APPELLATE CIVIL.

Before Mr. Justice Campbell and Mr. Justice Dalip Singh.

1926

Jan. 20.

SAT NARAIN AND ANOTHER (PLAINTIFFS) Appellants

versus

SRI KISHEN DAS AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 2173 of 1916.

Presidency Towns Insolvency Act, II of 1909, sections 2, 17 and 52 (2) (b)—Insolvency of a Hindu father governed by Mitakshara Law—Right to dispose of the sons' interest in the co-parcenary property—whether vests in the Official Assignee.

Held, that when at the commencement of his insolvency a father has the power to enforce by the sale of the whole joint family estate the pious obligations of his sons to discharge out of their interest his then existing untained antecedent debts, the capacity of the insolvent vests in the Receiver after adjudication, whatever may be the technical effect of the adjudication upon the co-parcenary in its other aspects.

Official Assignee of Madras v. *Allu Ramachandra Ayyar* (1), and *Sellamuthu Servai, In re* (2), followed.

Bawan Das v. *O. M. Chiene* (3), *Sita Ram* v. *Beni Prasad* (4), *Brij Narain* v. *Mangal Prasad* (5), and *Fakir Chand-Moti Chand* v. *Moti Chand-Hurruck Chand* (6), referred to.

First appeal from the decree of C. L. Dundas, Esquire, District Judge, Delhi, dated the 13th April 1916, dismissing the plaintiffs' suit.

TEK CHAND and MOOL CHAND, for Appellants.

MOTI SAGAR, for C. BEVAN-PETMAN, M. S. BHAGAT, SARDHA RAM and SHAMAIR CHAND, for Respondents.

The judgment of the Court was delivered by—

CAMPBELL J.—On the 5th April 1913 *Rai Bahadur* Sri Kishen Das of Delhi mortgaged to the

(1) (1922) I. L. R. 46 Mad. 54.
(2) (1923) I. L. R. 47 Mad. 87 (F. B.).
(3) (1921) I. L. R. 44 All. 316.
(4) (1924) I. L. R. 47 All. 263.
(5) (1924) I. L. R. 46 All. 95 (P. C.)
(6) (1883) I. L. R. 7 Bom. 438.

Bank of Upper India the immoveable property detailed in list 1 on page 9 of the printed paper book. He acted both for himself and as guardian of his two sons, Sat Narain and Sada Nand, then minors. On 26th September 1913 Sri Kishen Das was adjudicated insolvent by the High Court of Bombay under the Presidency Towns Insolvency Act.

On the 14th April 1914 the Bank brought a suit at Delhi for realisation of the mortgage debt of Rs. 4,64,021-15-8 by sale of the mortgage property. The defendants were Sri Kishen Das, his sons and the Official Assignee. On 2nd October 1914 the sons through a next friend sued the Bank, the Official Assignee and their father for a declaration that their share in the mortgaged property was one-half and that the mortgage was not binding on them, and for an injunction to stop the sale of the property by the Official Assignee.

On the 11th January 1915 the same minors brought a second suit for partition of their share (described as one-half) in the whole of the joint family property, including the mortgaged properties, against their father, the Official Assignee, the Bank, and various purchasers of various items of property from the Official Assignee. It is with this suit that we are directly concerned and our judgment will also dispose of the appeal in the declaratory suit.

All three suits were tried by the District Judge, Delhi. Issues were framed in all three, but decision of the other two was postponed for that of the partition suit.

In the partition suit it was held firstly that the property was ancestral or purchased with the profits of the ancestral banking business and therefore co-

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parcenary and that the sons' share was as claimed, one-half ; secondly, that the adjudication order in insolvency against Sri Kishen did not operate to make the plaintiffs insolvents, but did operate to vest the disposing power of Sri Kishen Das, as regards the co-parcenary property, in the Official Assignee, and that the *onus* was on the plaintiff to avoid transfers made by the Official Assignee for the purpose of discharging the liabilities of the family firm by showing that the debts discharged were illegal or immoral ; thirdly that the debts due to unsecured creditors specified in a schedule filed by Sri Kishen Das in the insolvency Court, amounting to Rs. 11,83,825, were such for which the plaintiffs as Hindu sons could not escape liability ; fourthly, that none of the purchases was invalid for want of consideration ; fifthly, that there was nothing illegal about the sales by the Official Assignee of agricultural land ; and sixthly, on the question whether the plaintiffs were bound by the mortgage debt to the Bank of Upper India, that the Bank loans were taken for perfectly legitimate purposes and were employed in the discharge of antecedent debts and that the plaintiffs could not escape the necessity of discharging the debt. On these findings the suit was dismissed by order, dated the 13th April 1916. At the time that the suit was instituted the major portion, but not the whole of the joint family property, had been sold by the Official Assignee.

On the same date, 13th April 1916, the declaratory suit was dismissed as a necessary consequence of the judgment in the partition suit.

The Bank suit was disposed of on 17th April 1916. There originally had been contention between the plaintiff Bank and the defendant Official Assignee, and issues were struck on the disputed points. Later

on the sons of Sri Kishen Das came in with pleadings that the debts due by their father to the Bank were not for their benefit or for family necessity and were illegal and immoral, and that any decree passed should not be against the mortgaged property but should be purely personal against Sri Kishen Das. These pleas were traversed by the plaintiffs and afterwards the suit was suspended pending the decision in the partition suit. On the 24th April 1916 the Official Assignee confessed judgment, and it was held that against the sons of Sri Kishen Das the suit was *res-judicata* on the finding in the partition suit that they were bound by the mortgage debt to the Bank. Judgment was given for the amount claimed with interest at 7 *per cent. per annum* up to the date of realisation and costs " against the estate of the insolvent in the hands of the Official Assignee, Bombay ", the learned Judge observing that since the estate had already been sold in the insolvency proceedings a sale decree would be meaningless. Sada Nand and Sat Narain, the sons of Sri Kishen Das, appealed against the decree to this Court, but their appeal (No. 2172 of 1916) had been dismissed in default.

The same persons have also appealed in the declaratory suit (Appeal No. 2171 of 1916) and the partition suit (Appeal No. 2173 of 1916) and our judgment deals with these two appeals, but for all practical purposes the declaratory appeal has merged in the partition appeal and our findings will be pronounced on the record of that case.

It is admitted for the appellants that the decree against them in the mortgage suit is final, that they are bound by the mortgage and that the debt to the Bank secured by the mortgage is neither illegal nor immoral. The main question for decision is the posi-

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tion in law of the Official Assignee in his dealings with the joint family property including the sons' share, the major portion of which property, as already stated, he has transferred by sale to various auction purchasers.

Before coming to direct discussion of this question we must dispose of the individual case of one of these purchasers, Ghulam Mohi-ud-Din Khan, respondent No. 12, to whom the Official Assignee sold for Rs. 41,000, lot No. 19 in list 2 filed with the plaint (page 11 of the printed record) which specifies property in suit other than that mortgaged with the Bank.

On the 4th October 1920 an application was presented by the plaintiffs stating that Ghulam Mohi-ud-Din was dead and praying that his legal representatives be substituted for him on the record. The affidavit attached admitted that death had occurred more than 6 months previously. The application was granted subject to all just exceptions. The legal representatives have now presented an affidavit that death took place on 20th March 1918, and this has not been contradicted. We hold that the appeal against Ghulam Mohi-ud-Din has abated and that the application of 4th December 1920, if treated as one to set aside the abatement, should have been put in within 60 days of the abatement, which took place automatically six months after death, and that it is out of time. After hearing arguments on the question of extension of time under section 5 of the Limitation Act, we have decided that no good cause has been shown, and we reject the application. The representatives of Ghulam Mohi-ud-Din will have their costs of the proceeding.

A preliminary objection by Mr. Bhagat for one

of the respondents that this abatement necessitates the dismissal of the whole appeal we hold to be without force. The inference sought to be drawn from cases where suits for partial partition have been dismissed are fallacious. Here the whole property was included in the suit, and all that has occurred is that in the course of the suit the plaintiffs have lost their right to pursue their remedy in respect of a certain distinct portion of that property.

Yet another preliminary objection must be disposed of, which, however, is directly concerned with the main point of dispute. The sons of Sri Kishen Das were plaintiffs in another suit in which they claimed to pre-empt certain house property as owners of a contiguous and dominant tenement. The defence was that on their father's insolvency their share of the joint family property vested in the Official Assignee and they ceased to be owners for purposes of the Punjab Pre-emption Act. The District Judge decreed their claim, and, on appeal by the vendees to the High Court, the question was referred to a Full Bench whether an order of adjudication against a father vests in the Official Assignee his sons' interest in the joint family property. At the first hearing before the Full Bench an Advocate representing the Bank in the present litigation made a request that the parties to it should be given an opportunity of being heard on the point referred since the decision would also affect these appeals. The Full Bench directed "that the hearing of the aforesaid appeals be expedited and that notices issue to the parties interested therein requiring them to appear and argue the question referred to the Full Bench". Accordingly counsel for the Bank appeared and was heard by the Full Bench. The judgment delivered is

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printed as *Bihari Lal* v. *Sat Narain* (1), and answered "the question referred to the Full Bench in the affirmative" and on the record of the present appeal, No. 2173, was placed an order signed by two out of the three Judges who composed the Full Bench in the following terms:—"See judgment in Civil Appeal No. 2134 of 1915".

The pre-emption appeal was decided in accordance with the Full Bench judgment against the sons of Sri Kishen Das and they appealed to His Majesty in Council. The appeal was accepted and Their Lordships of the Judicial Committee held that it was not the intention of the Presidency Towns Insolvency Act that on the Insolvency of a father the joint property of his family should at once vest in the assignee. We shall return presently to Their Lordships' judgment which was delivered on 24th October 1924 and is published as *Sat Narain* v. *Behari Lal* (2). What we are concerned with immediately is a contention by the respondents before us that the order signed by the two Judges referred to above is a judgment disposing of this appeal in part, which has not been appealed from to the Privy Council and decides finally so far as this Court is concerned that the whole of the joint property including the sons' share vested in the Official Assignee, Bombay.

Subsequently to the Full Bench decision on 19th July 1922 the present appeals and Appeal No. 2172 came up for decision before another Bench of two Judges and an application was presented on behalf of the appellants for the taking of fresh evidence on commission, which was granted. The present contention was not raised upon that occasion, and in our opinion

(1) (1922) I. L. R. 3 Lah. 329 (F.B.) (2) (1924) I. L. R. 6 Lah. 1 (P.C.).

it is based upon a misconception of the function performed by the Full Bench. In another appeal the Full Bench was asked for a ruling on an abstract question of law to guide the Division Bench charged with the duty of deciding that appeal. The parties to our appeals, being interested in the same abstract question, were allowed to appear and argue the question, but there is no reason to hold from that fact that, contrary to the ordinary practice of the Court, those appeals were before the Full Bench for the determination of any issue or ground of appeal peculiar to them. The judgment of the Full Bench was in the nature of an opinion intended for our guidance, as well as for that of the other Bench and one which would have been binding upon us, had it not subsequently been reviewed and altered by a higher authority in the other appeal. As matters have turned out, the decision of Their Lordships of the Privy Council has superseded it as the authoritative pronouncement which we are to apply to the question of what vested in the Official Assignee on the adjudication of Sri Kishen Das as an insolvent. We overrule the objection that the Full Bench has passed orders actually deciding this part of the appeals before us.

The Privy Council judgment is conclusive in favour of the appellants that the adjudication order did not immediately vest in the Official Assignee by virtue of their father's insolvency their interest in the joint family property. The case for the respondents now is that, under section 52 (2) (*b*) of the Presidency Towns Insolvency Act, the Official Assignee had the right to sell that interest for the purpose of paying debts which the appellants as Hindu sons were under a pious obligation to discharge.

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We have not permitted Mr. Tek Chand, the appellants' learned Advocate, to argue that, in transacting the sales made by him, the Official Assignee did not purport to sell the whole property including the sons' interest. This point was not taken in the memorandum of appeal, and it could and should have been taken if the appellants had intended to rely upon it.

Under section 17 of the Presidency Towns Insolvency Act when a person becomes insolvent his "property wherever situate" vests in the Official Assignee and becomes divisible among his creditors. The first part of section 52 of the same Act states that the property of an insolvent divisible among his creditors is referred to in the Act as the property of the insolvent and specifies certain exemptions. Section 52 (2) runs as follows:—

> "Subject as aforesaid, the property of the insolvent shall comprise the following particulars, namely:—
>
> (*a*) All such property as may belong to or be vested in the insolvent at the commencement of the insolvency, or may be acquired by or devolve on him before his discharge;
>
> (*b*) the capacity to exercise and to take proceedings for exercising all such powers in or over in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge * * * * * * *".

Section 2 is the definition section of the Act and regarding the word 'property' it says:—

2. " In this Act, unless there is anything repugnant in the subject of context * * * *

(*e*) " property " includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit ".

The Full Bench Judgment *Behari Lal* v. *Sat Narain* (1), held that in consequence of this definition the power of a Hindu father to sell joint property and utilise the proceeds for the payment of his debts converted the whole joint property on his insolvency into property of the insolvent within the meaning of section 17 of the Act. Their Lordships of the Judicial Committee said in effect:—" No, there is something in the subject and context repugnant to this interpretation. The father's power to dispose of the joint property is not absolute, but conditional on his having debts liable to be satisfied out of the joint property, and section 2 seems to contemplate an absolute and unconditional power of disposal. It is difficult to reconcile the provisions of section 52 (2) (*b*) with the proposition that the property itself vests in the assignee ". This is as far as their decision went. The question before them was whether, for purposes of pre-emption, a son ceases to be an ' owner ' of joint family property immediately on his father becoming insolvent, and they answered it in the negative. They did not require to and did not examine the scope of section 52 (2) (*b*). In regard to it they made, in passing, two other observations in addition to the one referred to above, firstly that the power to obtain a partition of the joint family property was a power which the Official Assignee might have exercised

(1) (1922) I. L. R. 3 Lah. 329 (F. B.).

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under section 52 (2) (*b*) and secondly, the following at the conclusion of their judgment :—

> " It may be that under the provisions of section 52 or in some other way that property (*i.e.*, the joint family 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."

Their Lordships also stated in their judgment that the question before them was to be decided on the wording of the Presidency Towns Insolvency Act and on that Act alone. Applying this method we hold on what we conceive to be the plain terms of sections 17 and 52 (2) (*b*) that when at the commencement of his insolvency a father has the power to enforce by sale of the whole joint family estate the pious obligation of his sons to discharge out of their interest his then existing untainted antecedent debts, the capacity to exercise that power for the benefit of the insolvent vests in the Receiver after adjudication, whatever may be the technical effect of the adjudication upon the co-parcenary in its other aspects.

The observation of Their Lordships of the Privy Council that the words in section 2 " disposing power " must be taken to mean an absolute and unconditional power of disposal appears to us to have no connection with the interpretation of section 52 (2) (*b*). We have been asked on the strength of that observation to read the word " property " in section 52 (2) (*b*) as though it were "property over which or the profits of which the insolvent has an absolute and unconditional disposing power which he can exercise for

his own benefit ". In the first place, however, section 2 does not contain an exhaustive definition of the word property. Secondly the words in section 2 are " any person " and not " the insolvent ". Thirdly, if so construed, section 52 (2) (*b*) would become a mere redundant repetition of section 52 (2) (*a*), since all property over which the insolvent has an absolute and unconditional disposing power which he may exercise for his own benefit is, by the definition in section 2, included in the word " property " and so comes wihin the scope of section 52 (2) (*a*). The insolvency of a father neither takes away the pious obligation of the sons nor destroys the curious right possessed by the father to enforce it, and, this being so, we cannot see that the exercise of that right by a receiver in insolvency (who is very far from being in the position of an ordinary stranger alienee) is in any way repugnant to the principles of Hindu Law. The present litigation is an example of what the sons can do if they wish to contest the exercise of the power on the ground that the debts are fictitious or immoral.

We are supported in this conclusion by the decision of the Madras High Court in *Official Assignee of Madras* v. *Allu Ramachandra Ayyar* (1), which was expressly re-affirmed by a Full Bench in *Sellamuthu Servai, In re.* (2), that the Official Assignee under the Presidency Towns Insolvency Act, although the interest of the sons does not vest in him by reason of the adjudication of the father, yet he, standing in the shoes of the insolvent, can alienate the minor sons' interests in the joint property for the purpose of paying the insolvent's debts unless they were incurred for an illegal or immoral purpose, the presumption being that they were not, and that he is entitled to all the

(1) (1922) I. L. R. 46 Mad. 54. (2) (1923) I. L. R. 47 Mad. 87 (F. B.).

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rights of the insolvent father, excluding such as are in their nature personal to a member of the family as such but including the right to possession of the family property. The same view was taken by the Allahabad High Court in *Bawan Das* v. *O. M. Chiene* (1), and *Sita Ram* v. *Beni Prasad* (2), under the Provincial Insolvency Act, where the definition of "property" in section 2 is the same as in section 2 of the Presidency Towns Insolvency Act, and where there is no subsequent provision corresponding with section 52 (2) (*b*) of the Presidency Towns Insolvency Act. The latter ruling also followed the former in accepting as a rule of Hindu Law another proposition which is material to the present case, namely, that, in the event of a partition suit against a father by sons for division of the joint family property, provision must first be made for all debts due by the joint family, as such, including debts due by the father. This rule is enunicated in other text-books besides Trevelyan's Hindu Law to which the learned Allahabad Judges referred. An argument has been addressed to us that the rule stated is not in fact supported (so far as the *Mitakshara* school is concerned) by any of the authorities cited by Mayne, Trevelyan, Mulla or Gour. The doctrine, however, is firmly established (in the words used by Their Lordships of the Privy Council in *Brij Narain* v. *Mangal Prasad* (3), "that debt has been contracted by the father, and the pious obligation incumbent on the son to see the father's debts paid prevents him from asserting that the family estate, so far as his interest is concerned, is not liable to purge that debt". It seems to us necessarily and obviously to follow that a Hindu father, with the fear before

(1) (1921) I. L. R. 44 All. 316. (2) (1924) I. L. R. 47 All. 263.
(3) (1924) I. L. R. 46 All. 95, 101 (P. C.).

him of imprisonment for debt in this world or of punishment in the next world, is entitled to plead in resistence to a partition suit by his son that his own share of the property after partition and his own separate property are not sufficient to satisfy his antecedent debts. The Allahabad Court has gone so far as to hold in *Sita Ram* v. *Beni Prasad* (1), that, when during insolvency proceedings against a father the sons obtain a partition, the Receiver can step in at partition and take the property allotted to the sons for payment of the father's debts.

These Madras and Allahabad decisions are, no doubt, based largely on the approval of Mr. Justice Latham's ruling in *Fakir Chand-Moti Chand* v. *Moti Chand-Hurruck Chand* (2), which was noticed by Their Lordships in *Sat Narain* v. *Behari Lal* (3), and was held not to be a guide for determination of the question before them because that case was decided under a different statute. But Their Lordships nowhere say that the rule deduced by Mr. Justice Latham from section 7 of the Indian Insolvency Act, 11 and 12 Vic., c. 21, namely, that a vesting order vests in the Official Assignee a father's right to dispose of his son's interest for payment of his own just debts, does not harmonise with section 52 of the Presidency Towns Insolvency Act.

It remains to apply these our findings to the facts of this appeal.

[*The remainder of the judgment is not material for purposes of this report—Ed.*]

N. F. E.

Appeal for partition accepted.
Appeal for declaration dismissed.

(1) (1924) I. L. R. 47 All. 263. (2) (1883) I. L. R. 7 Bom. 438.
(3) (1924) I. L. R. 6 Lah. 1 (P.C.).