

Smt. Malti Devi Vs. Phool Chand and ors.

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Court : Allahabad

Decided On : Nov-04-1981

Reported in : AIR1982All86

Judge : Deoki Nandan, J.

Acts : Hindu Law; [Limitation Act, 1963](#) - Sections 10

Appeal No. : Second Appeal No. 1029 of 1975

Appellant : Smt. Malti Devi

Respondent : Phool Chand and ors.

Disposition : Appeal allowed

Judgement :

Deoki Nandan, J.

1. This is a dependent's Second Appeal in a suit for partition. The appellant was the third defendant in the suit, and the appeal from the preliminary decree is confined to the claim made on her behalf that she is entitled to a provision being made for the payment of the sum of Rs. 11,600 by the joint family before the division of its property among the separating coparceners. The following are the relevant facts :--

2. The plaintiff and the defendants Nos. 1 and 2, who are respectively respondents Nos. 1, 2 and 3 in the Second Appeal in this Court, are the sons of Sri Shyam Lal. The third respondent, who was the second defendant, is the defendant appellant's husband. According to the plaintiff, the three brothers were living and messing separately, although in separate portions of the same ancestral house, and that the father Sri Shyam Lal died on the 6th July, 1959, and after him the management of the joint family property, namely, the three houses specified in Schedule to the plaint, came to be vested in the first defendant; but, because of apathy of the members of the family, the property was not being managed properly and it was necessary to have a partition between the brothers. Paragraph 1 of the plaint specifies certain disputes between the brothers. Clauses (i) to (vii) thereof relate to certain disputes between the brothers about property No. B of Schedule I, Clauses (viii) and (ix), which are relevant for the purposes of the present appeal, run as under :--

'(viii) That the other dispute relates to deposit in trust of a considerable amount by defendant No. 3, in the Firm Messrs Murlidhar Shyamlal, which was owned, managed and worked by defendant No. 1 and the plaintiffs father.

(ix) That the defendant No. 3 claims that as the amount was deposited by her in Trust she is entitled to the repayment of her amount before the joint immoveable property is, divided amongst the brothers and claims a charge over the property before partition and asserts that before partition is made her first charge should be discharged.'

3. The third defendant appellant pleaded as follows in paragraphs 13, and 14 and 15 of her written statement ;--

'13. That this defendant deposited in trust a sum of Rs. 11,000/- her stridhan money with the firm Murlidhar Shyamlal and it has remained unpaid till now.

14. That this defendant did not make any demand simply because of the relationship.

15. That this defendant has a first charge for the aforesaid amount on the joint property and it is necessary that in the event of a decree for partition necessary provision for its repayment be made in the decree.'

4. The first defendant denied the plaint allegations on this point in these words :--

'7 (viii), para 7 (viii) is not admitted. '7 (ix), para 7 (ix) is not admitted and is denied and it is submitted that Shrimati Malti Devi defendant No. 3 is not entitled to have any charge declared over the said property.'

5. In the additional pleas, paragraph 18 reads thus :--

'18. That it is absolutely false that Shrimati Malti Devi defendant No. 3 deposited any sum whatsoever in the family firm out of her own stridhan funds. The plaintiff has deliberately concealed the important fact that the sum credited to the name of Shrimati Malti Devi virtually represented joint family farad(r) and she was never in a position to deposit any sum in the firm as her own.'

6. Under Order 10 Rule 2 of the Code of Civil Procedure, the first defendant made the following statement on the 8th March, 1965:--

'The following properties are still partible. No properties or assets of the joint Hindu family of the parties have been partitioned as yet. The sum of Rs. 11,000/- entered into account books of the firm M/s. Murlidhar Shyamlal in the name of Smt. Malti Devi defendant No. 3 really belonged to my mother Smt. Kiran Devi. Smt. Kiran Devi died in August, or September, 1959.'

7. The issues touching this controversy were issues Nos. 2, 3, and 6 which are as follows:--

'2. Whether the sum of Rs. 11,000/- deposited in the account books of M/s. Murlidhar Shyamlal in the name of defendant No. 3 really belongs to the joint Hindu family of the plaintiff and defendants 1 and 2 ?

'3. If the issue No. 2 is to be answered in the negative, to what relief, is defendant No. 3 entitled in respect of this money ?

'6. Whether defendant No. 2 is not liable to pay any share out of the amount of Rs. 11000/- claimed by the defendant No. 3 '

8. The trial court held that the third defendant deposited Rs. 11,000/- with the firm Murlidhar Shyam Lal; and that she nowhere stated that Shyam Lal had created a charge over any property for the same; that according to the un-rebutted statement of the second defendant (the third defendant's husband), the firm M/s. Murlidhar Shyam Lal was not the joint family firm, but was the firm owned by Sri Shyam Lal and Madan Lal only. The trial court then noticed that according to the decree in Suit No. 386 of 1955, Shyam Lal, Madan Lal and Phool Chand were the parties in the firm Murlidhar Shyam Lal. It then found that the amount of Rs. 11,000/- stood credited in the name of the third defendant in the books of the firm M/s. Murlidhar Shyam Lal, but it was not clear whether the amount was given as a deposit or as a loan to the firm. It held that the statement of the third defendant 'does not convincingly show that the money was really a deposit with the firm' and her written statement does not show that a charge was created by Shyam Lal for this amount; that her statement does not show that a charge was created over any specific property and that the charge over the property could not have been created orally. It then found that the money was deposited with the firm M/s. Murlidhar Shyam Lal which was not a joint family firm and, therefore, 'any amount due from the firm cannot be realized from the joint family;' that it could be realized from the joint family;' that it could be realized only from the assets of the firm or against its partners; that the firm was dissolved in the year 1955 and Shyam Lal, who allegedly took the money from defendant No. 3, died in the year 1959 and the defendant No. 3 took no steps to realize the amount either when the firm was dissolved or when Shyam Lal died. Lastly, according to the trial court; 'there is no clear-cut proof that the money is due to defendant No. 3 as such no provision can be made. However, defendant No. 3 files a suit for her money and if her suit is decreed then she may realize her money from the property against whom the suit is decreed.'

9. Before the lower appellate court, at the very outset, it was stated by the third defendant alone, vide paper No. 32-Ka (475), that the relief sought in the appeal was that a declaration be made in the appellant's favour that the sum of Rs.

11,000/- deposited with the firm Murlidhar Shyam Lal shall be a first charge on the joint family property and that the appellant did not claim any money decree for the said amount. The controversy in the lower appellate court was confined to the question whether the third defendant was entitled to have a charge for the sum of Rs. 11,000/-declared in her favour on the joint family properties. After negating a legal objection to the maintainability of the appeal, the lower appellate court took into consideration the contention raised on behalf of the third defendant appellant that in a partition suit a provision must be made for the outstanding debts of the family. The lower appellate court observed that if the father or manager of a joint Hindu family firm had taken a loan before the partition, the joint family property may be made liable for payment of such debts at the time of partition, or that provision may be made for the satisfaction of such debts at the time, of partition; and that 'the more important question which has to be seen in the present case is, whether the amount in question is such amount and whether the orinciples laid down in the above noted cases are applicable to the present case.' According to the lower appellate court, the amount must be one taken by the father or the Karta of the joint Hindu family and naturally the family should have been joint at the time of taking the amount; but. in the present case, it was neither the case of the plaintiffnor of the defendant-appellant nor of her husband that there was any joint Hindu family in existence. The lower appellate court found that there was a complete absence of the necessary pleadings, or evidence, by the appellant or her husband in this regard.

10. The lower appellate court then proceeded to examine the question whether the amount of Rs. 11,000/- had been taken by the Karta of the joint Hindu family, and, after referring to Clauses (viii) and (ix) of paragraph 7 of the plaint, and the pleas taken by the defendants in the written statement, it came to the conclusion that, according to the case pleaded by the parties, the defendant-appellant had deposited the sum with the firm Murlidhar Shyam Lal; that it was not alleged by any one of them that it was a joint Hindu family firm; on the other hand, it was alleged that the firm was owned by the defendant No. 1 and the plaintiff's father, and it was not pleaded that the amount was taken by Shyam Lal, and. even if the amount belonged to the appellant, before any provision could be made for it at the time of partition, it was necessary to show that it was deposited with the joint

Hindu family firm. The statement of the defendant-appellant that her father-in-law had demanded the money from her; that she gave Rs. 11,000/- to him and her father-in-law told her that his property could be liable for the amount was not accepted by the lower appellate court in view of the pleading that the amount was deposited with the firm and it was added that there was no pleading or evidence that the firm was a joint family firm, and, if the money was deposited with that firm, and it was not joint Hindu family firm, the members of the joint Hindu family cannot be held liable for it. It then proceeded to confirm the finding of the trial court that the firm Murlidhar Shyam Lal was not a joint Hindu family firm. The lower appellate court also recorded the finding that after the separation of the appellant's husband from the joint family, the remaining members continued joint, or the family continued as joint family thereafter. According to the lower appellate court : 'Thus the case was that there was complete separation though some property remained joint.' The lower appellate court summarised its findings by saying that it was not proved by the appellant that the amount was deposited with the joint Hindu family firm and she was not entitled to get any provision made for its payment in the suit for partition of the joint properties. Having found on this basis that the appeal was liable to be dismissed, the lower appellate court observed that it had proceeded on the assumption that the amount belonged to the appellant and even so she was not entitled to get any relief in view of the aforesaid discussion. It proceeded to further point out that the firm ceased in 1954-55 and Shyam Lal died in 1959 and yet no attempt was made to realise the amount. The lower appellate court then proceeded to hold that even though charge may be created orally, it was not the case of the defendant-appellant that her father-in-law created and charge, she was claiming that charge may be created over the property before the partition. The lower appellate court did not enter into the controversy whether the amount was a loan or deposit and in view of its aforesaid findings dismissed the appeal.

11. Mr. Swami Dayal, the learned counsel for the appellant pressed before me that the money was given to the then Karta of the joint family, namely. Sri Shyam Lal in trust for being kept in deposit, and, on the partition of the last remaining assets of the joint family, the present karta, namely, Sri Madan Lal, defendant No. 1, must account for the same, and if the money was no longer available with him on account of loss in the business activities carried on by them, provision should be

made for recovery of it from the funds of the joint family or its property. In support of this submission, Mr. Swami Dayal invited my pointed attention to Clauses (viii) and (ix) of paragraph 7 of the plaint, wherein it was stated that the dispute related to the 'deposit in trust of a considerable amount by defendant No. 3 in the Firm Messrs Murlidhar Shiamlal, which was owned, managed and worked by defendant No. 1 and the plaintiff's father' and that 'the defendant No. 3 claims that as the amount was deposited by her in Trust, she is entitled to the repayment of her amount before the joint immoveable property is divided amongst the brothers and claim a charge over the property before partition and asserts that before partition is made her first charge should be discharged.' Emphasis was placed by Mr. Swami Dayal on the expression 'deposit in trust'. He then urged that the defendant no. 2, the husband of defendant No. 3, denied his liability for the payment of the amount due to her, on the ground that the amount of Rs. 11,000 was the Stridhart of the third defendant and was deposited by her with the firm Murlidhar Shyam Lal which was managed, worked and owned by the first defendant, and his father, and that he had no interest in the firm and was not liable, in any way, to repay 'the trust amount due to the defendant No. 3'. The third defendant admitted the plaintiff's assertion in paragraph 7, and only added in paragraph 13 of the written statement that she 'deposited in trust a sum of Rs. 11,000/- her Stridhan money with the firm Murlidhar Shyam Lal and it has remained unpaid till now'; and, further in paragraph 14, that she did not make any demand because of the relationship and in paragraph 15 that she has a first charge for repayment of the amount on the joint property and that it is necessary in the event of the decree for partition to make a provision for its repayment. Mr. Swami Dayal then emphasised that the main contesting defendant, namely, Madan Lal defendant No. 1. simply said in reply to Clause (viii) of paragraph 7, that it is not admitted and in reply to Clause (ix), that it is not admitted, and is denied and that the defendant No. 3 is not entitled to have any charge declared over the said property. There was no denial of the case expressly and specifically pleaded by the plaintiff and the third defendant both, that the amount was deposited by the defendant No. 3 in trust with the firm M/s. Murlidhar Shyam Lal and that the firm was owned, managed and worked by defendant No. 1 and the father Shyam Lal. In paragraph 18 of the additional pleas, there was no denial of these allegations. Instead a counter-claim was set up that

the money did not belong to defendant No. 3, and it belonged to the mother. Mr. Swami Dayal urged that, on this state of pleadings the lower appellate court had completely gone off the track in trying to find whether the amount was paid to the joint family or that the joint family had ceased to exist or that the firm, to which the amount was paid, was a firm of partners, and that, therefore, the third defendant was not entitled to recover the amount from the joint family or its assets.

12. Before dealing with the argument, I must state a few facts. It is undisputed in view of the Bahi Khata entries of the firm M/s. Murlidhar Shyam Lal, vide Ext. C-1, that the amount of Rs. 11,000/- was credited in the books of the firm on six dates from Phagun to Kartik of Vikram Sambat 2008 and 2009. The finding that it was a firm of partners, in which the plaintiff and the first defendant Madan Lal along with their father Shyam Lal were partners, is based on a misconstruction of the Exts. A-1 to A-5. Ext. A-1 is the copy of the plaint in Suit No. 386 of 1955 in which M/s. Ganga Dhar Ram Chandra were the plaintiffs who claimed themselves to be a registered firm of partners. The defendants were described as: (1) M/s. Murlidhar Shyam Lal... through Lala Madan Lal one of the partners of the said firm, (2) Shyam Lal son of Murlidhar....Partner (3) Madan Lal son of Sri Shyam Lal ...Partner, (4) Bal Kishun Das son of Sri Shyam Lal partner, and (5) Fhool Chand son of Shyam Lal...partner with the super added description to the effect that 'defendants 2 to 5 are partners of the firm.' The suit was for a loan of recovery of Rs. 1545/- borrowed on a Hundi. The defendants Nos. 1 and 3, namely, the firm M/s. Murlidhar Shyam Lal, and Madhan Lal filed one written statement (Ext. A-2). It was stated in paragraph 10 of that written statement that the defendants Nos. 2 and 3 are the only owners of the firm Murlidhar Shyam Lal. The defendant No. 2 raised an identical plea in paragraph 10 of his written statement (Ext. A-3). The defendant No. 4, namely, the present second defendant, who is the husband of the third defendant in the present case pleaded in paragraph 6 of the additional pleas in his written statement Ext. A-4 that he is 'neither a partner nor a member of the firm and is entirely separate from his father and brothers and is not a member of the family.' Ext. A-5 is the decree in Suit No. 386 of 1955. The decree was passed on the foot of an award. The first term of the award was that 'Sri Bulaqi Das defendant No. 4 separated himself from the Hindu joint family long since. Therefore, he does not come in the picture.' The award given was that the suit be

decreed for recovery of Rs. 1500/-against defendants Nos. 1 to 3 and 5 and Bulaqi Das defendant No. 4 may be exempted and the suit be dismissed against him. The amount was made payable in instalments. All the parties including Bulaqi Das and Madan Lal appeared to have signed the award. I find it impossible to read these documents to mean that the firm M/s. Murlidhar Shyam Lal was a firm of partners. The pleas raised by the defendants in their written statements and the first term of award rather show that the business was of Hindu joint family, from which Bulaqi Das Bansal had separated. They were fully consistent with the position that the firm Murlidhar Shyam Lal was the name in which the Hindu joint family, of which Shyam Lal was the Karta, carried on business. The claim made by Murlidhar and Shyam Lal in their written statement that they alone were the two and the only owners of the firm may have been an attempt to deprive the present plaintiff Phool Chand of his interest of that business of the joint family, but it was surely inconsistent with the case that it was a firm of partners, in which only Madan Lal and Shyam Lal were partners. I am accordingly of the view that the business carried on in the firm name Murlidhar Shyam Lal was the business of the joint family which was being looked after by Shyam Lal and Madan Lal. Bulaqi Das had no interest in the business as he had separated therefrom. Phool Chand the plaintiff did continue to have an interest in that business. The finding of the two courts below that it was a firm of partners is erroneous in law, inasmuch as it is contrary to the case pleaded by the parties and cannot be said to be based on the evidence relied upon in support of it by the two courts below, namely, Exts. A-1 to A-5.

13. The next fact, which must be clarified, is that, although Bulaqi Das Bansal had no interest in the business, it cannot be said that the joint family had come to an end, for partition can be partial both as regards persons and property. The joint family continued between the coparceners other than Bulaqi Das Bansal in respect of the business carried on under the name and style of M/s. Murlidhar Shyam Lal so long as the business continued to be carried on and, even if Phool Chand had no interest in the business, as asserted by Madan Lal and Shyam Lal in their written statements, they did carry on the business as owners and being father and son, and the business being ancestral, it must be deemed to have been carried on by them as coparceners in the absence of any plea or evidence that they were

carrying on it as a firm of the partners. Indeed, the plea in their written statement in Suit No. 386 of 1955 is inconsistent with the finding arrived at by the two courts below that the firm Murlidhar Shyam Lal was a firm of partners. The joint family continued undivided among the father Shyam Lal and his three sons, namely, phool Chand. Madan Lal and Bulaqi Das in respect of a house property. The finding of the lower appellate court that there was no joint family in existence is against the admitted facts of the case. There could be no question of any suit for partition if a joint family did not exist on the date of its institution, and the suit giving rise to the present second appeal is a suit for partition of certain joint family properties.

14. The next question is of the liability for payment of the amount of Rs. 11000/- credited in the books of the firm M/s. Murlidhar Shyam Lal in the name of the third defendant, namely, the appellant Smt. Malti Devi who is the wife of Bulaqi Das. It has been found above that the said firm was not a firm of partners, but Shyam Lal and Madan Lal were undoubtedly, its owners as the members of a coparcenary, and possibly Phool Chand was also a coparcener and owner of the business with them. It is said that the business was closed in 1955 and the father Shyam Lal died in the year 1959. It was alleged in the plaint and also the written statement of the defendant No. 3 that the amount was deposited in trust. The defendant No. 3 pleaded that she did not make any demand because of relationship. The deposit was made in the account books of the business carried on by the joint family. Shyam Lal, the father, could be presumed to have been the Karta. He was indisputably carrying on the business along with the first defendant Madan Lal as owner thereof. Phool Chand the plaintiff does not dispute the liability to share the burden of repayment of that deposit, and possibly, as observed above, he was also a coparcener in the business. Bulaqi Das alone is the person who is a coparcener in the joint family properties to which the suit for partition relates, but was not a coparcener in the business. When I put the matter across to the learned counsel during the course of arguments Bulaqi Das also conceded that his share may also be burdened with the liability to repay the deposit due to his wife.

15. In spite of the delay, the claim for recovery of the deposit does not appear to be barred by time, as the limitation for recovery of a deposit is three years from the

date when the demand is made under Article 22 of the Schedule to the [Limitation Act, 1963](#), which had come into force when the suit had been filed. The limitation under the Indian Limitation Act, 1908, was also the same. According to the defendant-appellant's case, no demand was made at any time before the filing of the suit, and this part of her case has not been controverted by any party. Further, her case was that the amount was deposited in trust. That part of her case has also not been controverted or denied by any of the parties. Therefore, if the deposit was made by Smt. Malti Devi in trust with the joint family, of which her father-in-law was the karta, it can easily be said that the father-in-law occupied a fiduciary relationship and was bound to account for the amount as a trustee without any limitation of time under Section 10 of the Limitation Act. The Karta of the family, who succeeded Shyam Lal in that position, would be under the same liability.

16. Moreover, it was not suggested by any one that the deposit had been repaid. What was pleaded by Madan Lal was that the amount credited in the books of the firm in the name of the third defendant did not really belong to the joint family fund, and in his statement under Order X, Rule 2, C. P. C. he stated that it belonged to the mother of the two brothers. This part of the case has not been accepted by either of the two courts below for want of any evidence in support thereof. The evidence led by Smt. Malti Devi on this point should therefore, be accepted and it must be held that she had deposited the amount. It has been observed by the lower Court that her statement that she had paid the money to her father-in-law was inconsistent with her case in the written statement. That is not so. If the firm Murlidhar Shyam Lal was a joint family firm, as found by me above, and Shyam Lal was the father and eldest male member of the family, he must be presumed to have been the karta. It is obvious that a deposit made with him was a deposit made with the joint family firm of that name and vice versa.

17. There is no dispute about the shares or any other matter as determined by the preliminary decree under appeal. In view of the findings arrived at by me, the defendant-appellant is entitled to require the first defendant Madanlal to account for the deposit of Rs. 11,000/- in the books of firm Murlidhar Shyam Lal. Since there is no dispute about the amount deposited and it has been found that the

amount has not been paid back so far, the shares of the parties can be made liable proportionately for payment of the sum of Rs. 11,000/- to the defendant-appellant.

18. I accordingly allow the appeal and modify the preliminary decree to this extent. However, I leave the parties to bear their own respective costs in this Court.

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