

ORISSA HIGH COURT

Pramod Kumar Pati

Vs

Damodar Sahu

First Appeal No. 42 of 1946

(Panigrahi and Mohapatra, JJ.)

09.12.1952

JUDGMENT

Panigrahi, J.

1. This appeal by the plaintiff arises out of a suit for the recovery of a sum of Rs.3700/- on two promissory notes, dated 9-6-1941 and 18-6-1941 for Rs.3000/- each. The suit promissory notes were executed by defendant 1 Damodar Sahu, who was admittedly the manager of the Hindu joint family consisting of himself and the other defendants. He also held a power of attorney, executed by the other members of the family, and was given certain well-defined powers. The suit was filed on 22-1-1946 and the plaintiff relied upon two endorsements of payment made on each of the promissory notes, to save limitation. These endorsements were made on 1-1-1942 and 24-1-1943 by defendant 1 on the hand-notes (which are marked as Exs.2 and 3) the endorsements being marked as 2A, 2B, 3A and 3B respectively. Defendants 4, 10 and 11 contested the suit. The other defendants were ex parte. Defendant 1 did not file any written statement though he appeared in Court. The plea urged on behalf of the defendants (other than defendant 1) was that defendant 1, Damodar Sahu, had no power to borrow on behalf of the family and that neither the handnotes nor the endorsements purporting to have been made thereon by him, would make the other defendants liable for the plaintiff's claim.

2. The learned Judge granted a decree to the plaintiff only against defendant 1 and dismissed the suit as against the other defendants.

3. Mr. M.S. Mohanty appearing for the plaintiff-appellant has raised two contentions in support of this appeal. His first contention is that defendant 1 being the manager of an undivided Hindu family was competent to borrow for family purposes and for the family business which admittedly was an ancestral family business, and keep the debts alive by making partial payments towards the discharge of those debts. Secondly, he urged that defendant 1 had been clothed with the power to borrow by virtue of the registered power of attorney executed by the other defendants on 16-2-1939 (Ex.1) and by virtue of a similar power conferred on him by Gopinath Sahu under Ex.1-A D/-22-2-1939. These two documents it is pointed out empowered the donee to borrow for the family and also to make payments and endorsements.

4. In order to appreciate the force of the above contentions, it is necessary to state a few more facts at this stage. Defendant 1 was undoubtedly the managing member of the defendants' family which owned a sugar factory at Aska, and he was constantly in need of funds to run the business. The family had also contracted several other debts from various persons. The members of the family had, therefore, authorised defendant 1 to carry on the business on their behalf, and in particular, to liquidate the family debts. The exact extent of the power conferred on defendant 1 as defined in Exs.1 and 1-A is as follows:

"We authorise you to raise loans in any shape to encumber, sell, or otherwise alienate any of our properties, either moveable or immovable, execute the necessary documents on our behalf for the following among other purposes that you, as the head of our joint Hindu family, have to meet and act:"

- (1) to liquidate old and subsisting debts or liabilities incurred by you or your father on account of our joint family trade and business;
- (2) to undertake or carry on new business and enter into or conduct commercial and industrial enterprises within India or abroad;
- (3) to renew old debts or obligations and
- (4) for the furtherance of any other purpose that you consider in your discretion necessary in the best interests of our family concern."

In exercise of the power conferred by these deeds defendant 1 executed the suit promissory notes (Exs.2 and 3) which are identical in terms, in favor of the plaintiff's father. Exhibit 2 runs as follows:

"Promissory note executed by Sri Damodar Sahu who holds power of attorney by document 11 dated 16-2-1939 registered at Berhampur, Sub-Registration Office, and document 8 dated 22-2-1939, registered at Aska Sub-Registration Office, from Gopinath Sahu and others, to Sri Ananda Pati, resident of Aska, is as follows:

'As I am in need for my Sugar factory at Aska I have borrowed Rs.3000/- from you in cash. I shall repay it with interest at $\frac{1}{4}$ per cent per month, on demand by you or your order. I have received the consideration in cash. I consent to this promissory note.'

Rupees three thousand only
(on stamp)

Sd/- Damodar Sahu 9-6-1941."

The two endorsements made by Damodar Sahu on the promissory note are also signed by Damodar Sahu, but without any description of the capacity in which he made the payments or signed the endorsements.

5. The plaintiff's suit was based; firstly on the negotiable instruments as such and secondly on his claim for recovery of the debts contracted by defendant 1 as the manager of the family. He

alleged that all the defendants were benefited by the loan, as the loan was incurred for family purposes and for legal necessity of the family. He also alleged that they were liable on the nandnote as they had authorized defendant 1 to contract the debt and as the debt was contracted as their agent. The defendants contest both these claims. They allege that the money borrowed by defendant 1 was not utilized for the benefit of the family and that the power-of-attorney held by him did not authorize him to contract new debts.

6. The learned Subordinate Judge held that the plaintiff had failed to prove that the suit loans were necessary for the running of the factory business or that they were actually utilized for the same. He also held that the plaintiff had failed to prove that he had made any *bona fide* enquiry, as a prudent creditor should have done, as to whether there was real family necessity which could not be met except by contracting loans. On the second point he held that Exs. 1 and 1-A did not authorize defendant 1 to contract the suit loans. Defendants also raised a further plea that the endorsements of payment made by defendant 1 on the suit promissory notes, on which reliance was placed by the plaintiff to save the bar of limitation, would not bind the defendants as defendant 1 had ceased to be the manager of the family. It was proved at the trial that defendant 4 issued a notice on 6-10-1942, demanding a partition of the family properties, and that this notice was served on all the other members of the family. Exhibit-A is that notice. It is said that the joint status of the family was severed as a consequence of the notice sent by one of the coparceners conveying his unequivocal intention to separate from the family. The learned Subordinate Judge held that as there was a severance of status, the payment made by defendant 1 after the receipt of the notice of partition, would not bind the other members of the family as he had ceased to be the manager of the family and therefore the suit was barred by limitation. On the alternative contention put forward by the defendants that the registered power of attorney (Ex.1) had been cancelled, the learned Subordinate Judge held that that had not been established and that if the power conferred by Ex.1 did, in fact, authorize defendant 1 to raise a loan, it would be open to him to keep the debt alive by making a part payment. In the result he gave a decree to the plaintiff against defendant 1 only and dismissed the suit as against the other defendants.

7. It is well-settled that the manager of a Hindu joint family can borrow for purposes of the family and that he can bind the other members for the debts thus incurred by him. He is the representative of the family and can bind the other members for necessary purposes. His authority to incur expenditure and contract loan is determined by family necessity and family benefit. While, therefore, the members of the family, of which he is the manager, are liable for the debts and their interests in the family property can be attached for the realization of the debts, they are not personally liable either for the debts, or upon a negotiable instrument executed by the manager. There is, however, no presumption that the borrowing was not for his own private purposes and that the other members of the joint family are not liable on the promissory notes, in the absence of satisfactory evidence that the money was borrowed for purposes of family business. See - '*Abdul Majid Khan v. Saraswati Bai*'. It is unnecessary here to discuss whether benefit to the estate can only be inferred when there is pressure on the estate and whether the pressure or danger could not be removed except by resort to borrowing. It is also unnecessary to consider whether every case of benefit must also be a case of necessity, or protection of the estate from the danger. The facts of this case disclose that the manager Damodar Sahu (defendant 1) was in need of funds for running the sugar factory at Aska. But whether that need was of such pressing character that the family business could not have been run, or that it would have been exposed to danger if the borrowing had not taken place, has not been attempted to be proved; for

it is always upon the creditor who lends to a Hindu joint family acting through its manager, to show that there was pressing necessity for family purposes or that the borrowing resulted in benefit to the estate. The case reported in - '*Bajinath v. Binda Prasad*'², relied on by Mr. Mohanty does not assist the appellant in this case and is easily distinguishable on facts. Fazl Ali, J., (as he then was) observed in that case;

"Upon the evidence on the record there can be no doubt that these debts were regarded as legitimate debts not only by Jung Bahadur, but by all the adult members of the family and when Jung Bahadur executed the hundi he executed it with the concurrence of all the adult members".

There is no such allegation in the present case, nor has any evidence been adduced which would support the inference that the suit debts contracted by defendant 1 had the approval or concurrence of the other adult members. If the suit loans had been proved to have been contracted for the purposes of the family, I would accept the appellant's contention that there is nothing in the Negotiable Instruments Act which would debar the plaintiff from suing upon the handnotes so as to make the family liable. The latest decision of the Judicial Committee in '*Abdul Majid's case, (A)*' referred to above, would seem to have resolved all conflict of views among the several High Courts on the point.

8. But where, as in this case, a payment is made by a person, purporting to be the manager of a joint family, and is accompanied by an endorsement of such payment made on the promissory note, the question whether the debt is kept alive and limitation is saved as against the entire family would depend not upon the liability of the non-executing members for the debt, but upon a proper interpretation of the provisions of the Limitation Act which governs the case. Section 21, Limitation Act deals with acknowledgments or payments by one of several joint contractors. Section 21(3)(b) says:

"Where a liability has been incurred by or on behalf of a Hindu undivided family as such, an acknowledgment or payment made by or by the duly authorized agent of, the manager of the family for the time being, shall be deemed to have been made on behalf of the whole family."

It is clear therefore that "the manager of the family for the time being" can acknowledge or make a payment on behalf of the whole family. The words "manager of the family for the time being" indicate that at the time of making the acknowledgment or payment, the person making the endorsement should be the manager of the family. While there can be no doubt, therefore, that the manager has the implied authority to contract a loan on behalf of the family, he cannot make any payment and keep the debts alive as against the entire family, unless it is shown that he is also "the manager of the family for the time being", that is, at the time of making the payment. The argument on behalf of the respondents is that by virtue of the notice dated 6-10-1942, wherein one of the coparceners communicated his intention to separate, defendant 1 ceased to be the manager of the family from that date. It is well-settled that when a coparcener communicates his unequivocal intention to separate to the other coparceners, there is immediately a severance of

status in the family, and there is no presumption that the others continue to remain united. An agreement amongst the members to remain united, or to re-unite, should be proved like any other fact. It is not essential that all the coparceners should agree to the disruption of the joint status. Neither is it necessary that severance of rights can be worked out only by an actual division of the properties held jointly. Our attention was drawn to the dictum of Sir John Edge in - '*Palani Ammal v. Muthuvenkatachala Moniagar*³', which was adopted by the Judicial Committee in a later case in - '*Balkrishna v. Ramakrishna*⁴', which is to the following effect: "It is now beyond doubt that a member of a joint family can separate himself from the other members of that joint family and is, on separation, entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining members may, without any special agreement amongst themselves, continue to be coparceners, and enjoy as members of the joint family what remains after such partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them." It follows from the above that the plaintiff, in order to avail himself of the benefit of the endorsement made by defendant 1, should prove that after the receipt of the notice dated 6-10-1942 he (defendant 1) remained joint with the other members of the family and continued to be its manager. No attempt has been made to establish this fact. The payments made by defendant 1 on 24-1-43 must, therefore, be held to have been made by defendant 1 in his individual capacity and not as manager representing the family as such. The endorsements in support of these payments would, therefore, only serve to keep the debt alive as against himself and are ineffective against the other members of the family which became divided on receipt of the notice dated 6-10-1942. There is no evidence as to how the family business was carried on after the receipt of the notice of partition and even if, as a fact, defendant 1 carried on the business of the sugar factory that by itself would not be sufficient to show that he was acting as manager of the family. In fact, if the evidence of D.W. 1 Kasinath Sahu, were to be accepted defendant 1 was not the karta of the family even at the time of contracting the loan. He was no more than an authorised agent or power-of-attorney-holder of the family. D.W.2. also gave evidence to show that defendant 1 was only a formal agent and not a manager. Exhibits 1 and 1-A expressly state that for facility of administration of the joint estate of the members of the family, defendant 1 was appointed their agent. There is no express mention of his having been empowered to act as manager of the family, in any of these documents. But even if it be assumed that he was also the manager of the family at the time of the execution of the suit promissory notes, there is clear evidence that he ceased to be so at the time he made the endorsements of payment on 21-5-43. It must accordingly be held that the defendants other than defendant 1 are not bound by the endorsements of payment and that the suit as against them seeking to make them liable for the suit debt, assuming it was a family debt, should fail on the ground of limitation.

9. After the arguments had been closed, Mr. Mohanty brought to our notice a case reported in - '*Kasiram v. Bhaga*⁵', a decision of a single Judge, in which it was held that unless intimation of the severance of the joint status between the members of a joint Hindu family is given to the outsider creditors who had dealings with the joint family through its manager, the manager of the family would be deemed to continue to represent the family and that he would have power to make acknowledgment or part-payments so as to extend the period of limitation. Bhagwati, J., applied the law of partnership to the members of a joint Hindu family and held that it was incumbent upon the members of a joint family effecting a severance of the joint status, to give

intimation to the stranger or outsider-creditor of such severance of status between themselves and of the manager of the karta having ceased to enjoy a status as the managing director. But, with great respect to the learned Judge, I am of opinion that the question as to whether a debt can be kept alive by endorsement of payment depends entirely upon the true construction of the language used in the Limitation Act. Section 21 was introduced to remove the conflict of authority as to whether the benefit of Sections 19 and 20 could be invoked by a creditor when an acknowledgment of payment is made by a person other than the party who incurred the liability, Explanation 2 to Section 19 provides that an acknowledgment could be signed either personally or by an agent duly authorized in this behalf. Section 20 similarly provides that payment on account of a debt could be made by the person liable to pay the debt, or by his duly authorized agent, and that the acknowledgment of that payment could be signed by the person making the payment. In the case of a Hindu joint family acting through its manager, it cannot be said that the non-executing members are the persons liable to pay the debt or that the manager of the family is their duly authorized agent. The person liable to pay the debt, under Section 20, is the 'Executant' and the junior members of a joint Hindu family are not such persons though their interest in the family property is liable to be attached for the debt contracted by the manager for the benefit of the estate. But it would be doing violence to the language of that Section, to say that they are the persons actually liable to pay the debt. Nor could such persons be brought under the provisions of Section 19. That section says that the acknowledgment should be signed by the party against whom such right is claimed or by some person through whom he derives title or liability. It is obvious that the coparceners do not derive their title through the manager. Nor does the creditor claim any right against them as such. The claim is against the joint family assets in their hands. I am, therefore, inclined to the view that neither Section 19 nor Section 20 would apply to the case of an acknowledgment or payment made by the manager so as to bring in the junior members of the joint family. As I have stated already, the relevant Section is Section 21 where the expression "agent duly authorized in this behalf" is explained rather than defined. And Section 21(3)(b) makes express provision for such cases. Unless, therefore, the payment is made by the manager of the family for the time being, as laid down in that sub-clause the payment cannot be deemed to have been made on behalf of the whole family. Any consideration of the Contract Act or the Partnership Act is, in my view, irrelevant in

deciding whether the bar of Limitation is saved by the payment made by the manager of the family. The use of the words "for the time being" is, I think, a pointer as to the extent to which the payment made by the manager can be relied on by a creditor to make the family liable. It would appear that it is the duty of the creditor to enquire whether the person making the acknowledgment or the payment still retains his character as the manager of the family at the time an acknowledgment or payment is made. No duty is cast upon the members of the family whose names do not appear either on the note or on the endorsement, to intimate the creditor by a general notification. They may not be aware of the debt at all. It is the creditor who takes a risk and relies upon the representative capacity of the manager and advances the loan. No less is it his duty to enquire and satisfy himself whether the executant continues to represent the family at the time he makes an acknowledgment or payment. I have, therefore, come to the conclusion that a severance of the joint family status puts an end to the representative capacity of the manager and that an endorsement of payment made by him after the joint status of the family had been disrupted, would not save the claim from the bar of limitation against the other members. The same view was taken in - '*Rangaswami v. Sivaprakasam*'⁶,

10. The second contention raised on behalf of the appellants is equally untenable. The appellant

relies upon the fourth clause in Ex.1 as empowering defendant 1 to contract loans as an agent of the executants. That clause is in general terms and recites;

"For the furtherance of any other purpose that you consider in your discretionary power necessary in the best interests of our family concern." This recital cannot be said to authorise defendant 1 to contract loans in his name and bind the principals. It only authorises him to execute the necessary documents on their behalf for the furtherance of any other purpose in the best interest of the family. Strictly construed the power conferred is limited to execution of document for liquidation of old and subsisting debts and renewal of old debts and obligations. If the plaintiffs seek to invoke the power conferred by Ex.1 to make the other defendants also liable or the debts, one would expect a more unambiguous recital in the deed than is legitimately inferable from the words used by the executant in this case. But assuming that the alleged power does exist, the question is whether the donee of the power was acting within the limits of his power and purported to act on behalf of his principals when he executed Exs.2 and 3.

11. Section 27, Negotiable Instruments Act provides that a person capable of entering into a contract can bind himself or be bound by a duly authorized agent acting in his name : and further provides :

"A general authority to transact business and to receive and discharge debts does not confer upon an agent the power of accepting or indorsing bills of exchange so as to bind his principal." The last clause of the Section says :

"The authority to draw bills of exchange does not of itself import an authority to indorse." Section 28 of the Act provides that an "agent who signs his name under a promissory note, without communicating therein that he signs only as

an agent or that he does not intend thereby to incur a personal liability, is liable personally on the instrument except to those who induced him to sign upon the belief that the principal only will be held liable." On a plain reading of these two sections it is clear that a general authority to transact business and to discharge debts does not confer upon an agent the power of endorsing bills of exchange so as to bind his principal. Nor can an agent escape personal liability unless he indicates that he signs as an agent and does not intend to incur personal liability. An express power of attorney to discharge and satisfy debts or to incur loans in the best interests of the family would not also include the power to keep the debt alive by making an endorsement. But apart from this the plaintiff is confronted with an even more formidable obstacle in the way of getting any relief upon the promissory note as such. In executing the handnotes, defendant 1 does not disclose that he was incurring the debt on behalf of his principals. The only reference to the principals is in the preamble to the handnote in which he describes himself as having obtained a power of attorney from Gopinath Sahu and others. These words in my opinion, are no more than descriptive or decorative, and do not import that he was borrowing for or on behalf of his principals. Neither does he say in the body of the note that the money

was required by his principals. Nor has he signed as agent. On the other hand the express recital in the promissory note is

"As I am in need of money, for the sugar business at Aska, I have borrowed from you." These words are capable of only one meaning and that is that the loan was contracted by defendant 1 in his individual capacity and not as an agent of the other defendants. In - '*Dutton v. Marsh*'⁷, four directors of a joint stock company signed their names in a promissory note which was as follows :

"We, the directors of the Isle of Man Slate Company, Ltd., do promise to pay J.D. £. 1600/-/- with interest at 6 per cent. per annum till paid, for value received." The company's seal was also affixed to the note Cockburn, C.J., delivering the judgment of the Court said :

"Where parties in making a promissory note or accepting a bill of exchange describe themselves as directors or by a similar form of description, but do not state on the face of the document that it is on account, or on behalf, of those whom they might be otherwise considered as representing - if they merely describe themselves as directors, but do not state that they are acting on behalf of the company - they are individually liable." It was further observed that so far as the written portion of it went, it was totally, without any such qualifying expression, and the fixing of the seal of the company upon the note, was "simply for the purpose of ear-marking the transaction or, in fact showing to the directors that, as between them and the company, it was for the company that they were signing the note and that it was a transaction in which the proceeds to be received upon the note would operate to the benefit of the company; but there is no case that goes the length of saying that the fixing of the seal where the parties otherwise do not use terms to exclude their approval or liability would have that effect.

" It is, therefore, of the essence of a claim based upon a negotiable instrument that the person executing that document should disclose, on the face of the document itself, that he is not personally liable and that he is executing a promissory note for someone else. In the well-known case of - '*Sadasuk v. Kishen Prasad*'⁸, the handnote ran as follows :

"By order of Sarkar may his happiness increase. To . Mohan Lal, son of Hira Lal. Six months from the date of execution of this hundi, please pay to Seth Sadasuk Janki Das Sahu of the Residency Bazaars, or to his order, the sum of H.S. Rs.2500/- (half of which is Rs.1250/-), which sum I have received in cash in the Residency Bazaars from the said Seth Sahib.

.Dated 14-4-1910. Mohan Lal (In Urdu) Acting

.Superintendent of the Private

.Treasury of His Excellency

.Sir Maharaj Prime Minister

.of His Exalted Highness the Nizam.

.(On the back)

.This hundi has been accepted by Mohanlal, son of Hiralal, in favour of Seth Sadasuk Janki Das, inhabitant of Residency Bazaars, Hyderabad."

.Sd/- Mohan Lal. (In Urdu)

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It was contended that the words "By order of Sarkar" appearing in the preface to the instrument implied that the subsequent signatures were on behalf of Sarkar, and their Lordships of the Judicial Committee in rejecting this contention observed as follows :

"It is of the utmost importance that the name of the person or the firm upon a negotiable instrument, should be clearly stated on the face or on the top document so that the responsibility is made plain and can be instantly recognized as the document passes from hand to hand."

Their Lordships went further and observed : "It is not sufficient that the principal's name should be 'in some way' disclosed; it must be disclosed in such a way that, on any fair interpretation of the instrument his name is the real name of the person liable upon the bill." It must, therefore, be held that in any action on a promissory note against a person whose name properly appears on that instrument, it is not open, either by way of claim or defence, to show that the signatory was, in reality, acting for an undisclosed principal. In - *Man Mohan v. Radhakishan and Sons*⁹, the promissory note was written on a piece of paper bearing the name of the firm, Radhakishen and Sons and was signed by one Shamlal in the following form :

'Shamlal'

Pro. Radhakishen and Sons.

Their Lordships held that the use of the word "Pro." indicated that the executant was the proprietor of Radhakishen and Sons and that it was only descriptive of the executant and was not legally sufficient to fix any liability on the firm of Radhakishen and Sons. In - *Sitaram v. Chimandas*¹⁰, a hundi was signed by one G. V. Athale, managing proprietor, Gangadhar and B, Friends, Sanderson Road, Bombay. The Court held that the person liable on the handnote was the person named

Athale and not any firm, alleged to have been styled as "Gangadhar and B. Friends". In the matter of - *Jajodia Cotton Mills, Ltd.*, AIR 1927 Calcutta 612, the promissory note ran as follows :

"We promise to pay to----or order the sum of for value received."

and it was signed by two directors of the company, and below the signatures was given their description as directors, and below these signatures, again, was the signature of the managing agents. The promissory note also bore the seal of the company. It was, however, held that the promissory note did not bind the company.

12. I have, therefore, no doubt in my mind, on a review of the authorities, that in a suit based on a handnote the person signing the document is the person actually liable, and that no evidence is admissible to prove that it was executed on behalf of an undisclosed principal. Having regard to the character of such instruments, which constantly pass from hand to hand, it would be

dangerous to permit evidence to be adduced so as to bind persons whose names are not disclosed on the face of the note itself, or to hold that the person signing the negotiable instrument was only an agent for an undisclosed principal.

13. It is unnecessary in the view that I have taken of the liability created under the suit promissory notes, to discuss whether the endorsement made by Damodar Sahu would keep the debt alive against the principals. The endorsement does not say that it was made by an agent. As I have already stated, the power-of-attorney relied on by the plaintiff does not empower the agent to make endorsement of payment on behalf of the principals. The power conferred by Ex.1 to renew old debts or obligations should be limited to the debts and obligations that were in existence on the date of execution of the power-of-attorney. It cannot, in my opinion, be interpreted as empowering the agent to contract new loans and to renew them from time to time on behalf of the executants. On a consideration of all the facts and the principles of law discussed in the foregoing paragraphs I have arrived at the conclusion that the plaintiff is not entitled to any relief against the non-executing defendants and that his suit has been rightly dismissed. It is unfortunate that a righteous claim should be defeated by an unrighteous defence. I would, accordingly, while dismissing the appeal direct that the defendants other than defendant 1, should not be allowed the costs of this appeal. There will be a decree against defendant 1 alone for the suit amount, with costs and future interest, as directed by the Court below.

Mohapatra, J.

14. I agree.

Appeal dismissed.

Cases Referred.

¹ AIR 1934 PC 4

² AIR 1939 Pat 97

³ AIR 1925 PC 49

⁴ AIR 1931 PC 154

⁵ AIR 1945 Bom 511

⁶ AIR 1941 Mad 925 (FB)

⁷(1871) 6.QB 361

⁸ AIR 1918 PC 146

⁹ AIR 1934 Lah 815

¹⁰ AIR 1928 Bom 516