

Channabasavegowda and ors. Vs. Rangegowda and ors.

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Court : Karnataka

Decided On : Nov-30-1950

Reported in : AIR1951Kant38; AIR1951Mys38

Judge : Venkataramaiya, ;Balakrishnaiya and ;Mallappa, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 - Order 1, Rule 10; Hindu Law; Mysore Land Revenue Code - Sections 54; [Evidence Act, 1872](#) - Sections 101 to 103

Appeal No. : Second Appeal No. 77 of 1947-48

Appellant : Channabasavegowda and ors.

Respondent : Rangegowda and ors.

Advocate for Def. : A.R. Somanatha Iyer and ;M.K. Srinivasa Iyengar, Advs.

Advocate for Pet/Ap. : V. Krishnamurthy, Adv.

Disposition : Appeal allowed

Judgement :

Yenkataramaiya, J.

1. This appeal has been referred to the Full Bench for disposal as the Division Bench by which it was heard was of divided opinion as regards the decision in the

ease. The suit from which the appeal arises is of a familiar kind in which the song seek shares in certain properties alleging that these are of a joint family and the alienations thereof by their fathers are ineffective 30 far as they are concerned. As can be seen from the following genealogical tree

KAVALU THIMME GOWDA

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K. Girl Gowda (1st Deft). K. Naojegowda (dead) K. Mari Gowda (2nd Deft.) K. Rame Gowda (3rd Deft.)

||||

_____ | _____ Sons _____ | _____ | _____

|| (Plffs. 7 to 9) ||||

(Sons. (Plffs. Daughters Sons Daughter Sons Daughters

1 to 4) (Plffs. 11 and 12) (Plffs. 5 and 6) (Plff.13) (Plff.10) (Plffs. 14 & 15)

the plaintiffs are the grand-children of one Kavalu Thimme Gowda, by different sons and include grandsons as well as grand daughters. All of them together claim three-fourths share in 16 items of property specified in the plaint alleging that these belong to a joint family consisting of themselves and defendants 1 to 3. It is admitted that none of the properties is in the possession of any member of the family and are all in occupation of the other defendants as a result of certain transactions entered into by defendants 1 to 3 and the father of plaintiffs 7 to 9 which in particular are a mortgage of items 1 to 2 by defendant 1 on 9-7-1934 in favour of defendant 4 and sale of other items by defendants 1 to 3 under deeds dated 16-11-1935. The plaintiffs impeach the mortgage as well as the sales as invalid and not binding upon them. Defendants 1 to 3 were ex parte. The

substance of the defence of the other defendants is that there was legal necessity for the alienations and that the plaintiffs lost their right in their properties by virtue of the proceedings on the foot of the mortgage against defendants 1 to 3 in a representative character and also by reason of the revenue sale of items 1 to 11 on 18-7-1936. They also disputed the correctness of the share claimed by the plaintiffs on the ground that many of them were not born at all on the dates of the alienations and objected to the suit as being multifarious as defendants 1 to 3 had effected a partition of the family properties and the plaintiff's could not jointly seek a share pretending to be undivided. The learned Munsiff decreed the suit as prayed for and his decision was confirmed on appeal. Defendants 7, 8, 10 and 11 have preferred the second appeal.

2. Normally it is not the practice in second appeal to disturb a concurrent decision based on findings of fact. But the appellate judgment in this case reads to be only a brief summary of what the learned Munsiff has stated about the matters involved for consideration and does not show that there has been any independent examination of the points at issue. Further, the findings of the learned Munsiff seem to have been coloured with an erroneous view of the nature and degree of proof reasonably expected of an alienee to support his title. He has overlooked the significance and the effect of the documents which purport to sever the joint status of the family and instead of requiring the plaintiffs who though apparently bound profess to be unaffected by the recitals to furnish reasons, called upon the defendants to adduce independent proof in support of them. It, therefore, seems that this is a case in which the conclusions reached by the Courts below are vitiated by a wrong approach to the case and influenced by the evidence being appreciated from a wrong angle and as such interference is not only justified but also necessary,

3. That the properties in question belonged to the joint family cannot be doubted. Nor is it denied that up to the year 1932 the parties constituted a joint Hindu family. The claim as regards items 1 to 9 depends on the effect of the mortgage by defendant 1 on 9-7-1924 and the proceedings thereunder. On that date defendant 1 was, even according to the plaintiff's witnesses, the manager of the family. He borrowed Rs. 500/- from defendant 4 for purposes of cultivation of the dry lands

and for domestic expenses as recited in Ex. XII, the deed of mortgage. For recovery of the mortgage debt defendant 4 sued not merely defendant 1 but also his brothers defendants 2 and 3 and another Nanjappa Gowda who is now dead alleging in the plaint, Ex. X, that defendant 1 is the manager of the family and that he borrowed that amount for family benefit. None of the defendants contested the suit or discharged the debt with the result that there was a decree which was followed up by a sale at which defendant 5 happened to be the purchaser. Exhibit XIV, the sale certificate, shows that the properties in entirety were sold in public auction for satisfaction of the decree. The contention of the defendants is that having regard to the character of the suit and the subject-matter of the sale, defendant 6 become the full owner of items 1 to 9 and that it is not open to the plaintiffs to question it. There cannot be any doubt that a suit filed against the manager qua manager of a joint Hindu family in a representative character binds all the members of the family even though they may not actually be made parties to the proceedings when "the debt was one due by the whole family". (See 6 Mys. L. J. 317.) In *Daulat Ram v. Mehrchand*, 15 Cal. 70: (14 I. A. 167 P. C.) their Lordships of the Privy Council pointed out that where the mortgage extends to the entire interest of the family and not confined to the share of any particular member and where in the plaint the mortgagee claims not only to recover the amount of the mortgage from the individual mortgagor but asks that the 'debt owed by the family as joint members of an ancestral trading firm' may be satisfied out of the mortgaged property, in short where these conditions are fulfilled, although the manager alone is impleaded, he effectively represents all the members who therefore become bound by the decree. (See also *Sheo Shankar Ram v. Mt. Jaddo Kunwar*, 36 ALL. 363: (A. I. R. (1) 1914 P. C. 136); *Shankara Narayana v. Rajamani*, 47 Mad. 462: (A. I. R. (11) 1924 Mad. 550) and *Unnamalai Animal v. Abboychetty*, 50 M. L. J. 172: (92 I. C. 524). Having regard to the definite statements contained in the plaint and the fact that besides the mortgagor all the then adult members were made parties to the suit and the claim for recovery of the debt due from joint family was made from the entire properties, I think the proceedings were meant to bind the family as a whole. Irrespective of the question whether the manager acted beyond the scope of his authority or in excess of his powers, the claim with respect to items 1 to 11 is manifestly untenable on account

of the revenue sale by which the purchaser acquired an indefeasible title. The learned Munsiff was, in my opinion, in error in assuming that what was conveyed in the revenue sale was not the entire property but only the right, title and interest of defendants 1 to 3 as there are no materials in support of it and the presumption under Section 54, Land Revenue Code is that the entire property is sold. The mere fact that subsequent to and in spite of the revenue sale the purchaser secured sale deeds from the previous owners, does not militate against these and if at all, can only suggest that it was meant to prevent attempts being made by the defaulters to get the sale cancelled. The sale for recovery of land revenue can be questioned in the civil Court only on the ground of fraud and the party who impugns it has to furnish particulars of the fraud. Absolutely no such particulars are alleged in the plaint or disclosed in the evidence. Further the suit as regards this appears to be belated as it was filed more than six years after the purchaser got possession under the Revenue Sale.

4. As regards the remaining items the sale deeds, Exs. I-V, recite that the debts contracted by defendant 1 for liabilities incurred by him were for the benefit of the family and that at a family settlement each of the brothers undertook to discharge a portion of these from his own share of the properties. P. W. I the patel is the scribe of these documents. Though apparently interested in the plaintiffs he states that defendant 1 might have instructed him as to what properties had to be included in each of the documents as having fallen to the share of the executants. D. Ws. 3 and 4 have also spoken to the partition amongst the brothers. Defendants 2, 3 and 4 though made parties to the suit and were in a position to throw light on the question of partition, are not examined in the case and it looks as if it is they who have engineered this litigation to defeat or impair rights of the alienees. While it is true that the burden of proof to establish the validity of an alienation in a subsequent suit filed by or against the sons lies on the transferee, the rule should not be extended too far to enable the transferors themselves to nullify the alienation through the agency of their sons. There is clear reference in Exs. II to V that the debts were divided, properties were partitioned and specific portions were held by particular members of the family. The inference that the division was real and not made to believe gain a strength from a comparison of these documents with Ex. I which alone refers to the properties not divided. The probability is, if parties

wanted to practice dissimulation they would have followed a uniform pattern and not made a difference between one property and another. I am therefore inclined to hold that there is more in favour of the brothers having effected a division in 1932 than in their continuing undivided. If there was division amongst brothers, as I think there was, the plaintiffs cannot profess to be members of a joint family as the severance of status amongst the brothers operates as a severance amongst the branches as well. There is not even the faintest suggestion that defendants 1 to 3, who are fairly old, experienced in worldly affairs and not addicted to any evil habits, were tricked into executing sale-deeds or that they did it with any mala fide intent. The documents exhibited in the case show that the members of the family had incurred debts prior to the sales and if at a family settlement the liability for discharging these debts was distributed by common agreement, it cannot be said that the arrangement voluntarily entered into was imprudent or improper. Moreover, the case of the plaintiff is not that the partition was unjust or unfair but that it was unreal--a plea which cannot be sustained. Defendants 1 to 3 could have explained the reasons for the recitals in Exs. I to V suggesting partition and the apportionment of debts. They were wantonly kept back perhaps because their examination would help the other defendants. In any case these documents clearly signify a severance in status amongst the brothers. The plaintiffs who are their children cannot therefore claim to be joint and seek a share in all the properties without getting the partition thereof cancelled. It seems to me that the suit in its present form clubbing together several and different causes of action by separated members of the family against several defendants ignoring the partition is misconceived. I would, therefore, allow the appeal and dismiss the suit directing the parties to bear their own costs throughout.

Balakrishnaiya, J.

5. The case was originally heard by a Division Bench of which I was a party; and on divergence of opinion it was referred by me to the Full Bench, and my opinion has remained the same.

6. This Second Appeal by defendants 7, 8, 10 and 11 is directed against the appellate decree confirming the decision of the trial Court. Briefly stated the facts

leading to the case are as under:--The plaintiffs in the suit are the grand-children of one Kavalu Thimme Gowda by his sons, defendants 1 to 3, and one other Nanje Gowda, since deceased. The present suit is for partition of the plaint schedule properties and for possession of their share alleging that the alienations made by their respective fathers, defendants 1 to 3, and the deceased Nanje Gowda are not for legal necessity or for family benefit and, therefore, not binding on their three-fourths share in the said properties. The fathers of the plaintiffs alive are impleaded as defendants 1 to 3, Defendants 4 to 11 the alienees are contesting the suit. Their defence may be summarised thus. The alienations were for family necessity and the plaintiffs who were not born at the time of the alienations cannot challenge the same; the ages of the plaintiffs as given in the plaint are incorrect and even otherwise, the plaintiffs were all duly represented in the previous litigations and the transfers that took place prior to the present suit, and therefore their interests, if any, are bound by the alienations effected by their parents.

7. Defendant 1 is the eldest member of the joint family of himself and his brothers, defendants 2 and 3, and the deceased Nanje Gowda; he borrowed Rs. 500 on 9-7-1924 from defendant 4 (Sri Sringeri Mutt) mortgaging items 1 to 9 of the plaint schedule properties. Defendant 4 filed a suit on the foot of the said mortgage in O. S. No. 615 of 28-29 in the Court of the Munsiff of Gbickamagalur, alleging that defendant 1 as the manager or Karta of the joint family borrowed the amount for family necessity and prayed for a decree against the mortgaged family properties and defendant 1 personally. Defendants 2 and 3 and the deceased Nanje Gowda who were all the then adultmembers of the family were impleaded in the said suit which was decreed as prayed for. In execution of the said decree, the mortgaged properties, items 1 to 9, were sold and purchased by defendant 5 in the court auction and the purchaser was put in possession of the properties by the Court in Misc. Case No. 262 of 34-35. These form one stage of the proceedings which the plaintiffs claim as not binding on them or their interest in the plaint schedule properties.

8. Defendants 1 to 3 and Nanje Gowda had allowed the land revenue payable by them to the Government to fall into arrears and the properties were brought to sale by the revenue authorities. Defendant 6 who had acquired eights in some of the

properties purchased in the revenue auction items 9, 3, 5 to 7 and 9 to 11. These form the second stage of the proceedings which the plaintiffs assert as not binding on their interest.

9. The third stage of proceedings brings us to 1932, the date of Exa. I to V, By this time the financial position of the family appears to have absolutely deteriorated. On 7-12-1926 defendant 1 borrowed Rs. 1000 on a pronote from defendant 5 who filed a suit in O. S. No. 34 of 28-29 in the same Munsiff's Court and obtained a decree. Again on 26-3-1927 defendant 1 borrowed Rs. 1000 under Ex. VI from defendant 5 for alleged family necessity and mortgaged the schedule items 10 to 13 and 16. There was also another decree obtained against defendant 1 by defendant 6 who in execution of the said decree had purchased defendant 1's share in some of the schedule properties. In the meantime, the revenue payable to Government on these properties was in arrears owing to the default in payment by defendants 1 to 3 and the deceased Nanje Gowda and defendant 6 who presumably had acquired rights in the properties paid the arrears and filed a suit for the recovery of Rs. 570 the amount paid against all the adult members of the family including Nanje Gowda who was then alive and obtained a decree.

10. According to the recitals in the documents exhibited defendants 1 to 3 and their brother Nanje Gowda, since deceased, appear to have in pursuance of a family settlement divided amongst themselves the assets and liabilities of the family and subsequently executed documents in favour of defendant 6 in respect of their liability securing their respective shares in the properties. Exhibit I is the document executed on 15-1-1932 by all the brothers for Rs. 1200 securing the family properties in their common enjoyment. On the same date, the four brothers individually executed Exs. II to V for Rs. 850 each securing their individual shares for their respective share of liability. Later on 16-11-1936 defendants 1 to 8 executed a sale-deed, EX. VIII, Exs. IX and XVI, sale-deeds, were executed by defendants 1 and 2 respectively, of the properties covered under Exs. II to V in favour of defendant 6 and the properties covered by those sale-deeds are subsequently sold to defendants 7, 8 and 9. These form the last stage of the transactions impeached by the plaintiffs.

11. Both the Courts below have failed to appreciate the legal aspects involved from a proper perspective. The decisions, though concurrent, cannot be supported and warrant interference.

12. The crucial point for consideration is whether the several alienations are binding on the plaintiffs. The suit properties are undoubtedly the ancestral properties of the plaintiffs and defendants 1 to 3 and the deceased Nanje Gowda. Defendant 1 who is the eldest member of the four brothers was in law and in fact the manager of the joint family in the year 1924 and continued as such till about 1932 the date of Exs. I to V. The first alienation by way of mortgage was in respect of items 1 to 9 made by defendant 1 in favour of Sri Srin gari Mutt, defendant 4 in the case, in the year 1924. Exhibit X is the copy of the plaint filed by defendant 4 against all the four brothers of whom defendant 1 is styled as manager. Exhibit XI is the copy of the decree. Exhibits XIV and XV and the sale certificate and the delivery receipt respectively. It was alleged in the said suit that the debt was incurred for necessity binding on the family; in addition to the executant, defendant I though expressly sued as manager his three brothers who were the remaining adult members of the family were impleaded ex abundant cautela; the decree which was passed as prayed for though ex parte concluded altogether the question of family necessity. Even otherwise, it is a well recognised principle of law that the manager of the joint Hindu family is its accredited representative; he has a right to represent the family in suits filed by him on behalf of the family; so also, the manager as representing the joint family may be proceeded against in suit concerning family properties so as to bind the entire family property including the shares of those members who are not eo nomine made parties to the suit.

13. The theory of representation of the members of the family by its manager in suits concerning the family property has long been settled in this Court by a series of decisions. In 17 Mys. C. C. Rule 7, it has been laid down that it is competent to a father to represent his sons in a suit brought against him for the enforcement of a mortgage and when the properties have been sold in execution of the decree, the son a could not maintain a suit for redemption of such properties on the ground that they were not made parties to the suit. Again, in another gut where the plaintiff, a mortgagee, had purchased the mortgaged property and sued for

possession against the sons of the mortgagor one of whom was an infant at the time of the institution of the suit and the other was born after the decree--both of them having contended that their rights to redeem were not extinguished a Full Bench of this Court in 33 Mys. C. C. Rule 250, in which Sir Leslie Miller C. J., who delivered the opinion, held that neither of them was entitled to an opportunity to redeem the plaintiff's mortgage as the after born son only acquired interest after the decree and was consequently bound by it, and the infant son in the absence of fraud, collusion, or negligence on the part of the father was substantially represented by him in the mortgage suit. In 6 Mys. L. J. 317 where in execution of an ex parte decree obtained against the mortgagor in respect of the ancestral property of the family, the property was sold, the brothers of the judgment-debtor filed a suit for a declaration of title to their share on the ground that they were not parties to the previous suit, it was held that the mere facts that the decree being ex parte one is not of material importance, unless there is proof that the manager was negligent or guilty of fraudulent conduct and as the decree was against the whole family the brothers of the judgment-debtor were properly and effectively represented by the managing member and that the decree was binding even though the other members were not impleaded in the suit. The principle laid down in the above cases was confirmed in the latest decision of the Court reported in 4 D. L. R. (Mys.) 91. In the Madras High Court following the decision of the Judicial Committee, his Lordship Venkataramaiah J. in a separate but concurring judgment of the Full Bench reported in Venkata Narayana Rao v. Venkata Somaraju, A. I. R. (24) 1937 Mad. 610 : (I. L. R. (1937) Mad. 830 F. B.) observes that

"where a decree has been obtained against a manager as representative of the joint Hindu family liabilities, it will be binding on his undivided brothers--and the fact that they are not parties *eo nomine* will not any the less render them precise to the suit,'

Again it is held in *Papamma v. Narayana* : AIR1948 Mad54 that

'a decree in a suit against the manager of a Hindu family binds the other as *res judicata*. Merely because other members were not parties to the suit by name it

does not follow that they are not bound by the decree in the suit.'

In a later case (Vide *Abbakka Shedthi v. Palli Vittai Hegda* : (1947)2MLJ177 , the same High Court has concluded that a decree passed against the manager, when it relates to the family property, cannot be set aside on the ground that the manager remained ex parte or that he did not put forward good available defence or even though he be grossly negligent. Apart from the sons that were in existence, a decree against a father in a suit in respect of a joint Hindu family property is held to be binding on a child in the womb who is deemed to have been in existence and represented by his father (Vide *Balaraj v. Pichai Muthu Chettiar* : (1947)2MLJ161 .

14. In the present case regarding the first stage of transaction all the other adult coparceners in addition to the manager of the family were added as parties to the earlier mortgage; suit referred to above. It was no doubt unnecessary to have done so, though it might have been presumably done by way of abundant caution which by no means affects the result. Further more, it could be said that each of the adult co-parceners effectively represented his branch of the family consisting of minor children that were in existence on that date. This view is supported by the decision reported in *Abhey Singh v. Himta*, A. I. R (10) 1923 ALL. 234 : (65 I. C. 653). In this state of law both in Mysore and elsewhere, the decree and the subsequent proceedings against the member collectively or against the manager as their representative is binding and cannot be re-opened by the minor members.

15. The second series of transactions impeached by the plaintiffs covers schedule items 10 and 11. Items 2, 3, 5, 6, 7, 9, 10 and 11 were sold by the revenue authorities for arrears of revenue and purchased by defendant 5 as per Ex. XXIV. The sale for arrears of revenue implies forfeiture of all prior claims and encumbrances and the purchaser gets a free and absolute title. The sale is not otherwise impeached. The sale or transfer of the family properties for payment of claims due to Government on account of land revenue and taxes is undoubtedly recognised in Hindu Law as a justifiable necessity binding on the entire family and so it is not at all open to the plaintiffs at this stage to lay claim to these properties. Thus, it is seen that in respect of plaint schedule items 1 to 9 purchased in the

court-sale in execution of a decree against the manager and all the adult coparceners of the family and items 10 and 11 purchased in the revenue sale, legal necessity is proved beyond doubt and the plaintiffs must inevitably be non-suited in so far as these items are concerned.

16. By the year 1932 defendant 1 had incurred other debts on pronotes and under a mortgage which covered items 12 to 15 of the schedule properties in addition to the other items about which conclusions have already been noted. Defendants 5 and 6 had not only obtained decrees but also and out executions of their decrees. It was in these circumstances that the four brothers who were all the then adult coparceners of the joint family effected a settlement in respect of the assets and liabilities of the family. They took stock of the properties and liabilities of the family and apportioned the same amongst themselves. The recitals in Exs. 1 to v are a clear indication of the family partition effected amongst the four brothers. The brothers - defendants 2 and 3, and Nanje Gowda since deceased have not only admitted and acknowledged in unmistakable terms the debts incurred by defendant 1, the family manager, as debts incurred for family necessity but also undertook the individual responsibility of discharging the portion of the debt fallen to their respective share. Exhibit I which is the mortgage deed executed by all the four brothers in favour of defendant 6, in respect of a portion of the debt runs thus:

'In pursuance of the settlement of a panchayathi to which you and we are parties and which was held in respect of the discharge of the debts incurred for our joint family.'

In EX. in the mortgage deed executed by defendant 2 in favour of defendant 6, it is mentioned that:

'In pursuance of a panchayathi a debt of Rs. 850 had fallen to my one-fourth share out of the amount relating to the decree obtained by you against my brother Giri Gowda (defendant 1) which debt was incurred by him for our joint family.'

Similar recitals are found in Exs. IV and V executed by defendant 3 and the deceased Nanje Gowda in favour of defendant 6. These five documents not only cover the other properties of the plaint schedule, but also the entire debt due by

the family at that stage. The four brothers who were the adult coparceners of the plaintiffs' joint family have expressly consented to the debts incurred by defendant 1 and effected a division thereof. In the circumstances each member is deemed to have represented his branch of the family at the said partition.

17. Whether the alienation of the family property by a father or the manager of a joint Hindu family raised a presumption of necessity so as to bind other members had been the subject-matter of a number of decisions in this Court. In 7 Mys C.C. R. 15, it is laid down that in the absence of any circumstance to justify a contrary view the presumption where a father alienates the property during the minority of his sons is that the alienations was made for the sake of the family. In 21 Mys. C. C. R. 145, it was held that where all the adult male members in the family joined in contracting a debts, there arises a presumption that the debt is contracted for the benefit or for the necessities of the family. The same proposition is reiterated in 28 Mys. C.C. R. 10, where Plumer J. observes, following the cases cited above that:

'We might no doubt readily infer from the circumstances and from the fact that the mortgage was executed by only two adult male members of the family, that the transaction was a family business, for the benefit of the family and intended to bind the family property.'

In 50 Mys. H. G. B. 118, the learned Judges observe that:

'Where a mortgage deed more than 40 years old contained recitals as to the necessity for its execution and all the adult members of the family had joined in its execution a presumption that it was for family necessity may be raised.'

Considering the proposition that where all the adult male members of a family joined in the execution or consented to the alienation or otherwise ratified the debt it was affirmed in the latest decision that a presumption of necessity may be raised (Vide 4 D. L. B. Mys. 91). It therefore follows that in cases of transfer or alienation where family necessity is either implied or otherwise expressly proved want of necessity for such transfer or alienation cannot again be challenged. The following case relied upon by the learned Advocate for the respondents do not help him. In 15 Mys. L. J. 193, Reilly, C. J. in discussing 7 Mys. C. C. B. 16 and 31 Mys. C. C.

R. 145 observes that :

'The learned Judges who decided those cases were certainly entitled to raise a presumption in those cases if they thought appropriate in the circumstances of the cases,'

but he only doubted whether that could be a general ruling applicable to all cases. He further explained his own opinion in 18 Mys. L. J. 276. wherein he observed that:

'No doubt it might well be more proper to raise such a presumption in a case, where more than one member of the joint family joined in incurring a debt than in regard to a debt incurred by the manager alone,'

and where the only adult male member of the joint family incurred a debt, the binding nature of the debt may require further proof, which necessitates comparatively little other evidence to satisfy the Court. In the case under consideration, unlike the only adult member or the manager alone all the adult male members confirmed and ratified the acts of the manager in having raised the loans accepted them to be the debts binding on the family and undertook to discharge their respective share of liability. The circumstances amply justify the raising of such presumption as against the plaintiffs who were represented by their parents; the plaintiffs have failed to rebut the said presumption; on the other hand, there is sufficient proof by the creditors that at the time the loans were advanced, they enquired about the needs of the family and were satisfied that the necessity binding on the family did exist. It is settled law of this Court that if all the adult coparceners of a joint family incur a debt or give consent to or acknowledge a debt to be one for purposes binding on the family, the said debt is presumed to be one for legal necessity and such consent and consequent presumption are binding as much on themselves as on their progeny.

18. It was argued by the learned counsel for the respondents that the burden of proving legal necessity was heavily on the alienees, which burden according to their contention was not sufficiently discharged. I do not propose to dilate at length on this aspect, in view of the above conclusions; but it is necessary to note that

this is a suit of the usual nature by the minor members of a Hindu family to avoid alienations effected by their fathers. The parents of the plaintiffs who are alive have arrayed themselves as defendants 1 to 3 but have not stepped into the witness box to prove the nature of the debts or to show for what purposes they were incurred. They were certainly in a better position to explain the circumstances but have deliberately chosen to be ex parte and remain behind the screen. The remarks of Sir John Wallis in *Jagannath v. Shri Nath* that:

'They have allowed their children, who are all minors but one, to figure as plaintiffs and have themselves been impleaded as defendants 4 and 5. They have not gone into the box in support of the plaintiff's case, in which they are so largely interested ... In these circumstances their Lordships have no hesitation in holding that this also was a collusive suit'

amply fit into the circumstances of the present case. Applying the same principles, the Oudh Chief Court has made similar observations in *Sant Bakhsh Singh v. Lachhman Prasad*, A. I. R. (33) 1946 Oudh 92: (1945 A. W. R. C.C. 9). I have, therefore no hesitation in holding that the evidence on record coupled with the default of defendants 1 to 3 in not having explained the nature of the debt raises a presumption that the debts were incurred for family necessity.

19. Except plaintiffs 1 and 2 the others are found not to have been born on the date of alienations according to the ages given in the plaint. Though the consideration of this matter is not very material for the decision of this case, a controversy was raised regarding the burden of proof about the ages of the plaintiffs.

The correctness of the ages, as given by the plaintiffs, has been denied by the contesting defendants. It has been laid down in this Court that it is for the plaintiffs to establish the correctness of the fact of age averred by them in the plaint, and no attempt has been made by them to discharge that burden.

20. Considering the evidence as a whole, I have no hesitation in arriving at the conclusion that the plaintiff's suit must fail; the judgments and decrees of the Courts below are therefore set aside and the suit is dismissed; but in the

circumstances of the case the parties will bear their own costs throughout.

Mallappa, J.

21. I agree that the appeal has to be allowed and plaintiff's suit for partition should be dismissed. The plaintiffs have to cross too many hurdles before they can succeed in their suit for partition. Most of the properties have been sold in revenue sales for default of payment of kadayam by the manager of the family and the title of the plaintiffs in them has been extinguished. The oral evidence that the heads of the several branches of their family effected partition is corroborated by documentary evidence. The plaintiffs cannot ignore the partition and file this suit for partition of all the properties as if they all are still members of a single joint family. Moreover as pointed out in the judgments of my learned colleagues which I have had the advantage of going through in the first place, there is evidence in this case of the plaintiff schedule properties having been purchased in execution of decrees obtained in suits filed against the manager of the joint family in his capacity as manager and in the second place there is material in this case justifying the conclusion that the debts were binding on all the members of the joint family. The finding of the Courts below to the contrary is due to their ignoring a very important piece of evidence and as such as pointed out in 18 Mys. L. J. 17 it is liable to be set aside. This is the documentary evidence showing that all the debts were divided at the time of family partition as if they are debts binding on the joint family. This evidence clinches the point and it has to be held that debts for recovery of which previous suits were filed are debts due by the family. This being so, plaintiff's suit is liable to be dismissed.

22. There is however one point which I think requires some clarification, as the point was raised at the time, this case was argued, and was also in fact raised in a recent case S.A. 460 of 47-48 by the learned advocate who however opposed it in this case. To avoid any doubt in the matter, I am inclined to think that it is worthwhile making the law on the point clear. The contention raised was, that, once a decree is passed against the manager of the family as such as can be ascertained from the fact that the debt was sought to be recovered from the entire estate, the decree is binding on the other members of the joint family and it is not

open to them to show in a subsequent suit that it is not a debt due by the joint family and that the decree as such is not binding on them. The contention is based on the ground that the manager should have raised the plea and his failure to do so is a bar. This is an incorrect statement of law. It is only in case the debt is binding on all the members of a joint family that a suit filed against the manager as such is binding on the other members of the family. It is only in such a case that persons not actually parties to the suit cannot be allowed to reopen the matter and claim to have a right to discharge such debts in spite of the manager who represented them having failed to discharge the debt and allowed a decree to be passed. On the other hand, it is equally clear that even if a suit is filed for recovery of the joint family debt, the right, title and interest of the person who is a party to it is alone liable if the suit is not filed against him as manager of joint family.

23. As regards this point I may refer to the decision in *Ramachandrah v. Seetharamaih*, 60 Mys. L. R. 60. It was held in that case as follows :

'A person who in execution of a decree obtained by him against a member of a joint Hindu family has purchased the right, title and interest of his judgment debtor cannot obtain possession of the whole of the family property on the ground that the debt for which he obtained the decree in execution of which the property was bought was a family debt contracted by the defendant as managing member of the family for its benefit unless the original suit had been brought against the defendant as manager of the family and the decree had been passed against him as such,'

The position on the point is clarified by Reilly C. J. in a lucid manner in 14 Mys. L.J. 361:

'Defendant 2's sons were no parties to that suit, and they were not represented in that suit directly or indirectly. They are entitled to appeal to another elementary principle, that no decree can be made against any one without his knowledge and behind his back. But somehow the question has been raised in the subsequent suit and tried by the learned District Judge on an issue framed in that suit, whether this debt was incurred for a family purpose. The learned Judge has found that it was not incurred for a family purpose. But in my opinion it was quite unnecessary

for him to consider that question at all, and indeed in the circumstances improper. It cannot reasonably be suggested in my opinion that a lender can obtain a decree against the manager of a joint family alone and in execution of that decree bring to sale the shares of the junior members of the family and then in a subsequent suit such as this by the junior members either put them to the proof that the debt was not incurred in circumstances making it binding on the family or be : allowed to show that he might have proved that it was a debt binding on the family in his own suit, though he never attempted to do. To my mind that would be a perversion of the legitimate procedure, which we could never properly countenance. Here we have a suit brought by defendant 1. in which he claimed and obtained a decree against defendant 2 alone, and with that he must be content. In my opinion it is quite unnecessary to spend any time on the question whether this debt was incurred for the benefit of the joint family. We are not interested in that question. We are only interested in the question whether the decree obtained by defendant 1 in O. S. No. 339/ 17-18 was binding upon defendant 2's sons, and in my opinion unquestionably it was not binding.'

24. It is however the other aspect that is seriously disputed. In the Privy Council decision *Nanomi Babuasin v. Maddun Mohivn*, 19 Cal. 21 : (13 I. A. 1 P. C.) the question that arose for consideration was :

'How far the joint sons can be precluded from disputing the liability attaching to their shares where proceedings have been taken by or against the father alone.'

Lord Holborn who delivered the judgment of their Lordships answered this question as follows :

'All, the sons can claim is that, not being parties to the sale or execution proceedings they ought not to be barred from trying the fact or the nature of the debt in a suit of their own.'

This case was the basis for a later Privy Council decision *Daulat Ram v. Mehrchand*, 15 CAL. 70: (14 I. A. 187 P. C.). In that case as is clear by the head-note :

'The managing members of a joint trading family having purported to mortgage the family estate to pay a debt due by the firm, were sued upon it by the mortgagee'. It was noticed that 'In that plaint the mortgagee claims not only to recover against the mortgagors the amount of the mortgage debt with interest but asks that be may have execution and be satisfied out of the mortgaged property', and 'their Lordships find by the certificate of sale that the whole property was sold' (p. 78).

It is clear that the managing members were sued in a representative capacity. All the same it was held that the other members of the family could plead in the second suit that the debt was not one binding on the family estate. As evidence on the point had not been recorded the question of remanding the case for evidence arose. It was noticed that :

'The plaintiffs proposed to prove all the facts that were necessary to make the mortgage valid and binding upon them. The defendants had the opportunity of trying that question but they did not wish to try it.'

So the case was not remanded. In *Puttegowda v. Rudregowda*, 12 Mys. L. R. 450 at p. 465 (sic,) that :

'In the case *Daulat Bam v. Mehr Chand*, 15 Cal. 70 : (14 I. A. 187 P. C.) their Lordships bold that, if the managing member of a joint family having purported to mortgage the family estate to pay a family debt is sued upon it by the mortgagee, and the property is sold, such family estate may pass in its entirety to the purchaser if it be proved that the mortgage was a valid mortgage which bound the ancestral property, and the purchaser bargained and paid for the entire estate. In the present case it has been proved, that judgment was given in O.S. No. 19 of 1835 against the whole of the property in question for a family debt ; and that defendant 3 purchased that property and not merely the right, title and interest of defendant 1. On the other hand, the plaintiff, has failed to prove, that the mortgage effected by defendant 1 did not bind his share. It therefore follows, that the plaintiff is not entitled to recover his half share in the coffee estate in question.'

The principle laid down in the Privy Council decisions is that in the second suit it is open to the members of the joint family other than the manager against whom the

first suit was filed to raise the question whether the debt or alienation was binding on the entire family. In fact it is usual for mortgagor to file suits on hypothecation bonds against the manager of the family and bring to sale the entire property and not merely the share of the manager who executed the hypothecation deed, it is equally usual for the other members of his family to file suits for getting their share of the property by partition and in all those cases they succeed in getting a share if the mortgagee fails to prove in their suit that the debt or alienation was binding on them and they fail if he proves that the debt or alienation was binding on all the members of the family. The decision in 18 Mys, L. R. 546 is again based on *Daulat Bam v. Mehr Chand*, 15 Cal. 70 : (14 I. A. 187 P. C.) and lays down the point clearly ;

'All that the other members of the family who were not parties to the suit and other proceedings on the mortgage claim is that they ought not to be barred from an opportunity of trying the question whether the mortgage was a valid one binding the ancestral property or no.'

25. In the Full Bench decision 23 Mys. C. C. R. 250 the shares of the sons were held to have been extinguished by sale held in execution of a mortgage decree against the father alone in view of the fact that the mortgage debt was binding on the sons as 'neither of them had been born at the date of the mortgage' as clearly stated in the head-note itself. The order of reference to the Full Bench also states that 'the mortgage is found to have been for necessity and binds on sons' interest.'

26. The doctrine laid down by their Lordships in *Nanomi Babuasin v. Maddun Mohit*, 13 Cal. 21 : (13 I. A. I.P.C.) that 'all the sons can claim is that not being parties to sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own' is quoted with approval at p. 260 of the Full Bench decision. 27 Mys C. C. R. 55 is a case decided subsequent to the above Full Bench decision. In that case the mortgagee obtained a decree for sale against the mortgagor but the minor members of the family filed a suit for a declaration that the decree does not affect their shares. In the case the question whether the debt was binding on the family was not only gone into but was answered in the negative. It was held that the decree against the father did not

bind the shares of sons. I may refer to 32 Mys. C. C. R. 247 also as it is to the same effect. In 6 Mys. L. J. 317 it was observed at p. 319 as follows:

'Nagappa was the manager of the family and the debt was one due by the whole family. It seems to us that the plaintiffs were properly and effectively represented by Nagappa who was the managing member of the family of which the plaintiffs were also members and that the decree binds them even though they were not impleaded in the suits.'

27. It will be noticed that the conclusion was based not merely on the fact that Nagappa was the manager of the family but also on the fact that the debt was due by the whole family.

28. As regards recent decision 4 D. L. R. (Mys.) 91, relied on in support of the proposition, that all that is necessary to consider in the subsequent suit filed by members of the joint family not impleaded in the previous suit, is to find out whether the previous suit was filed against the manager as such and whether the entire family property was proceeded against, and that if it is so they are barred from questioning the fact or the nature of the debts in their suit, the scope of the decision is not properly understood and this proposition does not follow from the decision At p. 98 the point for consideration was formulated as follows :

"The question now remains whether the debts are binding on plaintiff also and whether the plaintiff could be deemed to have been represented by his father in the court proceedings so as to bind his interest in the suit properties.'

It will thus be seen that both the points arose for consideration in the second suit. In the two previous paras the question was whether the father 'Subbaraya did represent the minor in the court proceedings.' This was answered in the affirmative. It was then observed that 'this leads us to the consideration of the point whether the hypothecation under Ex. IV is binding on the plaintiff.' It has to be stated that if the finding on the first point was in the negative, it would not have led to the consideration of the second point. The second point became necessary as the first point was answered in the affirmative. As on the second point it was held that the debt was binding on plaintiff, after it was held on the first point that his

father must be deemed to have been represented in the suit on the hypothecation deed, plaintiff's suit was dismissed. The case relies on the earlier decisions of this Court already referred to and does not purport to differ from them. It is only necessary to add that one other decision of this Court (S. A. 460 of 47-48) recently decided fully supports the view clarified by me. The question is a simple one but it required a detailed examination as from the arguments it appeared that recent decisions had raised some doubts and they required clarification. It was observed in that case:

'that before a decree that is passed against a person who happens to be the manager of a joint family could be said to be binding upon other members of the joint family it has to be shown in the second suit, filed by or against them that, in the first place the first suit was filed against that person as manager of the joint family and in the second place that the debt for recovering which that suit was filed was a debt binding on the family.'

29. The burden of proof in this case lay no doubt on the alienees to show that the debts were binding on the plaintiffs and the evidence adduced by them in this case justifies the conclusion that the debts for discharging which the properties were alienated were debts binding on the plaintiffs. The appeal is therefore allowed and the suit dismissed.

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