

(1932) 11 BOM CK 0003

In the Bombay High Court

Case No : Second Appeal No. 519 of 1929, from 1932

Umakant Balkrishna

APPELLANT

Vs

Martand Keshav

RESPONDENT

Date of Decision : 08-11-1932

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Contract Act, 1872 — Section 63
Limitation Act, 1908 — Section 7

Citation : AIR 1933 Bom 245 : (1933) 35 BOMLR 388 : 145 Ind. Cas. 164

Hon'ble Judges : Rangnekar, J; Baker, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Rangnekar, J.—These two appeals and the revision application arise out of suits filed by one Balkrishna against the defendants to recover the amounts due to him on promissory notes passed in favour of "the shop of Balkrishna Saraf". Shortly after the institution of the suit Balkrishna died, and on an application by his two sons, Umakant and Narhari, the plaint was amended and they were brought on record as heirs and legal representatives of the deceased plaintiff". The principle suit in which evidence was recorded was suit No. 61 of 1925. The defendants put in a written statement in December, 1925, and the main defence was that the claim of the plaintiffs under the promissory note was satisfied by payment made to Narhari, the younger son, in respect of which the latter had passed a receipt. It may be stated that the total principal sum due to the "shop of Balkrishna Waman Saraf" was about Rs. 5,380 exclusive of costs and interest. Besides that there was an outstanding decree for Rs. 1,033 with interest and costs. According to the defendants they paid about Rs. 3,625 in full satisfaction of all these claims and obtained three receipts, the receipt relating to the claim in the principal suit being obtained in 1925. By his reply the plaintiff Umakant contended that the receipt passed by Narhari did not amount to a valid discharge of the debt which was due to the joint family, of which he and his father were

members and of which he was the karta after the death of his father. He further contended that the payment, if any, was fraudulent inasmuch as it was made not only after a public notice given in two newspapers warning all the debtors of the shop not to make any payment to Narhari because he was a profligate and a wastrel and dissipating the family property, but even after a specific notice given to the defendants to the same effect. He further contended that nothing in fact was paid by the defendants to the plaintiff. The receipt, Exhibit 50, after referring to the respective promissory notes, stated that a settlement was made by mutual consent and the claim which came to more than Rs. 3,000 was settled for Rs. 2,500, which T. was paid in cash to Narhari. It further recited that if Umakant raised any objection in respect of the same, Narhari was to be liable for the same, and that on no account were the debtors to be troubled. This receipt as well as the others were admittedly passed by Narhari.

2. The trial Court raised three issues which are at page 8 of print. The learned Judge held that the alleged satisfaction relied upon by the defendants was not binding against plaintiff No. 1 as the manager of the family. He further held that in fact no moneys were paid to Narhari, and in the result he passed a decree in favour of the plaintiff. Defendants appealed to the District Judge from this judgment, and the learned District Judge held that, in any event, Narhari was bound to the extent of his share in the family property, but that Umakant was not. The learned Judge, therefore, modified the decree of the trial Court by ordering that the plaintiff should recover a half of the substantive amount decreed by the trial Court which would represent Umakant's share in the debt due to the family firm. Second Appeal No. 655 raises the same question in respect of the second promissory note between the parties, and the revisional application similarly relates to the claim of the plaintiff in respect of the third. It appears that by consent of the parties these cases were heard together and it was agreed that the decision in one case should govern the other two cases. Accordingly, all these matters were heard together by both the Courts below and one judgment recorded. Subject to Mr. Limaye's objection as regards the revisional application, it is understood that the controversy between the parties in all these three cases should be determined by one judgment in this Court also.

3. It seems to me to be clear from the record that it was common ground that "the shop of Balkrishna Waman Saraf," as appears from the judgment of the learned District Judge, "was a joint family concern of which Balkrishna and his two sons, Umakant and Narhari, were owners as members of a joint Hindu family." We must, therefore, take this finding, and deal with the appeals on the footing that the promissory notes in question were passed in favour of the joint family consisting of Balkrishna and his two sons, Umakant and Narhari.

4. It is argued by the learned counsel on behalf of the defendants that there was nothing to show on the plaint, or on the face of the promissory notes that there was any ancestral joint family business, and that therefore the position was that the shop of Balkrishna Waman Saraf constituted a partnership between the

father Balkrishna and his two sons, Umakant and Narhari. A short answer to the argument is that this case was never made out by or on behalf of the defendants, and that the burden of making out this case really rested on them. The position in law with regard to this question is clear. Where property has been acquired in business by persons constituting a joint Hindu family by their joint labour, the question arises whether the property so acquired is joint family property, or whether it is the joint property of the acquirers, or whether it is ordinary partnership property within the meaning of the Indian Contract Act. If it is the joint family property, the male issue of the acquirers take interest in it by birth. If it is the joint property of the acquirers, it will pass by survivorship, but their male issue will not take any interest in it by birth. If it is partnership property, then its devolution would be governed by the Indian Contract Act. So that in each case different considerations would arise and different results follow, and if it was the contention of the defendants that this receipt which was challenged on behalf of Umakant was binding on him on the ground that the shop of Balkrishna Waman Saraf was a partnership concern and that the receipt was passed by one of the partners Narhari, the burden of making out this case rested on the defendants. No issue on this point was asked for, no suggestion to this effect was made any where, and it is now too late for the learned counsel to raise this case in second appeal.

5. It was found by the trial Court that no payment was made by defendants to Narhari, and that Narhari was a wastrel and dissipating the family moneys and executing receipts without receiving proper or adequate consideration. The finding of the trial Judge was accepted by the appellate Judge as regards Narhari's character, position and antecedents. The learned District Judge, however, came to the conclusion that as it was not proved that Narhari was a lunatic or an idiot, he must have received something ; but what he received the learned Judge was unable to state. This is what he says at page 4 : "I am therefore of the opinion that the receipts in question must have been passed by Narhari after taking some amounts, the exact quantity of which it is difficult to determine." Speaking for myself, it is difficult to accept this as a finding of fact. But for the purpose of disposing of the point which arises in this case it may be assumed that some payment was made to Narhari when this receipt was passed.

6. As stated above, after Balkrishna's death his two sons were brought on record. It is not necessary to consider the question whether in the case of a joint Hindu family when a suit is instituted by the manager on behalf of the family, whether on the death of the manager his sons (should be brought on record in accordance with the provisions of Order XXII of the Civil Procedure Code. It has been held by the Lahore High Court in *Atma Ram v. Banku Mal* ILR (1930) Lah. 598 that in such a case it is not necessary to bring the sons on record, but that the next succeeding karta should be brought on record. One thing, however, is clear that neither the trial Court nor the appellate Court held that Umakant and Narhari were brought on record as heirs of Balkrishna. But assuming that they were brought on record as heirs, I think the appellants would be in a better

position under the decisions of the Indian High Courts. If they were co-heirs, it seems to me that the defence in this case must fail, firstly, because one co-heir cannot give a valid discharge in respect of a debt due to the ancestor without the concurrence of the other coheirs, and, secondly, a fraudulent payment made to one co-heir is under no circumstances a proper payment and would not amount to a valid discharge. In *Ankalamma v. Chenchayya* ILR (1917) Mad. 637 it was held that one coheir by a single promise is not entitled to give a valid discharge in respect of a promissory note executed in favour of his ancestor. In *Sheik Ibrahim Tharagan v. Rama Aiyar* ILR (1911) Mad. 685 it was held that payment to one member of an undivided Hindu family or to one of several joint creditors will not operate as a payment to all members or creditors if the payment is made fraudulently to one and not for the benefit of all. The learned District Judge accepted this position, but he thought that under the decision in *Sheik Ibrahim Tharagan v. Rama Aiyar* the person receiving payment would in any case be bound as regards his share in the debt. I am unable to agree with him. The only point which arose in that case was whether a fraudulent payment made to one co-heir would amount to a valid discharge, and the answer was in the negative. In this case if it were necessary to express an opinion, I would hold that payment alleged to have been made to Narhari was a fraudulent payment, and therefore would not bind the other heir. But having accepted the authority in *Sheik Ibrahim Tharagan, v. Rama Aiyar*, I think the conclusion to which the learned District Judge came was wrong. He says at page 4 :-

Assuming that Narhari has received something it would be most inequitable to give his firm, that is, to him and his brother, a decree for the whole amounts due under the promissory notes. If Narhari chose to wipe off these debts by receiving not even the full amount of his own share, it is his business and he cannot in, equity claim any relief against a fraud to which he himself was a party.

7. I take exception to this part of the judgment where the learned Judge speaks of the share of Narhari in the debt. If, as in this case, it was a joint family debt, I am unable to understand how it can be said that a member of a family had a definite share in that debt, because under the ordinary Hindu law until partition no member of the family can as such say that he is entitled to any definite share in any particular family property. It may be stated that both Umakant and Narhari are not without issue.

8. In my opinion there are many points of resemblance between *Ankalamma v. Chenchayya* and the present case. It was held in that case that the principles applicable in the case of co-heirs would also be applicable to the case of coparceners. But I think the real question in this case is whether a discharge given by a junior member of a joint Hindu family amounts to a valid discharge of a debt due to the family, or whether in order to be binding on the family it must be given by the manager of the family. It has been found by the trial Court, and there is no finding of the District Judge on this point, that Umakant was the manager of the family to the knowledge of the defendants. In the absence of any

evidence to the contrary, I think under Hindu law the eldest son of the deceased father would be the karta of the family. According to Manu the father in the case of a joint Hindu family is the manager of the family consisting of himself and his descendants and other relations. After the death of the father the eldest son generally becomes the manager or karta of the family, though it is possible that a more capable son may become the manager. The joint family is governed on the principle of subordination and its affairs are managed by one person whose acts within the scope of his authority are binding on the family. Manu says in Chapter IX:-

As a father (supports) his sons, so let, the eldest support his younger brothers, and let them also in accordance with the law behave towards their oldest brother as sons (behave towards their father)." (108). "The eldest alone may take the whole paternal estate, the others shall live under him just as (they lived) under their father. (105).

To the same effect is the text of Narada in Chapter XIII -

Or the senior brother shall maintain all (the junior brothers), like a father, if they wish it, or even the youngest brother, if able ; the well being of a family depends on the ability (of its head)." (5). [Sacred Books of the East].

Apart from the finding, therefore, to which I have referred, I think, even under the ordinary Hindu law Umakant would be the karta of the family.

9. The position of the karta has been defined and recognised in several well-known decisions of the Courts. Speaking generally, the karta represents the joint family in all its affairs and transactions or concerns with the outside world, provided they are for family necessity. In an early decision of this Court it was held that a Hindu family is regarded as a corporation whose interests are necessarily centred in the manager, the presumption being that the manager is acting for the family unless the contrary is shown : Gam Savant Bal Savant v. Narayan Dhond Savant ILR (18S3) Bom. 467 He has power to contract debts and borrow moneys for legitimate and proper purpose of the family, and then his acts would bind the family. In Kishen Parshad v. Ear Narain Singh (1910) L.R. 38 IndAp 45 13 Bom. L.R. 359 their Lordships of the Privy Council held that besides the power to contract debts for the family business, the manager has the power of making contracts, giving receipts, and compromising or discharging claims ordinarily incidental to the business, and without a general power of that kind, it would be impossible for the business to be carried on. In Pitam Singh v. Ujagar Singh ILR (1871) All. 651 it was held that a compromise entered into by the manager bona fide for the benefit of the family binds the other members of the family including the minors. In Jagan Nath v. Mannu, Lal ILR (1894) All. 231 it was held that the manager has the power to refer to arbitration disputes relating to the joint family property, provided such reference is for the benefit of the family. In Bapu Tatya v. Bala Ravji ILR (1920) Bom. 446 22 Bom. L.R. 1383 it was held that the manager has power to give a valid discharge for a debt due to

the joint family, and hence if one of the members is a minor, he cannot claim the benefit of Section 7 of the Indian Limitation Act. This case was followed in another decision of the same Court in *Supdu Daulatsing v. Sakharam Ramji* ILR (1928) Bom, 441: 30 Bom. L.R. 537 Recently the legislature by the Indian Limitation (Amendment) Act, I of 1927, has provided that in respect of a liability of a Hindu undivided family an acknowledgment or payment made by the manager shall be deemed to have been made on behalf of the family so as to keep the debt alive. These are some of the principal powers of the manager or the karta as such in addition to the power of alienating the family property within defined limits. The decisions of the Privy Council in *Kishen Parshad v. Har Narain Singh* and AIR 1914 136 (Privy Council) lay down the principle that in respect of transactions entered into by the manager in his name on behalf of the family he may sue or be sued alone, and that the other members of the family are not necessary parties to such a suit, and on the other hand would be bound by the decree made therein. This being then the position as to the rights and powers of the manager, I think it is but a logical corollary from these principles to hold that in the case of a joint Hindu family it is only the manager who can bind the family in such things, such as discharge of a debt. It must, therefore, follow that a discharge given by any other member of the family would not be a valid discharge binding on the family.

10. I may now refer to a decision of our Court in *Sitaram v. Shridhar* ILR (1903) Bom. 292 5 Bom. I.R. 91 That was a case of a mortgage, and it was laid down in that case that where property is mortgaged to a person who subsequently dies leaving two or more heirs jointly entitled to his estate, payment made by the mortgagor of the amount due on the mortgage to one of those heirs, without the concurrence of the rest, does not amount to a valid discharge to the mortgagor. The learned counsel for the respondents relies on the concluding part of this judgment in which payment received by one of the heirs of "the mortgagee was recognised and treated as a valid payment and was taken into account in passing a redemption decree. But the judgment makes it clear that as all the parties interested in the mortgage were before the Court it was not desirable to send them to a fresh litigation, because the Court was in a position to give complete relief without altering the nature of the case. It is clear, therefore, that the learned Judges proceeded on equitable principles, because they felt that on the materials before them they were able to do complete justice. Speaking for myself, I think it is difficult for us on the facts in this case to give relief to defendants, if they are entitled to any on this equitable principle, because, as I have pointed out, the finding of the trial Court was that no payment to Narhari was proved, and the finding of the District Judge is too vague for the Court to act upon. If, however, the defendants are entitled to proceed against Narhari and have a remedy in law, they may be entitled to adopt it. In my opinion, therefore, the receipt passed by Narhari does not amount to a valid discharge and is not binding on the family.

11. Before parting with the case, I may refer to a point raised by the learned

counsel on behalf of the plaintiff in support of his appeal. He contended that the defendants pleaded accord and satisfaction, and the plea failed as the finding of the learned District Judge amounted to this, that a smaller sum was paid to the creditors in discharge of the debt. I am unable to accept this argument, as it seems to me there is a clear difference between the English and the Indian law on this point. In England the law is clear that you cannot discharge a debt by payment of a smaller sum where the debt is in respect of a liquidated amount. But our law is quite different and u/s 63 of the Indian Contract Act every promisee may dispense with, or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit. The commentary on that section in Pollock and Mulla's Indian Contract Act states clearly that the section makes a wide departure from the English common law.

12. For these reasons, I think, the judgment of the District Judge in the two appeals must be reversed and that of the trial Court must be restored with all costs throughout. The cross-objections in second appeal No. 519 of 1929 are not pressed, and they must also be dismissed with costs.

13. There now remains the civil revision application which, as I have stated, relates to a promissory note for Rs. 370. Mr. Limaye's point is that the application is not competent u/s 115 of the Civil Procedure Code, inasmuch as there is no question of jurisdiction involved in this case. As I have pointed out, the parties in this litigation agreed that all the three suits should be heard together, evidence in one should be treated as evidence in others and that one judgment should govern all the cases. The point was exactly the same in all the cases, and if I have held that the learned District Judge was wrong in modifying the decree of the trial Court in one, it must follow that his decision in the remaining suits is wrong. Therefore, the decree made by the District Judge in this case is also set aside and that of the trial Court restored with all costs throughout.

Baker, J.

14. I agree. My learned brother has exhaustively dealt with the question of the plaintiffs being the members of a joint family. If they are regarded merely in the capacity of the heirs of a single promisee, the release of the debt by one of the heirs of the deceased creditor would not be a valid discharge in view of the authority in *Sitaram v. Shridhar* ILR (1903) Bom. 292: 5 Bom. L.R. 91 But so far as the question of the alleged payment to Narhari is concerned, altogether putting aside the fact that there is evidence that notice was sent to the defendants not to pay Narhari, there is a small point which has not been mentioned by the Courts below, as far as I know ; and it is this : According to the contention of the defendants the sum of Rs. 2,500 for which the receipt was passed was paid to Narhari on November 25, 1925, and yet a little over a fortnight later, i. e., on December 11, 1925, Narhari writes Exhibit 74 in which he states that he is unable to return from Shahabad for want of money. If that

means anything, it means that he was not able to raise a few rupees within sixteen days of his having received so large a sum as Rs. 2,500. This is a very clear indication that all the story about payment made to Narhari is false. My learned brother has pointed out that the finding of the District Judge that Narhari must have received something, although he cannot find what amount he actually received, is not really a finding of fact. In this view of the circumstances to which I have just alluded, if it was necessary for me to come to a finding on the question of fact, I should hold that nothing was paid to Narhari.

15. In these circumstances, I agree that the judgment of the appellate Court cannot be sustained and that the appeals should be allowed with costs.

16. With regard to the revisional application my learned brother has already dealt with that point. If that application had come alone for decision, difficulty might have arisen on the question of jurisdiction. But as a matter of fact all these cases were disposed of by one judgment, and the applications to admit the appeals and the revisional application were all made at the same time. Where in the two appeals as in the present case the decision of the lower appellate Court has been held to be wrong, I think it would be a denial of justice if we interfere in the two cases and refuse to interfere in the third. I, therefore, agree that the application must be allowed and the rule must be made absolute with costs throughout.