1922

MUHAMMAD ABDUL GHANI v. FAKHR JAHAN BEGAM.

manifest from a perusal of the deed which he received and acted upon. The question is, did Lutf-ullah Khan actually or constructively take possession of the property in question in this suit? That he did not, until Munni Bibi's death in 1906, take physical possession of mauza Mundia Misir, the 4 anna 5 pie share in Gundhia or the two groves, the house and *sir* land in Jalalpur, or apply for mutation of names in his favour in respect of these particular properties, is admitted. On the execution of the deed of gift in 1884, Lutf-ullah Khan did obtain mutation of names in his favour of all the other zamindari property, and from the 7th of March, 1884, until Munni Bibi died in 1906, he paid the Government revenue which became due in respect of the taluqdari part of the property now in question. If Lutf-ullah Khan had received after the 7th of March, 1884, and before Munni Bibi died in 1906, any of the rents or profits of the property now in question, he would be held to have received them as a trustee for Munni Bibi, although the title to the corpus of the property was in him. In their Lordships' opinion Lutf-ullah Khan must be regarded as having been constructively in possession, although not in physical possession of the corpus of the property now in question from 1884 until 1906, and the gift was a valid gift.

Their Lordships will accordingly humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Solicitors for appellants: *Watkins and Hunter.*

Solicitors for respondents: *Barrow, Rogers and Nevill.*

Appeals dismissed.

APPELLATE CIVIL.

1921
December, 6.

Before Mr. Justice Piggott and Mr. Justice Walsh.

BAWAN DAS AND ANOTHER (OBJECTORS) v. O. M. CHIENE (RECEIVER) *

Act No. V of 1920 (Provincial Insolvency Act), section 28 (2)—Joint Hindu family—Insolvency of father—Vesting of entire co-parcenary property in the receiver.

Where the father of a joint Hindu family which includes minor sons as well as himself seeks the protection of the Bankruptcy Court, he must place all his property at the disposal of the court and of the receiver appointed by the

* First Appeal No. 122 of 1921, from an order of B. J. Dalal, District Judge of Allahabad, dated the 5th of April, 1921.

court. From the date of the adjudication the receiver takes over all rights in the insolvent's property which the insolvent himself possessed, and one of those rights would be to alienate co-parcenary property belonging to himself and his minor sons in satisfaction of antecedent debts incurred by him, provided those debts were not tainted with immorality. *Fakirchand Motichand* v. *Motichand Hurrukchand* (1) and *Rangayya Chetti* v. *Thanikachalla Mudali* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Jang Bahadur Lal* and Munshi *Shiva Prasad Sinha*, for the appellants.

Babu *Benoy Kumar Mukerjee*, for the respondent.

PIGGOTT and WALSH, JJ. :—These are two appeals in insolvency The appellants are the minor sons of the insolvent Bindraban, appearing in the matter under the guardianship of their mother Certain property which the receiver desires to make available for the satisfaction of the insolvent's debts was claimed by the appellants, on the ground that it had been conveyed to them by the will of their paternal grandfather. It may be noted at once that it has been proved and is not now contested, that the insolvent Bindraban had separated from his father. The said father was supposed to have executed two wills on one and the same date, by which he left property (dealt with by him as his self-acquired property) to the present appellants, the sons of Bindraban, and to another set of grandsons, the sons of a pre-deceased son, in equal shares. The two documents were produced and evidence was called before the District Judge to prove them. The District Judge was entirely sceptical as to the genuineness of these documents. There is certainly force in the argument on which he chiefly relies. As they stand the two papers are somewhat elaborate documents, very carefully written and elaborately attested. If the executant was going to take so much trouble in the matter, it seems a curious circumstance that he should not have got them registered. When in connection with this we take the fact that on each document the executant is supposed to have put his mark in the form of a thumb-impression, and that the thumb-impression is a mere smudge of ink—practically incapable of identification—suspicion as to the genuineness of the document is certainly confirmed.

(1) (1888) I. L. R., 7 Bom., 438. (2) (1895) I L. R., 19 Mad , 74.

1921

BAWAN DAS v. O. M. CHENE

In view of these circumstances and of the strong opinion formed by the District Judge as to the reliability of the evidence by which it was sought to establish these two wills, we are not prepared to dissent from his finding of fact.

We must pass on, however, to consider a question of law, apparently not raised at all in the court below, but of considerable general interest. If the grandfather, Ram Das, *teli*, in fact died intestate and the property in question is to be treated as his self-acquired property, it would descend in equal shares to the sons of his pre-deceased son on one side and Bindraban and his minor sons, the appellants, on the other. It would be co-parcenary property in the hands of Bindraban and his minor sons. On this the plea taken is that only Bindraban's share, amounting at most to $\frac{1}{4}$ of $\frac{1}{2}$, can be made available for the satisfaction of Bindraban's creditors or vested in the receiver for that purpose. A practically identical question was raised before the Bombay High Court in the case of *Fakirchand Motichand* v. *Motichand Hurruckchand* (1), and a very similar case was also decided by the Madras High Court in *Rangayya Chetti* v. *Thanikachalla Mudali* (2). In both cases the view taken seems in principle to be this, that from the date of the adjudication the receiver takes over all rights in the insolvent's property which the insolvent himself possessed. One of those rights would be to alienate co-parcenary property belonging to himself and his minor sons in satisfaction of antecedent debts incurred by him, provided those debts were not tainted with immorality. Therefore the learned Judges held that questions of this sort do not really arise in insolvency matters and that, for practical purposes, where the father of a joint Hindu family which includes minor sons as well as himself seeks the protection of the Bankruptcy Court, he must place all his property at the disposal of the court and of the receiver appointed by the court. If we may refer to another principle of Hindu law, we may note that, in the event of a suit for partition by these minor sons against their father, provision would first be required to be made for all debts due by the joint family as such, including debts due by their father. (*Vide* on this point Trevelyan's Hindu Law, 2nd edition, at page 355 and the authorities

(1) (1883) I. L. R., 7 Bom., 438. (2) (1895) I. L. R., 19 Mad., 74.

there cited). We think, therefore, that the question of law as well as the question of fact tried out in the court below must be decided against the appellants. We dismiss these appeals, accordingly, with costs.

1921

BAWAN DAS v. O. M. CHIENE

Appeals dismissed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

1922

January 9, 16.

LALTA PRASAD (DECREE-HOLDER) *v.* SURAJ KUMAR AND OTHERS (JUDGMENT-DEBTORS) *

Civil Procedure Code (1908), section 48, clause 2(a)—Execution of decree—Limitation—"Fraud"—Execution prevented by a series of frivolous objections on the part of the judgment-debtors.

Where the judgment-debtors, by means of a series of absolutely frivolous and futile objections, succeeded in preventing execution of the decree against them for more than twelve years, it was *held* that their conduct amounted to fraud within the meaning of section 48, clause 2(*a*), of the Code of Civil Procedure and the decree-holder was entitled to the benefit of the section. *Beni Prasad* v. *Kashi Nath* (1), *Mewa Lal* v *Ahmad Ali* (2), *Evans* v. *Edmonds* (3), *Jolliffe* v. *Baker* (4) and *Derry* v. *Peek* (5) referred to.

THE facts of this case were as follows:—

A decree was obtained in the court of the Subordinate Judge of Cawnpore, on the 16th of November, 1900. On appeal the decree was upheld by the High Court, on the 19th of February, 1903. The decree was against two sets of defendants. After the decree the defendants first set sued for a declaration that they were minors and were not bound by the decree because they were not properly represented. They got the declaration on the 1st of July, 1907. During all this period the execution of the decree was stayed.

In 1908 the decree-holders sought execution against the defendants second set. The latter objected that under an agreement prior to the decree the decree-holder had agreed not to execute the decree against them. The objection was disallowed.

In 1909 an application was made for the sale of immovable property of one of the judgment-debtors. Objections were put in

* First Appeal No. 171 of 1921, from a decree of Kashi Prasad, First Subordinate Judge of Cawnpore, dated the 22nd of January, 1921.

(1) (1909) 6 A. L. J., 401. (3) (1853) 13 C. B., 777.

(2) (1911) 9 A. L. J., 17. (4) (1883) 11 Q. B. D., 255.

(5) (1889) 14 A. C., 337