

Privy Council Appeal No. 19 of 1921.

P. M. Sadasiva Mudaliar and others - - - - - *Appellants*

.

A. R. Hajee Fakeer Mahomed Sait and Sons - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 24TH NOVEMBER, 1922.

Present at the Hearing :

LORD BUCKMASTER.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

LORD SALVESEN.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal from a decree, dated the 25th March, 1919, of the High Court at Madras, which varied in the plaintiffs' favour a decree, dated the 11th August, 1917, of the Subordinate Judge of the Nilgiris in Civil Suit No. 67 of 1916. The suit relates to a contract which was made and to be performed in the Presidency of Madras.

The defendants, who are the appellants here, are P. M. Sadasiva Mudaliar, defendant 1; P. M. Gurusamy Mudaliar, defendant 2, and P. M. Pasupathy Mudaliar, defendant 3. They and their youngest brother, who is a minor and is not a party to this suit, constitute a joint Hindu family. When this suit was instituted on the 4th October, 1916, defendant 1 was 40 years of age, defendant 2 was 35 years of age, and defendant 3 was 22 years old. They were sons of P. Marudachala Mudaliar, who died in 1906. This joint family carried on business as owners of lands and house property in the Nilgiri District, and in the purchase and sale of hides, and as commission agents for the sale of beer

brewed at the Rose and Crown Brewery, of which brewery the father had been a director. In the office of director of that brewery the father was on his death succeeded by his son the defendant 1. The joint family business was carried on under the names of P. M. Marudachala Mudaliar and Sons and P. M. Sadasiva Mudaliar and Brothers. In the father's lifetime he had acted as the manager for the joint family with the assistance of his eldest son, and since the father's death the defendant 1, with the assistance of the defendant 2, managed the family business.

On the 8th April, 1915, the plaintiff firm obtained against persons who constituted the firm of Rangayya Goundan and Company, a decree for sale of two breweries, known as the Nilgiri Brewery, of Ootacamund, and the Castle Brewery, of Aruvanghat, in default of payment of Rs. 1,81,429 odd, interest thereon and costs. The plaintiff firm claiming that more was due to them in that suit, appealed to the High Court. While that appeal was pending these defendants 1 and 2, on the 6th December, 1915, agreed (Exhibit H) with Rangayya Goundan, one of the judgment debtors of the 8th April, 1915, to purchase the two breweries, free from all encumbrances, for a sum of Rs. 3,70,000, of which Rs. 1,83,000 were to be paid into Court on or before the 3rd January, 1916, in satisfaction of the decree of the 8th April, 1915. These defendants 1 and 2, not having the money with which to pay the Rs. 3,70,000, applied to the plaintiffs' firm for financial assistance, and on the 31st December, 1915, an agreement (Exhibit AA) was drawn up as between these three defendants and their minor brother through his guardian, who were described as the mortgagors (that term to include them and each of their heirs) of the one part and the plaintiff firm of the other part, whereby the plaintiff firm agreed to advance to the mortgagors four lakhs of rupees at 12 per cent. per annum interest on the security of the two breweries, and of other property which was property of the joint family. The four lakhs of rupees were to include a bonus of Rs. 30,000 to the plaintiff firm for their assistance. The four lakhs of rupees were to be paid as follows :—To the mortgagees, the plaintiff firm, Rs. 1,83,000 or thereabouts, in satisfaction of their decree of the 8th April, 1915 ; to the mortgagors, Rs. 51,000 or thereabouts ; to Mr. Branson in satisfaction of a decree obtained by him against Rangayya Goundan and Company, Rs. 86,000 or thereabouts ; an undefined amount to be kept in reserve pending the decision by the High Court of the appeal by the plaintiff firm in the suit against Rangayya Goundan and Company, and Rs. 30,000 the bonus. The agreement was signed by the defendants 1 and 2, and by the defendant 1 as the guardian of their minor brother. The defendant 3 was at the time absent from his home at Ootacamund ; he was in some country district, and did not sign the agreement, nor was he consulted about it.

It was found that the defendants 1 and 2 were not in a position to grant a mortgage of the two breweries, owing to the illness of Rangayya Goundan and to the widow and son of Nanjayya Goundan refusing to join in a conveyance of the breweries until

certain claims which they made had been satisfied, and on the 5th January, 1916, the defendants 1 and 2 gave to the plaintiff firm the following letter :---

(Exhibit BB.)

" To Messrs. A. R. Hajee Fakcer Mahomed Sait and Sons,

"Ootacamund.

" We beg to inform you that we are unable to carry out at once as agreed upon the terms of our finance agreement of the 31st December, 1915 (hereinafter referred to as the agreement), on account of the delay in obtaining a proper conveyance of the Brewery properties from the vendor and all necessary parties.

" In the event of our not being in a position to execute the mortgage for Rs. 4,00,000 referred to in the agreement within two months from this date, we agree to take a transfer of the decree obtained by you against Rangayya Goundan and others on the 8th day of April, 1915, in O. S. No. 28 of 1910 on the file of the Sub-Court upon which the sum of Rs. 1,82,145-14-2 is now due and also any further decree that may be passed in your favour by the High Court on an appeal now pending from the said decree.

" In consideration of your making us an advance of Rs. 50,000 on our promote on this date (Rs. 20,000 having been paid in cash and Rs. 30,000 being the bonus already paid by us to Mahomed Hashim Sait for his services for arranging the loan of Rs. 4,00,000 referred to in the agreement), we hereby agree to execute in your favour a legal mortgage of our properties set out in the agreement to secure the said sum of Rs. 50,000 and interest thereon as provided for in the agreement as and from the 5th day of January 1916.

" As to the transfer of the said decree amounting to Rs. 1,82,145-14-2 as aforesaid, we agree to execute a legal mortgage in your favour of our properties set out in the agreement as well as the said decree to be so transferred to secure the said sum of Rs. 1,82,145-14-2 with interest as provided for in the agreement as and from the 3rd day of January, 1916.

" As to any further amount that may be decreed on appeal by the High Court, we will execute a legal mortgage in your favour of our properties set out in the agreement and any excess amount so decreed and to be transferred as aforesaid to secure the excess amount decreed on appeal with interest as provided for in the agreement as and from the date of the appellate decree.

" Should the agreement to purchase the Breweries fall through, the agreement shall be restricted to the present advance of Rs. 50,000 and the amounts of the decree of the Sub-Court of the Nilgiris and of any further decree to be passed on appeal by the High Court.

" Dated this 5th day of January, 1916.

" (Signed) P. M. Marudachala Mudaliar and Sons.

" (") P. M. Sadasiva Mudaliar.

" (") P. M. Gurusamy Mudaliar.

" (") P. M. Sadasiva Mudaliar, guardian for Raji-
bahadur Mudaliar.

It will be observed that one of the signatures to the letter is in one of the business names of the joint family. The solicitor who acted for the plaintiff firm probably thought that by way of precaution the letter had better be also signed by the members of the family. The defendant 3 did not sign that letter of the 5th January, 1916, nor was he consulted about it. He was at that time still absent from home. The plaintiff firm agreed to the terms of that letter, and gave to the

defendants 1 and 2 Rs. 50,000 by cheque, which was duly paid, and received from them the following promissory note :—

(Exhibit CC.)

“ OOTACAMUND,

“ 5th January, 1916.

“ On demand we, P. M. Sadasiva Mudaliar and P. M. Gurusamy Mudaliar, jointly and severally promise to pay Messrs. H. A. R. Hajee Fakeer Mahomed Sait and Sons or order the sum of Rs. 50,000 with interest at 12 per cent. per annum for value received this day in cash.

“ Fifty thousand only.

“ P. M. Sadasiva
Mudaliar.

Signed on
one anna
stamp.

“ P. M. Gurusamy
Mudaliar.”

The defendants 1 and 2 were unable to come to an arrangement with the widow and son of Nanjayya Goundan, and consequently could not grant the mortgage of the two breweries. The two breweries were finally sold to the United Breweries Company. That Company, by payment of the amount due under the decree of the 8th April, 1915, discharged that decree.

The defendants 1 and 2 in December, 1915, entered into possession of the two breweries under their agreement with Ramgayya Goundan, of the 6th December, 1915, and carried on the business of brewing at the breweries. They obtained in the name of P. M. Sadasiva Mudaliar and Brothers the necessary Government Abkari licence for the official year 1915-16. That licence was hung up in a prominent place in the brewery office. The business of brewing was carried on until the breweries were sold to the United Breweries Company.

According to the evidence of defendant 3, he first became aware, in February, 1916, that the two breweries were being carried on by the defendants 1 and 2 and of the terms on which they had acquired an interest in the breweries. That may, in their Lordships' opinion be accepted as a fact. It appears that he had been advised by an uncle of his that the two breweries should not be treated as business of the joint family, and that on his return to Ootacamund in March, 1916, he informed his brothers the defendants 1 and 2, that he objected to the breweries being joint family business. As a matter of fact, the owning and carrying on of breweries was not business which had been carried on by the joint family, and was outside the scope of the business of the joint family. If that was his opinion, as it may be assumed it was at that time, he should have avoided taking any part in the management of the breweries, and in the sale of the beer brewed there. Probably he came to the conclusion that the breweries were or would be a profitable concern for him to have an interest in as a proprietor. Whatever his motive may have been, he acted at Ootacamund in the management of the two breweries from June until October, 1916. In October, 1916, a depot for the sale of the beer brewed at these breweries was

started at Madras, and the defendant 3 took charge of that depot, which was carried on in one of the trading names of the joint family. Some of the cheques which were received at the depot in Madras in payment of money due for beer were endorsed by him in the name of P. M. Sadasiva Mudaliar and Brothers, and were paid by him into the account of the joint family with their bankers. Their Lordships will later express their opinion as to what are the inferences to be drawn from the acts of the defendant 3 in and after June, 1916, at Ootacamund and in Madras. It has not been suggested that he acted in the position of a paid manager or paid clerk.

This suit was brought on the 4th October, 1916, on the basis of the letter of the 5th January, 1916, the offer contained in it having been accepted by the plaintiff firm. The plaintiff firm claimed in their plaint Rs. 77,303-13-7, which represented the Rs. 50,000 which were advanced on the 5th January, 1916, and interest on that sum; interest on the sum of Rs. 1,82,145-14-2, the amount of the decree for sale of the 8th April, 1915; interest on Rs. 37,336-7-5, the additional amount which was allowed to them by the Appellate Court in the appeal from the decree for sale; and interest on the total amount of that Appellate Court decree by way of prospective damages; and the plaintiff firm prayed for a decree against the defendants 1, 2 and 3 personally and against their family property in the hands of the defendants excepting the share in it of their minor brother. The defendants severed in the defences, the defendants 1 and 2 filed one written statement, and the defendant 3 filed two written statements. The defences pleaded, so far as they are now material, were briefly that the agreements of the 31st December, 1915, and of the 5th January, 1916, were not completed contracts, as they were not executed by all the parties intended to be jointly bound by them and could not be enforced against any of the defendants. That in view of the facts, as will later appear, was an untenable defence. It was further pleaded by the defendant 3 that the agreements were not for the benefit of the joint family, and were not within the powers of the manager of a joint family to make. The defendant 3 also specially pleaded that he was not consulted about the agreements, and was not bound by them. The defendants 1 and 2 in their written statement, admitted their liability to pay Rs. 20,000 of the Rs. 50,000.

The learned Subordinate Judge who tried the suit and heard the witnesses giving their evidence, observed in his judgment:—

“The facts of the case not being complicated, and covering as they do a comparatively short period, the oral evidence in the case is, on the whole, short: the questions in issue are in the main questions of construction and questions of law. Despite, however, the essential simplicity of the facts, there has been in the case an unusual amount of hard swearing on the part of the four parties to the suit that have been examined, a most regrettable feature of the case, having regard to the fact that the Plaintiffs and the Defendants occupy a very leading position in their respective communities.”

The four parties to the suit who gave evidence were the defendants 1, 2 and 3, and the managing member of the plaintiff

firm. As regards the defendant 3, the Subordinate Judge also said in his judgment :—

“ As regards Pasupathy Mudaliar, I do not think he is speaking the truth when he tries to dissociate himself as much as possible from the brewery business which was actually being carried on in the name of the family firm and in which he actually took part between June, 1916, and January, 1917, in Ootacamund and in Madras. He has tried hard to fight shy of even an ocular acquaintance with the contents of the licence in the name of the firm that was hung up in the brewery. I cannot agree with him when he pretends that he was an independent member of his joint family on the same footing as his senior brothers. I do not believe him when he says that he told his elder brother in September, 1915, that he would not be bound by their forming a syndicate to buy the breweries.”

and :—

“ As already indicated in the summary of facts, the 3rd defendant after July, 1916, took an active, though subordinate, part in the brewery business which defendants 1 and 2 wanted to acquire for the family. The reasonable inference to be drawn is that he ratified those acts of the defendants 1 and 2 under which they bound themselves to acquire the breweries, *e.g.* the agreements H and J and those acts under which defendants 1 and 2 obtained authority from the Board of Revenue to carry on the brewing business and to open a depot in Madras. But this does not indicate that he ratified those acts of defendants 1 and 2 which are referable to the particular method of acquisition which the defendants 1 and 2 wished to adopt ; and I may say that there is absolutely no evidence whatsoever which shows that the 3rd defendant ratified Exhibits AA, BB or CC except to the extent of the sum of Rs. 20,000-0-0 which forms a portion of the consideration of the Exhibit CC promissory note. I make this exception, as in the absence of the account books of the family, I must presume that this sum of Rs. 20,000-0-0 actually received by defendants 1 and 2 has passed into the family accounts, and on the ground that the implied authority given by the 3rd defendant to defendants 1 and 2 by way of ratification to acquire the breweries necessarily implies an authority to borrow the required money under *ordinary* conditions ; and the borrowing of Rs. 20,000-0-0 only at 24 per cent. for the purpose of making up Rs. 3,70,000-0-0, the sale price of the breweries, *prima facie* amounts to borrowing under ordinary conditions.”

In conclusion the Subordinate Judge, disallowing all plaintiff company's claims except as to Rs. 20,000, made the following decree :—

“ It is ordered and decreed that the defendants 1 to 3 do pay to the plaintiffs the sum of Rs. 21,800-0-0 (being principal—Rs. 20,000-0-0 and interest thereon at the rate of 12 per cent. per annum from 5th January, 1916, to date of suit, 4th October, 1916,—Rs. 1,800-0-0) out of the amount sued for, with interest on Rs. 20,000-0-0 at the rate of 12 per cent. per annum from 5th October, 1916, to this date, viz., Rs. 2,040-0-0, and with further interest on the aggregate amount of Rs. 23,840-0-0 at the rate of 6 per cent. per annum from this date to the date of realization, and that the defendants 1 to 3 do also pay to the plaintiffs the sum of Rs. 682-2-0 on account of the proportionate costs of the suit, with interest thereon at the rate of 6 per cent. per annum from this date to the date of realization, subject, however, to the reservation that the 3rd defendant's liability is restricted to his share in the family property only.

“ It is further ordered that the defendants 1 to 3 will not get their proportionate costs on the amount disallowed to the plaintiffs and do bear their own costs.”

It is not clear why the Subordinate Judge did not decree payment of the Rs. 50,000, instead of Rs. 20,000 only. If he had been consistent, he would have decreed payment of the larger amount.

From the decree of the Subordinate Judge the plaintiff company appealed to the High Court. The leading judgment in the High Court was delivered by Abdur Rahim, J. In his judgment, he said :—

“ The main question argued both in the Lower Court as well as before us is whether the agreement, Exhibit BB, was a contract at all, that is to say, whether the agreement was to be regarded as complete and binding since the 3rd defendant in the suit, Pasupathy Mudaliar, did not sign it. It is signed by ‘ P. M. Marudachala Mudaliar and Sons ’—that is the name of the family firm of the Mudaliars—and also by the 1st defendant, Sadasiva Mudaliar, the 2nd defendant, Gurusamy Mudaliar, and by Sadasiva Mudaliar as guardian for Rajabahadur Mudaliar, minor brother of the defendants. I have no hesitation whatever in accepting the evidence of Mr. Walker that the parties expected that the third brother, Pasupathy Mudaliar, also would execute the agreement. The promissory note, Exhibit CC, is signed only by Sadasiva Mudaliar and Gurusamy Mudaliar, 1st and 2nd defendants. The question with respect to both the documents is whether they are to be regarded as completed transactions or whether it was the intention of the parties that there was to be no binding contract until the 3rd defendant, Pasupathy Mudaliar, joined in executing Exhibit BB. The learned Subordinate Judge has held that the agreement was conditional, that is, it was not to take effect until it was executed by Pasupathy Mudaliar. It seems to me, however, that the admitted and clearly established facts of the case point to an opposite conclusion. There can be no doubt whatever, as already stated, that both the parties intended that Exhibit BB should be binding on the entire family. At the same time, it is equally clear to me that the parties intended that, if all could not be bound, at least those who signed in their individual capacity, would be bound. The Saits had left the matter in the hands of their legal adviser, Mr. Walker, and the evidence also shows that the Mudaliars were represented by a Pleader, Mr. Rama Row, who, however, has not been examined in the case. There was considerable discussion between different parties and their lawyers as to what should be the exact nature of the arrangements. The result of the evidence amounts to this—that since there was difficulty as mentioned in Exhibit BB itself as to getting the necessary parties to join in the conveyance of the breweries to the Mudaliars, the expedient that they hit upon was that the Mudaliars should take a transfer of the decree of the Saits. With that decree in their hands they expected that there would be no great difficulty in securing the breweries. The Mudaliars wanted the breweries for the benefit of the entire family, which consisted of three adults and one minor brother, but the lawyers of the parties thought that difficulty might arise in binding the entire family, as questions might be raised as to whether the transaction was a proper one for the benefit of the family. Mr. Walker’s evidence makes it clear that under the circumstances, he thought it expedient and advisable that the agreement should be signed not only by the firm or in the firm’s name, but by the Mudaliars individually. The plaintiffs’ object in that was that if it so happened that the transaction did not come within the scope of the family business which consisted mainly in plantations, the members of the family who signed the agreement would be bound by them. The 3rd defendant was at the time not in Ootacamund, and that was the reason why he did not actually sign Exhibit BB, but he was expected to sign it, and the evidence is that the 1st defendant, who is the head of the family, being the elder brother, undertook to obtain the signature of

Pasupathy Mudaliar. Mr. Walker positively swears that it was never suggested or understood that Exhibit BB would not come into operation unless or until Pasupathy signed it. There is not the slightest reason to doubt the *bona fides* or accuracy of his statement. And it clearly could not have been the intention of the parties that Exhibit BB was to have no effect whatever until the third brother signed it.”

Their Lordships agree with all that the learned Judge said on that subject. As to the liability of defendant 3, he said that—

“ It cannot be disputed that at least from June, 1916, he took a very active part in the business of the breweries. He was in charge of the depot in Madras for some time according to the arrangement with the Excise authorities (their licence); he received monies from the family to funds (with which to carry on the business), and paid the profits of the business into the family account with the bank. He also signed cheques in the name of the family firm of Marudachala Mudaliar and Sons and Sudasiva Mudaliar and Brothers, and there cannot be the least doubt that he regarded the business as much his own as that of the 1st and 2nd defendants.”

Their Lordships are not aware that the defendant 3 ever signed any cheque in the name of either of the joint family firms, if that is what the learned Judge meant in the passage quoted; but he probably meant that the defendant 3 had endorsed some cheques in the name of the firm, and with that explanation their Lordships agree with the finding quoted. Further on the learned Judge found “ the evidence clearly shows that he (the defendant 3) treated and adopted the whole transaction as one in which he was interested as much as the 1st and 2nd defendants,” and he also found that the defendant 3 ratified and adopted the transaction of the 5th January, 1916, by his subsequent conduct, and made himself liable by adopting that contract. Spencer, J., in a short judgment, agreed with Abdur Rahim, J., and said, “ I also agree in thinking that the 3rd defendant, by his subsequent conduct, ratified and acquiesced in the agreement when he joined with his brothers in managing the brewery business in 1916.” The result was the High Court gave the plaintiff firm a decree for Rs. 76,159-5-7, which included the Rs. 54,359-5-7, which had been decreed by the Subordinate Judge, and with some future interest at 6 per cent.

From that decree of the High Court this appeal has been brought. Their Lordships agree with the findings of the High Court, which they have quoted from the judgments delivered in that Court. There can be no doubt the business of owning and carrying on breweries was not a business of the joint family, and that the minor brother, when he comes of age, can repudiate the contract of the 5th January, 1916, so far as he and his interest in the joint family property are concerned, and that his interests in the joint family property cannot be affected by this suit. The contract of the 5th January, 1916, cannot be regarded as a contract of the joint family of which the minor brother is a member, but defendant 3 accepted that contract as binding on him, and derived benefits under it and consequently accepted it, with liability to perform it; the money which was advanced under it by the

plaintiff firm was money which was required for the starting and carrying on of the brewing business. It appears to their Lordships that it is a contract which is binding on those members of the joint family, the defendants 1, 2 and 3, who were parties to it or accepted it as a contract, and that they cannot escape their liability to perform it or to pay damages for the nonperformance of it by showing that they have no property except that which is property of the joint family in which their minor brother is equally interested with them. If it were the law that some members of a joint family could escape from liability to perform contracts entered into by them on the grounds that their contracts were not such as would bind the joint family, and that they had no property other than that which was the property of the joint family, it would be necessary for every person with whom they sought to make a contract to assure himself that the business to which the proposed contract would relate was business of the joint family, and that no member of the joint family was a minor. Under such circumstances, it would be difficult to carry on business with persons who happened to be members of a joint family of the Province of Madras. What might be the position in other Provinces it is unnecessary to consider. The decree in this suit cannot be executed against the minor's interest in the joint property of the family.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

P. M. SADASIYA MUDALIAR AND OTHERS

vs.

A. R. HAJEE FAKKEER MAHOMED SAIT AND
SONS.

DELIVERED BY SIR JOHN EDGE.

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