
(1951) 11 CAL CK 0001
In the Calcutta High Court
Case No : Suit No. 1131 of 1947

Ganeshmull Surana

APPELLANT

Vs

Nagraj Surana

RESPONDENT

Date of Decision : 20-11-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3
Limitation Act, 1908 — Article 181

Citation : AIR 1953 Cal 294 : 56 CWN 812

Hon'ble Judges : Banerjee, J

Bench : Single Bench

Advocate : H.N. Sanyal, for the Appellant; Asoke Sen, for the Respondent

Final Decision : Allowed

Judgement

Banerjee, J.—This is an application for setting aside abatement (if any) of the suit and substitution of the petitioner in place of the deceased Ganeshmull Surana who filed the suit for self and as the Karta of a Mitakshara joint family carrying on a joint family business in the name and style of Messrs. Ganeshmull Nimchand, against defendant Nagraj Surana on (inter alia) the following allegations: Ganeshmull Surana at all material times was the Karta of the joint family and for the benefit of the family carried on a joint family business which acted as a commission agent of the defendant; that there were various transactions between the parties, & a sum of Rs. 10,887/7/-including interest became due which the defendant in spite of demand did not pay.

2. The suit was filed in 1947. Ganeshmull died on 23-12-1949, & the Notice of Motion of this application was taken out on 1-5-1950.

3. From the dates it is clear that the application is out of time, Mr. H.N. Sanyal who appears on behalf of the petitioner has conceded that the petition does not disclose sufficient grounds for enlargement of the time. But he has raised an interesting question. He contends that the suit has not abated and a suit of this

nature cannot abate by the death of a Karta. I think Mr. Sanyal's contention is right. As the point is an important one, and as I am dissenting from certain decisions of other COURTS, I must give my reasons. No authority of this Court has been brought to my notice which directly covers the point.

4. The Question is -- Has there been an abatement of the suit. The answer depends on the nature of property in Hindu Law, in the plaint the allegation being that the joint family firm acted as the Commission agent, the right to recover the money is in the joint family.

5. The Hindu system of property has a peculiar characteristic. It has no reference to any notion that can be drawn from the English Law. In England ownership, as a rule, is single, independent and unrestricted. That is not so, as a general rule, in India. Individual property is the rule in the West; corporate property is the rule in the East.

6. Three forms of the corporate system of property exist in India. The patriarchal family, the joint family and the village community. The two former in one shape or other exist throughout the length and breadth of India, The village community exists only in certain parts of India, particularly in the Punjab.

7. The patriarchal family may be defined as a group of natural or adoptive descendants, held together by subjection to the eldest living ascendant, father, grandfather, great grandfather." The patriarch has absolute authority over the family. Whatever property is acquired by any member of that family belongs to the patriarch.

8. The joint family arises, where it does arise, at the death of the common ancestor. After the death of the common ancestor, if the family chooses to continue united, there is a joint family. The eldest son, as a rule, is the natural head. But his position is not like that of the deceased patriarch; the one was head of the family by a natural authority; the other can only be so by a delegated authority. He is head by choice, or by natural selection, and not by right. The eldest of course is usually the head. But it is not necessary that he should be the head. A junior member who is more capable and better suited for the post may be the head. The head of a joint family is known as the "Karta" or its managing member.

9. The joint family may not have any property. But if it has, it belongs to the family which is a corporate body of which the members are individuals. The ownership of the coparcenary property is in the whole body of the coparceners. According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. Each member with his wife and children is entitled to be maintained and educated out of the family property. But no member can say that because some other member has got a bigger family, he is entitled to a better mode of living commensurate with his share in the income as on partition. If he is dissatisfied,

his remedy is to ask for partition But until then perfect equality exists among the members of the family, namely, in their right to be maintained, to be educated, etc., out of the joint family property but no member has any share in the property or in the income thereof.

10. Death does not dissolve the family nor make any difference in its corporate character. At any particular point of time, if the question is asked: "who is the owner of the property"--the answer would be, "the joint family". Who are its members?-- "A, B, C". If ten years later, the same questions are asked, the first question will evoke the same answer if, in the meantime, there has been no partition; the answer to the second question may be C, D, E,--A and B having died in the meantime, and D and E born into the family. Those who are born in the family are entitled to be maintained and educated in the same way as the other members. But they get no specific share in the property. On the death of a particular member, nothing devolves on his sons as his heirs, because the member had no share or estate in the joint family property. His sons are interested in the joint family property not because they are sons of the deceased coparcener, but because they are members of the coparcenary. This is the fundamental characteristic of a Hindu joint family. Recent legislation, I do not think, has made any change in this respect.

11. It is obvious that the business of the family cannot be carried on by all the members; some of them may be babies. Yet the business has to be carried on. It is carried on by the Karta for the time being. He is not an agent of the other members of the family though to a certain extent he is liable to render accounts. At times of compelling necessity he can dispose of the entire joint family property. This is not because he has got any proprietary right in the joint family property, but because he represents the family and can sell the property for the necessity of the family.

12. It follows, as a result of the necessity for either joint action or action by the accredited representative of the family, that a single coparcener who is not the managing member cannot sue or be sued on behalf of the family. A single member cannot sue, or proceed by way of execution, to recover a particular portion of the family property for himself, whether his claim is preferred against a stranger who is asserted to be wrongfully in possession, or against his coparceners. If the suit is against a stranger, the suit must be by all the members and must be brought to recover the whole property for the benefit of the family.

13. A necessary consequence of the corporate character of the family holding is that, wherever any transaction affects that property, all the members must be expressly or impliedly represented by the managing member or must be parties to it; and whatever is done must be done for the benefit of all, and not of any single individual. It is well settled that the managing member of a family business, or the managing members where there are more than one have the power of making contracts, giving receipts, and compromising or discharging

claims incidental to the business. They can sue and be sued in all matters affecting that business without joining the other members of the family and in particular in respect of contracts and transactions made in their own names.

In other words, the managing member has the right to represent the entire family in all transactions relating to the family, whether they are in connection with Immovable properties or otherwise. The managing member represents the family in a suit, whether the suit is on a mortgage or is for the recovery of money. (Mayne, 10th Edn. Chapters 7 and 3). This is the principle, I apprehend, which underlies the decision of their Lordships of the Privy Council in -- "Lingangowda v. Bastangowda" 54 Ind App 122 (PC) where it was held that a decree obtained by or against the managing member of a joint Hindu family is binding upon minor members of the family u/s 11, Expl. 6, Civil P. C. (1908), if it appears to the Court that the Manager was acting in the former litigation on behalf of the minors in their interests.

14. Lord Phillimore delivering the judgment of the Board made the following observation (p. 125):

"In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he becomes of age, and then bring an action, or bring an action by his guardian before; & in each of these cases, therefore, the Court looks to Expl. 6 of Section 11, Civil P. C. (1908) to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors."

15. The relevant portion of Section 11, Expl. 6 is this:

"Where persons litigate bona fide in respect of.....a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

16. The decision, in my view, depends upon a very broad principle and that principle I apprehend is this: that if a person has by law the right to represent a group of persons and files a suit for the benefit of all to enforce a right belonging to them collectively, then whatever is decided in the suit is binding on all the persons concerned: all those persons are regarded as being parties to the suit,

17. In -- "Krishnaswami Iyer v. Seethalakshmi Ammal AIR 1919 Mad 479, in a suit by the nearest reversioner to set aside a widow's alienation, the plaintiff died and the Court declared an abatement of the suit "suo motu" without hearing the next reversioner. It was held that the latter court apply to the Court to continue the suit for himself and the other surviving reversioners and the Court could under Order 1, Rule 8(2) bring him on the record in place of the deceased plaintiff. It was further held that the right to apply to continue the suit was incidental to a reversionary suit, wherein the plaintiff represented the entire body of reversioners and such a suit should be decided, if possible, in one litigation. An

application to set aside the order of abatement would be misconceiving the action but it may be treated as an application to continue the suit.

18. Sadasiva Aiyar J., said at p. 480:

"in the beginning of 1915 the Privy Council decided the case reported as--"Benkatanarayana Pillai v. Subbammal" ATR 1915 P C 124 in which their Lordships held that a suit brought by the next reversioner is a suit really brought on behalf of the entire body of the reversioners and that if the reversioner who was conducting the suit dies, the next man is entitled to come in for the purpose of continuing the conduct of the suit. Their Lordships express a doubt on the question whether the next reversioner, who has the right to continue the suit comes within the definition of a "legal representative" in Section 2, Sub-section 11, Civil P. C. But they base their decision on a broader ground, namely, that he was already a party to the suit though the conduct of it was in the hands of the first reversioner and that, therefore, he was entitled to continue the suit after the plaintiff's death."

19. Just as reversioner represents the other reversioners, so a Karta represents the joint family in the suit. The Hindu Law permits the conduct of the family's suit to be placed in the hands of the Karta, but the family is the party to the suit.

20. In -- "Amar Chandra Kundu v. Sebak Chand Chowdhry" 34 Cal 642 (FB), a decree for money passed against a member of a joint Hindu family governed by the Mitakshara was sought to be executed after his death against his son and heir. Mitra J., one of the members of the Full Bench, made the following observation at p. 654:

"Both, therefore, on the principle that the son is an heir as regards self-acquired property and that he is the person to whom the "universitas juris" of the deceased passes according to Hindu Law, he being the representative of the family and the custodian of the family property in succession to the deceased according to the Mitakshara system which retains the relics of the patriarchal system. I am of opinion that the son may, on the death of the father, be placed on the record of a suit as his legal representative after decree, irrespective of the nature of the property sought to be attached by the decree-holder."

21. In -- "Ganesh v. Narayan" 55 Bom 709, it was held that a decree for injunction obtained against the father as the Manager and representative of a joint family estate can, on his death, be executed against his son as his legal representative u/s 50 read with Section 53, Civil P. C. This decision was approved by the Privy Council in -- "Bhimsingh v. Shersingh" 52 CWN 109 (PC). Patkar J. in the Bombay case said at p. 716. "In one sense a coparcener leaves no estate in the coparcenary property on his death, and so a surviving coparcener, even though a son, is not strictly his legal representative, and it cannot be said that the estate of the judgment-debtor has devolved on the death of the judgment-debtor on his joint son who is sought to be proceeded against in execution. If the father represented the estate of the joint family during his life time, it is difficult

to hold that the son though joint with him cannot represent the estate of the joint family which was represented by his deceased father, and is not a person who in law represents the estate of a deceased person. u/s 53 property in the hands of the sons, which is liable under Hindu Law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son as his legal representative".

22. In this case his Lordship further observed that it was difficult to accept the view taken in -- "Chunilal v. Bai Mani" 42 Bom 504, that u/s 50, Civil P. C., a son who is joint is not a legal representative of his father.

23. The words "shall be deemed to be property of the deceased" in Section 53 are very significant. It suggests that the deceased has left no property; but in respect of debts of the father which are not tainted with immorality the entire property of the joint family consisting of the father and the sons is liable. When a father incurs a debt it is the pious obligation of a son governed by the Hindu Law to pay the debt. On that ground when the father is dead though he does not leave any estate because he had none in his lifetime, property in the hands of the son becomes liable to be attached and sold to satisfy the father's debt and such property is deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

24. The Karta has neither any share in the income nor in the property. It is the family, the corporate body, which is the owner of the property and if one member dies, it is still the family that remains the owner. If that is so, in a suit to recover joint family property, the Karta suing as such conducts the suit on behalf of the family. His name is used for the family. To borrow an expression from the Law of Partnership, it is a compendious way of describing the family. The death of the Karta does not, make any difference to the suit at all. The family is there and the next Karta springs up and the family is described as suing by so and so (the next Karta).

25. This is the logical conclusion of the legal concept that underlies a joint Hindu family.

26. Mr. Asoke Sen on behalf of the respondent opposing the application referred me to--"Rajendra Prasad v. "Ganga Bux Singh" AIR 1945 Oudh 60. In that case Misra J. referred to the definition of the term "legal representative" in Section 2, Clause 11, C. P. C., which is as, follows:

" "Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

His Lordship said:

"In case of a joint Hindu family if the right to sue survives at all, it survives in

consequence of the fact that the estate of the deceased is represented by the survivors. If it does not, the action must terminate upon the death of the deceased party. If it is claimed that the right to sue survives, it must come to the coparceners as representatives of the deceased".

27. With great respect to the learned Judge, I am unable to see how any estate of the deceased can devolve. There is no estate at all as I have already tried to explain. Therefore, there cannot be any question of its devolution.

28. On these considerations I hold that the suit has not abated. The application is an application to continue the suit, and I treat it as such as was done in -- "Krishnaswami Iyer"s case" AIR 1919 Mad 479.

29. Ganeshmull who was the Karta of the joint family is dead. The petitioner as the next Karta represents the family and can go on with the suit on behalf of the family which was represented by Ganeshmull before his death.

30. The petitioner, as it appears from the petition, was anxious to be brought on the record. He says for certain reasons he could not apply earlier. The family has got to get a large sum of money from the defendant. It cannot be and has not been suggested that the suit by Ganeshmuli was not for the benefit of the family.

31. Whether to an application of this kind any article of the Limitation Act applies, I need not consider now. In the present case I assume that Article 181 applies and as this application has been made within three years from the death of Ganeshmuli, it is within time.

32. I allow the application. The petitioner will continue the suit as the Karta of the joint family. Necessary and consequential amendments may be made in the plaint and the suit will be heard in the usual way.

33. Without prejudice to the right of any party to appeal from this judgment I give the following directions:

"Within fourteen days from the date the amendments are made in the plaint, the defendant will be at liberty to file an additional written statement. There would be cross-order for discovery within fifteen days thereafter; inspection forthwith; thereafter the suit to be placed on the prospective list on 2-2-1952. Costs of this application and of the additional written statement (if any) will be costs in the cause; Certified for counsel."