

(1940) 11 CAL CK 0002

In the Calcutta High Court

Case No : Appeal from Appellate Decree No.131 of 1937

Choudhury Gangadhar Das Mahapatra and ors

APPELLANT

Vs

Nihar Kumar Hazra, Receiver

RESPONDENT

Date of Decision : 29-11-1940

Acts Referred:

Citation : (1940) 11 CAL CK 0002

Judgement

Mitter, J.—One Murari Mohan Das Mahapatra died in the year 1924 leaving him surviving his only son Rashbehari Das Mahapatra, and three grandsons Gangadhar Das Mahapatra, Girindra Kumar Das Mahapatra and Jnanendra Kumar Das Mahapatra, the sons of Rashbehari, who are Plaintiffs Nos. 1 to 3. Subsequently Ganga Dhar had a son of the name of Raghunandan Das Mahapatra, a minor, who is Plaintiff No. 4. It is now admitted that the parties are governed by the Mitakshara School of Hindu Law, with the result that Rashbehari, his sons and grandson acquired interest by birth in the ancestral joint family properties. On the 7th June, 1933, Rashbehari filed an Insolvency application, and on his application he was adjudged an insolvent on the 25th October, 1933. A Receiver was appointed to take charge of the insolvent's estate. Mr. Nihar Kumar Hazra is now the Receiver appointed by the Insolvency Court. By an order of the learned District Judge passed on the 24th April, 1937, in the Insolvency proceedings, he has directed the Receiver to take possession of the whole of the joint family estate and to take steps to sell the same. Appeal from Original Order No. 177 of 1937 is directed against that order, the Appellants being the sons and grandson of Rashbehari.

2. It is said by the Plaintiffs that before Rashbehari filed his application for insolvency, there was a salis for the partition of the family properties between Rashbehari and his sons and grandson who had acquired by birth interest in those properties. The arbitrators made an award and in pursuance of that award a memorandum of partition, Exhibit 4, was drawn up on the 11th May, 1931. This memorandum which is an unregistered document gives a list of properties which were allotted to Rashbehari and to his three sons and grandson. It is signed by a

number of witnesses amongst whom were twenty-eight persons who are said to have acted as arbitrators. This salis was followed by a registered deed of partition (Ex. 3A) executed on the 28th November, 1931, that is to say, about a year and half before Rashbehari applied for insolvency

3. After the Respondent Mr. Hazra had been appointed Receiver of the Insolvent's estate, he made an application to the Insolvency Court on the 24th January, 1934, for annulment of the said partition deed. Shortly after that the Plaintiffs brought a title suit in the Court of the Subordinate Judge for a declaration that the partition deed was a valid deed and that in accordance therewith they had acquired exclusive title to the properties allotted to them by the said deed. This suit was withdrawn by them on the 6th June, 1935, with liberty to sue again. A day after the withdrawal of the suit, the Receiver renewed his application for annulling the partition deed. On the 21st December, 1935, this suit was filed by the four Plaintiffs named above, three being the sons of Rashbehari and the fourth Plaintiff being his grandson. To this suit, five idols, viz., Sri Iswar Durga Debi Thakurani, Sri Sri Iswar Raghunath Jew Thakur, Sri Sri Iswar Kali Thakurani, Sri Sri Iswar Gopinath Jew Thakur, and Sri Sri Iswar Lakshi Janardan Thakur represented by the shebait Gangadhar, Girindra, Jnanendra and Raghunandan were also Plaintiffs.

4. The subject-matter of the suit was distributed in six Schedules to the plaint. The case of the first four Plaintiffs in the plaint is that the lands of Schedule (ha) are the lands which were allotted to them at the aforesaid partition effected on the 11th May 1931, and which was confirmed by the registered deed dated 28th November, 1931, that the lands described in Schedule (kha) belonged to the Plaintiff idol Sri Sri Iswar Durga Debi Thakurani, those described in Schedule (ga) belonged to the idol Iswar Raghunath Jew Thakur, those in Schedule (gha) to Iswar Kali Thakurani, those in Schedule (uma) to Iswar Gopinath Jew Thakur, and those described in (cha) to Iswar Lakshmi Janardan Jew Thakur. The material prayers are two in number: the first prayer is in substance a prayer for a declaration of the sixteen anna ownership of the first four Plaintiffs, viz., the three sons and the grandson of Rashbehari, in the properties in Schedule (ka). This claim for a declaration is based on the partition mentioned by the said Plaintiffs in their plaint; and the second prayer in substance is a prayer for a declaration that the properties described in Schedules (kha), (ga), (gha), (uma) and (cha) are debutter properties, and belonged respectively to Plaintiff Thakurs Durga Debi, Raghunath Jew, Kali Thakurani, Gopinath Jew and Lakshmi Janardan Jew.

5. The Receiver, Mr. Hazra, put in a written statement, in which amongst other things he stated that the family was governed by Dayabhaga School of Hindu law and not by Mitakshara School of Hindu law, that the partition set up in the plaint was a fraudulent one made with a view to deprive the creditors of Rashbehari, whose indebtedness was heavy, and that the properties in Schedules (kha) to (cha) were not properties of the idol Plaintiffs.

6. The learned Subordinate Judge has come to the conclusion that the parties are governed by the Mitakshara School of Hindu law. That finding of the learned Subordinate Judge is not challenged before us by the Receiver Respondent. The learned Subordinate Judge further came to the conclusion that the partition of the secular properties set up by the first four Plaintiffs was a fraudulent one, that the properties described in Schedules (uma) and (cha) were the properties of the idols Gopinath Jew and Lakshmi Janardan Jew, and that the shebait Plaintiffs failed to establish that the properties described in Schedules (kha) to (gha) are the debutter properties of the three other idol Plaintiffs. Although the learned Subordinate Judge came to the conclusion that the properties of Schedules (uma) and (cha) are the properties of the idols Gopinath Jew and Lakshmi Janardan Jew, he held that the shebait Plaintiffs, viz., the three sons and the grandson of Rashbehari could not get any declaration in their favour as the deed of partition which conferred shebaiti right on them was found by him to be a fraudulent deed. In view of the said findings the learned Subordinate Judge dismissed the entire suit.

7. The points raised before us by the Appellants are as follows: (1) that the finding of the learned Subordinate Judge that the partition was a fraudulent one is wrong, (2) that the learned Subordinate Judge ought to have held that the properties described in Schedules (kha) to (gha) are the debutter properties of the idols Durga Debi, Raghunath Jew and Kali Thakurani and (3) that in any view of the matter the learned Subordinate Judge on his own findings on the merits of the case ought to have given a declaration prayed for in respect of properties described in Schedules (Uma) and (cha).

8. We do not think that the reasons given by the learned Subordinate Judge for refusing the declaration in favour of the idols Gopinath Jew and Lakshmi Janardan Jew are sound. The learned Subordinate Judge found that the properties of Schedules (uma) and (cha) were debutter properties and belonged to the said idols. As we read the plaint, the idols themselves are the Plaintiffs. In law they had a right to maintain a suit regarding their properties in their own name, but they had only to be represented by human agencies, e.g., their shebaiti. An idol being a juridical person can sue in its own name, but, as has been observed by the Judicial Committee it must act necessarily through human agency. The family being a Mitakshara family, the right of shebaitship would vest in all the coparceners. The sons and grandson of Rashbehari became shebaiti along with Rashbehari. They do not derive their shebaiti right through the partition deed, for in law they were shebaiti from before. The only effect of the partition deed is, that Rashbehari relinquished his rights as shebaiti. In this case the shebaiti right is not in dispute. But the dispute is between the idols and a third party with respect to a property which the idols claimed to be their own. In these circumstances we do not see why a declaration should not be made in favour of the said idols Gopinath Jew and Lakshmi Janardan Jew to the effect that the properties mentioned in Schedules (uma) and (cha) are the properties of those idols. On that declaration the Receiver in Insolvency the Respondent before us

would not be entitled to those properties.

9. No question as to the proper representation of the idols had been raised in the lower Court. Rashbehari was a Defendant to the suit. If there were other shebait of the said idols, they would have been brought on the record, if an objection in proper form had been taken by the Defendant as to the proper representation of the said idols. In this view of the matter we cannot allow Mr. Bagchi to argue that although the idols are parties to the suit as Plaintiffs they have not been properly represented in the suit. We accordingly hold that a declaration has to be given to the effect that the lands described in Schedules (uma) and (cha) are debutter properties and they belong to the idols Gopinath Jew and Lakshi Janardan Jew.

10. We do not see sufficient reason to disturb the finding of the learned Subordinate Judge that the partition set up by the Plaintiffs is a fraudulent one. The learned Subordinate Judge has examined this question in great detail. His reasons are cogent. We need not repeat all the reasons which have been given by the learned Subordinate Judge in support of his finding. We only notice some of the leading features of the case.

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[The rest of the judgment in F.A. No. 131 of 1937 is not material to the report.]

M.A. No. 177 of 1937.

11. On the adjudication of Rashbehari his properties no doubt vested in the Receiver. It is now well settled, that where the head or a co-parcener of a Mitakshara Hindu family is adjudicated an insolvent, the whole of the joint ancestral or family property does not vest in the Receiver, [Sat Narain v. Beharl Lal L.R. 52 I.A. 22 : s.c. 29 C.W.N. 797 (1925)]. The effect of the insolvency of a member of a joint Hindu Mitakshara family is to vest his interest in the joint family property, in the Receiver who, so to say, steps in the shoes of the former. If the insolvent happens to be the father of the other co-parceners of the joint family consisting of himself and his descendants, the Receiver in Insolvency would have all the powers which the insolvent had. Sat Narain v. Sri Kishen Das L.R. 63 I.A. 384: s.c. 40 C.W.N. 1382 (1936). The Receiver in Insolvency would thus be able to bind by his sale the share of the other co-parceners, if the insolvent himself could have sold for those debts of his the joint property including the share of his descendants, that is to say, the Receiver will have the powers to bind the non-insolvent co-parceners by his sale of the entire joint property, provided the family at the time of his sale was still undivided, and provided the sale is for the liquidation of the personal debts of the father (insolvent) which were not of immoral nature. These are the further rights which the Receiver gets on the adjudication as insolvent of the father of a joint Mitakshara family. The position, therefore, is that he steps into the shoes of the father who has become insolvent. In accordance with this principle he will not be entitled to take possession of the entire joint undivided properties, but would only be entitled to joint possession with the other non-insolvent co-parceners of

the family. In this view of the matter the order of the learned District Judge so far it has directed the Receiver to take possession of the entire joint properties cannot be justified.

12. In the First Appeal from Appellate Decree No.131 of 1937 we have held that the deed of partition was a fraudulent one, so Rashbehari must still be considered as joint with his sons and grandson. The Receiver would, therefore, be entitled to joint possession with the sons and grandson of Rashbehari with regard to the properties of Schedules (ka) and (gha) of the plaint. He would be further entitled to get joint possession of so much of the properties of Schedules (kha) and (go) as may be found by

13. the Court to be not the properties of the two idols mentioned in the judgment of the First Appeal. But inasmuch as that matter is to be investigated in accordance with the order of remand of this Court, we cannot at this stage give the Receiver possession of the properties included in Schedules (kha) and (ga). This appeal is accordingly allowed in part to the extent indicated above.

14. This judgment of ours would not fetter the Receiver in exercising the powers which Rashbehari as father and grandfather of the other co-parceners of the joint family has or had as long as the family remains undivided. In this respect we draw the attention of the Receiver to the case of *Sat Narain v. Sri Kishen Das* (2) and particularly to the case of *In re Balusami Ayyar* (3) referred to with approval by the Judicial Committee in its said judgment. The Appellants are entitled to the costs of this appeal from the Receiver Respondent, hearing-fee, one gold mohur. The costs to be paid by the Receiver will come out of the insolvent's estate.