

(1938) 10 BOM CK 0009

In the Bombay High Court

Case No : Cross First Appeals No's. 149 and 222 of 1936

Shanmukhappa Gurulingappa

APPELLANT

Vs

Rudrappa Golappa Malli
 Rudrappa Golappa Malli Vs
Gurulingappa Gurabba Malli

RESPONDENT

Date of Decision : 13-10-1938

Acts Referred:

Trusts Act, 1882 — Section 81

Citation : AIR 1939 Bom 266 : (1939) 41 BOMLR 223

Hon'ble Judges : Macklin, J;Broomfield, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Broomfield, J.—These are cross-appeals in a suit .for partition and possession of a half share in the suit properties. There was a Hindu joint family consisting of Rudrappa and his two sons Shiddappa and Gurappa. Shiddappa had no son. Gurappa had sons Golappa and Gurulingappa. Shiddappa adopted Golappa as his son. Soon after this adoption he died. Golappa the adopted son died in 1908 and soon after that Gurappa died. From 1908 to 1929 Gurulingappa, defendant No. 1 in the suit, his mother Channavva and Golappa's widow Iravva defendant No. 7 lived together as a joint family. The plaintiff was adopted by Golappa's widow in 1929. Defendant No. 1 while he was the sole surviving coparcener alienated a number of the family properties, some to his wife Ningavva defendant No. 8, some to the other defendants in the suit. After the adoption of the plaintiff he alienated other properties in satisfaction of debts previously incurred by him. This suit was brought to recover a half share in all the properties.

2. The trial Court held that the alienation in favour of defendant No. 2, which was prior to the adoption, was valid and binding on the plaintiff. The alienations to defendants Nos. 3 and 4 were subsequent to plaintiff's adoption but they also were held valid because they were made to satisfy a mortgage which was prior to it. The alienation in favour of defendant No. 5 was held binding as it arose

from a debt contracted prior to the adoption and that in favour of defendant No. 6 was upheld because it was held to be in respect of a debt incurred for the family business. On the other hand the alienation in favour of defendant No. 8, which was prior to the adoption of plaintiff, was held not binding, the learned trial Judge apparently taking the view that the transaction was not intended to take effect as a gift. The alienation to defendant No. 9 was prior to the adoption and held binding. The alienation to defendant No. 11 was subsequent to the adoption but nevertheless held binding by the trial Court for reasons similar to those on which the decision in defendant No. 5's favour was based.

3. Plaintiff in his appeal, First Appeal No. 222, has challenged only the findings in respect of the alienations to defendants Nos. 5, 6 and 11. Defendant No. 8 in her appeal, First Appeal No. 149, has challenged the finding that the alienation to her does not bind the plaintiff.

4. The case raises some novel and difficult questions of Hindu law. The position could not have arisen prior to the decision of the Privy Council in *Bhimabai v. Gurunathgouda Khandappagouda* (1932) L.R. 60 IndAp 25 : 35 Bom. L.R. 200, because according to the view of the law accepted before that case, the adoption of the plaintiff would not have been valid. This case, therefore, falls to be decided mainly on first principles.

5. It is well settled that a sole surviving coparcener is entitled to dispose of the coparcenary property as if it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it. If a son is subsequently born to him or adopted by him, the alienation, whether it be by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations made by his father before he was born or begotten.

6. The alienations which took place prior to the plaintiff's adoption are not now challenged in the appeal. But it is contended on plaintiff's behalf that on his adoption he obtained a coparcenary interest in all the properties. Defendant No. 1 had no longer an unfettered right to deal with them and he became simply an individual coparcener and could not alienate more than his own share. It is further argued that on the assumption that he could be regarded as manager of the family after plaintiff's adoption, the alienees are bound to prove necessity for the alienations, or at least that they made a proper inquiry as to the existence of necessity, and that no such necessity or inquiry has been proved in the present case.

7. Mr. Manerikar who appeared for the alienees, defendants Nos. 5 and 11, put his argument in this form. He said that although defendant No. 1 was the sole surviving coparcener, the joint family was not extinct and the property must be regarded as being all the time coparcenary property. After the plaintiff's adoption, according to him, defendant No. 1 became automatically the manager of the family; and apart from that he contended that the power to alienate possessed by the sole surviving coparcener includes the power to incur debts

which will bind the estate.

8. As regards the first proposition, the property was coparcenary property before the plaintiff's adoption in the sense that defendant No. 1's interest in it was liable to be diminished by the adoption of a son by him or by Golappa's widow. But that does not carry us very far. As to the second proposition, defendant No. 1 was not necessarily the manager of the family. That must depend on the circumstances of the case; and of course the manager can only alienate for family purposes. Mr. Manerikar's third proposition, if it means that any debts incurred will bind the estate, is in my opinion not sound. As the property was in a sense coparcenary property, it is probably true to say that debts contracted for necessary purposes and for the benefit of the family would bind the estate. But the fact that the sole surviving coparcener can alienate the properties at a time when he is solely entitled can hardly justify the conclusion that he can alienate them when he has ceased to be solely entitled in satisfaction of his private debts. It seems to be opposed not only to Hindu law but to all principles of law and equity that a man should be able to sell what does not belong to him in satisfaction of obligations incurred by himself alone for his own purposes.

9. Mr. Jathar who appeared for the alienee, defendant No. 6, urged that in view of the evidence as to the state of the family it may be assumed that the debts, were incurred for family purposes. That aspect of the case I will deal with separately. His further argument was that it is not necessary to prove that the debts were of that kind. When the plaintiff came into the family by adoption, he became entitled to his share of the assets but also became liable for his share of the liabilities of the family. If there is a debt which is binding on the estate represented by defendant No. 1, it is not necessary to prove legal necessity, and it was even contended that under the circumstances of this case defendant No. 1's personal debts for whatever purpose contracted, provided they were not immoral or illegal, are binding on the family. Mr. Jathar said in fact that there is no basis for any distinction between personal debts and individual debts in the case of a sole surviving coparcener and that a business started by a sole surviving coparcener must be regarded as a family business in which a subsequent adoptee becomes a partner.

10. I find myself unable to accept these arguments. The proposition that an adopted son must take his share of the liabilities of the family is sound, but it begs the question. It is not correct to say that plaintiff in a case like this would necessarily become entitled to the assets of defendant No. 1. Any coparcener may have separate acquisitions, a separate business and private debts. The position of a sole surviving coparcener is the same in that respect. On this particular point there happens to be a direct authority in *Periakaruppan Chetty v. Arunachalam Chetty* ILR (1926) Mad. 582. That was a case where a Hindu, who had no coparceners, built a house out of his self-acquisitions on an ancestral site of little value. Subsequently he adopted a son with whom he lived in the house, A creditor of the son claimed a share in the house, but it was held that the father

was solely entitled to the superstructure and to a half of the site and the son's creditor was entitled to attach and sell the son's half share only in the site and not the superstructure. Defendant No. 1 in this case had a ginning factory. If that business had prospered, the plaintiff it appears could not have claimed any share. That being so, there is no reason why he should be subject to all the liabilities incurred by defendant No. 1, for instance, liabilities arising out of a new business. There is no analogy with the case of a son and no question here of any pious obligation on plaintiff's part to pay the debts of defendant No. 1.

11. There is no reason that I can see why the case should differ from the ordinary one where there are several coparceners. It is obvious that if defendant No. 1 had had another brother and the two of them had conducted a private business, having nothing to do with the family property, the after adopted son of a deceased coparcener would not have been liable. I can see no principle on which a case like the present can be decided, except this, that when a sole surviving coparcener contracts debts but does not alienate the family property to pay them or create any charge on the property in respect of them, the question whether the debts are binding on a coparcener who subsequently comes into the family (he not being a son of the sole surviving coparcener and not therefore under a pious obligation to pay them) must depend simply on whether they would have bound him if he had been a member of the family when they were contracted. That is to say, when an alienation takes place after the family has once again become a coparcenary in the true sense, legal necessity or family benefit or bona fide inquiry into these matters must be proved in the ordinary way, and in the absence of such proof the new coparcener's share will not be bound.

12. In the case of the alienations to defendant No. 11, a point is made of the fact that a decree was obtained against defendant No. 1 after the date of plaintiff's adoption. Defendant No. 1 borrowed Rs. 700 from one Virappa on a promissory note in 1927. After the adoption Virappa sued defendant No. 1 and got a decree which was assigned to defendant No. 11. One of the properties claimed in the present suit was attached and ultimately has been sold by auction and purchased by defendant No. 11. It has been argued that the decree against defendant No. 1 binds the plaintiff and that therefore the purchase by defendant No. 11 also binds him. But why should this be so? No doubt there may be cases as for instance *Kishen Parshad v. Har Narain Singh* (1910) L.R. 38 IndAp 45 : 13 Bom. L.R. 359, AIR 1914 136 (Privy Council) and *Lingangowda v. Basangowda* (1927) L.R. 54 IndAp 122 : S.C. 29 Bom. L.R. 848 where the manager represents the whole family in litigation and a decree against him binds the whole family even though he has not been expressly sued as a manager. But whether the manager can properly be said to represent the family depends on the circumstances of the case, and when, as here, it is a matter of dispute both whether defendant No. 1 was in any real sense the manager of the family and whether the transactions which led to the litigation had anything to do with the family at all, I do not see how it can possibly be held that the decree against defendant No. 1 concludes

the matter against the plaintiff. He was an adult, about twenty-four, at the time of the adoption. He says he never lived with defendant No. 1 and there is no evidence that he did, and no evidence of any relations between him and defendant No. 1 from which his consent to the decree against the latter could possibly be inferred, In my view the decree and the Court sale are binding on the plaintiff if the debt of defendant No. 1 is binding on him, but not otherwise.

13. In the case of all three alienations therefore the question is whether they can be justified on the ground of legal necessity or benefit to the family or on the ground that proper inquiry was made by the alienees. Before dealing with the particular alienations, I may refer briefly to the evidence such as it is as to the position of the family and the nature of defendant No. 1's activities. Plaintiff, who is not of course a disinterested witness, says that defendant No. 1 had an income of Rs. 4,000 or Rs. 5,000 a year, was not leading a good life, used to keep prostitutes and started a ginning factory and a dramatic company. The ginning factory was not a big concern, it resulted in losses, and latterly defendant No. 1 had a flour mill from which he maintained himself. The plaintiff's father Ningappa says that defendant No. 1 used to keep women and wasted his money. He started a "drama" and also had a ginning factory. This witness obviously knows very little about the matter. Plaintiff's adoptive mother Iravva merely says that defendant No. 1 had a ginning factory but did not trade in cotton otherwise. These are the plaintiff's witnesses and they are not worth very much. But the burden of proof, as I take it, is on the alienees, and it is noteworthy that it does not seem to have been even suggested to these witnesses that the ginning factory was a family business or that the liabilities incurred by defendant No. 1 had anything to do with the family needs.

14. Defendant No. 2 in his evidence says that defendant No. 1 sold his property to pay off debts incurred through losses in the cotton trade, ginning factory and home farm. But he has admitted that he does not know to whom defendant No. 1 actually owed the debts or how the money which defendant No. 1 received from him was utilised. The evidence of defendants Nos. 3 and 4, witness Premchand Marwadi and witness Basappa proves that defendant No. 1 had mortgaged some of his lands for Rs. 10,000 and also borrowed money from defendant No. 4 and that he paid off these debts by selling lands to defendants Nos. 3 and 4. The mortgage took place before plaintiff's adoption and these alienations are admittedly binding on him. This evidence is relied upon as showing indirectly that defendant No. 1 was in embarrassed circumstances and therefore under the necessity of borrowing even for the needs of the joint family. But no such conclusion is justified by what the witnesses say. Defendant No. 3 merely says that defendant No. 1 had a big business and many debts. Premchand, from whose firm Rs. 10,000 were borrowed, apparently knows nothing and at any rate says nothing about the purpose of the loan. Defendant No. 4 says vaguely that defendant No. 1 borrowed from him for household difficulties and that he had a home farm and trade and a ginning factory. Basappa says that defendant No. 1's income was Rs. 3,000 or Rs. 4,000, that

there was no debt in his father's time and that defendant No. 1 incurred debts owing to losses in the home farm and trade and ginning factory. It appears, however, that he has no personal knowledge of these matters and he does not know if there was any trade in the time of defendant No. 1's father. It would be impossible to hold on this evidence either that there was any family business-the ginning factory and the cotton trade appear to have been private speculations of defendant No. 1 himself-or that apart from business losses and possible extravagance there would have been any necessity to incur debts for the purposes of a joint family consisting only of defendant No. 1 and his wife and two other women.

15. We may look now at the facts connected with the three alienations which are in dispute. Defendant No. 1 borrowed Rs. 4,600 from one Vaidya in June, 1927, on a promissory note. In June, 1930, Vaidya filed a suit and got some property attached. Defendant No. 1 then mortgaged some of his land to defendant No. 5 for Rs. 2,500 and paid off Vaidya. But he could not repay defendant No. 5 and in January, 1931, he sold to him one of the suit lands for Rs. 5,000, of which Rs. 2,200 were in cash. Vaidya's son Gurunath has been examined. He proves the debt and the satisfaction of it and that is all. The plaint in Vaidya's suit, exhibit 172, says nothing about the purpose of the loan. In the sale-deed to defendant No. 5, exhibit 169, the only relevant recital is that the sum of Rs. 2,200 in cash was taken "to pay off debts of others". Defendant No. 5 merely says that defendant No. 1 wanted the money which he lent on mortgage to pay off Vaidya, that he pressed defendant No. 1 for the payment of the mortgage debt and that defendant No. 1 wanted Rs. 2,200 for household difficulties, the nature of which he does not know. He admits that he did not inquire how many lands defendant No. 1 had or what his income was, and it does not appear that he made any inquiries at all. The Judge says it was quite prudent on the part of defendant No. 1 to satisfy Vaidya's debt by borrowing money elsewhere and that the suit sale to defendant No. 5 was necessary and binding on the plaintiff. These transactions may or may not have been prudent and necessary from defendant No. 1's point of view. He had got himself into such difficulties that he may very probably have seen no alternative. But they cannot be said to be binding on the plaintiff except on what seems to me the untenable hypothesis that any debts whatever contracted by defendant No. 1 would be binding upon him.

16. The sale-deed to defendant No. 6, dated February 15, 1930, purported to be for a consideration of Rs. 10,000. It recited that defendant No. 1 owed Rs. 5,200 to Virbhadrappa Shivappa and Rs. 2,800 to Virbhadrappa Kasyappa and that Rs. 2,000 were taken in cash for petty debts. Defendant No. 6's son who has been examined deposes that the two creditors were paid off and produces a receipt signed by one of them. The Judge says that the debts were incurred for articles required for running the ginning factory. I can see no evidence of this. Defendant No. 6's son does not say so, nor is there any recital to that effect either in the sale-deed or the receipt. Moreover there is no evidence that the ginning factory was a family business.

17. I have already mentioned the circumstances which led to the alienation to defendant No. 11 and expressed the opinion that the decree in execution of which defendant No. 11 purchased is binding on plaintiff if and only if the original debt of Virappa was binding upon him. There is no evidence whatever as to the purpose for which this money was borrowed by defendant No. 1. The only reason given by the trial Judge for holding this alienation binding on the plaintiffs is that the debt was prior to the adoption.

18. Applying the principle which seems to me to govern the case, viz., that the alienations in favour of defendants Nos. 5, 6 and 11 affect the plaintiff's interest in the properties only if the debts to satisfy which they were made would have been binding upon him if he had been a member of the family at the time when they were contracted, I think the only possible conclusion is that his undivided half share in the property is not affected by any of them. There is no evidence to justify the conclusion that the debts in question were incurred for family necessity or family benefit or that either the persons lending the money or the alienees made any inquiry in that connection.

19. I hold, therefore, that plaintiff succeeds in his appeal as against defendants Nos. 5, 6 and 11.

20. There was a subsidiary point raised as to costs. Costs have been awarded to each successful defendant on the aggregate value of all the properties. It is argued that they should have been calculated according to the interest of each defendant in the properties. But on this point *Laxman Waman Gadre Vs. Saraswati Ganesh Gadre*, is against the appellant, and I think the trial Court is right.

21. Then as to the appeal by defendant No. 8, defendant No. 1 by a registered deed of gift dated August 17, 1929, transferred two fields and two houses to defendant No. 8 his second wife. The deed recites that it was in consequence of an agreement made at the time of the marriage. As this alienation was prior to the adoption, it is *prima facie* valid and binding on the plaintiff. But the trial Judge apparently doubted whether there was any intention to make a gift at all, and learned Counsel for the plaintiff, who naturally supports this view, argues that the case is governed by Section 81 of the Indian Trusts Act. But it is difficult to see what there is in the attendant circumstances which is inconsistent with an intention on defendant No. 1's part to dispose of the beneficial interest in these properties. It appears that defendant No. 8 got possession of the lands which were duly transferred to her name in the Record of Rights. The plaint itself recites that they are in her possession. There has been no visible change in the possession of the houses, but as defendant No. 8 is living with her husband that is only to be expected. There is nothing in the pleadings or the evidence to support the hypothesis that this was a benami transaction, and ill. (d) to Section 81 of the Indian Trusts Act is against the appellant's argument. I think defendant No. 8's appeal also must succeed.

22. The result is that both appeals will be allowed. The plaintiff will get his costs in proportion to the claim which has been allowed in both Courts from defendants Nos. 5, 6 and 11 and will pay the costs of defendants Nos. 2, 3, 4 and 9 in both Courts, one set for defendants Nos 2, 3 and 4 and one set for defendant No. 9. Defendant No. 8 will get her costs throughout. The decretal order of the trial Court will be modified by substituting the words "defendants Nos. 2, 3, 4, 8 and 9" for the words "defendants Nos. 2, 3, 4, 5, 6, 9 and 11" in the first sentence thereof. The inquiry as to mesne profits directed by the trial Court will be in respect of mesne profits from the date of suit till recovery of possession or three years from the date of this decree, whichever event first occurs.