

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Somayya.*

RM. AR. AR. RM. ARUNACHALAM CHETTIAR (DEAD)
AND FOUR OTHERS (FIRST RESPONDENT AND HIS LEGAL
REPRESENTATIVES AND SUPPLEMENTAL APPELLANTS),
APPELLANTS,

1939,
February 9.

v.

SABARATNAM CHETTIAR AND TWO OTHERS
(RESPONDENTS 3, 2 AND 1), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 28 (2)—Hindu joint family—Father—Insolvency of—Proceedings against his undivided son's share in family property after—Condition precedent to taking of—Leave of Insolvency Court if—Attachment of son's share in execution—Power of Official Receiver after, to sell that share to meet just and proper debts of insolvent.

Section 28 (2) of the Provincial Insolvency Act of 1920 refers only to the property of the insolvent and the prohibition against the institution of legal proceedings without the leave of the Insolvency Court contained therein refers to proceedings with regard to the insolvent's property. In the case of the insolvency of a Hindu who is subject to the Mithakshara law his undivided son's share in the family property does not vest in the Official Receiver, what vests in him being only the power of the insolvent himself to sell his son's share in the family property for paying his just and proper debts. Section 28 (2) is therefore no bar to proceedings being taken in respect of the son's share in the family property without the leave of the Insolvency Court.

The right of the Official Receiver to exercise the power of the insolvent himself and sell his undivided son's share to meet his (the insolvent's) just and proper debts exists only so long as the son's interest in the family property exists. If

*Appeal Against Appellate Order No. 166 of 1936.

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the interest has been sold or if there has been a lawful attachment thereof, which has the same effect, the power of the Official Receiver to sell the son's share is lost.

Baluswami Naidu v. Official Receiver, Madura(1) overruled.

Gopalakrishnayya v. Gopalan(2) and *Manickam Pillai v. Vellayya Naickar*, Appeal Against Order No. 253 of 1936, followed.

Chinna Veeriah v. Gurivi Reddi(3) approved.

Seetharama Chettiar v. Official Receiver, Tanjore(4) relied upon.

APPEAL against the order of the District Court of Ramnad at Madura, dated 2nd July 1936 and passed in Civil Miscellaneous Appeal No. 105 of 1932 preferred against the order of the Court of the Subordinate Judge of Devakottah in Interlocutory Application No. 423 of 1932 in Insolvency Petitions Nos. 12 and 13 of 1927.

M. Patanjali Sastri and *T. K. Sundararaman* for appellants 2 to 5.

C. S. Venkatachari for *M. Murugappa Chettiar* for first respondent.

K. Sankara Sastri for second respondent.

T. M. Ramaswami Ayyar for third respondent.

JUDGMENT.

LEACH C.J.

LEACH C.J.—On 24th September 1931 the appellant obtained a decree for Rs. 19,383-10-1 with interest against one Ramaswami Chettiar and his five sons. The father and the sons constituted a joint Hindu family. In 1926 the father was adjudicated an insolvent by the Subordinate Judge of Tinnevely. The Court of the Subordinate Judge of Devakotta

(1) (1938) 1 M.L.J. 824.

(3) (1933) 66 M.L.J. 277.

(2) (1926) I.L.R. 51 Mad. 342.

(4) (1926) I.L.R. 49 Mad. 849 (F.B.).

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subsequently obtained seisin of the insolvency proceedings and the estate of the insolvent vested in the Official Receiver of Ramnad. The Official Receiver sought to bring the whole of the family properties to sale for the benefit of the creditors on the ground that the sons' shares in those properties were available for the discharge of the father's debts on the principle of Hindu law that sons are liable for their father's debts. The Official Receiver received bids for the various items of property in March 1932, but he did not accept any bid and adjourned the sale until 9th April 1932. Meanwhile the appellant had filed in the Court of the Subordinate Judge of Devakotta proceedings in execution of his decree and asked for the attachment of the shares of the sons in the family properties. An order was issued and the properties were attached. The appellant then filed an application asking the Court to restrain the Official Receiver from proceeding to sell the shares of the sons in the attached properties. By consent, on 9th April 1932, an order was passed by the Subordinate Judge allowing the Official Receiver to proceed with the sale of the properties, but subject to his paying five-sixths of the proceeds (the amount representing the sons' shares) into Court pending the decision of the main application. In pursuance of this order the Official Receiver sold the properties in June 1932 and realised a total sum of Rs. 17,400. Of this amount Rs. 14,500, representing the shares of the sons, was deposited in the Court of the Subordinate Judge. The Subordinate Judge having heard the parties held that the appellant was entitled to an order for payment to him of the Rs. 14,500 on the ground that the Official Receiver's power to sell the interests of the sons in the properties for the discharge of the father's debts was

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defeated by the order of attachment. The Official Receiver appealed to the District Judge who reversed the decision of the Subordinate Judge on the ground that the right to sell the properties had vested in the Official Receiver either at the time of adjudication or some time before the sale of the properties took place. The learned District Judge failed to understand the question which was before him. The fact that the right to sell the sons' shares had devolved on the Official Receiver was not the only factor. The present appeal is from the order of the District Judge.

The appellant contends that the Official Receiver merely stands in the shoes of the father. He says that as the attachment would be valid against the father and would prevent him from exercising his power to sell his sons' interests in the family properties in order to discharge his own debts, the attachment puts an end to the right of the Official Receiver to sell as he has no greater rights than the father. The Official Receiver does not attempt to support the decision of the District Judge on the ground given by the District Judge, but he says that there cannot be a valid attachment without the leave of the Insolvency Court and in this connection relies on the provisions of section 28 of the Provincial Insolvency Act, 1920. Before examining the effect of section 28 it will be convenient to refer to certain authorities which lay down principles which have application here.

In *Sat Narain v. Behari Lal*(1) the Privy Council held that when a Hindu is adjudicated an insolvent under the Presidency-towns Insolvency Act, 1909, his sons' interests in the joint family property do not thereby become vested in the Official Assignee, although

(1) (1924) I.L.R. 6 Lah. 1 (P.C.).

under section 52 or in some other way their interests in the family property might be available for the payment of the father's debts. There is no provision in the Provincial Insolvency Act which renders the position any different from the position under the Presidency-towns Insolvency Act. In *Seetharama Chettiar v. Official Receiver, Tanjore*(1), a case governed by the Provincial Insolvency Act, a Full Bench of this Court expressly held that on the insolvency of a Hindu who is subject to the Mithakshara law, the insolvent's power to sell his sons' shares in the family property for paying his just and proper debts vests in the Official Receiver but that the sons' shares do not vest in him. This principle was re-affirmed by the Judicial Committee in *Sat Narain v. Sri Kishen Das. Same v. Bank of Upper India*(2). There, their Lordships pointed out that, although section 52 (2) (b) of the Presidency-towns Insolvency Act entitles the Official Assignee to exercise the father's powers to sell the share of his son in the family property to discharge his debts, such powers are subject to limitation.

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Section 28 (2) of the Provincial Insolvency Act states :

“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, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceedings, except with the leave of the Court and on such terms as the Court may impose.”

(1) (1926) I.L.R. 49 Mad. 849 (F.B.).

(2) (1936) I.L.R. 17 Lah. 644 (P.C.).

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This section refers only to the property of the insolvent and the prohibition against the institution of legal proceedings without the leave of the Court refers to proceedings with regard to the insolvent's property. Although the right of an insolvent Hindu father to sell his son's share in the family property to discharge his own lawful debts vests in the Official Assignee or the Official Receiver as the case may be, it does not follow that proceedings cannot be taken in respect of the son's interest in the family property without the leave of the Insolvency Court. The right to sell the son's interest only exists so long as the son's interest in the family property exists. If the interest has been sold or if there has been a lawful attachment, which has the same effect, there exists no property over which the power can be exercised.

The right of a creditor to proceed to attach a son's property notwithstanding the father's insolvency has been recognized by two Benches of this Court. In *Gopalakrishneyya v. Gopalan*(1) RAMESAM and DEVADOSS JJ. held that, notwithstanding that on the insolvency of a Hindu father joint with his son the power of the father to sell the son's share in the family property passed to the Official Receiver in the insolvency, the Official Receiver is not entitled to exercise that power after there has been an attachment of the son's share by a creditor. The attaching creditor is entitled to proceed with the execution by selling the share of the son. In *Manickam Pillai v. Vellayya Naicker*, Appeal Against Order No. 253 of 1936, a decision which has not yet been reported, KING and KRISHNASWAMI AYYANGAR JJ. had to consider the direct question whether section 28 (2) of

(1) (1926) I.L.R. 51 Mad. 342.

the Provincial Insolvency Act prohibits an attachment of a son's share without the leave of the Insolvency Court. They held that it did not. The learned Judges in that case pointed out that all that the Official Receiver can do in respect of the property of the undivided sons of an insolvent is to exercise the power of the insolvent himself and sell that property to meet the insolvent's debt; but that power can be defeated at any time by any action taken by the sons themselves to dispose of their property or by any action taken by the sons' creditors against them. This principle was also recognized by KRISHNAN PANDALAI J. in *Chinna Veeriah v. Gurivi Reddi*(1). In that case, after the adjudication of the managing member of a joint Hindu family a creditor filed a suit on a promissory note executed by the managing member. The suit was dismissed as against the insolvent and the Official Receiver, but was decreed as against the other members of the joint family. It was argued on appeal that the suit could not even be maintained as against the other members of the family on the ground that on the insolvency of the managing member the power to sell the whole of the family property to discharge the debts of the family vested in the Official Receiver as the property of the insolvent. The Court held that the creditor was not resorting to any property of the insolvent or trying to interfere with the power of the Official Receiver. The creditor was only seeking to realize his debt from the share of the son in the family property and therefore the suit was maintainable.

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The learned Advocate for the Official Receiver has quoted the decision of PANDRANG ROW J. (sitting alone) in *Baluswami Naidu v. Official Receiver*,

(1) (1933) 66 M.L.J. 277.

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Madura(1). The learned Judge does appear to have formed the opinion that in the case of the insolvency of a Hindu father, section 28 (2) of the Provincial Insolvency Act does prevent the creditors of a son from attaching the son's share in the family property without the leave of the Insolvency Court. As I have indicated, I do not share this view and, as I have also indicated, it is opposed to the decisions of two Benches of this Court : *Gopalakrishnayya v. Gopalan*(2) and *Manickam Pillai v. Vellayya Naickar*, Appeal Against Order No. 253 of 1936. The position is that while the interest of the son remains unsold or unattached the Official Assignee has the right to sell the properties for the lawful debts of the insolvent father, but unless he exercises his right he may lose it and he loses it if the interest of the son is attached by a creditor of the son.

For these reasons I hold that the decision of the District Judge is wrong and the decision of the Subordinate Judge should be restored. Accordingly I would allow the appeal with costs against the Official Receiver here and below.

SOMAYYA J.—I agree.

A.S.V.

(1) (1938) 1 M.L.J. 824.

(2) (1926) I.L.R. 51 Mad. 342.