law that ancestral property must be protected from being alienated unless and until all the coparceners become a party to the alienation and they are competent to do so.

Exceptions are recognised on sound principles of public policy, but they need not be enlarged by case law so as to disturb and upset the law which has all along been practised and administered. Shri Gupta has not cited a single case where such an adventure as the running of a mill has been held to be an extension of money-lending business.

The second contention of Shri Gupta is that the creditor was entitled to a decree for sale because Ramjidas (the son) was liable to discharge his father's debt on the doctrine of pious obligation. Referring to the leading case of *Brij Narain v. Mangala Prasad* 51 IA 129: (AIR 1924 PC 50), and the summary of law stated (herein, Shri Gupta relies on the proposition No. 2, since it was no body's case that Har Narain incurred the mortgage debt for an immoral or illegal purpose.

There has been some controversy whether the word "debt" in the second proposition included a "mortgage debt". In his dissenting judgment Sulaiman Actg. C. J. answered this question in *Jagdish Prasad and Others Vs. Hoshyar Singh and Another* in the affirmative and that was approved in another (F.B.) decision reported in *Hira Lal and Others Vs. Puran Chand and Others*, . The observations of Sulaiman Actg. C. J., were also noticed with approval by Sir John Beaumont in *Bharmappa Murdeppa Soppin Vs. Hanmantappa Tippanna Belludi*, . In that case it was held:

"The word "debt" in the proposition laid down by the Privy Council in AIR 1924 PC 50, namely, where the manager of a joint Hindu family is the father & the other members are his sons the father 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 covers all forms of debt including secured debts.

But that proposition deals with recovery of a debt, not in its character as a mortgage debt, but as a debt for which a decree has been obtained, and the decree is being executed. Where a mortgage is created, not for necessity or for payment of an antecedent debt, it binds only the father's interest in the property, and it is only that interest which can be sold under a mortgage decree.

But if the debt is not for immoral purposes, the sons are liable, and if a personal decree is obtained against the father, then that decree can be enforced by sale of the sons' interest in the property. There must however be a personal decree against the father for payment of the debt, and not merely a decree or payment of the debt by sale of the mortgaged property."

We also hold that the word "debt" in the second proposition of Brij Narain's case 51 Ind App 129: (AIR 1924 PC 50), includes a mortgage debt. But that does not help the appellant unless we further hold that the mortgage itself is enforceable under that proposition. That cannot be done, it is not held in Brij Narain's case 51 Ind App 129: (AIR 1924 PC 50), nor has the learned counsel been able to place before us any other authority for the proposition, that if the word debt includes a mortgage debt it also means that the mortgage itself remains enforceable and effective.

In our opinion, to hold so would be contrary to fundamental concepts of Hindu Law because then it would mean that a father could always mortgage the property belonging to himself and his sons provided the debt was not tainted with immorality or illegality. The questions of pious obligation and want of immorality or illegality have been applied to father's debts as debts, but not to alienations which are illegal or void or which out step the legal authority of the father. The statement of this law is found at page 461 in Mulla's treatise:

"By far the largest number of cases in which the above principle has been applied are cases of mortgage by the father of joint family property belonging to himself and his sons, where the mortgage is neither for legal necessity nor for payment of an antecedent debt. In such a case the son himself may sue for a declaration that the mortgage is not binding on his share and if he proves that the debt was contracted for illegal or immoral purposes to the knowledge of the lender he will be granted a declaration that the mortgage and the debt are not binding on him.

In all these cases the mortgage qua mortgage cannot be enforced against the sons' interest in the mortgaged property, and no mortgage-decree for the sale of that interest can be passed against the son. But the son is nevertheless under a pious obligation to pay the mortgage debt qua debt if it was not contracted for

an illegal or immoral purpose. The son may therefore be successfully sued for the father's debt, and the decree passed in such suit may be enforced in execution by sale of the entire ancestral estate including the sons' interest therein."

Shri Bhagwandas Gupta has fairly and frankly stated that the position of the law, as derived from Brij Narain's case 51 Ind App 129: AIR 1924 PC 50, and the precedents noticed and collected in the well known treatises, does not help the appellants unless we go a stage further and hold that even though a mortgage executed by a father is not for legal necessity, yet it should be enforceable unless it is tainted with immorality or illegality.

And this the learned counsel persuades us to do on the argument that law is dynamic and it must recognise such a mortgage so as to provide trading facilities to the family. For reasons more than one, I find myself quite unable to accept the argument. In the first place, the principle of stare decision must not be disregarded. The Hindu Law is no exception to that sacred principle which is of paramount importance in the legal world.

It is of utmost value and significance that the law must be certain and uniform. In particular also, although the Hindu Law was unmodified and even today its several branches continue to be so, judicial pronouncements of the highest authorities have been recognised as a source of Hindu law. On that basis the law has been administered at all times and the courts are loathe to depart from a settled position of the law except on very strong grounds.

While there can be no quarrel with the proposition that the needs of the society go on changing with its economic structure and notions and the law must be modified to equal those needs, yet this Court will not think of shaking the very fundamental conceptions of Hindu Society by its judgment. Moreover, in the present set up, it is the Parliament established by the Constitution which is the real arbiter of the needs of the society. Hindu Law is being codified in parts and it must be left to the Legislature to enact a different law if it is expedient to do so.

I for one, would see the law as stringent as possible when one person deals with a property which belongs to another or, at any rate, which is not exclusively his. And this should be all the more so when there exists a fiduciary relationship as that of father and son. Law must provide for all protection to the son. Today a manifestation of this strictness is Section 8 of the newly enacted Hindu Minority and Guardianship Act 1956.

We, therefore, hold that the debt which was taken by Har Narain under the mortgage deed could be recovered from Ramjidas under his pious obligation, but that could only be done "qua debt". A decree for sale cannot be passed for the enforcement of the mortgage.

The third contention advanced on behalf of the appellant is that, in any event, the father's share in the ancestral property which was mortgaged with the plaintiff could be sold, that is, a decree for sale could be passed for Har Narain's

undivided share in the joint family property. Reliance is placed on the third proposition laid down in *Brji Narain's case* 51 Ind App 129: (AIR 1924 PC 50). We are unable to accept this contention.

The third proposition in *Brij Narain's case* 51 Ind App 129: (AIR 1924 PC 50), comes into play only when a decree is passed against the father and his share in the ancestral property is sought to be sold. But there must be a decree first and the decree cannot be for the enforcement of the mortgage because such a mortgage is void ab initio. This is settled law and it would be sufficient to refer to *Balgobinddas v. Narainlal* 20 IA 116 ; *Lachhman Prasad v. Sarnam Singh* 44 Ind App 163: (AIR 1917 PC 41), and a number of other decisions collected in *Mulla's Hindu Law* in paragraph 269, where the learned author has stated the rule thus:

"Where a member of a joint family governed by the Mitakshara law as administered in Bengal and Uttar Pradesh sells or mortgages the joint family property or any portion thereof with the consent of his coparceners, the alienation is liable to be set aside wholly unless it was for legal necessity, or payment by a father of an antecedent debt, and it does not pass the share even of the alienating coparcener.

The result is that if the alienation is neither for legal necessity nor for the payment of an antecedent debt, the other coparceners are entitled to a declaration that the alienation is void in entirety."

The result of the above discussion is that the plaintiff could only get a simple money decree for the recovery of the debt. If such a decree could be passed in this suit, the judgment debt could be recovered from the father's interest in the ancestral property and the son was also liable to pay the same under his pious obligation, subject to other limitations imposed by the law.

But the greatest hurdle, which is unsurmountable in this case, is that the suit for recovery of money, forgetting the mortgage, was barred by time. As stated above, the debt was incurred on 20-12-1932 and was repayable within three years. As "the starting point of limitation was 20-12-1935, a suit should have been instituted within six years according to the Gwalior State Limitation Act which was in force on the date of the suit. But this suit was actually instituted on 19-12-1947; it was beyond the prescribed time.

The last contention raised by *Shri Gupta* is that the suit was not barred by time because Article 97 of the Indian Limitation Act was applicable and the starting point of limitation was the judgment of the first court itself because by that adjudication the "consideration of the mortgage failed." As the Gwalior Act contained no Article exactly corresponding to Article 97, the matter to put it at the highest, fell under the residuary Article No. 13 (corresponding to Section 120 of the Indian Limitation Act).

There the period prescribed is only three years from the date when the right to sue accrues. Even if we stretch *Shri Gupta's* argument to borrow and engraft

Article 97 of the Indian Act into Article 13 of the Gwalior Act, it does not help the plaintiff. Article 97 runs thus:

"97.

For money paid upon an existing consideration which afterwards fails.

Three years.

The date of the failure."

In my opinion, that Article has no application to this case because here the consideration has not "subsequently" failed. It may be remembered that at no time physical possession of the mortgaged property was parted with by the mortgagors. Article 97 speaks of those cases only where consideration "afterwards" fails. It is not applicable to transactions which are void ab initio. See Gajadhar Bakhsh v. Gauri Shankar AIR 1921 Oudh 47, and Sahib Singh v. Gurdial Singh AIR 1930 Lah 993. In the present case the mortgage was void ab initio and Article 97 is not attracted.

No other point has been urged and those pressed before us have been found against the appellant.

This appeal is, therefore, dismissed with costs.

A.H. Khan, J.

I agree.