

(1941) 01 AHC CK 0010
In the Allahabad High Court

Seth Babu Lal

APPELLANT

Vs

Babu Lal and Others

RESPONDENT

Date of Decision : 14-01-1941

Acts Referred:

Citation : AIR 1941 All 194

Hon'ble Judges : Bajpai, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Bajpai, J.—This appeal arises out of a suit to enforce two simple mortgages dated 6th May 1929 and 27th June 1929 executed, by two Hindu brothers, Babu Lal and Kashi Prasad in favour of Seth Ram Chandra for Rs. 7000 and for Rs. 600 respectively. The mortgagee Seth Ram Chandra being dead, his son Pearey Lal instituted a suit for recovery of Rs. 13,662 on the basis of the said two mortgages, after making adjustments of certain payments made by the mortgagors. To this suit he made originally his mortgagors as the defendants; but later on four minors, sons of the mortgagors, applied to be made and were made defendants and the main contest in the suit had been between the mortgagee and the sons of the mortgagors. The property mortgaged under the mortgages were 12 shops and houses in the city of Banda and these were ancestral properties of the mortgagors. The purpose for which the loan was raised was Rs. 1827 for payment of an antecedent debt and the rest of the loan "for purchasing grain at the time of harvest for grain business." According to the plaintiff the mortgagors were in the habit of purchasing grain and grain-pits at the time of harvest when rates were low and selling the commodity later in the season when rates went high and this business had come down to the mortgagors from the time of their father and was continued by them. The plaintiff alleges that money under mortgages was borrowed to finance an ancestral or joint family business of the mortgagors and even if in fact such a business did not exist a representation was made to him at the time of the

mortgage that it existed and the mortgagee honestly believed in it and advanced money on the basis of the statement. The mortgages are therefore binding upon the entire family including the minor sons of the mortgagors. It is further alleged that the mortgages were made by two managers of the joint family in the interest of the joint family and for the benefit of the family and of the estate, and on that ground also they are binding upon the defendants.

2. The defendants on the other hand contend that the mortgagors were given to gambling and the plaintiff was one of their associates and the money was advanced under mortgages for the purposes of gambling. The trial Court has found that a sum of Rs. 1827 out of the total mortgage consideration was for payment of a valid antecedent debt of the mortgagors and the remaining consideration of the mortgages was a loan taken for the purposes of grain business. But the grain business was a separate business of the mortgagors and was not their ancestral or joint family business. It has further found that the mortgagee rested on his own personal knowledge and made no enquiries as regards the ancestral or joint family character of the business and that the mortgages were not justified by legal necessity or family benefit. It accordingly granted a decree to the plaintiff for a sum of Rs. 1827 and its interest, in all for Rs. 3177 and dismissed the rest of the claim. The defendants have submitted to the decree, but the plaintiff has made this appeal against the said judgment and decree.

3. The mortgagors Babu Lal and Kashi Prasad are Tamolis (betel-sellers) by caste. But it is in evidence that for years now they have not followed their caste profession. They and their father Nand Ram and their grandfather Sheo Gharan owned and possessed certain amount of house property which brought the family some income which varied from time to time. This family income has been variously estimated by the witnesses at the trial. But about the time when the mortgages were made, it could not be less than Rs. 60 per mensem. Whether the family property was the sole means of livelihood of the family or whether the family followed some other occupation and had some other income is a matter of controversy to the case. In the year 1918, Nand Ram, the father of the mortgagors, entered into a purchase and sale transaction relating to a grain pit through a firm of commission agents at Banda by the name of Mool Chand Brij Behari of the value of Rupees 7596-4-0. Again, in 1920 Nand Ram entered into a second transaction of purchase and sale of a grain pit through a firm of commission agents at Banda by the name of Mool Chand Ram Prasad of the value of Rs. 3991-2-3. In or about 1920, Nand Ram died leaving two sons Babu Lal and Kashi Prasad, the mortgagors, the former aged about 19 and the latter about 15. Between 1920 and 1924, there is no evidence that any more grain pits were purchased by the mortgagors or by the family or any fresh grain business was done by them or on their behalf. In the years 1924-25 the elder of the two mortgagors, namely Babu Lal, borrowed a sum of Rs. 2300 from the plaintiff. This money was partly borrowed on the pledge of ornaments and partly on a promissory note. Between 1925 and 1930 both the mortgagors borrowed various

sums of money from the plaintiff. Some of these borrowings were on the basis of promissory notes, some on pledge of ornaments and others on the basis of mortgage bonds, two of which are the subject-matter of the present suit. In 1928 the mortgagors purchased and sold a grain pit through the firm of Lakhichand Babulal of the value of Rs. 2694 and in the same year they entered into another abortive transaction of two grain pits through the firm of Moolchand Brijbihari which led to a dispute which was finally settled by arbitration, as a result of which all parties including the mortgagors had to suffer some small loss. In 1930 the mortgagors entered into a fresh transaction relating to a grain pit through the firm of Deokarandas Gulraj of the value of Rs. 2593-14-6 and in the same year they entered into another transaction through the firm of Moolchand Ram Prasad of the value of Rs. 168-10-6.

4. Between 1924 and 1930, undoubtedly, money was borrowed by the mortgagors from time to time on pledge of ornaments and on promissory notes and lastly on mortgages. What did they do with this money? The plaintiff's statement is and he is supported, in this by one or two witnesses that money was borrowed for the purposes of grain business which the mortgagors used to carry on. The two mortgagors have not denied this statement on oath. They have not produced their account books and it is manifest that they are supporting the claim of their minor sons and have put them up to contest this claim. Mr. Banerji strongly contends that every presumption should be made against the defendants and we should accept the statement of the plaintiff to the effect that the mortgagors were carrying on grain business between 1924 and 1927 and money borrowed from the plaintiff was for investing in the grain business. We have given due weight to this contention. But the fact remains that if in fact grain-pits were purchased between 1924 and 1927 they must have been purchased through some firm of commission agents and their books must have been available to substantiate the point. In the absence of such accounts and any other document or reliable evidence in the ease, it is not possible to hold that between 1924 and 1927 any grain business was done by the mortgagors or any money borrowed from the plaintiff was invested in that business. The situation however is slightly different between 1928 and 1930. During that time grain business was being done by the mortgagors and they were also reconstructing their houses and shops which according to defendants' own witnesses cost over a thousand rupees. It is therefore probable that some portion of the mortgage money may have been utilized for grain business and for the construction of the houses.

5. The reliable evidence however in the ease goes no further than this, that in 1918 and 1920 Nand Ram, the father of the mortgagors, purchased two grain pits and in 1928 and in 1930 the mortgagors themselves purchased certain grain pits and between 1924 and 1930 they borrowed certain sums of money from the plaintiff on pledge of ornaments and on promissory notes and afterwards on mortgages and in the mortgages in suit it was recited that money was required for purchasing grain at the time of harvest for grain business. In this state of

evidence, it is not possible to hold that any regular business in grain was carried on by Nand Ram which came by succession to his two sons and which may be regarded as ancestral business of the family or that the business carried on by the two sons of Nand Ram was a joint family business of any sufficiently long standing and definiteness before the mortgages in suit were made. Money was no doubt borrowed from the plaintiff on a representation that it was required for grain business. But, in fact, there was no ancestral grain business nor joint family business of that kind. The mortgagee according to his own evidence did not make any enquiries as to the existence of the business, its nature and requirements. He states:

The business for which Rs. 7000 were required was storing of grain in pits which was to be sold later on. I believe the plaintiff and no doubt arose in my mind as to the existence of the necessity. I therefore made no enquiries as to the existence of the necessity represented by defendants 1 and 2 (namely the mortgagors) and I agreed to advance the amount requested for.

6. It is not therefore possible to afford to the mortgagee in this suit the protection which law allows to a lender who advances money on a representation of necessity for loan after making bona fide enquiries as to the existence of the necessity. There remains now the question of the transaction being for the benefit of the family and of the family estate. The two mortgagors were the only adult members of the family and they were its managers. The family belongs to a trading caste. Their father who had died a few years back had engaged himself in transactions of purchasing grain pits and this is a kind of business which is well known and is often carried on in the part of the country to which the mortgagors belong and ordinarily it does not involve any great risk and speculation. The mortgagors had married and had a growing family and the income from family property was small and fixed. It would be a natural desire in persons situated as the mortgagors were to supplement the family income by trade in grain. We have no doubt whatever that they acted in good faith in raising the loan and so did the mortgagee in advancing the money. Mr. Banerji in his able arguments has strongly pressed upon us that it is open to a Hindu father in circumstances like the present, to augment the family income by entering in trade and to raise loans on family property for financing the trade. According to him this is a transaction which any prudent manager could and might have made and it should be regarded for the benefit of the family and of the estate. This raises the vexed question as to what is the meaning of the phrase "benefit of the estate", as this expression is used and is understood in Hindu law. The famous text of Brihaspati quoted by Vijñanesvara in chap, 1, Section 1, verse 28 of the Mitakshara and which is the foundation of the law on the subject is as follows:

Even a single individual may conclude a donation, mortgage, or sale, of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes.

7. Vijñanesvara's commentary on this passage set out in verse 29 of chapter 1,

Section 1 of the Mitakshara is as follows:

The meaning of that text is this, while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers are so and continue unseparated; even one person, who is capable, may conclude a gift, hypothecation, or sale, of immovable property, if a calamity affecting the whole family requires it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable.

8. The original word "for the sake of the family" in verse 28 of Mitakshara is "kutumbarthe." As to this word Shah J. said in a Bombay case, Nagindas Maneklal v. Mahomed Yusuf ("22) 9 AIR 1922 Bom. 122 at p. 316 that it must be interpreted with due regard to the conditions of modern life. In a later case in Bombay, Ragho v. Zaga Ekoba ("29) 16 AIR 1929 Bom. 251 at p. 426, Patkar J. said:

The explanation of the text by Vrihaspati of Mitakshara in verse 29 is by no means to be considered as exhaustive and may be treated as illustrative and interpreted with due regard to the conditions of modern life.

9. In the Full Bench case in Ramnath v. Chiranji Lal ("35) 22 AIR 1935 All. 211 at p. 624, Sir John Thorn in his judgment observed as follows:

There is ample authority, not only in the original text but in the decisions of the Privy Council and of this Court, for the proposition that where the starting of a new business is a prudent step taken by the manager of the family for the benefit of the family, a loan taken for this purpose or for the carrying on of the new business, is a valid loan and is binding upon the minor members of the family. Indeed it would be most unfortunate if the law were otherwise. In the present economic and social state of the development of this country it must often be absolutely necessary in the interest of the joint Hindu family and for the purpose of conserving the estate of that family not only to discontinue an old ancestral business but to embark upon a new business, and for that purpose to negotiate loans.

10. The Patna High Court in a recent decision, Chhotey Lal Chaudhury and Another Vs. Dalip Narain Sing and Another, , have followed two earlier decisions of their Court with the following observations:

Dhavle J. held that the power of the manager of a joint Hindu family to enter into transactions for the support of the family is to be judged (when in exercise of such power the family property is charged or alienated by the manager) by the consideration whether that transaction was one into which a prudent owner would enter. In that case the manager of a Teli family executed a mortgage bond to provide funds for starting a grocery shop to supplement the income of the family which was not in a flourishing condition. It was held that a grocer's shop was neither a luxury nor a speculative transaction and that the mortgage was

binding on all the members of the family. AIR 1932 182 (Privy Council) was referred to. The second case, Lalji Singh v. Muchkund Singh ("34) 21 AIR 1934 Pat. 699 is a decision of a Division Bench. The facts in that case were that a mortgage had been executed to raise money partly for the payment of a previous debt and partly for the purchase of 41/2 bighas of land situated about a mile and half from the residence of the mortgagor's family. The suit on the mortgage was contested on the ground that there was no legal necessity for the loan. In delivering the judgment of the High Court, Mohammad Noor J. observed:

What was required to be done by the mortgagees was a reasonable and honest enquiry that the purchase was being made for the benefit of the family. I have said that the usual livelihood of the family was cultivation. Augmenting the means of livelihood, unless speculative or risky, must be taken to be beneficial to the family.

11. The view of the Lahore High Court in regard to this matter as expressed in a recent judgment, Prabh Dayal v. Basant Lal ("38) 25 AIR 1938 Lah. 622 at p. 622, is as follows:

....when the business of joint Hindu family to finance which money has been borrowed is a new business and not an ancestral business, the sons are not liable for the payment of the loan contracted by the father for that business, unless the transaction was for the benefit of the family or to the benefit of the estate or it was supported by legal necessity.

There is a conflict of authority as to the exact interpretation of the words "benefit of the estate." In some cases it has been held, on the basis of the remarks of their Lordships of the Privy Council in Palaniappa Chetty v. Devasikamony Pandara Sannadhi ("17) 4 AIR 1917 P.C. 33, that the benefit must be of a defensive character, while in others it has been held that it need not be so restricted : of. Jagat Narain and Another Vs. Mathura Das and Others , Ragho v. Zaga Ekoba ("29) 16 AIR 1929 Bom. 251 and Sellappa Chettiar and Others Vs. Suppan Chettiar and Others, .

12. In the Full Bench case in Ramnath v. Chiranjilal ("35) 22 AIR 1935 All. 211 at p. 619 Sir Shah Sulaiman has stated the law in the following words:

It seems to follow that the question whether the particular transaction in dispute was for legal necessity or was for the benefit of the estate and the joint family, is something more than the mere question whether the money borrowed was required for the purposes of a new business. The fact that it was required for a new business would not be any justification. If in addition thereto, it could be shown that there was either a pressure of necessity to continue that business, as it was the mainstay of the family or that the particular transaction was at the time beneficial to the family and the family estate, the transaction would be supported but, of course, on the latter ground. The question whether the transaction was for such benefit or not is a question of fact depending on the circumstances of the case, and it is for the Court to decide whether it was so

beneficial and was such" as an ordinary prudent manager would have entered into in the interest of the family.

And in a recent judgment of the Madras High Court, V.K. Nataraja Iyer and Others Vs. S.L. Lakshman Iyer and Others, , Varadachariar J. observed as follows:

It must be remembered that when the family character of the business is put aside and the transaction is sought to be justified on the ground of necessity, no difference can turn on the fact that the debts are incurred by the father and not by any other manager. The proof must therefore amount to proof of necessity in the sense ordinarily known to the Hindu law.

13. And further on:

Further, when considering the question whether moneys required in connexion with such a business can be said to be moneys required for "family necessity," the learned Judges suggest that necessity need not be restricted to transactions of a purely "defensive nature." There is some conflict of opinion on this point, but for the purpose of this Base it seems to us unnecessary to canvass that question, because even assuming that a category of "benefit" may be recognized in this connexion apart from "necessity" in the ordinary sense, the oases referring to such benefit also recognize that the benefit must at least be certain and the business free from any risk or danger.

14. And again:

Assuming that defendant 1 was actuated by the motive of increasing the family income by adding to it the profits derived from the business, we do not think a family manager who is in charge of the estate of junior members, all of whom are minors, is either obliged to adopt or is justified in adopting a course of this kind with a view to give them more comfort than the normal income of the family properties would make possible.

15. There has been a divergence of judicial opinion as to the meaning of the expression "benefit of the estate," as it is used in Hindu Jaw, some of which is also reflected in the passages quoted above. But there is a general agreement as to the powers of a manager of a joint Hindu family whether he be a father or some other coparcener with regard to starting of a new business and borrowing money to finance it, by alienating family property. In each case the transaction has to be justified By legal necessity or by family benefit and benefit of the estate and in this respect there is no difference between the powers of a father and of any other coparcener and before any transaction can be characterized as for the benefit of the family and of the estate, it must pass through certain tests and these are that the transaction must be such as a prudent manager and not a prudent owner would enter into in the interest of the family and for the benefit of the estate and is either necessary for its good management or is necessary in the general interest of the family. Whether a particular transaction does or does not satisfy these tests, is a question of fact to be determined upon the

circumstances and evidence in each case. It cannot be said as a matter of Hindu law that it is not open to a manager of a Hindu joint family to start a new trade for the purpose of augmenting or supplementing the family income, nor can it be said that he cannot borrow money by alienating family property to start such a business. Indeed in some cases there may be compelling necessity to take such a course and even when there is no compelling necessity, circumstances may exist which may render it prudent to adopt such a course and the adoption of such course may be for the benefit of the estate or of the family. But in the latter case benefit must be practically certain and the proposed business free from any real risk or danger.

16. It is not possible in this case to say that the transaction made by the mortgagors was a prudent one and was for the benefit of the estate or of the family. The mortgagors were two young men with no previous experience of business. It is not clear whether the previous transaction in grain business which the mortgagors had made had resulted in profit or loss. A mortgage of the entire family property by raising a loan of Rs. 7600 carrying heavy interest for investing in a grain business which may or may not turn out to be profitable, cannot be regarded as a prudent transaction free from risk and danger which would entitle the mortgagors to make a mortgage of the family property. Actual result of a transaction is not a decisive factor to determine whether the transaction when it was made was a prudent one or not. But the fact that no definite sum out of the money raised by mortgages could be shown to have been invested in grain business and the further fact that there is no evidence to show whether the purchase of grain-pit which was made by the mortgagors in 1930 after the mortgages resulted in a loss or in a profit and the further fact that after 1930 there is no evidence that they carried on any more business in grain, are matters which cannot be disregarded and lend colour to the contention that the mortgagors were inexperienced young men who with a view to embark on a business of a speculative nature and partly for other purposes which have not been disclosed to us raised the loan covered by the mortgages and in this view of the matter it is not possible to uphold the transaction as binding on the family on the ground of family benefit. The appeal, therefore, fails and is dismissed with costs.