(1974) 09 OHC CK 0001

In the Orissa High Court

Case No : A.H.O. No. 12 of 1973

Sundar Sahu APPELLANT

Vs

Jogeswar Das RESPONDENT

Date of Decision : 30-09-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 52

Citation : AIR 1975 Ori 175 : (1974) 40 CLT 1273

Hon'ble Judges : S.K. Ray, Acting C.J.;K.B. Panda, J

Bench : Division Bench

Advocate : R.N. Sihna and S.N. Sinha, for the Appellant; B.K. Pal, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Ray, Actg. C.J.

1. This appeal is by the judgment-debtor claimant in Execution Case No. 102 of 1960 from the decision of a learned Single Judge of this court dated 1-1-1973 preferred under clause 10 of the Letters Patent read with Article 12 of the Orissa High Court''s Order, 1948.

2. This litigation has a chequered background which it is necessary here to recount in order to appreciate the points involved.

Chamar, Sundar and Bhikari were three brothers. Sundar had four sons, one of whom was Makhan. Chamar incurred a loan from one Jogeswar, the decree-holder-respondent in this appeal, and died without repaying the same. Before his death he filed a partition suit (T. S. No. 28 of 1950) in the court of the Subordinate Judge, Sambalpur, claiming his share against his two brothers, namely, Sundar and Bhikari and their sons. A preliminary decree was passed in the said suit on 18-3-1955 in which Chamar''s share was determined to be one-third. Likewise the share of Sundar and his sons as one unit and the share of Bhikari and his sons as another unit were determined at one-third each.

Subsequent to this priliminary decree, as stated above, Chamar died on 2-3-1957. The respondent-creditor filed money suit No. 58 of 1957 against Sundar and Bhikari and the former''s natural son Makhan for realisation of his loan which he had advanced to Chamar under a handnote dated 9-6-1954 for a sum of Rs. 900/-. In this suit Makhan claimed to be the adopted son of Chamar. This money suit was decreed on contest with costs on 25-8-1958 against Makhan on his own admission that be was the adopted son of Chamar, but was dismissed also on contest against Sundar and Bhikari.

Subsequent to this decree, on 8-12-1958, a compromise final decree in the partition suit was passed. In the course of the final decree proceeding Bhikari, one of the brothers of Chamar, filed a petition stating that since Chamar had died on 2-3-1957, he and his brother Sundar were his sole legal representatives and prayed that Chamar''s name be struck off and that his share be divided between him and brother Sundar in two equal shares. The learned Subordinate Judge disposed of this application by his order on 13-11-1957 in which he held that Makhan was not the adopted son of Chamar and directed that the share of the deceased Chamar devolved on Sundar and his sons as one unit and Bhikari and his sons as another unit. On the basis of this determination the final decree was passed. This order of the Subordinate Judge dated 13-11-1957 and final decree dated 8-12-1958 have become final between the parties as, no appeal was preferred from it by any of the concerned parties. It is true that under the Hindu law, Chamar''s one-third interest on his death, after the passing of the preliminary decree disrupting the joint status, would devolve on his two brothers, namely, Sundar and Bhikari by succession and their sons would have no interest in the same, but the learned Subordinate Judge allotted one-half of Chamar''s share to Sundar and his sons and the other half to Bhikari and his sons whereby the sons on the strength of the final decree got a share in Chamar''s interest which otherwise they would not have got. Rightly or wrongly the final decree has become final between the parties and it is no longer open to any of the parties to the partition suit to contest the correctness of that final decree by which the sons of Sundar and Bhikari have acquired a share in Chamar''s one-third interest.

3. The respondent-decree-holder levied execution of his money decree in Execution Case No. 102 of 1960 against Makhan alone and sought to attach Chamar''s share in the hands of Makhan. He apparently proceeded against Makhan alone, because in his suit Makhan claimed to be the adopted son of Chamar and it was also so held. The decree-holder sought to attach and sell one-tenth share of Makhan. The judgment-debtor filed an objection u/s 47, Civil P. C. contending that when Chamar''s interest had been distributed among Sundar and his sons on the one hand and Bhikari and his sons on the other, the one-tenth interest of his, allotted to him, should not be exclusively liable to discharge his decretal dues. This objection was upheld and the matter came before this court in M. A. No. 106 of 1962. Hon''ble Mr. Justice G. K. Misra (as he then was) by his judgment dated 11-11-1963 held,

"(a) If some portion of the properties of Chamar has come to the hands of the judgment-debtor, if not by inheritance but by the compromise decree, then in respect of that property he is definitely an intermediary and comes clearly within the definition of legal representative.

(b) In this case, the decree is passed against Makhan as the legal representative of deceased Chamar. The decree is for payment of money out of the property of the deceased Chamar. On the plain language of the section, the decree is executable against the property of the deceased in the hands of judgment-debtor.

(c) If any of the property of the deceased Chamar is found in the hands of the judgment-debtor, then such property is liable to be attached and sold in execution."

This M. A. No. 106 of 1962 was allowed and the case was remanded to the trial court.

After remand, the executing court passed an order on 5-12-1964 in which he said,

"Thus I am convinced that in fact some of the properties of the deceased Chamar are in possession of the judgment-debtor and his father and the decree is to be proceeded against 1/15th share and not 1/10th share as given out in the execution petition. Let the decree-holder amend the execution petition accordingly and proceed against the judgment-debtor."

This order was appealed from in Misc. Appeal No. 3/2 of 1965 and was confirmed. The judgment-debtor came to this court from such confirming appellate order in M. A. No. 159 of 1965 in which Hon''ble Mr. Justice G. K. Misra (as he then was) passed his judgment on 4-9-1968 holding,

"Both the courts below have gone into evidence and come to the conclusion that by the compromise decree dated 1-10-1958 Makhan got 1/5th interest in Chamar''s share in the Joint family property including the house. Against this concurrent finding this Misc. Appeal has been filed by Makhan.

The only point urged by Mr. Sinha is that Makhan''s interest in Chamar''s share in the joint family property under the compromise decree is only l/30th and not 1/15th, Mr. Pal accepts Mr. Sinha''s contention. The judgment of the courts below must accordingly be modified. Makhan would be held to have only l/30th interest in Chamar''s l/3rd share in the entire joint family property."

4. When the matter came back to the executing court after the aforesaid decision of this court in M. A. No. 159 of 1965, Sundar, father of Makhan, filed a claim petition under Order 21, Rule 58, Civil P. C. contending that the execution cannot proceed against the property which he inherited from Chamar or against his own share in the joint family properties. This application was registered as Misc. Case No. 19 of 1965. The executing court upheld the claim. The order of the executing court was set aside in first appeal by the first appellate court in M. A. 44/12/3 of

1965. The decree-holder thereupon came to this court in M. A. No. 43 of 1968 which was heard by Hon''ble'' Mr. Justice R. N. Misra and disposed of on 19-11-1969. The learned Judge held,

"(a) Thereunder even if Sundar is liable, it has to be shown that it was Chamar''s property in the hands of Sundar. By the time Chamar died, he did not have his interest carved out in specie. Therefore it is very difficult to find out what that 1/3rd interest of Chamar actually represents.

(b) I do not propose to express any final views in the case as the matter has to go back to the lower appellate court for determination as to whether Sundar in the circumstances can be held to be liable for the satisfaction of the money decree."

After remand the executing court dismissed Execution Case No. 102 of 1960 and allowed the appellant''s petition under Order 21, Rule 58, Civil P. C. The decree-holder thereupon appealed to this court in M. A. No. 166 of 1971 which was heard and disposed of by the learned Single Judge as aforesaid.

5. The contention of Mr. Pal, the learned counsel for the decree-holder, was to the following effect:--

"As per the definition in Section 2(11), Civil P. C., one who in law represents the estate of a deceased person or one who intermeddles with the estate of the deceased, is a legal representative. u/s 52 of the said Code where a decree is passed against a party as the legal representative of a deceased person and the decree is for payment of money out of the property of the deceased, it may be executed by attachment and sale of any such property. Therefore, Makhan being one of several persons to whom the share of Chamar was allotted under the final decree in the partition suit is a legal representative either as a person who in law represents the estate of Chamar or as a person who intermeddles with such estate. Hence the decree in the money suit instituted by the appellant having been passed against Makhan as the legal representative of Chamar and the decree being for payment of money out of the properties of the deceased, it may be executed by attachment and sale of any such property. According to him, whatever may be the law of inheritance, under the partition decree Makhan having been given a share in the estate of the deceased Chamar, the appellant is entitled to execute the decree at least in respect of the share allotted to Makhan under the partition decree and this share as per the decision in M. A. No. 159 of 1965 having been determined to be l/30th interest of the total joint family properties belonging to Chamar, Sundar and Bhikari, the courts below should have allowed the execution to proceed in respect of the -same interest."

The contention of Mr. Sinba, the learned counsel for the judgment-debtor, as advanced before the learned Single Judge was to the following effect:--

"The creditor is entitled to realise his dues against the deceased debtor out of his assets in whosever hands they may be. But before realising his dues the appellant-creditor has to obtain a decree against the true legal representative of the deceased debtor. In the present case, the decree has been obtained only against Makhan which can be executed only against him. But as Makhan has not inherited any property of Chamar and Chamar''s properties have been inherited by Sundar and Bhikari, the creditor cannot proceed against the properties inherited by Sundar and Bhikari after the death of Chamar since under the Hindu Law of inheritance his properties would be inherited by his two brothers, only."

The learned Single Judge accepted the contention of Mr. Pal and rejected that of Mr. Sinha and, in our opinion, very rightly. In the instant case the decree-holder, on account of his doubt as to the identity of the real legal representative of the deceased Chamar and as a matter of abundant caution, bona fide impleaded all the male members who were likely to inherit Chamar, in his Money Suit No. 58/57. Makhan in that suit expressly alleged to be the sole legal heir of the deceased Chamar and, as such, represented the estate of the deceased. His father and his uncle who were also co-defendants with him did not dispute this stand of Makhan and allowed the Court to pass the decree against Makhan on that footing. The decree which was ultimately passe4 in the said Money'' Suit No. 58 of 1957 provided as follows :--

"It is ordered that the suit be decreed on contest with costs against defendant No. 1 alone and it is dismissed on contest against defendants 2 and 3 without costs. The property of deceased Chamar will only be liable for payment of loan."

Sundar and Bhikari were aware that Chamar''s estate was expressly made liable for repayment of the loan though they were not made personally liable. In these circumstances, applying the principle enunciated by the Supreme Court in the case of N.K. Mohammad Sulaiman Vs. N.C. Mohammad Ismail and Others, and the other cases referred to by the learned Single Judge, Makhan must be held to have represented the estate of the deceased Chamar in the money suit and the decree passed in the money suit will bind the entire estate, whoever might be the actual legal representative. Therefore, by operation of the rule of representation of the estate enunciated by the Supreme Court, the estate of Chamar will be liable to be attached and sold in the hands of the legal representatives of Chamar, whoever they may be even though they might not have been impleaded in the decree-holder''s money suit. If so, such parts of Chamar''s estate which have come into the hands of Sundar and Bhikari under the final partition decree, would be liable to be attached and sold in execution of the respondent''s money decree. The only effect of dismissal of M. S. 58/57 against them would be that they would not be personally liable.

Makhan either as a holder of some interest in Chamar''s estate under the final decree or as an intermeddler in such an estate would be a legal representative of the deceased Chamar as the definition of "legal representative" in Section 2(11), Civil P. C. would fully apply to Makhan. There is no doubt that respondent can execute his decree against Makhan''s 1/30th share in Chamar''s estate. It was so held in M. A. 159/65 and accepted by the decree-holder. The controversy now is whether the rest of the estate of Chamar coming into the hands of Sundar and Bhikari would be liable to be attached and sold and that controversy has been resolved above by applying the rule of representation of the estate. In result, such of the estate of Chamar which has come into the hands of Sundar will be liable to be attached and sold and, accordingly, his objection must fail and the executing court was wrong in dismissing the entire execution case.

6. A minor, subordinate point has been taken that the application of Sundar under Order 21, Rule 58, Civil P. C. filed in the executing court is not maintainable because he is a judgment-debt or within the meaning of Explanation to Section 47, Civil P. C. and as such, all questions regarding execution, satisfaction and discharge of the decree passed in the money suit can only be raised before the executing court u/s 47, Civil P. C. A bare reading, of the Explanation to Section 47, Civil P. C. makes the position clear. Under this Explanation Sundar would be a judgment-debtor because the money suit in which he was a party had been dismissed against him. So more appropriately he should have presented his application, nomenclatured as one under Order 21, Rule 58, Civil P. C. u/s 47, Civil P. C. That, however, is a technical stand. If the application is maintainable u/s 47, Civil P. C., it cannot be thrown out merely because it has been nomenclatured as one presented under Order 21, Rule 58, Civil P. C. Taking into account the substance of the application and the fact that it was dealt with by the executing court, this point of maintainability is of no practical importance at this stage specially in view of our decision on the main questions rendered above.

7. We are of opinion that the decision of the learned single Judge was correct and, accordingly, this appeal fails and is dismissed. But in the peculiar circumstances of the case there would be no order for costs of this court.

Panda, J.

8. I agree.

