

(1949) 11 CAL CK 0014
In the Calcutta High Court
Case No : A.F.A.D. No. 664 of 1944

Gouri Sankar Singha Roy and Others	Vs	APPELLANT
Prafulla Behari Singha Roy and Others		RESPONDENT

Date of Decision : 23-11-1949

Acts Referred:

Provincial Insolvency Act, 1920 — Section 28A, 28A

Citation : AIR 1951 Cal 210 : 54 CWN 651

Hon'ble Judges : Gopendra Nath Das, J; Das Gupta, J

Bench : Division Bench

Advocate : Amarendra Nath Bose and Hemanta Kumar Bose, for the Appellant;
Sudhanshu Bhusan Sen and Satyabrata Dutta, for the Respondent

Final Decision : Dismissed

Judgement

Gopendra Nath Das, J.—This appeal is on behalf of defendants 3 to 10. The plaintiff's case is that defendants 1 and 3 were adjudicated insolvents in Insolvency Case No. 66 of 1936 on. 16 2-1939, that defendants 1 to 10 were members of a joint Mitakshara Hindu family, defendants 3 to 6 being the sons of defendant 1 and defendants 7 to 10 being the sons of defendant 2, that the disputed property was the ancestral homestead of the defendants, that the Province of Bengal which was entitled to certain dues on account of settlement operations from the defendants was creditor 6 in the application for insolvency, that on their application the disputed property was brought to sale and purchased by the plaintiff on 22-8-1941 and the learned District Judge as a Receiver in Insolvency executed a conveyance in favour of the plaintiff on 24-1-1942. The plaintiff having failed to get possession instituted the present suit for declaration of his title and for recovery of possession.

2. To this suit several defences were taken, viz., that, defendants 1 and 2 had a brother named Pramatha, that Pramatha who was separate from defendants 1 and 2 died and was succeeded by his son Binode, that on the death of Pramatha and Binode, their widows acquired an interest in the disputed property and the

suit was defective on the ground of non-joinder of parties, the widows of Pramatha and Binode not having been impleaded in the suit, that the interest of defendants 8 to 10 did not vest in the Receiver in Insolvency and the sale to the plaintiff did not pass their title.

3. The trial Court overruled the defence and decreed the plaintiff's suit. On appeal the decree of the trial Court was affirmed.

4. Mr. Bose appearing for the defendants-appellants in this Court has raised two points: (1) that the interest of defendants 3 to 10 did not vest in the Receiver and did not pass by the sale to the plaintiff and (2) that the suit was defective for non-joinder of the widows of Pramatha and Binode.

5. In support of the first contention, Mr. Bose referred to the provisions of Section 28(2), Provincial Insolvency Act. Section 28(2) states that the whole of the property of the insolvent shall vest in the Receiver. Mr. Bose next referred to Section 2, Clause (d), Provincial Insolvency Act which defines the word "property" to include any property over which or the profits of which any person has a disposing power which he may exercise for his benefit. Mr. Bose contended that the above definition of the word property does not include the power, if any, of the father of a joint Mitakshara Hindu family to deal with the interest of the sons who are joint with him, even though the debts which give rise to the insolvency proceedings were not incurred for illegal or immoral purposes. In support of his submission, he referred to the observations of Mukherjea J., in the case of Bejoy Kumar Saha represented by his next Friend and Guardian Mother, Kuntalabala Dasi Vs. Ramapati Basu, Receiver and Others, , which runs as follows :

"The creditor has his remedy in law against every one of them (members of the joint family) 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."

Mr. Bose also referred us to the decision of the Patna High Court in the case of Nilkantha Narayan Tewari Vs. Debendra Nath Ray, . Mr. Bose contended that although the decision in Bejoy Kumar Saha represented by his next Friend and Guardian Mother, Kuntalabala Dasi Vs. Ramapati Basu, Receiver and Others, referred to above, dealt with the position of a Receiver in Insolvency in a case where the managing member of a Dayabhaga Hindu family was adjudicated insolvent, the reasoning of Mukherjea J. fully supports his submission. The observations of Mukherjea J. on which Mr. Bose relied, found favour with the Madras High Court in the case of Ramasastrulu v. Balakrishna Rao I. L. R. (1943) Mad. 83 : (A. I. R. 1942 Mad. 682 F. B.). It may be conceded that the position in law as understood by this Court and the Patna and Madras High Courts was, as contended for by Mr. Bose, viz., that where the father of a Joint Mitakshara Hindu family is adjudicated insolvent under the Provincial Insolvency Act, by reason of

the adjudication alone the power of the father to sell the son's interest for payment of his debts which are not incurred for illegal or immoral purposes, does not vest in the receiver and the receiver cannot therefore sell such an interest so as to vest in the purchaser a good title to the interest of the sons. In the Ramasastrulu case (I. L. R. (1943) Mad. 83 : A. I.R. 1942 Mad. 682) already referred to, Sir Lionel Leach C. J. delivering the judgment of the Full Bench commented on the difference between the law as contained in the Presidency-Towns Insolvency Act and the Provincial Insolvency Act and observed that

"the remedy is in the hands of the Central Legislature and we trust that it will bring the two Acts into line and will do so without delay."

It appears that the wish expressed by Sir Lionel Leach was acted upon by the Indian Legislature and by Act XXV [25] of 1918 which came into force on 12-4-1948 a new section, Section 28A was added. Section 28A runs as follows:

"The property of the insolvent shall comprise and shall always be deemed to have comprised also 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 above paragraph of Section 28A brings the Provincial Insolvency Act into line with the corresponding provision of the Presidency Towns Insolvency Act. The effect of the amendment, therefore, is that on an adjudication in insolvency the power of the father to sell the son's interest for payment of his debts which are not incurred for immoral or illegal purposes vests in the Official Receiver both under the Provincial Towns Insolvency Act and the Presidency Towns Insolvency Act: AIR 1936 277 (Privy Council) . Section 28A as enacted gives the section retrospective operation and applies to all transfers which may have been effected by the receiver on an adjudication of the father or the managing member of a joint Mitaksbara Hindu family under the Provincial Insolvency Act. The fact that the decree of the trial Court had been passed already and the amendment was made during the pendency of an appeal, does not affect the applicability of Section 28A of the Act which is expressly made retrospective. This view is supported by the decision in the case of The Official Receiver of Ramnad Vs. P.L.P. Devarayan Chettiar and Others, . The position, therefore, is that although the sale by the Receiver to the plaintiff took place in 1941 before the passing of the amended Act, the effect of the amendment is to confer on the receiver retrospectively the power of the father to sell the son's interest. The conclusion, therefore, follows that the plaintiff as the transferor from the Receiver is entitled to the interest of defendants 1 and 2 as also of their sons, defendants 3 to 10 in the disputed property and is entitled to possession of the disputed property. The first contention raised by Mr. Bose, therefore fails.

6. Mr. Bose next contended that even on the finding of the Court of Appeal below, the widows of Pramatha and Benode are entitled to residence in the

ancestral dwelling house, that is, the disputed property and no decree for possession can be passed without impleading the two widows. It is not necessary to consider in this case the question whether in a suit in ejectment it is imperative on the part of the plaintiff to implead all persons who may be in possession even though some of those persons may not have taken any part in dispossessing the plaintiff. In this case the pleadings do not indicate that the two widows are in possession of the disputed property. So, the question whether the two widows have a right of residence in the disputed property is a matter which does not call for adjudication in this suit and it is also not desirable to adjudicate upon their claim in their absence. This judgment will not in any way affect their rights, if any, in the disputed property. As the widows are not in possession of the disputed property it cannot be said that their absence makes the suit bad on the ground of non-joinder of parties. The second contention also fails.

7. The appeal accordingly fails and it is dismissed with costs to the plaintiff-respondent.

Das Gupta, J.

8. I agree.