

Kesar Chand Vs. Uttam Chand

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Court : Mumbai

Decided On : Apr-30-1945

Reported in : (1945)47BOMLR945

Judge : Goddard, ;Madhavan Nair and ;John Beaumont, JJ.

Appellant : Kesar Chand

Respondent : Uttam Chand

Disposition : Appeal allowed

Judgement :

Madhavan Nair, J.

1. This is an appeal from a decree of the High Court of Judicature at Lahore dated May 16, 1941, which affirmed a decree of the Court of the Subordinate Judge, First Class, Montgomery, dated May 29, 1939, and dismissed the plaintiffs' suit.

2. The appeal arises out of a suit instituted by the plaintiff-appellants before the Board-for setting aside the sale and for possession of the properties mentioned in the plaint which were sold by Court in execution of a decree, by reason of a surety bond executed by their father Uttam Chand in the circumstances mentioned below. The properties in dispute have been found to be ancestral.

3. The main question arising for decision in this appeal is whether the above-mentioned surety bond creates or gives rise to a personal liability on Uttam Chand.

4. Uttam Chand and Dogar Chand, shown in the pedigree given below, were two separated Hindu brothers. Kesar Chand and Ram Lal-appellants Nos. 1 and 2-are the sons of Uttam Chand; Chand Kishan-appellant No. 3-is the son of Kesar Chand and grandson of Uttam Chand. Uttam Chand and the three appellants constituted a joint Hindu family. Dogar Chand died leaving a widow, and three minor sons, Hans Raj, Sohan Lal, and Des Raj.

Machhi Ram

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Uttam Chand Dogar Chand

(Defendant No. 1) |

(Respondent No. 1) |

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Kesar Chand Ram Lal Hans Raj Sohan Lal Des Raj

(Plaintiff No. 1) (Plaintiff No. 2)

(Appellant No. 1) (Appellant No. 2)

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Chand Kisan

(Plaintiff No. 3)

(Appellant No. 3)

5. On July 1, 1927, respondent No. 2, Nand Lal, obtained a preliminary mortgage decree against the minor sons of Dogar Chand, represented by their guardian Uttam Chand, on the basis of a mortgage executed by their mother, for Rs. 7,743, with interest and costs. This decree was made final on January 21, 1928. Hans Raj and his brothers through their guardian appealed to the High Court against the decree, and prayed for a stay of the execution of the proceedings which had been taken by the decree-holder. The stay asked for was granted by Coldstream J. who passed the following order on May 11, 1928:

Mr. Anant Ram [counsel for Nand Lai] asks that his clients may in any case be secured by a charge upon immovable property against loss if the sale is stayed. I think this is a reasonable argument and, having in view all the circumstances, I order that the property be not sold if the petitioners can furnish security in the form of a charge upon immovable property to the satisfaction of the executing Court for paying to the decree-holder in the event of the failure of their appeal, the amount by which the price fetched by the mortgaged property when sold under the decree falls short of the amount then found, due to the decree-holder under the provisions of the final decree)...

Thereupon Uttam Chand executed a security bond on July 31, 1928, in the following form, after stating that the High Court had called upon him to file a security bond to the effect that if the decree money and costs, etc., are not recovered in full from the land, he would be liable to make good the deficiency.

Hence I hereby stand as surety for Hans Raj and others, minors, judgment-debtors, and agree that in the event of the Appellate Court's decision being against the judgment-debtors, my movable and immovable properties, detailed hereinafter, shall be liable for making good the deficiency, if the sale proceeds of the hypothecated property are not sufficient to meet the demand, i.e., the amount which may then be found due from the judgment-debtors according to the decision.

The above statement is followed by a list of some items of movable property, though their security was not called for, and three items of immovable property.

6. The appeal before the High Court was compromised, and the Court passed a mortgage decree in terms of the compromise, providing that the property should remain under attachment and that ' the security furnished by the surety shall also stand.

7. As the mortgage debt was not paid in time, the decree-holder took out execution and had the mortgaged property sold. As the decree debt was not realised in full by the sale, the four items of property involved in the suit, which included only one item of secured property, were sold in execution, as before his liability had occurred Uttam Chand had transferred almost all the properties included in the security bond. As stated by the Subordinate Judge' it is common ground between the parties that the whole of the property in dispute is outside the scope of the security bond executed by Uttam Chand excepting the house which was purchased by Ghela Rama, defendant No. 3.' Barring this house, the other properties were purchased by Nand Lal, the decree-holder, and respondents Nos. 4 to 9 have purchased different plots of land from him after the execution sale had been confirmed in his favour by the executing Court. It is admitted that Nand Lal has paid Rs. 646-5-0 in discharge of two mortgages on the land purchased by him in the course of the execution.

8. Their Lordships will now proceed to consider whether the sale of the properties in dispute found to be ancestral, in enforcement of the security bond executed by Uttam Chand, is valid in law and binding on the appellants, his sons and grandson. The liability of the appellants is sought to be based on the pious obligation imposed on a Hindu son to pay his father's debts. In this connection it may be stated that the appellants did not allege that the debt said to have been incurred by Uttam Chand for which the properties have been sold is an immoral one; nor did the respondents allege that it was raised for the benefit of the family.

9. The Subordinate Judge held that the security bond was an instrument of charge only and did not create any personal liability, that Uttam Chand had laid himself open to personal liability by reason of his having admittedly transferred a major

portion of the properties included in the bond, that the sale of properties not covered by the security bond was justified by the principle expressed in Section 68(1)(c) of the Transfer of Property Act which says that 'the mortgagee has a right to sue for the mortgage money' 'where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor' and that he was competent to charge family property by the execution of the security bond as the rule of Hindu law forbidding alienation of family property or the creation of charges thereon except for family necessity or for an antecedent debt of the father did not apply to charges created by the father as surety. In the result, he dismissed the appellants' suit.

10. The learned Judges of the High Court disagreeing with the Subordinate Judge held that 'on a true construction of the security bond, Uttam Chand had undertaken personal liability, and that it is not possible at that stage to re-open the execution proceedings by holding that no such liability could be enforced.' The latter ground appears to be based on the reasoning stated at the close of the immediately preceding paragraph of the judgment that 'the executing Court acted on the assumption that Uttam Chand had undertaken a personal liability and this assumption does not appear to have been challenged at any stage of the proceedings,' but it must be noticed that the sons and grandson of Uttam Chand have a valid right of challenging that assumption by instituting a suit if they can make out a proper case. In the view which the learned Judge took, which they thought was 'sufficient to conclude the case,' the question of pious obligation did not seem to them to arise for decision; however, they did not consider it, but nothing turns upon that now. Before passing, it may be mentioned that the learned Judges were not prepared to accept the view of the trial Court that the executing Court would in any case have been entitled to act as it did by virtue of the provisions of Section 68 of the Transfer of Property Act.

11. Mr. Subba Rao, the learned Counsel for the appellants, contended before the Board that Uttam Chand was not personally liable under the terms of the security bond, and that in reality there was no debt due by him outstanding in consequence of which family property, either secured or unsecured, could be sold.

12. The main question for their Lordships to consider is whether the security bond imposes any personal liability on Uttam Chand, for unless this is established first, properties other than those covered by the security bond can in no event be validly sold. It was argued by Sir Thomas Strangman that the expression 'I stand surety for Hans Raj and others' appearing at the commencement of the operative portion of the deed to which their Lordships have already called attention, means I promise to pay, and imports personal liability. The argument is not without some force, but their Lordships have, after careful consideration, come to the conclusion that the statement which immediately follows the expression referred to, namely, 'and agree that...my movable and immovable properties detailed hereunder shall be liable' qualifies it and limits the scope of the liability to proceedings against the properties specified only, thus creating a charge on them excluding all personal liability. That this is the proper construction that should be put upon the document appears to be clear from the order passed by Coldstream J. when he stayed the execution of the decree. That order states clearly that the property should not be sold if the petitioners can furnish surety 'in the form of a charge upon immovable property' and it was complied with by Uttam Chand by executing the bond in question. Their Lordships pointed out in *Raja Raghunandan Prasod Singh v. Raja Kirtyanand Singh Bahadur* (1936) 36 C.W.N. 701, where the construction of a security bond executed in pursuance of an order passed by the Court arose for decision that it 'must be considered in the light of the order directing security to be given.' Read in the light of Coldstream J.'s order there can be no doubt that the obligation undertaken by Uttam Chand was merely confined to the extent of the properties charged by him for the satisfaction of the amount. Another argument urged by the learned Counsel in support of his contention, viz. that the appropriate form of the bond in a case of this kind, as may be seen from Appendix G of the Code of Civil Procedure, would clearly provide for a personal liability, and that the order for furnishing security must therefore be construed as having been made with reference to such a form, overlooks the fact that the order of the Court is perfectly clear, and what their Lordships are called upon to do is to construe a specific document with reference to its specific terms, and if need be in the light of the Court's order which, as they have already stated, is not open to any doubt. The next argument, that the inclusion of the movable properties in the deed would

suggest that Uttam Chand had thereby undertaken personal liability, cannot be accepted, as the terms of the document do not impose any such liability and nothing is known as to why those items were included in the deed. The last argument advanced in this connection, that even if there is no personal liability originally incurred by Uttam Chand under the stipulations of the security bond, he became personally liable as he had transferred a major portion of the property included by him in the security bond, should also be disallowed as it was not made clear to their Lordships how in the present case the privilege conferred by Section 68 of the Transfer of Property Act on a mortgagee to sue for money can be availed of by a charge-holder, in proceedings in execution of a decree, without resorting to a suit, assuming that the security has been impaired by the conduct of Uttam Chand which itself is open to some doubt. For these reasons their Lordships hold that as it is not shown that Uttam Chand has made himself personally liable for the amount that remained due to the decree-holder, there was no debt due from him, and it follows therefore that the unsecured property in question cannot be validly sold in enforcement of the security bond. The same is the position with regard to the secured property also. To make the ancestral property liable, there must in reality be a debt due by the father. In the present case, the security bond was executed not for the payment of any debt due by Uttam Chand, but for payment of a debt which was due from third parties. Unless there was a debt due by the father for which the security bond was executed, the doctrine of pious obligation of the sons to pay their father's debt cannot make the transaction binding on the ancestral property.

13. For the foregoing reasons their Lordships are of opinion that this appeal should be allowed and that the decrees of the Courts in India should be set aside and that it should be declared that the security bond dated July 31, 1928, executed by Uttam Chand in *Namd Lal v. Hans Raj and others* is not binding on the appellants or on the properties comprised therein; that the sale proceedings in execution of the decree of defendant No. 2 in *Nand Lal v. Hans Raj and Ors.* relating to the joint family properties of the appellants and defendant No. 1 (described in paragraph 4 and list A of the plaint) are null and void and (a) the purchasers at the auction sales, namely Nand Lal and Ghela Ram defendant No. 3 and (4) the alienees of Nand Lal namely defendants Nos. 4 to 9 acquired no title to the said properties;

that each of the defendants Nos. 2 to 91 do put the appellants and defendant No. 1 in possession of such of the properties described in paragraph 4 and list A of the plaint as he may be possessed of; so far as defendant No. 2 is concerned on being paid Rs. 646-5-0; and that defendants Nos. 2 to 9 should pay the appellants the costs of his appeal and their costs incurred in the High Court and the Court of the Subordinate Judge, First Class, Montgomery. It is said that defendants Nos. 2 to 9 have been in possession of the properties and have deprived the appellants' family of possession and enjoyment of the same and that it is just and right that they should account for the profits received or which might have been received by them. Their Lordships think that whatever rights the appellants may have in this respect should be claimed by them in a separate suit which will not be barred by these proceedings. Their Lordships will humbly advise His Majesty accordingly.

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