

(1938) 12 CAL CK 0027
In the Calcutta High Court

Hara Krishna Pramanik

APPELLANT

Vs

Indu Bala Dassi and Others

RESPONDENT

Date of Decision : 02-12-1938

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 73
Provincial Insolvency Act, 1920 — Section 28, 52

Citation : AIR 1939 Cal 279

Hon'ble Judges : S.K. Ghose, J;B.K. Mukherjea, J

Bench : Full Bench

Judgement

B.K. Mukherjea, J.—These connected rules are directed against certain orders passed by the Subordinate Judge of Nadia rejecting the application of the petitioners for rateable distribution u/s 73, Civil P.C., The facts, so far as they are material for our present purposes, may be briefly stated as follows : One Lakshmi Narayan Ganguly who is said to be a karta of a joint Hindu family consisting of himself and 14 other co-sharers was adjudicated an insolvent on the application of a creditor on 16th July 1935. The receiver in insolvency attempted to put up to sale not only the one-fourth share of Lakshmi Narayan in the joint properties of the family but the remaining three, fourths share owned by the other co-sharers as well on the footing that as the insolvent was the karta of a joint family business, he had a disposing power over the shares of the other coparceners to discharge the family debts and consequently these shares also vested in the receiver u/s 28, Provincial Insolvency Act. Three persons who figure as the contesting opposite party in these rules had obtained money decrees against the insolvent and his other co-sharers before the insolvency proceedings were started and they got an attachment before judgment in respect of 38 items of property belonging to the joint family. These creditors applied for executing their decree by sale of the three-fourth share which the non-insolvent judgment-debtors had in the attached property. The receiver opposed their application and the matter was then taken before the Judge in insolvency and the District Judge by his order dated 19th August 1935 decided the matter

against these creditors and held that they did not get any advantage by reason of the fact that they had an existing attachment upon these properties. Following this order, the executing Court also stayed further proceedings in execution. These three creditors thereupon preferred appeals to this Court against the order of the Judge in insolvency and also against the orders of the executing Court and these appeals were heard together by Costello and Edgley JJ. The learned Judges in disposing of these appeals observed

that in view of the very definite difference in the provisions of Section 52, Presidency Towns Insolvency Act, as compared with Section 28, Provincial Insolvency Act, it could scarcely be accurate to describe the managing member's right as regards incurring and discharging liabilities on behalf of a joint Hindu family business, as an item of property according to the Provincial Insolvency Act.

2. It was said at the same time that there were a large number of decisions which would go to show that the receiver in insolvency who stepped into the shoes of the insolvent acquired the right which the insolvent manager had of making the entire joint property available for the joint debt. The receiver, it was held, however could not have higher rights than the insolvent himself had got, and as in these cases the properties were already under attachment the rights of the receiver could only be exercised subject to the rights of the attaching creditors. The result was that the appeals-were allowed, the orders appealed against were set aside and it was directed that the-execution cases should proceed. The matter went back to the executing Court and eventually the attached properties were sold. The petitioners before us who had also obtained money decrees against the insolvent and his cosharers and had applied for execution of these decrees now appeared" before the executing Court and claimed rateable distribution u/s 73, Civil P.C., The trial Judge rejected their applications-and it is against these orders that these, the present rules, have been obtained. The view taken by the learned Judge is, that, under the decision of this Court referred to-above which was binding on all the parties-not only the one-fourth share of insolvent Lakshmi Narayan, but the remaining three-fourths share of the other judgment-debtors-who were not declared insolvents vested in the receiver and this was subject only to the clog created by the attachment, which was made at the instance of the three creditors mentioned above. These creditors and these creditors alone, according to the Subordinate Judge, were entitled to participate in the sale proceeds and not any other creditors who had no pre-existing attachment, upon these properties.

3. In our opinion the view taken by the lower Court is not correct. The opposite party decree-holders were allowed to levy execution of their decrees against the three-fourth share of the non-insolvent judgment-debtors. The petitioners before us had also applied for execution of their decrees against the same judgment-debtors and if the sale proceeds are taken to be assets held by the Court, there is apparently no reason why Section 73, Civil P.C., would not apply. The Court below has denied relief to the petitioners on the ground that the properties sold

were not really the properties of the judgment-debtors but they were vested in the receiver subject to the rights of the attaching creditors as laid down by the learned Judge of this Court. We do not think that the interpretation put upon the judgment by the Court below is a proper one. In the first place, this Court assumed rather than decided that the rights of the manager to dispose of the joint property to discharge joint debts would be a species of property within the meaning of Section 28, Provincial Insolvency Act. In the second place, even taking that to be the decision of this Court, the learned Judges never said that the shares of the co-parceners who were not adjudicated insolvents would vest in the receiver. Indeed, if the view taken by the Allahabad and Madras High Courts in *Allahabad Bank Vs. Bhagwan Das Johari and Others*, *Bawan Das v. O.M. Chiene* A.I.R.(1922) 79, *Seetharama Chettiar v. Official Receiver, Tanjore* A.I.R (1926) 994, *Gopala krishnayyaj v. Gopalan* AIR (1928) 479 and by the Judicial Committee in AIR 1925 18 (Privy Council) and AIR 1936 277 (Privy Council) be held to be applicable to a Dayabhag family, all that vests in the receiver is not the interest of the other co-sharers of the insolvent manager but only the right or the capacity which the insolvent had of making the interest of his other co-sharers available for the benefit of joint creditors under certain conditions which are recognized by Hindu law. So long therefore as this right is not exercised by the receiver and the interests of the other judgment-debtors are not sold it is open to the latter to transfer their shares voluntarily to others and it is open also to their creditors to attach and sell them in execution of their decrees. To hold otherwise would be to give the receiver a larger right than what the insolvent had under the Hindu law and such a view does not receive support from any of the decisions to which reference has been made. We think therefore that the Court below was not right in the view it took and as the receiver had not already exercised his powers the property which has been attached and sold must be deemed to be the property of the judgment debtors and the decree-holders will have their rights according to the provisions laid down in the Civil Procedure Code.

4. We are not impressed by the argument advanced by the learned advocate for the opposite party decree-holders that this Court in the decision mentioned above had made an order determining a question of priority as between the rival decree-holders. No such point seems to have been raised or decided by this Court. Mr. Ghose who appears for one of the opposite party decree-holders has taken a further point that as the executing Court had passed orders against these petitioners negating their right to proceed with the execution and they had not challenged these orders by way of appeal, they are incapable of taking this point now. We have been taken through the relevant order sheet and we are unable to say that any order negating their right to proceed in execution was at all passed by the executing Court. The orders passed were to the effect that the execution proceedings would be stayed pending the decision of the Insolvency Court and the appeals pending before the-High Court. As soon as these cases were decided, the stay order spent itself and as a matter of fact the execution

cases were allowed to proceed without any objection-taken by the opposite party decree-holders. The result is that the rules must be made absolute and the orders of the Subordinate Judge must be set aside. The cases will be sent back to the executing Court in order that the claims of these petitioners for rateable distribution may be considered on their merits and disposed of according to law. There will be no order as to costs in these rules.

S.K. Ghose, J.

5. I agree.