

*Privy Council Appeal No. 128 of 1929.*  
*Allahabad Appeal No. 27 of 1928.*

Sri Thakur Ram Krishna Muraji - - - - - *Appellant*

v.

Ratan Chand and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 27TH FEBRUARY, 1931.

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*Present at the Hearing :*

LORD BLANESBURGH.

LORD TOMLIN.

LORD RUSSELL OF KILLOWEN.

SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

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This is an appeal by the defendant idol through its manager, Ram Lal, against a decree of the High Court of Judicature at Allahabad, dated the 2nd of April, 1928, which reversed a decree, dated the 31st of January, 1924, of the Subordinate Judge of Cawnpore.

The suit was brought by Ratan Chand, a minor, under the guardianship of his mother, against the said defendant idol, and one Gulab Chand, for a declaration that a preliminary decree, dated the 26th July, 1922 (and the final decree, if any), in Suit 57 of 1922, in the Court of the first Subordinate Judge of Cawnpore, and decided by the Second Subordinate Judge of the said Court, is invalid, null and void and ineffectual against the plaintiff, and that the property in dispute, viz., a house in the city of Cawnpore, the subject matter of a mortgage dated the 5th of December, 1920, is not saleable in execution of the said decree. Gulab Chand did not defend the suit, the defendant idol filed a written statement and contested the plaintiff's claim.

The Subordinate Judge, on the 31st of January, 1924, made a decree dismissing the plaintiff's claim with costs, and directed that the defendant idol should get his costs from the plaintiff. The minor plaintiff, Ratan Chand, appealed against that decree to the High Court of Judicature at Allahabad, which, on the 2nd of April, 1928, allowed the appeal, directed that the said decree of the Subordinate Judge should be set aside, and made a declaration that the said preliminary decree, made on the 26th July, 1922, as well as the final decree, if any, was invalid, void and ineffectual as against the plaintiff and that the said property was not saleable in execution of the said decree. It is against that decree of the High Court that the defendant idol, through his manager, has appealed to His Majesty in Council.

The plaintiff, Ratan Chand, and the defendant, Gulab Chand, did not file a case, and they were not represented on the hearing of this appeal.

The material facts are as follows :—The defendant, Gulab Chand, is the adopted son of one Hardeo Das, and the plaintiff, Ratan Chand, is the natural son of Hardeo Das ; Ratan Chand was born after the adoption of Gulab Chand.

Hardeo Das was a member of a joint Hindu family governed by the Mitaksara law. He died in 1917, leaving three sons, the defendant Gulab Chand, the plaintiff Ratan Chand, and Madan Gopal.

Hardeo Das until his death, carried on business in partnership with his brother-in-law, Kalyan Mal, under the name and style of Hardeo Das Kalyan Mal. After the death of Hardeo Das, Gulab Chand, acting on behalf of the members of the joint family to which he and Ratan Chand belonged, carried on the business with Kalyan Mal until the 9th October, 1919. On this date Kalyan Mal retired from the business, and the partnership was dissolved. Madan Gopal had died before this time.

Accounts were taken, the outstanding debts due to the partnership were divided, and the liabilities, which exceeded the assets, were apportioned.

From that date, viz., the 9th October, 1919, the business was carried on at the same premises, part of the joint family property, under the name of " Hardeo Das Gulab Chand," by Gulab Chand, purporting to act on behalf of the joint family.

It appears that a new set of books was opened on that date, the balances of the partnership Hardeo Das Kalyan Mal, were not transferred to the new books ; but the liabilities were debited in a ledger account styled " Hardeo Das."

These liabilities were discharged subsequently by means of alienations of property of the joint family, as to which no question arises in this appeal.

On the 2nd September, 1920, Gulab Chand applied to the District Judge under the Guardian and Wards Act viz., Act VIII of 1890, to be appointed guardian of the person and property of Ratan Chand, the minor plaintiff.

Amongst other matters the petition contained the following statement :—

“(k) The petitioner and Ratan Chand, minor, are own brothers and the business has been carried on jointly for a long time at the firm styled Hardeo Das Gulab Chand. The firm has suffered a loss of about Rs. 35,000, for half of which Ratan Chand, minor, also is responsible. The proper proceeding for the safety of the property of the minor and the petitioner appears to be this, that the whole or part of the house or other property mentioned in this application, in which one-half is the share of the minor and the other half of the petitioner, may be sold or mortgaged and the debt paid up and the remaining property may be free from the charge. As without the certificate of guardianship of the said minor, no one is ready to take under mortgage or to purchase (the property) on account of there being the share of the minor, this application is filed for the certificate of guardianship for the safety of the person and property of the minor.”

The house in Cawnpore, which is the subject of the mortgage hereinafter mentioned, was included in the specification of the property stated in the petition to be joint family property. Apparently no objection was made to the appointment and the District Judge appointed Gulab Chand as the certificated guardian of his minor brother Ratan Chand. It was held by the High Court in this suit that this appointment was improper, as it appeared on the applicant's own showing that the family was a joint Hindu family, and Gulab Chand should not have been appointed guardian of the property of his brother, who was a member of the joint family.

On the 15th September, 1920, Gulab Chand applied to the District Judge for leave to mortgage the share of his minor brother to the same extent as he would mortgage his own share.

That application was granted on the same day. The High Court has further held in this suit that this order did not comply with the provisions of Section 31 of Act VIII of 1890, that it did not describe the property with respect to which the permission was given, and did not specify any condition.

On the 5th December, 1920, Gulab Chand, purporting to act for himself and as the certificated guardian of Ratan Chand, the minor, executed a mortgage of the said house in Cawnpore, which was part of the joint family property, in favour of the defendant idol to secure the sum of Rs. 15,000, with interest at the rate of 1 rupee per mensem to be compounded at the end of three months. The mortgage contained a recital that the firm styled Hardeo Das Kalyan Mal was discontinued with the consent of Gulab Chand and Kalyan Mal, and that after the shop had been discontinued Gulab Chand and Ratan Chand, minor, started a shop with their own funds, styled Hardeo Das Gulab Chand.

It was further recited in the mortgage that the money was required for paying the debts of the firm of Hardeo Das Gulab Chand, and it is an admitted fact that the money borrowed on the security of the mortgage, was utilised for the payment of debts which had been incurred in connection with the business carried on under the name of Hardeo Das Gulab Chand.

In 1922 the idol, through its manager, Ram Lal, instituted a suit on the mortgage against Gulab Chand and Ratan Chand, the minor. Apparently the Court appointed Gulab Chand the certificated guardian of the minor, to act as guardian *ad litem* for him in the suit. The suit was not contested and on the 26th July, 1922, a preliminary decree for the sale of the mortgaged property was made.

This is the decree which is impugned by the plaintiff in this suit.

As already stated, the Subordinate Judge dismissed the suit. When the appeal instituted by Ratan Chand, the minor, came before the High Court, a new point, which was not covered by the issues tried by the Subordinate Judge, was raised.

The new point was whether Gulab Chand started an entirely new business as distinct from the family business which had existed during the lifetime of his father Hardeo Das, and during the period after his death up to October, 1919, and whether it was of a wholly speculative nature. The High Court thereupon on the 4th March, 1927, directed that a Commissioner should be appointed to examine the books which had been filed in the Trial Court, and to report to the High Court upon the following questions :—

“(1) Whether the old firm of Hardeo Das-Kalyan Mal carried on business relating to sugar, silver, gold or cotton on its own behalf or whether it was confined to commission agencies.

“(2) Whether the new firm carried on any commission agency business or not.

“(3) Whether the latter business was of a gambling nature.”

Each party submitted questions for the consideration of the Commissioner, who examined the books and made his report in the form of answers to the questions submitted to him by the parties. The learned Judges of the High Court, relying mainly on the report of the Commissioner and on the recitals in the mortgage, hereinbefore mentioned, came to the conclusion that the business carried on under the style of Hardeo Das Gulab Chand was, in fact, a new business, and that it was impossible to hold that the money secured by the mortgage was advanced for the purpose of financing a business which was the ancestral family business under a new name. They held, further, that the Commissioner's examination of the account books and his report showed that the indebtedness of the new business which led up to the making of the mortgage of the 5th December, 1920, resulted chiefly from forward contracts, which constituted gambling or wagering transactions in cotton and gold.

The learned Judges came to a further conclusion, viz. : that Ram Lal, who, as manager of the estate of the idol, advanced the money, did not make all necessary enquiries.

The learned Judges, therefore, held that the debts so incurred by the alleged new business were not binding upon the property of the minor, Ratan Chand. They allowed the appeal and they

made a decree in favour of the plaintiff as already stated. It was further ordered that the defendant idol should pay the plaintiff's costs in both Courts.

Their Lordships do not propose to express any opinion as to the propriety of the appointment of Gulab Chand as certificated guardian of his minor brother, Ratan Chand, or as to the question whether the order of the District Judge, which granted leave to Gulab Chand to mortgage the minor's share was irregular, inasmuch as, in their Lordships' opinion, a decision in respect thereof is not necessary for the disposal of this appeal.

Their Lordships will assume that the decision of the High Court in respect of these two matters was correct, but in their opinion this does not conclude the material issues which arise in this appeal.

Before dealing with such issues their Lordships feel constrained to express their disapproval of the course taken in the High Court with reference to the examination of the books of the alleged new business carried on under the style of Hardeo Das Gulab Chand. Their Lordships are not aware whether the order of the 4th March, 1927, was made under protest by the appellant defendant or with his consent, and they are not prepared, therefore, to hold that the report of the Commissioner should be disregarded, and they have taken it into consideration along with the other evidence in the case.

They are of opinion, however, that the method which was adopted by the High Court is open to serious objections. The questions which were submitted to the Commissioner comprised both questions of fact and questions of law. The distinction between contracts which are legitimate and genuine trading transactions of a speculative character and contracts which are simply gaming and wagering transactions is frequently a narrow one and difficult of determination even after the examination of the parties concerned, the course of the business and the nature of the contracts. It certainly was not a question which could safely be left to the decision of a Commissioner who had no materials before him, except certain entries in books. The Commissioner was not subject to cross-examination as to his conclusions, and the parties were not afforded any opportunity of giving evidence as to any of the entries upon which the Commissioner based his conclusions. If the issues involved in the questions submitted to the Commissioner were, in the opinion of the High Court, essential to the right decision of the suit on its merits, the proper course would have been to frame the issues and refer the same for trial to the Court from whose decree the appeal was preferred. Such Court would then have taken any additional evidence which was required, and the Trial Court would have submitted the evidence and its findings thereon to the Appellate Court.

The first question to be considered is whether the business carried on under the style of Hardeo Das Gulab Chand was, in

fact, a new business in respect of which Gulab Chand would not have authority to bind the property of his minor brother Ratan Chand. There is no doubt that up to the 9th October, 1919, the joint Hindu family, of which Gulab Chand and Ratan Chand were then members, was a partner in the business. Kalyan Mal was the other partner. Hardeo Das had been the manager, so far as the joint family was concerned, until his death; after that event Gulab Chand was the manager. Both Hardeo Das and Gulab Chand carried on the partnership business for the benefit of the joint family. On the 9th October, 1920, Kalyan Mal retired from the partnership business. Accounts then had to be taken for the purpose of ascertaining the assets and liabilities of the partnership business and adjusting the rights and liabilities of the partners as between themselves, viz., the joint Hindu family, on the one hand, and Kalyan Mal on the other hand.

The business had on the dissolution accrued to the joint family. Gulab Chand, as the manager of the joint family, then had to consider what was to be done with the interest of the joint family in the business, and the goodwill, if any, thereof. He decided to carry it on for the benefit of the joint family. For this purpose new accounts had to be opened, and as Kalyan Mal had ceased to be interested the name was changed from Hardeo Das Kalyan Mal to Hardeo Das Gulab Chand. It is significant to note that this was done on the same day as the dissolution of the firm of Hardeo Das Kalyan Mal. The business was carried on at the same place by Gulab Chand, and there is no doubt, as appears from the report of the Commissioner, that for at least six months after the change of name, the nature of the business was the same as before the change of name; no wagering transactions were entered into and substantial profits were made. The fact, if it be the fact that Gulab Chand, at a later stage, entered into speculative transactions did not make the business a new business, retrospectively or otherwise. Nor did the fact that Kalyan Mal had ceased to be a partner with the joint Hindu family in the business, and that the name was changed have the effect of converting the business which theretofore had been carried on for the benefit of the joint family, into a new business.

The recital in the mortgage that the firm styled Hardeo Das Kalyan Mal was discontinued and that Gulab Chand and Ratan Chand started a shop styled Hardeo Das Gulab Chand with their own funds, in their Lordships' opinion, is not destructive of this view. It must be taken into consideration with the other facts proved in the case. It is to be noted that the recital is that the firm of Hardeo Das Kalyan Mal was discontinued; that is another way of stating the dissolution of partnership which occurred when Kalyan Mal retired from the partnership, which consisted of the two partners, Kalyan Mal and the joint Hindu family. It did not necessarily mean that the business carried on in the name of the old partnership came to an end. The fact is that without any break

of continuity or interval the business was carried on under the new name. The statement that Gulab Chand and Ratan Chand started a shop with their own funds is not inconsistent with the conclusion that they continued to carry on with the joint family funds the business in which the joint family had for many years had an interest, but under the new style, viz., Hardeo Das Gulab Chand.

In their Lordships' opinion the recitals are not inconsistent with the inference to be drawn from the other known facts of the case, but that, indeed, in some respects they confirm such inference. Their Lordships, therefore, are not able to agree with the conclusion arrived at in this respect by the High Court, and on consideration of all the evidence they are of opinion that the business carried on under the style of Hardeo Das Gulab Chand was so carried on for the benefit of the joint family, and that it was a continuation of the ancestral family business which had hitherto been carried on in the name of Hardeo Das Kalyan Mal. Consequently, Gulab Chand, being the manager of the joint family, and carrying on the business for the benefit of the joint family, had authority to borrow money, if such borrowing was necessary for a legitimate and proper purpose of the family business, and to secure the same by mortgaging the joint family property if the charge so created were such as a prudent owner would make in order to benefit the estate.

The next question, therefore, is whether the borrowing of the Rs. 15,000 was such as Gulab Chand, as manager of the joint family business, had authority to make.

There is no doubt on the evidence that at the time the mortgage of the 5th December, 1920, was executed, the creditors of the firm of Hardeo Das Gulab Chand, were pressing for payment, and that there was urgent necessity for raising money to meet the demands of the creditors. Further, as stated by the High Court, it is an admitted fact that the Rs. 15,000, advanced on the security of the mortgage, was utilized in the payment of the debts of the business of Hardeo Das Gulab Chand.

It was held, however, by the High Court that the debts so paid off were gambling debts of Gulab Chand, and that the property of the minor, Ratan Chand, could not be made liable in respect of such debts.

This conclusion was based on the report of the Commissioner, who based his report on the examination of the books, and who came to the conclusion that after a period of six months from October, 1919, the wagering transactions increased and the commission agency business dwindled accordingly.

In view of the unsatisfactory manner of taking the evidence on this question, to which reference has already been made, their Lordships would hesitate considerably before holding that the money which was borrowed had been used to pay debts incurred by Gulab Chand in gambling. But it is evident from the Commissioner's report that even during the period when the alleged

wagering transactions were taking place, there were transactions in which actual goods were dealt with, and there is no proof on which their Lordships can rely, that the money borrowed on the security of the mortgage was used for paying gambling debts of Gulab Chand, as distinguished from legitimate trade transactions of the business which may have been of a speculative nature.

Their Lordships, therefore, are not able to accept the decision of the High Court in this respect.

There is another material matter to which it is necessary to refer. The High Court held that Ram Lal did not make all necessary enquiries before he advanced the money, and that he had clear notice that the former partnership had been discontinued and a shop styled under a different name had been started and had incurred debts. As regards the last-mentioned matter their Lordships have already indicated their opinion that the business carried on in the name of Hardeo Das Gulab Chand was not a new business in the sense indicated in the High Court's judgment. The consideration of the question whether Ram Lal made reasonable enquiries necessitates a reference to the evidence in the case.

Before dealing therewith it is desirable to state the rule of law which is applicable to the facts of this case. It is to be found in the judgment of the Board in *Hunooman-Persaud Panday v. Musummat Babooe Munraj Koonweree*, 6 Moo., I.A. 393, at page 424, and is as follows :—

“ Their Lordships think that the lender is bound to enquire into the necessities for the loan, and 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. But they think that if he does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual applicator, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived.”

The evidence shows that the transaction was negotiated through a broker named Angleshwar. Both the broker and Gulab Chand informed Ram Lal that the firm of Hardeo Das Gulab Chand was owing money to various creditors, and the names of some of the creditors were mentioned. Ram Lal then made enquiries on his own behalf from Kalyan Mal, the uncle of Gulab Chand, who informed him that it was correct that money was due to people in the market, and that he, Ram Lal, might advance the money without danger. Ram Lal was informed that Gulab Chand was guardian of Ratan Chand; he asked



Gulab Chand for the certificate of guardianship; Gulab Chand produced the certificate of guardianship, as well as the order of the Court granting Gulab Chand permission to mortgage the minor's share in the property as well as his own share. Ram Lal was informed that the debts were not the personal debts of Gulab Chand, but that they had been incurred in connection with the business carried on in the name of Hardeo Das Gulab Chand. Ram Lal made enquiries personally from some of the alleged creditors, and he found that money was owing to them as stated by Gulab Chand.

It is to be noted that it was recited in the mortgage that Gulab Chand had been appointed by the Court as guardian of the person and property of Ratan Chand, the minor, and that Gulab Chand had obtained permission of the Court to mortgage Ratan Chand's share in the property. These were matters which Ram Lal was entitled to take into consideration when deciding whether he would advance the money. Though it turns out afterwards that the orders of the Court may have been irregular, there is no suggestion that Ram Lal had at the date of the mortgage any knowledge of such irregularity. Ram Lal, however, according to the evidence, did not rely solely upon the above-mentioned orders of the Court for, as already indicated, he made enquiries not only from Gulab Chand and the broker who was acting for him, but also from some of the creditors of the firm of Hardeo Das Gulab Chand, whose names were given to him by Gulab Chand and the broker. The information which he received was all to the same effect, viz., that the debts were the debts of the business, that the creditors were pressing for payment, and that the money was really necessary for meeting the liabilities of the business.

In view of this evidence their Lordships are unable to adopt the conclusion of the High Court in respect of this matter, and they are of opinion that the evidence shows that Ram Lal did act honestly and with due caution, that he made reasonable enquiries, which led him to believe that a sufficient and real necessity for the borrowing of the money for the purposes of the family business did exist. That being so, it was not necessary for him to see to the application of the money.

For these reasons their Lordships are of opinion that the appeal must be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge restored. The plaintiff respondent must pay the costs of the defendant appellant, both of this appeal and of the appeal to the High Court. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

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SRI THAKUR RAM KRISHNA MURAJI

vs.

RATAN CHAND AND ANOTHER.

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