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review that such a record as this should have been admitted in evidence.

For these reasons their Lordships have humbly advised His Majesty that this appeal should be allowed and the conviction of the appellant should be set aside.

C. S-S.

Appeal allowed.

Solicitors for the appellant: *Hy. S. L. Polak & Co.*

Solicitors for the respondent: *The Solicitor, India Office.*

PRIVY COUNCIL.

Before Lord Thankerton, Lord Alness and Sir George Rankin.

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July 13.

SAT NARAIN AND ANOTHER—Appellants

versus

SRI KISHEN DAS AND OTHERS—Respondents.

SAME—Appellants

versus

BANK OF UPPER INDIA AND OTHERS—Respondents.

Privy Council Appeals Nos. 23 and 24 of 1932.

On Appeal from the High Court at Lahore.

Presidency Towns Insolvency Act, III of 1909, s. 52 (2) (b) — Hindu joint family governed by Mitakshara *— Insolvency of father — Liability of sons' shares for father's debt — Right of Official Assignee to exercise father's powers of sale — Decree on partition.*

Held, that on the adjudication of the father of a Hindu joint family governed by the *Mitakshara*, his power to sell the joint family property to pay his antecedent debts, not incurred for immoral or illegal purposes, vests in the Official Assignee under section 52 (2) (*b*) of the Presidency Towns Insolvency Act.

Held also, that in a suit for partition instituted by his sons during their father's insolvency, a direction may be made that the division of the family property shall be made

only after making provision for the satisfaction of the insolvent's antecedent debts, not incurred for immoral or illegal purposes.

Sat Narain v. Behari Lal (1), *Official Assignee of Madras v. Ramchandra* (2), *Re Sellamuthu Servai* (3) *Bawan Das v. Chiene* (4), *Brij Narain v. Mangal Prasad* (5), *Sahu Ram Chandra v. Bhup Singh* (6) and *Venku Reddi v. Venku Reddi* (7), referred to.

Re Balusami Ayyar (8), approved.

Sita Ram v. Beni Prasad (9), disapproved.

Consolidated Appeals from two decrees of the High Court (January 20, 1926), which modified two decrees of the District Court of Delhi (April 13, 1916).

The material facts are stated in the judgment of Judicial Committee.

1936, June 15, 16 and 18. UPJOHN, K. C., for the appellants.

The Bank's decree has become final and there is no question now with regard to the properties mortgaged to the Bank. The question now is whether the Official Assignee has the right to sell the shares of the sons of the insolvent in the property not mortgaged. This question was left open in *Sat Narain v. Behari Lal* (1). In that case it was held that the share of the sons in the joint family property did not vest in the Official Assignee on the adjudication of the father. The question as to whether the share of the sons could be made available to pay the debts of the father was left open. It is submitted that as the share of the sons does not vest in the Official Assignee he has no

(1) (1925) L. R. 52 I. A. 22: I. L. R. 6 Lah. 1 (P.C.).
(2) (1923) I. L. R. 46 Mad. 54.
(3) (1924) I. L. R. 47 Mad. 87.
(4) (1922) I. L. R. 44 All. 316.
(5) (1923) L. R. 51 I. A. 129: I. L. R. 46 All. 95 (P.C.).
(6) (1917) L. R. 44 I. A. 126: I. L. R. 39 All. 437 (P.C.).
(7) (1926) I. L. R. 50 Mad. 535, 539.
(8) (1928) I. L. R. 51 Mad. 417.
(9) (1925) I. L. R. 47 All. 263.

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power to deal with it and he had no power to sell the joint family property as he did here. He has not the power of the father to sell the family property to pay antecedent debts under ss. 46 (5) and 52 (2) (*b*) of the Act. Reference was made to the Presidency Towns Insolvency Act, ss. 9, 17, 46, 51 and 52, to Mulla's Hindu Law (7th ed.) pp. 354 and 356, para. 295, and to *Fakirchand Motichand v. Motichand Harruckchand* (1), *Sujraj Bansi Koer v. Sheo Prashad Singh* (2), *Official Assignee of Madras v. Ramchandra* (3), *Re Sellamuthu Servai* (4), *Subramania Ayyar v. Sabapathy Ayyar* (5), *Re Balusami Ayyar* (6), *Sita Ram v. Beni Prasad* (7), *Bawan Das v. Chiene* (8), *Venku Reddi v. Venku Reddi* (9) and *Kishan Sarup v. Brijraj Singh* (10).

PARIKH following: The pious duty of a son to pay his father's debts is limited. If the debt is an antecedent debt and if, by execution, ancestral property has been taken to satisfy the father's debts and has got into the hands of third parties, then the doctrine of pious obligation is applied and the sons' shares which have been made liable cannot be recovered. But if the father has debts, on a partition the sons' shares in the ancestral property cannot be made liable for the discharge of the father's debts. The doctrine does not apply.

Brij Narain v. Mangal Prasad (11), *Sahu Ram Chandra v. Bhup Singh* (12).

(1) (1883) I. L. R. 7 Bom. 438.
(2) (1878) L. R. 6 I. A. 88, 106: I. L. R. 5 Cal. 148 (P.C.).
(3) (1923) I. L. R. 46 Mad. 54.
(4) (1924) I. L. R. 47 Mad. 87.
(5) (1927) I. L. R. 51 Mad. 361.
(6) (1928) I. L. R. 51 Mad. 417.
(7) (1925) I. L. R. 47 All. 263, 266.
(8) (1922) I. L. R. 44 All. 316.
(9) (1926) I. L. R. 50 Mad. 535, 538-9.
(10) (1929) I. L. R. 51 All. 932.
(11) (1923) 51 L. R. I. A. 129: I. L. R. 46 All. 95 (P.C.).
(12) (1917) L. R. 44 I. A. 126: I. L. R. 39 All. 437 (P.C.).

So far as the decisions of the Board go, the doctrine has not been applied except in the case of antecedent debts and executions. In the case of a mortgage for a loan not in discharge of an antecedent debt, it has been held that the sons are not bound.

If the doctrine of pious duty applied without any limitation, the sons would be bound.

In Venku Reddi v. Venku Reddi (1), there was a decree against the father and sons and so, on partition, provision had to be made for the payment of the debt.

[LORD THANKERTON: The decision was based on the general principle of the pious duty of the sons to pay. It was not limited.]

The view of the minority in *Subramania Ayyar v. Sabapathy Ayyar* (2) is right. The effect of the decision is to destroy the *Mitakshara* texts. It extends the power of the father to incur debts and make them binding on the family property. The decision in *Ram Saran Das v. Bhagwan Singh* (3) supports my contention. Reference was also made to *Chandra Deo Singh v. Mata Prasad* (4) and *Jogi Das v. Ganga Ram* (5). Until there is a decree against the father, a creditor cannot proceed against the sons' shares. Sons have a right in the family property by birth and they have a right to check their father's extravagance.

Adjudication of a member effects a disruption of the family. It is inconsistent with the continuance of the joint family: *Madho Prasad v. Mehrban Singh* (6). A creditor of a co-parcener may get a decree against him and the effect of that would be to disrupt the family.

(1) (1926) I.L.R. 50 Mad. 535, 538-9.
(2) (1927) I.L.R. 51 Mad. 361.
(3) (1929) I.L.R. 52 All. 71.
(4) (1909) I.L.R. 31 All. 176.
(5) (1917) 21 Cal. W.N. 957 (P.C.).
(6) (1890) L. R. 17 I. A. 194: I.L.R. 18 Cal. 157 (P.C.).

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In the case of adjudication, separation would take place on the date of vesting. The Official Assignee would have the right to take the necessary steps to effect a division. The right of survivorship would cease, Mulla's Hindu Law, para. 229.

DUNNE, K. C. and UTHWATT, for the 3rd respondent: It was never suggested in the Courts below that adjudication effected a separation. The point was not raised.

The family remains joint till there has been some action by a member showing intention to break up the family. An adjudication does not show that any member has an intention to break up the family. The Official Assignee has vested in him the interests of the insolvent in the family property. That would not break up the family.

Provision for paying debts on partition may be made by the Court and was rightly made here—*Anand Prakash* v. *Narain Das-Dori Lal* (1) and *Bankey Lal v. Durga Prasad* (2).

UPJOHN, K. C. in reply: If there were no disruption on the vesting, then if the insolvent died before separation was effected, the share of the insolvent is taken by the other co-parceners by survivorship. On the true construction of section 17 of the Act, the share of the insolvent vests in the Official Assignee and a disruption of the family is thereby effected.

DUNNE, K. C. and WALLACH, for the 4th respondent—Hyam and Macmillan for the 8th respondent and Chinna Durai and Lady Chatterjee for the 12th respondent were not called on. The 5th and 7th respondents were not represented.

(1) (1930) I. L. R. 53 All. 239. (2) (1931) I. L. R. 53 All. 868.

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The judgment of the Judicial Committee was delivered by—

LORD THANKERTON—These are consolidated appeals from two decrees of the High Court of Judicature at Lahore, dated the 20th January, 1926, which, subject to some modification, affirmed two decrees of the District Judge of Delhi, dated the 13th April, 1916, dismissing two suits instituted by the present appellants, who are the two sons of Lala Sri Kishen Das, originally respondent No.1 to these appeals.

Sri Kishen Das, along with the appellants, formed a joint Hindu family, of which he was the managing member. The joint family owned considerable immoveable property, and a business, the headquarters of which were at Delhi.

On the 5th April, 1913, Sri Kishen Das mortgaged to respondents No.3, the Bank of Upper India, Limited, a large part of the immoveable property owned by the joint family, in security of his indebtedness to the Bank. On the 26th September, 1913, Sri Kishen Das was adjudicated insolvent by the High Court of Bombay under the Presidency Towns Insolvency Act, 1909.

On the 14th April, 1914, the Bank instituted a suit in the Court of the District Judge at Delhi for recovery of their mortgage debt, amounting to Rs.4,64,021-15-8, by sale of the mortgaged properties, against Sri Kishen Das, the present appellants, who were then minors, and the Official Assignee, Bombay. The present appellants contested the suit. The Official Assignee also contested the suit, but later he admitted the Bank's claim.

On the 2nd October, 1914, the present appellants, then minors, through a next friend instituted the first

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suit now under appeal at Delhi against their father, Sri Kishen Das, the Bank, and the Official Assignee, asking for a declaration that one-half of the mortgaged properties was owned by them and that, to the extent of their share, the mortgage was not binding on them, and also for an injunction to restrain the defendants from selling or alienating their one-half share in the said properties.

On the 11th January, 1915, the present appellants instituted at Delhi the second suit now under appeal against Sri Kishen Das, the Official Assignee, the Bank, and sundry purchasers of immoveable properties sold by the Official Assignee, claiming partition and a half share of the immoveable properties belonging to the joint family, two lists of which were filed by the plaintiffs, the first list setting out the mortgaged properties in dispute, and the second detailing the properties free from the mortgage.

The three suits were tried together by the District Judge, and on the 13th April, 1916, he delivered judgment in the partition suit and dismissed the suit; for the reasons set forth in that judgment he also dismissed the declaratory suit. On the 27th April, 1916, he gave decree in the Bank's suit for Rs.4,64,021-15-8 with interest, but made no order for sale, in respect that the larger portion of the mortgaged properties had already been sold by the Official Assignee; this decree has now become final, as an appeal therefrom was dismissed in default.

The present appellants appealed from the decrees of the District Judge in the declaratory suit and the partition suit to the Chief Court of the Punjab (now the High Court of Judicature at Lahore) and on the 20th January, 1926, the High Court delivered a

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judgment disposing of both appeals. In the declaratory suit a decree was made affirming the dismissal of the suit by the District Judge. In the partition suit it was ordered by decree of the same date that the decree of the District Judge, Delhi, dated the 13th April, 1916, dismissing the plaintiffs' suit be varied "to the extent of giving the plaintiff-appellants a preliminary decree declaring their share in the unsold properties; as detailed below," (here follow particulars of nine properties), "to be one-half, and directing that division shall only be made after provision for the satisfaction of the remainder of the debt due to the Bank and of such other antecedent debts of Rai Bahadur Sri Kishen Das as the plaintiffs fail to show are immoral or illegal." There was also a variation as to costs, which is not now material.

The present appeals are from these two decrees of the High Court, but the decision of the declaratory suit will follow the decision of the two questions raised in the appeal in the partition suit.

In opening the appeals on behalf of the appellants Mr. Upjohn made clear that no question was raised by them as to the joint family properties so far as they were included in the mortgage to the Bank, whether these properties had already been sold or remained to be sold, and that the appeals related only to the joint family properties which were not included in the mortgage. As to these properties, exception was taken to the decree of the High Court in the partition suit in two respects, *viz.*, (*a*) because it confined the declaration in the appellants' favour to these properties so far as unsold, and did not include those which had already been sold, and (*b*) in regard to the direction as to provision for the remainder of the antecedent debts.

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Certain of the respondents to these appeals were only interested in the matter as purchasers of some of the properties subject to the Bank's mortgage, and, on the second day of the hearing before their Lordships, Mr. Upjohn, on behalf of the appellants, agreed that they should be dismissed from the appeals, as he was no longer challenging these sales. These respondents were respondents Nos.4, 5, 7 and 8 in appeal No.23 of 1932 in the partition suit. Their Lordships held that respondents Nos.4 and 8, who had appeared on the appeal, were each entitled to their costs from the appellants.

Another preliminary matter relates to original defendant No.12 in the partition suit, Ghulam Mohi-ud-Din, who was a purchaser of one of the properties, and who had died more than six months before an application was made on the 4th October, 1920, by the plaintiffs for substitution of his legal representatives. In fact he had died on the 20th March, 1918, and, in their judgment of the 20th January, 1926, the High Court declined to extend the time, and held that the appeal had abated, and rejected the application. The legal representatives of Ghulam Mohi-ud-Din, respondent No.12 in appeal No.23 of 1932, are called along with Sheo Baran Singh, who has judicially established his right of pre-emption of the property purchased by Mohi-ud-Din, and who appeared in this appeal. Mr. Upjohn did not seek to press the appeal as regards this property, and the appeal falls to be dismissed as against respondent No.12, with costs to the respondent Sheo Baran Singh.

Turning to the first contention of the appellants, it is clear that Sri Kishen Das, as father of the two appellants, had the power, so long as it remained undivided, to sell or mortgage the joint family property,

including the interest of the appellants, for payment of his own debts, provided such debts were antecedent and were not incurred for immoral or illegal purposes. It is also clear that his interest in the joint family property vested in the Official Assignee, who would be entitled to obtain partition. But the question in these appeals relates to the power of the Official Assignee to deal with the interest of the appellants.

Under a previous decision of this Board, in a pre-emption suit instituted by the present appellants, it has been held that the adjudication order did not vest in the Official Assignee the appellants' interest in the family property: *Sat Narain v. Behari Lal* (1). But the Official Assignee claims the right to exercise the insolvent's power, as father, to sell the joint family property for payment of the insolvent's antecedent debts, so far as not incurred for immoral or illegal purposes, by virtue of the provisions of section 52 (2) (*b*) of the Presidency Towns Insolvency Act. Section 52 provides as follows:—

"52.—(1) The property of the insolvent divisible amongst his creditors, and in this Act referred to as the property of the insolvent, shall not comprise the following particulars, namely:—

"(*a*) property held by the insolvent on trust for any other person;

"(*b*) the tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessels, and furniture of himself, his wife and children, to a value inclusive of tools and apparel and other necessaries as aforesaid, not exceeding three hundred rupees in the whole.

(1) (1925) 52 I. A. 22: I. L. R. 6 Lah. 1 (P.C.).

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"(2) 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 or 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; and

"(*c*) all goods being at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof:

"Provided that things in action other than debts due or growing due to the insolvent in the course of his trade or business shall not be deemed goods within the meaning of clause (*c*):

"Provided also that the true owner of any goods which have become divisible among the creditors of the insolvent under the provisions of clause (*c*) may prove for the value of such goods."

Their Lordships agree with the decision of the High Court that the claim of the Official Assignee is well founded, and that, under section 52 (2) (*b*) the capacity to exercise the insolvent's power to sell the joint family properties for his antecedent debts, these not having been incurred for immoral or illegal purposes, vested in the Official Assignee. The decision of the High Court was based on two decisions of the

Madras High Court, and two decisions of the High Court of Allahabad, to which it is unnecessary to refer further. [*Official Assignee of Madras v. Ramchandra* (1); *Re Sellamuthu Servai* (2); *Bawan Das v. Chiene* (3); *Sita Ram v. Beni Prasad* (4); *cf.* also *Re Balusami Ayyar* (5)]. It was contended for the appellants that the limited class of creditors, who would benefit by such a sale, was not among those classes whose debts are expressly given a priority by section 49 of the Act, and that to distribute the proceeds of sale among such a limited class would be in contravention of sub-section 5 of section 49, which provides that, "subject to the provisions of this Act, all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference." But if, as their Lordships hold, section 52 (2) (*b*) entitles the Official Assignee to exercise the power in question, it is clear that such power must be exercised subject to its limitations, and the provisions of section 49 (5) do not apply. Equally, the provisions of section 17 are in no way inconsistent with the exercise of the power of sale subject to its limitations. The sales by the Official Assignee in the present case were completed before the partition suit was instituted.

Accordingly their Lordships are of opinion that the appeal fails in regard to the joint family properties which are not included in the Bank's mortgage and which have been sold by the Official Assignee.

As regards the unsold properties, not included in the Bank's mortgage, it is not disputed that the appellants are entitled to the preliminary decree declaring

(1) (1923) I. L. R. 46 Mad. 54.
(2) (1924) I. L. R. 47 Mad. 87.
(3) (1922) I. L. R. 44 All. 316.
(4) (1925) I. L. R. 47 All. 263.
(5) (1928) I. L. R. 51 Mad. 417.

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their share, on partition, to be one-half, but the appellants maintain that the High Court erred in directing that division should only be made after provision for satisfaction of the remainder of the insolvent's antecedent debts, in so far as the appellants fail to show that they are immoral or illegal.

In their Lordships' opinion, the High Court have rightly made the direction. The father's power of sale for his debts exists only so long as the joint family property is undivided, and the capacity of the Official Assignee must be similarly limited. In their Lordships' opinion, this was rightly held in *Re Balusami Ayyar* (1), *supra cit.*, and the decision in *Sita Ram v. Beni Prasad* (2), to the contrary effect was incorrect. When the family estate is divided, it is necessary to take account of both the assets and the debts for which the undivided estate is liable. The appellants maintained that the pious obligation of the sons was an obligation not to object to the alienation of the joint estate by the father for his antecedent debts, unless they were immoral or illegal, but that these debts were not a liability of the joint estate, for which provision required to be made before partition. This argument was sought to be supported by the judgment of this Board delivered by Lord Dunedin in *Brij Narain v. Mangal Prasad* (3), which was a case dealing with the rights of the father's mortgagee or creditor against the joint estate in the hands of the sons. That decision was important in that it corrected certain *obiter dicta* in the earlier decision of this Board in *Sahu Ram v. Bhup Singh* (4), and made clear *inter alia*, that the doctrine was not based on any necessity for the protec-

(1) (1923) I. L. R. 51 Mad. 417.
(2) (1925) I. L. R. 47 All. 263.
(3) (1923) L. R. 51 I. A. 129.
(4) 1917 L. R. 44 I. A. 126.

tion of third parties but was based on the pious obligation of the sons to see their father's debts paid, and also that it was immaterial to the liability of the family estate whether the father was alive or dead. There can be no doubt that it is a liability of the joint estate, and, in the opinion of their Lordships, it follows that it is right to make provision for discharge of this liability on partition of the joint estate. It was so decided in *Bawan Das v. Chiene* (1); reference may also be made to *Venku Reddi v. Venku Reddi* (2). Accordingly, the appellants' second argument must be rejected.

There seems to be a reasonable doubt as to the correctness of the list of properties in the decree of the High Court, and parties were agreed that the matter would be safeguarded by varying the decree in so far as it gives the appellants a preliminary decree so as to read, "a preliminary decree declaring their share in the properties not subject to the Bank's mortgage and remaining unsold to be one-half, and directing that division shall only be made after provision for the satisfaction of the remainder of the debt due to the Bank and of such other antecedent debts of Rai Bahadur Sri Kishen Das as the plaintiffs fail to show are immoral or illegal."

Their Lordships will accordingly humbly advise His Majesty that the appeals should be dismissed, and that the decrees of the High Court, subject to the variation above stated, should be affirmed. The respondents the Bank of Upper India will be paid their costs in these appeals by the appellants. The position of the respondents, 4, 5, 7, 8 and 12 has been referred to. As regards their costs: Nos.5 and 7 did not

(1) (1921) I. L. R. 44 All. 316. (2) (1926) I. L. R. 50 Mad. 535, 539

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appear, so no question of their costs arises; the appellants must pay the costs of Nos.4, 8 and of Sheo Baran Singh as representing No.12, with separate sets of costs to each.

C. S-S.

Appeals dismissed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the 3rd respondent in Appeal No.23 (The Bank): *Sanderson Lee & Co.*

Solicitors for the 4th respondent: *Hy. S. L. Polak & Co.*

Solicitors for the 8th respondent: *Sanderson Lee & Co.*

Solicitors for the 12th respondent: *Douglas Grant & Dold.*