
(1957) 09 BOM CK 0041

In the Bombay High Court

Case No : Civil Revision Application No. 1409 of 1956 (with Civil Application No. 2157 of 1956 for stay)

Ramanlal Manilal Bhatt and Another

APPELLANT

Vs

Manilal Laxmichand and Others

RESPONDENT

Date of Decision : 16-09-1957

Acts Referred:

Provincial Insolvency Act, 1920 — Section 2, 28, 28

Citation : AIR 1959 Bom 229 : (1957) 59 BOMLR 1243 : (1959) ILR (Bom) 13

Hon'ble Judges : J.C. Shah, J;Gokhale, J

Bench : Division Bench

Advocate : M.H. Chhatrapati and C.S. Trivedi, for the Appellant; S.M. Shah and V.T. Gambhirwala, for the Respondent

Judgement

J.C. Shah, J.—Lallubhai Jesangbhai, father of respondents Nos. 2 to 5 and husband of respondent No. 6, was running the business of a ginning factory at Dabhoi in the District of Baroda. After the death of Lallubhai the business was continued by his sons and his widow. One Muljibhai and respondents Nos. 2 to 5 were the sons of Lallubhai. It appears that for the purpose of the business deposits were taken from diverse persons. A deposit of Rs. 10,000 was taken from one Manilal Laxmichand and at the foot of the account of that deposit Rs. 8,234-6-0 with interest remained due. On 21-8-1953, the creditor demanded his dues from Muljibhai Lallubhai who was acting as manager of the business. Alleging that after the notice was served Muljibhai stopped payment and thereby committed an act of insolvency, the creditor Munilal Laxmichand applied to the Insolvency Court at Baroda for adjudicating Muljibhai, his four brothers and Bai Ujjam -- widow of Lallubhai -- as insolvents. That application was resisted by Muljibhai and respondents Nos. 2 to 6. The learned Judge of the Insolvency Court of 6-9-1954 adjudicated Muljibhai an insolvent and dismissed the application against respondents Nos. 2 to 6. The learned Judge however, proceeded to pass an order directing that the right of Muljibhai to alienate the joint family properties including the share of respondents Nos. 2 to 6 for the debts

contracted by the joint family firm shall vest in the Receiver in insolvency along with the separate property and undivided share of Muljibhai in the joint family property.

2. Against the order two appeals were preferred to the District Court at Baroda. Appeal No. 164 of petition, i.e., the four sons of Lallubhai other than Muljibhai and Bai Ujjam widow of Lallubhai. By that appeal they challenged the order of the Insolvency Court vesting in the Receiver the right of Muljibhai to alienate joint family properties including their share. Muljibhai filed Appeal No. 165 of 1954 challenging the order of adjudication. These two appeals were heard by the Assistant Judge at Baroda. The learned Judge dismissed Appeal No. 165 of 1954 and allowed Appeal No. 164 of 1954 and deleted that part of the order of the trial Court which vested in the Receiver Muljibhai's right to alienate the joint family properties including the share of Lallubhai's sons other than Muljibhai and of the widow of Lallubhai for the debts contracted by the joint family firm, and substituted a clause whereby the separate property of Muljibhai and his undivided interest in the joint property and his undivided interest in the joint family property vested in the Receiver. Against the order passed in Appeal No. 164 of 1954 the Receivers in insolvency have applied to this Court in revision. It may be observed that the order dismissing the application against the sons of Lallubhai other than Muljibhai & the widow of Lallubhai for adjudicating them insolvents has become final, no appeal having been preferred to the District Court against that order.

3. In this revision application, Mr. Chhatrapati on behalf of the Receivers in insolvency has contended that the Assistant Judge was in error in holding that the right of Muljibhai, as manager of the joint family, to dispose of property of the joint family to satisfy debts binding upon the family, had not vested in the Receivers. In order to appreciate this argument certain provisions of the Provincial Insolvency Act, 1920, by which the proceedings in insolvency are governed may be referred to.

4. By Section 2(d) of the Provincial Insolvency Act the expression "property" is defined, unless there is anything repugnant in the subject or context, to include "any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit". By Section 28(2) it is provided that "on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors" Section 59 of the Act confers upon the receiver power to sell all or any part of the property of the insolvent. Section 28A, which was added by the Provincial Insolvency (Amendment) Act, 1948 (Act 25 of 1948), provides:

"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."

That section is followed by two provisos which are not material at this stage.

5. On first impression, in view of the definition receiver in insolvency is invested with not only the property belonging to the insolvent, but also property over which the insolvent has a disposing power which the insolvent may exercise for his own benefit. But having regard to the fact that what vests in the receiver is property which is to become divisible among the creditors, it has been held that the capacity of an insolvent to dispose of property for his own benefit is not "property" within the meaning of Section 28(2).

6. In AIR 1925 18 (Privy Council) , their Lordships of the Privy Council held, in considering an analogous provision in the Presidency-Towns Insolvency Act, 1909, that by Section 17 of that Act the right of a father to dispose of the property of his sons for his own benefit was not vested in the official assignee. At pages 37 and 38 (of Ind App): (at p. 26 of AIR) their Lordships observed:

"It is true that Section 17 of the Act of 1909 provides that on the making of an order of adjudication "the property of the insolvent" shall vest in the official assignee and shall become divisible among his creditors, & that by Section 2 "property" is defined as including any property over which any person has a disposing power which he may exercise for his own benefit; and may be said that a Hindu father's power to sell the joint property and apply the proceeds to the payment of his debts is such a power. But the definitions in Section 2 are only to apply "unless there is something repugnant in the subject or context, and it is necessary therefore to consider the effect of the definition of "property" contained in that section in relation to the subject-matter which is being dealt with and the other sections of the Act. Now as to the subject-matter -- namely, joint property of an undivided Hindu Family, it is certainly a startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interests in the joint property and from the female members their right to maintenance and transfer the whole estate to an assignee of the insolvent for the benefit of his creditors. The father's power to dispose of the joint property is not absolute, but conditional on his having debts which are liable to be satisfied out of that property; and Section 2 seems to contemplate an absolute and unconditional power of disposal. And if the later sections of the Act are examined, it becomes apparent that this cannot have been the intention of the statute."

7. From these observations it is evident that the property of sons which a Hindu father may dispose of for his own benefit, i.e., to satisfy his own debts which are not Avyavaharika, is not vested in the receiver. The view taken by the Courts in India to the contrary in cases such as Fakirchand v. Motichand, ILR Bom 438; Jagabhai v. Bhukandas, ILR Bom 37 and Rangayya v. Thanikachalla Mudali, ILR Mad 74 decided under the Indian Insolvency Acts 11 and 12 Vict. 67, must be regarded as superseded. u/s 52(2)(b) of the Presidency-towns Insolvency Act the

expression "property of the insolvent" comprises the capacity to exercise and to take proceedings for exercising all such powers in or over property as might have been exercised by the insolvent for his own benefit, and it was observed in AIR 1925 18 (Privy Council) that under the provisions of Section 52 or in some other way the property may in a proper case be made available for payment of the father's first debts.

8. Before Section 28A was added by Act 25 of 1948, there was no provision in the Provincial Insolvency Act similar to Section 52(2)(d) of the Presidency-towns Insolvency Act. In *Ramasastrulu v. Balkrishna Rao*, ILR 1943 Mad 83: AIR 1942 Mad 682, a Full Bench of the Madras High Court held that the right of a manager of a joint Hindu Family to sell family assets to discharge debts which were payable out of the joint estate was not "property" within Section 2(d) of the Provincial Insolvency Act and there being no provision in Provincial Insolvency Act corresponding to Section 52 of the Presidency-towns Insolvency Act, such right of the manager did not devolve on the Official Receiver when the manager was adjudicated an insolvent under the Provincial Insolvency Act. The Calcutta High Court in *Bejoy Kumar Saha represented by his next Friend and Guardian Mother, Kuntalabala Dasi Vs. Ramapati Basu, Receiver and Others*, , held that on the insolvency of the karta (manager) of a Dayabhaga Hindu joint family his power to sell or mortgage the interest of other co-partners for the satisfaction of joint family debts did not vest in the receiver u/s 28(2) of the Provincial Insolvency Act 1920 and that such power of the karta (manager) was not property as defined in Section 2(d) of the Provincial Insolvency Act, 1920. In view of these judicial pronouncements the Legislature amended the Provincial Insolvency Act by adding Section 28A by Act 25 of 1948, and by that amendment the Legislature sought to bring the provisions of the Presidency-towns Insolvency Act. As observed hereinbefore, the property of the insolvent, since the amendment of the Act, is to comprise, and shall always be deemed to comprise, also the capacity to exercise and to take proceedings for exercising all such powers in relation to property as might have been exercised by the insolvent for his own benefit.

9. Mr. Chhatrapati urged that by Section 28A, the power to dispose of joint family property exercisable by the manager of a joint Hindu family, who is not the father, vests in the receiver if debts have been incurred by the manager for the benefit of the joint family. Mr. Chhatrapati submitted that the object of the Legislature in enacting Section 28A was that on the insolvency of a manager of a joint Hindu family it should, in the interest of the general body of the creditors, be open to the Receiver in insolvency to proceed not merely against the interest of the manager in the property of the joint family, but against the entire property of the joint family of which the insolvent was the manager and to sell the same for the benefit of the creditors. In our judgment that contention on the language used in Section 28A, cannot be sustained. What avails the receiver as property of the insolvent is the capacity to exercise the power in or over or in respect of property which the insolvent might have exercised for his own benefit. The key

words used in Section 28A are "for his own benefit". When a manager of a joint Hindu family, who is not the father, exercises his power of disposing of property for the benefit of the joint family for purposes of legal necessity, he does not exercise the powers for his own benefit. A Hindu father, however, has the power or capacity to dispose of for his own benefit the interest of his sons in joint family property, and by the operation of Section 28A such capacity may be exercised by the receiver. It was held by their Lordships of the Supreme Court in *Cheruvu Nageswaraswami Vs. Rajah Vadrevu Viswasundara Rao and Others*,

"where a Hindu father who has mortgaged the joint family property for an antecedent debt which is not illegal or immoral becomes insolvent and the receiver sells the property, the interest of his sons in the property also vests in the purchaser even in the case of a sale held before the Amendment Act of 1948 came into force, and the sons cannot redeem the property".

10. But we are unable to hold that the power or capacity of a manager of a joint Hindu family, who is not the father, to dispose of property for satisfying the debts of the joint family, vests in the receiver. The capacity, which may be exercised by the receiver, being capacity to exercise the power in or over property "for his own benefit", in our judgment, the capacity of a manager to dispose of property for legal necessity or benefit to the estate is not comprised in the expression "property" in Section 28A; and in the absence of any provision otherwise made in the Provincial Insolvency Act, we are unable to agree with the contention raised by Mr. Chhatrapati.

11. In *Arasappa Pillai and Others Vs. V. Thandavan Pillai and Another*, , Mr. Justice Raghava Rao held that: "Section 28A of the Provincial Insolvency Act is in terms..... identical with those of Section 52(2)(b) of the Presidency-towns Insolvency Act." and that the words "for his own benefit" occurring in the body of Section 28A, do not apply to cases of insolvency of a manager other than the father manager of a Hindu joint family. In our opinion, with respect, the view expressed in the case is correct. In *Shripad Gopalkrishna v. Basappa Rudrappa*, ILR Bom 785: AIR 1925 Bom 416, Sir Norman Macleod, C.J., observed, though it must be stated that it was strictly not necessary for him to so observe for deciding that case: "...I do not think that when the manager of a joint Hindu family is adjudicated insolvent, the power which he had before his insolvency to dispose of family estate for proper purposes, must be considered as vesting in the Receiver or Official Assignee". That was a case decided before Section 28A was incorporated in the Provincial Insolvency Act. In our view, by the enactment of Section 28A, a receiver in Insolvency is not invested with the right of a manager of a joint Hindu family, who is not the father, to dispose of property of the joint family for purposes of legal necessity or benefit to the estate.

12. We, therefore, hold that the learned Assistant Judge was right in modifying the order passed by the trial Court.

13. Rule is, therefore, discharged with costs. Stay in Civil Application No. 2157 of

1956 discharged with costs.

14. Rule discharged.