

(1922) 02 PRI CK 0004

In the Privy Council

Case No : Privy Council Appeal No. 132 of 1920

Sripat Singh Dugar and another

APPELLANT

Vs

Rai Hariram Goenka and others

RESPONDENT

Date of Decision : 14-02-1922

Acts Referred:

Citation : (1922) AIR(PC) 51

Hon'ble Judges : Ameer Ali, John Edge, Phillimore, Atkinson, JJ.

Advocate : W. W. Box and Co., G. C. Farr, Dube, Dunne, K. Brown, George Lowndes, for the Appearing Parties.

Judgement

Lord Phillimore

The late Ram Chandra Goenka, for himself and his partners, obtained in 1896 a decree against the late Chatrapat Singh for a considerable sum of money. Some money appears to have been recovered from time to time under this decree, but on the 21st December 1915, it was still in part unsatisfied, and on that date the decree-holder applied to attach a house belonging to the judgment-debtor in Calcutta. On the 3rd March 1916, the judgment-debtor applied to have the order of attachment, which had been thus obtained, set aside, saying that no notice of execution had been served upon him and that the decree was barred by the law of limitation. The decree being one made by the High Court of Judicature at Fort William, in Bengal, would be kept alive for twelve years, and thereafter by revivor if the proper proceedings were taken. The decree-holder replied that the judgment had been revived in 1904 by a writ of attachment issued on the 3rd February, 1904, and that before twelve years from the 3rd February, 1904, had expired, the notice of execution, taken out in December, had been served on the 12th January 1916 : that is, just within the further period of twelve years.

The application of the judgment-debtor came on for bearing before Fletcher, J., on the 22nd May 1916. He decided in favour of the decree-holder and dismissed the application. The judgment-debtor appealed.

On appeal it could not be gathered from the judgment of Fletcher, J., that he had considered the dispute as to the question of service on the 12th January 1916. His written judgment was wholly concerned with what took place in 1904. And on the 23rd November 1916 (the date is important), a remand was ordered.

No steps were taken for some time under this remand, and meanwhile the judgment-debtor died on the 25th April 1918. On the 5th August, 1918, the decree-holder took out a summons against the present appellants, the sons and heirs of the judgment-debtor, to show cause why the original decree should not be executed against them as sons and heirs, and having thus revived against them, brought the matter of the remand on for hearing. It was heard by Chaudhuri J., who decided in favour of the decree-holder, and held that the order of attachment, called the prohibitory order, ought not to be set aside. From this decision an appeal was taken. During the course of the appeal the decree-holder died, and his place was taken by the present respondents. The decision of Chaudhuri J. was affirmed by the High Court, and it is from this affirmation that the present appeal is brought.

With regard to what took place in 1904, the only materials for their Lordships' consideration are certain affidavits and the judgment of Fletcher J. and it is not very clear whether he decided the question of law or matter of fact. But on whatever ground he decided, the High Court must be taken to have agreed with him on this point, for if it had been otherwise, it would not have been necessary to remand the case for the consideration of the other point.

It was contended before their Lordships that the remand was general, but this is not their opinion. It was a remand to settle the matter of 1916, the consideration of which was only important if the decree-holder had successfully maintained his point with regard to what took place in 1904. This being so, from the very scanty materials which present themselves, their Lordships can find no reason for disagreeing with the opinion of Fletcher J., affirmed on this point by the High Court.

With regard to the question of fact as to whether or not Chatrapat Singh had been served, as contended, with a notice of execution on the 12th January 1916, Chaudhuri J. after hearing the evidence on both sides, came to the conclusion that he had been served, and the High Court accepted his finding, and there is nothing exceptional to cause their Lordships to interfere with two concurrent findings of fact.

This being so, there would be a short end to the matter, and the appeal would be dismissed without further trouble but for one circumstance. It is contended by the appellants that the proceedings subsequent to the remand were ineffective, and that the judgments of Chaudhuri J. on remand and of the High Court on appeal must be set aside because of the absence of a material or the material party. It is said that on the 23rd November 1916, the precise date of the order of remand, Chatrapati Singh was adjudged insolvent, and that thereupon the

insolvent Court, through its officer or the Receiver - if one were appointed under the then existing Insolvency Act - ought to have been served and have had an opportunity of being present and raising his points in objection to the attachment when the matter was heard before Chaudhuri, J.

The first observation which occurs upon this is that if the appellants were making this point they should have given proper proof of the material documents and raised the point distinctly at the hearing before Chaudhuri, J. But the only indication of the point being raised is to be found in the two questions following, put to the process server, apparently to lead up to the contention that the judgment-debtor could not have been living in the house in which the service is said to have taken place; and as the answers to these questions were in the negative, nothing was proved. Questions and answers are as follows :

"Do you know that Chatrapati was made an insolvent by an order of the Privy Council?"

"I do not know.

"And a Receiver was appointed of his estate on the 2nd August 1917 ?"

"No."

While there is thus nothing to show that the point was even taken before Chaudhuri J., there is at no stage in the case adequate and regular proof that Chatrapat Singh was adjudicated insolvent. On the other hand, in the grounds of appeal from the judgment of Chaudhuri J. to the High Court, and again in the petition for leave to appeal to His Majesty in Council, the point was expressly made, and in the matter of document some detail is given, it being stated that a Receiver was appointed by order dated the 2nd August 1917; and the statements in this petition are supported by an affidavit.

Moreover, however much the appellants may have precluded themselves personally from raising the point, it is hardly possible for their Lordships, in a matter which may concern their parties, to pass it wholly by; for the adjudication of insolvency in this particular case was a remarkable one. The application was made by the would be insolvent himself. It was refused by both Courts in India, who treated it as an unfounded application made for some fraudulent purpose. But this Board upon appeal felt bound by the terms of the Act, as it then stood, to grant the petition and to declare Chatrapati Singh insolvent. The case is reported in *Chatrapat Singh v. Kharag Singh*, AIR 1916 PC 64: 44 Cal 535 : 44 IA 11 (PC). It was decided on the 20th November, 1916, and the Order in Council confirming the report of the Judicial Committee has been placed before their Lordships and is dated the 23rd November 1916.

As to what happened after this order of adjudication was made there is no information. Whether it was afterwards annulled under the provisions of the Insolvency Act or came to a determination in some other way, before or after the death of Chatrapati Singh, and if so when, their Lordships have no information. It

seems unlikely that if the state of insolvency was continuing and was brought to the attention of the Court, it should have been passed over in silence by the various learned Judges, or that a decision in favour of the validity of the attachment should have been delivered in the absence of the Receiver or other officer to whom under the statute the assets of Chatrapati Singh should have passed. Moreover, if Chatrapati Singh remained insolvent, there would be no property to pass to his heirs, and no inducement to them to appear, except for the sake of getting their costs. Whereas they not only appeared, but called witnesses, and appealed and are now appealing to their Lordships' Board, though urging as one of their grounds of appeal a state of facts which would preclude them from having any interest in the matter.

On the other hand, it is not easy to see why the adjudication of insolvency did not divest the rights of the decree-holder as such and remit him to the position of an ordinary creditor.

In these difficult circumstances their Lordships, having no doubt what the decision as between the two parties to this appeal should be, but desiring that their judgment and His Majesty's order should be so expressed as not to prejudice the rights of other persons, have concluded that the right course is for them, while recommending that this appeal should be dismissed with costs, to recommend also that the dismissal should be accompanied by a declaration in the following words : "that if the adjudication of the insolvency of Chatrapat made on the 23rd November 1916, had not been annulled or the insolvency had not otherwise terminated on or before the 19th February 1919, the order then made by Chaudhuri J., would, owing to the absence of the Receiver or other representative of the Insolvency Court be inoperative except in so far as it decided against any asserted interest of the sons and heirs of Chatrapat, parties to the proceeding." And they will humbly recommend His Majesty accordingly.