Privy Council Appeal No. 121 *of* 1920.

Bengal Appeals Nos. 32 *and* 33 *of* 1919.

Sanyasi Charan Mandal - - - - - - *Appellant*

v.

Krishnadhan Banerji - - - - - - *Respondent*

Same - - - - - - - - - *Appellant*

v.

Satish Chandra Mukerji and others - - - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JANUARY, 1922.

Present at the Hearing:

LORD BUCKMASTER.
LORD ATKINSON.
LORD CARSON.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* SIR LAWRENCE JENKINS.]

These are consolidated appeals from two decrees of the High Court of Judicature at Fort William in Bengal, passed in separate suits on the 31st January, 1919, reversing two decrees of the Subordinate Judge of the 24 Parganahs, dated the 28th February, 1916.

In each suit a money decree was sought against the present appellant, who was a minor at its institution. One suit was brought on a hand note signed by the minor's three adult brothers; the other on a hath-chitta, signed by his four adult brothers, the youngest of them having then attained majority.

The ground of liability stated in the plaint is that the defendant and his brothers are owners and partners in ancestral businesses, and the money claimed was borrowed by the brothers for the purposes of the businesses.

The minor defended in each case by his guardian for the suit.

The defendant and his brothers were the five sons of Bhuban Mohan Mandal, a Hindu governed by the Dayabhaga school of law. He died in November, 1899, and at that time his two younger sons were minors. Nil Ratan, the eldest brother and the Karta of the family, was appointed their guardian under Act VIII. of 1890.

Bhuban Mohan had two businesses, one for fuel wood at Munshigunj, and the other for rice and other articles at Kalibazar. Each devolved as an ancestral business on the five sons, and was carried on by Nil Ratan as the Karta, assisted by his adult brothers After the father's death a new business in rice was started by Nil Ratan at Orphangunj, and it is the defendant's case that the money sued for was borrowed exclusively for the purpose of this business, and that the business was not ancestral.

The Subordinate Judge decided in the defendant's favour and dismissed the suits. The High Court on appeal apparently took the same view in the first instance, but as the result of a re-argument, set aside the Subordinate Judge's decrees and directed certain accounts against the defendant, not because his liability was established but for the purpose of determining whether or not he was liable. It is from these decrees of the High Court that the present appeals have been preferred.

A preliminary objection was taken that the appeals did not lie " because the order was not final," but their Lordships did not give effect to it and the appeals have been heard.

The businesses were conducted by Nil Ratan and his adult brothers for many years with success. Ultimately, however, there were financial difficulties, and on the 19th February, 1912, proceedings under the Provincial Insolvency Act, 1907, were commenced by a creditor against all five brothers in the Court of the District Judge at Alipur. It was established to the satisfaction of the Judge that the defendant was a minor and so could not be adjudicated insolvent, and that the minor was a joint owner in the family business inherited from his father. There was, however, an adjudication against the adult brothers, " they being the members of the firm Bhuban Mohan Mandal and Nil Ratan Mandal."

A Receiver was appointed under Section 18 (1) of the Act, and the property of the insolvents thereupon vested in him. He was ordered to realise not only the four-fifth shares of the insolvents in the joint property, but also the minor's share in the joint properties acquired after the father's death. As a result of his insolvency, Nil Ratan was removed from the guardianship of the minor, and Mati Lal Roy was appointed in his place.

On the 19th August, 1912, with the sanction of the Judge,

Mati Lal Roy and the Receiver agreed to appoint an arbitrator to effect a partition of the immoveable properties, and on the 8th October, 1912, an award was made under which the minor got one-fifth in both ancestral and after-acquired properties, Mati Lal Roy having claimed that the after-acquired properties were purchased out of the income of the ancestral properties. On the 14th January, 1912, a decree was passed in terms of the award.

In the meanwhile cross-appeals had been preferred by Mati Lal Roy and the creditors from the orders of the Judge in Insolvency, and on the 17th March, 1914, they were heard by the High Court with the result that the order refusing to adjudicate the minor an insolvent was affirmed, but so much of the order as directed the Receiver to realise the minor's share was set aside, and in lieu thereof it was ordered that the Receiver should "take possession of four-fifths share of the business, and four-fifths share of all the properties purchased since the death of Bhuban Mohan Mandal, and also four-fifths share of the other properties jointly held by the infant and his brothers."

It is in these circumstances that the present suits were commenced, as the dividend received by the plaintiffs in the insolvency fell short of the amount due.

It is established by concurrent findings by the Lower Courts, first, that the money now in suit was borrowed exclusively for the purposes of the Orphangunj business, and secondly, that this business was neither ancestral nor an extension of the ancestral business. These findings must now be deemed conclusive, and this strikes at the very root of the case made by the plaintiffs in the first Court.

The distinction between an ancestral business and one started like the present after the death of the ancestor, as a source of partnership relations is patent. In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business, with its benefits and its obligations. In the other they rest ultimately on contractual arrangement between the parties. The inability of a Karta to impose on a minor coparcener the risks and liabilities of a new business started by himself, is fully discussed by both Courts, and their Lordships agreeing with the conclusion at which they have arrived on this point, do not deem it necessary to enter on a further discussion of this aspect of the case.

What has to be seen in the peculiar circumstances of this dispute is not merely whether the minor has come under any liability in respect of the debts of the Orphangunj business, but whether that liability can be enforced by the plaintiffs in the suits as constituted.

It is important at this point to bear in mind (*a*) that at the institution of the suits the defendant was a minor; (*b*) that in the written statement filed in each suit on his behalf by his guardian for the suit, it was denied that he was a cosharer in the business, or had any responsibility with regard to it; (*c*) that when at a

later stage of the litigation the minor attained majority, he adopted these written statements ; and (*d*) that at that time the business of the firm had ceased.

The ancestral character of the Orphangunj business being negatived, the plaintiffs have attempted to formulate other grounds of liability. Before the Subordinate Judge the claim seems to have been rested on general principles rather than on the specific provisions of the Contract Act. Thus in the grounds of appeal it is contended that the defendant and his four brothers having all along lived as members of an undivided Hindu family, and properties having been acquired with the joint funds and the defendant having got some of those properties in his share on partition with the Receiver, the learned Subordinate Judge ought to have passed a decree against the defendant at any rate so far as the assets of the firms allotted to his share are concerned.

The answer to the case thus made is given by the Subordinate Judge towards the close of his careful and well-reasoned judgment, and their Lordships are in complete agreement with what is there said. In the High Court, however, reliance was evidently placed on the Contract Act for its provisions are mentioned and discussed. It becomes necessary, therefore, to examine the Act so far as it bears on the question now in contest.

Section 247 provides that a person who is under the age of majority according to the law to which he is subject may be admitted to the benefits of partnership but cannot be made personally liable for any obligation of the firm ; but the share of such minor in the property of the firm is liable for the obligations of the firm.

To bring this section into play it must be proved that the minor has been admitted to the benefits of the partnership. This is a fact to be established by evidence, and though it was neither pleaded nor made an issue at the trial, the High Court, without inviting evidence specifically directed to this point, held the admission proved, and thus set up a new case in appeal. The defendant has just ground of complaint as to this, and the procedure is not one to be commended ; still in the view their Lordships take they will deal with the case on the basis of the High Court's finding without expressing an opinion as to its correctness. Under the section liability is limited to the share of the minor in the property of the firm.

In Section 239 there is a definition of the word " firm." It is there said the persons who have entered into partnership with one another are called collectively a " firm." In the earlier part of the section it is enacted that " partnership " is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business and to share the profits thereof between them.

A person under the age of majority cannot become a partner by contract (*Mohori Bibee* v. *Dhurmodas Ghose*, L.R., 30, I. A.114), and so according to the definition he cannot be one of that group

of persons called a firm. It would seem, therefore, that the share of which Section 247 speaks is no more than a right to participate in the property of the firm after its obligations have been satisfied.

Though there may be this right, in fact it is not claimed by the defendant. On the contrary, the written statements deny his membership of the partnership; this denial was made on his behalf during his minority, and it was adopted by him when he attained his majority. This attitude he still maintains, and it can only be regarded as a relinquishment of all claim to a share in the property of the firm. It is still the property of the firm, and is liable as such to the obligations of the firm.

But all the property of the firm vested in the Receiver on the making of the order of adjudication (Provincial Insolvency Act, Section 16), and if any part of it has got improperly into the possession of the minor, the right to recover it is in the Receiver. This is not disputed by the defendant; and it is only by its coming into the hands of the Receiver that its rateable distribution among the general body of creditors can be secured. Nor does it make any difference that the business was conducted by the male adult members of a Hindu family governed by the Dayabhaga; the rights and liabilities of a minor member of such a family would be measured by similar principles for the purpose now under consideration.

The learned judges in the High Court seem to have thought that the judgment on appeal in the insolvency proceedings put a bar in the way of a recovery by the Receiver, and so justified the plaintiffs' suits; but this proceeds on a misconception of what was actually decided.

It is quite true that in that judgment it was said that "the essence of the matter is that the share of the infant has not vested in him and he is consequently not entitled to deal with it. . . . But whatever remedies may be available hereafter to the Receiver or to the creditor, it is clear that the properties of the infant cannot be dealt with by either of them in these proceedings." This was a correct statement of the legal position; but it in no way justifies the conclusion in the judgment now under appeal that in consequence of it "the defendant cannot now contend that it is only the Receiver (and not any individual creditor) who can deal with his share of the partnership properties." No property belonging to the minor could vest by the adjudication in the Receiver, but what would vest in him would be the right (if it existed) to recover from the minor property in his possession belonging to the firm.

It was then urged that any suit now instituted by the Receiver would be barred by limitation; but when Counsel for the plaintiffs was asked whether to obviate this, he was prepared to add the Receiver as a party, so that any assets realised could come into his hands for rateable distribution, he declined the offer, and frankly admitted that it would be of no use to his clients unless they could recover for their own exclusive benefit.

The absence of the Receiver from the suits is not an objection taken for the first time at this stage of the litigation. It was pleaded as a defect in the written statement, and an issue was framed on the point.

The plaintiffs do not now contend that the defendant has become personally liable, and so it is unnecessary to discuss the terms of Section 248.

In their Lordships' opinion, therefore, these suits constituted as they are, are misconceived. In the circumstances the Receiver is a necessary party to any proceeding for the purpose of realising assets liable for the firm's debts, and the proceeds of any realisation would be applicable not towards the exclusive discharge of any individual debt as the plaintiffs desire, but for rateable distribution among the whole body of the firm's creditors.

Their Lordships will therefore humbly advise His Majesty that the appeals be allowed, and that in each suit the decrees of the High Court dated the 31st January, 1919, be discharged, and the decrees of the Subordinate Judge, dated the 28th February, 1916, be restored, and that the respondents to each appeal do pay to the appellant the costs of the appeals in the High Court. They will also pay the costs of these appeals.

In the Privy Council.

SANYASI CHARAN MANDAL

v.

KRISHNADHAN BANERJI.

SAME

v.

SATISH CHANDRA MUKERJI AND OTHERS.

(*Consolidated Appeals.*)

DELIVERED BY SIR LAWRENCE JENKINS.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.

1922.