

(1940) 07 CAL CK 0030
In the Calcutta High Court

Jamuna Ram Bhakat and Another

APPELLANT

Vs

Heeralal Agarwalla and Co. and Others

RESPONDENT

Date of Decision : 05-07-1940

Acts Referred:

Citation : AIR 1940 Cal 515

Hon'ble Judges : Lodge, J;Khundkar, J

Bench : Full Bench

Judgement

Khundkar, J.—This appeal arises out of a suit for a declaration that the shares of the plaintiffs in certain immovable property comprising a house were not affected by two sales held in execution of decrees obtained respectively by defendants 1 and 2. There was a further prayer for a declaration that the plaintiffs' interest in the said property was not affected by a mortgage decree obtained by defendant 3, which decree had not been executed. The material facts may here be stated. There was an undivided Hindu joint family governed by the Mitakshara School of law the founder of which was one Moti Ram Bhakat. Moti Ram had four sons Balgovinda, Motru who is defendant 4, Ram Kissen who is defendant 5 and Sri Kissen who is defendant 6. The plaintiffs are the two sons of Balgovinda. Defendants 7, 8, 9, 10, 11 and 12 are the sons of defendant 4 Motru. The name of defendant 7 is Jodhan Prosad, and the name of defendant 9 is Bhagaban Das. Defendants 13 and 14 are the sons of defendant 6, Sri Kissen. Defendants 1, 2 and 3 are strangers. In the year 1927 a shellac business was established in the names of Moti Ram and Ram Kissen which was ostensibly a partnership but the business failed in that very year. In that year Jodhan Prosad purchased a pucca house which is the property in dispute. It is admitted that it was purchased in the name of Jodhan Prosad alone. The purchase was effected with the funds of the joint family.

2. In 1928 a jute business was established under the name and style of Jodhan Prosad Ram Kissen which was also ostensibly a partnership. Both the shellac and jute businesses were carried on in the house which Jodhan Prosad had

purchased. In 1927, defendant 1 obtained a decree in a suit which he instituted on the original side of this Court against the firm of "Moti Bhakat Ramkissen." In this suit the firm was described as a partnership business. After defendant 1 had obtained his decree, he made an application under the provisions of O. 21, E. 50, Civil P. C, for leave to proceed against the partners individually, but he was given permission to sell the interest of defendant 5 Ram Kissen only. The decree was transferred to Murshidabad and in execution thereof the property was sold on 1st July 1938. In 1931, defendant 2 instituted a suit in the Court at Chaibasa against the firm "Jodhan Prosad Bhagwandas" which was described as a partnership business, and also against defendant 5 Ram Kissen and defendant 7 Jodhan Prosad, individually. The decree in which that suit terminated was transferred to Murshidabad and in execution of it the property in dispute was sold on 1st October 1937. In 1937, defendant 3 instituted a suit in Murshidabad where the property is situated against defendant 7 Jodhan Prosad individually on the basis of a mortgage said to have been executed by this defendant alone, and obtained a decree. In these proceedings the property was described as the sole property of defendant 7. As stated above, this decree was never executed.

3. The findings arrived at by the lower Appellate Court were, firstly, that the property belonged to the firms of "Moti Bhakat Ramkishen" and "Jodhan Prosad Bhagwandas;" secondly that the firms were actually joint family businesses and the decrees obtained by the defendants amounted to decrees against the joint family; thirdly, that plaintiffs 1 and 2 were members of the joint family; fourthly, plaintiffs 1 and 2 had rights to the property as members of the joint family; and fifthly, that plaintiffs 1 and 2 have throughout been in possession of this property. The only question which arises in this appeal is whether the shares of the plaintiffs in the house were affected by the sales held in execution of the decrees obtained by defendants 1 and 2. It is evident that the decree obtained by defendant 1 was obtained against the partnership firm of "Moti Bhakat Ramkishen" and the decree obtained by defendant 2 was against the firm of "Jodhan Prosad Bhagwandas" and against Jodhan Prosad and Ram Kissen individually. It is also obvious that the procedure invoked in the suits which terminated in these decrees was the procedure embodied in the provisions of Order 30, Civil P.C. In *Lalchand Amonmal Vs. M.C. Boid and Co.*, it was held that a Hindu undivided family carrying on business is not entitled to file a suit as a firm under the provisions of Order 30, Civil P.C. In that case, Buckland Ag. C.J. quoted his own judgment in an earlier un-reported case, *Shivaprosad & Sons v. Ormerods (India) Ltd.*, and the following passage in the earlier judgment has an important bearing on the question raised in the present appeal:

A firm may not be an entity known to the law, as a company or a statutory corporation is known to the law, but nevertheless the term "firm" has been defined by Section 289, Contract Act, which by a definition of the word "partnership" makes it clear that agreement is necessary and says : "Persons who have entered into partnership with one another are collectively called a firm." There may be, and no doubt, are, certain elements common to a joint

family business and to a partnership firm as so defined but there are also very important distinctions. For instance, a joint family business does not involve agreement at its inception, children are born into it; nor is it dissolved by death as is the case with a contractual partnership. Another point to which my attention has been drawn is that a karta of a joint family business may sue alone in his own name on behalf of the business which is not permissible in the case of a partnership, for no one partner may sue. Either all may sue in their Individual names or they may sue collectively in the name of the firm as prescribed by Order 30.

4. As stated before, defendant 1 after he obtained his decree sought under Order 21, Rule 50, Civil P.C., to execute it against other members of the joint family as partners in the firm of "Moti Bhakat Ramkissen," but he got the permission of the Court to sell the property of Ramkissen only. It is quite clear that on the face of them the decrees of defendants 1 and 2 do not render liable any persons other than those mentioned in the decrees. Again the decrees were against the partnership firms, and not against the members of the joint family, or any member of the joint family on the footing that the business was a joint family business. Now, it appears to us that the Courts below have taken an inconsistent view. While recognising that the decrees as framed render liable only the persons mentioned therein on the basis of partnership and partnership alone, they have nevertheless held that the interest of the plaintiffs in the joint family property ought to be made answerable for the debts due by his partnership. In support of that view, it has been argued before us by Mr. Mukherjea on behalf of the defendants respondent that the Courts below have found as a fact that the partnership firms of "Moti Bhakat Ramkissen" and "Jodhan Prosad Bhagwandas" were in reality joint family businesses in which each member of the joint family had an interest, and the assets of these businesses comprised the house which was the joint family property. To put it succinctly it is contended that the form of the decree is really immaterial. The debts of the firms against which these decrees were obtained were in law the debts for which the joint family property was answerable, and the plaintiffs cannot claim immunity in respect of their interest or share in the property.

5. In support of this contention a number of cases have been cited. In *Doulat Ram v. Meher Chand* 15 Cal. 70 the plaintiff being mortgagee execution creditor and purchaser at an execution sale of the mortgage property sued the defendants for a declaration that his purchase included their shares of the mortgaged property and was not limited to the shares of the mortgagors, who as managing members of the joint family to which the defendants belonged and of the joint business in which they were interested, had purported to mortgage the interest of the entire family. The defendants refused to join issue upon the facts alleged by the plaintiff showing that the mortgage validly bound the ancestral estate and business, but pleaded that they were no parties to either the mortgage or the mortgage suit, and that thereafter the decree and execution sale, both of which purported to affect the whole estate to which they related,

did not affect their interests. It was held that this contention failed and the sale passed the whole estate to which it related. This case is distinguishable for the following reasons : firstly, the decree was a mortgage decree for sale of the mortgage security which was the entire property in dispute. Secondly, the mortgage was by two persons who were managers of the joint family business. Thirdly, the property was described in the mortgage deed as ancestral property and their Lordships held, to quote their own judgment:

That although the mortgagors stated that they were the sole proprietors, the statement that they were in ancestral possession showed that they intended to mortgage the whole of what they held as ancestral property, and that the mortgage passed the whole 16-annas of the property which they professed to mortgage and they mortgaged it, stating they did so for the purpose of paying the debt due from the firm.

6. Fourthly, it was found by their Lordships that the mortgagors were the managers of an ancestral business belonging to the joint family, and that the mortgage was necessarily entered into in order to pay the debts of the ancestral business belonging to the family of which the defendants were the members. In *Sheo Pershad Singh v. Saheb Lal* ('93) 20 Cal. 453 the plaintiffs, who were the members of a joint Hindu family, sought to recover a share in certain properties on the allegation that they were joint family properties, but wrongly sold in execution of a decree upon a bond executed by their paternal uncles 1 and S and one B Section The family was a trading family and carried on a money-lending business under the supervision of L and S. One ZM had dealings with 1 and S and in the course of such dealings he deposited a certain sum of money with them for which the above bond was executed in which certain properties belonging to the family were pledged as security. Subsequently, ZM sued on this bond, obtained a decree and put up the properties to sale which were purchased by some of the defendants who dispossessed the plaintiffs. The share of the properties advertised for sale, certified in the sale certificates granted to the defendants to have passed to them, was the share of the whole family in the properties sold, but it was described as the right, title and interest of L and S, the persons sued. It was held that L and S, though not the managers of the family were yet its accredited agents in the management of the money lending business, and as such had the authority of the other members to pledge the family properties for a joint debt contracted in the ordinary course of that business. It was held also that the sale having been under a decree in respect of a joint debt of the family, the whole interest of the family in the properties in dispute passed at the sale, although 1 and S only out of the members were sued. This also is a case of a mortgage decree for the sale of the entire mortgage security, and the findings were that the property had been pledged by the accredited agents of a joint family business for a joint debt contracted in the ordinary course of that business, and that, the sale was under a decree in respect of a joint debt of the family.

7. In *Baldeo Sonar v. Mobarak Ali Khan* ("02) 29 Cal. 583 it was held that a member of a joint Hindu family, not being a son of the debtor, would be bound by a decree and sale of the family property under the decree, although he was not a party to it, if the creditor or the purchaser, as the case may be, could prove that the debt had been contracted for the benefit of the family or for the purpose of a trading business in which they were interested and if the decree was substantially one against them although in form it might be against the head member or members of the family, who contracted the debt. The decree in this case was not a mortgage decree. It was never the less a decree against a managing member of a joint Hindu family for a debt contracted for the benefit of the family and for the purpose of a trading business in which they were interested. As already pointed out, the suit brought by defendants 1 and 2 in the present case were not framed as suits against managing members or accredited agents of the joint family or joint family business, but as suits against partnership businesses and the individuals who were cited as partners.

8. In *Raghunathji Tarachand v. The Bank of Bombay* ("09) 34 Bom. 72 one H persuaded N who was the only adult male member of a joint Hindu firm carrying on an ancestral trade to sign certain promissory notes in the name of his ancestral firm. N signed the notes without the knowledge of the other member of the firm and without any advantage to the firm. The notes were subsequently endorsed by H to B who advanced monies on them to H. On a suit by B to recover the amounts due on the notes from N's firm K, a minor coparcener, pleaded that he was not liable. It was held that the minor's share in the firm was liable. In the judgment delivered by Chandavarkar J., the following proposition was enunciated : The rule of Hindu law that debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose is subject to at least one important exception. Where a family carries on a business or a profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the very existence of the family. For the purpose of the present discussion this case is distinguishable in broadly the same way as that in *Baldeo Sonar v. Mobarak Ali Khan* ("02) 29 Cal. 583 but there is an additional distinguishing feature. The minor member of the family who pleaded that he was not liable was actually made a defendant in the suit, and the ultimate decree obtained by the plaintiff on appeal necessarily bound him expressly. The real questions decided in that case related to the liability of a minor member of a joint family carrying on trading business for a debt contracted for the purposes of that business, and to the implied authority of a managing member of the joint family to contract such a debt.

9. In *Chinna Lakshminarsimha v. Venkannachinniah* ("20) A.I.R.1920 Mad. 582 it was laid down that in the case of trading families like the Komati Chetties, if moneys are borrowed for the purpose of an ancestral business carried on by the

members of the joint family, all the members of the family including minors are liable for the payment of such sums to the extent of their share in the whole family property including the assets of the business. This decision followed certain earlier cases of the Bombay and Madras High Courts including the case in *Raghunathji Tarachand v. The Bank of Bombay* ('09) 34 Bom. 72 already referred to. This case does not lay down any principle more extended than that which was enunciated in *Raghunathji Tarachand v. The Bank of Bombay* ('09) 34 Bom. 72. In *Subbaraya Mudali v. Thangavelu Mudali* ('24) AIR 1924 Mad. 33 the proposition of law laid down as set out in the headnote is in the following words:

Where a member of a joint Hindu family who carries on an ancestral business on behalf of the family contracts debts for purposes of the trade, the creditors are entitled to go against the whole of the family property including the shares of the minor members inasmuch as the debt is borrowed for a family purpose.

10. Here again the debts had been contracted by the de facto managing members of a joint family for the purposes of trade carried on by the family. None of the cases just considered are authority for the proposition that members of a joint family would be bound to pay the debts contracted for purposes of trade by other members who are not managing members or accredited agents of the joint family but who are carrying on what were represented and regarded as independent businesses in partnership with one another. I ought to observe here that the findings of the Courts below do not mean that the debts were contracted by Moti Bhakat, Ram Kissen and Jodhan Prosad and were binding on other members of the joint family upon the principles enunciated in the cases to which reference has just been made. It has not been found that these persons were the managers of the joint family businesses or that the debts in question were contracted by these individuals as accredited agents for the purposes of the joint family business. The findings, as we understand them are that there was a joint family business, that the debts in respect of which defendants 1 and 2 had instituted their suits in some way not clearly explained, debts of the joint family business, and that the decrees obtained in these suits must be construed as decrees against the joint family.

11. Upon the findings of fact arrived at by both the Courts below the interest of the plaintiffs in the property in question would be answerable for the debts due to defendants 1 and 2 in the partnership firms, but the plaintiffs are seeking a declaration that their interest is not affected by the sales held at the instance of defendants 1 and 2. These sales were held in execution of decrees obtained by these defendants. What were these decrees? They were decrees against partnership firms and affected with liability the partners alone. Sales in execution of such decrees must in regard to the property sold be confined to the right, title and interest of the partners and of nobody else. It would, in my judgment, be quite wrong to say that the sales could affect the interest of other persons who were strangers to partnership. It may be, that as the Courts below have found, the businesses were really joint family businesses for the debts of which each

member of the family is liable at least to the extent of his share in the joint family property which was included in the business, but until that has been found in a properly constituted suit the plaintiffs are entitled to succeed. The decrees obtained by the defendants did not bind the plaintiffs. The sales held in execution of these decrees cannot affect their interest in the properties sold.

12. A word remains to be said with regard to the mortgage decree obtained by defendant 3. This defendant appeared to contest the suit in the trial Court and the suit was dismissed. This defendant did not appear to oppose the appeal in the lower Appellate Court but the appeal also was dismissed. In spite of this it appears to us that there really has been no decision by the Courts below upon the question whether the decree obtained by defendant 3 affected the interest of any member of the family in the property in dispute. We accordingly hold that this question must be left open. This appeal is allowed. The decrees of the Courts below are set aside and the plaintiffs' suit is decreed with the declarations indicated above. Parties will bear their own costs in all the Courts. In view of our decision in this appeal no order is necessary on the two connected rules.

Lodge, J.

13. I agree.