(1921) 11 MAD CK 0009

In the Madras High Court

Case No : Appeal No. 254 of 1920

Tadibulli Tammireddi and Another APPELLANT

Vs

Tadibulli Gangireddi RESPONDENT

Date of Decision : 30-11-1921

Acts Referred:

Citation : (1921) 11 MAD CK 0009

Hon'ble Judges : Spencer, J;Kumaraswami Sastri, J

Bench : Division Bench

Advocate : T. Ranga Achariyar, P. Somasundaram and P. Satyanarayana, for the Appellant; S. Srinivasa Ayyangar, D. Appa Rao, A. Krishnaswami Ayyar and C. Rama Rao, for the Respondent

Judgement

1. This Appeal arises out of a suit for partition filed by the Respondent against the Appellants. One Gangi Reddi died in May 1917 leaving a

widow Subbamma (the third Defendant). He had two sons, Thammayya and Bulli Tammi Reddi, the first Defendant. The Plaintiff is the son of

Thammayya and the second Defendant is the son of the first Defendant. Plaintiffï¿½s father died in 1902. The Plaintiff who attained majority in

1916 lived with the first Defendant till about July 1919. The Subordinate Judge passed a decree for partition directing the first Defendant to

account for his management of the family properties from six months prior to the death of Gangi Reddi, i.e., from October 1916. He held that the

business in opium carried on by the first Defendant was his exclusive business and not joint family business, and that the Plaintiff was not bound to

bear any part of the loss incurred in that business. As regards the choultry founded by Gangi Reddi he held that there was no endowment in

respect of the usufructuary mortgage in favour of Gangi Reddi relating to

Chengondapalli Estate. He held that the first Defendant did not make out

his case that the jewels in his possession were his wife''s jewels. As regards the second Defendant and his sister, he allowed a sum of Rs. 2,000

and Rs. 1,000 mentioned in the will for the purpose of making jewels on the occasion of their marriages but did not fix the amount to be spent for

their marriages. The Appeal relates to the above points and it is contended for the Appellants that the decision of the Subordinate Judge is

incorrect. As regards the accountability of the first Defendant, the Subordinate Judge bases his decision on the ground that the first Defendant had

not been maintaining proper accounts for sometime prior to Gangi Reddi''s death and that the Plaintiff is consequently entitled to claim an account

from October 1916. The case for the Plaintiff as laid in the plaint is that the first Defendant with the object of defrauding the Plaintiff ""showed

differences in the accounts, reduced considerable amounts, and in order to deprive the Plaintiff of a share, he converted a considerable amount as

jewels worn by women and showed under stridhanam, and even though profit was derived in some transactions, he concealed the same and

showed heavy loss, concealed some account books and has been conducting himself in such a way as to cause loss to this Plaintiff in all ways,"" that

the first Defendant misappropriated the properties and that he has a right to demand the first Defendant to furnish an account from the year 1902

when his father died. The Subordinate Judge has found that the charge as regards the jewels has not been made out and that the first Defendant

was not guilty of secreting any accounts. He, however, is of opinion that proper accounts were not maintained. As regards the accounts, it is

admitted that the first Defendant filed a criminal complaint against one Subbarayudu on the 24th of April 1917 of misappropriation of a sum of

about Rs. 6,000. Exhibit R is the judgment of the Magistrate in that case. In connexion with that complaint a warrant was issued by the Magistrate

and the account books of the family were seized and taken to the Police Court. The books were not returned till about October 1918. The Plaintiff

filed his plaint in December 1918 and a commissioner was appointed who made an inventory of all the account books in the family. After the

seizure of the account books by the Police, the first Defendant did not open regular account books but, according to the evidence, he was making entries on loose sheets of paper which were subsequently entered in the account books, Exhibits III, IV and V, filed in the suit. Exhibit V is the

rough day book, Exhibit III is the fair day book and Exhibit IV is the ledger. These account books were not kept in the regular course of business

from day to day and so far as the proof of any of the entries in these books is concerned, it is clear that these account books cannot have the same

effect as account books kept from day to day in the regular course of business. The question, however, is whether the first Defendant''s not

keeping the books from day to day can be said to be such misconduct as would make him accountable during the period that the accounts run. It

is not shown that any of the entries in these account books are wrong or that there has been any suppression of entries, It is explained for the first

Appellant that he expected the books in the Magistrate''s Court to be returned soon, that he therefore thought he could continue the accounts in

those books when they were returned and that during the interval he did not open regular account books. We do not think the mere fact that

regular books were not kept would, in the absence of any evidence to show that the accounts now produced are false in any particular, render the

first Defendant accountable especially as the most serious charges made in the plaint as regards the suppression of account books, making of false

entries in the account books and misappropriation of jewels, have not been made out. It is now well settled that, when an account has to be taken

with a view to make a partition of joint family properties, the account is merely an inquiry into the existing assets and that the head of the family

cannot in general be called upon to defend the propriety of his past transactions of the family except in cases of fraud, misappropriation or gross

reckless waste. We need only refer to Balakrishna Iyer v. Muthusami Iyer I.L.R. (1909) Mad. 271, Narayan Bin Babaji v. Nathaji Durgaji ILR

(1904) 28 Bom. 201, Parmeshwar Dube v. Gobind Dube (1916) ILR Cal. 459, Bhowani Prasad Shaha v. Juggernath Shaha (1909) 9 C.L.J.

133, and Kodali Kristnayya and Others Vs. Kodali Guravayya and Others, . All that a coparcener seeking partition is entitled to is an account of

the properties which exist at the date of partition or at the date when, owing to a demand for partition, there has been a severance of Status and

accounts will have to be taken in. so far as they relate to the ascertainment of what the properties in existence are. The manager of a joint family being the accounting party has to file an account as to the properties available for partition but, as pointed out in Parmeshwar Dube v. Govind

Dube ILR (1916) Cal. 459, and Kodali Kristnayya and Others Vs. Kodali Guravayya and Others, , the other members of the family are not

bound to accept the statement of the manager as to what the properties consist of and the inquiry directed by the Court should be conducted in the

manner usually adopted to discover *what in fact the property consists of and not what the manager says it is. In such a case it is open to the

members of the family to show that expenditure which the manager says has been incurred has not been incurred or that the savings out of joint

family funds have not been entered in the accounts. We are therefore of opinion that the direction of the Subordinate Judge that the first Defendant

is to account for the management from October 1916 cannot be supported. The direction ought to be that the first Defendant should file an

account of the properties existing and available for partition at the date of the plaint, the Plaintiff being entitled to surcharge the accounts and to

show that items of expenditure said to have been incurred were not, as a matter of fact, incurred or were not incurred to the extent mentioned in

the accounts filed by the first Defendant, or that more properties are available for partition than those mentioned in first Defendant''s accounts.

2. As regards the opium business which the first Defendant carried on, it appears from the evidence that he entered into partnerships with those

who got licenses from Government to vend opium and that large amounts were spent by him for financing, the business. Gangireddi, the

grandfather of the Plaintiff, died in 1917 and the case for the Defendant and the evidence adduced by him is to the effect that, though he was bed-

ridden for about six months before his death, he was giving instructions for the management of the family affairs and that the first Defendant was

transacting business after informing Gangireddi and getting his directions. An attempt was made by the first Defendant to show that this opium

business which he carried on was carried on with the consent and under the directions of Gangireddi : but this evidence has been rightly discredited

by the Subordinate Judge. The evidence is that in 1901 and 1902 Gangireddi did business in opium but that he stopped that business and that,

although he subsequently carried on extensive business in other directions, he did not do any business in opium. It is suggested that it was because he thought it was morally wrong to do BO, but the probabilities are that he stopped business because, as the Plaintiffï¿½s vakil contends, the

business ended in a loss.

3. It is argued by Mr. Ranga Acharya, for the Appellants, that the business in opium was being carried on by the relations of the Plaintiff and the

first Defendant, that the first Defendant as managing member of the family after making inquiries was satisfied that it was a profitable business and

that he did the opium business bona fide and for the benefit of the family. The contention for the Plaintiff is that the managing member of a family

while he is entitled to carry on an ancestral business has no right to embark on a new and speculative venture, that the business would not bind the

other members of the family, that in the present case the business which the first Defendant entered, into was illegal as it contravened the provisions

of the Opium Act, and that the managing member who enters into unlawful transactions has no right to saddle the family with the losses incurred

therein.* The business was commenced by the first Defendant on the 26th of March 1917 as evidenced by Exhibit A, the deed of partnership

between the first Defendant and others. Gangireddi died in May 1917. The Plaintiff had at that time attained majority and it is not suggested that he

was taking any part in the management of the family affairs. He was a student before and, although he was living with the first Defendant and his

grandfather, Gangireddi, it is not shown that he was aware of the business that was being carried on in opium. The first Defendant in his evidence

admits that he did not consult the Plaintiff before he began the business. The finding of the Subordinate Judge is that the first Defendant was

managing the family affairs for at least six months prior to the death of Gangireddi though the case for the first Defendant is that Gangireddi was

himself managing the family affairs till the date of his death. Even assuming that the first Defendant was managing the family affairs at the date when

the opium business began, we do not think he had power to commence a new business without the concurrence of the Plaintiff who was an adult

member of the family and living with him at the time. As between the members of a joint family inter se, whatever may be the powers of the

manager as regards the minor members of the family, there is no authority for holding that he can start a new venture without the concurrence of the adult coparceners. His position cannot be better than that of a partner and whatever may be the rights of third persons dealing with the family, as

between the members of the family inter se a new trade or business commenced by one member, even though he is the managing member, without

consulting the adult coparceners would not bind them in the absence of evidence of acquiescence. It is argued by Mr. Ranga Acharya that m new

business can be carried on by the managing member unless he was given a discretion in the matter : but it seems to us that the remedy is obvious.

He should get the consent of the adult coparceners. In the case of minor members, the position of the kartha is that while he has power to carry on

an ancestral trade that has devolved on the joint family he cannot bind the minors by embarking on new ventures. In D.Mc. Laren Morrison v. S.

Verschoyle (1916) 6 C.W.N. 429, it was held that the kartha of a joint family possessing an ancestral business has an implied power to pledge the

credit and property of the family, but only for the ordinary business of the family, and that he cannot do so for the purpose of embarking on a

business which is not the ancestral business. The power of the manager to bind the family by embarking on a new business was considered by

Abdur Rahim and Spencer, JJ., in K.K. Abdur Rahman Kutti Haji v. Hussain Kunhi Haji (1919) 37 M.L.J. 346, and it was held that the junior

members of a Malabar tarwad are not liable for the debts contracted by the karnavan in the course of a trade carried on by him, unless it is shown

either that the trade was a family business or that it was carried on by the karnavan with the consent of the junior members. So far as trading

families are concerned, there is not much difference between the position of a karnavan in his relations with the junior members and that of a

manager of a joint family under Mitakshara with his coparceners. We do not think that in the present case the trade carried on in opium by the first

Defendant is binding on the Plaintiff who was an adult member at the time when it was commenced and who admittedly was not consulted about it

and who, on the evidence, is not shown to have acquiesced in the business or to have known that it was being carried on. The business was of a

highly speculative character the first Defendant financing the various renters of opium in consideration of a share of the profits. According to the

ledger, Exhibit IV, between February and December 1917 over Rs. 55,442 were advanced out of the family funds in respect of the opium business of 1917-18.

4. Turning to the legality of the opium business carried on by the first Defendant, we are of opinion that the partnership entered into by him for

1917-18, as evidenced by Exhibit A, is not legal. The effect of the transaction was that the first Defendant entered into a partnership with a number

of people some of whom had obtained licences to sell opium, he agreeing to finance ,the business and retaining the control of the whole business in

his own hands. One of the terms in the licence, Exhibit B, which is typical of the other licences, runs as follows:

You shall not sell, relinquish or sub-lease to others your right to supply or sell opium without obtaining the previous sanction of the District

Collector in that respect. Even after obtaining orders of the District Collector in the said respect, no agent shall be appointed to exercise any such

right without previously obtaining the approval of the District Collector in regard to such appointment.

5. Exhibit A, which is the deed of partnership between the first Defendant and some others who had obtained licences to vend opium, begins by

stating that for the benefit of the first Defendant and twelve others mentioned therein, five of them bid at the auction for the sale of opium in the

villages mentioned in the Schedule annexed thereto from the 1st of April 1917 to the 31st of March 1918, that it was agreed that the capital

required for the business should be advanced by the first Defendant who should get interest at Re. 1-0-6 per cent per mensem and that each of the

other partners was to deposit with the first Defendant Rs. 125 for each share they had in the business, they getting similar interest. Clause 3 runs as

follows:

It is settled that Tadi Bulli Tammireddi (first Defendant), oat of as, should be writing all proper and necessary accounts such as chittas, ledgers,

etc., for this joint business and that Bulli Tammireddi should appoint, as he pleases, proper persons for felling opium in the villages specified in the

Schedule annexed hereto according to Government rules and get the work done by them and that a monthly report clearly showing purchase of

opium, sadar, sale, etc., should be made to Bulli Tammireddi once in a month from all stations and that the amount also should be sent (to him)

then and there.

6. It was arranged that the profits should be divided into 64 shares and that the first Defendant should get 20 shares and the others the various

shares mentioned in the document. The effect of the transaction is that whereas under the licences the only persons who can deal in opium are the

licensees, a partnership is formed which gives to persons, who are not licensees, an interest in the business, the shares being determined by the

terms of the agreement. It is also clear that, as regards the vending of opium, Clause 3 makes the first Defendant, who is not a licensee under any

of the licences, the sole person entitled to the right to appoint agents for the sale of opium. We are of opinion that the present case falls within the

principle of Nalam Padmanabham v. sait Badrinadh sarda ILR (1912) Mad. 582, where two persons who were farmers of opium revenue under

the Government entered into a partnership with a third person by which they admitted him as a partner in the opium business, and it was held that

the partnership agreement was void and the suit not maintainable, as the effect of the agreement was to enable a person, who was not entitled to

sell opium, to sell it and as it also amounted to a transfer to the person, who was not a licensee, of an interest in the business which was in violation

of the conditions subject to which the licence was granted. We are of opinion that Clause 3 of the agreement set out above gives the first

Defendant, who is not a licensee, a right to sell opium through his agents, and prevents the licensees from having any voice in the matter of the

appointment of agents to sell opium.

7. As regards the trade for 1918-19, it is clear from Exhibit VII and the evidence of the first Defendant that it was wholly illegal. The first

Defendant states that the persons who bid at the auction sale for that year and who were, under the Act, licensees for the vending of opium were

merely benamidars for the first Defendant and that the business was solely for the benefit of the first. Defendant, there being no partners in the

business. Exhibit VII states that the persons who bid for the right. to sell opium in 38 villages were merely benamidars and bid for the first

Defendant. The agreement proceeds as follows:

Therefore you may lease out the said shops as you please and vend the opium. Because of the said shops standing in our names we shall always be

ready to sign any papers you might require to be signed by us in connation therewith for any purpose at your request. We shall not claim any

remission whatever from you for the same. Farther you shall yourself recover the profit or loss accruing from the trade of the said 38 shops as you

please and we shall have nothing to do therewith.

8. As the partnership for 1917-18 was illegal and as the benami purchase by the first Defendant in 1918-19 was also illegal, it is clear that the first

Defendant cannot make the other coparceners liable. It is not open to one coparcener to enter into illegal transactions and to saddle the other

coparceners with the loss arising from them, especially where it is not shown that the other coparceners consented to it.

9. It is argued by Mr. Ranga Acharya that, whatever may be the rights of third persons, as between coparceners themselves the first Defendant

cannot be called to account for the monies he spent on this business, because it will really be calling him to account for his past transactions. No

authority has been cited for the proposition that the immunity of a manager to account for his past transactions entitles him to enter into illegal

transactions and use joint family properties for the purpose. We think it will be gross misconduct sufficient to entitle the coparceners to require the

managing member to bear the loss incurred in such transactions and to put back in the, family any money that he may have taken out of the family

for such transactions. Both on the ground that the business was unauthorized and that it was also illegal, we are of opinion that the decision of the

Subordinate Judge is right. In taking an account of the joint family properties, the first Defendant will pay the Plaintiff one-half of the monies of the

joint family which he has used for the opium business. The opium business for 1917-18 and 1918-19 will be treated as the sole separate property

of the first Defendant, he being entitled to the profits, if any, and liable to bear the loss.

10. As regards the choultry started by Gangireddi, there is little doubt on the evidence that it was started by him with approval of his two sons. In

MB deposition given on the 16th October 1903, Gangireddi states:

I endowed a choultry at Samarlakota for Rs. 10,000. I gave a leasehold right of the annual value of Rs. 1,200 for 25 years for a chatram in my

village. My son asked me to endow the chatram for lame and blind people with the interest accruing on Rs. 10,000 funded capital. I am going to do so hereafter.

In his second will, Exhibit Ia, dated the 13th day of May 1906, he states:

From after my death, interest accruing In a sum of Rs. 10,000 shall be paid once a year for the Dharma Chatram (charity house) situate in Gollala

Mamidada.

In his third will, Exhibit 16, dated the 8th day of October 1913, he states that he advanced a loan to Muchilika Appalaraju and others of

Chengondapalli and took a usufructuary mortgage of Chengondapalli and its hamlets which form a muttah and continues as follows:

The net profits realized from the said muttah annually I have been giving away for the expenses of feeding, etc., of the choultry which I built in

Gollala Mamidada and have been making credit and debit entries accordingly in the accounts also. So long as the said Chengondapalli muttah is in

our possession according to the term, the net profits annually realized therefrom shall be paid for the expenses of the said choultry even after my

death and Bulli Tammireddi shall look after the whole management needed for it. Besides this, the interest that may annually be realized on a sum of

Rs. 10,000 out of my own funds shall either be spent to meet the expenses of the charity choultry at Gollala Mamidada once a year or shall be

kept in deposit for the said purpose.

11. It appears from the accounts that the income from the muttah was utilized for the expenses of the choultry from the date of its opening. The

evidence shows that there was a dedication of the income from the muttah for the purpose of the upkeep of the choultry and we see no reason to

doubt the truth of the statement made by Gangireddi in his deposition given so early as 1903, already referred to, that he had already given the

leasehold right he had in the muttah as an endowment for the choultry. The Subordinate Judge upholds the provision in the will regarding the setting

apart of Rs. 10,000 as funded capital for the choultry but thinks that the dedication of the income from Chengondapalli muttah which is also

referred to in the same will is not binding on the Plaintiff. He observes:

there is no doubt of the fact that in the Chongondapalli. Khata the income was being shown as having been taken on to the account of the choultry

in the account books maintained during the. time of the late Gangireddi.

12. Relying on Sowcar Sahanada Govinda Doss, and Others Vs. Rajah Venkata Perumal Rajah, minor by his next friend Mr. W.A.

Varadachariar, , he is of opinion that the mere fact that the income was used by Gangireddi is no ground for holding that there was a dedication of

the corpus. It is, however, clear on the findings of the Subordinate Judge that Gangireddi and his sons were members of art undivided family and

that the trade carried on by Gangireddi was a joint family business in which the father and the sons were interested. The will executed by

Gangireddi by itself cannot bind the Plaintiff but the contention for the Appellants not based on the will but on an anterior dedication by Gangireddi,

and the will is only used as evidence of dedication. There seems to be no adequate reason for disbelieving the statement made by Gangireddi so

long ago as 1903 that he had endowed the choultry with the income of Chengondapalli muttah, especially as the account books also support his

statement. So far as the dedication is concerned, no document is necessary, We need only refer to Pallayya and Others and Mallayya Vs.

Ramavadhanulu, , and Ramalingam Chetti v. Sivachidambara Chetty ILR (1919) Mad. 440. We are of opinion that the income from

Chengondapalli muttah was dedicated to the choultry and that it is not joint family property liable for partition.

13. The next question is as to the marriage expenses of the first Defendant''s son and daughter. So far as the daughter is concerned, the will of

Gangireddi directs that a sum of Rs. 1,000 should be given for the purpose of making jewels for her. She is clearly entitled to the expenses of the

marriage being provided for out of the joint family funds and, having regard to the status pf the family, we are of opinion that a sum of Rs. 1,000

should be set apart for the expenses of her marriage in addition to the sum of Rs. 1,000 provided for jewels.

14. As regards the marriage expenses of the second Defendant, no claim was made in the written statement for any such provision. No issue was

raised on the point. The, only point raised was as to the setting apart of Rs. 2,000 for jewels to be made for the girl he might marry, as to which

provision was made in Gangireddi''s will. This has been allowed. The question as to the provision to be made for his marriage expenses was raised

for the first time by Mr. Ranga Acharya during the course of his argument. Under these circumstances we are not prepared to go into the question and direct any provision to be made.

15. As regards the jewels which form the subject matter of the tenth issue and which are claimed by the first Defendant, we think the Subordinate

Judge was right in deciding against the first Defendant. He set up the case that some jewels were pledged by strangers with the family and some

were lent to the family by others. He offered to file a list stating which jewels were pledged and which jewels were lent but did not do so. It is riot

proved that the jewels are the jewels of the first Defendant''s wife, and we do not think that, having regard to the contentions raised by the first

Defendant, he should now be given an opportunity of adducing evidence that the. jewels belong to his wife, a case which was never set up by him

in the written statement or at the time of trial in the lower Court.

16. This disposes of all the points raised in Appeal. The decree of the lower Court will be modified in the light of the above observations. As the

Appellants have failed substantially they will pay Respondentï¿½s costs.