ORIGINAL CIVIL.

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

1936
October 1

IN RE MAHADEV KRISHNA RUPJI.*

Hindu law—Practice—Joint family property—Alienation by father—Minor co-parcener—Inherent jurisdiction to appoint guardian of minor with power to alienate joint family property in which minor has an interest—Guardians and Wards Act (VIII of 1890).

The High Court has power under its inherent jurisdiction, apart from the Guardians and Wards Act, to appoint the father a guardian of the property of a minor member of a joint Hindu family, where the minor's property is an undivided share in the joint family property. The Court has also the power in a proper case to sanction an alienation of the minor's interest in the family property. The making of such an order will be for the benefit of the minor coparceners where the requisite facts are proved.

In re Manilal Hurgovan[1], *Jairam Luxmon,*[2] *Re Jagannath Ramji*[3], *Hari Narain Das, In re*[4] and *In re Bijaykumar Singh Buder,*[5] followed.

In re Dattatraya Govind Haldankar,[6] commented on.

Semble.—Whether a similar power ought not to be vested in the mofussil Courts is a matter which might well engage the attention of the legislature.

PETITION under the Inherent Jurisdiction.

The petitioner Mahadeo Krishna Rupji and his two minor sons, Virtanaya and Harischandra, were members of a joint and undivided Hindu family. The family owned a house in Bombay.

The petitioner and his brothers inherited the said house from their father and on a partition between him and his brothers it came to his share. The petitioner had to mortgage the house for making some payments to the other members of the family for equalisation of their shares and for effecting improvements in the house.

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

(1) (1900) 25 Bom. 353, F. B.
(2) (1892) 16 Bom. 634.
(3) (1893) 19 Bom. 96.
(4) (1922) 50 Cal. 141.
(5) (1931) 59 Cal. 570.
(6) (1932) 56 Bom. 519.

On July 17, 1934, Mahadeo executed a mortgage of the said property to secure a sum of Rs. 30,000 and he utilised this sum for paying off the prior mortgage and for making other necessary payments. In February 1936 he created a second mortgage of the said property. He utilised this sum for meeting the necessary expenses of the family. In September 1936 the total amount payable under the said mortgages and for payment to the contractor who effected repairs to the property amounted to Rs. 37,991-10-6. He, therefore, agreed to mortgage the house for Rs. 40,000. He desired to pay off all the debts on the said property out of the amount proposed to be borrowed on the mortgage.

On September 4, 1936, Mahadev applied to the Court under its inherent jurisdiction for an order appointing him guardian of the property of his minor sons Virtanaya and Harischandra and authorising him, *inter alia*, as such guardian to execute a mortgage of the property on behalf of those minors.

The petition was heard by B. J. Wadia J. on September 10, 1936. His Lordship without going into the merits, rejected the petition. He delivered the following judgment.

B. J. WADIA J. The application by the petitioner is for appointing him the guardian of the property of his minor sons, and for empowering him as such to complete an agreement for mortgage of certain joint family property including the minors' interests therein and to execute on their behalf the necessary deed of mortgage or transfer of mortgage. The application falls within the ruling of Kania J. in *In re Dattatraya Haldankar*,[1] under which it was held that it was the duty of a purchaser or a mortgagee from the manager of a joint Hindu family to inquire and satisfy himself that a necessity had arisen or that there were such circumstances as would entitle in law the manager to enter

[1] (1932) 56 Bom. 519.

1936

MAHADEV KRISHNA, *In re*

B. J. Wadia J.

into the proposed transaction on behalf of the joint family and which would be binding on the minor members of the family. It was also held that it was not open to such purchaser or mortgagee to cast the obligation of making the necessary inquiry on the Court, and to insist that unless the Court sanctioned the transaction he would not enter into the same. In paragraph 2 of his affidavit in support of the petition the petitioner alleges that the intending mortgagees refuse to advance moneys to him unless an order of this Court was obtained, authorising him to execute the mortgage on behalf of his minor sons. That is precisely what they cannot ask for under the decision of Kania J., with which decision I am in substantial agreement. It is pointed out at pp. 1159, 1160 of the report that by asking for such an order the Chamber Judge is called upon to deprive the minor of his right to challenge the transaction when he comes of age, and that the Court should not be " ordinarily " called upon to make such an order on the mere *ex parte* statements of an interested party which might have this possible effect. The use of the word " ordinarily " shows that in exceptional cases such an order can be made, as was done in *In re Manilal Hurgovan*,[1] where the transactions on the allegations contained in the petition were obviously for the benefit of the minor. Some doubt was thrown on a portion of the judgment of Kania J. by the Appeal Court in *Balaji* v. *Sadashiv*,[2] but with that portion of the judgment I am not here concerned.

It cannot be said that the proposed mortgage transaction is obviously for the benefit of the two minor sons of the petitioner merely because the mortgage amount is to be advanced at a slightly lower rate of interest. That cannot take away the responsibility of the father as a manager to do what is right and proper under the circumstances of the case, nor the responsibility of the lender who has, according

[1] (1900) 25 Bom. 353, F. B. [2] (1936) 38 Bom. L. R. 796 at p. 803.

1936

MAHADEV KRISHNA, *In re*

B. J. Wadia J.

to their Lordships of the Privy Council in the well-known case of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*,[1] "to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate".

I may also point out here that no sanction of the Court was obtained when the petitioner executed a mortgage in 1934 in favour of Manilal Harichand and his wife Narmadabai, to pay off which the petitioner now proposes to raise moneys on a further mortgage for Rs. 40,000 from the present intending mortgagees. Why, therefore, this petition should also be headed in the matter of the suit in which the consent decree was taken I cannot understand.

The judgment of Kania J. referred to above has been uniformly followed by all the Chamber Judges.

Per Curiam. Application rejected.

Mahadeo appealed from this order.

Sir Jamshed Kanga, for the appellant.

BEAUMONT C. J. This is an appeal from an order made by Mr. Justice B. J. Wadia in Chambers, and it raises a question of some importance to owners of property residing in Bombay. The petitioner and his minor sons are members of a joint Hindu family, and the petitioner is the manager. According to the statements contained in the petition the petitioner has had to borrow on the security of the joint family property substantial sums of money, part of them being secured on existing mortgages, and part of them being unsecured. What he now desires to do is to raise a sum of Rs. 40,000 for the purpose of paying off all the existing debts of the joint family, and he wants to secure that sum

[1] (1856) 6 Moo. I. A. 393 at p. 424.

1936

MAHADEV KRISHNA, *In re*

Beaumont C. J.

of Rs. 40,000 by a mortgage of joint family property. The proposed mortgagee is not willing to advance the money unless an order is made by this Court appointing the petitioner guardian of his minor sons and sanctioning the mortgage on behalf of the minor sons. The learned Judge, without going into the merits, refused to make the order on the authority of a decision of Mr. Justice Kania, to which I will refer in a moment. In my opinion earlier decisions of this Court establish clearly that the Court has jurisdiction in a case of this sort to make the order asked for. That jurisdiction was established definitely by a decision of a full bench in *In re Manilal Hurgovan*,[1] in which it was held that under its general jurisdiction, and apart from the Guardians and Wards Act, the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property. The applicant in that case also sought sanction of the Court for a sale of the family property in which the minor was interested, and that sanction was given. That decision confirmed a practice which had been adopted in previous cases : *Jairam Luxmon*[2] and *Re Jagannath Ramji*,[3] and such practice has since been followed in this Court and by the Calcutta High Court in *Hari Narain Das, In re*[4] and *In re Bijaykumar Singh Buder*[5]. However, in the year 1932 Mr. Justice Kania in the case of *In re Dattatraya Govind Haldankar*[6] stated his view that although the Court had jurisdiction in a case of this sort to make the order, the Court ought not to exercise that jurisdiction except in very special circumstances. The learned Judge pointed out correctly that the manager of a joint Hindu family has power to sell or mortgage for legal necessity or for the benefit of the estate, and that the burden is upon the purchaser or mortgagee to prove that the sale or mortgage fulfills those

[1] (1900) 25 Bom. 353, F. B.
[2] (1892) 16 Bom. 634.
[3] (1893) 19 Bom. 96.
[4] (1922) 50 Cal. 141.
[5] (1931) 59 Cal. 570.
[6] (1932) 56 Bom. 519.

conditions, and the learned Judge took the view that the purchaser or mortgagee had no right to cast that obligation on to the Court. I do not find myself able to agree with that reasoning. The attitude of a purchaser or a mortgagee is that unless he can get a good title, he is not going to enter into a contract of purchase or mortgage. He does not seek to cast any burden upon the Court; he merely says that he is not going on with the transaction unless he gets a good title. Now it is very difficult in many cases for a purchaser or a mortgagee to satisfy himself as to the existence of legal necessity, or benefit of the estate. It is very difficult for him to check the truth of the story told to him which is alleged to give rise to such necessity or benefit, and not only has he to do that, but he has to preserve evidence which will be available when the transaction may be attacked in years to come by a minor son of the manager. Experience in appeals from the mofussil has satisfied me that this burden which is cast on purchasers and mortgagees is a very heavy, and often an unreasonable one. A sale or mortgage is often impeached some twenty years after the date of the transaction, and it is set aside because the purchaser or mortgagee, or those claiming through him, cannot at that distance of time, when material witnesses are no longer available, discharge the burden of satisfying the Court of the existence of legal necessity or benefit to the estate. I am not at all surprised, therefore, that legal practitioners in Bombay decline to advise their clients to enter into a transaction with the manager of a joint Hindu family unless they get an order of the Court, binding minor members, and it seems to me that, as the Court has jurisdiction to make an order sanctioning the transaction, it ought in a proper case to do so. Whether a similar power ought not to be vested in mofussil Courts is a matter which might well engage the

1936

MAHADEV KRISHNA, *In re*

Beaumont C. J.

attention of the legislature. The petition in this case suggests that the money can be obtained on mortgage on much better terms if an order of the Court is obtained, than would be the case if an order is not obtained. Therefore the making of the order may well be for the benefit of the minors, and, if the requisite facts are proved, in my opinion the Judge should not hesitate to make the order. But undoubtedly a Judge has to exercise great care in seeing that the case is a proper one. As Mr. Justice Kania points out, the evidence of the manager himself is generally interested, and it may not always be easy to check; but if the Court is not satisfied that the transaction is really for the benefit of the minor, it ought to refuse its assent.

In the present case the learned Judge has not gone into the merits, and therefore I think the case will have to go back to him, and I will only observe that I do not think that the evidence as it stands is sufficient to justify the Court in making an order. It can undoubtedly be corroborated by evidence from the persons to whom money is said to have been paid by the manager, and by further inquiry into one item of Rs. 3,100, which seems to be a liability incurred by the manager in not paying over a legacy. I only make those observations in order not to mislead the learned Judge of the Court below into thinking that we are satisfied on the evidence as it stands. On the general question, however, I am quite satisfied that this is a type of case in which the learned Judge ought to make an order if he is satisfied that the evidence shows that the mortgage will be one for the benefit of the minor. The case will therefore be referred back to be disposed of on the merits. Costs of the appeal will be costs in the petition.

RANGNEKAR J. This is an appeal in a petition presented by a Hindu father for being appointed a guardian of the undivided share of his two minor sons in a joint family,

and for obtaining the sanction of the Court to the proposed mortgage of a joint family property in which he as well as the sons are equally interested. The matter came before the learned Chamber Judge, who, without going into the merits, and relying on the decision of Mr. Justice Kania in *In re Dattatraya Govind Haldankar*,[1] refused to entertain the application. The question is of some importance, and the question is, whether this Court has, apart from the provisions of the Guardians and Wards Act, inherent jurisdiction to appoint a guardian in the case of members of a joint family consisting of a father and his minor sons possessed of joint family property, and to sanction a transaction by way of sale or mortgage of the joint family property in a proper case. It is well established that under the Guardians and Wards Act a guardian cannot be appointed of the undivided interest of a minor in coparcenary property. Long before 1900 the practice in this Court was to entertain such applications, and it was recognised that this Court, which has inherited the jurisdiction of the Supreme Court, was not limited in such cases by the provisions of the Guardians and Wards Act, and had inherent jurisdiction to appoint guardians in such cases, and to sanction a transaction either by way of mortgage or sale in the case of joint family properties, where minors were concerned, if the transaction was for the benefit of the minors. Some doubt was felt in 1900 as regards the correctness of this practice. The matter then was referred to a full bench in *In re Manilal Hurgovan*,[2] and the decision of the full bench was that under its general jurisdiction, and apart from the Guardians and Wards Act, the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property, and the Court has

[1] (1932) 56 Bom. 519.

[2] (1900) 25 Bom. 353, F. B.

1936

MAHADEV KRISHNA, *In re*

Rangnekar J.

jurisdiction to sanction an alienation by the father or the manager of a joint family where the Court was satisfied that the transaction was for the benefit of the minor. Since that decision the practice on the Original Side has uniformly been to recognise the jurisdiction of the Court in these matters, and in proper cases to make such orders. I myself remember, ever since I have been in this Court, such orders being made without any objection being raised to the jurisdiction of the Court. In 1932, however, Mr. Justice Kania seemed to cast some doubt upon the correctness of this practice in *In re Dattatraya Govind Haldankar*,[1] and I am told, since then the practice has been to refuse to accept petitions praying for the appointment of the father or a manager as a guardian of his minor son's interest in joint family property, and to decline to sanction such transactions without considering the merits of the case. When I was Chamber Judge this decision was mentioned, and in one or two cases which first came before me I felt some doubt about the correctness of the observations of my brother Kania. The question, therefore, is whether this new practice is justified. Apart from any thing else, I think, we are bound by the decision in *In re Manilal Hurgovan*,[2] and I see no objection to our following the rule established by that decision. Not only, as I said, that the rule laid down in that case was followed by this Court until Mr. Justice Kania's decision, but it has been also followed in Calcutta, and latterly, in the Allahabad High Court. I need not refer to the cases which were cited before us by Sir Jamshedji Kanga on behalf of the appellant.

I have now carefully considered Mr. Justice Kania's decision and I do not find anything in it contrary to the rule established in *In re Manilal Hurgovan*.[2] The learned Judge concedes that the Court has inherent jurisdiction to appoint a Hindu father, or a manager of

[1] (1932) 56 Bom. 519.

[2] (1900) 25 Bom. 353, F. B.

a joint family, guardian of the undivided interest of the minor coparceners in the joint property. He then lays down that " the Court should not be *ordinarily* called upon to make such an order on the mere *ex parte* statements of an interested party ". As I understand the judgment, all that the learned Judge says is that such orders should not be made in every case. I agree. But if the judgment means that the Court should not and cannot entertain such application, then, I am not, with respect, prepared to accept the decision. It is true that in one place the learned Judge has observed that it will be wrong to entertain applications of this nature for two reasons, the first being that according to the decision of the Privy Council in the well-known case of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[1] it is the duty of a purchaser or mortgagee or any one who wants to deal with joint family property to see that a legal necessity exists, and that moneys are required for a legal necessity or for the benefit of the estate. That, undoubtedly, is correct, and many transactions take place which are not challenged, where the burden, which is placed upon a purchaser or mortgagee in such cases, is completely discharged without the parties coming to Court. The second reason,—and that seems to be his principal reason,—is that a purchaser has no right to impose upon the Court the burden of satisfying itself that the transaction is one which is warranted by Hindu law. But I am unable to see on what principle a Hindu father, or the manager of a joint Hindu family, should be deprived of the right to come to Court and ask the Court to adjudicate upon the merits of the application on the ground that the transaction is for the benefit of his minor sons or minor members of the family, and that if the transaction was not sanctioned the other party to the transaction refuses to complete. With great respect to

[1] (1856) 6 Moo. I. A. 393.

1936

MAHADEV KRISHNA, *In re*

Rangnekar J.

the learned Judge, I think it is wrong to say that the purchaser is casting any burden on the Court. The purchaser is not a party to such applications at least ordinarily, and it is a matter of perfect indifference to him whether the transaction is sanctioned or not. He is entitled to say that unless the vendor or mortgagor obtains an order sanctioning the transaction he would not complete, and that is all. Then assuming that it is a burden on the Court, I do not see why the Court should fight shy of discharging or bearing that burden. There are many burdens imposed on the Court, and one more, I do not think, would affect the position. Experience, on the other hand, shows clearly that such a practice is a wholesome practice. It is quite true that a purchaser is able to look after himself about the necessities of the transaction at the time the transaction takes place. But what would happen say after twenty years after the transaction ? Is it to be expected that he or his successors would all the time carry evidence with them so as to discharge the burden when the question arose after the lapse of a considerable interval ? There are many cases which come before us, which satisfy us as to the necessity of having a rule to this effect not only in this Court, but even in the mofussil. For the moment I am not concerned with the mofussil, but if I have jurisdiction in this Court, I see no reason or principle why I should decline it. I agree therefore, that the learned Judge should not have rejected the application on the ground that he had no jurisdiction to entertain it. The matter must be referred back to him to be disposed of on the merits, as proposed in the judgment just delivered.

Case referred back.

Attorneys for appellant : Messrs. *Mulla & Mulla.*

B. K. D.