(1962) 05 MP CK 0013

In the Madhya Pradesh High Court

Case No : S.A. No. 3 of 1962 (G)

Ghasilal APPELLANT

Vs

Inayatali RESPONDENT

Date of Decision : 03-05-1962

Acts Referred:
Limitation Act, 1963 — Section 22

Citation : (1964) JLJ 582

Hon'ble Judges : Shivdayal, J

Bench : Single Bench

Advocate : G.P. Patankar, for the Appellant; S.T. Mungre, for the Respondent

Final Decision : Allowed

Judgement

Shivdayal, J.—Firm Ningiu Ram Jhutalal, a joint Hindu family firm instituted a suit through Ghasilal against Inayat Ali respondent for sale of mortgaged property on foot of two mortgage deeds dated 8-8-44 for Rs. 800 executed by the defendant in favour of Jhutalal, Narain Das and Ghasi Lal. The plaint mentions an earlier mortgage between the same parties. The suit was resisted inter alia on the ground that the mortgagees being three individuals, from Mangta Ram Jhutalal, which was not the mortgagee was not competent to sue. This objection found favour with the trial Judge who dismissed the suit on that ground. The learned District Judge has dismissed the plaintiffs'' appeal.

2. The defendant executed the first mortgage deed on 25-7-38 in favour, of "Jhutalal s/o Savat Ram, Narain Das s/o Mangtu Ram and Ghasilal s/o Jhutalal Malik Dukao Mangtu Ram Jhutalal." This mortgage was for Rs. 600.

3. The second mortgage was also executed by Meer Inayat Ali in favour of the same mortgagees named above. In this mortgage it was admitted that Rs. 275 were outstanding on account of the earlier mortgage and Rs. 525 were paid in each by the mortgagees to the mortgagor so that the total mortgage money was Rs. 800. It is stated in paragraph 1 of the plaint that plaintiff is an ancestral firm

of a joint Hindu family of which Jhutalal, Narain Das and Ghasilal were then members. This allegation is not denied in paragraph 1 of the written statement. All that is denied is that the defendant mortgaged his house with firm Mangturam Jhutalal and it is assuted that the mortgage was in favour of Jhutalal, Narain Das and Ghasilal. It must, therefore, be concluded that it the time of the mortgage there was in existence the joint Hindu family firm carrying on business in the name and style Mangturam Jhutalal, and further, that Jhutaram, Narain Das and Ghasilal were the members of that coparcenary firm.

4. It is remarkable that in both the mortgage deeds all the three individuals were named as mortgagees, but in the same breath they are described as proprietors of firm Mangturam Jhutalal. This in conjunction with the undisputed fact that those three individuals constituted a joint Hindu Family which had an ancestral business "Mangtu Ram Jhutalal" leaves no manner of doubt that in with and, substance the mortgagee was the joint Hindu family firm. It must be remembered that a joint Hindu Family Firm has no entity dissociated from members constituting the joint Hindu family itself.

5. It has not been found, nor has been agreed before me, that Ghasilal was not the Karta of the joint Hindu family.

6. The plaintiffs'' notice the defendant wrote a letter addressed to Ghasilal on 17-4-1956 admitting the entire claim and expressing his inability to pay at that time and requesting him not to repeat his demands for payment as he felt ashamed of his default. It is worthy of note that this letter was not addressed to the three individuals named in the mortgage deeds. This letter shows that the defendant also treated Ghasilal as the Karta of the family and as the person authorised to deal with the outer on behalf of the mortgagee.

7. For the forgoing reasons'' I see no defect in the frame of the suit. The cause title could have been drawn as it has been drawn or in the manner in which the mortgagee was described in the mortgage deeds. It makes no substantial difference on the facts which have emerged from the pleadings of the parties and; the mortgage deeds. I would here rely with benefit on the observations of their Lordships in Devidas vs. Shrishailappa AIR 61 SC 1277 that the question of the right of a manager to sue in that capacity is one of authority. There it is further observed that it depends upon the circumstances of each case whether a suit was instituted by the manager in his personal capacity or as representing the family. The fram of the suit in the present case reveals that Ghasilal sued not in an individual capacity, but as Karta of the joint Hindu family As such per dictum in the above pronouncement of the Supreme Court other members of the family were not necessary parties though they could be joined as proper parties. A failure to join a proper party does not affect the maintainability of the suit, nor does it invite the application of section 22 of the Limitation Act

8. The learned District Judge has relied on three decisions. Adheppa vs. Rachappa, AIR 1948 Bom 211 is not in point because their the original

mortgagee was the Karta, but prior to the institution of the suit a partition was brought about among three branches of the family, each branch was beaded by a separate Karta. It does not appear from the report of that case that the property had fallen to one of those branches It was therefore held that the three branches became co-owners of the mortgage. That is not the position here. In Rameshwar Bux Singh and Others Vs. Ganga Bux Singh and Others, , a possessory mortgage was made to three individuals but it does net appear from that report whether they were members of a joint Hindu family. It was held that the suit by one of the mortgagees was not maintainable either for the whole or part of the mortgage property on the principle of the indivisibility of mortgage, and the principle that all the joint promisees must combing to enforce the claim against the promisors. In the present case that position does not obtain. Here three persons are members of a joint Hindu family carrying on business and a suit is brought by the joint family firm. If that was permissible under the CPC then in fore, it cannot be said that one of the mortgagees has issued. The third case relied on is Veerni Soorayya Vs. Kateeza Bee gum (died) and Others . But that decision is not apposite here.

9. The foregoing discussion leads me to conclude that the suit was properly framed and there was no defect of non-i(sic)indet of necessary party.

10. However, there is yet another point which must be mentioned. During the pendency of this suit there was partition of the plaintiff''s joint family. The mortgage debt in this suit fell to the share of Ghasilal. In consequence an application was made for leave to amend the plaint which was allowed and the plaint has been amended. It is now said in paragraph 1 A of the plaint that on partition of the joint Hindu family firm the mortgage debt has fallen to the share of (1) Ghasilal s/o Jhutalal, (2) Babulal s/o Ghasilal, (3) Suresh Chandra, (4) Shyamlal, (5) Govind s/o Ghasilal and (6) Gopal s/o Babulal who are joint inter se and the Karta of this branch is Ghasilal. That being so, after the amendment of the plaint which was initially signed and verified by Ghasilal himself, it cannot be said that there is any defect in the frame of the suit so as to effect its maintainability. Even if it was held, although I think it could not be, that Jhutalal and Narain Das were necessary parties, that defect now does not survive in the altered circumstance.

11. Viewed from either angle the judgments of the Courts below must be set aside and the case must be tried on merits.

12. Before I leave this case I must observe that after holding that the sui(sic) was defective for non-joinder of necessary parties, it was dismissed out right giving the plaintiff an opportunity to add the parties who were held necessary by the Court. This course was not proper nor just. The plaintiff should have been given an opportunity to add those parties and then the Court could examine the question of limitation, if it arose.

13. The appeal is allowed. The judgments and decrees of both the Courts below

are set aside. The case is sent back to the trial Court for proceeding further with the trial of the suit. The plaintiff shall get his costs in this Court a also in the first appellate Court.

