Panchaiti Akhara vs Babu Nem Chandra And Ors. on 17 March, 1953

Equivalent citations: AIR1953ALL657, AIR 1953 ALLAHABAD 657

JUDGMENT

Chaturvedi, J.

1. The present appeal by a creditor, Sri Panchaiti Akhara, Kydganj, Allahabad arises out of proceedings under the Encumbered Estates Act. In order to appreciate the points that arise in this appeal, it would be necessary to give a few facts.

2. On 13-4-1930, Mutsaddi Lal, father of the respondents Nos. 1 and 2, and himself arrayed as respondent No. 11 in the appeal, executed a deed of simple mortgage in favour of the appellant. The mortgage deed was for a sum of Rs. 20,000/-, and by means of the deed, property in village Arai and a plot of land situate on the Zero Road, Allahabad, were mortgaged. In the year 1932, the two sons of Mutsaddi Lal brought a suit for partition of their shares against their father and arrayed the appellant also as a defendant in the suit. On 23-1-1933, the appellant filed a written statement resisting the suit for partition, and claiming that the mortgage executed by Mutsaddi Lal in favour of the appellant was binding on the sons also as it was executed in discharge of antecedent debts and was a valid and binding transaction. On 7-9-1933, the suit was compromised between the father and the sons and the village Arai was allotted to the share of the sons and the plot of land on the Zero Road was allotted to the wife of Mutsaddi Lal. The appellant was exempted from the suit and it was dismissed against the appellant with costs.

This preliminary decree for partition was made final on 26-10-1933. The U. P. Encumbered Estates Act came into force with effect from 1-4-1935, and on 9-10-1935, an application was filed by Mutsaddi Lal alone, under Section 4, Encumbered Estates Act, which was in due course transmitted to the Special Judge, Allahabad. On 19-11-1935, Mutsaddi Lal filed his written statement under Section 8 of the Act and alleged that as a result of the partition he was allotted a share in certain other properties, which were not mortgaged to the appellant, and he showed those properties only as the properties belonging to him. The appellant filed his written statement on 12-3-1936, and the allegations made by him were that the alleged partition effected by means of the compromise decree was a fraudulent and collusive transaction and it was not binding upon the appellant. It was further pleaded that the property which was mortgaged to the appellant was Mutsaddi Lal's self-acquired property and, as Mutsaddi Lal belonged to the Jain Community, he was absolute owner of the property. As regards the mortgage, it was alleged that the mortgage was executed for legal necessity and for the payment of antecedent debts and it was a valid and binding transaction.

3. After the written statements had been filed, the entire properties, including the properties which had been allotted to the shares of the sons of Mutsaddi Lal and his wife, were all notified in the Government Gazette under Section 11 of the Act. After this publication in the gazette and within the time allowed by law, objections were filed under Section 11 by the sons, and also by the wife of Mutsaddi Lal claiming that they were the owners of the properties allotted to them by the compromise partition decree of 7-9-1933; and that the properties were not liable to attachment, sale or mortgage in satisfaction of the debts of Mutsaddi Lal. It was also pleaded that the said partition was valid and that the mortgage executed in favour of the appellant had not been executed for any valid necessity. The appellant contested the claim of the sons and of the wife and the learned Special Judge dismissed the objections. He held that the mortgage deed executed by Mutsaddi Lal in favour of the appellant was executed for payment of the antecedent debts of Mutsaddi Lal which had actually been satisfied out of the consideration received under the mortgage. The deed was held to be binding on the sons as under the Hindu law the pre-partition debts of the father continued to be binding on the sons even after the partition. He held that the property in village Arai and the plot of land on the Zero Road were liable to pay the debt under the mortgage in favour of the appellant.

4. The two sons of Mufsaddi Lal then went up in appeal from this order. The wife of Mutsaddi Lal had died during the pendency of the case in the Court of the Special Judge and it was alleged that the plot of land on the Zero Road was inherited by Mutsaddi Lal. The appeal came up for hearing before the learned District Judge on 19-5-1943. The learned District Judge held that it was true that the pre-partition debts were not affected by any partition between the members of the joint family and the mortgaged property continued to remain liable for the payment of the mortgage debt, but the property after partition could not be described as being liable to attachment, sale or mortgage in the satisfaction of the debts of the applicant and, the property being no longer in the hands of Mutsaddi Lal, the appellant creditor could proceed against that property only in the manner provided by the Encumbered Estates Act. The learned Judge pointed out that the provisions of Section 9, Sub-sections (4) and (5), had to be followed. He was of the opinion that the decision of the point where the mortgage deed was executed for legal necessity or for the payment of antecedent debts did not arise for decision at that stage. That question was to be considered only while passing the decrees under Section 14. He consequently allowed the appeal and declared that the properties in dispute were not liable to attachment, sale or mortgage in satisfaction of the debts of Mutsaddi Lal. The creditor Sri Panchaiti Akhara has now come up in second appeal to this Court.

5. The learned counsel appearing for the appellant has raised two points in the appeal. His first contention is that the appellant had asserted in his written statement that the partition was a fraudulent and collusive one and, as such, it was not binding on the appellant; but this question had not been determined by any of the courts below. His next contention is that under Section 11, U. P. Encumbered Estates Act the court had only to see whether the appellant's debt was recoverable from the property, and it made no difference whether the property at the time stood in the hands of the sons or the wife or any third person. For this contention the learned counsel relies mainly on the wordings of Section 11, Sub-section (2) of the Act.

6. The first point raised by the learned counsel need not detain us because it appears that the appellant had not pursued his allegation that the partition effected by the compromise decree was a

fraudulent and collusive transaction. There is no mention of this point in the judgment of the first court; and no evidence appears to have been tendered either, to prove that the father continued in possession of the property even after the partition, and the partition was not acted upon. Before the lower appellate court, it appears that the point was argued and the finding of the learned Judge on the point is that there was not sufficient material on the record to justify the conclusion that the partition decree was a fraudulent one. This finding is a finding of fact and, in our opinion, it is further justified on the evidence on the record. It is true that the appellant was first made a party to the partition suit and was subsequently exempted. But this does not mean that the remaining parties to the suit did not intend to act upon it, or that it was not a final and binding partition between them. It may be that in that suit they decided not to have the question of the legal necessity of the mortgage determined and, therefore, exempted the appellant from the suit. But there is nothing to show that they did not" mean to effect a partition of the properties and treat themselves henceforth as the separate and exclusive owners of the properties allotted to them in the partition. We, therefore, find no force in this contention.

7. Great stress was laid by the learned counsel on the other point raised by him, namely, that, irrespective of the present ownership of the property, what the court should have seen was whether it was liable for the payment of the debt of the appellant. He urged that the decision of the learned Special Judge was correct on the point. His submission was that there were three types of cases which might arise before a Special Judge One was where the debt had been contracted by the father but the sons were under a pious obligation to discharge the debt. The second was where the debt had been contracted by the Karta as manager of a joint Hindu family and the question was whether the other members of the family were also liable for the payment of the debt, and the third was the case where there were ordinary joint debtors with no question of coparcenary between them. According to the learned counsel, in the first case, the learned Special Judge should decide, under Section 11, whether the property notified in the gazette was liable for the payment of the debts of the landlord. He says that in a case like this neither the property is to be divided nor the debts are to be apportioned between the father and the son; and the entire property, in spite of the partition, must be treated to be the property which is liable for the payment of the pre-partition debts of the father which the sons are bound to pay under the Hindu law. For this contention the learned counsel relied on the wordings of Sub-section (2) of Section 11, and contended that the section nowhere provides that the Special Judge should determine which property belongs to the landlord and which belongs to the others; all that the Special Judge is required to see is which property is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant.

In support of his contention the learned counsel relied on a case reported in -- 'Hari Shanker v. Gulab Shanker', AIR 1948 All 448 (A). In this case an objection by the son was filed after the Special Judge had decided the case and had sent the papers to the Sub-Divisional Officer under Section 19 of the Act. The son claimed a one-fifth share in the property, and the Special Judge dismissed the claim on the ground that it was not mentioned in the objection when the son was born and why the application was not made earlier. The learned Judges of this Court agreed with the learned Special Judge that the claim was correctly dismissed on the grounds mentioned by the learned Special Judge. But the learned Judges added a further ground and they remarked :

> "The Special Judge is not called upon to determine the share of the claimant in the property and that of the landlord applicant. What the Special Judge has to decide is whether any part of the property is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. These words were used to cover cases under the Hindu law where on account of the indebtedness of the father, the son's share could also be sold."

This was not a case where any partition had been alleged between the father and the son, nor was it known whether the son had even been born on the date that the notification was published in the gazette under Section 11 of the Act. The position, therefore, was quite different from the position in the present case. In the present case, there has been a partition effected by means of a decree of court, there is no longer any joint family consisting of the father and the sons, and the property is at present owned by the sons, who have not joined in the application and are actually separate from their father.

7a. While considering this point it would far necessary to refer to a number of provisions of the Encumbered Estates Act. Under Section 8(1)(b) and (c) the landlord applicant is required to give the nature and extent of the "landlord's" proprietary rights in land and also of his other property which is liable to attachment and sale under Section 60, Civil P. C. This section does not require the landlord to give a list of all the properties which are liable for the payment of the debts contracted by him, even though they did not on the date of the written statement belong to him. What these clauses require is that he is to specify the nature and extent of his proprietary rights in land, and also of his other properties which are liable to attachment and sale under Section 60, Civil P. C.

8. Section 9 requires the Special Judge to publish a notice in the gazette calling upon all persons having claims in respect of private debts against the 'person or the property' of the landlord to file written statements of their claims.

9. Section 10 requires every claimant referred to in Section 9 to state, so far as they are known to or can be ascertained by him, the nature and extent of the 'landlord's' proprietary rights in land and the nature and extent, if any, of the 'landlord's' property other than proprietary rights in land.

10. Under Section 11(1) the Special Judge is required to publish a notice specifying the property mentioned by the applicant under Section 8 or by any claimant under Section 10. We have already, seen that these properties which are to be mentioned under Section 8 or under Section 10 are the landlords' proprietary rights in land and his other properties excluding those which are exempt from attachment, sale or mortgage under Section 60, Civil P. C. Under Sub-section (2) of Section 11 a claim may be preferred respecting the property mentioned in the notice and the Special Judge is required to determine whether the property specified in the claim is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. In our opinion, the words "liable to attachment, sale or mortgage" refer to a similar expression used in Section 8(1)(c). The Special Judge is required to determine only that property of the landlord which is liable to attachment, sale or mortgage in satisfaction of his debts. Obviously Sub-section (2) refers only to those properties which have been spoken of in Sub-section (1) as having been notified under Section 8 or Section 10,

and we have already seen that the written statements filed under Section 8 or under Section 10(1) are to be confined to the properties belonging to the landlord. A property which does not belong to the landlord is not to be mentioned under Section 8 or Section 10(1) and, therefore, does not come under Section 11(1) at all. Whatever doubts there might have been because of the wordings of Sub-section (2) of Section 11 are removed by a reference to the above sections and also to the subsequent provisions of the Act which deal with the liquidation of the debts of the landlords,

11. under Section 24(1) the Collector is directed first to realise the value of such of the 'debtor's property' other than proprietary rights in land, as shall have been reported by the Special Judge under the provisions of Sub-section (2) of Section 19 to be liable to attachment or sale. Under this section the Collector is authorised to deal with such of the debtor's property as has been reported by the Special Judge to be liable to attachment and sole. In other words, the property which the Collector is entitled to deal with under Section 24 has to be the debtor's property and it should further be such as is liable to attachment or sale, that is, the property should not be exempt from attachment or sale under the Civil Procedure Code or some other provision of law. But it has to be the debtor's property all the same. In Chapter V of the Act the "landlord" has been spoken of as the "debtor" and not as the landlord. But, in our opinion, the word "debtor" has been used in the same sense as the "landlord" in the previous Chapters of this Act. Section 26 of the Act similarly speaks of the debtor's property.

12. We may further point out that under Section 11, Sub-section (2), the Special Judge is only required to adjudicate concerning the property which is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. In these proceedings the Special Judge is interested only in the debts of the applicant, and a provision has separately been made for the apportionment of joint debts.

13. In view of what we have said above, we are of the opinion that the Special Judge under Section 11 (2) is required to determine only with respect to the property of the landlord, or any part thereof, whether it is liable to attachment, sale or mortgage in satisfaction of his debts. In case the property at the time belongs to somebody else, the Special Judge should declare the property as belonging to the claimant and the question whether that property is also liable to attachment or sale does not fall for consideration under Section 11 at all. That question has to be determined by the Special Judge under Sub-sections (4) and (5) of Section 9 of the Act.

14. The view expressed by us above is supported by a decision of this Court reported in -- 'Pirya Shankar v. Radhey Shiam', AIR 1946 All 109 (B). In this case the father had contracted a debt before partition and a decree had been passed against him alone after partition. In execution of that decree the decree-holder sought to put to sale the share of separated son in the property which was previously joint family property of the father and the son. The learned Judges held that the creditor could not execute the decree against the son which had been passed against the father alone after the partition. In case he wanted to recover the money from the property allotted to the son, he ought to bring a separate suit against the son; and in case the suit was decreed, he could then and then alone execute the decree against the son. This case is an authority for the proposition that the property of the sons cannot be proceeded against simply because the debt contracted by the father

was of a period prior to the partition. A decree has to be obtained before the sons' property can be proceeded against.

15. Sub-section (5) of Section 9 covers a case of joint debtors; and would, therefore, be applicable to the case where the sons are also liable for the payment of the debt in spite of the partition. They cease, after partition, to be members of a joint Hindu family and become joint debtors with the father. In such a case, the Special Judge is required to determine the amount of the joint debt which is due by the applicants and that due by those who have not applied. The provision of the Encumbered Estates Act, therefore, which applies to the present case is Section 9 (5).

16. We might also refer to a Full Bench case of this Court reported in -- 'Bala Din v. Mst. Bam Piaray', AIR 1952 All 977 (C). The facts Of this case were different, but the Full Bench by a majority decision held that there was no power conferred by the provisions of the Encumbered Estates Act on a Special Judge to include the property of a third person in the list of the property of the landlord debtor.

17. An unreported case decided by a Division Bench of this Court on 22-11-1949, -- 'F. A. No. 273 of 1944, Manmohan Das v. Sat Narain Prasad'. (D) appears to be on all fours with the present case. In that case the debts were contracted by one Sat Narain Prasad when he was the manager and Karta of the joint family which consisted of his five sons and one nephew. Subsequently it was alleged that these other members were dissatisfied with the Karta's management and the matter was referred to arbitration. The arbitrator gave an award dividing the properties between the different members of the family and the award was subsequently made a rule of court. Sat, Narain Prasad subsequently applied under Section 4 of the Encumbered Estates Act and a creditor had all these properties notified under Section 10 of the Act. One objection was filed by the sons, another by the nephew, and a third by the widow of a deceased brother of Sat Narain Prasad. This award was taken to be a valid and binding award, but the contention of the creditor was that, as his debt was a pre-partition debt, therefore, all the properties which had been subsequently partitioned should be shown under Section 11 as liable to be mortgaged or sold in satisfaction of his debts. The Division Bench of this Court repelled the creditor's contention and observed that the other properties did not belong to Sat Narain Prasad and were, therefore, rightly not shown by him in his written statement.

The learned Judges then observed as follows:

> "It may be that Sat Narain Prasad having incurred debts in his capacity as manager of the joint Hindu family at a time when the family was joint, the creditors are entitled to enforce their decrees and realise debts from the entire joint family property. We are not concerned with that matter in the present proceedings.
>
> That may have to be investigated in proceedings which Lala Manmohan Das or any other creditor may take under Section 9 of the Encumbered Estates Act. For proceedings under Section 11 of the Act, it must be held that Sat Narain Prasad is the owner only of such properties as were allotted to him under the award and we, therefore, hold that the Special Judge was right in allowing the objections of the

various objectors and in rejecting the contention of Lala Manmohan Das (creditor)."

18. The learned District Judge has taken the same view as in the case cited above and, in our opinion, he has arrived at a correct conclusion.

19. The objections filed by the sons have to be allowed, and the property which has been allotted to them on partition has to be taken out of the proceedings, under the Encumbered Estates Act, in so far as the attachment, sale or mortgage of the properties under the Encumbered Estates Act is concerned. These properties should not be notified to the Collector as the properties of the landlord under Section 19 (2) of the Act because the objections under Section 11 by the sons having succeeded, the properties have gone out of the liquidation proceedings which can be taken by the Collector under the Encumbered Estates Act. The objections filed by the sons under Section 11 are allowed, and the Special Judge will now proceed to pass decrees under Section 14 of the Act. While doing so, he will also consider what is the amount which the landlord applicant, Mutsaddi Lal, is liable to pay under the mortgage. We might mention here that the mortgage is dated 13-4-1930, and the application under Section 4 was filed by Mutsaddi Lal within six years of this date, namely, on 9-10-1935. The personal liability of Mutsaddi Lal, therefore, had not become barred by time and Mutsaddi Lal was liable for the payment of a part of this debt. The Special Judge will determine what amount Mutsaddi Lal was liable to pay on the date of the application, and also the amount payable by the sons. He will make the sons also parties to the proceedings, in case they have not already been made parties. The Special Judge shall then proceed under the provisions of Sub-section (5) of Section 9 of the Act to determine the respective liabilities of the sons and the landlord applicant, Mutsaddi Lal, treating them as joint debtors,

20. With these observations we affirm the decree of the lower appellate court and dismiss the appeal with costs.