
(1932) 06 AHC CK 0006
In the Allahabad High Court

L. Jagannath Prasad and Others

APPELLANT

Vs

Chunni Lal and Others

RESPONDENT

Date of Decision : 23-06-1932

Acts Referred:

Citation : (1932) 06 AHC CK 0006

Hon'ble Judges : Bennet, J

Bench : Single Bench

Judgement

Bennet, J.—This is a first appeal brought by the following defendants: defendant 2 Om Prakash, his son defendant 3, Gandharab Singh, a minor and defendant 5, Jagannath Prasad. The plaint sets forth in para. 8 that defendants 5 to 10 are the subsequent transferees of the property in mauza Shikohpur and that they have been made pro forma defendants. This allegation is admitted by Jagannath Prasad, defendant 5, who is one of the appellants before us, so far as it concerns himself. It has not been made clear from the record exactly what share the appellant Jagannath Prasad now holds. But he is a transferee from some of the defendants, defendants 1 to 4. The family pedigree is as follows:

HARBANS, DIED 1920 | _____ | | Fateh Singh
Udai Prakash Om Prakash defendant 4 defendant 1 defendant 2 (eldest son).
(second son). (youngest son) | Gandharb Singh defendant 3. 2. The plaintiffs
sued on a mortgage dated 15th September 1922 executed by Udai Prakash for
himself and as guardian of Om Prakash minor. The mortgage was in favour of
Chunni Lal plaintiff and Ratan Lal now deceased, the father of the minor plaintiff
Ajir Prasad. The property hypothecated was in mauza Biswan and mauza
Shikohpur. But the plaint sets forth that as the property in mauza Biswan is
highly encumbered and there is no prospect of getting anything out of it, it is
exempted from this suit. The mortgage money was Rs. 6,000 and the claim in
the plaint is for Rs. 25,088-10-0. Interest was at 2 per cent per mensem with six-
monthly rests. The plaint sets forth that defendants 1 to 4 were members of a
joint Hindu family and that debts were contracted for legal necessity and

antecedent debt. There was no written statement on behalf of defendants 1 to 4, but the case for defendants' 2 and 3 has been argued before us along with the case for defendant 5, Jagannath. The written statement of defendant 5 sets forth that the document in question was executed on 15th September 1922 when Udai Prakash was a minor and therefore it was invalid. Further it was pleaded that there was no legal necessity and it was stated in para. 15 that Udai Prakash was not joint in family with his brothers; that Fateh Singh, the eldest brother, was the certified guardian of Udai Prakash and Om Prakash, the two executants of the document. The following questions arise in this case: 1. (a) Did Harbans and Fateh Singh separate from the minor members of the family in 1915 ? (b) Did this separation effect the separation of the two minor members Udai Prakash and Om Prakash inter se ? 2. Was Fateh Singh the certified guardian of Udai Prakash and Om Prakash on 15th September 1922, and if so, was Udai Prakash incompetent to execute the mortgage in question ? 3. Was Udai Prakash a minor at the date of execution, 15th September 1922 ? 4. Has legal necessity been proved ? 5. Has the mortgage in suit been ratified by Om Prakash on attaining majority on 5th March 1924 ? 6. Is the rate of interest excessive ? 7. Is there any clerical error in the decree ?

3. The history of this family on which reliance is placed for separation is as follows: On 26th September 1912, Harbans Singh made an application for his appointment as guardian of Udai Singh and Om Prakash which is printed on p. 27. The statements in that document are admissible in evidence as Harbans Singh is now dead. In that document he set forth that the creditors were making pressing demands for the payment of their debts and the property had been advertised for sale and that it was desirable to make arrangements to pay off the debts. That application was refused. Subsequently an application was made by the eldest son Fateh Singh to be the guardian of the two minor sons and that application was granted by the District Judge on 26th May 1915. Accordingly from that date Fateh Singh was the certified guardian of his two minor brothers. There is an order of the District Judge dated 1st December 1915, in this guardianship case in which the District Judge sanctioned a mortgage and in his order it is set forth "Harbans Singh and his major son Fateh Singh have sold their 5 biswas share," the village in question being Based. It is further stated in an order of the District Judge of 17th February 1916, that Fateh Singh and his father had sold their shares outright in this village and that the main property of the family was in this village Basod, There was left only the share of the minors. Now the allegation is that Harbans and Fateh by having an application in guardianship made for the minor members of the family thereby effected a partition of the family property. It is well-established law that if a family remains joint, it is not open to the District Judge to appoint a certified guardian for the minor members for their share of joint family property. Therefore we must assume that the appointment of a certified guardian implies that ipso facto the minor members are being separated from the adult members. This presumption in the present case is further strengthened by the subsequent action of the adult members in

disposing of their shares of the property after separating their shares from, the shares of the minors. We therefore, hold it established that in 1915 there was a separation effected between Harbans and Fateh on the one hand and Udai Prakash and Om Prakash on the other hand.

4. The next question is whether the action of Harbans and Fateh Singh did effect in law a separation between the two minors Udai Prakash and Om Prakash. In this connexion we may set forth that no action was taken which would in fact make any separation between the shares of Udai Prakash and Om Prakash. The application to the District Judge was that a guardian should be appointed for the property of these two minors and that the guardian would administer the property of these minors as a single unit, and so far as the evidence shows this is what was done. Reference was made to AIR 1925 49 (Privy Council) where it is stated:

It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them.

5. Reference is also made to AIR 1931 154 (Privy Council) where their Lordships stated:

The general principle undoubtedly is that every Hindu family is presumed to be joint unless the contrary is proved. If it is established that one member has separated, does the presumption continue with reference to the others?....Their Lordships are therefore of opinion that the question whether on Lalman's separation in 1907 the other members of the family remained joint was a question of fact.

6. This shows therefore that on the separation of some members it is a question of fact in each case as to whether the other members did or did not separate. There is no presumptiop either way as to separation or remaining joint and the onus of proof lies on the person who makes an assertion that the other members separated or that the other members remained joint. In the present case we have the circumstances of the application for guardianship and of the proceeding that took place on that application. Various applications were made to the District Judge and some were allowed by him to the effect that the property of the two minors was mortgaged jointly. There were therefore joint transactions and we consider that on the evidence in this case it if proved that the two minors Udai Prakash and Om Prakash remained joint when Harbans and Fateh Singh separated in 1915.

7. The next question is whether Udai Prakash was competent to execute a mortgage on behalf of himself and his minor brother when Udai Prakash attained majority. This question is not free from difficulty. In the present case it was not shown that any application was made to the District Judge at any time that Udai Prakash had become of full age. At the time of the mortgage in suit Fateh Singh apparently remained the certified guardian. But assuming that Udai Prakash was a major at the time of the mortgage in suit, the question before us is what became of the status of guardianship when Udai Prakash, one of the two minors, attained majority ? Reliance was placed on a ruling of the Bombay High Court *Bindan Laxuman v. Mathurabai* (1906) 30 Bom 152 in which the only question before their Lordships was whether a guardian could be appointed for the minor members of a joint family, and it was laid down that a guardian could not be appointed for minor members whose only proprietary interest was that of coparceners along with adults in joint family property. Their Lordships made an observation that if a guardian were appointed for minor coparceners where there were no adults, then as soon as one minor became an adult the proper course would be for an application to be made to the District Judge to terminate the guardianship. That may be so and in the present case no such application was made. But the dictum of the Bombay High Court was merely in regard to procedure and we are concerned with the question of substantive right. It is we consider contrary to the Hindu law that there should be a guardian certified by the Judge for a joint Hindu family where there is an adult member. On the attainment of adult status by one of the minors for whom a guardian had been appointed, we consider that ipso facto the guardianship terminates. Therefore we consider that in the present case Udai Prakash on attainment of majority would be competent to execute a mortgage for legal necessity on behalf of himself and on behalf of his minor brother Om Prakash notwithstanding the fact that Fateh Singh still continued to be recorded as a certified guardian appointed by the District Judge. (After considering the evidence, his Lordship held that it was not proved that Udai Prakash was a minor at the date of the execution of the document of 15th September 1922, and held that legal necessity was proved to the extent of Rs. 1,500 only). The above considerations relate to the case of legal necessity from the point of view of the interest of Om Prakash who was then a minor.

8. The question remains as to what is the effect in the case of Udai Prakash. We have held that Udai Prakash along with Om Prakash formed a joint Hindu family at the time of execution of this bond. Reference has been made to *Balgobind Das v. Narain Lal* (1893) 15 All 339. That was a case as stated at p. 340 which related to an attempted mortgage of right and interest in joint ancestral-estate by a cosharer, and the distinction between voluntary and compulsory alienations by him, the latter being sales in execution of decrees against him. The joint family in the case consisted of Narain Lal, son, and Naunidh Lal, the father; Narain Lal had made a mortgage on which a suit was brought and in that case the father was a defendant and there were also as defendants Narain Lal and two

persons who were auction purchasers on decrees against Narain Lal. The question which was decided by their Lordships was whether a purchaser at auction sale of the interest of the mortgagor Narain Lal, could challenge the validity of the mortgage made by Narain Lal when Narain Lal was one of the members of a joint Hindu family. It was held by their Lordships that the auction-purchasers could challenge the validity of the mortgage and that the father could challenge the validity in his capacity as taking by purchase at auction sale apart from his capacity of survivorship: see p. 351. This ruling has also been referred to in Madan Lal Vs. Chiddu and Others and, where it is also held that an auction-purchaser could challenge the validity of a previous mortgage by the judgment-debtor whose interest he had acquired and a distinction was drawn between auction-purchasers and private transferees from the mortgagor. We therefore consider that it is open to Jagannath Prasad as an auction-purchaser to challenge the validity of the mortgage in suit whether he was a transferee of the interest of Udai Prakash or of other members of the family. Therefore all the appellants before us are entitled to challenge the validity of the mortgage-deed in question so far as the interests of Udai Prakash are concerned in addition to the interests of Om Prakash. We consider that as Udai Prakash was a member of an undivided family he was not entitled to execute the mortgage-deed in question for items which were not for legal necessity. Accordingly we hold that the mortgage-deed is altogether invalid except as regards the items which we held for legal necessity, that is, Rs. 1,400, deposited in the Government Treasury and Rs. 100 paid before registration, total Rs. 1,500.

9. The next question is ratification. The alleged ratification is contained in a bond dated 5th March 1924, executed by Om Prakash after he attained majority. He was an executant along with Fateh Singh and Udai Prakash. In that document there is a recital of a number of other documents which had been executed and among them is the mortgage-deed in the suit. Now the question arises of the position of the son of Om Prakash, Gandharb. In the plaint it is stated that he was about five years of age and the plaint was filed on 5th January 1929. Therefore the date of his birth would be 5th January 1924, that is, two months prior to the alleged ratification on 5th March 1924. Now attention is invited to the point that the plaint merely states that the age is about 5 years but, if Gandharb Singh had been conceived, it would be impossible for the ratification by his father to bind him. " Therefore taking a period of 9 months from 5th March 1924, we come to December 1924 and, if Gandharb Singh were born on 5th December 1924, he must have been conceived at the date of ratification. Therefore we consider that the expression about 5 years of age must be taken to cover birth by 5th December 1924. Accordingly we consider that the ratification will not bind the interests of Gandharb Singh, but would only bind Om Prakash personally.

10 The next question which we shall examine is the rate of interest. The rate of interest in the mortgage-deed in suit was Rs. 2 per mensem compound interest with six monthly rests. The mortgage was executed in 1922 after the Usurious

Loans Act of 1918, and we also consider that legal necessity is not shown for the high rate of interest. On these grounds we reduce the rate of interest to 15 per cent simple interest. The last point is an alleged clerical error in the decree. This does not arise because the question of compound interest no longer remains. We have taken this rate in various other cases and we consider where sufficient security has been given that the rate of 15 per cent simple interest is ample. We accordingly allow the appeal to the extent indicated with proportionate costs in both Courts. A decree will be framed by this Court under the provisions of Order 34, Rule 4, 6 months being allowed for payment by the defendants. Interest at 15 per cent will run until the date fixed by the Court. As regards-the cross-objection, we have already indicated in our order which items we consider are not for legal necessity and the cross-objection is therefore disposed of by those findings. The cross-objection is dismissed except so far as we vary the rate of pendente lite interest and interest up to the date of payment.. As this amount is small, we dismiss the cross-objection with costs.