

(1944) 11 AHC CK 0006
In the Allahabad High Court

Kailashi

APPELLANT

Vs

Shankar and Another

RESPONDENT

Date of Decision : 21-11-1944

Acts Referred:

Citation : AIR 1945 All 164 : (1945) 15 AWR 61

Hon'ble Judges : Malik, J

Bench : Division Bench

Judgement

Malik, J.—This appeal has arisen out of a suit for partition filed by Kailashi, son of Ram Chander, minor, under the guardianship of his mother, Mt. Ram Dulari, against the defendants, Shankar and Ram Dayal, brothers of Ram Chander: and uncles of the minor. Plaintiff's case was that his grandfather, Bhagwanta, died in the year 1937 and his father, Ram Chander, died in the year 1920 and that Bhagwanta with his sons and grandson formed a joint Hindu family. If the family was joint plaintiff's share on partition on the date of suit was one-third, according to Hindu law. The plaintiff claimed partition of his one-third share and further claimed mesne profits from August 1937 when the plaintiff was excluded from the enjoyment of the property. Defendants' case was that Bhagwanta did not inherit any property from his father and whatever property was acquired by him was his self-acquired property. The defendants further alleged that certain items included in the plaint were the personal property of the defendants, and that as regards the property that belonged to Bhagwanta he had left a will dated 19th May 1936 under which the plaintiff was entirely excluded and the entire property came to the defendants. The defendants further pleaded that about seventeen or eighteen years before the suit there was a partition between Bhagwanta and his three sons and Ram Chander was given property worth about Rs. 2000 and was separated. The reason given for this partition was that Mt. Dulari was not of good character. The defendants also pleaded that for the last twenty-five years the defendants had been carrying on the business of purchasing and selling mules and Bhagwanta had no concern with this business nor had the plaintiff any connexion with it. The lower Court has held in favour of

the defendants that Ram Chander had separated from the family and had died as a separated member. That the property was the self-acquired property of Bhagwanta, that he had before his death given away this property under his will, which was a perfectly valid document that no part of the property was thus divisible and that the plaintiff's suit must fail.

2. The plaintiff has filed this appeal against the decree of the lower Court. It has been argued before us that the alleged separation of Ram Chander is not proved and that most of the documents relied on by the Court below for its finding, on the question of separation, were not admissible in evidence. Learned Counsel for the appellant has pointed out that the cause of separation has been variously given by the defendants from time to time. In the written statement, para. 12, the cause of separation was given as the immorality of Ram Dulari, while Ram Dayal, defendant, in his deposition stated that Ram Chander separated from the family two years before his death as he did not wish to take part in the mule transport business. Kundan, another witness for the defendant stated that Bhagwanta had said that his son did not want to live with him and that was the reason why he was giving him his share and allowing him to separate. The oral evidence of separation consists of the evidence of Ram Dayal, defendant, who has stated that when Ram Chander wanted to separate as he did not want to take part in the mule transport business, there was a panchayat called by Bhagwanta and a house and tonga and Rs. 500 in cash and ornaments worth about Rs. 800 to Rs. 1000 were given by Bhagwanta to Ram Chander as his share. Kundan and Badal are the two other witnesses to this panchayat and separation. It is pointed out that there was no written document executed and there is no contemporaneous document to show that there was a partition. The evidence of partition is, however, to some extent supported by the evidence of Raghubar Dayal, a witness for the plaintiff, who stated in his examination-in-chief that Ram Chander had lived separate from the other members of the family for some time though he added that he did not hear of any partition. As regards the reason for partition, we cannot attach much importance to the discrepancy in the evidence of the witnesses. The reasons may have been more than one and each witness was emphasising the reason that he may have thought was the real cause. After all the witnesses were now deposing to an incident which took place more than twenty years ago.

3. Great reliance was placed by the learned Judge on a notice supposed to have been sent by Pandit Dwarka Nath Raina, Vakil, on behalf of Mt. Dullo, widow of Ram Chander. This notice, however, cannot be used as evidence against the plaintiff. This notice purports to have been sent by Pandit Dwarka Nath Raina on instructions from Mt. Dullo. No evidence has been given of any such instructions having been given by Mt. Dullo. All that the defendants have proved by the production of Om Narain is that he has proved the signature of Dwarka Nath Raina. Even if it be assumed that this notice was sent under instructions given by Mt. Dullo and the facts recited in this notice were the facts that Mt. Dullo gave to the learned vakil, it may be used to contradict Mt. Dulari's evidence and to show

that she was not a reliable witness, it cannot be used as substantive evidence against the plaintiff to prove that the family was really separate. It was suggested by learned Counsel for the defendants that it must be deemed that Mt. Dullo sent this notice on behalf of the minor. The notice itself does not purport to be on behalf of the minor, but even if it were so, the admission could not be used against the minor as substantive evidence of the partition u/s 18, Evidence Act.

4. There are two documents on which very great reliance has been placed on behalf of the plaintiff. The first is an agreement dated 9th February 1926, Ex. I printed at p. 32 of our paper book. The defendants and Mt. Dulari for self and as guardian for her children entered into this agreement. It appears that after the death of Ram Chander, Mt. Dulari who was a young widow contracted illicit intimacy with Ram Dayal, her husband's younger brother, and she had conceived and the conception was about three months advanced. It was at that time that this agreement was entered into and a provision was made for the maintenance of Mt. Dulari. There are certain recitals in this document which go to show that the entire family and the family property was joint and Bhagwanta was the eldest member and karta of the family. Bhagwanta himself signed this document as a witness. For some reason the document was handed over to Mt. Dulari and it was not presented for registration immediately after its execution. It was on 7th May 1926 that Mt. Dulari presented this agreement for registration and Ram Dayal and Shankar objected to the registration of the document on the ground that their thumb impressions had been obtained by fraud. The document was, however, compulsorily registered. In his deposition Ram Dayal has stated that his and his brother's and father's thumb marks were obtained on this document by force and they did not know what was written in it. We are not prepared to accept this evidence of Ram Dayal but at the same time we are not prepared to place much reliance on this agreement. It was evidently executed to appease Mt. Dulari as the document itself was kept in her custody, though why it became necessary to appease her it is now impossible to say. As we have already said, this document was presented for compulsory registration in May and soon after that there was trouble between Dulari and the other members of the family and notices were exchanged in June 1926.

5. On 26th June 1926 Bhagwanta filed an application to be appointed guardian of his minor grandchildren on the ground that Mt. Dulari was immoral and was not a fit person to be the guardian of her minor children. The learned District Judge on 16th July 1926 appointed him guardian to the person of the minors holding that it was clearly established that the widow, Mt. Dulari, was not of good character. In this application for guardianship Bhagwanta stated that he was the karta or managing member of the joint Hindu family and these minors were living with him and he was looking after them. Great reliance is placed on this statement of Bhagwanta. Again we cannot lose sight of the fact that Bhagwanta by this statement wanted to strengthen the application for his own appointment as guardian of these minors. In his will, however, Bhagwanta on 19th May 1936

stated that the family was separate and that Ram Chander had separated from him in his lifetime. However, the question whether Ram Chander had or had not separated is, to our mind, not a matter of any very great importance. Even if it be assumed that Ram Chander had died as a member of the joint Hindu family consisting of himself, his father and his brothers, the plaintiff would not be entitled to claim any share in the properties in suit unless he could establish that they were joint family properties. It is conceded that katcha dilapidated houses that Bhagwanta had inherited from his father, Bhuranand, had been sold in payment of debts due and they had been repurchased by Bhagwanta under a sale deed dated 2nd September 1901. After the repurchase he rebuilt the houses and he purchased other property detailed in the plaint. The first two items contained in List (a), we are told, were purchased on 2nd September 1901 by Bhagwanta for Rs. 200. This sum of Rs. 200 was raised by a mortgage of the same date, so this was clearly property acquired by Bhagwanta himself. Later on he rebuilt the houses at considerable expense. The third item was purchased by Bhagwanta under a sale deed of 6th February 1919 for Rs. 2300. The whole of it was paid for in cash and the fourth item was purchased under a sale deed dated 27th October 1931. The rest of the property consists of moveable property. No evidence has been shown to us to prove that there was any ancestral nucleus from which the property in suit could be acquired.

6. Learned Counsel has not placed any reliance on any acquisition made with the aid of ancestral nucleus, but what he has urged is that Ram Chander and the other sons of Bhagwanta helped Bhagwanta in his business of buying and selling mules and therefore the business must be deemed to be joint family business and all income from the same must be deemed to be joint family income and the property acquired with such income must also be joint family property. From the evidence on record we find that Shankar was the eldest son of Bhagwanta born about the year 1890, Ram Chander was the second son born about the year 1895 and Ram Dayal was the youngest born about the year 1896. We have no clear evidence as to when this business of dealing in mules was started but from the evidence we can gather that it was started by Bhagwanta long before 1914. The business flourished during the last war and Bhagwanta made money. When the business was started Ram Chander and Ram Dayal must have been minors, while Shankar was a young man who may have just attained majority. The business must, therefore, have been the personal business of Bhagwanta. It is alleged that when the sons grew up they started helping Bhagwanta in the business and therefore it must be deemed that the business became the joint family business and it was no longer the separate business of Bhagwanta. What part actually the sons of Bhagwanta took in the carrying on of the business is neither clear nor has it been proved. The plaintiff produced some witnesses who generally said that it was joint business and they all worked together, but learned Counsel for the appellant placed no reliance on the evidence of these witnesses and did not even care to read it to us. His entire argument was based on two sentences in the deposition of Ram Dayal who in his examination-in-chief stated

that the money for all these purchases and constructions came from their mule transport business, and then in cross-examination he said that before Ram Chander's separation the whole income of the mule business was joint and they were living with their father. It is argued that this statement of Ram Dayal goes the whole length of proving the plaintiff's case. We, however, do not agree with this contention of learned Counsel. It is true that the sons of Bhagwanta were living with him and were being maintained by him, that they were all deriving benefit from the income of the mule transport business and that they were also helping their father in the successful carrying on of the business but that would not be enough to make the business which was started by the father the joint business of the family. Several rulings were cited before us by learned Counsel for the appellant, but, to our mind, it is not so much a question of law but a question of inference from facts.

7. It is now well settled that it is open to a member of a joint Hindu family to start a business of his own and if he starts it, it would be his separate business and any property acquired by him from the income of such business would be his separate property. A fortiori if several members of a joint Hindu family join together to start a business, it would be their separate business and any property acquired by them from such business would be their separate property. It is further clear that any property acquired by a member of a joint Hindu family which is his separate property if thrown into the joint stock, becomes joint family property. The law is well settled that ordinarily adult members of a joint Hindu family have no right to start a new business which would bind the junior members of the family and make them liable for the losses thereof : see the decision of the Privy Council in AIR 1932 182 (Privy Council) , however, a family consists of certain adult members and all the adult members join together to carry on a new business as members of a joint Hindu family and acquire property for and on behalf of the joint family no doubt the property would be joint family property. Even if they acquire property from their own business but throw it into the joint stock, it will no doubt become joint family property. But if a business is started by an adult member of the family separately, the mere fact that his sons who are dependent on him and are being maintained by him give him some help in the carrying on of the business would not necessarily make the business cease to be his own business and make it the joint business of himself and his sons. It is no doubt true that when the sons grow up the father and the sons may so conduct themselves that from their conduct it may be apparent that it was either expressly or impliedly agreed that the business which at its start was a separate business of the father had become the joint business of the father and the sons by some arrangement between them.

8. In the case before us there is no evidence, pointed out by learned Counsel for the appellant, barring those two sentences in the deposition of Ram Dayal, for the basis of his argument that the business was a joint family business. From the fact that there was absolutely no ancestral nucleus, that the business was started by Bhagwanta when his sons were minors or, at any rate, two of them were

minors and his sons lived with him and were maintained by him and that as they grew up, they helped him in the business, though what was the nature of the help has not been deposed to by the witnesses, we do not feel justified in holding that the business became at any point of time a joint family business. It must be remembered that Ram Chander died at the very young age of about twenty-five in the year 1920. The question may well arise at what point of time the separate business of Bhagwanta became the joint family business of himself and his sons? Was it on the first occasion when one or more of his sons gave him some help or on which of such subsequent occasions? No text of Hindu law has been pointed out to us which would make such business the joint family business of the father and sons. In Edn. 7 of Mayne's Treatise on Hindu Law and Usage, which was the last edition edited by Mayne himself, dealing with this question at page 349 he said:

If a single individual acquired a fortune by his own exertions, without any assistance from ancestral property, his issue would certainly take no interest in it. If several brothers did the same the property would be joint as between themselves. It would certainly be self-acquired as regards all collaterals, and it is difficult to say why it should not be the same as regards their issue, unless they chose voluntarily to admit latter to a share of it.

In Edn. 10 edited by S. Srinivasa Iyengar, following certain decisions quoted in the volume, the learned author has stated at p. 359, that the property acquired by joint labour of members of a joint Hindu family would be joint family property and the presumption would be that it was so unless an intention not to treat the property as joint family property but the joint self-acquisition, of the acquirers was proved. The cases quoted by learned Counsel for the appellant have all been considered in Mulla's Hindu law, Edn. 9 at p. 247, para. 228, and following certain authorities quoted therein the learned author has said that the property is to be deemed to be joint property unless proof was given that the property was acquired not as members of a joint Hindu family but as members of an ordinary trade partnership resting on contract. As we have already said, we think there is hardly any question of law involved, nor could there be any question of presumption. The matter should be decided on the circumstances and facts of each case.

9. The first case relied on by learned Counsel for the appellant is a decision of Sen and Bajpai JJ. reported in Jamna Prasad and Others Vs. Mt. Durga Dei and Another, . The point that has arisen before us did not arise in that case. There was a nucleus of ancestral property with the aid of which the property in dispute had been acquired. Even if there was no nucleus, there was evidence that the property had been thrown into the common stock. On these findings the Court held that the property was joint family property. The next case cited was reported in Gopalasami Chetti v. Arunachellam Chetti ("04) 27 Mad. 32 at p. 35 where a Bench of the Madras High Court held that "the family is not shown to have had any ancestral property but it acquired property by trade in which the

father and the two sons were jointly engaged. There being no indication of an intention to the contrary it must be presumed that the property thus acquired was held by the members of the family as joint property with the incident of the right of survivorship." Evidently the family in that case consisted of the three members who were carrying on the trade and there is nothing to show from the report that the trade or business was started by the father and the sons merely gave him occasional help when they grew up. In *Karsondas Dharamsey v. Gangabai* ("08) 32 Bom. 479 the well-known decision of Beaman J., he has discussed what is joint property, joint family property and joint ancestral family property, at great length. The point before us for consideration did not arise in that case. Mulji Jaitha had started business without the aid of any ancestral funds. The business flourished due to his personal exertions. It was at a much later stage that he associated his son, Soonderdas, with him in the business. Soonderdas predeceased him and his father took the whole estate by survivorship. Then the question arose whether this property was his self, acquired property over which he had full powers of disposition. At an earlier stage it had been accepted that the property was the joint family property of Mulji Jaitha and Soonderdas. Beaman J. however at p. 495 said:

Let me guard myself against being supposed to think that in the circumstances of this family which have been fully narrated in a previous judgment, and about which there is no dispute, it need have necessarily followed that what Mulji Jetha made in trade by his own exertions became joint family property between himself and his son Soonderdas. Indeed I think that had the matter come to the proof and had there been no admissions such facts as are undisputed clearly point to Mulji Jetha, and Soonderdas too for that matter, having intended not to make this joint family property.

In *Laldas Narandas v. Motibai* ("08) 10 Bom.L.R. 175 Chandavarkar J. has held that where the father and sons, members of a joint Hindu family, acquire property with their joint exertions and throw it all into one common stock, they should be deemed to manifest their intention to deal with one another and with outsiders as members of a coparcenary system under the Hindu law. In the brief judgment of that case the facts are not fully noted, and we have already said that where a family consists of adult members and they jointly start a business as members of a joint Hindu family and acquire property as such, it may be, that the property so acquired may become joint family property. The observations of Chandavarkar J., therefore, do not necessarily go against the view expressed by us. The case reported in 10 Bom.L.B. 1756 was followed by another Bench of the Bombay High Court in *Haridas Narayandas v. Devkuvarbai Laldas Narandas v. Motibai* ("08) 10 BomLR 175. In that case the business was started by one Narayandas without the aid of any ancestral nucleus and the business flourished. Later on, a son Haridas was born to him. When he reached the age of majority he was associated with Narayandas in his business and gradually as the father grew older and feeble the son took upon his shoulders a greater share in the management of the business, and it may have been possible, therefore, under

those circumstances to hold that the business which to start with was the separate business of the father became by a sort of implied consent the joint business of the father and the son. The last case cited by learned Counsel is reported in Parbhulal Dullabhram Vs. Bhagvan Parbhu, In that case one Parbhu Makan formed a joint Hindu family with his sons and owned certain properties. Parbhu Makan sold one of the houses in 1909 and in 1911 he applied to be adjudicated an insolvent and was so adjudicated. After his adjudication his sons began to conduct the family business in their own names and repurchased the house sold by the insolvent. The Court held that the property had been acquired by the joint Hindu family of the insolvent and his sons and the share of the insolvent vested in the receiver. The facts of that case are entirely different from the facts before us. The business itself was a joint family business and Parbhu Makan, the father, was a member of the joint Hindu family. The Court held that the property was acquired by the joint family of which the insolvent and his sons were proprietors and therefore the insolvent's share vested in the receiver in insolvency.

10. So far as the facts of the case before us are concerned on our finding that the business was started by Bhagwanta without the help of his sons and was therefore his own separate business, that there is no satisfactory evidence as to what part his sons took in the business -all that learned Counsel has urged being that they helped him in the business-as they would probably be expected to do as dependants on him being his sons and being maintained by him, we find it impossible to hold that the association of his sons with Bhagwanta has been proved to be such that it must be held that expressly or by necessary implication, Bhagwanta decided to treat this business as the joint family business of himself and his sons. In the absence of satisfactory proof that the business at any time became joint family business, properties acquired with the funds of this business must also be the properties of Bhagwanta. The defendants have raised a plea that some of the items claimed by the plaintiff were acquired by them separately and Bhagwanta had nothing to do with the same. As we are of opinion that it is not proved that any part of the property is joint family property, we need not go into this question as to whether any part of the property was the self-acquired property of the defendants. We dismiss this appeal with costs.