NAGPUR HIGH COURT

Udmiram Karoodimal

Vs

Balramdas Tularam

First Appeal No. 17 of 1947

(R. Kaushalendra Rao and Tambe, JJ)

30.04.1946. 20.10.1954

JUDGMENT

R. Kaushalendra Rao, J.

1. This is an appeal by defendants 1 and 2 directed against the judgment and decree passed by the Extra Additional District Judge, Bilaspur, on. 30-4-1946, decreeing plaintiff 1 Balramdas's claim that the debts incurred by his father defendant 12 Tularam from the appellants and others were tainted with immorality and are not binding on him.

2. The facts relevant for purposes of this appeal are as follows. This suit is brought by Balramdas, aged 7 years, through his next friend grandmother Mst. Sukwara who is also plaintiff 2 in the case. The plaintiffs' case is that one Bhursal wad 'kotwar' of 'Mouza' Jharna, tahsil Janjgir, district Bilaspur. He possessed agricultural lands and 'malguzari' shares in certain villages. He also did money-lending business. He was in affluent circumstances. He died in January 1938, leaving behind his joint son defendant 12 Tularam and widow Mst. Sukwara (plaintiff 2); and they became owners of the estate, each owning a half share therein. This property was yielding good income which was more than sufficient for the needs of Tularam and his family.

3. The plaintiffs alleged that since about 1942 Tularam took to gambling in the company of defendants 3 to 6 Lakhan, Deonath, Deocharan end Bisesar, and since then he was constantly gambling at his own house and at other places. In order to meet his expenses defendants 3 to 6 themselves advanced him money and also caused leans to be advanced to him by defendants 1 and 2. Thus, he borrowed large sums of money from various people and squandered them in gambling. The plaintiffs, therefore, filed this suit seeking a declaration that the total debts amounting to Rs. 23,600/- borrowed by Tularam (defendant 12) from the various defendants were taken for illegal and immoral purposes and therefore not binding on the plaintiffs' share in the ancestral property described in the plaint.

4. The borrowings from defendants 1 and 2 are as follows : Rs. 8, 000/- on a mortgage bond of dated 31-8-1944 whereby -/8/- share of 'mouza' Jharna together with certain 'sir' and 'khudkashta'

lands was mortgaged.
Rs. 6,000/- on a promissory note dated 5-11-1944.

5. Defendants 1 and 2 admit that Bhursal was 'Kotwar' of 'mouza' Jharna, and that he did money and 'dhan' lending business along with selling and purchasing of 'dhan.' The extent of property left by him was, however, not admitted by these defendants. They denied that Bhursal died in January 1938, and pleaded that he died on 22-1-1937 and, therefore, plaintiff 2 Sukwara had no share in the property left by him. According to these defendants, on the death of Bhursal his son Tularam succeeded to his property and was also appointed 'kotwar' of the village. These defendants denied that Tularam was given to gambling or wasted his property. They also denied that they advanced any money to him for purposes of gambling. According to them Tularam had borrowed various amounts for his business of 'dhan' and money lending and that of sale and purchase of paddy.

6. As for the mortgage debt of Rs. 8,000/- it is alleged by these defendants that the amount was borrowed to pay off the antecedent debts - Rs. 3,500/- were due to these defendants on hand-notes, dated 17-8-1944, and 23-8-1944, and Rs. 4,500/- were paid in cash before the Registrar as the time of registration for payment of other antecedent debts as detailed in the mortgage deed. These defendants pleaded that 'bona fide' enquiries about the existence of these debts were made, and they were satisfied as to their existence. So far as the unsecured debt of Rs. 6,000/- on the promissory notes is concerned, these defendants pleaded that Tularam had borrowed that amount to redeem the ornaments which he had pledged with one Gulabrai Nanakchand.

7. The trial Court held that Bhursal died on 22-1-1937, as alleged by defendants 1 and 2, and not in January 1938, as alleged by the plaintiffs; and therefore Sukwara had no share in the property left by him and Tularam alone succeeded to the entire property. It also held that the entire property as mentioned in the plaint was left by Bhursal, and it was ancestral in the hands of Tularam. It was further held that all the debts incurred by Tularam from the various defendants were borrowed for purposes of gambling and, therefore, not binding on plaintiff 1 Balramdas son of Tularam.

8. The defendants had also raised a plea that the suit was bad for mis joinder of parties and causes of action. The trial Court had framed a preliminary issue on this point, and by its order, dated 22-9-1945, held that there was no misjoinder of parties or causes of action.

9. Against the judgment and decree of the trial Court defendants 1, 2, 3, 5 and 6 have filed appeals; First Appeal No. 17 of 1947 is by defendants 1 and 2, First Appeal No. 71 of 1946 is by defendant 6 Bisesar, and First Appeal No. 72 of 1946 is by defendants 3 and 5 Lakhan and Deocharan. However, when these appeals came up for hearing, the learned counsel for the appellants in First Appeals Nos. 71 and 72 of 1946 stated before us that his clients were not prosecuting these appeals. These appeals were accordingly dismissed.

10. We are now only concerned with appeal No. 17 of 1947 filed by defendants 1 and 2. It is admitted that the parties are governed by the 'Mitakshara' school of Hindu law.

11. It is not seriously contested before us that Tularam was given to gambling. It is, however, contended :

(i) that even assuming that he was given to gambling, the plaintiffs have not established the connection between the debts borrowed Tularam and his alleged gambling;
(ii) that the plaintiffs have also to prove that the lenders had knowledge of the immoral purpose for which the debts were incurred and the plaintiffs have failed to do so;
(iii) that the suit is bad for misjoinder of parties and causes of action;
(iv) that the trial Court erred in awarding costs against all defendants jointly and severally; they should have been awarded to the extent of the claim against each of the defendants; and
(v) that, at any rate, this suit is not tenable-in respect of the unsecured debt of Rs. 6,000/-, and the declaration granted in respect of that debt is bad in law.

12. It is contended on behalf of the respondents that it is true that connection between the debts borrowed and the alleged vice of the borrower is to be established by the sons who are challenging their father's debts, but it is not incumbent on them to prove by direct evidence that the debts borrowed were actually expended on the vice. The connection between the debts and the vice can be established by circumstantial evidence from which the necessary inference can be drawn; and in the instant case the plaintiffs have established it lay such evidence. It is further contended that it is not necessary for the plaintiffs in the present cage to show that the lenders had knowledge of the immoral purpose for which the debts were incurred. According to them, the suit is not bad for misjoinder of parties or causes of action. A suit for a declaration in respect of unsecured debts is maintainable, and the order as to costs is proper.

13. The points that arise for determination, therefore, are :

(i) What is the quantum of proof that is required to be given by the sons to establish the connection between the debts borrowed by their father and the alleged vice of the borrower for which the debts were incurred ?
(ii) Is it also necessary for the plaintiffs to prove that the lender had knowledge of the immoral purpose for which the debts were borrowed ?
(iii) Is a declaratory suit maintainable in respect of unsecured debts ?
(iv) Is the present suit bad for misjoinder of parties and/or causes of action ?
(v) Is the order of the Court in respect of costs proper in the facts and circumstances of the case ?

14. As regards point (i), the view in this Court has been that it is not necessary to prove by direct evidence that the amounts borrowed, from the lenders were actually expended on the vice. In 1889, in - '*Narayen Shridhar Naik v. Jagannath*[1]', it Js observed that when a father borrows money for expenditure in vice, the son cannot be required to show that the money was actually spent in immoral purposes. It is sufficient if it is proved that the; money was borrowed for immoral purposes, that the father was spending money in vice and that there is no evidence to prove that the
money was spent properly. In - '*Sheonarain v. Nathu*'[2], it is observed at p. 4.

"A number of rulings have been cited by the appellants' learned advocate in support of his

contention that it is not sufficient merely to show that the father was of immoral and extravagant habits in order to enable the son to claim exemption from the payment of his father's antecedent debts, but it must also be shown that the money borrowed was applied to immoral purposes. In the present case, as is admitted by the learned advocate for the respondent Pundlik, it is not proved that any specific sum borrowed was so applied. But, in my opinion, such proof is not indispensable. The issue whether the debts were contracted for immoral purposes is one of fact and may be proved by inference from evidence showing that they were contracted during a period of extravagant immoral habits. But in such a case there must be definite and convincing proof that the immoral practices were contemporary with the loans and could not have been indulged in without the use of the borrowed amounts."

15. This view was approved in - '*Rajeshwar v. Mangiram Gangabishan*'[3], by another Division Bench consisting of Niyogi and Grille, A.J. Cs. It is observed at p. 91 : Relying on 4 CP LR 29, it is urged that the son cannot be required to show that the money was actually spent on immoral purposes. It may be conceded, as observed in the reported case, that it is impossible to trace out the items spent on indulgence of vice, but it must in any case be proved that the money was borrowed for immoral purposes, that the father was in the habit of spending money for immoral or illegal pursuits and that there was no evidence that the money was spent properly. Neither this case nor AIR 1922 Nagpur 1 is an authority for the proposition that mere general immoral conduct is sufficient to presume that the debts were incurred for immoral purposes. Both the decisions specify certain relevant facts to serve as a basis for the deduction that the debts were in some way connected with the vicious pursuits of the father."

16. Thus, the view prevailing in this Court is that though it is not necessary to prove by direct evidence that the money borrowed is expended on the vice, yet it is necessary for the sons to establish the connection between the debt borrowed and the immoral habits of the father. And this can be proved by leading circumstantial evidence from which such an inference can reasonably be drawn. To the same effect is the decision in - '*Sundara Goundan v. K. Arumuga Goundan*[4]', Nothing has been shown to us as to why we should depart from the view so far prevailing in this Court.

17. We are, therefore, of the opinion that if the sons are able to establish that during the period the debts were borrowed by the father he was indulging in a life of vice and that the life of vice could not be indulged in but for the borrowings and that there was no other necessity for the borrowings, and further if it is not established that the borrowings were utilized for some purpose which had no connection with the vice, then a reasonable inference can be drawn that the debts borrowed were for immoral purposes. It is not necessary for the sons to further establish by direct evidence that
the debts borrowed were utilized to feed the vice.
18. The learned counsel for the appellants submitted that in the absence of proof of knowledge on the part of the mortgagee that the antecedent debts had been tainted with immorality the son cannot succeed in his suit. The learned counsel relied upon the following observations in - '*Sat Narain v. Beharilal*'[5],

> "When the decree which was executed was made in a suit to which the sons were not parties and the property sold was the joint property of the father and the son, the sale was good on the principle of Hindu law that it is the pious duty of a Hindu son to pay his father's debts unless it is shown that the debt in respect of which the decree was made was contracted by the father to the knowledge of the lender' for the purposes of immorality."

(The underlining (here in ' ') is by us). According to the contention for the respondents, the law does not require the son to establish any knowledge on the part of the lender about the purpose of the debts having been immoral. The learned counsel for the respondents submitted on the authority of - '*Lakshmanaswami v. Raghavacharyulu*[6]*',* that the reference to "the lender" in the cited passage was "perhaps an inadvertent slip."

19. We are not concerned in the present case as to the circumstances under which the son can escape his liability under a decree passed in a suit to which he was not a party but which is sought to be executed against, the joint property of the father and the son. The observations of the Privy Council have reference to such a situation. In such a situation the question may arise as to whether the son has to prove the knowledge of the purchaser at the execution sale or the original lender. In - '*Lakshamana-swami v. Raghavacharyulu*', (supra) the Court was not called upon to decide the question raised in the instant case, which is, whether the son can impeach an alienation made by the father for discharging his antecedent debts on the mere proof of such debts having been incurred for immoral purposes without further proof that the alienee was aware of the tainted character of such debts. It is, therefore, not necessary to determine the precise import of the observations in - '*Sat Narain v. Beharilal*', (supra) relied upon by the learned counsel for the appellants. The more apposite pronouncement on the present question is the one cited with approval in the very case of - '*Sat Narain v. Beharilal* (supra), (pp. 22-23) from - '*Suraj Bunsi Koer v. Sheo Proshad Singh*[7]*,"*

20. The first proposition laid down in - '*Suraj Bunsi Koer v. Sheo Proshad Singh* (supra), on the basis of an earlier decision in - *Girdharee Lall v. Kantoo Lall*[8]*.'* must be held to conclude the present question against the son. The proposition is :

> "1st, that where joint ancestral property has passed out of a joint family, either under and conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt,.....his sons, by reason of their duty to pay their father's debts, cannot recover that property,
> unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted;....."

The proposition so laid down has more than once been relied upon or given effect to see - '*Hanuman Singh v. Nanak Chand,*[9]*'* - '*Lal Singh v. Deo Narain Singh*[10]*,'* - '*Jamna v. Nain Such*[11]*,'* - '*Bhawani Baksh v. Ram Dai*[12]*,'* No valid distinction can, in our opinion, be made between a case in which the son sues to recover property which has gone out of the family and the present one in which he comes as the plaintiff merely impeaching the alienation.

21. In our opinion, if a Hindu son governed by the 'Mitakshara' school of Hindu law comes to

Court as a plaintiff claiming relief from an alienation by his father for discharging his antecedent debts on the ground that such debts had been tainted with immorality the son cannot succeed without proof that the alienee was aware of the character of the debts.

22. This brings us to point (iii). It is contended by the learned counsel for the appellants that no declaratory suit can be instituted by the sons to obtain a declaration that an unsecured debt contracted by the father is not binding on them or their share in the joint family property. It is urged that merely because the father had contracted an unsecured debt it does not mean that there is any threat to the interest of the son as is in the case of a secured debt. A threat, if any, is very remote. No case is, however, cited by the learned counsel in support of his proposition. Section 42, Specific Relief Act runs thus :

> "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration, that he is so entitled, and the plaintiff need not in such suit ask for any further relief :
>
> Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

23. It will be seen that a suit is maintainable not only against a person who is denying the plaintiff's right but also against a person who is interested in denying the plaintiff's right. It would not be unreasonable but natural for the son to assume that the unsecured creditor of his father is likely to execute the decree that would be obtained by him not only against the share of the father but also against the share of the sons. A man will always be presumed to act in his best interest. See - '*Gokuldas Gopaldos v. Puranman Premsukhdas*[13]*,'*

24. Further, in the defence raised by the appellants they claim that the unsecured debts are binding on the plaintiffs share in the joint family property. The defense itself casts a cloud on the plaintiff's right to hold his share free from liability to pay these unsecured debts of his father. In such circumstances the Court was justified in
granting a declaration, though no case for granting a declaratory relief under section 42, Specific Relief Act is strictly made out : '*Bishunath Saran v. Sitla Bakhsh*[14]*,'* and - '*Mt. Indar Devi v. Kirpa Ram*[15]*,*

25. We are, therefore, of the opinion that in this suit the plaintiff is entitled to obtain a declaration that an unsecured debt contracted by this father is not binding against his share in the joint family property.

26. The next point urged by the learned counsel for the appellants is that the present suit is bad for misjoinder of parties and causes of action. '*Purshottam v. Bhagwansao*[16]*,'* is a conclusive answer to this contention. No good reason is shown as to why we should depart from it At pp. 462-463 it is observed :

> "The common question of law and fact which arises in the suit is whether or not the father was addicted to vices to feed which he made the alienations. It is true that it is incumbent on the plaintiffs to prove as against each defendant alienee that the money borrowed from

him was used for an immoral purpose and to that extent it may be conceded that though the cause of action against each of the alienees was distinct it does not preclude the several alienees from being joined in the suit under Order 1, Rule 3, Civil Procedure Code"

Order 1, Rule 3, Civil Procedure Code provides that all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly or severally, or, in the alternative, where if separate suits were brought against such persons, any common question of law or fact would arise.

27. If separate suits were brought in the instant case, the plaintiff would have been required to lead the same evidence in all the suits in order to prove that his father was addicted to vicious life during the period these various debts were borrowed by him. No prejudice is, in our opinion, caused to the appellants by the joint trial. The learned counsel for the appellants argues that the learned trial Judge was prejudiced against them in his view on account of the heavy borrowings by the father of plaintiff a and this has resulted in an adverse finding against them. The extent of borrowing by the father is always a material factor in determining whether the debts were borrowed for vicious purposes or otherwise. It cannot be said that because a relevant factor was taken into consideration by the trial Court it was prejudiced against the appellants.

28. The last contention of the appellants i.e., as to costs, is in our opinion, well founded. The trial Court was not justified in ordering the entire costs jointly and severally against all the defendants in the circumstances of the case as each defendant was concerned in defending his interest only and was not trying to defend the cause of any of the other defendants. In a case where there are several distinct items claimed against separate defendants, costs should be awarded to or against each defendant in proportion to the plaintiff's claim failing or succeeding against him. No reason is given by the trial Court for departing from this well established rule.
29. We will now consider the facts of the case, having discussed the principles of law applicable to the case.

30. Firstly, we will consider the extent of the income from the property left behind by Tularam's father on his death. In this respect there is evidence of Sukwara (P.W. 1), mother of Tularam. She states that the property left behind by her husband was enough to maintain the family of Tularam during the period of the borrowings. The family then consisted of Tularam, his wife Mst. Budhwara, daughter Narmadabai, aged 10 years, and son Balramdas, aged 7 years, and the witness herself. She further deposes that at the time of his death Bhursal had left behind 100 acres of land, malguzari shares in three villages, some cash, ornaments and some recoveries to be made in respect of money-lending and grain-lending. She is supported by Mukanda (P.W. 9) who is an old man of the village and deposes as to the property left behind by Bhursal. He says that Bhursal left behind 100 acres of land and 'malguzari' shares.
The land was of good quality and yielding 40 gadas of dhan in good years and 30 in bad years. Nandlal (P.W. 6) is the 'malguzar' of the village where Bhursal resided. He too deposes that Bhursal left behind about 100 acres of land yielding about 50 to 60 gadas of dhan. To the same effect is the evidence of Kevalprasad (P.W. 10) who is a priest and who used to attend the house of Bhursal in the course of his duties as a priest. Even Balaji (1 and 2 D.W. 3), witness for the

appellants themselves, who is 'patwari', deposes that after the death of his father Tularam got about 95 acres of land which yielded about 40 gadas of dhan annually. There is evidence to the effect that a gada is equal to 20 khandis, and the price of a khandi of dhan at that time was between Rs. 5/- to Rs. 10/-. Calculating at average rate of Rs. 7/- per khandi the annual income from the land comes to about Rs. 5,600/- per year. Admittedly, he had also -/5/- share in village mouza Zarna, 0-0-6 share ill rnouza Bhurkadih and -/-/2 share in mouza Beda. It would not be unreasonable to assume that on his death Tularam's father had left properties which were yielding about Rs. 6,000/- as annual income to him. It would also not be unreasonable to believe Sukwara when she says that some cash and gold ornaments were also left behind by her husband. We, therefore, hold that when Tularam succeeded to the property of his father on his death ho came to be in possession of properties yielding an income of about Rs. 6,000/ per year, and cash and gold ornaments. We are of the opinion that this, income from the property was quite sufficient to meet the needs of Tularam and his family.

31. It is urged by the learned counsel for the appellants that an adverse inference should be drawn against the plaintiffs because the account books of the estate are not produced in Court by them. Reliance is placed in this connection on the following observations in a case reported in - '*Shanker Rao v. Kampta Prasad*[17]*,'*

> "No party should be allowed to take advantage of an abstract doctrine as of the burden of proof and conceal from the Court the evidence in its own possession which would assist the Court in arriving at a correct decision. In this case the burden of proof lay on the defendants. We are entitled to hold that the plaintiffs having failed to produce the account books in their own possession have made the task of the defendants easy, and we are justified in holding that had those account books been produced they would have proved the case of
>
> the defendants."

32. In the present case no question of drawing an adverse inference arises, as the appellants had not specifically denied the allegations in the plaint in respect of the extent of the income from the properties. The allegations in paras 9 and 10 of the plaint are as follows :

> "9. That from the total share mentioned above the yield obtained is 40 gadas of dhan (paddy) according to the standard khata measure. There are only 5 members in the family, two of which are minors and there is enough income left after the household expenses. There is no other business. The purpose for borrowing such heavy sums of money cannot be any other than that of wasting them in gambling.
> 10. That the amount of the said mortgage deed does not include any antecedent debt and even if there be any, all the amount of debt taken from the creditors defendants has been spent by defendant 12 Tularam in the vice of gambling and so binds neither the plaintiffs nor the joint ancestral property as aforesaid. Hence the plaintiffs are entitled to the relief as prayed for below because after suing on the said debt and obtaining the decree the

creditors defendants' would cause attachment and sale of all the property, which will affect the interest of the plaintiffs adversely".

33. The reply given by defendants 1 and 2 to these allegations is as follows :

"That it is submitted Bhursal was doing business of advancing dhan and cash and also sale and purchase of paddy. The said business has been continued by defendant 12, and as the prices of paddy have gone up considerably owing to war conditions, the business has been more brisk nowadays and ready cash is generally required. It appears that defendant 12 has been raising money for purchase of paddy as well as for advancing loans to others from time to time. Therefore, the allegations in paras 8 and 9 of the plaint are denied".

34. It will thus be seen that the appellants have not themselves challenged the extent of the income from the properties left behind by Tularam's father, nor have they challenged the fact that the income was sufficient for the purpose of maintenance of the family. On the other hand, the case of the appellants is that the money was borrowed by Tularam for the purpose of doing the business of money-lending and dhan-lending. In these circumstances we consider that no question of drawing an adverse inference against the plaintiff on account of the non-production of the account books arises in this case.

(After discussing evidence on other points their Lordships concluded).

35. The result is that this appeal is partly allowed. The decree of the lower Court shall be modified to the extent aforesaid. As the success of the parties is divided, we order that costs shall be borne by the parties as incurred throughout.
Appeal partly allowed.

Cases Referred.

[1]4 CP LR 29
[2] AIR 1922 Nag1
[3]AIR 1933 Nag 89
[4] AIR 1920 Mad 968
[5] AIR 1925 PC 18 at p. 22
[6] AIR 1943 Mad 292
[7]6 Ind App 88 at p. 106 (PC)
[8]1 Ind App 321 (PC)
[9]6 All 193 at p. 193
[10]8 All 279 at p. 281
[11]9 All 493 at pp. 494, 495
[12]13 All 216 at pp. 223-224 and AIR 1933 Nag 89
[13]10 Cal 103 (PC)
[14] AIR 1924 Oudh 69
[15] AIR 1930 Lah 803
[16] AIR 1933 Nag 461
[17] AIR 1947 Nag129 at p. 135