

(1880) 03 CAL CK 0003

Calcutta High Court

Case No: None

Bemola Dossee

APPELLANT

Vs

Mohun Dossee and
Others

RESPONDENT

Date of Decision: March 29, 1880

Citation: (1880) ILR (Cal) 792

Hon'ble Judges: Richard Garth, C.J; Pontifex, J

Bench: Division Bench

Judgement

Richard Garth, C.J.

The question we have to decide in this appeal is, whether two adult ladies, who are the widows of two members of an undivided Hindu family governed by the law of the Dayabhaga, are bound by a mortgage of joint family property made by the surviving brother and managing member of the family, as to which they allege they were not consulted, and by the subsequent decree for sale in a suit by the mortgagee against the managing member as sole defendant.

2. The plaintiff, who is one of the two ladies above-mentioned, the other of them being a defendant in the same interest with the plaintiff, by her plaint prays, that her rights in the mortgaged premises may be ascertained and declared; that it may be declared that her share is not affected by the mortgage; that the decree in the mortgage suit may be declared fraudulent and void as against her; that an account may be taken of the rents and profits, and her share ascertained and paid; and that the mortgaged property may be partitioned.

3. If the case turned on a question of joint family property pure and simple, it would be doubtful whether, apart from consent, the plaintiff would be bound by a mortgage made by the managing member alone, or by a decree on the mortgage obtained against the managing member as sole defendant, even though the mortgage was made for a debt in respect of which she was liable jointly with the managing member.

4. It is certainly doubtful, under the law of the Mitakshara, where a member of a joint family before partition has no definite share, whether an adult would be bound by the mortgage or alienation for necessary purposes by the managing member of the family,--see *Sheo Bunshi Koer v. Sheo Prosad Singh* (L.R. 6 IAILR Cal 471 88); and if there is any difference in this respect between the law of the Mitakshara and the law of the Dayabhaga, it would seem to be still more doubtful under the latter. The question to be determined in this case, however, is not in our opinion a question of joint family property pure and simple, for it is materially affected by other circumstances.

5. Ramlochun Soor was the father of Obhoy Churn, Sree Churn, and Gour Churn. During his lifetime Ramlochun carried on business in Calcutta in partnership with a third person, whom and whose representative we shall hereafter refer to as the independent partner. During Ramlochun's life the properties to which this suit relates were purchased, and two of those properties were actually purchased in the names of Ramlochun and the independent partner. Ramlochun died more than fourteen years ago intestate, and his property and his share in the partnership business were inherited by his three sons, who conducted and managed the same. Obhoy Churn, the plaintiff's husband, died in 1868, intestate and without issue; and Sree Churn died in 1872, intestate and without issue, leaving a widow, who is a defendant to this suit in the same interest with the plaintiff. After the death of Obhoy Churn and Sree Churn, Gour Churn continued to manage the family share in the partnership and the joint family property, and he and his brother's widows continued to live as an undivided family, the profits of the family share in the business being blended with the income of the joint family property, and employed for the benefit and maintenance of the joint family, for we agree with the lower Court in altogether disbelieving the evidence adduced by the plaintiff, meagre as it is, as to her withdrawing from the business, or altering her position with respect thereto. The business had for years been financed by the defendants. In 1874 the amount due to them was over Rs. 21,000. The business had pressing need of further advances, and application was made to the defendants, who agreed to make advances, but insisted upon having security for the Rs. 21,000 and for further advances up to Es. 31,000 on the whole. In March 1874 Gour Churn and the independent partner executed a mortgage accordingly, which not only covered the joint family property in respect of which this suit is instituted, but also property of the independent partner. Upon the execution of the mortgage a further advance was made.

6. In June 1876 there was a balance due on the mortgage of over Rs. 29,000. On the 8th June 1876 the mortgagees instituted a suit on the mortgage against Gour Churn and the independent partner, and on the 17th August they obtained a decree, and under it one of the properties purchased by Ramlochun has been sold; but the purchaser has not been made a party to this suit.

7. This suit, in fact, except so far as it asks for partition, which we consider is asked for merely as a secondary relief, seeks only for a declaratory decree. It is apparent from the foregoing circumstances, therefore, that this is not simply a case in which Gour Churn mortgaged joint property as the managing member of the family. These ladies continued to be interested in the business; they must be taken to have known that it was financed by the defendants, and that it required advances; they allowed Gour Churn to stand forward as the ostensible owner of the family share; they participated in and were maintained out of its profits, and they were, in our opinion, certainly liable for the debts of the business. As authorised manager of the family share in the business, Gour Churn was clearly capable of making all necessary business contracts. Did it lie within his power as such manager to raise monies necessary for the business (as to which there is no question) by mortgaging the joint family property?

8. If the joint family property can be considered as partnership property belonging to the family share of the business, we think there could be no doubt that he could pledge it. Mr. Justice Lindley, in his book upon partnership, states the English law, which in this respect is founded on reason and convenience, as follows: "The writer is not aware of any decision in which an equitable mortgage made by a partner by a deposit of deeds relating to partnership real estate has been upheld, or the contrary; he can therefore only venture to submit that such a mortgage ought to be held valid in all cases in which it is made by a partner having an implied power to borrow on the credit of the firm." (Page 229, 1st edition).

9. In this case Gour Churn certainly had an implied power to borrow on the credit of the joint family as partners in the firm; also we think, he had power to borrow on the credit of the joint family, as a joint family for the purposes of the firm. A joint family carrying on a business is necessarily a peculiar kind of partnership. It does not cease on death; but the shares in it are inheritable along with the shares in the joint family property. We agree with the decision at page 51, Appendix I, of the first volume of the Bombay High Court Reports (ILR Cal 471). In that case the following propositions were stated as law (pages 71 and 72): "The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Third parties, in the ordinary course of bona fide trade dealings, should not be held bound to investigate the status of the family represented by the manager whilst dealing with him on the credit of the family property. Were such a power not implied, property in a family trade, which is recognized by Hindu Law to be a valuable inheritance, would become practically valueless to the other members of an undivided family, wherever an infant was concerned, for no one would deal with a manager, if the minor were to be at liberty, on coming of age, to challenge, as against third parties, the trade transactions which took place during his minority. The general benefit of the undivided family is considered by Hindu Law to be paramount to any individual interest, and the recognition of a trade as inheritable property renders it necessary for the general

benefit of the family that the protection which the Hindu Law generally extends to the interests of a minor should be so far trenched upon as to bind him by acts of the family manager necessary for the carrying on and consequent preservation of that family property; but that infringement is not to be carried beyond the actual necessity of the case."

10. In the present case the question of necessity or propriety does not arise. And we can see no difference in respect of the law so laid down between families governed by the law of the Mitakshara and the law of Dayabhaga. But it is objected that the Bombay case relates only to" the power of the manager to bind infants; and that it is no authority for the proposition that he can also bind adults, and no doubt that is so. But, having [806] regard to the observations in that case as to the peculiar nature of a joint family business, and the opinion expressed by Mr. Justice Lindley in his book, with which we also agree, we think that the manager had at least power, for the necessary purposes of the business, to make an equitable pledge of the joint family property which would bind the plaintiff.

11. The circumstances of the case do not, in our opinion, render it necessary for us to express an opinion whether the plaintiff is bound by the decree in the suit to which she was not a party. The plaintiff is, in our opinion, distinctly liable for the debt, and bound by the pledges. She now sues without making any offer to pay off the debt. She is seeking the aid of equity without offering to do equity. If she had made such offer, she might perhaps have been entitled to have the decree re-opened and the accounts re-taken, for purpose of giving her an opportunity of redeeming. She is either bound by the decree in the mortgage suit or not. If she is bound we cannot interfere. And if she is not bound, we ought not to interfere by making any declaration except upon the condition of her offering to pay the debt for which she is liable.

12. As she has made no such offer, we must confirm the decree of the Court below, and dismiss the appeal with costs on scale No. 2.

13. We may add that we are the more inclined to arrive at this conclusion, because we think it a highly suspicious circumstance that the lady was not examined by commission or otherwise, and has not ventured to affirm that she was not cognisant of and consulted with respect to this mortgage. Although we affirm the decree of the Court below, we think it is necessary for us to say that we do not concur in the doubt expressed by the learned Judge at the end of his judgment as to whether the plaintiff's suit would lie at all; for this case being governed by the Dayabhaga, the plaintiff would be entitled to a definite share in the joint property.