(1950) 03 OHC CK 0004

In the Orissa High Court

Case No : Misc. Appeal No. 66 of 1947

Maturi Mall and Another APPELLANT

Vs

Bhagaban Das Purna Mall and Another RESPONDENT

Date of Decision : 02-03-1950

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 50(2), Order 30 Rule 10

Citation : AIR 1950 Ori 189 : (1950) 16 CLT 136

Hon'ble Judges : Ray, C.J;Panigrahi, J

Bench : Division Bench

Advocate : H. Mohapatra and R.N. Sinha, for the Appellant; N. Mukherji, for the Respondent

Final Decision : Allowed

Judgement

Panigrahi, J.—This appeal is directed against the order of the District Judge, Cuttack, permitting the decree-holder to implead the present appellants as judgment-debtors under order 21, Rule 60 (s), Civil P. C. The decree-holder obtained his decree in Original Suit no. 18/193 of 1932 31 in the Court of the Munsif against Messrs. Biss-warlali Kishori Das alias Biseswarlal Kishorilal alleged to be a firm of Commission Agents. The decree was passed on 24th May 1933 and affirmed in appeal on 19th September 1933 and execution was taken out against the judgment-debtor in the year 1935 but it was unsuccessful. A second execution petition was filed on 28th July 1938 in execution case no. 333 of 1938, in which the judgment-debtor was described as Biseswarlal Kishorilal, Firm, Proprietor Mangturam Kishorilal, Mangturam appeared and objected to the execution of the decree against him on the ground that he was not a partner of the firm. The decree-holder, however, did not press his execution and allowed it to be dismissed on 19th November 1933, and the miscellaneous case filed by Mangturam was allowed. The decree holder thereafter started a third execution case in Execution case so. 222 of 1941 and described the judgment-debtor this time as Kishorilal Mangturam Kishorilal Firm and impleaded the present appellants as the legal representatives of the judgment-debtors. This execution case was also dismissed on 11th November 1941. A fourth Execution case No. 184 of 1944 was thereafter started on 19th August 1944 in which the judgment-debtor was described as Biseswarlal Maegturam Kishorilal, Firm, Proprietors Maturi Mall and Jogeswar, the present appellants. This execution case was also dismissed and the Miscellaneous case no. 161 of 1944 filed by the appellants as objectors was consequently not pressed. Then the fifth execution case NO . 229 of 1946 was started against the present appellants, who started a Miscellaneous case NO, 147 of 1946. This miscellaneous case was allowed by the executing Court on 22nd January 1946, who absolved the appellants from any liability under the decree sought to be executed. The decree holder thereafter filed, on 4th January 1946, a petition under Order 21, Rule 60, Civil P. C. for leave to execute the decree against the appellants as undisclosed partners of the judgment-debtor firm of Biseswarlal Kishorilal.

2. The undisputed facts are that Biaeswarlal had a son, Mangturam. The appellants are the grandsons of Mangturam. Kishorilal, their father is the son of Mangturam. Appellant 2, Jogeswar, is still a minor and was not born at the time of the passing of the decree. Kishorilal died a few years ago while Biseswarlal is said to have died some forty years ago. It is also said that the firm, Biseawarlal Kiehorilal was dissolved about 14 years ago when appellants Manturi Mall was a minor and appellant Jogeswar has not even been born. The appellants case is that the judgment debtor firm of Biseswarlal Kishorilal was not joint Hindu family business; that they did not inherit any property belonging to the judgment-debtor firm; and that the decree is now barred by limitation. They further allege that the firm was started by Kishorilal himself and that it existed for only about a year. The case of the decree-holder in the lower Courts was that the firm Biseswarlal Kishorilal was the appellants'' ancestral joint family business but this contention has been negatived by both the Courts below. It his also been further found that the members of the joint family were not partners of this firm so as to make them liable under Order 21, Rule 50, Civil P. C.

3. On behalf of the appellants, it is contended that the decree-holder''s remedy to proceed against them, as members of a joint Hindu family, is now barred as the order passed by the Court on 22nd January 1946 in Miscellaneous Case no. 147 of 1945 has become final. Nor, it is contended, can the appellants be made liable as undisclosed partners of the firm as the decree, holder did not at any time since the passing of the decree, execute the decree against the firm as such. It is, therefore, argued that the decree has become barred by limitation.

4. Mr. Mukherji appearing for the respondent-decree-holder urges that Order 21, Rule 60 applies to a joint Hindu family, trading as a firm, as well as to a partnership firm and that an enquiry can be started against the appellants as ''undisclosed partners'' of the judgment debtor firm and their liability can be ascertained under Order 21, Rule 50, Sub-rule (a), Civil P. C. Order 31, Rule 50 prescribes the procedure to be adopted for executing a decree passed against a

firm. Sub-rule(2) of R. 50 enables the decree-holder to apply to the Court for leave to execute the decree against those who had not appeared in the suit as partners, so that the Court may try and determine the issue whether such persons were partners and whether they can be made liable for the decree against the firm. The procedure for the filing of suits by and against firms is laid down in Order 30, Civil P. C. Rule 10 of Order 30 lays down that a suit against a person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name. Both Order 30 and Order 21, Rule 60, refer to firms and do not in terms apply to a joint Hindu family business concern. Persons who have entered into partnership with one another are called individually as partners and collectively known as firm according to Section 4, Partnership Act. Section 5 of that Act lays down that the relation of partnership arises from contract and not from status, and in particular members of a Hindu undivided family carrying on family business are not, as such, partners in such business. The language of Rule 60 of Order 21, Civil P. C. appears to contemplate contractual partnership in so far as it refers to the partnership property and service of summons on individual partners. It may be that a Hindu joint family may carry on trade in an assumed name but to me it appears that it would be unduly stretching the language of Rule 50 of Order 21, Civil P. C. to attribute to such a family concern the characteristics of a partnership firm. The family business is represented by a ''karta'' who can sue and be sued as such and make the entire family liable. There is no property of the partnership as such, as distinct from the property of the family; nor is the liability of the members of a joint family limited to their shares in the family. There is no question of dividing the profits and losses of the partnership in a joint Hindu family business, according to the shares held by each individual member. On a plain reading of the section, therefore, I am convinced that Order 21, Rule 50 has no application to the case of a joint family concern carrying on business in an assumed name and that its application must be limited to oases of contractual partnerships only.

5. Mr. Mukherji, however, has invited oar attention to certain decisions of the Patna High Court which apparently lend support to his contention that Order 31, Rule 60 applies to the case of a Hindu joint family concern. The first case relied upon by him is Alekh Chandra v. Krishnachandra, reported in 7 C. L. T. 21: A. I. R. 1941 Fat. 596 where Fazl Ali J. (as he then was) held that Rule 10 of Order 30, Civil P. C. would apply to a Hindu joint family trading as a firm, as such a family may be regarded as a legal person. But now here in that judgment has it been laid down that Sub-rule (2) of Rule 50 of Order 21 can be invoked so as to enable the Court to hold an enquiry into the liability the members of a Hindu joint family as undisclosed partners. In that particular case it had been established that the firm of Padan Sahu & Co., against whom a decree had been obtained was a compendious name for all the members of the family and that the decree was against the family as such. It was also found that the family acted through one Natabar Sahu and that, on his death, his sons were

substituted in the execution proceedings without any objection. Bhramarabar Sihu and Achhyut Sahu who preferred appeals in that case, had themselves held out to the decree-holder that Natabar represented them in their dealings and that they were principals of the firm of Padan Sahu & Co. In these circumstances it was held that the judgment-debtor firm included the appellants also and that they were liable for the decree obtained against the firm, whom they represented. This case, however, is no authority for the point which has been agitated before us that Sub-rule (2) of Rule 50 of Order 21, would entitle a Court to enquire into the liability of undiviled members of a Hindu family doing business under an assumed name. Reliance was also placed on Satchidanand Vs. Prayag Sah-Saheb Ram, but in that case it was assumed that Rule 60 of Order 2: would apply and the point was not expressly raised or decided. Another case of the Patna High Court on which reliance was placed is Nathuni Prasad and Others Vs. Firm Radha Kishun Dutt Rai, . In that case, however, it was expressly found that the firm of Ayodhya Ram was not a joint family business; and the further observation of Chatterji J. that assuming that it was joint family concern there was no reason why the provisions of Order 21, Rule 60 should not be applied, is merely an obiter dictum. In my judgment, the word ''firm,'' used in Order 21, Rule 50, Civil P. C. applies to a decree passed against a contractual firm and not to a decree passed against a joint family business.

6. In the case before ns, the decree was obtained against the firm of Biaeswarlal but the execution was levied against the joint family property of the appellants. In none of the previous executions was the property of the partnership--if there was any such property sought to be proceeded against. Execution of the decree against the partnership property would consequently be barred by time as no step-in-aid had been taken within three years of the present execution. Mr. Makherji, however, relies upon Order 30, Rule 10, Civil P. C., and contends that the name of the judgment-debtor is the assumed name of a legal person, viz., a Hindu joint family. Order 30 prescribes how suits by or against firms have to be instituted and Rule 1 of that Order contemplates suits by or against two or more persons carrying on business in the name of the firm. Order 30, Rule 10 however contemplates suits against a single individual carrying on business in a name or style other than his own. If the decree-holder wanted to make more than one person liable under the decree, Rule 10 would hardly be applicable to such a case, The entire Order 30, Civil F. C. is almost a verbatim reproduction of o. 48 (A) of the English Rule and Rule 10 of Order 30 is modelled on the corresponding provision contained in Rule 11 of order 48 (A). It has been held in England that that rule applies to a single individual who carries on business under an assumed or trading name : See St. Gobain Chauny & Cirey Co v. Soyer-- Mann''s Agency (1893) 2 Q. B. 96 and Maciver v. G. & J. Burns (1896) 2 ch. 630: 64 L. J. ch. 681. I can find no justification for departing from the English practice and would hold that Order 30, Rule 10 applies only to a case of a suit against a single person carrying on business in an assumed name. I am, therefore, unable to accept the contention of Mr. Mukherji that the judgment-debtor''s name was an

assumed name on behalf of more than one individual carrying on business jointly. If it be assumed that the appellants were in existence and were members of the firm, then it must be held that there is no decree against them as such and Rule 10 of Order 80 cannot be called in aid.

7. I am satisfied that there was no decree against anybody other than Biseswarlal Kishorilal, assuming that that firm represented a single individual. The decree not having been executed against the assets of that firm is now barred by limitation. Alternatively, even if it be held that the judgment debtor represented a joint Hindu family business as the "Karta," the order passed on 32nd January 1946 by the Court in Miscellaneous case No, 147 of 1945 having become final the decree is no longer available for execution. In either view the decree baa now become in executable. No leave under Order 31, Rule 50 can therefore be granted to the decree-holder. The order of the learned District Judge, under appeal, is set aside and this appeal is allowed with costs.

Ray, C.J.

8. I agree.

