three years makes an exception in favour of a pending proceeding. It is not clear what the word " proceeding " means. It need not be execution proceeding. A proceeding to have a decree transferred may be said to be a proceeding and therefore the execution of the decree may be in continuation of such a proceeding. At any rate, the decree had not, even according to the rule, if the rule is legal, become void when it came for execution to Banka. In my opinion the execution is therefore valid.

I would, therefore, allow the two appeals, set aside the orders of the Court below and direct that the executions shall proceed. In the circumstances of the case the parties will bear their own costs throughout.

SAUNDERS, J.—I agree.

Appeals allowed.

Cases remanded.

APPELLATE CIVIL.

Before Agarwala and Varma, JJ.

1935.

December, 3, 4.

NILKANTHA NARAYAN TEWARI

v.

DEBENDRA NATH RAY.*

Provincial Insolvency Act, 1920 (Act V of 1920), sections 2, 28(2) and 59—Receiver in insolvency, if can sell the share of the insolvent's son—joint Hindu family—" property ", meaning of, within section 2(1)(a) of the Act.

The powers of a Receiver-in-insolvency are defined by the statute and that power is to sell the property of the insolvent which vests in the Receiver by reason of the order of adjudication.

* Appeal from Appellate Decree no. 322 of 1932, from a decision of S. P. Chattarji, Esq., Officiating Judicial Commissioner of Chota Nagpur, dated the 19th May, 1931, confirming the decision of Babu Narendra Nath Chakravarty, Subordinate Judge of Ranchi, dated the 28th September, 1929.

1935.

NILKANTHA NARAYAN TEWARI v. DEBENDRA NATH RAY.

The power of a Hindu father to sell the joint family property, including the interest of his son, is not "property of the insolvent" which by section 28 of the Act vests in the Receiver and which by section 59 he is empowered to sell for distributing among the creditors.

Sat Narayan v. *Behari Lal*(1), relied on.

Chairman, District Board, Monghyr v. *Shcodutt Singh*(2), not followed.

Mahabir Prasad v. *Shivanandan Sahay*(3), distinguished.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Agarwala, J.

A. B. Mukharji and *U. N. Banarji*, for the appellant.

S. M. Mullick (with him *B. C. De*, *L. N. Chaudhury*, *K. K. Banarji* and *K. N. Varma*), for the respondents.

AGARWALA, J.—This appeal arises out of a suit brought by the appellant, a Hindu son, to recover the whole of, or his interest in, the ancestral property, which was sold to the defendants by a receiver appointed in the insolvency of the plaintiff's father. The appeal, therefore, raises the question, which has often been agitated in the Courts in this country, regarding the effect on the interest of a Hindu son when his father is adjudicated an insolvent. Section 28(2) of the Provincial Insolvency Act (1920) is as follows:—

"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 ....."

The procedure for dividing the property of the insolvent among his creditors is provided by section 59 of

(1) (1924) I. L. R. 6 Lah. 1, P. C.
(2) (1926) I. L. R. 5 Pat. 476.
(3) (1934) 15 Pat. L. T. 502.

the Act which, in so far as is material, is in these terms:—

"Subject to the provisions of this Act, the receiver shall, with all convenient speed, realise the property of the debtor and distribute dividends among the creditors entitled thereto, and for that purpose may (*a*) sell all or any part of the property of the insolvent."

It is quite clear from a perusal of these two sections that what vests in the receiver on an order of adjudication is the "property of the insolvent" and what the receiver is authorised by section 59 to sell for the purpose of providing dividends for the creditors is the whole or any part of the "property of the insolvent". The question that falls for determination in the present case, therefore, is whether the undoubted right which the father would have had to sell the whole of the ancestral property including his son's interest therein, in satisfaction of his own debt, provided that the debt was neither for an illegal or immoral purpose, is "property of the insolvent" within the meaning of the statute. By section 2(*1*)(*a*) of the Act, it is provided that "property" includes "any property over which or the profits of which any person has a disposing power which he may exercise for his benefit". It is contended that the right of a Hindu father to sell the ancestral property, including his son's share, in satisfaction of his own legal debts is property which vests in the Receiver within the meaning of this section and section 28. That contention was expressly negatived by the Privy Council in *Sat Narain* v. *Behari Lal*(1). At page 22 of the report, in considering the definition of the word "property" in the Presidency-towns Insolvency Act, which is precisely the same as in section 2(*1*)(*d*) of the Provincial Insolvency Act, their Lordships said:

"Section 2 seems to contemplate an absolute and unconditional power of disposal."

The power of a Hindu father to sell the joint family property and apply the profits for the payment of his debt was not, in the opinion of their Lordships

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

1935.

NILKANTHA NARAYAN TEWARI v. DEBENDRA NATH RAY.

AGARWALA, J.

such an absolute and unconditional power as is contemplated by section 2. It follows, therefore, that the power of a Hindu father to sell the joint family property, including the interest of his son, is not "property of the insolvent" which, by reason of section 28 of the Act vests in the receiver, and which, by section 59, he is empowered to sell for distributing among the creditors. Since the decision of the Privy Council in the case already referred to, there have been many cases in the High Courts in India in which precisely the same question has been discussed and decided. Those cases are: *T. S. Balavenkata Seetharama Chettiar* v. *The Official Receiver, Tanjore*(1), *Basava Sankaran* v. *Garapati Anjaneyulu*(2), *Khem Chand* v. *Narain Das*(3), *Gori Shankar* v. *Official Receiver, Delhi*(4), *Anand Prakash* v. *Narain Das Dori Lal*(5), *Haridas Himatlal* v. *Lallubhai Mulchand Mehta*(6), *Siddheshwar Nath* v. *Deokali Din Vakil*(7), *Bajirai* v. *Daulatrai*(8) and *Hiralal Champa Lal Marwadi* v. *Fattehchand Parmanand*(9). In all these cases it was held that a receiver appointed in the insolvency of a Hindu father is entitled to sell the ancestral property, including the interest of the insolvent's son, for the satisfaction of the insolvent's debts.

There can be no doubt that a Hindu father has the power to sell the entire joint property in satisfaction of his own debt and that such sale is binding on his son provided that the debt, for the satisfaction of which the property was sold, was not contracted for an illegal or immoral purpose. It is also clear that where, in execution of a decree against a Hindu father, joint family property, including the interest

(1) (1926) I. L. R. 49 Mad. 849, F. B.
(2) (1926) I. L. R. 50 Mad. 135, F. B.
(3) (1925) I. L. R. 6 Lah. 493.
(4) (1931) I. L. R. 13 Lah. 464.
(5) (1930) I. L. R. 53 All. 239, F. B.
(6) (1930) I. L. R. 55 Bom. 110.
(7) (1933) I. L. R. 9 Luck. 304, F. B.
(8) (1930) 128 Ind. Cas. 404.
(9) (1934) A. I. R. (Nag.) 271.

1935.

NILKANTHA NARAYAN TEWARI v. DEBENDRA NATH RAY.

AGARWALA, J.

of his son is sold, the latter is not able to challenge the sale except on the ground that the debt was not one which was binding on him, that is to say, that it was either illegal or immoral. The question, however, is whether, under the Insolvency Act, the receiver of the insolvent has the power which a Hindu father has. Many of the cases referred to above appear to indicate an assumption that because the father may alienate his son's interest in satisfaction of his own debts, a receiver appointed on the adjudication as an insolvent of the father stands in the place of the father with respect to the power which the latter may exercise over the interest of his sons in the joint family property. I find nothing, however, in the Provincial Insolvency Act to justify this assumption. The powers conferred on the receiver are defined by the statute and in so far as it is material to the present question the only power conferred on the receiver is to sell the "property of the insolvent", that is to say, the property of the insolvent which vested in the receiver by reason of the order of adjudication. The decision of the Privy Council in *Sat Narain* v. *Behari Lal*(1) has made it quite clear, and indeed it was conceded by the learned Advocate for the respondents that this is so, that the property of the son does not vest in the receiver on the adjudication as an insolvent of his father. The case before the Privy Council arose in this way. A Hindu son applied to pre-empt a certain property on the ground of contiguity. His suit was resisted on the ground that his father had been declared an insolvent and that, therefore, the property by reason of which he claimed to pre-empt had vested in the receiver, and that consequently the son had no right in the property which would entitle him to pre-empt. Their Lordships negatived this in unmistakable language and indeed characterised as "startling" the proposition that the insolvency of one member of a Hindu family should of itself and immediately take from the other male members of the

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

1935.

NILKANTHA NARAYAN TEWARI v. DEBENDRA NATH RAY.

AGARWALA, J.

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 case went to the Privy Council from a decision of a Full Bench of the Lahore High Court, presided over by Sir Shadi Lal, C.J. In the course of his judgment the learned Chief Justice said: "The result of the above survey of the judicial decisions is decidedly in favour of the contention urged on behalf of the Official Assignee, but I must say that if the matter were res integra, I should find considerable difficulty in subscribing to the doctrine that the son's interest in the joint family property should, in the event of the father's insolvency, be regarded as the latter's property which vests in the Official Receiver. Upon general principles of the Hindu Law governing the rights of the father and his son in the coparcenary property I should be inclined to hold that an order of adjudication against the father has only the effect of replacing the father by the Official Receiver, and that the order does not by itself vest in the latter the interest of the son in the property. As the son's share is in certain cases liable for the debts of the father, the Official Receiver may be able to enforce that liability provided that he takes appropriate proceedings for the purpose and satisfies the conditions which alone render the son's interest liable for the father's debts." Pausing here for one moment it may be noticed that the learned Chief Justice does not express any decided opinion that in such circumstances the receiver would be able to enforce the ordinary liability of a Hindu son for the legal debts of his father. His Lordship merely says that the receiver may be able to do so provided that he takes appropriate proceedings. Although the opinion of the learned Chief Justice was contrary to the claim of the receiver to be able to deal with the son's share in the same way as the father could have dealt with it his Lordship referred to the authorities which in his opinion precluded him from enforcing that view. With reference to those authorities their

Lordships of the Privy Council said at page 11, "Their Lordships are of opinion that the question to be decided in this appeal must be decided on the wording of the Presidency-towns Insolvency Act, 1909, and on that Act alone. Cases which have arisen under section 266 of the Code of Civil Procedure, 1882, or under section 60 of the Code of Civil Procedure, 1908, depended on different considerations, and decisions in cases under those sections are likely to mislead a Court which has to construe the Presidency-towns Insolvency Act, 1909." On a construction of the provisions of that Act their Lordships held that the right of a Hindu father to sell the interest of his son in the joint family property in satisfaction of his own debts is not a right which vests in the receiver appointed on the adjudication of the father as an insolvent. At page 23 their Lordships went on to observe, however, that "It may be that under the provisions of section 52 or in some other way that property may in a proper case be made available for payment of the father's just debts; but it is quite a different thing to say that by virtue of his insolvency alone it vests in the assignee, and no such provision should be read into the Act." We have, therefore, to decide the question which arises in the present appeal entirely on the provisions of the Provincial Insolvency Act and as has already been indicated that statute does not empower a receiver to sell anything more than the property of the insolvent which vests in the receiver by reason of the adjudication. That, the Privy Council held, does not include the right of a Hindu father to sell the interest of his sons in the joint family property. In this Court a contrary view was taken in the case of the *Chairman, District Board, Monghyr* v. *Sheodutt Singh*(1). But that being a decision prior to the decision of the Privy Council in *Sat Narain* v. *Behari Lal*(2), we do not consider that we are now bound by that decision. The matter has since been agitated in

(1) (1926) I. L. R. 5 Pat. 476.

(2) (1924) I. L. R. 6 Lah. 1, P. C.

1935.

NILKANTHA NARAYAN TEWARI v. DEBENDRA NATH RAY.

AGARWALA, J.

Bhola Prasad v. *Ramkumar Marwari*(1); but that case was eventually decided on other grounds and the present question was expressly left open. Their Lordships said at page 408 of the report: "The decisions of this Court may possibly have gone a little too far, and it is perhaps not essential in the present case to say whether the fathers' power to dispose of their sons' share for their own just and proper debts has vested in the Receiver." The matter also came before a Division Bench of this Court, of which I was a member, in *Mahabir Prasad* v. *Shivanandan Sahay*(2). The real question that arose for decision in that case was whether a receiver had power to convey a portion of the joint family property to one particular creditor and the point really decided was that the power of the receiver to sell the property of the insolvent is confined to a sale for the purpose of providing dividends for the general body of creditors and that the powers conferred on him by the statute did not include the power to convey a particular property to any particular creditor to the exclusion of the general body of creditors. In the judgment of the case, however, reference was made to the decision of the Privy Council in the following terms: "The question whether the property which vests in the Receiver on the insolvency of a member of a joint Mitakshara family includes the interests of other members of the family has been set at rest by the decision of the Privy Council in *Sat Narain* v. *Behari Lal*(3). Their Lordships of the Judicial Committee there held that it is only the insolvent's share in the joint family property which vests in the receiver, and pointed out that in cases where the sons of the insolvent are liable for the debt of their father, the Receiver, by adopting the appropriate procedure, may bring the share of the sons to sale." Although this observation, in view of the real point for decision in that case, may be regarded as obiter dictum, it is the only expression of

(1) (1931) I. L. R. 11 Pat. 399.
(2) (1934) 15 Pat. L. T. 502.
(3) (1924) I. L. R. 6 Lah. 1, P. C.

opinion in this Court that we have been able to find since the decision of the Privy Council. It was, however, contended by the learned Advocate for the respondents that if the receiver cannot by virtue of the powers conferred on him by section 59 sell the interest of the son of the insolvent, there is no procedure under the Act by which the undoubted liability of the son for his father's just debts can be enforced.

For the appellant, however, it was contended that the proper procedure in such a case is for the receiver to request the Court to issue notice on the sons, and after hearing the sons, in exercise of its powers under section 4, to decide all questions arising in insolvency proceedings to declare the sons' liability. Whether that is the only procedure provided by the Act or whether it is the only method by which the receiver can enforce the liability of Hindu sons for their father's debts is not the question with which we are concerned in the present case for no notice was issued to the son, who was then a minor. If there is a lacuna in the Act in this respect it is for the legislature to provide the appropriate remedy. So far as we are concerned, we have to consider the language of the Act itself, as pointed out by the Privy Council, and in our view a proper construction of the Act precludes the receiver from selling property which did not vest in him by reason of the adjudication.

In the result this appeal must be allowed in part. It appears, in respect of three of the properties in dispute, namely, Harchanda, Hassatu and 13 annas of Bartua, that they were not ancestral properties in which the plaintiff acquired any interest by his birth, and with respect to these properties the suit will be dismissed. With respect to the remaining property the suit will be decreed in terms of prayer (*iii*) of the plaint. Each party will bear his own costs throughout.

VARMA, J.—I agree.

Appeal allowed in part.