SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Phool Chand Vs. Lalit Kishore and ors.

Phool Chand Vs. Lalit Kishore and ors.

SooperKanoon Citation : sooperkanoon.com/450293

Court : Allahabad

Decided On : Dec-22-1967

Reported in : AIR1969All155

Judge : S.N. Katju, J.

Acts : Hindu Law

Appeal No. : Second Appeal Nos. 1744 and 1745 of 1961

Appellant : Phool Chand

Respondent : Lalit Kishore and ors.

Advocate for Def. : Anangpal Gupta, Adv. (for No. 1) and ;P.M. Gupta, Adv. (for No. 2)

Advocate for Pet/Ap. : Brij Lal Gupta and ;Ashok Gupta, Advs.

Disposition : Appeals dismissed

Judgement :

S.N. Katju, J.

1. These are two connected appeals which arise out of proceedings in execution of a decree passed in favour of Phool Chand in suit No. 242 of 1953 of the court of Munsif Koil, district Aligarh.

2. One Mohan Lal has two sons --Udai Ram and Maya Ram. Udai Ram's son was Ram Prasad who was married to Smt. Sharbati. Their sons are Lalit Kishore and Durga Dutt. Maya Ram's son is Shiam Manohar.

3. Phool Chand who is the appellant in the two appeals before me instituted the aforesaid suit No. 242 of 1953 for recovery of Rs. 2535/- together with interest etc. from Durga Dutt. It was alleged that the latter had borrowed money from Phool Chand and hence the claim against Durga Dutt. The aforesaid suit was decreed. The defendant in that suit was described as 'Durga Dutt son of Sri Ram Prasad, caste Maithil Brahman, resident of Pala Sahibabad, Pargana and Tahsil Koil, district Aligarh, Proprietor of R. S. Sharma & Company, Aligarh'. Suit No. 73 of 1959 was brought by Phool Chand against Lalit Kishore, Smt. Shar-bati, Shiam Manohar and Durga Dutt. It was stated therein that after the passing of the aforesaid decree in suit no. 242 of 1953 against Durga Dutt the plaintiff got attached the house and shop in dispute.

Objections under Order 21, Rule 58 C. P. C. were raised by Lalit Kishore, Smt. Sharbati and Shiam Manohar on the ground that they had a 5/6th interest in the said house and the shop and their aforesaid interest could not be attached and sold in execution of the decree in suit No. 242 of 1953. The plaintiff Phool Chand sought a declaration by suit No. 73 of 1959 that the aforesaid house and the shop were liable to be attached and sold in execution of the aforesaid decree in suit No. 242 of 1953 which had been passed in his favour. Suit No. 401 of 1958 was instituted by Lalit Kishore, Smt. Sharbati and Shiam Manohar against Phool Chand and Durga Dutt in which they prayed that their 5/6th interest in the aforesaid house and shop was not liable to be attached and sold in execution of the decree in suit No. 242 of 1953 which had been passed in favour of Phool Chand.

4. The trial court decreed suit No. 401 of 1958 and dismissed suit no. 73 of 1959. Aggrieved from the decision in the two suits Phool Chand preferred appeals before the lower appellate court. Both the appeals were dismissed by it. Phool Chand has now preferred second appeal in this Court. When the appeals came before me earlier I remitted the following issue to the court below for its finding thereon:--

'Whether Shiam Manohar, Ram Prasad, Durga Dutt and Lalit Kishore were members of a joint Hindu family and whether Shiam Kishore had an interest in the properties purchased by Ram Prasad and Durga Dutt by the sale deeds of 1940?'

The court below found that Shiam Manohar was not a member of the joint family with Ram Prasad and his sons. It has further found that Shiam. Manohar had no interest in the properties pur-chased in the name of Ram Prasad and Durga Dutt by the sale deeds of 1940.

5. It was the case of Lalit Kishore and Smt. Sharbati that Ram Prasad had purchased the house and the shop in dispute from his own money and the name of Durga Dutt had been entered in the sale deed as benami, and that Shiam Manohar had no interest in the aforesaid house in dispute because Ram Prasad and Shiam Manohar were separate. The aforesaid findings are findings of fact They cannot be assailed in second appeal.

6. It was strenuously urged by Phool Chand that the shop and the house in dispute were exclusively owned by Durga Dutt The court below repelled this contention and it must be held that the house and the shop in dispute are jointly owned by the two brothers Lalit Kishore and Durga Dutt and their mother Smt. Sharbati. The question for consideration is whether Phool Chand could execute his decree as against the said house and the shop. It was contended by the learned counsel for Phool Chand that the decree passed in suit no. 242 of 1953 was binding on Lalit Kishore and Smt. Sharbati also because Durga Dutt had taken the loan from Phool Chand for purposes of the family business run in the name of Messrs. R. S. Sharma and Durga Dutt as manager of the family was representing the interest of the members of the family and, therefore, the latter were bound by the decree passed against Durga Dutt As mentioned above, Durga Dutt was described in the suit as the owner of Messrs. R. S. Sharma & Company, Aligarh, It was stated in the first paragraph of the plaint of the said suit that the firm R. S. Sharma was the family (khan-dani) firm of the defendant Durga Dutt for purposes of which he had taken the loan from the plaintiff Phool Chand. Besides the aforesaid averment that the firm R. S. Sharma was a family firm there was no other allegation in the plaint to show the character of the firm and the members of the family which had interest

therein, or the fact that Durga Dutt was the karta of the family and the needs of the business necessitated the taking of the loan. That suit was decreed against Durga Dutt and the decree describes Durga Dutt as proprietor of firm R. S. Sharma & Co. Thus there is nothing in the decree to indicate that Durga Dutt was the manager of the family which was conducting the family business and money had been taken for purposes of the said business.

7. In suit no. 73 of 1959, the case of Phool Chand was that the house and the shop in dispute belonged exclusively to Durga Dutt and they were liable to beattached and sold in execution of the decree passed against him. In the alternative he contended that even if it was held that Lalit Kishore and Smt. Shar-bati had any interest in the said house and the shop, even then the aforesaid properties could be sold in execution of the decree passed in his favour because the loan had been taken by Durga Dutt for purposes of the family business and he being the Karta represented the other members of the family in his dealings with Phool Chand. The case of Lalit Kishore and Smt. Sharbati was that Shiam Manohar was also a member of the family and had an interest in the said house and the shop in dispute and thus Durga Dutt had only a 1/6th share in the said house and the shop in dispute. It has been found that Shiam Manohar is not joint with the branch of Ram Pra-sad and, therefore, Durga Dutt will have a one-third interest in the said house and the shop in dispute.

8. There can be no doubt that the 1/3rd interest of Durga Dutt in the properties in dispute is liable to be attached and sold in execution of the decree passed against him and in favour of Phool Chand. The question, however, is whether the 2/3rd interest of Lalit Kishore and Sharbati is also liable to be sold in execution of the decree passed in favour of Phool Chand. The decree passed in the earlier suit no. 242 of 1953 was only against Durga Dutt and the court below held that it was not open to the decree-holder in the execution proceedings to contend that it could also be executed against the interest of Lalit Kishore and Smt. Sharbati in the joint properties in dispute. It observed:

'There is nothing in the plaint of that suit to show that Phool Chand had alleged that the debt was borrowed by Durga Dutt as a manager of the joint family concern

and for the benefit of the members of the joint family and the same was as such binding on the other members of the family. These points should have been agitated and decided in the original suit (suit no. 242 of 1953).

These points cannot be agitated and decided in the execution department after the decree in suit no. 242 of 1953 had been passed and put in execution.

At this stage Phool Chand cannot be heard saying that the debt was taken by the manager of the joint Hindu family concern in his capacity as such manager and was binding on every member of that joint family.'

9. Learned counsel for the appellant relied on a Full Bench decision of the Punjab High Court in Jai Kishen v. Ram Chand, AIR 1935 Lah 1. In the aforesaid case one R obtained a money decree against D and in execution of that decreea house was attached and sold to the decree-holder who obtained possession in due course. J, a minor, who was the nephew of D brought a suit for possession of the house alleging that it was the exclusive property of his father T on whose death it had devolved on him and, therefore, it was not liable to attachment and sale in the execution of the decree obtained against D. D and T were brothers. The suit was resisted by the decree-holder R who contended that T and their sons were members of the joint Hindu family of which D was the Karta and the decree in execution of which the house had been sold had been passed on foot of a debt raised by D in his capacity as Karta of the family and for purposes which were binding on all the coparceners. It was also alleged that the house in question, though nominally purchased in the name of D, really belonged to the joint family and, therefore, it had been properly attached and sold in execution of the decree. The Court posed the question whether in such a case it is obligatory on the plaintiff to implead the junior members of the parties to the suit and where this has not been done and the decree ex facie is against the managing member alone, whether the decree-holder can proceed against the entire family property. It observed as follows:

'This question has to be examined in respect of two distinct classes of cases:

(i) where the managing member has mortgaged the family property and the suit has been brought on foot of the mortgage and decreed against him alone, and

(ii) where the loan raised by him was unsecured and a simple money decree has been passed against him to which the junior members were not parties.'

A Full Bench decision of this Court in Hori Lal v. Nimman Kunwar, (1912) ILR 34 All 549 (FB), was relied on (for?) the support of the proposition that in a suit brought on the foot of a mortgage against the Karta the decree would be binding on the junior members of the family. Banerji, J. observed as follows:--

'I do not think that it is essential that the manager when he brings his suit should state in distinct terms that he is suing as manager, or that the plaintiff in a suit against the family should describe the defendant as the manager of the family. All that is essential is that the manager is in fact suing or being sued as such in respect of a family debt. If it is denied that the person suing or sued is the manager that fact must be proved.'

On the second proposition where a simple money decree is passed for the recovery of an unsecured debt in a suit against the managing member of the family to which the junior members were not parties, Tek Chand, J. made the following observation in Jai Kishen's case, AIR 1935 Lah 1 (supra):--

'The consensus of judicial opinion is overwhelmingly in favour of the view that a decree passed against the managing member of an undivided Hindu family in respect of a liability incurred within the scope of his authority is enforceable against the interest of the junior members in the family property, even though they had not been made parties to the suit, but such members are not precluded from contesting the authority of the manager or the nature of the debt, and this they may do either in the course of execution proceedings or in a suit of their own.'

Tek Chand, J., however, pushed theabove mentioned proposition of law stillfurther when he observed:

'There is, of course, no presumption that a debt contracted by the manager of a Hindu family was contracted for family purposes, and this fact must be proved by

evidence: AIR 1934 P. C. 4. But at the same time, the mere circumstances that it had not been disclosed in the courseof the proceedings, in the original suit against the managing member, that the debt had been raised for family necessityor that the decree does not show on the face of it that the judgment-debtor had been sued in his capacity as manager, is not fatal to the right of the decree-holder to proceed against the entire family property. It is not the frame of the suit or the form of the decree which is conclusive of the matter the essential point is whether in fact the debt which is the basis of the decree had been raised by the judgment-debtor within thescope of his authority as the manager and for the purposes of the family. This question of fact can be determined finallyonly after the junior members have had proper opportunity of being heard, either in the execution proceedings, or in a separate suit specially brought for the purposes.'

10. I respectfully beg to differ from the above mentioned proposition of law as enunciated by Tek Chand. J. I am not prepared to subscribe to the view that where a creditor institutes a suit against a member of the family, not mentioning in it that the defendant is the Kartaof the family and not disclosing in it that the debt had been incurred for family necessity and the judgment and decree on the face of it do not show that the defendant had been sued in his capacity as the Karta of the family and the liability had been incurred on behalf of the family, then in such circumstances it is open to the creditor-decree-holder to execute his decree against the joint family properties and leave it to the members of the family to challenge theright of the decree-holder to proceed against the family properties. If there is nothing in the judgment or the decree to indicate that the claim of the creditor had proceeded on the footing that the debt had been incurred by the Karta of the family on behalf of the family and for legal necessity, then in such a case the decree obtained by the creditor can only be executed as against the interest of the judgment-debtor in the family properties and not against the entire joint family properties in which the other members of the family have interest. It may be that in certain cases the defendant is not described as the Karta of the family and the other members of the family are not impleaded but if there is sufficient indication in the judgment and the decree that the claim was not only against the defendant in person but in his capacity as the managing member of the family, then in such a case it may be open to a creditor to proceed against the joint family properties

leaving it to the members of the family to challenge the action of the creditor decree-holder.

11. In suit no. 242 of 1953 Durga Dutt had been described as proprietor (malik) of R. S. Sharma & Company and in the first paragraph of the plaint it was only stated that the firm R. S. Sharma was the family (khandani) firm. In the description given in the array of parties Durga Dutt was described as the proprietor. That may mean that he was the sole proprietor of the firm. The mere use of the expression Khandani in the first paragraph of the plaint could not mean that the business was run by the family of which Lalit Kishore and Smt. Sharbati were also members. It might be that Durga Dutt had continued the lock making business of his father. That would not necessarily imply that the business of Durga putt was a joint business in which Lalit Kishore and Sharbati were also interested as members of the family. Again, the decree was only against Durga Dutt who was described as the proprietor of the firm R. S. Sharma & Co. The judgment of the learned Munsif in the aforesaid case was not produced by the appellant and there is only the plaint and the decree in suit no. 242 of 3953 to indicate the nature of the suit and the decree. There is thus nothing to show that Durga Dutt had been sued in his capacity as the managing member of the family of which Lalit Kishore and Sharbati were members and that the firm R. S. Sharma & Company was the joint family firm of the family and the money which had been advanced by Phool Chand to Durga Dutt had been taken by Durga Dutt for the benefit of the family. Under these circumstances I have no hesitation in holding that it is not open to the decree-holder to proceedagainst the entire family properties in which Lalit Kishore and Sharbati are also interested. The lower appellate court took the correct view in holding that the aforesaid question should have been agitated and decided in suit no. 242 of 1953 and it could not be raised subsequently in execution proceedings.

If that was not so, a hazardous situation would be created for the members of a joint family. The result would be, with which I disagree, that a creditor could institute a suit against a member of the family and take the other members of the family by surprise by confining his claim only against one of the members and succeed in obtaining a decree against the defendant and once the decree is obtained he would be free to proceed in execution not only against the interest of

the defendant in the joint family property but also against the entire family properties leaving it open to the other members of the family to assert their own claims in the joint family. If the creditor intends to make his ciaims against the entire family, then even if he impleads only the Karta in the suit it should be sufficiently made clear not only in the plaint that the claim is against the entire family and the family properties, but this position should also be made clear in the decree so that the other members of the family may not be taken by surprise. If the position is made clear in the judgment and the decree that the decree was confined not to the defendant alone but it also extended as against the entire family, then only the decree-holder could proceed against the family properties. It such a position is not made clear in the judgment and the decree then the decree-holder has no right to proceed in execution beyond the interest of the defendant-judgment-debtor in the family pro-perties. In Chippagiri Nagiredi v. Venka-dari Somappa AIR 1943 Mad 1 (FB) the case related a claim on the basis of a promissory note. It was observed:

'Each case must depend on its own facts but where the facts are similar to the facts in those cases, as they are in the present case, only the defendant can be called upon to satisfy the decree. A creditor has only himself to blame if he contents himself with the suing on the instrument. He can if he wishes add a claim on the debt and join the other coparceners as defendants, or he can bring a suit against them on the debt.'

It is not necessary to refer further to the aforesaid case as it arose out of a claim on the basis of a promissory note.

12. I agree with the view of the court below that 'at this stage Phool Chand cannot be heard saving that the debt was taken by the manager of the joint Hindu family concerned in his capacityas such manager and was binding on every member of that joint family.'

13. Even though it was not necessary for me to consider the evidence on the record with regard to the liability of the joint family I have looked into the evidence and find that it is wholly insufficient to establish that the firm R. S. Sharma & Co. was a joint family firm in which Lalit Kishore and Sharbati had interest and the

money borrowed by Durga Dutt from Phool Chand was for legal necessity and for the benefit of the family firm.

14. The appeals fail and are dismissed with costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com