Privy Council Appeal No. 84 *of* 1938
Allahabad Appeal No. 12 *of* 1937

Seth Kishori Lal and another - - - - *Appellants*

v.

Bhawani Shankar 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 23RD MAY, 1940.

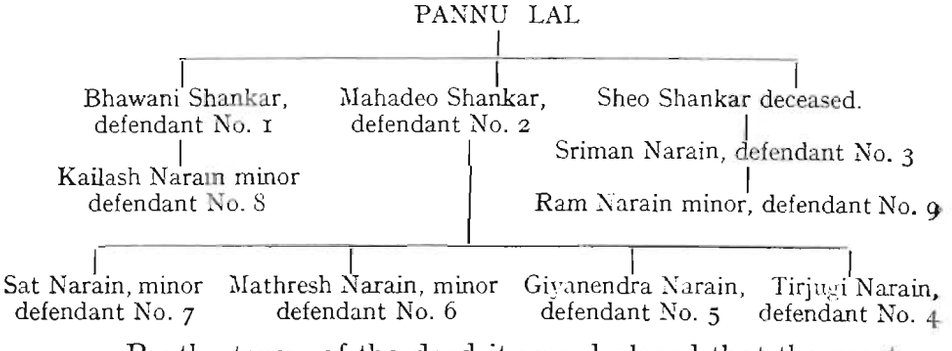
Present at the Hearing:

LORD THANKERTON
SIR GEORGE RANKIN
SIR PHILIP MACDONELL

[*Delivered by* SIR GEORGE RANKIN]

This appeal is brought by the plaintiffs from a decree of the High Court at Allahabad, dated 24th November, 1936. The defendants have not been represented at the hearing of the appeal, but Mr. Rewcastle and Mr. Hyam for the appellants have carefully laid before the Board all the material considerations.

The suit was brought on the 21st March, 1932, in the Court of the Subordinate Judge of Etah, upon a registered mortgage dated 1st September, 1926, and claimed the usual relief under O.34, C.P.C.—enforcement of the mortgage by sale of the mortgaged property. The mortgage deed was in favour of the plaintiffs. It was executed by three persons as mortgagors—Bhawani, Mahadeo, and Sriman Narain—but Bhawani purported to execute on behalf of himself and his minor son Kailash Narain; while Mahadeo purported to execute on behalf of himself and his four minor sons—Tirjugi, Giyandendra, Mathresh and Sat Narain. As will be seen from the pedigree hereunder, Bhawani and Mahadeo were brothers and Sriman Narain was their nephew, being the son of their deceased brother Sheo Shankar.



By the terms of the deed it was declared that the mortgagors were joint; and the property mortgaged was in fact the zemindari property of the family. The sum borrowed

was stated as Rs.60,000 and it was recited that this sum was borrowed " for the purpose of paying the debt, detailed below, which we the executants have jointly taken for lawful necessity, for carrying on a business and other necessities, and by which all of us the executants, whoever may have borrowed the sum, have been benefited and for payment of which all of us, the executants, are liable to pay." It was further stated that " we the executants require money for carrying on our business also and also for purposes of starting the business by starting a sugar machine (*khandsal*) carrying on a business and for household purposes for the benefit of our family." Interest was at 9 per cent. per annum with yearly rests.

In the body of the mortgage deed 16 different sums amounting in all to Rs.50,491 were mentioned as having been left with the plaintiffs out of the mortgage money for payment of decretal and other debts therein described. Apart from the sum of Rs.458-7-3 which went to pay the stamp and registration fees the remaining item was a sum of Rs.9,050 which the mortgagors purported to have taken in cash " for carrying on the business of *khandsal* and setting up a sugar machine as well as for trade and other family necessities."

The plaintiffs suing to enforce this mortgage deed impleaded all the members of the family as well as certain transferees from them who need not be further mentioned. The first three defendants were Bhawani, Mahadeo and Sriman Narain. There being some difficulty about the appointment of a guardian *ad litem* for the minors Kailash and Ram Narain, these two were before the trial discharged from the suit at the plaintiffs' instance on 6th August, 1932. It was conceded by the defendants at the trial that the three branches of the family were joint and it is not disputed that Mahadeo was the *karta*. The learned Subordinate Judge thought that since two of the minor members of the family were no longer parties to the suit it was not open to him to give a mortgage decree against joint family property, and that the only relief which he could grant was a money decree against the three defendants who had been of full age at the date of the deed—viz., Bhawani, Mahadeo and Sriman Narain. This view was overruled by the High Court who pointed out that in such a suit a minor member of a Hindu joint family is sufficiently represented by the *karta*.

Leaving on one side a question whether the plaintiffs were entitled to a certain credit in respect of a motor car, both Courts have found that the amount lent was Rs.58,541 and not Rs.60,000; that Rs.27,891 was applied by the plaintiffs in discharge of antecedent debts and that the balance of Rs.30,649 was paid to the mortgagors in cash. It was objected in the High Court—though the point does not appear to have been taken before the trial Judge—that the sum of Rs.27,891 expended upon antecedent debts was not wholly expended upon antecedent debts which were

joint, some being, so far as appeared in evidence, the individual debts of defendants 1, 2 or 3. The High Court, having examined the evidence, came to the conclusion that Rs.16,299 was shown to be due from these three jointly and were prepared to regard the joint estate as validly mortgaged for that sum. The balance, Rs.11,592, was only shown to have been incurred by one or other, or by two, of the first three defendants. A Full Bench in *Chiranji Lal* v. *Bankey Lal* (1933) I.L.R. 55, All. 370, had held that "it is the privilege of the father alone to burden the family estate by a mortgage by discharging an antecedent debt which must be a debt of his own. A manager of the family who is not the father cannot bind the estate merely by discharging a pre-existing debt of the family." Hence, apart from proof of legal necessity—another ground of claim altogether—the High Court held that the joint estate was not bound by the mortgage deed save to the extent of Rs.16,299. It is not pretended that legal necessity has been proved as regards the balance of the sum of Rs.27,891.

In the result the High Court gave the plaintiffs a money decree against the first three defendants for Rs.58,541 with interest: of this Rs.16,299 and no more was held to be a valid charge on the family estate and a preliminary decree for sale was made in respect thereof.

This decision is complained of by the plaintiffs in three respects. In the first place appeal is made to the principle of Hindu law that where sons are joint with their father they are liable to pay debts contracted by him for his own personal benefit provided that the debts are not immoral. It is said that judgment should have been given against the sons of each of the first three defendants in the present suit. No such relief was asked for before either Court in India and the suit as framed was a suit upon the mortgage of 1st September, 1926. It is not necessary to consider the extent of the plaintiffs' rights in execution of the personal decree against the fathers. Their Lordships cannot permit the suit to be recast at this late stage and must decline to entertain the new ground of claim now put forward for the first time.

The second contention of the plaintiffs is that their Lordships should hold the sum of Rs.30,649 paid to the mortgagors to have been raised for the benefit of the joint estate. This case would appear to rest entirely on the suggestion that the money was required for the *khandsal* business which—as held by both Courts in India—was not an ancestral business. In the High Court's judgment it is said, "Dr. Katju, who argued this case very fully on behalf of the appellants, had to concede that there was no evidence upon which we could hold that the cash advanced was for legal necessity and that the plaintiff-appellants had not discharged the onus which the law casts upon them. That being so it is clear that a mortgage decree cannot be passed in respect of this portion of the advance—viz., Rs.30,649-8-0." It was suggested before the Board that it was still open to the plaintiffs to seek a mortgage decree

for this sum on the ground that it was borrowed for "the benefit of the estate" as distinct from "legal necessity," but on the facts of the case their Lordships regard this as but another and more difficult form of the same contention that was abandoned as hopeless in the High Court.

Lastly it was said that the whole sum of Rs.27,891 expended upon antecedent debts should have been treated as charged upon the joint estate by the mortgage and not only the sum of Rs.16,299 found to have been jointly due by the first three defendants. Their Lordships were not asked to question the law applied to the matter in the High Court but were asked to hold that the whole sum of Rs.27,891 was jointly due, since the individual debtor may well have incurred the obligation on behalf of the heads of the other branches as well as on his own account. It was said that the recital already quoted from the mortgage deed throws the burden upon the defendants of disputing that all the executants were liable for all these debts. As against the minor members of the family into whose mouth this recital was put by the draftsman of the mortgage deed, their Lordships can attach no such high value to it. The burden remains heavily upon the mortgagee to establish compliance with the conditions under which the Hindu law permits the interest of the minor members to be taken from them. In the present case the recital read as a whole is proved to have been untrue—untrue to the prejudice of the minors—in important particulars regarding the antecedent debts. If the plaintiffs felt that they had been taken by surprise in the High Court they might have asked for an opportunity to call further evidence to prove the joint character of the debts in question. They do not appear to have done so and their Lordships see no reason to disturb the findings of the High Court which appear to be accurate.

Their Lordships are much obliged to the appellants' learned counsel for their arguments, which have been both fair and clear, but they must humbly advise His Majesty that this appeal should be dismissed. As the respondents have not appeared there will be no order respecting costs.

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In the Privy Council

SETH KISHORI LAL AND ANOTHER

v.

BHAWANI SHANKAR AND OTHERS

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