

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

VITHAL YESHVANT GAVDE (ORIGINAL DEFENDANT No. 2), APPELLANT *v.*
SHIVAPPA MALLAPPA HOSMANI AND OTHERS (ORIGINAL PLAINTIFFS
AND DEFENDANT No. 1), RESPONDENTS².

1923.

January 5.

Hindu law—Joint family business—Manager starting new business—Mortgage of family property for business purposes—Proof that money was borrowed for joint family business—Liability of co-parceners.

A joint Hindu family consisted of an adult male member (manager), his son and his two nephews, one of whom had separated from the family. The family carried on two shops, one in iron and the other in grocery. The manager started two new businesses, one in oil and the other of mirabolams. About that time he borrowed money on mortgage of the family property. Although the deed of mortgage recited that the money was borrowed for business belonging to the family, there was no evidence to show that it was so required. The mortgagee having sued to recover the money by sale of the entire family property :—

Held, that the interest of neither of the nephews in the family property was amenable to the mortgage claim, it being necessary for the mortgagee to prove not only that the mortgagor was carrying on a family business, but also that the money was required for that business.

Raghunathji Tarachand v. The Bank of Bombay⁽¹⁾, commented on.

FIRST appeal from the decision of K. R. Natu, First Class Subordinate Judge at Belgaum.

Suit on mortgage.

A joint Hindu family consisted of one Krishnaji, who had a son, Vaman ; and two nephews Vithal and Kashinath. Of these Kashinath had separated from the family.

The family business consisted of two shops, one of which dealt in hardware and the other in grocery.

² First Appeal No. 51 of 1921.

(1) (1909) 34 Bom. 72.

1923.

VITHAL
YESHWANT
v.
SHIVAPPA
MALLAPPA.

In 1906 Krishnaji started a new shop dealing in oil. It was closed in 1909. About that time, he also started another business in mirabolams.

On the 19th of January 1909, Krishnaji, who was the only adult male member of the family; borrowed Rs. 9,400 on the security of the family property. The deed of mortgage recited that the money was borrowed "for our needs arising out of some (pecuniary) difficulties, i.e., for the necessity of the business of the shop belonging to the family." There was no evidence to show if the old business of the family stood in need of funds.

In 1918, the mortgagee sued to recover money due on the mortgage by sale of the family property.

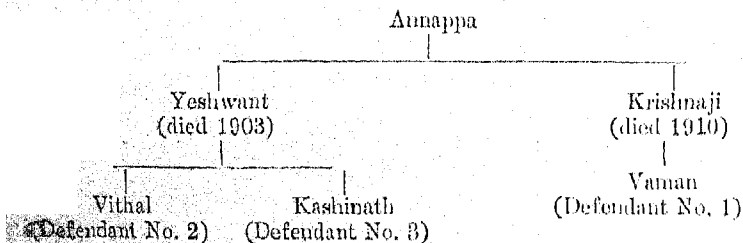
The Court of first instance exempted Kashinath from liability, but passed the usual decree against Krishnaji, his son, Vaman, and his nephew, Vithal.

Vithal appealed to the High Court.

H. C. Coyajee, with *D. R. Manerikar*, for the appellant.

Nilkant Atmaram, for respondents Nos. 1 to 3.

MACLEOD, C. J. :—The plaintiffs sued to recover on a simple registered mortgage bond Rs. 9,400 principal and Rs. 9,400 as interest, with costs and future interest at 12 per cent. The original mortgagor was one Krishnappa Annappa. The pedigree of the family is as follows :—



When the mortgage was executed Kashinath, the son of Yeshwant, the brother of Krishnaji, was separated from the family. The members who remained joint were Krishnaji, his son Vaman, and Vithal, the brother of Kashinath. A decree was passed in favour of the plaintiffs for Rs. 18,890, with costs and future interest at 12 per cent. per annum on Rs. 9,400 from the suit date till the expiry of six months from the date of the decree and at 6 per cent. thereafter until satisfaction. On failure so to pay, the mortgaged property excepting the interests of defendant No. 3, if any in it, or a sufficient portion of it, was to be sold towards satisfaction of the mortgage. The personal remedy was held to be time-barred. The principle issue in the case was whether the mortgage was executed for a joint family necessity. The Judge found that issue in the affirmative. The 2nd defendant Vithal has appealed. In 1909, Krishnaji was the sole adult member of the family. He carried on an iron shop and a grocery shop, which undoubtedly were businesses belonging to the family. From 1906 to 1909 Krishnaji had also carried on an oil shop. But that was a new business, and so the other members of the family would not be liable for any debts which were due by that shop. In 1909, Krishnaji entered into a partnership with some other persons to deal in mirabolams, and there can be no doubt that that could not be treated as a family business, and that Krishnaji would be liable for any debts which were incurred for that business.

The law regarding mortgages of joint family property made by the manager of a joint family governed by the Mitakshara, who is not the father of the other members, is laid down in *Anant Ram v. The Collector of Etah*⁽¹⁾, a decision of the Privy Council. Such a mortgage,

⁽¹⁾ (1917) 40 All. 171.

1923.

VITHAL
YESHWANT
vs.
SHIVAPPA
MALLAPPA

1923.

VITHAL
YESHWANTc.
SHEGAPPA
MALLAPPA.

it was held, could only be justified so far as it was wanted for the joint family purposes. If the necessity could not be established by direct evidence, it might be assumed, if it could be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith. In either case the burden of proof was on the person who claimed the benefit of the mortgage. It was further held that if the mortgage debt was not incurred for necessity, not even the mortgagor's own interest could be sold in enforcement of such a mortgage.

In the suit mortgage deed, with regard to the amount taken from the mortgagee, it was stated as follows :—

"The amount of rupees taken from you by us for our needs arising out of some pecuniary difficulties, i. e. for the necessity of the business of the shop belonging to the family of Krishnaji Annappa Gavde and the said minors is as follows :—Rs. 2,000 : Krishnaji Annappa Gavde, one of us has taken from you on 11th January of 1909 by passing in writing a promissory note Rs. 2,000 in cash and Rs. 7,400 have been received from you now."

That statement in the mortgage bond would not be binding on the 2nd defendant, nor would it avoid the necessity of the mortgagee proving that the mortgage money was required for joint family purposes. There is no evidence whatever that at the time when the mortgage was executed either the iron shop or the grocery shop was in need of funds. There is no evidence that the mortgagee took any steps to ascertain whether or not the money was required for the family business, and therefore, it is difficult to see how the mortgagee has satisfied the burden of proof which lay upon him. But reliance was placed on the decision in *Raghunathji Tarachand v. The Bank of Bombay*⁽¹⁾. The plaintiff in that case filed a suit on certain promissory notes signed by the only adult male member of a joint Hindu firm carrying on an ancestral trade, and it

1923.

was held that the minor defendant's share in the firm was liable. Mr. Justice Chandavarkar at p. 81 said :—

“ Assuming that it is so [sc. that the minor is governed by the principles of Hindu law], what is the Hindu Law on the subject? Where a minor is a co-parcener in a joint family, his *share* in the family property is liable for debts contracted by his managing co-parcener for any *family purpose* or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference that the term *family purpose* or *purposes incidental to it* must here give way to the expression *trading purpose* or *purpose incidental to it*, having regard to the nature and objects of the family business. The circulating of a negotiable instrument is in the case of a joint family trading as a firm, necessary for its existence and its purposes. It is a necessary incident of the carrying on of the trade. Without it the firm could not gain credit in the market and prosper.”

With the greatest respect I should say that assertion was far too wide. Although in the case of some joint family firms the circulating of a negotiable instrument may be a necessary incident of the business, it still must be shown that it is a necessary incident of business carried on by the Hindu joint family whose members the plaintiff seeks to make liable. I think it is most probable that from the evidence which was before the learned Judge, it did appear that in that family it was incidental to its business to circulate negotiable instruments. But I do not think that the argument holds good that an exception can be grafted to the rule laid down by the Privy Council. When the manager of a joint Hindu family mortgages joint estate, it must still be incumbent on the parties supporting the mortgage to prove that the money raised on the mortgage was required for family purposes. No doubt if the family is carrying on a trading business, it would be very much easier to prove that the money was required for the purposes of that trade, and so for family purposes, than if the family were mere agriculturists. But it is not a necessary inference that, because Krishnaji was carrying on two shops dealing in iron

VITHAL
YESHWANT
v.
SHIVAPPA
MALLAPPA.

1923.

VITHAL
YESHIVANT
v.
SHIVAPPA
MALLAPPA.

and groceries, and because he raised moneys by mortgaging family property, the money was necessarily required for the purposes of the joint family business. There is no direct evidence as to what was the capital involved in the iron and grocery shops in 1909, but there is also no evidence whatever that they were in need of so much money as was raised by Krishnaji on the said mortgage. On the other hand, it has been proved that Krishnaji in 1909 was entering upon an entirely new venture with several outside partners which required, as the accounts show, considerable capital.

It was suggested that before 1909 Krishnaji had been dealing in mirabolams. That suggestion is based on a statement made in the plaint in the suit filed by Kashinath, the 3rd defendant, for partition, in which he claimed a share in the mirabolam business. That by itself would not be evidence that as a matter of fact Krishnaji was carrying on mirabolam business as a part of the family trade. Even if he was doing so, it would not be an ancestral business any more than the oil shop was. It seems to me, therefore, that the onus which lay on the mortgagee to prove that Krishnaji was entitled to mortgage in his favour joint family estate for family purposes has not been satisfied. The Judge says at page 7 "I fully believe that the suit debt was borrowed by Krishnaji for joint family necessity, i.e., trade necessity as stated in suit bond. It is not shown that Krishnaji had no necessity to borrow at the time of the suit bond. Krishnaji was a man of business and I do not hence disbelieve the statement in suit bond about the amount being taken for family trade necessity". I have endeavoured to show that the learned Judge has not appreciated, even if he considered, the decision of the Privy Council, which shows that it is not sufficient for a mortgagee to prove by evidence

that the mortgagor was carrying on a family business. He must show that the money was required for that business. It follows that the appeal must be allowed, and that the interest of the 2nd defendant in the suit property must be excepted from the sale.

The 3rd defendant Kashinath was made a party to the suit and although the suit was dismissed against him, he was ordered to pay his own costs. In his appeal No. 93 of 1921, it has been argued for the respondents that no appeal lies on the question of costs. In this particular case we think a principle is involved. But apart from the question whether any principle is involved, since the 2nd defendant has appealed, the whole decree of the lower Court is before us, and we can make any alterations we think fit in it. The principle involved is due to the rule that costs follow the event, and that the successful party is entitled to get his costs, unless it has been shown that there is some very good reason why he should bear his own costs. This has not been done. The plaintiffs, therefore, will have to pay the costs of the 2nd and 3rd defendants in the Court below and of their respective appeals.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump

RAGHUNATH GOVIND MAYEKAR (ORIGINAL DEFENDANT NO. 1),
 APPLICANT *v.* GANGARAM YESU MAYEKAR (ASSIGNEE OF ORIGINAL
 DECREE-HOLDER), RESPONDENT*.

*Civil Procedure Code (Act V of 1908), Order XXI, Rules 2 and 16—Decree
 —Satisfaction—Not certified to Court—Assignment of decree.*

* Civil Extraordinary Application No. 310 of 1921.

1923.

VITHAL
 YESHYANT
 v.
 SHIVAPPA
 MALLAPPA.

1923.

January 9.