
(1957) 08 MAD CK 0018

In the Madras High Court

Case No : Appeals No's. 299 and 746 of 1953

Sakthivel Pandaram represented by Guardian Mother
Siddamanika Ammal

APPELLANT

Vs

The South Indian Bank Ltd., a Joint Stock Co. and Others

RESPONDENT

Date of Decision : 02-08-1957

Acts Referred:

Citation : (1958) ILR (Mad) 15

Hon'ble Judges : P.V. Rajamannar, C.J;Panchapakesa Ayyar, J

Bench : Division Bench

Advocate : D. Ramaswami Ayyangar and P.R. Varadarajan, for the Appellant; K. Kuttikrishna Menon, C.T. Verghese, T.K. Subba Rao and A. Narayana Pai, for the Respondent

Final Decision : Dismissed

Judgement

Rajamannar C.J.

1 The other appeal, Appeal Suit No. 746 of 1953, by the second Defendant raises an interesting question of law in which there is not much of decided authority. It involves the question raised by the second Defendant that the suit debt was incurred for a new business started by his father, the first Defendant, which was not an ancestral business and, therefore, the suit mortgage was not binding on him or his share of the joint family properties. The second Defendant was born on 30th October 1947. He was, therefore, in his mother's womb in July 1947, when the mortgage in favour of the Plaintiff was created. Prima facie, therefore, he would be entitled to challenge the validity of the alienation in favour of the Plaintiff.

2. The facts which emerge from the evidence as regards the business for which the suit debt was incurred are these. The family of the first Defendant was a trading family. Their ancestral business was banking and money-lending which the first Defendant carried on under the name and style of Sadasiva Pandaram,

banker. Prior to 1940, the money was being lent out only on security of immovable properties. Subsequent to 1940, the first Defendant began to lend moneys on security of hundies and in 1943, he started a business in stocks and shares. He was acting as a broker and was also purchasing and selling shares on his own account.

3. The learned trial Judge refrained from deciding whether the business of moneylending on hundies and the stock and share business were in the nature of joint family businesses or new businesses started by the first Defendant. He decided the case against the second Defendant on the ground that when these businesses were started the first Defendant was the sole coparcener of his family as the second Defendant was born only in 1947, and, therefore, it must be taken that by then, these businesses had become joint family businesses though they were not strictly ancestral.

4 Mr. D. Ramaswami Ayyangar for the second Defendant-Appellant, contended that the first Defendant could not make an alienation of joint family property so as to bind his minor son to raise money for the purpose of a new business, that is to say, a business which was not ancestral. The most authoritative pronouncement on this subject is contained in two decisions of the Privy Council. The first is in *Sanyasi Charan Mandal v. Krishnadhan Banerji* I.L.R.(1922) Cal. 560 . In that case a joint Hindu family governed by the Dayabhaga consisted of four adult brothers and a minor brother., The family owned two businesses, one for fuel wood at Munshigunj and the other for rice and other articles at Kalibazar. These two businesses had been carried on by the father and devolved on the five sons and were carried on by the eldest of the brothers as the karta. After the father's death a new business in rice was started by the karta at Orphangunj. The money sued for was borrowed exclusively for the purpose of this new business. The suits were eventually dismissed on a ground which has no relevancy to the present discussion. But their Lordships of the Judicial Committee observed in the course of their opinion that the karta of a joint family could not impose on a minor coparcener the risks and liabilities of a new business started by himself. The case concerned a Hindu family governed by the Dayabhaga. The next case in *Benares Bank Ltd. v. Hari Narain* I.L.R(1932) All. 504 related to parties governed by the Mitakshara Law. There the adult members of a Mitakshara joint family on behalf of themselves and their minor sons mortgaged family property for the purpose of paying off two previous mortgages and to carry on a business which had been started by the manager. Their Lordships found as a fact that, the business in question was started by the manager of the family and, therefore, could not be said to be ancestral so as to render the minor's interests in the joint family property liable for the debt. The following passage in the judgment of Sir Dinshah Mulla who delivered the judgment of the Committee is a complete exposition of the rule on which the Appellant relies :

Next it was argued that a business started by the father as manager, even if new, must be regarded as ancestral. Their Lordships do not agree. It is in direct

opposition to the ruling of the Board in *Sanyasi Charan Mandal v. Krishnadhan Banerji* I.L.R.(1922) Cal. 560 . The judgment in that case proceeded on the broad ground that the manager of joint family has no power to impose upon a minor member of the family the risk and liability of a new business started by him. That, no doubt, was a Dayabhaga case, but there is no distinction in principle on this subject between a case under the Dayabhaga and one under the Mitakshara. The power of the manager of a joint family governed by the Mitakshara Law to alienate immovable property belonging to the family is defined in verses 27 to 29 of Chapter I of the Mitakshara . The judgment of the Board in *Hunooman Persaud Panday v. Mussumat Babooee Munraj Koonweree* (1856) 6 Moo. I.A. 392 (P.C.), relied on by the bank, was founded apparently on those verses. A new business, their Lordships think, is not within the purview of those verses. It does not make any difference that the manager starting the new business is the father. Their Lordships find that the balance of authority in India is in accordance with this view.

5. The point now for determination is whether this rule would apply to a case in which a sole surviving coparcener starts a new business and subsequently a son is born to him. It must not be overlooked that in both the cases decided by the Privy Council above referred to, when the manager started the new business there were minor coparceners in the family. The language used in stating the rule clearly implies the existence of a minor member at the time when the new business is started. When there is a minor with vested interests in the joint family property, their Lordships no doubt say that the manager, even if he be the father, has no power to impose upon the minor the risk and liability of a new business started by him. Supposing at the time the new business is started there is no minor member of the family-Then how can it be said that the manager or father was imposing upon a minor member the risk and liability of a new business? If the family consisted of two adult coparceners and both of them start a new business and treat it as a family business and there are no minors in the family at the time, how can it be said that the karta was rendering anyone's interest in the property subject to the risk and liability of a new business without their consent? When such a business is started by the sole surviving coparcener or by the karta with the consent of all the adult members of the family, there being no minors, and with the profits of such a business properties are acquired, will not the sons born subsequently acquire a right by birth in such properties? In our opinion, undoubtedly they would, because such properties would become assets of the joint family. If that be so, does it not follow in reason that the sons would be bound by debts incurred for such business ?

6. The point now in issue was discussed in a decision of the Allahabad High Court in *Angney Lal Narain Das and Others Vs. Angney Lal Munni Lal*, . The learned Judges in that case held that the rule of law laid down in *Benares Bank Ltd. v. Hari Narain* ILR (1932) All. 564 and the earlier case of *Sanyasi Charan Mandal v. Krishnadhan Banerji* I.L.R.(1922) Cal. 560. cannot apply to a new business started by the sole surviving coparcener or with the consent of all the members

of the joint family before the birth of a minor coparcener. They observed :

But when a business has been started by a sole surviving coparcener, or with the consent of all the members of a joint Hindu family, the members being all adults, the business becomes a family business and the minor members of the family born long after the business had been started are no longer able to say that the risk and liability of a new business cannot be imposed upon them because the risk and liability have been taken by the family and new comers in the family share the risk and liability of the business along with the assets of the joint family.

7. The decision in this case we find accepted as good authority in Mulla's Hindu Law, eleventh edition, page 274 (edited by the late Chief Justice of the Supreme Court of India, MukherjEA C.J.). The proposition is thus laid down :

The rule of law laid down in Benares Bank Ltd. v. Hari Narain I.L.R.(1932) All. 564 and in other cases of a like nature cannot apply to a new business started by the sole surviving coparcener of a Mitakshara family. Such business becomes from its origin a family business and the minor members of the family born subsequently are not competent to say that the risk of the new business cannot be imposed on them. The risk and liability having been already taken by the family the new comers must share them along with other assets and liabilities of the family.

8. A different view was taken by the learned Judges who decided Ganpat Rai v. Sukhdeo Ram AIR 1938 Pat. 335. They were apparently inclined to the view that only an ancestral business could be joint family business. They said :

The fact that the minor members were not born at the time when the business was started ? makes no difference in this case.

9. We prefer to follow the view taken by the Allahabad High Court. No decision of this Court has been cited to us taking a contrary view.

10. Mr. Kuttikrishna Menon, learned Counsel for the Plaintiff-Respondent, contended that in any event the rule in the Benares Bank's Case I.L.R.(1932) All. 564 would not apply in all its strictness to the case of a trading family. There is considerable authority in support of the distinction sought to be drawn between the case of an ordinary family and a family whose hereditary avocation is trade. In Mayne, eleventh edition, after a discussion of decided cases, the learned editor comes to the conclusion that the better view is against the imposition of any such limitation as laid down in the Benares Bank's Case I.L.R(1932) .All. 564 :

? otherwise there would be an undue curtailment of commercial adventure and enterprise, which is the very life, so to say of a hereditary trading family.

11. The following passage at page 384 sums up the position :-

It is however not unreasonable to distinguish between a family whose hereditary

avocation or Kulachara or commerce and a non-trading family. In the latter case, of course, the starting of a new business cannot be within the powers either of a father or other managing member. In the former case, the usage of the family must be held to modify the ordinary rule relating to the joint family so as to empower the managing member to start a new business either in place of the old or in addition to it. Hindu law does certainly recognize the usages of a trading family. And the distinction in the case of such families between an ancestral and a new business appears, so far as the risk and liability are concerned, to be more formal than substantial. An inherited business may involve quite as much risk as a new business and apparently there is no duty on the part of a manager to close down an ancestral business notwithstanding its evident risk. The element of risk, incident in varying degree to all kinds of trade or business, is necessarily assumed by trading families.

12. In a recent decision of this Court in *Kumbakonam Bank v. Shanmugham* ILR (1956) Mad. 430, this view has been adopted. Govinda Menon, J., said :

In my view a distinction has to be drawn between families which thrive and depend solely and purely upon agriculture or the learned professions and those whose members are totally devoted to the calling of trade or commerce. In the latter case it cannot be said that if one of the members starts a business, his sons cannot be made liable for the debts incurred by their father. It may be that a member of a moneylending family may embark upon a different kind of commercial transaction, for example, the starting of a spinning and weaving mill or some other industrial concern. Can it be said that if he starts such a business with family funds his sons will not be liable for the debts incurred by him? I am of the opinion that it is not right to extend the principles laid down in the *Benares Bank's Case* I.L.R (1932) All. 564 which dealt with a non-trading family to trading families.

We are also inclined to take the same view; but in this case it is sufficient to rest our decision on the ground that a business started by the sole surviving coparcener with joint family funds and subjecting the joint family property to the risks and liabilities of such business should be considered to be joint family business in the profits of which a subsequent born son would be entitled to a right by birth and to the liabilities incurred in which he would be subject. The second Defendant cannot, therefore, question the alienation in favour of the Plaintiff-bank. The appeal is, therefore, dismissed. But in the circumstances there will be no order as to costs. The Appellant will pay to the Government the Court-fee due on the memorandum of appeal.