

(1924) 07 MAD CK 0027
In the Madras High Court

Kuppuswami Goundan and Others	APPELLANT
Vs	
Marimuthu Goundan Insolvent and Others	RESPONDENT

Date of Decision : 22-07-1924

Acts Referred:

Provincial Insolvency Act, 1920 — Section 16

Citation : AIR 1925 Mad 52 : (1924) 20 LW 783 : (1924) 47 MLJ 487

Hon'ble Judges : Charles Gordon Spencer, C.J.;Srinivasa Aiyangar, J

Bench : Full Bench

Judgement

Charles Gordon Spencer, C.J.—The two plaintiffs, who are minors represented by their mother, brought a suit to obtain a partition from

their father, the 1st. defendant. They made their father's step-mother (2nd defendant) and her daughter (3rd defendant) and their father's uncle

(7th defendant) and two mortgagee-creditors of their father (4th and 5th defendants) and two mortgagee-creditors of 7th defendant (defendants 8

and 9) parties to the suit. The plaintiffs' father was adjudicated an insolvent on December 19, 1916, and this suit was instituted on 2nd March,

1917 after the 1st defendant had become an insolvent in law. The Subordinate Judge dismissed the suit on the ground that the suit was not

maintainable after the plaintiffs' father had become insolvent. He refused to give the plaintiffs an opportunity of proving that the mortgage bonds in

favour of defendants 4 and 5 were executed to secure debts not binding on the plaintiffs on account of the immorality of their father, on the ground

that this matter was res judicata owing to the finding in the previous suits (O.S. Nos. 13 and 14 of 1917) on the file of the Sub-Court, Coimbatore,

which were suits brought by these mortgagees as plaintiffs in which the Court found that the plaintiff debts had not been proved to be not binding on

these plaintiffs, who were defendants 2 and 3 in those suits.

2. The first point argued in appeal is that the Subordinate Judge was wrong in regarding the decision in the prior suits as *res judicata*. It is clear

from the judgment of the High Court in Appeal No. 356 of 1919 that the plaintiffs abandoned their rights to claim a mortgage decree against these

defendants in those suits. The defendants against whom the suit had been dismissed had no right of appeal upon the finding as to the nature of the

debts and therefore this question was not finally decided as between the opposing parties to the suit. The lower Court must therefore take the suit

back on its file and decide Issue 1 upon such evidence as may be adduced on either side.

3. The main point upon which we have heard arguments in this appeal is, whether the whole estate, of which the 1st defendant was manager,

vested in the Official Receiver upon the 1st defendant's adjudication as an insolvent. Mr. Ramachandra Aiyar tried to persuade us that it was a

condition precedent to the Official Receiver exercising the father's power to sell the joint estate for the discharge of his debts that those debts

should be neither illegal nor immoral. Section 16 of the Provincial Insolvency Act III of 1907 declares that Upon the making of an order of

adjudication the whole of the property of the insolvent shall vest in the Receiver and that during the pendency of the insolvency proceedings no

creditor shall have any remedy against the person or property of the insolvent in respect of the debt or commence any suit or other legal

proceedings except with the leave of the Court. Section 2, Clause (e) defines "" property "" as including any property over which or the profits of

which any person has a disposing power which he may exercise for his own benefit. Now there is nothing in these provisions to indicate that the

vesting of the property will depend upon the nature of the debts. Therefore there is no condition precedent to the vesting of the property and it may

be ascertained whether the debts were incurred for illegal or immoral purposes in proceedings either before or after the adjudication. The argument

that what vests in the Official Receiver, where the interest of undivided members of a joint family is concerned, is not the property itself but only a

power exercisable over that property is in my opinion not sound. The definition in Section 2 (e) corresponds to the provision in Section 266 of the

CPC of 1882 (Order 21, Rule 60 of the CPC of 1908) by which a creditor may attach in execution all saleable property over which the judgment-

debtor has a disposing power which he may exercise for his own benefit. It has been laid down by a Full Bench in Sellamuthu Servai, In re ILR

(1923) M 87: 46 MLJ 86. that an Official Assignee standing in the shoes of an insolvent father can alienate family property to pay his antecedent

debts provided that those debts are not tainted with illegality or immorality. In The Official Assignee of Madras Vs. Allu N. Ramachandra Aiyar

and Others by mother and guardian Swornambal, a Bench of this Court, to which Schwabe, C.J. and Coutts Trotter, J. were parties, held that the

interest of the sons does not vest in the Official Assignee by reason of the adjudication although it would be competent to him to deal with their

shares if the debts of the insolvent were of such a nature as to be binding on their interest. At the hearing of that case, the learned Advocate-

General conceded, (I think erroneously) that the sons' shares did not vest in the Official Assignee and their Lordships adopted what he conceded

as being the correct law upon the point. But the decision is one under the Presidency Towns Insolvency Act, and having regard to the manner in

which the case was disposed of, should not be treated as a ruling on a point which was not necessary for the decision of the case. So long ago as

1895 Subramania Aiyar, J. decided in Rangayya Chetti v. Thanikachalla Mudali ILR (1895) M 74. that after the making of a vesting order the

Official Assignee had power to transfer not only the shares of the insolvent but also those of his co-parceners provided that the debts were shown

to have been incurred for purposes binding upon them. This decision was followed in Nunna Setti v. Chidaraboyina ILR (1902) M 214., quoting

the opinion of Latham, J. in Fakirchand Motichand v. Motichand Hurruckchand ILR (1883) 438., although Bashyam Aiyangar, J. was inclined to

treat the Official Assignee's powers as derived from Section 30 of the Indian Insolvency Act, which deals with powers rather than from Section 7

which deals with property. A Full Bench of the Lahore Court has definitely decided upon this point in Bihari Lal v. Sat Narain ILR (1922) Lah

339. that on the insolvency of a Hindu father governed by Mitakshara Law not only his own interest in the joint family estate vests in the Official

Assignee but also his sons' interests which must be treated as the property of the father so far as the Official Assignee is concerned. I am

respectfully inclined to adopt that decision as a correct statement of the law. An unreported decision in C.M.A. No. 110 of 1919 by Krishnan, J.

and myself was to the same effect, viz., that the property which vested in the Receiver upon the adjudication of the judgment-debtor as an insolvent

included all property over which he had a disposing power which he might exercise for his own benefit. I think that Sanyasi Charan Mandal v.

Asutosh Ghose ILR (1914) C 225, which was quoted to us in the arguments, has no bearing on this question, as what was dealt with in that case

was the power of a Receiver to deal with the interests of a minor who had not been adjudicated as an insolvent in a partnership property, upon

which different considerations from those applying to co-parcenerships arise.

4. It is clear that the present suit is not barred by the adjudication of the 1st defendant as an insolvent and the lower Court should not have

dismissed it on that ground. The plaintiffs may reasonably wish to protect themselves against the father contracting further debts on the security of

the joint family property and their only means of protecting themselves is by becoming divided [vide Sama Rao v. Vannaji Vapuji ILR (1922)M 64

: 43 MLJ 745.]. The suit must therefore be remanded for retrial on the issue relating to illegality or immorality of the debt's incurred in favour of

the 4th and 5th defendants and for declaring the plaintiffs separate from their father in status and for fixing the amount of the shares to which they

are entitled. As the property has vested in the Official Receiver, it will be impossible to effect a division by metes and bounds until the

administration of the estate is completed. The passing of the final decree must therefore be deferred pending the divestment of the estate from the

hands of the Official Receiver. The Official Receiver will get his costs of opposing this appeal out of the insolvent 1st defendant's estate. The costs

of the other parties to the suit in the lower Court and in the appeal will abide and be provided for in the final decree.

Srinivasa Aiyangar, J.

5. I agree with my Lord the Officiating Chief Justice in the order made by him. Having regard, however, to the very important nature of the

questions raised in this appeal, I feel constrained to add some observations of my own. The main question is whether on the adjudication of an

undivided Hindu father what vests in the Official Receiver is only the power to

dispose of the sons' shares for the satisfaction of debts which are neither illegal nor immoral or the entire property inclusive of the shares of the sons therein. The decision in *The Official Assignee of Madras Vs.*

Allu N. Ramachandra Aiyar and Others by mother and guardian Swornambal, though it related to an insolvency under the Presidency Towns

Insolvency Act, proceeded on a construction and consideration of language identical in the Presidency Towns Insolvency Act and the Provincial

Insolvency Act. It is true that the decision of the learned Judges seems to be based on the concession made by the learned Advocate-General at

the very opening of his argument. It is also true that the definition of property contained in Section 2, Clause (e) of the Act was not referred to or

its effect on the question before the Court considered.

6. However, personally speaking, in view of the very definite statement of the law set out in the said judgment, I should have been disposed to

consider the matter of sufficient importance to deem a reference to the Full Bench necessary in the matter. But in view of the intimation by my Lord

the Officiating Chief Justice in a matter which is essentially one of etiquette, I felt bound not to disagree with his decision that it is not necessary to

make any such reference.

7. The expression "Property over which or the profits of which any person has a disposing power which he may exercise for his own benefit" is

by no means easy to construe. It cannot of course be said that a father who exercises the power of sale over the joint property in which his sons

have also a vested interest for the payment of antecedent debts of his, is not exercising the power of sale for his own benefit because though

primarily the benefit accruing from the sale is the creditors, still, the freedom from liability for a personal debt is undoubtedly benefit of the kind

contemplated. But the power of sale possessed by the father under the Hindu Law is not an absolute power of sale, and it is possible to regard the

power, as argued by Mr. T. R. Ramachandra Aiyar, the learned Vakil for the appellant, as conditional upon the existence of antecedent debts and

the requisite that such debts should not have been contracted for illegal or immoral purposes.

8. Were the matter *res integra* one would have been inclined to avoid the monstrous result that the family estate including the sons' shares should

vest in the Official Receiver or Assignee on the insolvency of the father by holding that the father's power being merely conditional, the vesting of

the property in the Official Receiver or Assignee both in quantity and quality would only be such as to tantamount to a vesting merely of the bare

power, as held in the case of *The Official Assignee of Madras Vs. Allu N. Ramachandra Aiyar and Others* by mother and guardian Swornambal, .

But the expression "" Property over which or the profits of which any person has a disposing power which he may exercise for his own benefit"" was

by no means new to the Indian Legislature and has been bodily copied from Section 266 of the CPC of 1882.

9. Remembering that the Provincial Law of Insolvency is a development of the old Law of Civil Procedure, it seems to me that we are bound to

construe that expression in the same manner as it has been construed by Courts in India for a long time beginning at any rate with the case of

Jagabhai Lalubhai v. Bhukhandoss Jagjivandoss ILR (1886) B 37.. That case and the numerous cases that followed it have proceeded on the

basis that the power of a father to dispose of his sons' shares also, for the payment of his debts was not in the nature of a latent power which came

into existence on the coming into existence of certain conditions precedent but a potential power over the entire property exercisable by him validly

subject only to the sons successfully questioning the same in proper proceedings.

10. It is therefore impossible to hold that when the property of the insolvent is said to vest in the Court or the Official Receiver and property is

defined to include all property over which the insolvent has a disposing power what so vests is not the entire property itself inclusive of the shares

of the sons therein but only the power of disposal which a father has.

11. There would also be enormous difficulties of a practical nature in holding that the power of a father is only a conditional power and that the

vesting is contingent upon or proportionate to the debts of the father which are neither illegal nor immoral. But though the entire property inclusive

of the shares of the sons vests in the Official Receiver or Assignee, it is clear that it so vests for the purpose of enabling him to exercise the power

of sale which the father, had of disposing of the property for the discharge of debts of an unobjectionable character, and it follows therefrom that

the sons can in proper proceedings require to have it determined in respect of

which debts such power can be exercised and in respect of which

not. And it also follows that the sons can in proper time require that what is left over after the administration of the insolvent's estate and the due

exercise of the powers by the Official Receiver or Assignee should be made over to them.

12. The proper way, it seems to me, of regarding the vesting so far as the sons are concerned would be to regard it as in the nature of a trust for

the exercise of the father's power of disposal of the family property for his antecedent debts on the one hand and on the other for the

ascertainment and delivery over to the sons of the remainder of the property, if any.

13. I am not at all sure whether it ought not to be held that on the mere making of a vesting order by a Court as regards the father or as for that

matter another co-parcener of the joint family the indeterminate share possessed by the co-parcener becoming defined and definite there is not

brought about in law a status of partition between him on the one hand and the other co-parceners on the other. However that may be there can be

no doubt at any rate that the sons are at least entitled to have the status of division declared and further to have their rights to the residue of the

property, if any, ascertained, declared and decreed. The lower Court was therefore wrong in dismissing the plaintiffs' suit entirely on the mere

ground that the plaintiffs' shares became vested in the Official Receiver and that therefore the plaintiffs had no cause of action whatever.

14. As regards the other question, namely, whether the finding in the previous suit by the creditors that the debts were neither illegal nor immoral

operates as res judicata in the present suit, I agree that it is not a case in which the rule of res judicata applies. In the case of Midnapur Zamindari

Company, Ltd. v. Naresh Narain Roy ILR (1920) C 460. their Lordships of the Judicial Committee held that the finding against the occupancy

right claimed by tenants in a suit against them which was dismissed as premature should not operate as res judicata in a subsequent suit, and the

ground of decision is that in the former suit the tenants had no occasion to go further as to the finding against them.

15. If it should be necessary to bring the case within the terms of Section 11, Civil Procedure Code, I should be disposed to regard it not as a case

in which there has been no final decision but as a case in which the issue was not substantially in issue between the parties in the previous suit for

the reason that though directly and substantially in issue at one stage it ceased to be substantially in issue on the finding of the Court with regard to

another issue which was sufficient to dispose of the case.

16. I therefore agree that the appeal should be allowed and that the plaintiffs' suit should be restored and remanded on the terms set out in the

judgment of my Lord the Officiating Chief Justice.