
(1936) 08 BOM CK 0026
In the Bombay High Court
Case No : First Appeal No. 245 of 1930

Sabhachand Navalchand

APPELLANT

Vs

Sambhoo Gyanoba Bhoj

RESPONDENT

Date of Decision : 21-08-1936

Acts Referred:

Citation : AIR 1937 Bom 182 : (1937) 39 BOMLR 118

Hon'ble Judges : Sen, J;N.J. Wadia, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sen, J.—The plaintiffs-appellants sued the defendants, who are the members of a joint Hindu family, to recover Rs. 9,648-7-6 with costs and future interest, and further prayed that in case the defendants failed to pay the said amount, it might be ordered to be recovered by sale of the mortgaged property, and that if the amount realized by sale of the same fell short of the decretal amount, the deficit might be ordered to be recovered from the defendants personally. The mortgage in this suit was for Rs. 5,000, out of which the sum of Rs. 900 was paid in cash and Rs. 4,100 was required to be paid to Government in respect of a liquor contract taken in defendant No. 3's name, on account of which Government had attached defendant No. 3's share in the defendants' house. The mortgage deed, exhibit 57, was signed by all the defendants, defendant No. 1 signing both for himself and on behalf of the minor defendants Nos. 5 to 7. The plaintiffs paid the sum of Rs. 4,100 direct to Government, and the attachment on defendant No. 3's share was raised. The learned Subordinate Judge held that the mortgage bond was not binding upon the minor defendants Nos. 5 to 7 and passed a decree against the other defendants. The plaintiffs have appealed, and contend that the bond is binding on the three minor defendants.

2. The learned Subordinate Judge's grounds for his finding that the bond was not binding on the minor defendants are as follows :-(1) that the liquor business is not proved to be the defendants' joint family business; (2) that the mortgage

was not for the minors" benefit nor entered into in the interest of the minors. He has based his first ground on these reasons : the defendants are not kalals or liquor sellers either by caste or profession, their caste being Mi the liquor license was taken by defendant No. 3 in his own name alone and it was only the share of defendant No. 3 in the defendants" house that was attached.

3. The learned Counsel for the appellants in this appeal has argued that the business in question was the ancestral business of the defendants, that there was legal necessity for the mortgage, in that the object was to prevent defendant No. 3's share being sold to a stranger, and that the principle of law enunciated in *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (1856) 6 M.I.A. 393 applies in this case.

4. On the first point, viz., the defendants" business being ancestral or otherwise, we have the following evidence. In the mortgage deed the mortgagors said : "We have recently taken on account of our joint family a liquor shop at Ghodnadi from Government in the name of No. 3 out of our joint family". It also refers to the shop not as defendant No. 3's shop but as "the Ghodnadi shop." It refers to the amount of Rs. 4,100 paid by the plaintiffs as "the said amount you paid on our account". We have next a statement made by defendant No. 3 in a criminal case against him on August 24, 1925, to the effect that the Abkari business is of the joint family. Then we have the evidence of plaintiff No. 2 in this case that "the liquor shop at Ghodnadi was taken in the name of defendant No. 3 for the entire family"; and defendant No. 3 states : "We also take contracts". Except for a single sentence in defendant No. 3's evidence there is certainly no evidence that the defendants" family or any member of it did any business in liquor prior to 1925. That sentence is : "I used to take liquor contracts". In our opinion, this evidence is altogether insufficient to establish that there was, any ancestral liquor business in the defendants" family.

5. We also find it somewhat difficult to arrive at the conclusion that the business in question has been satisfactorily proved to be the joint family business of the defendants. At the same time, it does not appear unlikely that the adult members of the defendants" family treated the business as a family business. This would explain the phraseology used in the mortgage deed, and perhaps the fact that the liquor license was taken in the name of defendant No. 3 alone is to be explained by some Government rule against such licenses being taken out jointly by more persons than one. The explanation of the fact that defendant No. 3, and not defendant No. 1, the head of the family, took the license in his own name, appears to be that defendant No. 1 did not at the time live in Poona, where the liquor business was conducted.

6. Supposing, therefore, that the business was a joint family business of the defendants, and that it was not ancestral, as we hold that it was not, it must be held to be a new business undertaken by the defendants" family. The principle applicable to a new business has been enunciated in AIR 1922 237 (Privy Council) and *Benares Bank, Ltd. v. Hart Narain* and other cases. It is to the effect

that the manager of a joint Hindu family cannot impose upon a minor member of the family the risk and liability of a new business started by himself and the other adult members. Applying: this principle, it seems to us that the conclusion of the learned Subordinate Judge, that the mortgage bond was not binding on the minor defendants, cannot be regarded as incorrect.

7. Mr. Mulgaonkar has, however, referred us to the law relating to the general power of a manager of a joint family business as to alienation of the coparcenary property, as stated in Mulla's book on Hindu Law, 8th edn., paragraphs 241 to 243A. In particular, he has referred to the principle that the manager of a joint Hindu family has power to alienate for value the joint family property, so as to bind the interests of both adult and minor coparceners in the property, provided that the alienation is made for a legal necessity, or for the benefit of the estate. It has been contended that the mortgage was entered into for a legal necessity, both the necessity for payment of Government dues and that of preventing a stranger from coming into the joint family property constituting such legal necessity. As regards the payment of Government dues, this cannot be said to have been a charge on the joint family property, as only the share of defendant No. 3 in the joint house was attached. It cannot, therefore, in our opinion, be said that the necessity for paying the amount due to Government was a legal necessity for the whole joint family, though the adult members of the family may have felt a moral obligation to pay the same.

8. Next, we come to the necessity for keeping a stranger out of the joint family property. There does not appear to be any case bearing on this point, and we find it difficult to hold that the danger of the share of one of the coparceners being sold to a stranger was such as to give rise to a legal necessity for the whole joint family of preventing such partial alienation. In this connection our attention has been drawn also to the possibility that if the purchaser of defendant No; 3's share wanted to have partition of that property, his remedy would be nothing short of a suit for general partition : Mulla's Principles of Hindu Law, 8th edn., p. 299. It has been held that the purchaser of the undivided interest of a coparcener in a specific property belonging to the joint family is not entitled to a partition of that property alone, and that he can only enforce his rights by a suit for a general partition : Shivmurteppa v. Virappa ILR (1899) 24 Bom. 128 : 1 Bom. L.R. 620. and IsHrappa v. Krishna ILR (1922) 46 Bom. 925 : 24 Bom. L.R. 428. Such a contingency might possibly be regarded as a grave danger to the joint status of the defendants; but it seems that this could be prevented by the coparceners themselves suing the purchaser for partition of the alienated property without bringing a suit for a general partition : Naro Gopal v. Paragauda ILR (1916) 41 Bom. 347 : 19 Bom. L.R. 69. and Hanmmdas Ramdayal v. Vallabhdas ILR (1918) 43 Bom. 17 : 20 Bom. L.R. 472. In any case, however, as we have already said, we find it difficult to take the view that the possibility of a stranger coming into the joint family property was such as would fall under the category of legal necessity.

9. Similar remarks would appear to be applicable to the argument based on "the benefit of the estate" which would entitle a manager of the joint Hindu family to alienate the joint family property so as to bind the interests of both the adult and the minor coparceners. The latest Bombay case in which the expression "benefit of the estate" has been interpreted is *Hemraj Dattubuva Mahnubhao Vs. Nathu Ramu Mahajan*, . In this case a full bench has decided that the expression "benefit of the estate" is not intended to include every transaction which is advantageous or which a prudent owner will carry out in connection with his own estate. It has also been held that this expression "is not necessarily limited to a transaction which is of a character to protect or preserve the property of the owner. The expression "benefit of the estate" appears to have been first used, in connection with the question of alienating a minor's interest, in *Hunoomanpersaud's* case. Mr. Mulgaonkar has based a large part of his contention on the theory of the benefit of the estate, as applied in AIR 1931 136 (Privy Council) . As I have pointed out above, no case has been brought to our notice deciding either that the necessity to keep out a stranger forms a legal necessity or is covered by the expression "benefit of the estate". As pointed out in *Hemraj v. Nathu*, the benefit has to be determined with reference to the facts of each case. We find in this case that the liquor contract was taken in the name of only one of the defendants, and when the contract was taken the possibility of defendant No. 3's share being attached and sold could not be said to have been absent from the minds of the other defendants. It does not appear what share exactly defendant No. 3 had in the joint family property; as there are as many as eight defendants in this case, it may be presumed that his share was not large. The argument based on the necessity of keeping a stranger out of the joint family property, again, appears to have been advanced for the first time in this Court. No question on this point has been asked to any of the witnesses examined in this case, nor has the learned Subordinate Judge referred to this argument. It seems to us a far-fetched argument to say that the keeping of a stranger out of the joint family property was regarded by any of the defendants as conducive to the benefit of this estate.

10. Coming to the rulings in *Hunoomanpersaud's* case and *Ram Krishna Muraji v. Raton Chand*, Mr. Mulgaonkar has particularly invited our attention to the following passage in the first case (p. 424) :?

Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt cannot be

viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution, but is himself deceived.

Ram Krishna Muraji v. Ratan Chand applies this principle to the case of the ancestral business of a Mitakshara joint family. We have already held that in the present case the business cannot be said to be ancestral. As to the general principle referred to in Hunoomanpersaud's case, we must hold that it is qualified and restricted by the later decisions of the Privy Council in Sanyasi Charon Mandal v. Krishnadkan and Benares Bank, *Ld. v. Hari Narain*, and that, therefore, it cannot be said, in the case of a new business started by adult members of a joint family, that they can impose upon the minor members of the family the risk and liability arising out of that new business. This seems to us clear, though the exact relationship between Hunoomanpersaud's case and these later decisions does not appear to have been indicated in any decisions of the Privy Council. The question in *Benares Bank, Ld. v. Hari Narain* arose out of a case of ancestral business, while in Hunoomanpersaud's case the question of a new business does not appear to have been raised at all. The general principle enunciated in Hunoomanpersaud's case must, accordingly, be regarded as modified by the decisions relating to a minor's liability in the case of a new business. Again, in the present case it is not clear what kind of inquiry was made by for the loan or as to the business of the defendants being ancestral. There is no doubt as to the general proposition that the benefit of a creditor should not suffer when he has acted honestly and with due caution. But in this case, unless the plaintiff satisfied himself as to the real necessity for the loan and as to the business of the defendant being ancestral, it cannot be said that he acted with due caution. The point as to the business being ancestral is important. Unless it was ancestral the Privy Council decisions of 1922 and 1932 clearly protected the interests of the minor defendants against any claim arising out of the mortgage. This was, therefore, a point which required particular investigation by the person advancing the loan. Therefore, it does not appear to us that even taking the principle enunciated in Hunoomanpersaud's case it supports the appellant's case.

11. We, accordingly, hold that the learned Subordinate Judge was right in holding that the mortgage bond was not binding on the minor defendants Nos. 5 to 7, and that, therefore, the appeal must be dismissed with costs.

N.J. Wadia, J.

12. I agree.