

Kundomal Ganga Ram vs Topamal Chotamal on 10 February, 1953

Equivalent citations: AIR1953ALL710, AIR 1953 ALLAHABAD 710

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

V. Bhargava, J.

1. This is a judgment-debtor's appeal arising out of proceedings for execution of a simple money decree for a sum of Rs. 12,140/1/-. The parties to this appeal were original residents of Sind. Some time in 1947, the decree-holder filed Suit No. 533 of 1947 on the original side of the Chief Court of Sind for recovery of money against Firm Kundomal Ganga Ram, and it was alleged that the appellant, Kundomal Ganga Ram, was one of the partners of that firm. In addition, there was an allegation that his four brothers were also partners in the firm and that there was one other partner known as Kodumal. The firm was sued through Kodumal as partner and the service of the summons in the suit was effected on Kodumal. On 8-11-1948, the Chief Court of Sind decreed the plaintiff's suit.

Admittedly, by the time the decree was passed in the Chief Court of Sind, the partition of India had come into existence and the decree was passed by a Court in Pakistan which was naturally, at that time a foreign Court. On the basis of the judgment in that suit, the decree-holder filed another suit (No. 205 of 1949) in the Court of the Civil Judge of Agra. In this suit, he impleaded not only Firm Kundomal Ganga Ram as defendant but he also impleaded Kundomal Ganga Ram as well as his four brothers as defendants. These five brothers were defendants 2 to 6 and the firm was defendant 1. The firm was again sued through Kodumal as partner though, in the plaint, it was requested that the service be effected on the firm by serving the summons on Kodumal. The suit was decreed by the learned Civil Judge of Agra against Firm Kundomal Ganga Ram in the following terms:

"I decree the plaintiff's suit for Rs. 12,140/1/-with costs and future and 'pendente lite' interest at 3 per cent, against defendant 1 and such property of the firm M/S Kundomal Gangaram as may be found in the hands of defendants 2 to 6."

It is this decree which was sought to be executed by attachment of certain properties which principally consisted of a shop and the assets inside that shop at Agra. Defendants 2 to 6 filed an objection that this property was not liable to attachment and sale in execution of the decree as the shop and the assets were not the assets of Firm Kundomal Ganga Ram but were the personal

property of the joint family property of defendants 2 to 6. The learned Judge of the lower Court held that the assets sought to be attached were not the assets of the firm but that the share of Kundomal Ganga Ram, who was defendant 2 in the suit, in the family property was liable to attachment and sale in execution of the decree under Order 21, Rule 50, Civil P. C. The shares of the other four brothers of Kundomal Ganga Ram were held to be not liable to the decree. Kundomal Ganga Ram has, therefore, appealed against the finding which affects his share in the property where as a cross-objection has been filed by the decree-holder with regard to the shares of the other four brothers in the property.

2. We may first deal with the cross-objection as it can be disposed of on one very short point. The appeal was filed by Kundomal Ganga Ram and the only respondent in the appeal was the decree-holder, Topamal Chhotamal. The four brothers of Kundomal Ganga Ram were not impleaded as parties in the appeal. The cross-objection could, therefore, be only directed against Kundomal Ganga Ram. His four brothers were not impleaded as parties in the cross-objection either. Since the cross-objection is directed against their shares in the property and as they have not been made parties to the cross-objection, the cross-objection cannot be entertained and must be dismissed.

3. So far as the appeal is concerned, learned counsel for the appellant has urged that, in this case, the lower Court was wrong in applying the provisions of Rule 50 of Order 21, Civil P. C., because when the decree was passed, there was a specific direction by the Court passing the decree that only the assets of the firm in the hands of the appellant or his brothers were liable to the decretal amount and it refused to grant the prayer which had been made in the plaint that there should be a decree for personal liability against the appellant and his brothers. Learned counsel for the respondent has urged that even though there was such a direction in the decree, the executing Court was entitled to proceed under Order 21, Rule 50 of the Code against properties of the partners who might satisfy the requirements of Clauses (b) and (c) of Sub-rule (1) of Rule 50.

We are unable to accept this contention. It is not for the executing Court to vary the terms of the decree. The function of the executing Court is to execute the decree as it stands. The decree is specifically against the firm itself and the assets of the firm in the hands of the appellant and his brothers. During the suit, there was a specific claim by the decree-holder that the decree should be against the appellant and his brothers personally. This plea was fully considered and decided against the decree-holder. The remedy of proceeding against the assets "of the partners under Rule 50 of Order 21, Civil P. C. can only be permitted in cases where the decree is against a firm and the Court passing the decree has not imposed any limitations on the decree which would govern the executing Court when executing the decree.

If any limitations are placed on the decree itself, the executing Court is bound by them and, to that extent, the powers of the executing Court to proceed under the general provisions of the Code become limited. It may also be noticed that, by using the words 'may execute' in Rule 50 of Order 21, Civil P. C., the Court is only empowered to proceed against the assets of a partner under certain circumstances. When the rule merely empowers the Court and does not enjoin on it to proceed against that property, the Court can only proceed against that property in appropriate cases. In a

case where the decree itself prohibits proceedings against that property, it is obvious that the executing Court can never be justified in proceeding against it.

4. Learned counsel for the respondent tried to support the order of the lower Court on an alternative ground. His contention was that the property sought to be attached and sold consisted of the assets of the partnership firm, and, therefore, the decree-holder-respondent was, in any case, entitled to execute his decree against that property. The learned Judge of the lower Court did not enter into any detailed discussion on this question. His judgment has, however, proceeded on the basis that, in his view, the property sought to be attached and sold did not consist of the assets of the partnership firm but consisted of the property of the appellant and his brothers which could not be held to be the assets of the firm in their hands. Learned counsel has not been able to point out any material on the file of the execution case or in the judgment passed in the suit which could justify our differing from the view taken by the lower Court.

On the execution file, there is an affidavit filed by one of the brothers of Kundomal Ganga Ram viz., Khem Chand. In this affidavit, Khem Chand has explained how he and his brothers came into possession of the property now sought to be attached. He has stated that his father had left property in Karachi which was mostly his self-acquired property. This property devolved on the five brothers. In addition, there was some property belonging to his mother, Shrimati Asan Bai. Further, there was some ancestral zamindari property. The house property, which was the self-acquired property of the father, and the property of the mother were sold when the appellant and his brothers migrated to Agra from Karachi. The zamindari property which was the ancestral property was exchanged for land in India. Out of the assets realised from the sale of the property in Karachi, property was acquired at Agra and a shop was started. These facts given in the affidavit show that the property, which is now sought to be attached, had nothing to do at all with the assets of the firm.

The affidavit goes on to relate that Kundomal appellant, by that time, started a petty enterprise in the name of Kundomal Ganga Ram which could hardly carry on any business worth the name and died out in its infancy owing to the creation of Pakistan leaving no assets whatsoever. Besides this affidavit, no other evidence was advanced before the lower Court which could tend to show that the property in suit represented the assets of the firm or had been acquired out of the assets of the firm. Learned counsel for the respondent urged that, in case of trading families there would be presumption that the property of the joint Hindu family is not separate from the assets of the ancestral business firm of the family. This proposition of law has no reference at all to the facts of the case before us. In this case, it was nowhere alleged that the appellant and his brothers were members of a trading family or that they had any ancestral business. There is, therefore, no presumption that the property belonging to the family or to the father of the appellant, in any way represented the assets of the firm. Consequently this argument also fails.

5. As a result, the appeal is allowed with costs, the order passed by the lower Court, directing execution to proceed against one-fifth share in the property belonging to Kundomal Ganga Ram, is set aside and the objection of the objector is allowed. The cross-objection is dismissed with costs.