

## APPELLATE CIVIL.

*Before Addison and Agha Haidar JJ.*

MUSSAMMAT CHAMPA (PLAINTIFF) Appellant  
*versus*  
OFFICIAL RECEIVER, KARACHI, AND OTHERS  
(DEFENDANTS) Respondents.

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June 20.

Civil Appeal No. 770 of 1927.

*Hindu Law—Joint family business—Debts incurred by manager therefor—liability of the family property—Insolvency of the business—widow's suit for maintenance—priority of debts to her claim—Necessity of getting permission of Insolvency Court to bring the suit—Provincial Insolvency Act, III of 1907, Sections 28 (2), 34 (2)—also of impleading the general body of creditors.*

A Hindu family carried on an ancestral family business by the name of Mul Chand-Mutsaddi Lal, C.L., son of Mutsaddi Lal, being for a long time the manager thereof. The firm was adjudicated insolvent in Karachi in the year 1922. The present suit was brought by *Mst. C.*, widow of C. L.'s father, for recovery of maintenance for three years before suit as well as for a sum to be fixed for her future maintenance and made a charge on the estate, and also for a declaration that she was entitled to reside in the family dwelling house at Delhi. Defendant No. 1 was Official Assignee, Karachi, C.L.'s minor brother and minor son being defendants 2 and 3, respectively.

It was established on the record that the family business failed owing to a heavy fall in the price of goods and that the debts were incurred in the ordinary course of the family business by the manager.

*Held*, that the suit must fail as the whole family property was liable for the payment of the debts incurred by the manager for the purpose of the family business, the shares of the minor co-parceners being also liable; and the rights of the widow to maintenance and residence must be postponed to the payments of the debts.

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*Raghunathji Tara Chand v. Bank of Bombay* (1), *Thakur Ramkrishna Muraji v. Rattan Chand* (2), *Niamat Rai v. Din Dayal* (3), and *Official Receiver, Anantapur v. Ramachandrappa* (4), relied upon.

Mayne's Hindu Law (9th Edition), page 398, Mulla's Principles of Hindu Law (7th Edition), page 260, Gour's Hindu Law (2nd Edition), page 778, referred to.

*Held also*, that the suit was incompetent as having been brought without the permission of the Insolvency Court, Karachi—*vide* Sections 28 (2) and 34 (2) of the Provincial Insolvency Act.

*Rura v. Official Receiver, Amritsar* (5), *Maharana Kunwar v. Davil* (6), and *Linton v. Linton* (7), distinguished.

*Held further*, that the creditors are necessary parties in a suit of this nature and though the Official Assignee represents, for most purposes, the general body of creditors, he would not do so in a case like the present as the question which arises to be decided is that of family necessity in the case of each debt, a circumstance which is of no concern to the Official Assignee. *Louis Dreyfus v. Jan Mohammad* (8), followed.

*First Appeal from the decree of Sayad Abdul Haq, Subordinate Judge, 1st Class, Delhi, dated the 7th February, 1927, dismissing the plaintiff's suit.*

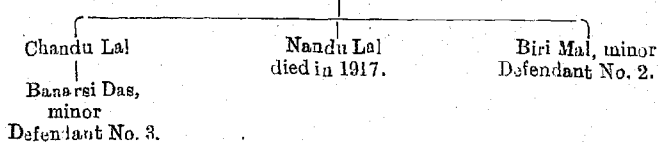
KISHAN DAYAL, for Appellant.

HAR GOPAL and BHAGWAN DAS, for Respondents.

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ADDISON J.—The following pedigree-table is necessary :—

MUISADDI LAL = WIDOW MST. CHAMPA, PLAINTIFF.



Defendant No. 1 is the Official Assignee, Karachi.  
This family carried on an ancestral family business

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| (1) (1910) I. L. R. 34 Bom. 72.         | (5) 1930 A. I. R. (Lah.) 708.   |
| (2) (1931) I. L. R. 53 All. 190.        | (6) (1924) I. L. R. 46 All. 16. |
| (3) (1927) I. L. R. 8 Lah. 597 (P. C.). | (7) (1885) 15 Q. B. D. 239.     |
| (4) (1929) I. L. R. 52 Mad. 246.        | (8) (1919) 49 I. C. 421.        |

by the name Mul Chand-Mutsaddi Lal: Chandu Lal was for a long time the manager thereof. The firm was adjudicated insolvent in Karachi in the year 1922. This suit has been brought by *Mussammat* Champa as the widow of Chandu Lal's father and her claim is for recovery of maintenance for three years before suit as well as for a sum to be fixed for her future maintenance and made a charge on the estate. She also claims a declaration that she is entitled to continue to reside in the family-dwelling house at Delhi.

The Official Assignee pleaded that the liquidation of the debts incurred in due course of the ancestral business of the family left nothing out of the estate against which the plaintiff could enforce her rights, those rights not taking precedence over such debts. He also pleaded that the suit could not proceed without the sanction of the Insolvency Court at Karachi and that maintenance could not be recovered in a suit against the Official Assignee.

The trial Judge held that the bringing of the suit required the leave of the Insolvency Court and that it was, therefore, incompetent. He further held that the creditors were necessary parties as the question between them and the widow was, whether the debts were incurred for family necessity, and for this purpose the Official Assignee did not represent the creditors. He also held that the failure of the business was due to Chandu Lal's negligence of it and the abnormal fall in the price of the goods stocked owing to a fall in the exchange rate. He then went on to say that the Official Assignee had not proved the object or purpose for which each debt was raised, while the plaintiff had not been able to show that they were contracted for immoral purposes. On

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these findings he dismissed the suit with costs, and plaintiff has appealed.

It seems to me that this appeal can be decided on the question as to whether the debts were incurred for family necessity. The evidence clearly establishes that the family business failed because the fall in the rate of exchange caused a 50 per cent. reduction in the price of the goods stocked while for other reasons the value of the goods fell further. There is no evidence on which the trial Judge was justified in holding that the failure was partly due to Chandu Lal's neglect in looking after the business. There is some general evidence of his debauchery which, in my opinion, is false. All that is established from the books is that he was taking Rs. 500 or so a month out of the business for his living expenses: and at the same time he was giving Rs. 300 to the plaintiff for her living expenses. The firm was a big one and these figures show that the family was living on a very moderate scale and that Chandu Lal was not even extravagant. It is, therefore, established on the record that the family business failed owing to a heavy fall in the price of goods by reason of the rate of the exchange changing and other causes. It must, therefore, be held that the debts were incurred in the ordinary course of the family business by the Manager.

This finding is sufficient to dispose of the case. In *Raghunathji Tarachand v. Bank of Bombay* (1) it was held that the rule of Hindu Law that debts contracted by a managing member of a joint family are binding on other members only when they are for a family purpose is subject to at least one important

exception. Where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the existence of the family.

Their Lordships of the Privy Council in *Sri Thakur Ramkrishna Muraji v. Rattan Chand* (1) held that a mortgage of property of the joint family for the purpose of discharging debts incurred in carrying on the business is binding upon the joint family including minor members, if the mortgagee, acting honestly and with due caution, has made reasonable enquiries which led him to believe that there was a real necessity so to borrow, and it is not necessary for him to see that no part of the money is applied in discharging debts due to speculative transactions.

Their Lordships again held in *Niamat Rai v. Din Dayal* (2) that where the managing member of a joint Hindu family sold part of the joint property for the full value and applied part of it to discharge debts incurred in carrying on business to which the joint family had succeeded, and invested the balance in the business, the manager had authority to raise the money, not only to discharge debts arising out of the family business, but to obtain money needed to carry it on. It was for him to decide whether the money should be raised by mortgage or sale, and whether it was better to raise money to continue the business or to close it down. It was not for the lender or purchaser to go into questions of that kind.

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The Madras High Court in *Official Receiver, Anantpur v. Ramchandrapa* (1) has held that in a Hindu joint trading family, where there are one or more minor members and the manager is not the father, and the adult members, including the manager, have been adjudicated insolvents, the power of the manager to dispose of joint family property for debts incurred for trading purposes, passes to and becomes exercisable by, the Official Receiver, so as to bind the minor's shares.

The matter is well expressed on page 398 of the 9th edition of Mayne's Hindu Law:—"On the other hand, the manager of a trading family has wider powers than those of the manager of a non-trading family. There is no deviation from the fundamental principle that what is done must be for the benefit or necessities of the family, but acts such as the incurring of debts and drawing of negotiable instruments are necessities to a trading family, while they would not be to a non-trading family. Even where the debts in fact are incurred merely for the personal purposes of the manager, they will bind the family if they are within the ostensible authority of the manager as conducting the family business. So it is that those who deal with him and to whom he incurs debts are not put upon enquiry as to whether the debts were incurred for the benefit or necessities of the family, so long as they are incidental to the family business."

At page 260 of Mulla's Principles of Hindu Law, 7th edition, it is said that the manager of a joint family has an implied authority to contract debts and pledge the credit and property of the family for the ordinary purposes of the family business. Such debts,

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(1) (1929) I. L. R. 52 Mad. 246.

if incurred in the ordinary course of business, are binding on the family property including the interest of the minor co-parceners therein. But the manager alone has such authority.

In Gour's Hindu Law, 2nd edition, at page 778, it is said that where the liability is incurred by the manager of a joint family business in the ordinary course of that business, the creditor or the alienee is not bound to inquire whether the liability is incurred for legal necessity or for the benefit of the family. Again, at page 560, the same author says:—So again the widow must subordinate her right of residence to a transfer by whomsoever made for a family necessity. So the house must go with the rest of the family assets on the manager's insolvency due to losses incurred in a family business.

The law is, therefore, not ambiguous. In the present case it is the family trading business which has been adjudicated insolvent. Its debts were due to the fall of the rate of exchange and other extraneous causes. The whole property of the family, therefore, can be sold in order to pay off these debts, and the shares of the minor co-parceners are also liable, while the right of the widow to maintenance and residence must be postponed to the payment of these debts. This finding is sufficient by itself to dispose of this appeal.

The trial Judge has said that the Official Assignee has not proved beyond doubt that nothing is likely to be left from the estate after the payment of his liabilities, but it was mentioned at the Bar that the secured creditors have sold the property mortgaged with them while the Official Assignee has declared a final dividend in respect to the unsecured creditors. This means that all the property has been disposed of and obviously in

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these circumstances there can be no decree without impleading the transferees.

I also agree with the finding of the trial Judge that the creditors are necessary parties in a suit of this nature and that, though the Official Assignee represents, for most purposes, the general body of the creditors, he would not do so in a case like the present as the question which arises to be decided is that of family necessity in the case of each debt. This is a circumstance which is of no concern to the Official Assignee. He is only concerned with the amount of the debt of the creditors not with the question whether it was raised for family necessity. It was held in *Louis Dreyfus & Co. v. Jan Mohammad* (1), by the Sindh Judicial Commissioner's Court that there is authority for holding that a trustee in bankruptcy and the bankrupt are privies, but there is no authority for holding that the trustee in bankruptcy and the creditors of the estate are privies. The mere fact that the Official Receiver takes the estate for the benefit of the creditors is not enough to bring about this relationship. This seems to me to be the correct position. In any case it is certain that the Official Assignee does not represent the secured creditors with whom a very large portion of the estate has been mortgaged and who have sold the mortgaged property in execution of decrees obtained by them. Chandu Lal (P. W. 8) establishes that property had been mortgaged to the extent of 3 lacs of rupees or more. The property mortgaged with them certainly does not vest in the Official Receiver. What the widow is trying to do is to get a charge upon a portion of the property of the family. How can that be done without the secured creditors

(1) (1919) 49 I. C. 421.



who are not represented by the Official Receiver and who have sold a large portion of the property belonging to the family in execution of their decrees? The suit was misconceived and was properly dismissed.

Further, the decision of the Court below that the suit only lay with the permission of the Insolvency Court, Karachi, is, in my opinion correct. Section 28 (2) of the Insolvency Act runs 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, 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 proceeding, except with the leave of the Court and on such terms as the Court may impose.”

This has to be read with section 34 (2) of the same Act which runs as follows :—

“ Save as provided by sub-section (1), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act.”

It will be seen that these words are very wide and include all liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent. The family firm was adjudicated insolvent and the members thereof were per-

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sonally liable at the time for the widow's maintenance. The property was not liable as there was no charge upon the estate. This may be done by decree of a Court or by agreement or by will but until it is done the widow has only a claim to obtain a charge which may be defeated for various reasons—see in this connection paragraph 569 of Mulla's Hindu Law.

The argument on behalf of the appellant was that leave of the Insolvency Court was not necessary as the right of the widow to claim maintenance was a right against the estate and was thus distinguishable from the rights of creditors. This seems to me to beg the question; for she has only an inchoate right against the estate until the estate has been charged therewith. She may never attempt to get a charge on the estate but be content with the payment of money to her by the members of the family. Unless there is a charge the family property is in no way liable for her maintenance. In fact without a charge, a widow's right is one of an indefinite character which is enforceable only like any other liability. Such authorities, therefore, as *Maharana Kunwar v. E. V. David* (1) and *Rura v. Official Receiver of Amritsar* (2) are not in point.

The learned counsel for the appellant put this in another way. He said that she did not claim through the insolvent and that her claim was for part of the ownership of the property. She was not a secured creditor but wanted to be made a secured creditor. This argument appears to me to be against him and to imply that his client is at present, until a charge is obtained, an unsecured creditor.

The learned counsel for the appellant also relied on *Linton v. Linton* (3) where it was held that future

(1) (1924) I. L. R. 46 All. 16. (2) 1930 A. I. R. (Lah.) 708.

(3) (1885) 15 Q. B. D. 239.

weekly or monthly payments of alimony, payable by a husband by virtue of an order of the Divorce Court, were not capable of valuation and were not a debt or liability within the meaning of section 37 of the Bankruptcy Act, 1883. The reasons for this decision are given at page 245 of the report as follows:—

“ The power is given in consideration of the husband’s ability to pay, irrespectively of his having any realized property, and it is a power to make him pay out of his earnings by means of his own personal exertions. That shows what this kind of alimony was intended to be by the Legislature. A man’s personal earnings after his bankruptcy do not go to his creditors; he keeps them himself notwithstanding his bankruptcy. He is as well able to pay alimony of this kind after his bankruptcy as before.”

The case, however, of a widow in Hindu Law is totally different. She is not asking that money be paid to her out of personal earnings but that the estate be charged. In the English case it was pointed out that the claim for alimony had to be met out of the personal earnings of the person against whom the order was made and had nothing to do with his property. There is, therefore, no analogy between that case and the present case.

I also consider that a claim for maintenance or residence is capable of valuation as much as an annuity which is admittedly provable in insolvency. It follows that the widow’s right of residence and maintenance was a liability, present and future, to which the insolvent firm was subject when it was adjudicated insolvent. The position of the widow, therefore, in this respect is no higher than that of a creditor and it follows that she should have obtained the leave of the Insolvency Court before bringing the present suit.

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For the reasons given I would dismiss the appeal with costs.

The Court below will see that the Court-fees are collected in the usual way.

AGHA HAIDAR J.—I agree.

A. N. C.

*Appeal dismissed.*

**REVISIONAL CRIMINAL.**

*Before Jai Lal J.*

THE CROWN—Petitioner

*versus*

LAL SINGH AND OTHERS—Respondents.

Criminal Revision No. 915 of 1933.

*Assessor—expressing his opinion in favour of one of the accused during the course of the trial—proper procedure under the circumstances—Criminal Procedure Code, Act V of 1898, Section 561-A.*

One of the three Assessors was discovered to be an active partisan of one of the accused during the course of a trial under Section 396 of the Indian Penal Code, when the evidence of 21 witnesses for the prosecution had been recorded.

*Held*, that the proper procedure under the circumstances was to set aside the proceedings taken in the trial before the Sessions Judge and to direct him to hold a *de novo* trial of the accused with the help of other assessors.

*And*, that the High Court had power to pass such an order *inter alia* under Section 561-A, Criminal Procedure Code.

*Sessions Judge of Tanjore v. Thiagaraja Thevan* (1), relied upon.

*Case reported by Mr. G. S. Mongia, Additional Sessions Judge, Lahore, with his No. 120 of 12th June, 1933.*

CARDEN-NOAD, Government Advocate and HAZARA SINGH, Special Public Prosecutor, for Petitioner.