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liable to be again sold in execution of the second decree that was a statement of a proposition of law and can not raise an estoppel; and even if the decree-holder had gone so far as to represent that he would not execute the second decree at all except by the sale of the holding (which is not found in this case) the decree-holder would not be estopped by the mere expression of such an intention. It is said that the judgment-debtor might, if he had been aware that the decree-holder would exercise his option as against the other properties, have applied to get the sale set aside under Order XXI, rule 89, Civil Procedure Code. The reply is that the decree-holder has no responsibility in the matter. It may be that the judgment-debtor has been beguiled into a sense of security, but after all that is his own fault. He should have objected at the outset to the irregular sale and not having done so he must suffer the consequences.

The result is that the appeal will be decreed with costs in this Court and the Courts below.

MACPHERSON, J.—I agree.

Appeal decreed.

APPELLATE CIVIL.

Before Das and Kulwant Sahay, J.J.

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May, 7.

SANT PRASAD SINGH

v.

SHEODUT SINGH.*

Provincial Insolvency Act, 1920 (*Act V of* 1920), *sections* 2(1)(d), 28 *and* 47—"*Property*," *meaning of—Joint family property, whether vests in Receiver on insolvency of the father—Receiver, proceeding against, whether leave of court is necessary—secured creditor, right of.*

* Appeal from Original Order No. 149 of 1922, from an Order of T. Luby, Esq., I.C.S., District Judge of Saran, dated the 4th April, 1922.

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It is not necessary to obtain the leave of the Court to proceed against a Receiver appointed under the provisions of the Provincial Insolvency Act, 1920.

Amrita Lal Ghose v. *Narain Chandra Chakravarti*(1), followed.

Where a secured creditor has not elected to relinquish his security the Insolvency Court is not competent to direct the Receiver to take possession of mortgaged property belonging to the insolvent and sell it and to direct that the mortgagee should merely be entitled to priority in the payment of debts.

Joint family property is not "property" within the meaning of section 2(1)(*d*) of the Provincial Insolvency Act, 1920, which vests in the Court or in a Receiver under section 28 on the making of an order of adjudication.

Sahu Ram Chandra v. *Bhup Singh*(2), applied.

Where the wife of an insolvent Hindu father of a joint family objected on behalf of the minor children to the Receiver taking possession of the joint family property, on the ground that such part represented the shares of the minors, who were not responsible for the debts of their father, inasmuch as the debts had not been contracted for the benefit of the family, and that the father was a man of immoral character, *held*, that the District Judge should himself have inquired into and disposed of the objection and should not have called upon the Receiver for a report and then have accepted the report of the Receiver without considering the matter himself at all.

Appeal by the decree-holder.

The facts of the case material to this report are stated in the judgment of Das, J.

Lakshmi Kant Jha and *Har Narayan Prasad*, for the appellant.

Nirsu Narain Sinha and *Raghunandan Prasad*, for the respondents.

DAS, J.—The parties have entirely misunderstood the provisions of the Provincial Insolvency Act, 1920,

(1) (1919) 30 Cal. L. J. 515.

(2) (1917) I. L. R. 39 All. 437; L. R. 44 I. A. 126.

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and the result is that there has been a serious failure of justice in this case.

The appellant obtained a mortgage decree against Shew Dutt Singh on the 19th February, 1917. Sometime in 1918, Shew Dutt Singh filed his schedule in insolvency and, on the 7th January, 1919, a Receiver was appointed under the provisions of the Provincial Insolvency Act to take charge of the properties of the insolvent. Having obtained the mortgage decree, the appellant caused the mortgaged properties to be sold; but on the objection of the Receiver the sale was set aside. It appears that the appellant did not make the Receiver a party to the execution proceedings, and the result was that the sale was properly set aside.

On the 24th January, 1921, the appellant filed a petition in the Insolvency Court. He stated in his petition that he desired to have the properties sold and he asked for permission of the Court to add the Receiver as a party to the execution proceedings. In my opinion the appellant entirely misconceived his remedy. A Receiver, in insolvency proceedings, is not in the same position as a Receiver in a suit. His position is that of an assignee in bankruptcy, and it is well settled that it is not necessary for a party to obtain the leave of the Court to proceed against a Receiver appointed under the provisions of the Provincial Insolvency Act of 1920 [see *Amrita Lal Ghose* v. *Narain Chandra Chakravarti* (1)].

As I have stated the appellant applied for leave to continue the execution proceedings against the Receiver. Thereupon the learned District Judge called upon the Receiver to appear and to show cause why the execution proceedings should not be continued as against him. The Receiver appeared and objected to the execution proceedings. On the 22nd of April, 1922, the learned District Judge passed an order directing the Receiver to take possession immediately of the property of the insolvent and to have it sold for

(1) (1919) 30 Cal. L. J. 515.

the benefit of the creditors, and he directed that the appellant should be given priority in the payment of the debts. In my opinion the learned Judge was not right in passing the order which he did pass. It is well established that a secured creditor stands on a different footing from that which is ordinarily occupied by unsecured creditors. The position of a secured creditor is dealt with in section 28, paragraph (6), and section 47 of the Provincial Insolvency Act. Section 28 provides 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, and shall become divisible among the creditors, and that thereafter, except as provided by the Act, no creditor to whom the insolvent is indebted in respect of any debt proveable under the 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. Paragraph (6) provides as follows :

(6) Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

Paragraph (6) is very emphatic in providing that the provisions of the Provincial Insolvency Act should not in the least touch a secured creditor who is entitled to realize or deal with the security in any way he chooses unhampered by the provisions of the Provincial Insolvency Act. Section 47 provides as follows :

(1) " where a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised,

(2) where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.

(3) where a secured creditor does not either realise or relinquish his security, he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

(4) Where a security is so valued, the Court may at any time before realisation redeem it on payment to the creditor of the assessed value.

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(5) Where a creditor, after having valued his security, subsequently realises it, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

(6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend.

Speaking broadly, a secured creditor may do one of three things: he may enforce his security and prove for the balance that may be due to him; or he may relinquish his security for the general body of creditors, and prove for the whole debt that may be due to him; or he may value his security, and receive a dividend for the balance that may be due to him, subject to the right of the Court to redeem the security. He may also ignore the Insolvency Court altogether, in which case he must be content only with his security, and will be debarred from claiming any dividend, if his security should prove to be insufficient.

Now, in the proceedings which are before us, it does not appear that the appellant elected at any time to relinquish his security for the general body of the creditors. That being so, the learned District Judge had no jurisdiction to direct that the property should be sold and that Sant Prasad Singh should merely be given priority in the payment of the debts. It is of course open to the appellant to consent to the property being sold in the Insolvency proceedings, but we do not find that the appellant, at any time, consented to the properties being sold by the Insolvency Court, or that he surrendered his security in favour of the general body of creditors. In my opinion the order of the learned Judge, dated the 22nd April, 1922, in so far as he directed the Receiver to take possession of the mortgaged properties and to sell the mortgaged properties, is wholly erroneous.

But the difficulty does not end here. On the 7th of September, 1921, Mussammat Anupa Kuer, the wife of the insolvent, on behalf of her minor children, filed an objection, the object of which was to have three-fourths share of the properties wholly exonerated from any liability. She alleged in her petition that her

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husband was a man of immoral character and was addicted to every sort of vice and that the money borrowed by him was not for the benefit of the joint family, and that the shares of the minors had not vested in the Receiver and could not be sold by the Receiver. Stopping here for a moment, it is necessary to point out that if the position taken up by the infants be at all right, then nothing at all has vested in the Receiver. Under the Provincial Insolvency Act property is defined 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. Section 28 of the Act provides that on the making of an order of adjudication the whole of the property of the insolvent, that is to say, property as defined in the Act, shall vest in the Court or in a Receiver as provided in the Act and shall become divisible amongst the creditors. The question then arises, did the insolvent have any property at all which could vest in the Receiver, assuming that the infants are right, that the family was a joint *Mitakshara* family? If the minors are right in their contention, there was nothing in the possession of the insolvent over which, or the profits of which, he had a disposing power which he could exercise for his own benefit. If, therefore, this issue be decided in favour of the minors then it must follow that, not the three-fourths share of the properties, but the entirety must be exonerated from all liability. No doubt there is a line of cases long before *Sahu Ram Chandra's* case (1) was decided by the Judicial Committee which held that the member of a joint *Mitakshara* family has an interest which is capable of passing to a Receiver upon insolvency; but *Sahu Ram Chandra's* case (1) authoritatively decides that that view can no longer be maintained. If we are therefore to uphold the decision of the learned District Judge, dated the 4th April, 1922, it would be necessary for us to direct that the entirety of the property that has vested in the Receiver be exonerated from all liability.

(1) (1917) I. L. R. 39 All. 437; L. R. 44 I. A. 126.

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We have now to consider the propriety of the order of the learned District Judge of the 4th April, 1922. I have already stated that on the 7th September, 1921, Mussammat Anupa Kuer, on behalf of her minor children, filed a petition claiming that three-fourths of the property should be exonerated from liability. The learned District Judge thereupon called upon the Receiver to report on the objection filed by Mussammat Anupa Kuer. The Receiver took evidence and came to the conclusion that the contention of Mussammat Anupa Kuer was right and he recommended to the learned District Judge that three-fourths should be excluded from sale. The learned District Judge, without considering the matter at all, (for there is nothing in the short order which he has passed which shows that he judicially considered the evidence which was laid before the Receiver) accepted the report of the Receiver and exonerated the share of the minor children from sale.

It is always desirable that a contention of this nature should be decided by the Court and not by an officer that may be appointed by the Court. The question raised on behalf of the minors was a question of paramount title and therefore a question raising a very important matter between the insolvent and the general body of creditors. It was, in my opinion, necessary that the learned District Judge himself should have disposed of the matter. I am therefore unable to uphold the order of the 4th April, 1922. I would accordingly set it aside, remand the matter to the learned District Judge, and direct that he do proceed to deal with it himself. So far as the appellant is concerned, he is entitled to pursue his remedy in the way he desires, either without the assistance of the Insolvency Court, or under the provisions of the Provincial Insolvency Act.

We make no order as to costs.

KULWANT SAHAY, J.—I agree.

Case remanded.