Jasoda Bai Vs Mangal Chand Maloo

Court: Calcutta High Court

Date of Decision: Dec. 11, 1940

Final Decision: Dismissed

Judgement

Mitter, J.
Two persons, Premsukh and Pannalal Mohata, carried on a business in jute under the name and style of Mangalchand Chunilal

at Calcutta and Dungarsidas Mangal Chand at Khulna. They had business dealings with the Respondent, Mangal Chand Maloo. In the course of

the year 1989 Sambhat, which ended on the 15th April, 1932, they became indebted to the latter for a sum exceeding rupees two lacs. To secure

a part of the said debt four mortgages, comprising separate sets of immovable property situate in the District of Khulna, were executed on the 10th

August, 1932, by Premsukh for self and as karta and guardian of his minor sons, Sewkissen Ram Kissen, Brijmohan, Ramratan and Madangopal,

by his major son Sewratan and by Pannalal for self and as guardian of his minor son, Maniklal in favour of Mongal Chand Maloo. Two of the

mortgages were for Rs. 50,000 each and the remaining two for Rs. 30,000 and Rs. 20,000. The mortgage deeds were also signed by one

Gopikissen purporting to act as the constituted attorney of Jasoda Bai. Apparently Sankerlal, the youngest son of Premsukh, and Monoharlal, the

son of his son Sewratan, had not been born then. The relationship of the parties to these four mortgage deeds appear from the following

genealogical tree: --

It is admitted that they are governed by the Mitakshara School of Hindu law. On the 26th November, 1932, a fifth mortgage was executed by the

aforesaid persons in the like manner in favour of Mangal Chand Maloo to secure a further sum of rupees one lac, being practically the balance of

the business debts. In this deed also Jasoda Bai did not sign but Gopikissen signed on her behalf as her constituted attorney. The properties

hypothecated by this deed were the Khulna properties included in the four earlier mortgages and an 1|84th share of a small plot of land situate in

Calcutta. On the 13th November, 1933, Mangal Chand Maloo, who would hereafter be called Maloo, instituted a suit, being No. 2193 of 1933,

in the Original Side of this Court against Premsukh, and his first four and sixth son, against Pannalal and his son and against Jasoda Bai (Ex. 8; II

98). In this suit he wanted to enforce all the five mortgages. As the first four mortgages of the 10th August, 1932, did not comprise any landed

property within the Ordinary Original Jurisdiction of this Court, the claim to enforce the same was not entertained, but as the fifth mortgage

comprised lands both within and outside the said jurisdiction, leave to sue under cl. 12 of the Letters Patent was granted and the claim to enforce

the same was entertained. In that suit only Premsukh, Pannalal and Jasoda Bai appeared, the first two through the same Advocates and Jasoda

through another Advocate Mr. S.C. Bose. As would appear from the minutes of the proceedings of that suit, dated the 12th November, 1935,

(Ex. J., II 106), and the additional issues suggested by Mr. S.C. Bose, Jasoda took up the position that Gopikissen was not her constituted

attorney and so she was not bound by the mortgage deed. The Advocate-General who represented the Plaintiff Maloo, stated that Jasoda Bai

was not a member of the joint family partnership"" and on that basis he did not wish to proceed against her. The suit was accordingly dismissed

against her. It proceeded against the rest and a preliminary decree was passed on the 5th mortgage against them by Ameer Ali, J., on the 14th

November, 1935, (Ex. 9; II-108). On an appeal by Premsukh the decree passed by Ameer Ali, J., was reversed on the 10th February, 1937, on

the ground that leave under cl. 12 of the Letters Patent ought not to have been granted on the ground that the land situate in Calcutta was

insignificant and had been included in the mortgage merely for the purpose of ""arranging jurisdiction."" (Ex. 37; II-116). Five days before Maloo

instituted his suit on the mortgages in the Original Side of this Court, Jasoda Bai instituted a suit in the Court of the Subordinate Judge at Khulna

(Title Suit No. 178 of 1933) for a declaration that she had a moiety share in the Khulna properties which had been included in Maloo''s five

mortgages. She made Premsukh and his sons and grandson and Pannalal and his son parties Defendants but Maloo was not made a party (Ex. 32;

II-90). A show of defence was made by Premsukh and Pannalal by filing a written statement. At the hearing none of the parties Defendants to that

suit appeared and so an ex parte decree was passed in favour of Jasoda on the 26th April, 1934, within a very short time of the institution of her

suit (Order-sheet Ex. 33; II-86). Jasoda Bai''s suit included some valuable properties in Khulna, one of them being a three-storied building, which

she had given up in favour of Premsukh and Pannalal by a registered nadabi deed in 1918 (Ex. 3; II-24); still Premsukh and Pannalal did not

contest her claim thereto and allowed the ex parte decree to be passed in her favour. We have no doubt in our mind that Jasoda''s declaratory suit

was a collusive one and that she was set up by Premsukh and Pannalal in the hope of saving a substantial part of the properties from the mortgage

claim of Maloo. This suit for declaration was followed by her by a suit for partition instituted against Premsukh and Pannalal and their descendants.

Maloo was not made a party. At the time of the institution of the partition suit, which was filed on the 2nd January, 1935, Jasoda knew that

Maloo''s mortgages included sixteen annas of the properties in respect of which she claimed partition. She in effect denied Maloo''s title as

mortgagee to the extent of 8 annas share. Maloo was accordingly a necessary party to her suit, [Jadunath Roy v. Parameswar Mullick) L.R. 67

IndAp 11 : s.c. 44 C.W.N. 283 (1939)], but he was intentionally left out. This suit was not also contested with the result that she got the most

valuable properties in her allotment. Three allotments were made: one in her favour, which included all the best and valuable properties, the second

allotment was made jointly in favour of the sons of Premsukh who were minors at the time of the mortgages, his minor son Sankarlal, the minor son

of Pannalal and Monoharlal, the grandson of Premsukh. It was the next best allotment and one joint allotment, the worst, consisting of a tin shed in

Khulna Bazar and two corrugated iron godowns on temporary lease-hold lands at railway sidings was made in favour of Premsukh, Pannalal and

Sewratan. The scheme is apparent on the face of it. Premsukh, Pannalal and Sewratan, the son of Premsukh who was a major at the time of

Maloo''s mortgages, had signed those mortgages. They could not hope to get out of Maloo''s mortgage claims. So they were given the worst

allotment. The minor sons of Premsukh and his minor grandson and the minor son of Pannalal were given one joint allotment, because it was

thought that they could set up a plausible defence to Maloo''s mortgage claim, as has been actually done, by saying that the debts due to Maloo by

Premsukh and Pannalal were immoral debts or debts incurred on account of a new business and so not binding on them or on their share of the

ancestral joint property. The grouping of Pannalal''s son with the sons and grandson of Premsukh who were minors then and those sons of

Premsukh who had attained majority after the mortgages is also very significant. We have also no doubt that the partition is also a collusive affair

and Jasoda was set up in that suit also by Premsukh and Pannalal with the same object as in her declaratory suit. The suit in which this appeal

arises was instituted by Maloo against Jasoda and the other Mohata Defendants on the 20th July, 1936. It is in substance a suit for a declaration

that Maloo has mortgage rights in sixteen annas of the properties mortgaged to him and that Jasoda has no proprietary right in the same. He bases

his cause of action on the aforesaid two suits instituted by Jasoda which he rightly characterises in the plaint as fraudulent ones. That cause of

action is valid as the ex parte decree which Jasoda had obtained before the institution of this suit had thrown a cloud on his title and the institution

of the partition suit was another challenge to his title. The learned Subordinate Judge has decreed this suit by his judgment and decree dated the

15th March, 1937. Hence Jasoda has preferred this appeal before us. Her Advocate has taken only three points before us, namely: --

(1) that the suit is not maintainable, as the relief claimed by the Plaintiff, Maloo, does not come within the purview of sec. 42 of the Specific Relief

Act,

(2) that the Plaintiff is stopped from asserting that Jasoda has no title to the properties in suit, and

(3) that in any event the Court below ought to have held that she has eight annas share in the properties in suit. We will deal with the points in the

order indicated above.

2. The basis of the argument of the learned Advocate for the Appellant on the first point is the wording of the prayer in the present suit. It is put in

the negative form, namely that Defendant Jasoda had not any right or title in the mortgaged properties at the date of the mortgages. It is said that

such a declaration is not authorised under sec. 42 of the Specific Relief Act and for that proposition reliance has been placed on the decision in

Deokali Koer v. Kedarnath ILR 39 Cal 704 : s.c. 16 C.W.N. 838 (1912).

3. Sec. 42 of the Specific Relief Act requires that the Plaintiff asking for declaration must be entitled to a legal character or to any right as to any

property and the relief prayed must be for the declaration of the Plaintiff"s legal character or right to that property. In Sheoparshan Singh v. Ram

Nandan Singh L.R. 43 IndAp 91 : s.c. 20 C.W.N. 738 (1916). the Plaintiff"s suit for decla ration was not entertained as he described himself as

entitled to the property of one Bachu Singh in case of intestacy. That case illustrates the proposition, which is well settled, that the Plaintiff must

claim to be entitled at the date of the suit either to a legal character or to any right or title to property, that is to say, the Plaintiff must have at that

time an existing status recognised by law or a present interest in the property, though it may not be one for immediate enjoyment. For the purpose

of deciding whether a suit is for a declaration of that character the substance and not the form must be regarded. Looking at the plaint in this suit

we have before us, the Plaintiff has asserted his present right as mortgagee of the suit properties and he in substance wants a declaration that he has

mortgage rights in the whole sixteen annas of those properties. A declaration to that effect necessarily would negative Jasoda"s claim to eight annas

share or to any share therein. In seeking for a declaration which negatives Jasoda"s claim to any share in these properties the Plaintiff in substance

asserts his own right and seeks for a declaration in respect thereto. We do not therefore see any substance in the first contention of the Appellant.

4. Mr. Dutt appearing for the Appellant says further that Maloo having taken a mortgage from his client, Jasoda, cannot now say that Jasoda has

no title to the mortgaged premises. It is a well recognised doctrine that neither the mortgagor nor the mortgagee can deny the title of the other at the

time of the mortgage. They can only show that the title had ceased after the mortgage. This doctrine of estoppel has for its basis the relationship of

mortgagor and mortgagee and is based on the principle that one who derives a benefit from the other cannot deny the other"s title. The mortgagor

having obtained money from the mortgagee on the representation that he has the title which he conveys to the mortgagee by way of security cannot

turn round and say that he had no title in opposition to a claim founded on the mortgage, and thereby defeat the mortgagee"s rights. The mortgagee

having obtained a transfer of an interest in the property from the mortgagor cannot also turn round and say that his mortgagor had no title. That

being the principle, there is no scope for the application of that doctrine to the facts of this case. Jasoda took up the position in Suit No. 2193 of

1933 that she was not the mortgagor. Maloo accepted that position and that suit was accordingly dismissed against her. In paragraph 3(g) of the

written statement of this suit she has also taken up the position that she is not the mortgagor as Gopikissen had no authority to sign the mortgage

instruments on her behalf. She cannot go back on her pleading and, for the purpose of urging the plea of estoppel, say that she is the mortgagor

and Maloo the mortgagee, and in the same breath maintain that the mortgages in favour of Maloo do not bind her alleged interest in the mortgaged

properties. Even if she had not pleaded what she has done in paragraph 3 (fir) of her written statement, she would have been prevented from

urging that there was relationship of mortgagor and mortgagee between her and Maloo for the purpose of invoking the doctrine of estoppel in her

favour, on the principle that a litigant cannot blow hot and cold. Having defeated Maloo"s mortgage suit No. 2193 of 1933 on the plea that she

was not the mortgagor, she cannot be allowed to turn round and say that she is the mortgagor and then only for a limited purpose. [Maharaja of

Vizianagram v. Secretary of State for India L.R. 53 IndAp 64 : s.c. ILR 49 Mad. 249 (1926). and Dwijendra Narayan Roy v. Jogesh Chandra

De 39 C.L.J. 4052 (1923).]. We accordingly overrule the second point urged by the Appellant''s Advocate. The last point depends upon two

questions:

(i) whether Chunilal was joint with Chogmull and was joint at the time of his death with the sons of Chogmull who had predeceased him;

(ii) whether the properties were joint family properties of the aforesaid persons. As these two points are interdependent we will take them up

together.

5. It is not the case of any of the parties that Assaram left such property, as would form the nucleus of the acquisitions of the Khulna and Calcutta

properties. It is, however, the common case of the parties that all the properties in suit were acquired out of the profits of a business carried on at

Khulna, Daulatpur and Sachiadaha. The case of Jasoda is that that business was started by Chogmull and Chunilal as partners at a time when

Chogmull and Chunilal were separate. She says accordingly that that business is to be regarded in the same way as a business carried on in co-

partnership by strangers. The case of Maloo is that Chogmull and Chunilal were joint, the business was a joint family business started jointly by all

the sons of Assaram who were alive at the time when it was started and that at all material times Chogmull and his sons were joint with Chunilal.

We are to see which version is correct.

6. Jaharmull and Dungasidas died a long time ago, without leaving widows or descendants. We do not know precisely when they died but the

evidence discloses that they must have died before 1888. Mangalchand died leaving a widow after the year 1888 but before 1890 or so. The

names and styles in which the jute business was carried on were Dungasidas Mungalchand and Mangalchand Chunilal. This would suggest that a

business was started when Dungasidas and Mangalchand were alive and not in 1896 or so as is the case of Jasoda, by only Chogmull and Chunilal

in co-partnership. The documentary evidence is that a site was purchased in the Khulna bazaar in the names of Mangalchand and Chunilal on the

29th May, 1888 (Ex. 20-II-1). In this document Mangalchand and Chunilal describe themselves as moneylenders and traders in cloth. From the

location of the site so purchased it can be inferred that the site acquired was for business purposes. On the 28th August, 1888, another site in the

Khulna bazar was acquired in the benami of Gulab Chand Mundra and a third site was acquired in the name of Chunilal on the 23rd July, 1890.

Those three sites adjoined each other. Those three sites were amalgamated into one and one big building was raised thereon before Jasoda was

married and came to Khulna in 1896 or so. This building has been allotted to Jasoda at the questioned partition. These facts prove that

Mangalchand and Chunilal had joint properties and that they jointly started a business at Khulna. On the 16th August, 1896, another site was

acquired in the name of Chogmull in the same locality. On it a building was erected. At the questioned partition this was allotted to Jasoda on the

footing that in it her husband Chunilal was interested jointly with the male descendants of Chogmull.

7. The course of dealings with the properties for years shows that after the death of Chunilal, the properties were treated as the properties of

Premsukh and Pannalal. In the Municipal Demand Registers they were recorded as owners. So also in the settlement records. Suits in respect

thereto were instituted by Premsukh and Pannalal. Jasoda''s name does not appear on any paper. It is hard to believe Jasoda when she says that

she got profits in her share. These facts are only consistent with the case that the properties were the joint properties and that on the death of

Chunilal, his share passed by survivorship to Premsukh and Pannalal to the exclusion of his widow. The Subordinate Judge has rightly pointed out

that the name and style in which the business was carried on suggests that the business was one in which Dungasidas Mangalchand and Chunilal

were interested. According to Jasoda herself, Chogmull had also interest thereon. We do not know when Jaharmull died. None of the witnesses

say when he died but it is certain that he died a very long time ago before Mangalchand''s death and without a family. The position therefore is that

the four surviving sons of Assaram, namely Dungasidas, Mangalchand, Chogmull and Chunilal were the owners of the business. The ordinary

presumption would be that they were joint and were living as members of a joint Hindu family. There is moreover evidence to the effect that they

were so. One of the Plaintiff''s witnesses, Surya Das, proves that Chunilal and Premsukh and Pannalal and Mangal Chand''s widow were living as

members of a joint family. This witness was competent to speak on the subject and we consider him to be a reliable witness. We do not however

consider the Plaintiff''s witness Bolaki Das to be so. The witnesses produced by Jasoda who say Chogmull and after him Premsukh and Pannalal

were all along separate from Chunilal and jasoda are worthless witnesses and have been rightly disbelieved by the learned Subordinate Judge. We

cannot also rely upon any statement of Jasoda. Some of those witnesses are parties to the faked documents Ex. D and D1, the copy of the

account book said to have given to Jasoda just after her husband''s death. Some others attempt to prove them as genuine, and the others go to the

length of saying that although Jasoda and Premsukh and Pannalal lived and live in the same house at Khulna -- a fact which could not be denied --

they lived in two different stories of the building. They would not even admit that they lived in the same storey for the fear that such an admission

may be damaging Jasoda''s case. That building at Khulna was a spacious one and had been partly sub-let to strangers. There was ample room in

the second storey to accommodate both Pannalal, Premsukh and Jasoda. On the evidence on the record we have come to the conclusion that the

sons of Assaram and their descendants were members of a joint family governed by the Mitakshara law, that the sons of Assaram or such of them

as were alive at the material point of time started a joint business which was not a partnership business but a joint family business. The properties in

suit were acquired from joint funds and were therefore joint properties. After the death of Dungasidas and Mangalchand without male issue, their

interest passed by survivorship to their surviving brothers Chogmull and Chunilal and on the death of Chunilal without male issue his interest passed

by survivorship to the descendants of Chogmull who had predeceased Chunilal by a few years. It is not necessary to be proved that the business

descended from Assaram or that there was ancestral nucleus coming down from him. When property has been acquired by members of a joint

Hindu family governed by the Mitakshara law out of a business carried on by them jointly such property would be joint property of the acquirers.

At least the presumption would be so, and this presumption can only be rebutted by proof, the onus being on the person so asserting, that the

persons constituting the joint family did not carry on the business as members of a joint family but as members of an ordinary trade partnership

resting on contract. There is no reliable evidence forthcoming from the side of Jasoda that the business of the brothers was only such a trading

partnership. There is no documentary evidence in support of her case that the business relationship between Chogmull and Chunilal, whom we

have found to have been joint, had rested on contract and the oral evidence in support of that case of hers is worthless. In a Mitakshara family

property falls under three broad classes:

(i) joint family property, that is property which had come from an ancestor. In this class sons acquire rights by birth;

(ii) joint property, that is property acquired by all the members of such a joint family without the aid of family property or family funds either by

joint exertions, or with the help of their common and not joint family funds, or separate earnings thrown into the common stock, or separate

property of one thrown into the common stock.

There is some conflict whether some of them would be presumed or considered as joint family property or simply joint property. In such joint

property the sons of the joint acquirers do not acquire rights by birth, but on the death of one of such joint acquirers his rights would pass by

survivorship. If he left no male descendants but either a widow or a daughter, and a joint brother, the latter would take by survivorship to the

exclusion of his widow or daughter as the case may be [Rampersad Tewarry v. Sheochurn Dass 10 M.I.A. 490 (1866).] This is the type of case

which we have before us.

(iii) Separate property. Property acquired out of the profits of a business carried on by members of a joint Mitakshara family not as members

thereof, but on the basis of a partnership based on contract would fall within this class (if not thrown into the common stock). Here the personal

heirs would succeed and the principle of survivorship would not apply.

The fact that the business did not descend from Assaram to his sons or that Assaram left no nucleus is immaterial, for the question before us is not

whether the grandsons of Assaram had interest therein with their respective fathers, but assuming that Chunilal was joint with his nephews,

Premsukh and Pannalal, at the time of his death (a fact which we have found in favour of Maloo), whether his interest passed by survivorship to his

nephews or passed by inheritance to his widow, Jasoda. If the business was the joint business carried on by the four sons of Assaram, and after

the death of his other two sons, by Chogmull and Chunilal and after the death of the former, by Premsukh, Pannalal and Chunilal as members of a

joint family, the properties in suit which have admittedly been acquired out of the profits of the said business would be joint properties of the

acquirers, the owners of that business, though they may not be joint family properties, and on the death of Chunilal would pass by survivorship to

Premsukh and Pannalal to the exclusion of his widow, Jasoda. We have already found that the business was carried on by the persons we have

already mentioned as members of a joint Hindu family governed by the Mitakshara School. On the death of Chunilal, who, as we have already

found, was at the time of his death joint with Premsukh and Pannalal, his rights passed by survivorship to the latter. Jasoda has, therefore, no

interest in the properties in suit. It is, in this view, unnecessary to rely upon the Nadabipatra (Ex. 3; II-24) which would put an end to Jasoda''s

claim to the main building at Khulna. We find that document to have been duly executed by the two ladies Jasoda and Chandana and is binding on

them. The result is that this appeal is dismissed with costs to Respondent No. I.P.C.