

(1952) 11 MAD CK 0025
In the Madras High Court
Case No : Appeal No. 20 of 1949

Parsam Venkataramayya

APPELLANT

Vs

Parsam Venkataramappa and Others

RESPONDENT

Date of Decision : 25-11-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 20 Rule 18

Citation : (1953) 66 LW 298

Hon'ble Judges : Mack, J; Krishnaswami Nayudu, J

Bench : Division Bench

Advocate : P. Somasundaram, for the Appellant; T.S. Narasinga Rao and M. Balachandrudu, for the Respondent

Final Decision : Allowed

Judgement

Krishnaswami Nayudu, J.—The main question that arises for determination in this appeal is as to whether a certain interest which the plaintiff-appellant had in a business is joint family property or the separate property of the plaintiff. The plaintiff and defendant 1 were brothers. Defendants 2 to 4 are the sons of defendant 1 and defendants 5 to 7 are the sons of a predeceased son of defendant 1 by name Thimmih. The suit, is for partition of the joint family properties. Defendant 1 was the manager and the elder brother of the plaintiff. He died on 28-8-1946, a day after the institution of the suit, the suit, having been instituted on 27-8-1946. The Joint family was possessed of about 60 acres of lands and a house at Kothur village and some valuable moveables including gold and silver. Defendant 1 was also conducting a small retail shop at Kothur and doing money lending business. There is no dispute that the plaintiff left his ancestral village of Kothur for Anantapur at which place he was married to the daughter of P.W. 4, Rentala Bala Venkataswami, from 1933 onwards he continued to remain in his father-in-law's place and never came back to Kothur excepting probably on certain occasions. The feelings between the members of the joint family and the plaintiff have always been cordial. In the written

statement filed on behalf of defendants 3 and 4, while not disputing the plaintiff's right to a partition of the joint family properties, It was alleged that the plaintiff was carrying on a mandy business on behalf of the family in partnership with the plaintiff's brother-in-law, Rentala Venkatasubbayya (D.W. 5), son of P.W. 4, and that the plaintiff should be directed to bring the family's interest in the said partnership into the hotchpot and the defendants given a share therein. The defendants also claimed a share in two houses at Anantapur, one acquired in the name of P.W. 4 and the other in the joint names of the plaintiff's wife and his brother-in-law D.W. 5. The case of the defendants is that they were fraudulently obtained in their names, though really the properties belonged to the family, that they were benami transactions and that therefore, they must be declared to be the properties of the joint family. The learned District Judge held in favour of the defendants that the plaintiff's share in the business at Anantapur was Joint family business and that the defendants are entitled to an account of that business. As regards the houses, the learned Judge reserved it for decision, in the final decree proceeding directing the impleading of necessary parties to the transaction.

2. It is well established that there is no presumption that a business carried on by a member of a joint Hindu family is Joint family business and it is for those who set it up to establish it that though the business was carried on by an Individual member it was the business of the family.

3. The plaintiff's case is that in 1932 or 1933 on account of some differences among the womenfolk and misunderstandings with defendant 1, he left for Anantapur, borrowed ,1 sum of Rs. 1000 under Ex. A. 5 from P.W. 2 and out of the sum he contributed about Rs. 600 or Rs. 700 to the partnership business of himself & his father-in-law and that later he discharged that liability. He is supported by P.W. 2 who has also filed the promissory note Ex. A. 5. The learned District judge declined to accept this evidence and it is unnecessary for us, in the view which we are taking of the other evidence in the case, to differ from the conclusion of the learned Judge as regards the truth of this portion of the plaintiff's case as to his securing a sum of Rs. 1,000 from P.W. 2 required for providing for the capital of the partnership business of himself and his father-in-law. On behalf of the defendants, while it is conceded that the plaintiff left the village about 1932 or 1933, the capital required for the business was stated to have been furnished by defendant 1 by realisation of a sum of Rs. 600 due from D.W. 1 to whom a sum Rs. 1,000 was lent on a promissory note by defendant 1 which was family money. Defendant 1 having died, D.W. 1 who is the person who borrowed from the family and paid Rs. 600 to the plaintiff says that he borrowed a sum of Rs. 1,000 on a promissory note, that Rs. 600 was required by the plaintiff with a view to enable him to start the business in Anantapur, that he paid the same to the plaintiff and defendant 1 In the presence of others and that an endorsement was made in the promissory note. D.W. 2 supports D.W. 1 that he was taken to the house of defendant 1 by D.W. 1 and that he was present when the sum of Rs. 600/- was paid and endorsed on the promissory note. This

evidence the learned District Judge has preferred to accept.

4. We are, however, unable to agree with the learned District Judge on this finding. The promissory note which is stated to have been discharged has not been produced and the more Important circumstance is that the account books admittedly maintained by the defendants which must necessarily have contained an entry as to this lending of Rs. 1000 if it was true and the repayment of Rs. 600 by D.W. 1 have not been produced. But on the other hand the learned Judge was of the opinion that defendants 2 to 4 have suppressed these accounts. In the absence of the promissory note and these accounts, it is not possible to accept the oral testimony of two witnesses on an important question as to payment of a sum of money on a certain occasion to the plaintiff for a particular purpose. We are therefore, unable to attach much weight to the oral testimony furnished by D. Ws. 1 and 2.

5. If the evidence on the side of the plaintiff and the defendants as regards the source or me capital for the starting of the partnership business is excluded, we have to fall back upon the documentary evidence in this case which throws some light BS to how the plaintiff was able to secure the necessary capital and invest it in the business at Anantapur. (After considering the evidence the judgment proceeded:) What we are able to arrive at from the evidence which is mainly documentary is that undisputedly a sum of Rs. 274-9-7 has been contributed by defendant 1 presumably out of joint family funds to make up the plaintiff's share of capital in the Anantapur business, the share of capital that required of him being Rs. 700-9-8. The balance must be deemed to have been provided by the plaintiff independently, as there is no evidence which we can rely upon to justify the conclusion that the Joint family made further contribution towards the share capital. It may be mentioned here that except the contribution of Rs. 274 and odd or even according to the defendants the sum of Rs. 600 there is no other connection between the plaintiff's partnership business at Anantapur and the Joint family at Kothur. It is not pretended that the defendants were drawing the profits of Anantapur business or contributed any further capital as by way of replenishing the capital of the partnership business at Anantapur; nor is there any evidence as to any blending of these two businesses; nor is it suggested that the members of the family at Kothur except the plaintiff have participated in the business at Anantapur. On the sole circumstance of this contribution, it is argued, the plaintiff's interest in the partnership business is joint family business and that would be sufficient to constitute a joint family business.

6. It is further sought, to be shown by the evidence of three witnesses D.Ws. 3, 4 and 6 that there was an admission by the plaintiff that his interest in the Anantapur business was family business and that he was prepared to bring it into account in any family partition about which there appears to have been a demand just sometime before the institution of the suit, when defendant 1 was admittedly ill. We are unable to attach any weight to this evidence of these witnesses as to the admission and it is significant that the important person

through whom the mediation is sought to have been broached has not been examined. We are, therefore, left with nothing except to decide on the mere fact that there is a small contribution made from the Joint family funds to the plaintiff, that it is a joint family¹ business. Decisions of the Privy Council have held that there is no presumption that a business started by a member of the joint family business, unless there is something to show that it was started with the nucleus of the Joint family or that the joint family participated in it or that there was a blending of the two businesses.

7. In "Annamalai v. Subramanian", AIR 1929 PC 1 (A), Lord Buckmaster observed that a member of a Joint undivided family can make separate acquisition of property for his own benefit, and unless it can be shown that the business grew from Joint family property, or that the earnings were blended with Joint family estate, they remain free and separate and that the burden of proving in a partition action that any particular item of property is joint primarily rests upon the person who sets up a case of a joint family nature. In "Bhuru Mal v. Jagannath", AIR 1942 PC 13 (B), with reference to presumptions as to properties and business, it was held that whether or not it can be said that if a joint family is possessed of some joint property, there is a presumption that any property in the hands of an individual member is not his separate individual property but joint property, no such presumption can be applied to a business. A member of a joint undivided family can make separate acquisition of property for his own benefit and, unless it can be shown that the business grew from Joint family property or that the earnings were blended with joint family estate, they remain free & separate. Sir George Rankin while agreeing with the observations of Lord Buckmaster in AIR 1929 PC 1 (A)" observed that this question is a question of fact and the burden of proof lies upon the person who claims a share in the business and that jointness may be proved by evidence that the business was carried on as a family business, by proof that the profits were treated as Joint family property being brought to one account or divided among the members.

8. Excepting that in this case there has been a nucleus of Joint family fund in the sense of a very small contribution from the family to one of its members to enable him to become a partner, there is nothing to show that the profits earned by the plaintiff in that business were brought into account in the family books or enjoyed by them. There could not have been any blending of the two businesses, which only points to the absence of an intention on the part of the plaintiff to treat it as a joint family concern and equally no intention on the part of defendant 1 and the other members to treat it as first family business. There must be some proof of Intention at the time of contribution that a particular business carried on by a member of the joint family individually or in partnership with others was treated as a Joint family concern. That intention may be expressed by direct evidence or by conduct of the members of the family which can be inferred from circumstances and the manner in which they have been dealing with each other. There is admittedly no participation and it cannot be said that such an intention has been established in this case. The subsequent conduct

on the part of the defendants, i.e., of the family docs not, show that they took any interest at all in the partnership business of the plaintiff. There appears to have been no connection whatsoever between the family and the plaintiff's partnership business.

9. Mr. Narasinga Rao argues that the account books of the defendants will disclose the nature of the business and the way in which the family was treated with reference to the plaintiff's share and the non-production of the books of the defendants has placed the defendants, most of whom are minors, in a difficulty and they are, therefore, unable to establish their case. But it must be noted that the defendants have suppressed their account books. By reason of the suppression it can be reasonably inferred that the production of the account books will show the absence of any entry relating to the Anantapur business in the joint family accounts. It is correct to say that the accounts of the Anantapur business have been completely suppressed. Certain ledgers and day books Exs. B. 8 and B-10 relating to the period from 1944 to 1946 and from 1947 to 1948 and even accounts relating to October 1938 have been filed. Excepting for the period from 1937 to 1943, the rest of the accounts have been filed and D.W. 5 has given some explanation which seems to be reasonable as to the inability to file the remaining account books. Even in the defendant's accounts so far produced, the defendants have not been able to establish or point out any entry to show any payment of the profits payable to the plaintiff to the joint family or any contribution for the carrying on the partnership business. We are, therefore, of the opinion that mere contribution, assuming in this case and accepting the evidence on behalf of the defendants, that the contribution has provided a major portion of the capital viz., Rs. 600 out of Rs. 700 and odd, coupled with the subsequent non-interference with the business by the defendants' family and the absence of any participation and non-enjoyment of any income from the business, would not justify the conclusion that the member's interest in that partnership business is joint family property.

10. It is not uncommon among trading families, as in the present case, for a member of the joint family who is fortunately married into a wealthy family to be taken by the father-in-law and set up in a business and that is what appears to have happened in this case. Almost ever since his marriage, the plaintiff has been with the father-in-law. His father-in-law took him as a partner in the business. It is not likely that the success of the business was due solely or mainly to the contribution of Rs. 274-9-7 towards the capital of business at its inception. It can reasonably be held in this case that the business was carried on by the plaintiff & not by the joint family and it is by reason of his efforts and exertions with the help and association with his father-in-law that he happened to be successful in that business.

11. We are inclined to the view that if a member of a Joint family who was given a certain sum from the Joint family funds and who goes out of the family in the sense of leaving the family house as in the present case, starts a business of his

own individually or in partnership and by virtue of his exertions he prospers in his business and acquires properties it will be not justifiable to hold that either the business or his properties would be joint family properties. In view of the constitution of the Hindu joint family and the incidents of its ownership of properties, to come to any other conclusion would be to deprive a member of such family of his initiative and his desire to eke out a livelihood by his individual efforts and intelligence. The trend of judicial opinion has been as far as possible to recognise properties acquired out of the individual exertions of a member of a joint family to be his self-acquisition. The Hindu Gains of Learning Act (Act 30 of 1930) is one of the enactments which gave legislative recognition to this view, by treating the properties acquired out of the earnings of the members of the family who happened to have had their education from out of the joint family funds as self-acquired and separate properties. The Act provides that notwithstanding any custom, rule or interpretation of the Hindu law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely for the reason that his learning, in whole or in part has been acquired with the aid of the funds of the family and "learning" has been understood to mean education which is to enable a person to pursue any trade, industry, profession or avocation in life. If a member of the family is inclined to start a trade and for that purpose he gets assistance by way of a contribution from the joint family funds without any further assistance from the joint family and goes and starts a business and acquires properties, it appears to be reasonable to extend the principle of the Hindu Gains of Learning Act to such a case. We are unable to find any real distinction between the case of a member getting himself educated out of the joint family funds and employing himself somewhere earning and acquiring properties and a member getting a cash contribution from the family and starting a trade on his own account. Unless it is shown that the joint family did not stop with the contribution but continued to take interest and the business was subsequently carried on with the assistance of the joint family, it should not be held that the business is family business.

12. Mr. Narasinga Rao referred to certain observations of Venkatasubba Rao J. in *Manickam Chetti Vs. Kamalam*, That was a case where there was already a partition and allotments of properties and a further claim was made as regards certain business and other properties and in considering the nature of the business whether it was joint family or separate, the learned Judge observed as follows: "There is no doubt that the business had been carried on with the aid of joint family funds, and that circumstance would prima facie make it a joint family concern. When coparcenary funds are employed there may be one of two intentions, either that the concern belongs to an individual member, his share being debited with the sums employed or what is more natural that the concern was carried on for the Joint benefit." With these observations we are in respectful agreement. The business in that case was carried on with the aid of joint family fund and not merely started with a contribution from the joint family. The question is one of intention on the part of the members starting the business &

the intention of the other members of the family as to the manner in which they treated the business, and such intention must be established by sufficient evidence. That evidence is lacking in the present case.

13. We are of the opinion that the plaintiff's share in the business at Anantapur in respect of which an account was ordered by the learned District judge is not joint family business and the defendants are not entitled to an account thereof. This disposes of the appeal and the appellant has to succeed.

14. But, there is one matter about which we consider it is necessary to express our views. Issue 5 relates to the ownership of the two houses at Anantapur standing in the name of the plaintiff's father-in-law, wife and brother-in-law as to whether they were benami for the joint family of the plaintiff and the defendants. In view of our finding that the plaintiff's interest in the Anantapur business is not joint family business, it may be unnecessary to go into the question as to whether the properties purchased with the income from the business are joint family properties or not. However, we desire to express our opinion, that the manner in which the learned Judge had dealt with it is not satisfactory. The consideration of the question as to the ownership of these houses can only be disposed of completely and effectively in the presence of the persons in whose names the properties are purchased, i.e., P. W. 4 and P.W. 5 and the plaintiff's wife all of whom are not parties to the suit. The learned District Judge thought that this is a matter that could be reserved for decision in the final decree proceedings after impleading the necessary parties. But, we would say that this is wrong procedure which should not be adopted. The final decree proceedings under Order 20, Rules 12 and 18 only relate to matters which are provided in the preliminary decree as to partition, as to an account for mesne profits or as to an account for other properties, but do not relate to the decision of any substantial rights of parties as to title to properties which can Only be decided in a regular suit. If P.W. 4; D.W. 5 and the plaintiff's wife had been parties to the suit and this issue had been raised, it would have been, open to the learned Judge while deciding the case to give his decision on that matter. But it was not open to him to reserve the question for the final decree proceedings. We, therefore, set aside that direction regarding the properties covered by issue 5 and reserve it for any suit which the defendants may file if so advised.

15. The appeal is allowed. The appellant will get his costs. Advocate's fee being fixed at Rs. 250 from the respondents.