
(1930) 02 BOM CK 0018
In the Bombay High Court
Case No : Second Appeal No. 845 of 1928

Jethalal Chhotalal Shah

APPELLANT

Vs

Lallubhai Mulchand Mehta

RESPONDENT

Date of Decision : 24-02-1930

Acts Referred:

English Bankruptcy Act, 1914 — Section 40(4)

Citation : AIR 1930 Bom 380 : (1930) 32 BOMLR 702

Hon'ble Judges : Madgavkar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Madgavkar, J.—This appeal turns on the construction of Section 61 (4) of the Provincial Insolvency Act (V of 1920).

2. The firm of Lallubhai Hirachand consisted of two partners, Chunilal Hirachand and Vrijlal Lallubhai. On November 14, 1926, the firm borrowed Rs. 2,000 from the appellants Jethalal and Hiralal Chhotalal, the promissory note being signed by Chunilal one of the partners, for the firm, and again by Chunilal, for himself. The appellants sued both the firm as well as Chunilal on the promissory note, and obtained a decree against the firm and against Chunilal. The firm and the partners became insolvent. The appellants desired to obtain their amount from the separate property of Chunilal, The recoverers were doubtful if they could proceed against this property and applied to the Court for directions as to the schedule in which the decree in favour of the appellants should figure. The trial Court decided that the decree-holders were entitled to be paid from Chunilal's separate property. In appeal by the receivers the learned District Judge was of a contrary opinion. The decree-holders appeal.

3. Section 61, Clause (4), of the Provincial Insolvency Act runs as follows:-

In case of partners, the partnership property shall be applicable in the first instance in payment of the partnership debts, and the separate property of each

partner shall be applicable in the first instance in payment of his separate debts. Where there is a surplus of the separate property of the partners, it shall be dealt with as part of the partnership property ; and where there is a surplus of the partnership property, it shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property.

4. It is argued for the receivers that the two schedules are mutually exclusive and that the amount having been taken and appropriated for the purpose of the partnership, and under the Indian law of partnership each individual partner being also liable for the debt of the partnership, the separate signature of Chunilal and the decree against him along with the signature and the decree against the partnership make no essential difference to the rights of the creditors decree-holders appellants, and they must proceed, at least in the first instance, against the partnership property and not against Chunilal's separate property. It is contended for the petitioners that in such a case Chunilal's signature and the decree against him have no meaning, and that, before the decree as after, the option is with the creditor, whether to proceed first against the separate property of Chunilal or against the partnership property.

5. The section corresponds in all essential particulars with Section 40(4) of the English Bankruptcy Act. There is, however, no exact decision on the point in England or in India. The scheme of the section is clear. The partnership property is different from the separate property of each partner. Whatever the element of the legal liability in respect of the partnership debt under the Indian Contract Act, the duty of the receiver with due regard to the light of the creditor and of the insolvent is to divide and classify the property into two categories, which are mutually exclusive : the first, partnership property, and the second, the separate personal property of each partner. In the case of the corresponding two categories of debts, however, viz., partnership debt and separate debt, they are not necessarily mutually exclusive and here is nothing in law to prevent, as in the case of this decree, the liability in respect of one and the same debt, both of the partnership and separately of the partners, and there is nothing in the section to compel a creditor to confine himself to one of the two categories, or much less, to accept one at the option of the receiver. On the contrary, under the general law, this clause does not, on the face of it, prevent the creditor from proceeding against either property at his own choice and for the balance against the other. In this view if they choose to proceed against the separate property of Chunilal, as they are entitled to under the decree, their right was not lost by reason of Section 28, Clause (4). It is not necessary, in my opinion, to consider stray observations even in works of such high authority as "Lindley on Partnership" on which the learned District Judge apparently relied. The basis of my conclusion shortly is that whilst the partnership property and the separate property are mutually exclusive, the partnership debts and separate debts need not be so as in the present case, and where they are not, in the absence of any provision in this clause to the contrary, the ordinary legal right of the creditors decree-

holders must remain including their option to proceed and rank their debt against the one or the other, without the power of the receivers to compel them as to their choice.

6. The appeal is, therefore, allowed, the decree of the lower appellate Court set aside, and the decree of the trial Court restored.

7. The appellants' costs throughout to come out of the estate of Chunilal. The respondents' costs to come out of the estate of the partnership.