

(1970) 08 MP CK 0002
In the Madhya Pradesh High Court
Case No : F.A. No. 128 of 1960

Mukundilal and others

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 04-08-1970

Acts Referred:

Hindu Succession Act, 1956 — Section 6
Transfer of Property Act, 1882 — Section 85

Citation : (1974) ILR (MP) 475 : (1972) MPLJ 1048

Hon'ble Judges : S.P. Bahrgava, J;A.P. Sen, J

Bench : Division Bench

Advocate : R.K. Shrivastava and H.L. Khaskalam, for the Appellant; A.R. Choubey, for the Respondent

Judgement

A.P. Sen, J.

This order disposes of a preliminary objection raised by the respondent that the appeal abates due to the failure of the appellants to bring on record the names of the legal representatives of the deceased appellant No. 2 Mukundilal.

The question whether the appeal abates, partially or as a whole depends on the nature of the suit and the circumstances of each particular case. The appeal arises out of a suit for sale on the foot of a mortgage. As a matter of principle, if there is partial abatement, the appeal in such suit necessarily abates as a whole [See Ghanaram v. Balbhadrasai 1938 NLJ 22 : AIR 1938 Nag. 42 : ILR 1938 Nag. 370], The question, whether there is partial abatement of the appeal, therefore, assumes importance.

Having heard the learned counsel, we are clearly of the opinion that there was no partial abatement of the appeal due to the failure of the appellants to bring on record the names of the legal representatives of the deceased appellant No. 2 Mukundilal, as the right to continue the appeal "survives" to the remaining appellants under Order XXII, rule 2 read with rule 11 of the Code of Civil

Procedure. The word "survives" in that rule comprehends not only cases of survivorship in a strict or technical sense but also cases as to devolution by succession and inheritance. The plaintiff alleges in paras. 2 and 6 (d) of the plaint that the defendants formed a joint Hindu family and were carrying on business in the name and style "M/s Govinddas Mukundilal" of which the defendant No. 1 Govinddas was the Karta. The mortgage in suit was executed by Govinddas in his capacity as such. The plaintiff further alleges that the mortgage debt was a joint family debt which was liable to be satisfied by sale of the mortgaged property and other properties of the joint Hindu, family. In such a suit, the other coparceners were not necessary parties, as they were effectually represented by the defendant No. 1 Govinddas as the Karta [See, *Kishan Prasad v. Bar Narain Singh* ILR 33 All. 272 (PC); *Sheo Shankar v. Jaddoo Kunwar* ILR 36 All. 383 (PC) and *Ganpat Lal v. Bindbasini Prasad* ILR 47 Cal. 924 (P C)]. In *Kishan Prasad v. Har Narain Singh* their Lordships of the Privy Council stated that where a suit is brought on a mortgage by or against the manager of a joint Hindu family in his representative capacity, the other members of the family are not necessary parties to the suit, and that the suit will not fail by reason of the non-joinder of those members. In *Sheo Shankar v. Jaddoo Kunwar*, a foreclosure decree was passed against a manager of the joint Hindu family. The other members brought a suit to set aside the decree on the ground that their non-joinder as persons interested in the equity of redemption u/s 85 of the Transfer of Property Act, made the decree ineffective. Their Lordships held that the decree was, in the circumstances of the case, binding upon them, though they were not parties to the suit. Their Lordships stated as follows :-

There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions including foreclosure-suits when the manager of a joint Hindu family so effectively represents all other members of the family, that the family as a whole is bound. It is quite clear from the facts of the case and the findings of the Courts upon them that this was a case where this principle ought to be applied : "There is not the slightest ground for suggesting that the manager of the joint family did not act in every way in the interests of the family itself, and no question arises u/s 85 of the Transfer of Property Act (Order 34, rule 1), because the mortgagee had no notice of the plaintiff's interests.

The decision in *Ganpat Lal v. Bindbasini Prasad* (supra) is also an authority for the proposition that in a suit on a mortgage against the manager of a joint Hindu family, all other members of the family are represented by the manager.

Under Order 34, rule 1 of the Code of Civil Procedure, all persons interested in the mortgage security or in the right of redemption must be joined as parties to a suit on the mortgage. But where the Karta is joined in a representative capacity, the other members of the family are not necessary parties. In *Devidas and Others Vs. Shrishailappa and Others*, their Lordships of the Supreme Court, while dealing with a suit of this nature, stated as follows :-

In a suit by the manager of a joint Hindu family for enforcement of a mortgage, an adult member who is interested in the mortgage security, is not a necessary party though he can be joined as a proper party; and failure to join a person who is a proper but not a necessary party does not affect the maintainability of the suit.

A fortiori where a suit is brought on a mortgage against the manager of a joint Hindu family, the other members of the family are not necessary but proper parties, as they are all represented by the manager against whom the suit is brought. They are proper parties in the sense that the Court should invariably join them if they seek to impeach the mortgage transaction as being effected by the manager without authority, i. e. without legal necessity. If that be so, then, the failure to implead the legal representatives of the deceased appellant No. 2 Mukundilal who was only a proper party could not result in an abatement of the appeal, so far as their interest was concerned, as their interest in the equity of redemption was sufficiently represented by the appellant No. 1 Govinddas, who, being the Karta of the family, was entitled to prosecute the appeal for their benefit.

The mortgage bond in suit was executed by the appellant No. 1 Govinddas in his capacity as the Karta. If that; was not the case, then, there would, undoubtedly, be much in the objection raised that the appeal abated due to the failure of the appellants to bring on the record the names of the legal representatives of the deceased appellant No. 2 Mukundilal. But we think that the fact of the mortgage bond having been executed by the appellant No. 1 Govinddas alone, entirely alters the case. He may be regarded as a contracting party not only on behalf of himself but also on behalf of undisclosed principals, i. e. the other members of the family. The plaintiff had also framed the suit in that manner. Admittedly, the deceased appellant No. 2 Mukundilal died during the life-time of the appellant No. 1 Govinddas. The right that he had in the equity of redemption devolved by intestate succession u/s 6 of the Hindu Succession Act, to the heirs specified in Class I of the Schedule. The quantum of share to be allotted to them was to be on the footing of a notional partition.

We are unable to agree that the notional partition as envisaged by Explanation I to section 6 brought about a disruption of the coparcenary so as to deprive the appellant No. 1 Govinddas of his representative capacity. In our view, such notional partition was only for the purpose of computation of the quantum of shares to be allotted to the heirs of the deceased coparcener and for no other purpose. There is nothing in the language of the section to suggest that it deals a death knell to the Hindu coparcenary the moment one of the coparceners dies leaving some female relative or a male relative who claims through such female relative, specified in Class I to the Schedule, who are not coparceners. We are inclined to think that devolution of interest by intestate succession by such person does not bring about a disruption of the coparcenary. These persons no doubt take a defined share in the undivided interest of the deceased coparcener

in the joint family property, and the determination of their shares has to be on the footing as if there was a notional disruption of the joint status of the family but such notional disruption is not actual disruption of the joint status. The Explanation was necessary in view of the provision whereunder inheritance in coparcenary property by succession was introduced even in respect of the outsiders to the joint family which was unknown to Hindu law. The object is achieved by the use of a legal fiction, i. e. by the words "shall be deemed to be the share" in Explanation I.

Each case depends on its own particular facts. In *Bhai Ganeshram Batbhadra Shop v. Firm Mangilal Balkishan* 1952 NLJ 690 : AIR 1952 Nag. 390 : ILR 1953 Nag. 248, Sinha C. J. and Mudholkar J. stated that where the Karta of a joint Hindu family who is the sole appellant in an appeal dies during the pendency thereof substitution has to be made either of the succeeding Karta or of all the surviving members of the family and the appeal abates if no application is made for substitution within 90 days of the date of death. In that case, their Lordships observed as follows :-

It is not a case where all the members of the joint family had been impleaded and the Karta died. In such a case, if all the members of the joint family at the time of the death of the deceased Karta are already on record the case would be governed by rule 2 of Order XXII. Only an entry to that effect will have to be made in the record, and the suit or the appeal as the case may be would proceed without anything further being necessary to be done. There is ample authority for the proposition that even if the Karta is on the record but not as such, that is to say, he has been impleaded in the litigation along with the other members of the joint family and if one of the members died leaving him surviving not only the members who are already on record but some other members who may have come into existence during the pendency of the litigation, it is necessary under the law to make substitution in place of the deceased party, and it will not do simply to say that the Karta is already on the record.

The portion underlined (here in italics) clearly qualifies the proposition laid down. That was not a case where the plaintiff besides impleading the Karta as representing the joint Hindu family had also joined some other members of the family, as here.

The decision in *Jugalkishore v. Wardhasa* 1955 NLJ 295 : AIR 1955 Nag. 166 is also distinguishable. In that case, Mangalmurti and Deo JJ. stated as follows:-

In the instant case the suit is to enforce the contract of lease made by the plaintiff with all the defendants. The suit is not brought against the Karta of the family in his representative capacity but against individual members who are the contracting parties. Each defendant represents his own interest. This appears to be the ratio of the decision in AIR 1933 95 (Nagpur) Where a suit is brought against the individual members of a joint family and not in a representative capacity the interest of the widow of a deceased member is not represented by

the other members of the joint family on the record of the case.

In that case, the other members of the family were also the contracting parties. Each defendant, therefore, represented his own interest. When a suit is brought against an individual member of a joint Hindu family and not in a representative capacity, the interest of the widow of a deceased member is not represented by the other members of the joint family. That is not the case here.

The matter can also be viewed from another angle. If the deceased appellant No. 2 Mukundilal can be regarded to have appealed in his individual right, then, the interests of his heirs, on his death, are sufficiently represented by his sons Madanlal and Umesh Kumar, the appellants Nos. 7 and 8 on record. The heirs of Mukundilal in their application for substitution of their names, have stated that Madanlal and Umesh Kumar being the heads of their family effectively represented their interest. In *union of india (UOI) Vs. Sree Ram Bohra and Others*, their Lordships of the Supreme Court refrained from expressing any final opinion as to whether there can be two Kartas in a joint Hindu family, and we do not think it is necessary to go into that question. Even assuming that there cannot be more than one Karta, one of the two certainly had the capacity to represent the other members of the family of Mukundilal.

The doctrine of representation clearly applies to a suit for the enforcement of a mortgage. In *N.K. Mohammad Sulaiman Vs. N.C. Mohammad Ismail and Others*, their Lordships of the Supreme Court, in dealing with a suit on mortgage, held that the suit was not imperfectly constituted though one of the heirs of a deceased mortgagor had not been impleaded as a party. Their Lordships stated :

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...in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record.

It is true that in that case the mortgagee, after making a diligent and bona fide enquiry, impleaded certain heirs of the deceased mortgagor as parties to his suit in the genuine belief that they were the only persons interested in the estate. We see no reason why the same principle should not apply to a case like the present where some of the heirs of the deceased appellant No. 2 Mukundilal are already on the record, if they are capable of representing the estate.

We accordingly reject the preliminary objection with costs. The appeal shall now be placed for hearing the parties on merits. Hearing fee Rs. 100, if certified.