Privy Council Appeal No. 95 *of* 1930.
Allahabad Appeal No. 54 *of* 1928.

The Benares Bank, Limited - - - - - *Appellants*

v.

Hari Narain and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH MAY, 1932.

Present at the Hearing:

LORD BLANESBURGH.
LORD RUSSELL OF KILLOWEN.
SIR DINSHAH MULLA.

[*Delivered by* SIR DINSHAH MULLA.]

This appeal involves questions which frequently arise in suits to enforce a mortgage against property which belongs to a Hindu joint family governed by the Mitakshara where the mortgage is executed by the father for himself and for his minor sons as their guardian.

The family in this case consisted of two brothers, Jagdish Narain and Raghubir Narain and their respective sons. Jagdish Narain had five sons, two of them, Suraj Narain and Dip Narain being adults, and the other three minors. Raghubir Narain had three sons, all of whom were minors.

On the 1st September, 1911, the adult members of the family borrowed Rs. 28,000 from the Benares Bank, Limited, the appellants before this Board, and executed a deed whereby they mortgaged six properties belonging to the family, one situated at Allahabad, another at Manjhiari, and the rest in the Fatehpur district, to secure the debt and interest, each father signing as guardian of his minor sons. The mortgage deed recited that the mortgagors were in need of money to pay off two previous

mortgages, one for Rs. 7,000 in favour of Dwarka Bibi, and the other for Rs. 11,000 in favour of Kishun Narain, and to carry on the mortgagors' business.

In 1913 the mortgagors paid Rs. 4,128 to the bank. In 1919 they sold one of the Fatehpur properties, and paid a further sum of Rs. 29,700. Jagdish Narain died in 1921. The balance not having been paid, the bank brought the present suit in the Court of the Subordinate Judge of Allahabad on the 27th April, 1923, against the surviving members of the family, who are respondents in this appeal, to enforce the mortgage against the remaining five properties.

The adult members of the family who had executed the mortgage did not defend the suit, but a written statement was filed on behalf of such of the sons of the two brothers as were minors at the date of the mortgage. The defence was that there was no consideration for the mortgage and no necessity for the loan. As to the business referred to in the mortgage deed, their case was that Jagdish Narain started a *theka* business in 1902 or 1903 and took building contracts from the Public Works Department at Benares, and that the business was the personal business of Jagdish Narain, and not a joint family business.

It would appear from the bank's books and other documents produced at the trial that Rs. 18,000 was paid in cash by the bank to the mortgagors, and that the balance of Rs. 10,000 was credited to the account of Suraj Narain pursuant to a letter dated the 24th September, 1911, addressed by the four adult members to the bank. It would also appear that Rs. 6,342 out of the Rs. 10,000 was transferred by the bank to the account of Bhagwati Prashad on the instructions of Suraj Narain and the balance of Rs. 3,658 was withdrawn by cheques drawn by Suraj Narain in favour of Ambika Prashad who attended to the *theka* business.

The Subordinate Judge found that the whole consideration was paid by the bank, that Rs. 18,000 was applied in discharging the two previous mortgages, that Rs. 6,342 was paid to Bhagwati Prashad to whom the family owed that amount, and that the balance of Rs. 3,658 was used for the *theka* business which he held was a family business. He also held on some evidence given in the case (to be presently referred to) that the Allahabad and Manjhiari properties belonged to Jagdish Narain and Suraj Narain, and not to the joint family. On these findings he passed a preliminary mortgage decree for the whole debt and for costs.

On appeal to the High Court at Allahabad, the judgment of the Subordinate Judge was reversed on all points except as to Rs. 18,000 which the defendants did not contest at the hearing of the appeal. As to Rs. 6,342 the High Court decided that there was no evidence on the record to show that the family owed that amount to Bhagwati Prashad. As regards Rs. 3,658 used in the *theka* business they held that the business was not a family

business, but the personal business of some adult member of the family, and that even if it was a family business, it was not ancestral so as to render the minors' shares liable for that debt. As to the Allahabad and Manjhiari properties they took the view that they belonged to the joint family, and not to the two brothers. Their conclusion therefore was that the mortgage was valid to the extent only of Rs. 18,000, and after taking certain accounts they passed a decree on the 8th August, 1928, in modification of the decree of the trial Judge in the following terms :—

> " It is ordered and decreed that this appeal be allowed in part, that in modification of the decree of the Subordinate Judge of Allahabad, the plaintiff's claim to the extent of Rs. 18,000 with interest thereon, for which the mortgage in suit was valid and which has been paid up by the defendants, be dismissed as against the appellants and the mortgaged property, and that a simple money decree be and it hereby is passed in favour of the plaintiff-respondent as against Raghubir Narain, Dip Narain and Suraj Narain personally and as against the heirs of Jagdish Narain deceased to the extent of the personal assets of the said deceased in their hands other than the mortgaged property, for recovery of Rs. 24,794·8·0 (twenty-four thousand seven hundred and ninety-four and annas eight) viz., Rs. 10,000 principal and Rs. 15,242·8·0 interest at Re. 0·12·0 per cent. per mensem simple from the date of the bond up to the 8th August, 1928, the date of this Court's decree, in all Rs. 25,242·8·0 minus Rs. 448 excess amount paid by defendants, and that the sum of Rs. 10,000 shall carry future interest at Re. 0·12·0 per cent. per mensem until realisation. It is further ordered that the parties shall bear their own costs throughout."

From this decree the bank has brought the present appeal to His Majesty in Council. The appeal is directed against all the points decided by the High Court against the bank.

As to the Allahabad and Manjhiari properties their Lordships were told by counsel for the bank that they were worth a good deal more than the amount claimed by the bank, and that if it were held that they belonged to Jagdish Narain and Raghubir Narain it would be unnecessary to consider the questions arising on the items of Rs. 6,342 and Rs. 3,658. This, no doubt, correctly represents the legal position, but their Lordships are unable to hold upon the facts that these properties belonged to the two brothers.

The bank's case as laid in the plaint was that all the properties were joint family properties, and this was admitted in the written statement filed on behalf of the minors. No issue was raised as to the ownership of these two properties, and no evidence was led on behalf of the bank that they belonged to the two brothers. The first time any indication was given by the bank of its contention as to these properties was in the cross-examination of Suraj Narain, who was a witness for the defence. Their Lordships think that in these circumstances the trial Judge ought not to have allowed the bank to make a new case at the close of the trial unless at least the plaint was amended and an issue was raised on it. Apart, however, from this consideration,

their Lordships are of opinion that the evidence on the record is too meagre to support the bank's case. The whole of the evidence as given by Suraj Narain on this question was as follows :—

> " Sheo Devi was my grandmother. She had the property of Manjhiari village which was given to her by her husband and a house No. 70 at Chowk Ganga Das. That same house and village property are among the mortgaged properties in the bond in question. There is a *mahal* Sheo Devi in Manjhiari. It belonged to my said grandmother. I do not recollect the year when my grandfather had made a gift to my grandmother. . . . Sheo Devi died some nineteen years ago."

No particulars of the alleged gift are given. It is not stated whether it was in writing or oral, nor is it stated when and where it was made. It is impossible to hold on this evidence that the properties were acquired by Sheo Devi as a gift from her husband, and that they descended on her death to the two brothers as her heirs.

The next question relates to the item of Rs. 6,342. As to this item the bank's case is that the family owed that amount to Bhagwati Prashad and that it was credited to his account with the bank pursuant to a letter from Suraj Narain to the bank dated the 27th September, 1911 ; that Bhagwati Prashad owed Rs. 5,278·13·4 to the bank under a promissory note : and that as a result of the payment of Rs. 6,342 into his account, his liability to the bank was discharged, and a balance of Rs. 1,063·2·8 was left to his credit which he afterwards received from the bank in cash. The principal witness on behalf of the bank was Babu Maharaj Kishore, who was the manager of the bank at the date of the mortgage. In his evidence he said that he had made inquiries from Jagdish Narain (who had died before the suit) or Suraj Narain as to the necessity of the loan and he was told that the family was indebted to Bhagwati Prashad and the debt had to be paid. This was denied by Suraj Narain in his evidence. He deposed that he was not present when the loan was negotiated, but that he was told by Jagdish Narain that he wanted a loan of Rs. 22,000 only, but the bank refused to give any loan unless he borrowed a further sum of Rs. 6,000 and paid it into the account of Bhagwati Prashad in liquidation of his debt to the bank. As to the letter of the 27th September, 1911, he said that he wrote it at the dictation either of Babu Maharaj Kishore or Balram Das. The Subordinate Judge did not believe his evidence, and held that the family was indebted to Bhagwati Prashad, and that the debt due to him was an antecedent debt and the minors' shares therefore were liable for it. The High Court also, it would appear, did not accept the evidence of Suraj Narain, but they held that there was no evidence on the record to show that the family was indebted to Bhagwati Prashad.

Their Lordships find themselves unable to agree with the High Court. Babu Maharaj Kishore did say in his evidence

that he was told by Jagdish Narain or Suraj Narain that the family was indebted to Bhagwati Prashad. As to this evidence the High Court say that it is " very unsatisfactory and is no more than a mere guess or hearsay." Their Lordships are unable to accept this view. The bank was the lender, Suraj Narain was a borrower, and the statement as to the indebtedness of the family was made by the borrower to the lender's agent. Such a statement repeated by the lender's agent in his evidence in a suit by the lender against the borrower is not, in their Lordships' view, hearsay. But the matter does not rest there. There is the letter of the 27th September, 1911, addressed by Suraj Narain to the bank asking the bank to pay Rs. 6,342 to Bhagwati Prashad out of the Rs. 10,000 left with the bank. The testimony of Suraj Narain as to the circumstances in which that letter was written having been discarded as unreliable, there was no alternative left to the Court but to hold, in the absence of any other explanation, that the payment which the bank was asked to make by that letter to Bhagwati Prashad was in respect of a liability to him either of Jagdish Narain and Raghubir Narain or of the whole family. There being no evidence that the liability was incurred for a necessity, it must be deemed to have been a personal liability of the two heads of the family. The Subordinate Judge held that this liability existed before the mortgage and therefore constituted an antecedent debt. It was argued before their Lordships that the liability might have been incurred after the date of the mortgage. But the short interval between that date and the date of the letter renders that view highly improbable. Their Lordships are therefore of opinion that the mortgage as regards this item must be deemed to have been made for the payment of an antecedent debt of Jagdish Narain and Raghubir Narain and it was therefore binding upon their sons.

The only other question is as to the item of Rs. 3,658 borrowed for the *theka* business. It was urged on behalf of the bank that the business was ancestral and that the minors were liable for the debt to the extent of their interest in the joint family property. On the other hand it was contended that the business was the personal business of Jagdish Narain and the family had no interest in it. Their Lordships have examined the evidence, and they consider that the business was started by Jagdish Narain and Raghubir Narain as managers of the family. The business therefore cannot be said to be ancestral so as to render the minors' interest in the joint family property liable for the debt.

Next it was argued that a business started by the father as manager, even if new, must be regarded as ancestral. Their Lordships do not agree. It is in direct opposition to the ruling of the Board in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (1922) L.R. 49, I.A. 108. The judgment in that case proceeded on the broad ground that the manager of a joint family has no power to impose upon a minor member of the family the risk

and liability of a new business started by him. That, no doubt, was a Dayabhaga case, but there is no distinction in principle on this subject between a case under the Dayabhaga and one under the Mitakshara. The power of the manager of a joint family governed by the Mitakshara law to alienate immovable property belonging to the family is defined in verses 27 to 29 of Chapter I of the Mitakshara. The judgment of the Board in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koo.-weree* (1856) 6 Moo. I.A. 393, relied on by the bank, was founded apparently on those verses. A new business, their Lordships think, is not within the purview of those verses. It does not make any difference that the manager starting the new business is the father. Their Lordships find that the balance of authority in India is in accordance with this view.

It was also urged on behalf of the bank that even if the business was not ancestral, the family was liable for the debt as the bank had made reasonable and *bona fide* enquiries which led it to believe that the business was ancestral and that there was a necessity for the raising of money for the purpose of the business. Their Lordships are not satisfied that the bank made reasonable inquiries as to the ancestral character of the business.

The mortgage as to Rs. 3,658, being neither for a necessity recognised by the law nor for the payment of an antecedent debt, is, in their Lordships' view, wholly invalid under the Mitakshara law as applied in the United Provinces, and it does not pass the shares even of the alienating coparceners.

A further point was raised for the first time on behalf of the bank that the bank was at least entitled to a decree for the sale of the minors' interest in execution on the principle enunciated in the second of the five propositions laid down by the Board in *Brij Narain* v. *Mangla Prasad* (1923) L.R. 51 I.A. 129. But the point was not taken in the Courts below, and as it might involve, as was conceded, questions of fact not yet tried, it is not open to the bank to raise it at this stage.

The result is that the mortgage is valid to the extent of Rs. 24,342 instead of Rs. 18,000 as held by the High Court. This will reduce the personal liability of the adult members of the family named in the decree from Rs. 10,000 to Rs. 3,658.

The decree of the High Court quoted above was passed after an account had been taken as directed in their judgment. The following are the material portions of the judgment :—

> " Although the plaintiff Bank did not ask for it, we think that it is well entitled to a simple money decree for Rs. 10,000 ; the amount of unsecured debt. In view of the payments made from time to time, and the clear acknowledgment of liability in a large number of documents, of which Exhibit 34, dated the 29th August, 1919, may be cited as an exemplar, the claim for a money decree is amply within limitation. We pass a simple money decree for Rs. 10,000 against Raghubir Narain, Dip Narain and Suraj Narain personally and against the heirs of Jagdish Narain, limited in the case of these heirs to the extent of the personal assets of Jagdish Narain in their hands other than the mortgaged property together with

simple interest at twelve annas per cent. per mensem from the date of the bond up to the date of realisation, subject to the further direction, which we proceed to give.

"The mortgage is valid to the extent of Rs. 18,000 with interest at twelve annas per cent. per mensem with six monthly rests. The mortgagors have already paid to the plaintiff Bank Rs. 33,828·4·9. We direct that an account be taken of the sums due and the sums received up to the date in 1919 when Rs. 29,700 was received by the plaintiff Bank. If after adjustment of the debits and credits any sum of money be found due to the plaintiff Bank, a decree for the said amount be passed under Order 34, rule 4 of the Code of Civil Procedure. If no amount be found due, the plaintiff's claim against the appellants and the mortgaged property be dismissed. If after adjustment of the debits and credits, a surplus be found in favour of the mortgagors, the same should be applied towards the reduction of the simple money debt and the simple money decree be passed only for the balance."

The account was taken as directed by the High Court, and it showed a surplus of Rs. 448 in favour of the mortgagors. The result was that the bank's claim in respect of the mortgage was dismissed, and the personal liability of the adult members was reduced by Rs. 448 as appears from the decree.

The account directed by the High Court was taken on the footing that the mortgage was valid to the extent of Rs. 18,000 only. The mortgage being valid, in their Lordships' view, for Rs. 24,342, a fresh account will have to be taken on that footing, substituting Rs. 3,658 for Rs. 10,000, and Rs. 24,342 for Rs. 18,000, in the judgment of the High Court quoted above.

Their Lordships will therefore humbly advise His Majesty (1) that this appeal should be allowed in part; (2) that it should be declared that the mortgage is valid to the extent of Rs. 24,342; (3) that the case should be remitted to the High Court to take an account on that footing of what will be due to the bank on the mortgage, and to modify their decree as regards the form and figures according to the result of the account, and otherwise to give effect to their Lordships' opinion: and (4) that the decree of the High Court should be affirmed subject to the above variations and directions. The bank will have two-thirds of the costs before the Board and in the Courts below, and the costs will be tacked to the mortgage debt. The costs of further proceedings in India will be dealt with by the High Court.

In the Privy Council.

THE BENARES BANK, LIMITED,

v.

HARI NARAIN AND OTHERS.

DELIVERED BY SIR DINSHAH MULLA.

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