BOMBAY HIGH COURT

In Re: Mahadeo Krishna Rupji

Vs.

State (Bombay)

O.C.J. Appeal No. 58 of 1936

(John Beaumont, Kt., C.J. and Rangnekar, J.)

01.10.1936

JUDGMENT

John Beaumont, Kt., C.J.

1. This is an appeal from an order made by Mr. Justice B. J. Wadia in Chambers, and it raises a question of some importance to owners of property residing in Bombay. The petitioner and his minor sons are members of a joint Hindu family, and the petitioner is the manager. According to the statements contained in the petition the petitioner has had to borrow on the security of the joint family property substantial sums of money, part of them being secured on existing mortgages, and part of them being unsecured. What he now desires to do is to raise a sum of L 40,000 for the purpose of paying off all the existing debts of the joint family, and he wants to secure that sum of L 40,000 by a mortgage of joint family property. The proposed mortgagee is not willing to advance the money unless an order is made by this Court appointing the petitioner guardian of his minor sons and sanctioning the mortgage on behalf of the minor sons. The learned Judge, without going into the merits, refused to make the order on the authority of a decision of Mr. Justice Kania, to which I will refer in a moment. In my opinion earlier decisions of this Court establish clearly that the Court has jurisdiction in a case of this sort to; make the order asked for. That jurisdiction was established definitely by a decision of a full bench in *In Re Manilal Hurgovan*[1] in which it was held that under its general jurisdiction, and apart from the Guardians and Wards Act, the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property. The applicant in that case also sought sanction of the Court for a sale of the family property in which the minor was interested, and that sanction was given. That decision confirmed a practice which had been adopted in previous cases : Jairam Luxmon I.L.R. (1892) Bom. 634 and Re Jagannath Ramji I.L.R. (1893) 19 Bom. 96 and such practice has since been followed in this Court and by the Calcutta High Court in *Han Narain Das*[2], and *In re Bijaykumar Singh Buder*[3] However, in the year 1932 Mr. Justice Kania in the case of *In re*

Dattatraya Haldankar[4], stated his view that although the Court had jurisdiction in a case of this sort to make the order, the Court ought not to exercise that jurisdiction except in very special circumstances. The learned

[1] I.L.R. (1900) 25 Bom. 353 : 3 Bom. L.R. 411
[2] In re I.L.R. (1922) 50 Cal. 141
[3] I.L.R. (1931) Cal. 570
[4] AIR 1932 Bombay 537 : ILR 1932 56 Bom 519 : (1932) 34 BOM LR 1156

Judge pointed out correctly that the manager of a joint Hindu family has power to sell or mortgage for legal necessity or for the benefit of the estate, and that the burden is upon the purchaser or mortgagee to prove that the sale or mortgage fulfills those conditions, and the learned Judge took the view that the purchaser or mortgagee had no right to cast that obligation on to the Court. I do not find myself able to agree with that reasoning. The attitude of a purchaser or a mortgagee is that unless he can get a good title, he is not going to enter into a contract of purchase or mortgage. He does not seek to cast any burden upon the Court; he merely says that he is not going on with the transaction unless he gets a good title. Now it is very difficult in many cases for a purchaser or a mortgagee to satisfy himself as to the existence of legal necessity, or benefit of the estate. It is very difficult for him to check the truth of the story told to him which is alleged to give rise to such necessity or benefit, and not only has he to do that, but he has to preserve evidence which will be available when the transaction may be attacked in years to come by a minor son of the manager. Experience in appeals from the mofussil has satisfied me that this burden which is cast on purchasers and mortgagees is a very heavy, and often an unreasonable, one. A sale or mortgage is often impeached some twenty years after the date of the transaction, and it is set aside because the purchaser or mortgagee, or those claiming through him, cannot at that distance of time, when material witnesses are no longer available, discharge the burden of satisfying the Court of the existence of legal necessity or benefit to the estate. I am not at all surprised, therefore, that legal practitioners in Bombay decline to advise their clients to enter into a transaction with the manager of a joint Hindu family unless they get an order of the Court, binding minor members, and it seems to me that, as the Court has jurisdiction to make an order sanctioning the transaction, it ought in a proper case to do so. Whether a similar power ought not to be vested in mofussil Courts is a matter which might well engage the attention of the legislature. The petition in this case suggests that the money can be obtained on mortgage on much better terms if an order of the Court is obtained, than would be the case if an order is not obtained. Therefore the making of the order may well be for the benefit of the minors, and, if the requisite facts are proved, in my opinion the Judge should not hesitate to make the order. But undoubtedly a Judge has to exercise great -care in seeing that the case is a proper one. As Mr. Justice Kania points out, the evidence of the manager himself is generally interested, and it may not always be easy to check; but if the Court is not satisfied that the transaction is really for the benefit of the minor, it ought to refuse its assent.

2. In the present case the learned Judge has not gone into the merits, and therefore I think the case will have to go back to him, and I will only observe that I do not think that the evidence as it stands is sufficient to justify the Court in making an order. It can undoubtedly be corroborated by evidence from the persons to whom money is said to have been paid by the manager, and by

further inquiry into one item of L 3,100, which seems to be a liability incurred by the manager in not paying over a legacy. I only make those observations in order not to mislead the learned Judge of the Court below into thinking that we are satisfied on the evidence as it stands. On the general question, however, I am quite satisfied that this is a type of case in which the learned Judge ought to make an order if he is satisfied that the evidence shows that the mortgage will be one for the benefit of the minor. The case will therefore be referred back to be disposed of on the merits. Costs of the appeal will be costs in the petition.

Rangnekar, J.

3. This is an appeal in a petition presented by a Hindu father for being appointed a guardian of the undivided share of his two minor sons in a joint family, and for obtaining the sanction of the Court to the proposed mortgage of a joint family property in which he as well as the sons are equally interested. The matter came before the learned Chamber Judge, who, without going into the merits, and relying on the decision of Mr. Justice Kania in *In re Dattatrayd Haldankar*[5], refused to entertain the application. The question is of some importance, and the question is, whether this Court has, apart from the provisions of the Guardians and Wards Act, inherent jurisdiction to appoint a guardian in the case of members of a joint family consisting of a father and his minor sons possessed of joint family property, and to sanction a transaction by way of sale or mortgage of the joint family property in a proper case. It is well established that under the Guardians and Wards Act a guardian cannot be appointed of the undivided interest of a minor in coparcenary property. Long before 1900 the practice in this Court was to entertain such applications, and it was recognized that this Court, which has inherited the jurisdiction of the Supreme Court, was not limited in such cases by the provisions of the Guardians and Wards Act, and had inherent jurisdiction to appoint guardians in such cases, and to sanction a transaction either by way of mortgage or sale in the case of joint family properties, where minors were concerned, if the transaction was for the benefit of the minors. Some doubt was felt in 1900 as regards the correctness of this practice. The matter then was referred to a full bench in *In Re Manilal Hurgovan*[6] and the decision of the full bench was that under its general jurisdiction, and apart from the Guardians and Wards Act, the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property, and the Court has jurisdiction to sanction an alienation by the father or the manager of a joint family where the Court was satisfied that the transaction was for the benefit of the minor. Since that decision the practice on the Original Side has uniformly been to recognise the jurisdiction of the Court in these matters, and in proper cases to make such orders. I myself remember, ever since I have been in this Court, such orders being made without any objection being raised to the jurisdiction of the Court. In 1932, however, Mr. Justice Kania seemed to cast some doubt upon the correctness of this practice in *In re Dattatraya Haldankar*[7], and I am told, since then the practice has been to refuse to accept petitions praying for the appointment of the father or a manager as a guardian of his minor son's interest in joint family property, and to decline to sanction such transactions without considering the merits of the

case. When I was Chamber Judge this decision was mentioned, and in one or two cases which first came before me I felt some doubt about the correctness of the observations of my brother Kania. The question, therefore, is whether this new practice is justified. Apart from any thing else, I think, we are bound by the decision in In re Manilal Hurgovan, and I see no objection to our following the rule established by that decision. Not only, as I said, that the rule laid down in that case was followed by this Court until Mr. Justice Kania's decision, but it has been also followed in Calcutta, and latterly, in the Allahabad High Court. I need not refer to the cases which were cited before us by Sir Jamshedji Kanga on behalf of the appellant.

[5] AIR 1932 Bombay 537 : ILR 1932 56 Bom 519 : (1932) 34 Bom LR 1156

[6] I.L.R. (1900) 25 Bom. 353 : 3 Bom. L.R. 411

[7] AIR 1932 Bombay 537 : ILR 1932 56 Bom 519 : (1932) 34 Bom LR 1156

4. I have now carefully considered Mr. Justice Kania's decision and I do not find anything in it contrary to the rule established in In re Manilal Hargovan. The learned Judge concedes that the Court has inherent jurisdiction to appoint a Hindu father, or a manager of a joint family, guardian of the undivided interest of the minor coparceners in the joint property. He then lays down that " the Court should not be ordinarily called upon to make such an order on the mere ex parte statements of an interested party." As I understand the judgment, all that the learned Judge says is that such orders should not be made in every case. I agree. But if the judgment means that the Court should not and cannot entertain such application, then, I am not, with respect, prepared to accept the decision. It is true that in one place the learned Judge has observed that it will be wrong to entertain applications of this nature for two reasons, the first being that according to the decision of the Privy Council in the well-known case of *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*[8] it is the duty of a purchaser or mortgagee or any one who wants to deal with joint family property to see that a legal necessity exists, and that moneys are required for a legal necessity or for the benefit of the estate. That, undoubtedly, is correct, and many transactions take place which are not challenged, where the burden, which is placed upon a purchaser or mortgagee in such cases, is completely discharged without the parties coming to Court, The second reason,-and that seems to be his principal reason, -is that a purchaser has no right to impose upon the Court the burden of satisfying itself that the transaction is one which is warranted by Hindu law. But I am unable to see on what principle a Hindu father, or the manager of a joint Hindu family, should be deprived of the right to come to Court and ask the Court to adjudicate upon the merits of the application on the ground that the transaction is for the benefit of his minor sons or minor members of the family, and that if the transaction was not sanctioned the other party to the transaction refuses to complete. With great respect to the learned Judge, I think it is wrong to say that the purchaser is casting any burden on the Court. The purchaser is not a party to such applications at least ordinarily, and it is a matter of perfect indifference to him whether the transaction is sanctioned or not. He is entitled to say that unless the vendor or mortgagor obtains an order sanctioning the transaction he would not complete, and that is all. Then assuming that it is a burden on the Court, I do not see why the Court should fight shy of discharging or bearing that burden. There are many burdens imposed on the Court, and one more, I do not think, would affect the position. Experience, on the other hand, shows clearly that such a practice is a wholesome practice. It is quite true that a purchaser is able to look after

himself about the necessities of the transaction at the time the transaction takes place. But what would happen say after twenty years after the transaction ? Is it to be expected that he or his successors would all the time carry evidence with them so as to discharge the burden when the question arose after the lapse of a considerable interval ? There are many cases which come before us, which satisfy us as to the necessity of having a rule to this effect not only in this Court, but even in the mofussil. For the moment I am not concerned with the mofussil, but if I have jurisdiction in this Court, I see no reason or principle why I should decline it. I agree, therefore, that the learned Judge should not have rejected the application on the ground that he had no jurisdiction to entertain it. The matter must be referred back to him to be disposed of on the merits, as proposed in the judgment just delivered.

[8](1856) 6 M.I.A. 393