1934

DE SOUZA v. DE SOUZA

Beaumont C. J.

jurisdictions of different High Courts, and provides that it is the High Court within whose jurisdiction the parties last resided together, and no other High Court, which is to have jurisdiction. It is clear on the evidence that of all the High Courts in India the High Court within whose jurisdiction the parties last resided together is this High Court. The fact that after residing together within the jurisdiction of this Court, they resided together somewhere else outside the jurisdiction of any High Court seems to me to be irrelevant. I think that under section 2 of the Act, read with section 3, this Court has jurisdiction to grant a decree. [After dealing with the case on its merits, his Lordship concluded :] I, therefore, grant a decree for judicial separation with costs. Liberty to apply with regard to the custody of children and with regard to alimony.

Attorneys for the petitioner : Messrs. *Souza & Co.*

Attorneys for the respondent : Messrs. *De Andrade & Co.*

Decree accordingly.

B. K. D.

ORIGINAL CIVIL.

Before Mr. Justice B. J. Wadia.

KAMALAKANT GOPALJI (PLAINTIFF) *v.* MADHAVJI MEGHJI (DEFENDANT).*

1934
November 26

Civil Procedure Code (Act V of 1908), Order II, rule 5—Promissory note passed in favour of Hindu father who was joint with his son—Suit by son of the promisee on his death as surviving coparcener—Alternative claim as heir of his father—Joinder of such claims void—Son can sue on promissory note only as heir of his father, the original holder—Negotiable Instruments Act (XXVI of 1881), sections 8, 32, 78—Hindu law—Joint family property.

Madhavji, the defendant, passed two promissory notes in favour of Gopalji, the plaintiff's father. On the death of Gopalji the plaintiff filed a suit on the promissory notes, alleging that he was joint with his father and was entitled to the amounts

*O. C. J. Suit No. 1421 of 1932.

1934

KAMALAKANT GOPALJI v. MADHAVJI MEGHJI

represented by the promissory notes as the sole surviving coparcener. In the alternative he claimed the amount as the sole heir and representative of his father Gopalji.

Held, that it was not proper according to Order II, rule 5, of the Civil Procedure Code to join the two claims together; and that it made no difference that the second claim was in the alternative to the first.

Whitworth v. *Darbishire*,[1] followed.

A coparcener, who becomes entitled by survivorship to the property of a joint Hindu family, cannot sue on a negotiable instrument payable to a deceased coparcener or order, by reason merely of operation of law, for he cannot give a valid and proper discharge to the maker of that instrument. It cannot be assumed in such a case that because the beneficial interest has survived to him, the legal title must follow suit.

Bank of Bombay v. *Ambalal Sarabhai*,[2] applied.

A surviving coparcener in a joint Hindu family does not represent the estate of a deceased member of that family. He gets the family property by survivorship in his own right, and not as a representative of the deceased.

If it is found merely that a Hindu father and son are joint in food and worship, there is no presumption that they held joint family property. It must be proved that the family possessed some joint or ancestral property from which the presumption could be drawn that all the property possessed by that family was joint family property.

SUIT on promissory notes.

On July 29, 1929, the defendant passed two promissory notes for Rs. 52,747-8-0 and Rs. 8,158-9-0 in favour of one Gopalji Ramji, the father of the plaintiff. The said Gopalji died intestate on June 3, 1931, leaving him surviving the plaintiff, Kamlakant, as the sole surviving coparcener of the family to which he and his father belonged. The plaintiff alleged that the amounts for which the said promissory notes were passed belonged to the said joint family.

The plaintiff filed this suit to recover the amounts due under the notes as the sole surviving coparcener of the said joint family, or in the alternative as the sole legal representative of Gopalji.

The defendant contended *inter alia* that the plaintiff was not a member of a joint and undivided Hindu family with

[1] (1893) 68 L. T. 216.

[2] (1900) 24 Bom. 350 at p. 359.

his father, and that even if he was, he could not file the suit on the notes as the sole surviving coparcener of the family.

M. C. Chagla, with *T. M. Guido*, for the plaintiff.

M. V. Desai, with *K. M. Vakil*, for the defendant.

B. J. WADIA J. The plaintiff has filed this suit to recover from the defendant two sums of Rs. 52,747-8-0 and Rs. 8,158-9-0 under two promissory notes dated July 29, 1929, which were passed by the defendant in favour of the plaintiff's father Gopalji Ramji. Gopalji Ramji died intestate at Bombay on or about June 3, 1931. Plaintiff is his only son, and claims the two sums as the sole surviving coparcener of a joint and undivided Hindu family of which he and his father were members, or, in the alternative, as the sole heir and legal representative of his father. Plaintiff has not obtained representation to the estate of his father, and at the commencement of the hearing his counsel said that he claimed only as a coparcener. It is clear that the two claims cannot be joined together under the terms of Order II, rule 5, of the Civil Procedure Code. It makes no difference that the second claim is in the alternative to the first: see *Whitworth* v. *Darbishire*.[1] Plaintiff's father and the defendant did business in partnership as colour merchants. The partnership was dissolved some time between 1922 and 1924, and on making up the accounts moneys were found due for which the defendant passed the two promissory notes in suit in favour of the plaintiff's father. The promissory notes were renewed from time to time, the last renewal being on July 29, 1929.

The suit was filed on September 9, 1932, and on the face of it the claim is time-barred. Plaintiff, however, relies on the absence of the defendant from British India in 1932 to save the bar of limitation. Defendant also contends that the plaintiff cannot maintain this suit on the promissory notes as a surviving coparcener, assuming that he was one,

[1] (1893) 68 L. T. 216.

1934

KAMALAKANT GOPALJI v. MADHAVJI MEGHJI

B. J. Wadia J.

as the promissory notes are payable to Gopalji Ramji or order. The plaintiff, it was contended, is not a holder who can give a valid and proper discharge to the defendant. In his written statement the defendant alleges that he is not aware that plaintiff is the only son and heir or legal representative of his father, and that even if he is, he cannot file this suit without obtaining representation to his father's estate. There was, however, nothing to prevent the plaintiff from filing the suit as the sole heir of his father if he was so minded, and all that has been held in *Raichand* v. *Jivraj*[1] is that the Court cannot pass a decree until he had obtained such representation. That question, however, does not now arise, as the plaintiff claims the two amounts of the promissory notes as the sole surviving coparcener.

I will deal with the latter contention first. Defendant denies that the plaintiff and his father Gopalji were members of a joint and undivided Hindu family. Plaintiff is the only son of Gopalji by a predeceased wife. Gopalji also left a widow, his second wife, and a daughter by her. They all lived together until Gopalji's death. Presumably the father and the son were joint in food and worship, but there is no presumption that they held joint family property. It is for the plaintiff to show that the family possessed some joint or ancestral property from which the presumption could be drawn that all the property possessed by the family was joint family property. There were three brothers, Purshottam, Ramji and Naranji, who were the sons of Ebji. Ramji had three sons, Gopalji, Vallabhdas and Shivji. Plaintiff was six or seven years old when his grandfather Ramji died. He could not state whether Ramji left any particular ancestral property except that according to his information and belief there was some ancestral property at Kamatipura and Madanpura. He, however, frankly admitted that he had no documents to prove his statement, but he was supported by his uncle Shivji Ramji, who would

[1] (1930) 56 Bom. 65.

certainly be in a better position by reason of his age to know the real state of affairs. Shivji also frankly stated that the condition of the family was poor, but Gopalji got some ancestral property from Ramji when he separated, and whatever was left came to him. According to him Gopalji also speculated, earned money, and did business in partnership with the defendant. Both he and the plaintiff stated that there never was any partition or separation between father and son. This is all the evidence, and I must say that it might have been a little fuller in detail. But I think the Court can still draw the inference from these statements which have not been disproved that the plaintiff and his father were members of a joint and undivided Hindu family, i.e., joint in food, worship and estate.

The important question still remains, whether the plaintiff can sue to recover the amounts of the promissory notes in his right as a coparcener. Defendant's counsel contended that he could not, as the property in the promissory notes which are negotiable instruments vested in the holder, and the plaintiff could not be said to be the holder of those instruments. On the other hand plaintiff's counsel argued that the property in the promissory notes was transferred to the plaintiff by operation of the law by which the parties to the instruments were governed. Wherever there is a promissory note, the suit is *prima facie* based upon it, unless there are circumstances to indicate that it is based on a cause of action independent of the promissory notes. Here it is conceded that the suit is principally and solely based on the promissory notes, and not on the debt which formed the consideration for them. The real contract between the parties to a negotiable instrument is one which appears on the face of the instrument. The promissory notes are payable to Gopalji Ramji or order, and Gopalji was therefore the holder of the notes. A holder is defined in section 8 of the Negotiable Instruments Act as the person entitled in his own name to the possession thereof and to

1934

KAMALAKANT GOPALJI v. MADHAVJI MEGHJI

B. J. Wadia J.

receive or recover the amount due thereon from the party liable. Section 32 of the Act makes it obligatory on the maker of a promissory note to pay the amount thereof according to the apparent tenor of the instrument, i.e., primarily to the holder, and under section 78 of the Act payment must be made to the holder in order to discharge the maker. The question, therefore, is whether the plaintiff can claim the two amounts of the promissory notes in his own right. It was held in *Harkishore Barna* v. *Gura Mia Chaudhuri*[1] that no one could maintain a suit on a promissory note except the holder thereof. In an earlier case, *Brojo Lal Saha Banikya* v. *Budh Nath Pyarilal & Co.*,[2] it was held that it was not the holder who alone could sue on a promissory note, but whoever was the true owner of the note could also sue. That judgment was dissented from in the later decision in *Harkishore Barna's* case,[1] which I have already referred to, and it is there pointed out that the earlier suit was based not only on the promissory note but also on the consideration for the same. It has been stated in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*[3] that the words "in his own name" appearing in section 8 of the Act were inserted by the Legislature to prevent anyone from claiming to be the holder of an instrument on the ground that the ostensible holder was merely a benamidar for the true holder. A holder of an instrument is entitled to recover if he is either the payee named in the instrument or the endorsee thereof; if the instrument is payable to a person or bearer, the person to whom it is delivered can recover. An assignee of a promissory note can sue in his own name: see *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar*,[4] though usually the assignor is joined as a co-plaintiff with the assignee for the sake of caution. Under section 130 of the Transfer of Property Act an assignee of a chose in action can sue in his own name. Under section 137 of that Act negotiable instruments are exempted from the

[1] (1930) 58 Cal. 752.
[2] (1927) 55 Cal. 551.
[3] (1906) 30 Mad. 88 at p. 90.
[4] (1905) 28 Mad. 544.

operation of the sections of the Chapter of the Transfer of Property Act dealing with transfers of chose in action, because such assignments are regulated by the Negotiable Instruments Act. The usual mode of transfer of a negotiable instrument is by endorsement or by delivery. At the same time negotiable instruments are also choses in action, and as such may be transferred by assignment. All that the exemption in section 137 means is that a negotiable instrument need not only be transferred by an assignment like other choses in action, as their transfer is also governed by the specific provisions of the Negotiable Instruments Act. The only difference between a transfer by endorsement and a transfer by assignment of a negotiable instrument is that under an assignment the assignee acquires only the right, title and interest of the assignor, whereas the endorsee may have all the rights and advantages of a holder in due course. In any event, the assignment must be in writing and duly executed before the assignee of a chose in action can sue upon it.

Can the plaintiff be said to be a holder of the promissory notes as a coparcener ? He could only be a holder if he was entitled in his own name to the possession of the promissory notes and could give a valid discharge to the maker, namely, the defendant. Plaintiff is not the payee under the promissory notes. Plaintiff is not the endorsee nor the assignee thereof. He cannot negotiate the promissory notes. They are drawn in favour of Gopalji individually, or order, and the property vested in him. Plaintiff's counsel, however, contended that the property passed to the plaintiff by operation of law, but no authority directly bearing on the point has been cited in Court. It has been held that a person whose name appears in a promissory note as the signatory thereto is alone liable on the note : see *Sadusuk Janki Das* v. *Kishan Pershad.*[1] It was argued by counsel for the defendant that conversely the person whose name

[1] (1918) L. R. 46 I. A. 33 : 46 Cal. 663.

1934

KAMALAKANT GOPALJI v. MADHAVJI MEGHJI

B. J. Wadia J.

appeared as the holder on the instrument alone could sue on it; the assignee also could sue, if the assignment was in writing and duly executed. In *Vithalrao* v. *Vithalrao*[1] it was held that the members of a joint and undivided Hindu family were not liable in a suit on a promissory note signed by one of them as manager, though a suit could lie to recover the debt as against all the members of the family. The distinction there drawn is between a suit on the promissory note and a suit on the debt. The manager who signed it is certainly liable on the promissory note, but the other members who did not sign the note could be sued only for the debt. A suit, therefore, on a promissory note must be filed against the executing party only, and the other coparceners cannot be joined in the suit although the loan might be binding on the estate. If, however, the loan and the promissory note are simultaneous and constitute one transaction, then there is no separate cause of action on the debt. In *Sharanbasappa* v. *Rachappa*[2] it was held that a promissory note signed by one partner in his own name, and not in the name of the firm, was binding on that partner alone. In an earlier decision of the Appeal Court in *Sitaram Krishna* v. *Chimandas Fatehchand*[3] it was held that in an action on a promissory note the signatory whose name appeared on it would not show that he was an agent for an undisclosed principal. Recently the Privy Council has held in *Pichhappa* v. *Chokalingam*[4] that the fact of a manager of a joint family becoming a partner with a stranger does not *ipso facto* make the other members of the family partners along with him. The trend of all these decisions seems to be to restrict the liability under a promissory note to the person whose name appears on the face of the instrument. Conversely, it was argued that the meaning of the word "holder" should not be so enlarged as to include in that designation persons other than those who are primarily entitled to sue. It was also pointed out that if a testator

(1) (1922) 25 Bom. L. R. 151.
(2) (1932) 35 Bom. L. R. 68.
(3) (1928) 52 Bom. 640.
(4) (1934) 36 Bom. L. R. 976, P. C.

bequeathed the amount due under a promissory note to a legatee, the legatee could not maintain an action on the promissory note in his own name, even if the executor had obtained probate according to the law, unless the executor had endorsed it in his favour. A coparcener also who becomes entitled by survivorship to the joint family property of the family to which he belonged cannot sue on a negotiable instrument payable to the deceased or order, for he cannot give a valid and proper discharge to the maker, by reason merely of the operation of the law. It cannot be assumed that because the beneficial interest has survived to him, the legal title must follow suit: see *Bank of Bombay* v. *Ambalal Sarabhai*.[1] The analogy of the Official Assignee suing on a promissory note passed in favour of an insolvent is not correct, because under the statute the property of the insolvent vests in the Official Assignee, and he represents the estate of the insolvent and holds it for the benefit of the creditors generally. A legal representative of a deceased person can sue as a representative, as he is by the very terms of the definition of a legal representative in section 2 (11) of the Civil Procedure Code a person who in law represents the estate of the deceased person. The coparcener does not represent the estate of the deceased member of the joint family. He gets the property by survivorship in his own right, and not as a representative of the deceased.

I might mention here that plaintiff's counsel said in his closing address that, if necessary, he would apply even now for a succession certificate, and that the Court might adjourn the suit before finally passing a decree in his favour. This would, in my opinion, alter the cause of action. The plaintiff is before me as a coparcener suing in his own right. The plaint is filed in his name personally and not as a representative. He rests his title, and has rested it throughout the hearing, on his position as coparcener in law, and I do not think I can now allow him to rest it on

[1] (1900) 24 Bom 350 at p. 359.

1934

KAMALAKANT GOPALJI v. MADHAVJI MEGHJI

B. J. Wadia J.

a succession certificate as an heir and legal representative. If he is a coparcener, he cannot be entitled to a decree merely on obtaining representation at this stage, because it would have the effect of turning a suit by him personally into a suit by him as the representative of his father, which position his counsel abandoned at the commencement of the hearing. Counsel referred to the practice prevailing in the Prothonotary's office to grant succession certificates even to coparceners. That is sometimes done at the instance of the coparcener himself, after giving due notice to all other interested parties, if he has to give a discharge which would be considered valid by the debtor.

For the reasons I have discussed before I hold that the plaintiff cannot maintain this suit on his title as a coparcener.

[The rest of the judgment is not material to this report.]

In the result, the suit must be dismissed with costs.

Attorneys for plaintiffs: Messrs. *Nagindas, Hooseinally & Co.*

Attorneys for defendants: Messrs. *Khandwala and Chhotalal.*

Suit dismissed.

B. K. D.

ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Rangnekar.

1935
March 4

RAHIMTULLA LOWJI DAMANI (ORIGINAL APPELLANT FROM THE DECISION OF THE OFFICIAL ASSIGNEE), APPELLANT *v.* THE OFFICIAL ASSIGNEE OF BOMBAY (ORIGINAL RESPONDENT FROM THE DECISION OF THE OFFICIAL ASSIGNEE OF BOMBAY), RESPONDENT.*

Transfer of property Act (IV of 1882), sections 54, 55 (1) (d)—Sale by Official Assignee of insolvent's property—Purchaser at auction sale—Resale by such purchaser—Right of purchaser to get conveyance in favour of his sub-purchaser of the property sold by Official Assignee.

A purchaser from the Official Assignee of Bombay of property of an insolvent is entitled to get a proper conveyance of that property from the Official Assignee

* O. C. J. Appeal No. 31 of 1934 from Insolvency No. 58 of 1933.