
(1930) 09 MAD CK 0024
In the Madras High Court

A.N. Ramchandra Iyer and Others

APPELLANT

Vs

The Official Assignee of Madras and Others

RESPONDENT

Date of Decision : 12-09-1930

Acts Referred:

Citation : 131 Ind. Cas. 481

Hon'ble Judges : Curgenvan, J;Bhashyam Ayyangar, J

Bench : Division Bench

Judgement

Curgenvan, J.—The question of law which this appeal raises is whether, during the pendency of a suit for partition, the Official Assignee can obtain in proceedings u/s 7 of the Presidency Towns Insolvency Act a declaration that the debts of an in-solvent father are binding upon the sons to extent of their shares in the family property. The father, Narasimha Iyer was adjudicated together with his partner on the 2nd December, 1919, A few days earlier, on the 20th November, a partition deed had been executed between himself and his sons which was held to be void as against the Official Assignee, and this decision was confirmed on appeal by this Court on the 1st August, 1922. Meanwhile in July, 1922, the sons filed a suit for partition in the Court of the Subordinate Judge, Madura, against their father. On the 5th February, 1924, the Official Assignee made the application to the Insolvency Court out of which this appeal arises. It was a notice of motion praying for a declaration that the insolvent's debts were binding upon his sons and for sale of their interests in the joint family property. The matter came in the first instance before Kumaraswami Sastri, J., who was in doubt as to the effect of the suit for partition upon the claim made by the Official Assignee and referred the question to a Full Bench. The opinion of the Full Bench is reported as In the matter of Balusami Ayyar [Official Assignee Vs. Ramachandra Aiyar and Others,] Ramesam and Madhavan Nair, JJ, Phillips, J., dissenting, held that the institution of the partition suit put an end to the joint family status and with that to the right of the father to alienate the son's shares for his debts, thus extinguishing the right of the Official Assignee to effect such a sale.

2. The latter, it was held, took the father's property exactly as it stood with all its advantages and all its burdens and notwithstanding that he took it as it existed at the commencement of the insolvency, yet the division in the status effected by the filing of the suit deprived the Official Assignee equally with the father of the power of sale. In his judgment, Ramesam, J., adverts to certain other remedies which might still be open to the Official Assignee. He might, the learned Judge considered, as representing the creditors or associating himself with them, file suits against the sons, obtain decrees and sell the son's shares also, or again he might apply in the partition suit for the creditors to be made parties and ask for a decree providing for the payment of such debts as were not illegal or immoral. He then adverts to another possible remedy, by taking what are called garnishee proceedings in the Insolvency Court itself, adding that this was a matter for the Judge sitting in insolvency to decide. These observations about a possible alternative courses, are it is needless to say, obiter. The case then came before Waller, J., who was of opinion that it was open to him to adopt the course last suggested u/s 7 of the Presidency Towns Insolvency Act, and he gave the Official Assignee the declaration for which he asked. Waller, J., did not in his judgment grant the further prayer for sale of the son's share and a direction to that effect inserted in the decretal order goes further, we must presume than his intention. This appeal has now been instituted by the sons and it is contended before us that it is not open to the Insolvency Court to deal with the liability of the sons' shares under the Act.

3. Mr. T.R. Venkatarama Sastri, for the appellants bases his arguments largely upon certain general considerations. In the first place he says the Insolvency Act has for its scope only the distribution of the debtor's property or assets, the term "property" of course concluding such property the Official Assignee by virtue of his special powers may recover u/s 55 or 56. The proceeds of a son's liability to pay his father's debts can-not be described as the property of the insolvent, he continues, because in no circumstances would the insolvent be entitled to realise it for his own benefit; the son is not under any pecuniary liability to his father but only the creditors of the father, so that the Official Assignee standing in the father's shoes cannot lay claim to a payment of this kind as money due to the father. The son's position bears some analogy to that of a surety and I think it may at once be conceded that in the ordinary acceptance of the term "property" the sale proceeds of the son's share could not be described as the property of the insolvent. Mr. Venkatarama Sastri's second main argument is that, assuming that the Official Assignee could deal with this property as an asset of the debtor, it would not necessarily be divisible equally amongst all the creditors. It might be that the debts due to some of the creditors were tainted with illegality or immorality or it might be that, while some of the creditors were pre-partition creditors, others were post-partition creditors, and the latter, of course, would have no claim on the son's shares. It is urged that equal distribution is of the essence of insolvency procedure and attention is drawn to the terms of Section 49 of the Act whereby after certain special

provisions Sub-section 5 lays down that "subject to the provisions of this Act, all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference." This principle also, I think, must in general terms be conceded.

4. For the Official Assignee it is contended that Section 52 (2) (6) affords the necessary statutory authority for dealing with the sons' shares in insolvency. This section defines what is to be deemed the property of the insolvent divisible among his creditors and the portion with which we are concerned includes as such property "the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge." The specific question with which we are concerned is what capacity had the insolvent to take proceedings to exercise powers in respect of the sons' shares, because whatever capacity he may have enjoyed will as "property" vest in the Official Assignee and will be at his disposal. It is clear, I think, that the section does not require that the property itself in respect of which the powers are to be exercised should in the ordinary sense be property of the insolvent, so long as he has a "capacity to take certain proceedings in respect of some other person's property, that capacity passes to the Official Assignee and it seems to follow that the proceeds realised by taking advantage of that capacity must themselves become the property of the insolvent. If this were not so, it would lead to the result that, whereas, the capacity to take proceedings is an asset, no benefit could accrue to the creditors as the outcome of such proceedings, which appears an irrational position. The effect of this provision would seem, therefore, in some cases artificially to enlarge the meaning of the term "property" of the insolvent and to include in it funds which according to ordinary tests would not be so classified. It may be pointed out that the next ensuing portion of the section declares to be his property goods in his possession as the commencement of the insolvency in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof, which seems to be another artificial extension of the idea.

5. Whatever difficulty there may be in holding that a sum of money so derived is a asset divisible among the creditors, the position undoubtedly has the support of a Full Bench of this Court. After the Privy Council in AIR 1925 18 (Privy Council) had settled that a son's share in the joint family property does not vest in the Official Assignee upon the father becoming insolvent, it became necessary to decide whether the father's power to sell that property so vested, and this question was affirmatively answered in *Balavenkataseetharama Chettiar v. Official Receiver, Tanjore* 97 Ind. Cas. 825 : 49 M. 849 : (1926) M.W.N. 743 : 51 M.L.J. 269 : 24 L W. 345 : AIR 1926 Mad. That decision was under the Provincial Insolvency Act, which does not contain any counterpart to Section 52 of the Presidency Towns Insolvency Act, but the Full Bench was able to hold, even without the aid of a provision in those terms, that the power to sell was property,

although the share to be sold was not. Now one of the logical implications of so holding clearly is that the proceeds of each a sale of property not itself the property of the insolvent is divisible among the creditors and is, therefore, "property," of the insolvent within the meaning and intention of the Act, 1", as seems reasonable to hold, only property which can technically be so described is so divisible. It is impossible to avoid seeing the difficulties which attach to this view. How, for instance, is any surplus to be dealt with, when Section 76 provides that it is to be returned to the insolvent, whereas it is not in any ordinary sense his property. But unless we are to adopt a position inconsistent with this Full Bench ruling I do not see how we can hold that, if in the one case the capacity to sell an undivided share affords sale proceeds divisible in insolvency, the capacity, whatever it may be held to amount, to take proceedings to realise debts due to the creditors out of a divided share does not afford proceeds equally divisible, and, assuming for the present that the insolvent has the capacity, which Section 52 declares to be his "property" or in other words, to vest in the Official Assignee, it seems necessary to hold, apart from this authority, that the proceeds become "property" in their turn, or at least that they are divisible among the creditors, otherwise as I have already said, the capacity itself would vest to no purpose. The case must be regarded, I think, as anomalous, because in all ordinary instances of the application of Section 52 (2) (b) it will be found that where the insolvent has a capacity to take proceedings to enforce some power over property, whatever those proceedings realise in the shape of money would be his property in the ordinary sense of the term.

6. The same Full Bench case bears upon the other main objection raised by Mr. Venkatarama Sastri, that the proceeds of a sale of the son's divided share would not necessarily be divisible among all the creditors, because the same condition might attach to the sale proceeds of an undivided share, the father's right to sell this too depending upon the debts not having been incurred for illegal or immoral purposes. This point has not been dealt with by the Full Bench and, therefore, it may be said that the decision does not in terms bind us; but here again considerations of consistency seem to require that the rule accepted in the one case should be in conformity with the rule accepted in the other. In defence of it may be adduced the ground that normally the father's debts would be binding upon the son and the proceeds equally divisible. In a special case where this was not so, it would be for consideration whether the insolvency procedure could be applied to distribute among only these creditors whose claims against the son could be sustained.

7. Let us now consider what capacity the father has to take proceedings for exercising power over the son's share for the purpose of ensuring the due discharge of the debts. Admittedly, he has the power, upon a partition, to require that suitable provision is made for the discharge of the debts out of the estate before it is divided up, indeed he can insist upon the payment of the debts by sale of sufficient portion: of the family property before the partition of the remainder is effected. And it has; not been denied that, in the pending partition

suit, the Official Assignee could take his place and secure the same result. Is it open to the Official Assignee, instead of adopting this course, to get a sale of a sufficiency of the property carried out in insolvency, by means of an application u/s 7 of the Presidency Towns Insolvency Act? Such a proposition does, I think, at first sight seem to extend the scope of the section to extreme and perhaps unjustifiable lengths; it virtually requires that the Insolvency Court should constitute itself a Court for the trial of a partition action and that too when there is already a partition action pending in the ordinary Civil Court. Mr. Srinivasa Iyengar, has rightly enough dwelt upon the very wide language in which, the Section 7 is couched, the only qualifying phrase which needs consideration being the opening words "subject to the provisions of this Act. I have already endeavoured to deal with the contention that the provisions of the Act require that the subject-matter of an application under the section must be "property of the insolvent divisible among his creditors. If the views expressed are not erroneous, I can discover nothing in the provisions of the Act to exclude the enquiry upon this score. Ramesam, J., in *In the matter of Balusami Ayyar [Official Assignee Vs. Ramachandra Aiyar and Others,]* appears to hold that the test is whether or not the sons are "garnishees" a term not to be found in the Act, but meaning I think third persons from whom divisible assets are realisable. The line of reasoning followed above would appear to bring them within this class. In another Full Bench case, *Official Assignee Vs. E. Narasimha Mudaliar*, composed of Coutts-Trotter; C.J., and Odgers and Beasley, J J., the scope of Section 7 came under consideration, with particular reference to the amended terms of Section 36. That specific point does not now concern us, but the learned Judges had occasion to lay down that, whatever might be the practice in England, "the Official Assignee is entitled to proceed by way of motion u/s 7 of the Act in these cases where he has money claim against a stranger to the insolvency. By, "money claim" is meant, I suppose any claim to money, which, on realisation, would rank as a divisible asset. This gives a very wide extension to the section, so far as the only question we are dealing with-- that of jurisdiction--is concerned. So long as its purpose is the realisation of assets, it seems that every species of action that would yield such a result can be so brought, discretion being reserved to the Court to decline to exercise jurisdiction in unsuitable cases. Mr. Srinivasa Iyengar has endeavoured to show by examples the divers uses to which the section, or the corresponding section in the Provincial Insolvency Act, has been put. In *(Akella) Ramasomayajullu and Others Vs. Official Receiver*, an issue had to be tried whether a partition had taken place or not. In *Doraiappa Aiyar v. Official Assignee of Madras* 65 Ind. Cas. 244 : 42 M.L.J. 141 : (1922) M.W.N. 77 : 15 L.W. 68 the insolvent had sold certain family property and had further given his purchaser a mortgage over other family property as security against a challenge of the sale by the other family members. The Insolvency Court was asked to decide whether the sale was or was not binding on the other members so that it might be ascertained how far, if at all, the security bond was necessary. In both these instances, of course, the objection of the enquiry was to determine what was and what was not property

of the insolvent, and perhaps they do not take us very far. On the other hand, it is worth note that no decision against the applicability of the section has been cited before us. There is, for instance, no authority for the view that if it should suit the Official Assignee, as representing the insolvent, to bring what would in effect be a suit for partition, the Insolvency Court would have no jurisdiction to entertain it. In *Morley v. While* (1878) 8 Ch. 214 : 42 L.J. Bk. 76 : 27 L.T. 736 : 81 Jur. D. 746, where the creditors of a deceased father filed an administration suit in the Chancery Division and the son petitioned in bankruptcy and connected questions arose in each Court with regard to the estates, it was decided by the Court of Appeal that the Court of Bankruptcy was the proper Tribunal to determine them. "The case is one" said James, L.J., which shows how beneficial is the effect of the 72nd section (corresponding to Section 7 of the Presidency Towns Insolvency Act), and he adds: "it is true that there may be important questions to be determined before it can be ascertained how the distribution is to be made; but the Court of Bankruptcy is armed for that purpose with every power of a Court of Law; and a Court of Equity and there is not a single question stated to us as an important and difficult question arising in this matter which cannot be litigated and determined by that Court of Bankruptcy which the Legislature has thought to be the proper tribunal for the determination of it."

8. There is no ground for holding that a Court of Insolvency in India has powers more circumscribed than these, and I cannot find any convincing answer to the contention that, whatever a Court of Law may do, an Insolvency Court, subject to the provisions of the Act, may do u/s 7. I think, therefore, that the learned Judge was acting with jurisdiction in giving the declaration asked for by the Official Assignee. We have not to adjudicate upon this power to direct sale of the property, but upon the line of reasoning I have accepted it seems that the Insolvency Court must possess that consequential power.

9. I think also that he has rightly decided the question of limitation. Generally speaking and excluding such an exceptional case as the post-partition renewal of a debt by the father, the liability of the son's share is enforceable so long as the father himself may be proceeded against; and it can make no difference to this principle what rule of limitation the circumstances may render applicable. Nor is it pertinent to say that the debt would be time-barred in an ordinary Court. We have been shown no authority for the view that, while a father's debt is alive in insolvency, any remedy in insolvency against the son may become barred; and that is the only question we have to decide. It is represented to us that Schedule A appended to the decretal order, enumerating the liabilities, needs amendment in some respects, but we think that this should be effected through an application to the Judge sitting in Insolvency.

10. We dismiss the appeal with taxed costs on the Original side scale, to be paid by the Official Assignee as Receiver in the partition suit, out of the appellants' shares in the family property.

Bhashyam Ayyangar, J.

11. The Full Bench, have, by a majority, decided in this case, that the severance of status brought about by the institution of a suit for partition by the appellants against their father, the insolvency in question, extinguished the right of the Official Assignee to sell by himself their shares in the family property to meet the debts of the insolvent.

12. The main questions in this appeal are, whether the Official Assignee has still any right left "in or over or in respect of" the said shares in the family property and, if so, how, that is, by what means, he is entitled to utilise it for the benefit of the general body of creditors.

13. As regards the first question, it is conceded in the leading judgments of the majority of the Full Bench delivered by Ramesam, J., "The only remedy lost to the Official Assignee is the right of selling the sons' shares by private sale. This is merely a processual right. The substantial right of the Official Assignee to enforce the debts due to the creditors against the sons remains."

14. Now, there cannot be the least doubt that, even after a division in status, the father has the right to ask and insist that, before a partition is made, all his proper debts be paid out of the family estate and that the sons cannot resist such a demand. This has been laid down by the Full Bench of this Court in *Koduru Venkureddi v. Magunta Venku Reddi* 100 Ind. Cas. 1018 : 50 M. 535 : 52 M.L.J. 387 : (1927) M.W.N. 267 : 25 L.W. 794 : AIR 1927 Mad. 471 : 38 M.L.T. 342

15. The right of the father just referred to may not be "property" as defined in Section 2 (e) of the Presidency Towns Insolvency Act, but it cannot be denied that it is a "power in or over, or in respect of property" exercisable by the father for his own benefit. The capacity to exercise and to take proceedings for exercising this power is one of the "particulars" comprised in and going to make up "the property of the insolvent (father) divisible amongst his creditors", as explained and defined by Section 52 of the Act. If authority were needed in support of this statement, it is found in the judgment of the Privy Council in AIR 1925 18 (Privy Council) , in which their Lordships observe at page 6 Pages of 6 L.--[Ed.] that the property of an insolvent which by Section 17 vests in the Official Assignee must mean the property which by that section and Section 52 is divisible among his creditors, after first pointing out that the power to obtain a partition of the joint family property is a power which the Official Assignee might exercise u/s 52 (2) (b).

16. The conclusion is, therefore, that notwithstanding the suit for partition and the consequent division in status, the right of the father to have his just debts paid out of the entire family property subsists, and the father being an insolvent, it now vests in the Official Assignee, "as property of the insolvent divisible among his creditors."

17. Going to the second question it will be noted in the first place that, in the case already cited, their Lordships of the Privy Council while holding that the

insolvency of the father does not of itself vest his sons' shares in the joint family property in the Official Assignee, observe that the Official Assignee may, in a proper case, make that property available for the payment of the father's just debts "under the provisions of Section 52 or in some other way" (page 23 Pages of 6 L.--[Ed.]). This goes to show that it is open to the Official Assignee to realise or convert into money, the right or capacity referred to already, in the insolvency proceedings themselves, without the necessity to proceed by or in an independent action. The right is given to, and the duty is laid on, the Official Assignee u/s 68 of the Act, to realise the property of the insolvent, with all convenient speed. It has been shown that on the insolvency of the father (of divided status), the Official Assignee becomes vested with his rights to get all his just debts paid up from and out of the entire family property, before partition. How is this right or capacity, which is property divisible among the creditors of the insolvent father, to be realised or converted into money? It can only be done by getting the family property of which he is in joint possession, or a sufficient portion thereof, sold. The Full Bench has held that owing to the division of status brought about by the suit for partition instituted by the sons after, insolvency, the father and consequently the Official Assignee also lost the right of private sale. The only other course open to him is, therefore, to obtain a declaration against the sons and get the family property including their shares therein sold by or through Court.

18. In what Court is this to be done? Is the Official Assignee entitled to get it done through the Insolvency Court itself or is he bound to seek the aid of a different Court? It was argued that the sons being strangers to the insolvency, the Official Assignee can get any order or relief against them only in or by means of an independent action against, them, but this argument does not seem tenable. In the first place, the relief asked for by the Official Assignee is not against the sons (personally), but their shares in the property of their family, which was being represented by the father insolvent. Secondly, the sons' shares being undoubtedly liable for all the just debts of the father insolvent, the sons who are entitled to get only the balance or surplus cannot, in so far as they own such shares, be said to be entire strangers to the insolvency. And thirdly, Section 7 of the Act gives the widest powers to the Insolvency Court to go into and decide all questions whatsoever arising in any case of insolvency, "for the purpose of doing complete justice or making a complete distribution of property in any such case." It must, therefore, be open to the Insolvency Court in a case of this sort to declare the liability of the sons' shares in the family property for proved and just debts of the father insolvent and make all necessary orders for their realisation.

19. The mere fact that the father alone is the insolvent and the sons are not does not preclude the Insolvency Court from exercising jurisdiction over the latter to the extent necessary for the realisation of all the assets divisible among the creditors of the former. That the jurisdiction of the Insolvency Court extends to the determination of questions affecting persons not parties to the insolvency,

has been decided in several cases u/s 105 of the English Bankruptcy Act (1914) which corresponds to our section. In some cases the Bankruptcy Courts even assumed exclusive jurisdiction by the issue of an injunction. These cases are collected in the commentaries on Section 105 in Williams on Bankruptcy and special re-ference need only be made to one of them, namely, *Morley v. White* (1878) 8 Ch. 214 : 42 L.J. Bk. 76 : 27 L.T. 736 : 81 Jur. D. 746. In that case, an administration suit was first filed in the Court of Chancery by a creditor of a testator against the executor, the estate consisting of a business in which the executor, son, of the testator, had individually been a partner with the testator. Subsequently a liquidation petition was filed in the Bankruptcy Court by the executor. A Receiver was then appointed in the suit and thereafter a trustee in the liquidation proceedings. Competition having arisen between the Receiver in the suit and the Trustee in Bankruptcy in the matter of the realisation of the partnership assets, the Court of Appeal held in favour of the trustee, Sir W.M. James, L. J, observing as follows :

20. It appears to me that the Court of Bankruptcy is the proper tribunal to determine the questions arising in this matter. The case is one which shows how beneficial is the effect of the 72nd section (the reference was to the Bankruptcy Act of 1869), Section 72 of which corresponded to Section 405 of the Bankruptcy Act of 1914. There are no doubt questions between the father's estate and the son's estate which have been mixed up together questions between the joint creditors of the father and son, the separate creditors of the father and the separate creditors of the son. These questions must be determined somewhere, before the assets can be distributed among the creditors. If the orders under appeal are to stand, the result must be that the whole administration of the estate, and its division among the creditors according to their respective rights, will be delayed until the suit is determined. It is true that there may be important questions to be determined before it can be ascertained how the distribution is to be made; but the Court of Bankruptcy is armed for that purpose with every power of a Court of Law and a Court of Equity, and there is not a single question stated to us as an important and difficult question arising in this matter which cannot be litigated and determined by that Court of Bankruptcy which the Legislature has thought to be the proper tribunal for the determination of it; and those questions, if decided in bankruptcy, would come on appeal before the same Court as if they had been determined in Chancery, that is, before the same Judges sitting under one name instead of under another."

21. These observations apply with full force to the facts of this case. They are not merely authority for the position that the Insolvency Court has jurisdiction in the present case to decide on the liability of the sons' shares and direct their realisation for the payment of the debts of the insolvent father but to show that as between that Court and the Court in which the sons have subsequently sought partition of the family property, the former is by far the more proper tribunal for dealing with the said matters satisfactorily and expeditiously.

22. There is also the direct authority of a Full Bench of this Court in support of a liberal construction of Section 7 of the Act. It has been held in the Official Assignee Vs. E. Narasimha Mudaliar, , that Section 7 of the Presidency Towns Insolvency Act is not limited in its scope to matters in which the Official Assignee by the operation of the Insolvency Law claims a higher title than what the insolvent himself would have had and the Official Assignee is entitled to proceed by way of a motion u/s 7... against strangers to the insolvency.

23. It was said that it is of the essence of the distribution of assets in insolvency that it should be rateable among all the simple creditors of the insolvent and as the sons' shares in the family property can be made liable only for such debts of the father as are just, that is, not illegal or immoral, these shares cannot be proceeded against and realised in insolvency, but only, if at all, in suits by individual creditors. This contention cannot, however, be accepted. It will be observed that if this objection were good, it would equally apply against the exercise of the Official Assignee of the power of selling, the shares of the sons on the adjudication of their undivided father. But the power of the Official Assignee to effect such a sale is undoubted and has been upheld by the Full Bench of this Court in Balavenkataseetharama, Chettiar v. Official Receiver, Tanjore 97 Ind. Cas. 825 : 49 M. 849 : (1926) M.W.N. 743 : 51 M.L.J. 269 : 24 L W. 345 : AIR 1926 Mad.

24. It must be held for these reasons that the learned Judge in insolvency had full power and jurisdiction to grant the declaration asked for by the Official Assignee u/s 7 of the Act.

25. A further point was raised that the debts of the insolvent father are now barred by time against the sons and the Official Assignee cannot, therefore, seek to make the latter's shares in the family property liable for them, but there is no force in this argument. It is conceded that limitation ceases to run as against the insolvent as soon as the adjudication is made, so long as the adjudication is in force. The debts are, therefore, alive as against the father. And this is all that is necessary to enable the Official Assignee to make the sons' shares liable for them in insolvency by appropriate proceedings. The only question is whether the sons' shares can or cannot be made liable in insolvency and there is really no point of limitation with reference to them, so long as the father's debts subsist and the subsistence is not due to any act of the father for which he had no authority, such as in acknowledgment made after a division of status.

26. The decision of the learned trial Judge was not challenged on any other ground. I concur with the order just pronounced by my learned brother.