

(1942) 05 CAL CK 0012
In the Calcutta High Court

Bejoy Kumar Saha represented by his next Friend and
Guardian Mother, Kuntalabala Dasi

APPELLANT

Vs

Ramapati Basu, Receiver and Others

RESPONDENT

Date of Decision : 21-05-1942

Acts Referred:

Provincial Insolvency Act, 1920 — Section 28(2)

Citation : AIR 1942 Cal 533

Judgement

1. The facts giving rise to these connected appeals may be shortly stated as follows: There were five insolvency proceedings started by certain creditors against five debtors, to wit, Doman Chandra Saha, Sibadas Saha, Bholadas Saha, Damini Sundari Dasi and Lilabati Dasi, who together with Bijoy Saha an infant who is the appellant before us, constituted a joint Hindu family carrying on business at Sainthia under the names of Doman Chandra Saha, Kunja Lal Saha, and Kunja Lal Saha and Sons. The District Judge of Birbhum by his order dated 14th September 1935 while holding that the debts due by each of the debtors exceeded Rs. 500 in amount, and that there were acts of insolvency committed by all of them, dismissed the applications for insolvency on the technical ground that they were not properly signed and verified by the petitioning creditors. Against this order, there were five appeals taken to this Court, and this Court by its order dated 13th June 1939 set aside the judgment of the trial Judge and adjudicated all the five debtors insolvents on the petition of one of the creditors named Dhansukh Das Hiralal. The learned Judges did not think it necessary, in these circumstances, to consider the applications of the other creditors. On 22nd September 1939 Ramapati Bose the respondent before us was appointed a receiver in respect of the estates of the insolvents. On 27th January 1940 the receiver reported to the Court that in taking possession of the properties of the insolvents he had to take possession of the undivided 1/6th share of Bijoy the infant cosharer in the joint estate, although he was not adjudicated an insolvent, and he solicited directions from the Court as to whether the rents and profits in the minor's share should be handed over to him. The matter was heard in the presence of the guardian of the minor, and by his order dated 16th March 1940,

it was held by the learned District Judge that as Doman Chandra Saha, the manager of the joint family was adjudicated an insolvent, the power which he had of disposing of the entire property, including the share of the minor for payment of joint business debts, vested in the receiver, and that the receiver could exercise these powers for the benefit of the creditors. It is the propriety of this order that has been challenged on behalf of Bejoy who is the appellant in these five appeals before us.

2. Mr. Chowdhury who appeared in support of the appeal has contended before us that u/s 28(2), Provincial Insolvency Act, all that vests in the receiver is the property of the insolvent and it can not be said that the right if any of the manager to alienate the joint estate, under certain conditions, for the purpose of satisfying family debts is a property within the meaning of Section 2(d), Provincial Insolvency Act, which would vest in the receiver u/s 28 of the Act. There are a number of cases, decided by other High Courts in India, where this question was agitated; though there is no authoritative pronouncement on the subject by this Court as yet. The question was raised in *Sm. Kamala Bala Dasi Vs. Surendra Nath Ganguly and Others*, but the learned Judges expressly left it undecided. As regards cases coming under the Presidency Towns Insolvency Act, it is now settled by two recent decisions of the Judicial Committee that when a father, who together with his sons constitutes a Mitakshara joint family, is adjudicated insolvent, the undivided interest of the sons in the joint estate does not vest in the Official Assignee as a property of the insolvent u/s 17, Presidency Towns Insolvency Act. The power or authority of the father however to make the sons' interest liable for his debts contracted not for illegal or immoral purposes, vests in the Official Assignee u/s 52(2)(b), Presidency Towns Insolvency Act, and the power can be exercised by the Official Assignee subject to all the limitations under which the father "himself could exercise it: AIR 1925 18 (Privy Council) and AIR 1936 277 (Privy Council) .

3. In the first of these cases, the plaintiff appellant claimed right of pre-emption over an adjoining house on the ground of contiguity. The defence was that as the plaintiff's father who was the karta of a Mitakshara joint family, had been adjudicated insolvent under the Presidency Towns Insolvency Act, the plaintiff's interest in the property by virtue of which the right of pre-emption was claimed, vested in the Official Assignee, and hence no longer existed. The trial Court negatived the defence and gave the plaintiff a decree. On appeal to the Lahore High Court, the learned Judges who heard the appeal made an order referring to a Pull Bench the following question:

Does an order of adjudication against a father vest in the Official Assignee his son's interest in the joint family property ?

4. The Full Bench presided over by Shadilal C.J. answered this question in the affirmative. Against that an appeal was taken to the Privy Council and their Lordships of the Judicial Committee reversed the decision of the Full Bench, and restored the judgment of the trial Judge with slight modification. Their Lordships

referred in their judgment to the provisions of Section 17 and Section 2(e), Presidency Towns Insolvency Act, and held that as the father's power of disposal over the son's property was not absolute but conditional on his having debts of a particular type, it could not be regarded as property as defined in Section 2(e), which contemplates an absolute and unconditional power of disposal. "It may be" so runs the judgment, "that under the provision of Section 52 or in some other way that property may in a proper case be made available for payment of the father's just debts; but it is quite a different thing to say that by virtue of his insolvency alone it vests in the assignee and no such provision should be read into the Act."

5. In the second case it was expressly held by their Lordships that the capacity of the father of a joint Hindu family governed by Mitakshara law to exercise his power to sell the joint family estate to enforce the pious obligation of his sons to discharge untainted antecedent debts, vests in the Official Assignee u/s 52(2)(b), Presidency Towns Insolvency Act; and although such powers could be exercised subject to all the limitations under which it could be exercised by the father himself, it does not militate against the provisions of Section 49(5) or of Section 17, Presidency Towns Insolvency Act. It will be seen that in both these cases, their Lordships of the Judicial Committee based their decision on the express provisions of the Presidency Towns Insolvency Act. Their definite decision was that the power of a Mitakshara father to dispose of his son's property under certain special circumstances was not "property" of the father which could vest in the Official Assignee u/s 17, Presidency Towns Insolvency Act. It was not the property itself but the power of the father relating to that property that would vest in and could be exercised by the Official Assignee u/s 52(2)(b), Presidency Towns Insolvency Act, which runs as follows:

...the property of the insolvent shall comprise the following particulars namely:

(b) 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.

6. There is no provision corresponding to Section 52(2)(b), Presidency Towns Insolvency Act, in the Provincial Insolvency Act of 1920; yet it has been held by different High Courts in India that the power of the father to sell his son's interest for payment of his untainted debts is "property," which vests in the receiver u/s 28(2), Provincial Act. Reference may be made among others to the cases in *Balavenkata Seetharama Chettiar v. Official Receiver, Tanjore* AIR 1926 Mad. 994; *Anand Prakash and Another Vs. Narain Das-Dori Lal and Another* ; *Haridas Himmat Lal v. Lallu Bhai Mulchand* AIR 1931 18 Bom. 50; *Khem Chand v. Narain Das* AIR 1926 Lah. 41 and *Chairman, District Board, Monghyr Vs. Sheodutt Singh*, . It will be seen that Section 2(d), Provincial Insolvency Act, is worded almost in the same manner as Section 2(e), Presidency Towns Insolvency Act, and according to it the expression "property" "includes any property over

which or the profits of which any person has a disposing power which he may exercise for his own benefit." according to the Judicial Committee Section 2(e), Presidency Towns Act, contemplates an unconditional power of disposal which the father does not possess over son's property. If the same meaning is attached to Section 2 (d), Provincial Act, it is difficult to see how the father's right could vest in the assignee under that Act. This difficulty was felt by many of the learned Judges who were parties to the above decisions, and some of them were of opinion that Section 2(d), Provincial Insolvency Act need not be called in aid for this purpose at all, as Section 28 was by itself sufficient to vest the power in the receiver as a species of property belonging to the father: vide Krishnan J., in T.S. Balavenkataseetharama Chettiar and Another Vs. The Official Receiver and Others, . Others again expressed the view that such power was "property" within Section 2(d), Provincial Insolvency Act, and that the Judicial Committee was forced to put a strict interpretation upon Section 2 (e), Presidency Towns Act, as otherwise it would have been repugnant to the other provisions of the Act. As however there is no provision relating to "power" as distinct from "property" in the Provincial Act, the word "property" as used in that Act is to be taken in its general sense as signifying a right which has a money value : vide Venkata Subba Rao J. in Balavenkata Seetharama Chettiar v. Official Receiver, Tanjore ("26) 13 AIR 1926 Mad. 994 and also Madgavkar and Barlee JJ. in Haridas Himmat Lal v. Lallu Bhai Mulohand AIR 1931 18 Bom. 50.

7. Sen J. who was a party to the Full Bench decision in Anand Prakash and Another Vs. Narain Das-Dori Lal and Another , was definitely of opinion that the disposing power exercisable by the father in certain circumstances over the undivided shares of the sons was not "property" within the meaning of Section 2(d) and Section 28(2), Provincial Insolvency Act. But it was held by the learned Judge that though the right of the receiver to attach and sell the son's share was not supported by express provisions of the Insolvency Act, yet having regard to the son's undoubted liability for the untainted debts of the father and to the unbroken current of authority on the point, the right in question should be affirmed. It appears that the consideration which weighed with most of the learned Judges who decided the above cases was that as under general law an individual creditor could realise the debts due to him, from the coparcenary property belonging to the debtor as well as to his sons, it would be quite fit and proper to allow the assignee who represents the general body of creditors to seize the interest of the sons also for the satisfaction of their debts. Reliance was placed in this connexion upon Section 60, Civil P.C. This we venture to say is a wrong way of approach. As was pointed out by the Judicial Committee in AIR 1925 18 (Privy Council) , the question must be decided on the wording of the particular Insolvency Act and on that Act alone. Cases u/s 60, Civil P.C., or provisions of other Acts depend on different considerations and these decisions are likely to mislead a Court which has to construe a particular Insolvency Act.

8. It is gratifying to note that a Division Bench of the Patna High Court has in a recent case taken a different view and held that the father's power over son's

property does not vest in the receiver u/s 28(2), Provincial Insolvency Act : Nilkantha Narayan Tewari Vs. Debendra Nath Ray, . It is not necessary for us to decide this matter finally in this case ; for even if we assume that the father's power does vest in the receiver under the Provincial Insolvency Act, that would be of little assistance to the respondent in the present case. In the case before us we have to deal with a joint family governed by the Dayabhaga law, where the rights of the father do not come into the picture at all. There can be no joint family under the Bengal law consisting of the father and the sons, and there is no question of the father having any power over the son's interest, which he can avail of for satisfaction of his just debts.

9. The question for our consideration is whether on the insolvency of the managing member of a joint Dayabhaga family who is not and cannot be the father, his power to sell or mortgage the interest of other coparceners for satisfaction of joint debts, vests in the receiver u/s 28(2), Provincial Insolvency Act. It is not disputed that as regards powers of alienation over the family property for purposes of family necessity or benefit, the manager or karta under the Dayabhaga law has the same position as a manager under the Mitakshara law : (Mayne p. 469, Edn. 10). If there are debts binding on the family, a manager would have the right to alienate family property for payment of these debts so as to bind the interest of all the undivided members of the family whether they are adults or minors. There is considerable difference however between the position of a father under the Mitakshara law and that of a manager either in a Dayabhaga or Mitakshara joint family. The capacity of a father to avail himself of his son's interest for satisfying his just debts, is founded on the religious and moral obligation, which Hindu Smriti writers impose upon the son to rescue his father from the penal, ties arising from non payment of debts. according to the strict tenets of the Hindu law, the son is bound to discharge the untainted debts of his father whether be received any asset from him or not. A manager on the other hand stands on a different footing altogether. His own debts are not binding on his "coparceners, and he cannot make the joint estate liable for any personal obligation incurred by him. As an agent or mouthpiece of the family he has an implied authority to sell or alienate family property for discharging family debts. These debts must be deemed to have been incurred by or on be-half of the other coparceners also. Even if Section 2(d), Provincial Insolvency Act, be held to include cases where the power of disposal is exercisable within certain limits or conditions, it must be a power that can be exercised for the benefit of the person who holds it. This is also the language of Section 2(e) and Section 52(2)(b), Presidency Towns Insolvency Act, as well as of Section 60, Civil P.C. The expression "for his own benefit" has been taken into the Indian Insolvency law from the corresponding English Bankruptcy Statutes, and it has been definitely held in England that a power that can only be exercised for the joint benefit of the bankrupt and another is not a power that can be exercised for his own benefit In re Taylor's Settlement Trusts (1929) 1 Ch. 435 and In re Mathieson (1927) 1 Ch. 283.

10. The power of a manager over the joint estate can never be exercised for his own benefit alone. It is exercisable for the benefit of the family as a whole, and it cannot be said that it is a "thing of value" so far as he himself is concerned. As we have said just now, the family debts, even if contracted by a manager, must be deemed to be debts incurred by all the members of the family, who occupy the position of debtors under law, and whose interests in the joint estate are liable to be sold for satisfaction of the same. The creditor has his remedy in law against every one of them but there is no warrant or justification for allowing the receiver in insolvency to seize and sell the share of those coparceners who have not been adjudicated insolvents, simply because the managing member has been so adjudged. As was pointed out by the Judicial Committee in AIR 1925 18 (Privy Council) in construing a particular Insolvency Act, we must confine ourselves to its express provisions and should not be guided by considerations of what the creditor could do under the provisions of other laws. There are undoubtedly a number of cases decided by other High Courts, where the view has been taken that even the manager's power of alienating the family property for family debts vests in the receiver on the manager being adjudged a bankrupt. One of the earliest pronouncements on this point is that of the Madras High Court in Rangayya Chetti v. Thanikachalla Mudali 19 Mad. 74 where the Official Assignee conveyed a house forming part of the family property of the insolvent to the plaintiff who sued for possession. The younger brother of the insolvent contested the suit. It was held, that the Official Assignee could convey the shares of those persons upon whom the debts of the insolvent were binding and reliance was placed among others upon the decisions of the Bombay High Court in Jagabhai Lalubhai v. Bhukandas Jagjivan Das 11 Bom. 37 and Fakir Chand Motichand v. Motichand Hurruck Chand 7 Bom. 438. These were cases relating to the authority of the father under the Mitakshara law, but Subrahmanya Ayyar J. who delivered the judgment was of opinion that the same principle was applicable to the case of a manager. The decision in Rangayya Chetti v. Thanikachalla Mudali 19 Mad. 74 was followed by the same High Court in Nunna Brahmayya Setti. v. Venkitswamy 26 Mad. 214. All these cases were decided under the Insolvency Act (11 and 12 Vict., Ch. 21) and their Lordships of the Judicial Committee in AIR 1925 18 (Privy Council) expressly distinguished these cases on the ground that the Indian decisions under that Act, could not be regarded as good law under the provisions of the Presidency Towns Insolvency Act.

11. The point again came up for consideration of the Madras High Court in Official Receiver, Anantapur v. Ramchandrapa AIR 1929 Mad. 166, The case was heard first by a Division Bench consisting of Odgers and Curgenvin JJ. The learned Judges differed in their opinion. Odgers J. expressed the view that the manager's power vested in the receiver while Curgenvin J. was definitely of opinion that it did not, as the disposing power which the manager has was exercised by him in a representative capacity and not for his own benefit. There was a reference to Devadoss J. u/s 98, Civil P.C. Devadoss J. agreed with Odgers J. simply on the ground that he was bound by previous authorities, though his

own views were clearly in agreement with those of Curgenven J. This decision was followed by the Lahore High Court in *Mt. Champa v. Official Receiver, Karachi* AIR 1933 Lah. 901. In our opinion the view taken by Curgenven J. was right and the decisions by reason of which Devadoss J. felt constrained to take a different view were mostly decisions under other Acts, which were distinguished on that ground by the Judicial Committee in AIR 1925 18 (Privy Council) . Happily, in this Court, we are not trammelled by any previous decision, and the view we have taken seems to us to be the only reasonable view, having regard to the observations of the Judicial Committee in the two cases mentioned above. The result is that in our opinion the contention of the learned advocate for the appellant should succeed and the appeal must be allowed. The order of the District Judge is set aside and it is declared that the receiver would have by virtue of the adjudication alone, no power of alienating the share of the appellant in the joint estate. No order as to costs.