CASES

DETERMINED BY

THE HIGH COURT OF JUDICATURE,

AT FORT WILLIAM IN BENGAL,

1868
July. 14.

IN ITS

ORIGINAL JURISDICTION.

CIVIL.

Before Mr Justice Markby.

M. RANGANMANI DASI *v.* KASINATH DUTT AND OTHERS.

Joint Hindu Family—Partnership—Account.

The manager of a joint Hindu family is not, by reason of his occupying that position, bound to render an account to the other members of the family. There is no analogy in this respect between a joint Hindu family and a partnership.

Where it was arranged, amongst the members of a joint Hindu family, that the accounts of a banking business, carried on by them, should be kept, on the understanding that the profits, when realized, should be divided amongst the individual members in certain proportions, and that the expenses of each member should be credited and charged in the name of each member,—*Held*, that this was in the nature of a partnership, and an account was decreed.

THIS was a suit for an account, by a member of a joint Hindu family, of a certain partnership, and for partition of the estate of one Guru Prasad, the ancestor of the family.

The plaintiff was the widow and legal representative of one Harikisto Dutt. The defendants were Kasinath Dutt, Srinath Dutt, Janokinath Dutt, Prankisto Dutt, Brindaban Chandra Dutt, S. M. Monmohini Dasi, S. M. Harimani Dasi, and Jibankisto Dutt, who carried on business in co-partnership as bankers. Dwarkanath, another member of the family, had disappeared in 1861.

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Mr. *Lowe* and Mr. *Woodroffe* for the plaintiff.

The Advocate-General and Mr. *Marindin*, for the defendant Kasinath Dutt.

Mr. *Cowell* for the defendant Harimani Dasi.

Mr. *Goodeve* for the defendants Monmohini Dasi and Bindabun Chunder Dutt.

Mr. *Jackson* for the defendants Srinath Dutt and others.

The facts of the case are fully set out in the judgment delivered by

MARKBY, J.—In this case the plaintiff, an infant widow, sued, by her next friend, Baharilal Dey, several members of her deceased husband's family, for the dissolution of partnership in a certain banking business carried on in Calcutta, and that Kasinath Dutt, one of the defendants, should render an account of the estate of Guru Prasad, common ancestor of the family, and of the said banking business, and that the said estate might be partitioned.

Guru Prasad, the common ancestor, died in 1835, leaving three sons and the infant son of a fourth son, who had pre-deceased him. Of the three sons who survived Guru Prasad, two are dead the survivor being the defendant, Kasinath. The estate of the family is a peculiar one. The family house is situate at Cooltee, a short distance from Calcutta. The banking business was carried on in Calcutta; and there is no doubt that, for many years past, the defendant, Kasinath, has been the active member of the family, and has almost entirely managed that business; but the other members of the family frequently came to Calcutta, and, as far as I am able to discover, were at full liberty to inspect the books of the business, and were, indeed, encouraged to do so by Kasinath. What small property the family had, besides the banking business, consisted of land, the rents of which appear to have been paid into the business; and what money was required

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for the maintenance of the family, the performance of ceremoies, and other joint expenses, was sent from Calcutta on application.

The accounts of the family were kept on the principle of partnership. Guru Prasad, shortly before his death, opened five accounts: one in his own name; one in that of each of his three surviving sons; and one in that of his infant grandson, the son of the son who had died. I am not sure, upon the evidence as it now stands, whether the fifth account has since been kept up, but that will be subject of further enquiry; and if it appears that there is any money standing to that account, that will be the subject of partition. What does appear clear is, that distinct accounts have been kept for each of the four branches of the family upon exactly the same principle as if the four descendants of Guru Prasad had been originally partners in the business, and that this partnership, or more strictly speaking, succession of partnerships, has been continued upon the principle that, on the death of each partner, his heirs succeed him according to the shares they would be entitled to by inheritance.

All the defendants, except Kasinath, support the plaintiff in demanding this account. On the other hand, nothing, in substance, is prayed by the plaintiff against any of the defendants, except Kasinath. It is admitted that the shares in the general family property and in the business are the same, and there is, with one slight exception, no dispute as to the amount of the shares. After considerable discussion, I raised the following issues:—

1. From what date, if at all, is the defendant, Kasinath, bound to render an account to the plaintiff of the banking business mentioned in the plaint?

2. On what footing ought the account of the banking business to be taken, and were there any and what accounts stated between Harikisto or Gopal Chandra and the other co-sharers for the time being, and what was the latest account so stated?

3. Was there any or what actual division of any and what part of the joint jewels, ornaments, and household furniture?

4. To what share is the defendant, Harimani Dasi, entitled to?

I am clearly of opinion that, in the ordinary case of a joint Hindu family, the manager of the whole, or any portion of the family property, is not, by reason of his occupying that position,

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bound to render any accounts whatever to the members of the family. There is no analogy whatever in this respect between the members of a joint Hindu family, and the members of a partnership; each partner is the agent of the other, bound, by his contract, to protect and further the interests of his co-partners, unless relieved from that responsibility by special arrangement; and each partner is entitled to consume, on his own account, no more of the partnership property than the share of the profits.

If he exceeds this, he becomes immediately a debtor to the concern. But in a Hindu family, it is wholly different. No obligation exists on any one member to stir a finger, if he does not feel so disposed, either for his own benefit, or for that of the family; if he does do so, he gains thereby no advantage; if he does not do so, he incurs no responsibility; nor is any member restricted to the amount of the share which he is to enjoy prior to division. A member of the joint-family has only a right to demand that a share of existing family property should be separated and given him; and so long as the family union remains unmodified, the enjoyment of the family property is in the strictest sense, common; as against each other, the members of the family have no rights whatever except that I have mentioned, and the only remedy, for a dissatisfied member, is by partition. But this relation is purely a voluntary one. Like many other relations, which are of frequent occurrence, the law has ascertained and defined, or attempted to ascertain and define, what it is in its unmodified form; but it has not imposed, on any family, the necessity of adopting that relation, or of adopting it in its unmodified form only; it is therefore capable of being modified in every way, and is frequently modified, either by the concurrent will of the family, or by the will of the ancestor from whom the property is derived. Had this been the case of a Hindu family, living jointly in the unmodified form, I should have refused to grant any account at all.

Mr. Justice Bayley and Mr. Justice Phear laid it down in a case, *Chuckun Lall Singh* v. *Poran Chunder Singh* (1), and the Chief Justice and myself the other day, in the Court of Appeal, affirmed

(1) 9 W. R., 183.

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the same propositions that the members of a Hindu family have not, as a rule, any right to an account against each other; and any member, who takes upon himself the active management of the family affairs, does not thereby render himself liable to render the rest of the family an account of his management. Nor am I prepared to concede that the additional fact that the person who asks for an account in this case is an infant, is sufficient to give her any right to an account. Mr Justice Phear, in the case I have already referred to, uses these words :—"There remains the plantiff's claim for an account of the defendant's managament of the property from the death of the father, to the expiration of the plantiff's minority. During this period, the plantiff was disqualified from taking any part in the management of the property, and the defendant was, I think, under the circumstances of the case in the position of a trustee for him of the joint-property to the extent to which he was entitled to share in it." What the circumstances were, which induced the learned Judge to hold in that case that the manager was a trustee for the infant member of the family during his minority, do not appear; but I am strongly inclined to think that, under ordinary circumstances, a manager and the infant members of the family do not stand in any relation of that kind.

The ground in which I make a decree for an account in this case is, that I consider that the ordinary relations of a joint Hindu family were in this case somewhat modified; and that this business was carrrd on, not as a common family business in the strict sense, the profits of which were all to sink into the common family fund, but rather on the footing of a partnership, and upon the understanding that the profits, when realised, should be divided amongst the individual members in certain proportions; and that the other profits of the family property, and the expenses of each member, should be be credited and charged in like manner, in the name of each. It is not necessary to say that the balance, appearing in the name of each in the accounts kept upon this understanding, became his separate property so long as the family remained joint; but I think it was a special arrangement in this family that the accounts should be so kept; and that upon a division, the share of each member should be ascertained

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upon the footing of such accounts. Under such circumstances I think the plaintiff may ask that this account should be taken by the Court; and on the whole, I think the proper period from which to take the account will be the death of Guru Prasad, that is, from the commencement of the so-called partnership; but though I direct an account from that early period, I by no means indicate that any greater responsibility falls upon the defendant, Kasinath, with regard to the transactions of that, or indeed of any, period, than upon the other defendants. I leave all these questions, as well as all questions of chargeability and settled accounts, for the taking of the account. I go no further at present, than to order the account to be taken in Court.

With regard to the share of Dwarkanath, I think there is no evidence, from which I can presume, that he is dead. His rights must, therefore, be reserved. An attempt was made to show that the defendant, Kasinath, was appointed specially by Gopal Chandra on his death-bed, to act as guardian of the interests of his infant children; but I think this is not established by the evidence. The family furniture was divided in 1246 or 1247; but the alleged division of jewels and ornaments did not take place.

The first two issues are not directly determined by this Judgment, but I think that I have said all that is necessary at this stage of the case, that Kasinath has always been willing that an account should be taken on the footing which I have directed; and, therefore, I think the plaintiff, who has asked for a wholly different account to which I hold that she is not entitled, ought to pay Kasinath's costs up to this point. The other defendants will each pay their own costs. The costs will be on scale No. 2.

There will be a decree for partition; and now that I have settled the question of Dwarkanath's share,, I understand there is no further dispute aboute the shares, nor any dispute as to what the family property consisted of. The partnership, in the banking business will be declared to be dissolved, and an account will be be taken of the credits, property, and effects belonging to the said business; any settled account will not be disturbed; each party will bring in, within three weeks from the date of the decree, all books of account papers and documents in his possession belonging to the family.

There are certain matters having reference to the accounts, on which it has been necessary to express my opinion derived from the evidence now before me. In doing so, however, I do not consider that I preclude the parties from shewing how the facts really stand in respect of any matter that may arise on taking the accounts.

Attorneys for the plaintiff: Messrs. *Carruthers and Co.*

Attorneys for the defendants: Mr *Watkins* and Baboo *P. C. Banerjee.*

Before Sir *Barnes Peacock*, Kt., *Chief Justice, and Mr. Justice Macpherson.*

1869
March 23.

NILKANT CHATTERJEE (DEFENDANT) *v.* PEARI MOHAN DAS AND OTHERS (PLAINTIFFS.)

Mortgage—Hindu Will—Executor—Devisee— Raising Issue not raised by the Plaint and Written Statement.

Where a plaintiff fails to show that a mortgage, created by certain persons as executrix and executors of a Hindu will has been validly created by them in that capacity, the Court will, unless it is manifestly inequitable to do so, allow him to raise an issue that the mortgage was validly created by the parties in another character.

Held, per MARKBY, J., that the executors of the will of a Hindu cannot, by virtue only of their character of executors, mortgage the estate of the testator, in the absence of any power, express or implied, contained in the will.

Held, on appeal, a creditor, who purchases under an execution against the general assets of a testator's estate, takes subject to a mortgage created in pursuance of a power contained in the will; and in a suit to foreclose, the purchaser is rightly made a party. Though the payment of debts is a charge on the property of a testator it is not a charge on any specific portion of that property.

THIS was a suit for foreclosure of a mortgage. The facts of the case appear in the judgment of the lower Court, which was as follows:—

MARKBY, J.—As this suit now stands, it is brought by the plaintiffs, claiming as mortgagees, under a deed dated the 15th of May 1863. The plaintiffs call themselves equitable mortgagees; but by the document in question, it is recited that Nabinmani Dasi, Charu Chandra Ghose, and Surut Chandra Ghose