

Bithal Das Vs. Shankar Das Dube

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Court : Allahabad

Decided On : Dec-31-1969

Reported in : (1895)ILR17All265

Judge : Blair and; Burkitt, JJ.

Appellant : Bithal Das

Respondent : Shankar Das Dube

Judgement :

Burkitt, J.

1. This is one of the many cases in which execution-creditors of the late Raja Hari Har Dat Dube of Jaunpur have sought to have execution of their decrees against the present Raja Shankar Dat Dube, under Section 234 of the Code of Civil Procedure, on the allegation that Shankar Dat had in his hands assets of his deceased brother on which the creditors were entitled to levy execution.

2. In the present case the decree-holder appellant, Bithal Das obtained a decree for some Rs. 6,900 odd, a simple money-decree, against the Raja Hari Har Dat Dube in the Court of the Subordinate Judge of Agra in February 189J. Raja Hari Har Dat Dube died on January 13th, 1892. Execution-proceedings were commenced at Agra in May 1892, against Raja Shankar Dat and the widow of Raja Hari Har Dat, who were described as heirs of the deceased and as in

possession of his property. The application was clearly one within Section 234 of the Code of Civil Procedure. Notices were issued to the two representatives, and, no appearance having been put in by them, the execution proceedings were transferred to the Jaunpur Court. Accordingly, in July 1892, the present appellant applied in Jaunpur for execution by attachment of certain immoveable (landed) property and of a sum of money lying in the treasury in deposit. Orders for attachment were issued by the Court on July 27th. Thereupon the Raja Shankar Dat, on August 17th 1892, objected to the attachment. He denied that he was in possession of any assets of his deceased brother. He asserted that the property which the creditors sought to seize in execution had not been the property of the deceased Hari Har Dat at his death, and that it belonged to him (Shankar Dat) under an agreement of June 17th 1889, a compromise dated September 4th, 1891, and a decree dated December 23rd, 1891. It was further pleaded in the alternative on behalf of Shankar Dat that he and his deceased brother were at the date of the death of the latter members of a joint undivided family, and that on his brother's death he (Shankar) acquired by survivorship his brother's interest in the property.

2. In the Court below the District Judge rejected the decree-holder's application for execution. The reason for his order was because the decree-holder had not obtained an order for attachment or sale before the decree of December 23rd 1891. In other cases in which orders for attachment had issued before that date the Court allowed execution to proceed against the attached property.

3. The decree-holder in the present case appeals against the order rejecting his prayer for execution against the property he sought to have attached and sold. The learned Counsel who appeared for the appellant addressed to us a very able argument in which he endeavoured to show firstly, that the agreement of June 17th 1889, was bad for want of consideration, and, secondly, that the two brothers Hari Har Dat and Shankar Dat were separate and were not members of a joint undivided family at the date of the death of the Raja Hari Har Dat.

4. Before we proceed to discuss these two contentions it is necessary to state a few preliminary facts as to the recent history of the family.

5. In the year 1875 the Jaunpur riasat belonged to Raja Lachmi Narayan and his two first cousins, the Rajas Hari Har Dat and Shankar Dat. The last-named was then a minor, as appears from the sulahnamah of January 2nd., 1875, No. 60 of the record, which was executed by the Collector of the district as guardian of Hari Har Dat. That document clearly shows that all [267] the three owners of the riasat were then joint, and that the object of this sulahnamah was to prevent any separation or partition then or at any future time and to give to the riasat the character of an impartible Raja character which of course such a modern Raj had not acquired. As to the management, it was provided that it should remain in the eldest member of the family, who was then Raja Lachmi Narayan Dat. The latter apparently did not long survive, and the estate soon became heavily involved in debt; for we find in 1879 the riasat was for the purpose of discharging its liabilities taken under the management of the Court of Wards, the then surviving two proprietors, Rajas Hari Har Dat and Shankar Dat, having been declared by Government, on their own application, to be incapable of managing their affairs.

6. Now there can be no doubt that of the debt in which the estate was. involved by far the greatest portion, amounting to several lakhs of rupees, had been contracted by Raja Hari Har Dat. Consequently, when consenting to the Court of Wards taking over his interest in the riasat, and so giving a good title to purchasers of any portion of it which the Court of Wards might sell, the Raja Shankar Dat Dube, by his ikramamah of June 13th 1879, 'No. 61 of the record) expressly reserved any rights he might have against Raja Hari Har Dat in respect of whatever property might be left after the management, of the Court of Wards had come to an end. The Court of Wards continued in possession of the riasat up to October 6th 1889, i.e., for a period of about ten years, and during that time, by selling some portion of it and by economical management it paid off all the debts and handed over, we are told, some Rs. 11,000 in cash to the owners. But meanwhile, on June 17th 1889, while the riasat was still in the hands of the Court, the two Rajas, Hari Har Dat and Shankar Dat, executed an agreement (No. 62 of the record) by which Raja Hari Har Dat surrendered all his, interest in the estate to his brother Shankar Dat. The second, third and part of the fourth paragraphs treat of the management of the riasat, and take away from Raja Hari Har Dat all power of contracting debts binding the riasat or of in any way incumbering it, and em-

power the younger brother to remove Raja Hari Har Dat from the management in case he infringes the agreement. It is also provided that Raja Hari Har Dat is to surrender the position of lambardar. Then in the concluding clauses of the fourth paragraph and in the fifth paragraph there is a complete abandonment by Raja Hari Har Dat of all his interest in the estate--except perhaps so far as that Raja Shankar Dat is to pay him Rs. 12,000 per annum for his 'personal expenses'--to Raja Shankar Dat, who undertakes to pay the Rs. 12,000 per annum. The reasons given for this surrender are because Hari Har Dat' had spent a great deal of money on account of my personal expenses,' and because the Court of Wards had paid off a sum of nine lakhs of rupees which Hari Har Dat had borrowed and applied to his personal expenses, for which Shankar Dat was 'entitled to compensation (to be recouped) which he has not received,' and by the concluding words, of the fifth paragraph Rajah Harf Har Dat' agrees that Shankar Dat is the 'absolute owner of my right and share in the state, as that I, Raja Hari Har Dat Dube, have no sort of personal proprietary right to the state property except to manage the same.' These are the material paragraphs of their agreement.

7. The learned Counsel for the appellant contends as to this agreement of June 1889, that the consideration for it was the payment of the nine lakhs of rupees to Hari Har Dat's creditors, that that was at the time of the agreement a fully executed and not an executory consideration, and that therefore, with the reference to the definition of the word 'consideration' in Section 2 of the Indian Contract Act, that consideration was a bad consideration, and that Raja Shankar Dat took nothing under the agreement. He contends that no express request moving from Hari Har Dat to Shankar Dat had been proved, and that under the circumstances no such request could be inferred or implied.

8. To this latter contention we cannot accede. It seems to us that when Shankar Dat allowed his interest in the riasat to be taken over by the Court of Wards which the agreement of June 13th, 1879, (No. 61 of the record), clearly shows he did do--it must be inferred that he did so at the request of Raja Hari Har Dat. It is difficult to see why such a request should not have been made, but it is very easy to understand why such a request must have been made. Shankar Dat, who had not long attained majority, does not appear to have been at all in embarrassed

circumstances as far as his interest in the riasat was concerned. On the other hand, Hari Har Dat was some lakhs of rupees in debt. It was of vital importance to him that the Court of Wards should intervene to save the estate, and that the intervention could in the nature of things have been obtained only on the condition that both the brothers (who, as we shall subsequently show, were joint owners of the estate) should apply to have themselves declared incapable of managing their affairs, and so put it in the power of the Court of Wards to deal with the joint interests as a whole. Had it been necessary first to separate and partition off Shankar Dat's share--a tedious and costly process--the Court of Wards in all probability would have declined to interfere on behalf of Hari Har Dat. And not merely is it to be inferred from the circumstances of the case that a request did move from Hari Har Dat to Shankar Dat, but also, as it appears that Hari Har Dat adopted and enjoyed the benefit of the consideration by his debts being paid off and his creditors getting money, part at least of which should have gone into Shankar Dat's pocket; such a request will be implied by law. It must also be borne in mind on this matter that all through the ten years 1879-1889, Shankar Dat had to live on a small allowance of from Rs. 250 to Rs. 400 per mensem, instead of being able to enjoy the full income of his relatively unembarrassed interest in the riasat, that that deprivation of income was still continuing at the date of the agreement of June 1889, and also that at to latter date the Court of Wards was still in possession and was still paying 'off the debts in pursuance of the consent thereto by Hari Har Dat shown in the agreement of June 13th, 1879. Further, there can be no doubt that, had Shankar Dat on the cessation of the Court of Wards' management desired a partition, he could have demanded an account from his brother, and that in that account he would not have been charged with the enormous debt which the waste and extravagance of his brother had caused. The result of such an account would in all probability have shown that Hari Har Dat had squandered the whole of his interest. In the agreement of June 13th, 1879, Raja Shankar Dat expressly reserves his right to demand Such an account, and, that feeling so, his refraining from suing his brother to recover the loss and damage which that brother's extravagance had entailed on him is in our opinion a good consideration for the agreement, of June 17th, 1889. And further there is the promise by Shankar Dat to make his brother the generous allowance of Rs.

12,000 per annum, notwithstanding that in all probability Hari Har Dat had by his extravagance wasted and squandered the whole of his interest in the estate. It appears also that Shankar Dat only intended to take Rs. 12,000 per annum for his own personal expenses out of the estate, desiring probably to allow the remainder to accumulate.

9. For the appellant it was contended that the Rs. 12,000 per annum were to be Hari Har Dat's remuneration for acting as manager. That in our opinion clearly is not so. The allowance was to be paid to him for his 'personal expenses,' and, as long as he remained manager, he was to be allowed to pay himself that amount out of the income of the estate. But the agreement empowered Shankar Dat to remove his brother from management. In that event the allowance of Rs. 12,000 was not to cease, but was to be paid by Shankar Dat to his brother, and, as before, for personal expenses.' It is quite out of the question to suppose that Rs. 12,000 were to be paid for anything but Hari Har Dat's support. Bearing the past in mind, his services as manager would have been dearly purchased at even Rs. 5 per month, but Shankar Dat probably hoped that under the strict rules as to the way in which the management was to be conducted, contained in the agreement of June 17th, 1889, Hari Har Dat would do better in future.

10. For the above reasons we are of opinion that the agreement of June 17th, 1889, was not bad for want of consideration. But, even if such were the case, we should still hold that the agreement might well be supported and held to be a good agreement under the provision of Section 25(2) and of Section 70 of the Indian Contract Act. By the agreement Hari Har Dat promised to compensate Shankar for an act which the latter had done for him in allowing his interest in the estate to be taken by the Court of Wards for the purpose of enabling the Court to liquidate Hari Har Dat's debts, and the agreement of June 13th, 1879, shows that Shankar Dat did not intend to perform that act gratuitously. We have no hesitation in holding that a very adequate consideration was given for the agreement of June 17th, 1889, and that Hari Har Dat felt he could not resist the claim which Shankar Dat had in the agreement of June 13th, 1879, reserved to himself the right to enforce.

11. We accordingly find that the agreement of June 17th, 1889, is a good and valid agreement binding on the parties to it, and from the date of its execution Raja Hari Har Dat ceased to have any longer any proprietary interest in the riasat, of which his brother Shankar Dat from that date became the sole and absolute owner, subject only to the obligation of paying Rs. 12,000 per annum to Hari Har Dat for his personal expenses. Neither the riasat nor Hari Har Dat's former interest in it remained any longer liable for any debt which Hari Har Dat might contract after the date of the agreement.

12. There is no ground whatever for supposing that this agreement was entered into for the purpose of defrauding creditors. At its date all or nearly all the debts had been paid off by the Court of Wards, and in every one of the many cases connected with this riasat, which up to the present have been before this Bench, the debts had been contracted after the date of the agreement of June 17th, 1889. For that reason therefore, and not because (as the lower Court holds) the appellant had not obtained an attachment or an order for sale before the decree of December 23rd, 1891, we hold that the appellant's decree cannot be executed against the property which the appellant desires to have taken in execution of that decree. As to the compromise of September 4th, 1891, and the decree of December 23rd, 1891, passed in terms of the compromise, we are of opinion that they are immaterial. Indeed the decree is only declaratory of the pre-existing title. Raja Shankar Dat's title does not depend on them, or on either of them, but on the agreement of June 1889 by virtue of which he became sole and absolute owner of the riasat from June 17th, 1889.

13. After the above finding it is hardly necessary to enter into the question as to whether Raja Hari Har Dat, and Shankar Dat, were joint in estate but as the question has been fully argued by the learned Counsel on both sides we think we should express our opinion respecting it. A very few words only are necessary. In our opinion there is not on record a shred of evidence from which it could be inferred that the two brothers were not joint. The only thing put before us was an allegation, not supported by any evidence, that in the village papers of the riasat the two brothers were recorded as each holding an eight-annas share in the various villages which make up the riasat. Such a record as that, standing by itself

and not supported by any evidence of an intention on the part of the proprietors to hold the estate in future in certain definite shares, or by any evidence of a separate holding by each independent of the other, is in our opinion perfectly immaterial. To hold that such an entry of itself amounts almost to conclusive evidence of partition--as was contended here--would put it in the power of any village patwari to work a partition in a Hindu joint family by recording immediately on the death of a proprietor the names of his sons as holding each some fraction of the estate, instead of recording all of them as holding the whole jointly. Now as to the present case it is hardly necessary to say that the presumption of law as to every Hindu family, and especially as to a family the members of which are brothers, is that it is joint, and that it lies on those who allege the contrary to establish their allegation by evidence. Here no assertion has been made as to the time when the two brothers separated. Reliance is placed only on the alleged record in the village papers and on some loose expressions in the agreements of June 1879, and June 1889. But it is in our opinion clearly manifest that the great object of all the members of the family was to keep the riasat joint and undivided. Indeed, as already mentioned, they went so far as to claim for it the dignity of an impartible raj. In the sulahnamah of January 2nd 1875, the riasat is treated as the joint property of all three proprietors, the eldest of whom is appointed to be the 'gaddinashin,' and the reason for entering into this sulahnamah is stated to be with the object of maintaining the riasat by preventing partition. The three owners' were then certainly joint. It has not been shown that anything happened to change the status of the family up to June 1879, when Exhibit No. 61 was executed. There is nothing to show that Hari Har Dat and Shankar Dat had become separate before 1879, and it is perfectly certain that the Court of Wards took over the estate in 1879 as being the joint property of the two brothers. In the agreement of June 1879, Shankar Dat, whose interest it certainly would have been to separate himself from his brother's liabilities, distinctly declares that the riasat is possessed jointly by himself and his brother, and says that the object of the Court of Wards' management was to protect the riasat. For the appellant reliance was placed on his statement further on that he and his brother each were proprietors of one moiety; but clearly that statement is made for the purpose, not of indicating any separation, but of explaining that, unless he joined in the application to have his

interest in the estate put under the Court, any portion of the estate which might be sold would not fetch a good price. Evidently there was no alteration in the status of the two brothers inter se during the ten years of the management of the Court of Wards, and finally in the agreement of June 17th, 1889, they declare that they are owners in equal proportion of the whole riasat in 'the manner of properties of Hindus' (bataur jaidad Hanud). The only oral testimony to which our attention was called was that of one Anand Kishora, an old servant of the family, who, in another execution case, had been called by Raja Shankar Dat to disprove the allegation of separation and partition between him and his brother. Strange to say, the appellant put on the record of this case a copy of the deposition of that witness in the other case *Peake Allen & Co. v. Raja Shankar Dat and Anr.* and made it evidence in this case, merely calling Anand Kishore' to prove he had made, the deposition and, - letting him be cross-examined for respondent. It was objected here that the copy of the deposition could not be looked at as the witness was alive. To that it is sufficient to reply that it was by appellant's own act that the copy of deposition was put on the record and made evidence in this case. As to this deposition of Anand Kishore we need say no more than that it conclusively disproves any idea of a separation between the two brothers.

14. For the above reasons we are of opinion that the appellant, on whom the burden of proof lay, has failed to prove any separation at any time between the brothers, Hari Har Dat and Shankar Dit, and we find that no separation occurred.

15. We accordingly, though not for exactly the same reasons as those given by the Court below, dismiss this appeal with costs.