Kustoor Chand Rai Bahadur v. *Dhumput Singh*

(1895) 22 I.A. 162

LORD HOBHOUSE -The respondent in this case is or was a banker carrying on business in Calcutta and other places, and the appellant is a creditor who seeks a declaration of insolvency against him. The act of insolvency relied on in the petition is that on the 7th and 8th February 1893, the respondent's principal *gomashta,* Punna Lal, and other *gomashtas* and servants, departed and were absent from his place of business in Shama Bye's Lane with intent to defeat the respondent's creditors. Two defences are raised by the respondent one being that no such act was committed by Panna Lal and the other that Panna Lal's act is not the act of the respondent on which he can be adjudged an insolvent.

The appellant's petition was presented on the 16th February, 1893, and was supported by affidavits on which the Judge in Insolvency, Mr. Justice Trevelyan, made an adjudication and a vesting order. The respondent immediately moved to set that order aside, and a great body of evidence was adduced by both parties. Except on minor and irrelevant points there was very little contradiction in the evidence and the two Courts below, through they have drawn different inferences, are in agreement on every material point of pure fact.

The respondent's principal office, or koti, was, as his residence was, at Azimgunge, near Moorshedabad. He had divers other Kites, the largest in point of business being in Calcutta. It was managed by Punna as head gomashta. The house in which it was conducted appears to have consisted of: first, a ground floor, on which were the durwans; secondly, a first floor, where was the guddy or office in which the gomashta sat to transact business, the cash-room, and another small room; and thirdly, a second or top floor in some of the rooms of which Punna slept, took his meals, and performed his puja. When the respondent visited Calcutta, he also, if alone, used the top storey; but, if his family were with him, he used some other house.

Late in the night of the 6th February, Paana decided that he must stop payment. Between one and two in the morning of the 7th, he telegraphed to the head gomashta at Azimgunge: "Business stopped; no payment today. Wire other kotis yourself." On the 8th a like telegram was sent to the same quarter, enquiring where the Huzoor (i.e. the "Master") was. In fact, the respondent was then in Ajmere, and was making his way to Calcutta. He had been on a pilgrimage to Palitana, almost at the other extremity of India, whence he was re-called by telegrams from Punna, which began as early as the 27th January, and which gave an alarming account of his Calcutta affairs. He did not arrive in Calcutta till the 11th February.

After the 6th the banking business in Calcutta was stopped. But under the Indian Statute that is not act of insolvency; the act alleged is that Punna departed from the place of business on the 7th and 8th Feburary, with intent to defeat, or delay, creditors. There is no doubt that he locked up the cash-room; that he left the guddi empty, though it was open; and that he betook himself to his own living rooms in the top storey. There is however no evidence that he prevented creditors from getting to him if they wished it. The strongest evidence in that direction is given by two creditors: Coverji and Premjee. Cuverji went up to the guddi twice on the 7th. It was empty, and the durwans told him that "We cannot make payments now, therefore, you cannot see the Babus." On the 8th, he was met on the ground floor with a like

intimation. Premjee went to the house on the 7th and was going upstairs, when the durwan said: “Do not go upstairs, there is no one upstairs.” On the 8th, he went up to the guddi, which he found empty. Neither of these witnesses appears to have made any attempt to see Punna in his own rooms. Mr. Justice Trevelyan remarks on this evidence: “I doubt very much whether there was anything amounting to a stoppage of persons going up. “He (Premjee) may have been discouraged and did not go up in consequence of what was said to him, but there was not forcible stopping.” On the other hand, two of the appellant’s witnesses, Narain Das and Kandarpa, and three of the respondent’s witnesses. Nobin Chunder, Radha Roman Shaha, and Kedar Nath Mozoomdar, all five being creditors, or acting for creditors saw Punna in his own rooms on the top storey at different times on the two critical days. Their Lordships agree with the High Court in thinking that, contrary to the opinion of Mr. Justice Trevelyan, it is impossible to hold that under these circumstances Punna departed from the place of business at all.

Even had there been more evidence of departure than there is, it is not shown how it could defeat, or delay, creditors. They were injured by the fact that the respondent did not supply Punna with funds to pay them; but Counsel were unable to explain in what way any one of them was debarred from pursuing any process available to him by the fact that Punna kept his own rooms instead of sitting in the guddi. It is the view of the High Court that nobody was or could be so debarred; and their Lordships agree with it.

That would be enough to dispose of the appeal. But there is another question which also goes to the root of the case, viz., the question whether the conduct of the agent can result in an act of insolvency by the principal. On that question also the High Court has differed from the first Court. The effect of the High Court’s decision is to disturb views of the law which have prevailed in Calcutta for some years. And as the point has been raised again in this appeal, their Lordships think it their duty to pronounce an opinion on it.

Mr. Justice Trevelyan considers it to be a settled principle that a person who leaves a gomashta in charge of a business can by that gomashta commit an act of insolvency. He refers to the case of ***In re Hurruckchund Golicha*** 5.C. 605 which is said to be the earliest reported case upon the point, though not the earliest decision, and to have been since taken as correctly expounding the law. In that case the trader, residing at Azimgunge, carried on business in Calcutta by a gomashta who absconded. Mr. Justice Broughton, the Judge sitting in insolvency, expressed his opinion thus:-

> “The first question is, whether a trader who trades by a gomashta can be adjudicated an insolvent, if the gomashta commits an act of insolvency. It he cannot, there must be numerous cases in which native traders in this city cannot be adjudicated insolvents at all, for nothing is more common than for a trader living in the mofussil, and scarcely ever visiting Calcutta, to leave an extensive business in the hands of his gomashta, who has the fullest authority, and who carries on the whole business on his behalf.....It requires indeed no departure from the literal meaning of the words, to hold that when a trader has established a business through a gomashta, he departs from the place of his business, if his gomashta departs, and if he does not came himself or send some one else to carry on the business.”

The abstract principle of law thus decided is, that the act of a gomashta may be taken as the act of his principal within the meaning of the Statute. And the learned Judge thought that the facts of Hurruck's case (1) fell within the principle. But it is obvious that the application of the principle must depend upon the position and authority of the gomashta; and as Mr. Justice Trevelyan points out, great care must be taken in applying it.

The view of the High Court, which is stated by Mr. Justice Pogot is that ***Hurruck's*** case (1) was wrongly decided; and that, this being the first occasion on which it has been challenged in appeal, it ought to be formally overruled. They lay down in broad terms ''that a man cannot commit any act of bankruptcy by an act of his agent, which he has not authorized, and of which act he had no cognizance.'' Of course in sense every act of an agent must have the authority of the principal in order to affect him. But the meaning of the learned Judges evidently in that for the act in question the agent must have specific authority, and that the authority cannot flow out of his general position, as Mr. Justice Broughton thought to might.

So understood, their Lordships cannot assent to the principle laid down by the High Court. The position of a gomashta differs in different cases. In some cases he may be little more, or no more, than an ordinary manager. In others he may represent the business so entirely that the beneficial owners have no practical control over it and are quite unknown to the customers. Mr. Justice Pigot states the possible position of a gomashta with even more force than does Mr. Justice Broughton. He says : ''It often happens that a large business is carried on for years by a munsif gomashta or by a succession of them, in the name of principals who never are seen, or personally known, in connection with the business at all; sometimes in the name of family firms the members of which are constantly fluctuating from generation to generation, and of which firms it is or may be difficult to determine who are, at any given time, actually members.'' He has himself known a case in which a family owned a business for more than a century, the owners being counted by scores, and many of their kotis being managed by gomashtas whose office passed from father to son, as thought it were hereditary. Yet even in such a case as that he thinks that the principle of Hurruck's case (supra) would not be applicable.

Their Lordships think otherwise. They cannot hold that the creditors of firms exclusively managed by gomashtas have no remedy by was of insolvency, whatever the gomashtas may do; thought he may make fraudulent conveyances, promote fraudulent executions, or, as in Hurruck's case (supra), learnt, ''leaving the creditors to find him or his master if they could.'' And yet that consequence must follow if the principle laid down by the High Court in this case be the true one.

It may be desirable that, as Mr. Justice Pigot suggests, the Legislature should intervene. Their Lordships express no opinion on that subject. But in the meantime the Statute should be interpreted with reference to the facts of Indian life. And it is a question in each case whether the gomashta occupies such a position that the owner must stand or fall by his acts, so that his fraud or his flight shall by imputation be the fraud or the flight of the owner or multitude of owners, for the purpose of bringing their case within the Statute of Insolvency. Their Lordships agree with the Judges who have held that the Statute admits of application to such cases, and that to exclude it may lead to injustice and confusion in many cases.

They are by no means prepared to say that Hurruck's case (supra) was wrongly decided; though the position of the gomashta there is not stated so fully as they would think desirable if the case were before them for decision. On the other hand they have no hesitation in agreeing with the High Court that Punna did not occupy such a position as to make the respondent liable to be declared insolvent on the ground of his personal conduct. The respondent appears to have been an active and responsible owner. His residence and head koti at Azimaunge were well known. He occasionally came to Calcutta, and to the koti. When difficulties arose, Punna applied to him to meet them; and when payment was suspended, Punna openly, by himself or by his servants, told the creditors, that his principal was coming, and that they must wait for his action. Under such circumstances, even if Punna himself had committed the acts alleged by the appellant, it would, in their Lordships' opinion, be wrong to hold that his acts were those of the respondent.

The result is that the appeal ought to be dismissed. And their Lordships will humbly advise Her Majesty accordingly. The appellant must pay the costs of this appeal.

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Yenumula Mallu Dora v. *Peruri Seetharathnam*

(1966) 2 SCR 209 : AIR 1966 SC 918

M. HIDAYATULLAH, J. - On the application of two creditors the appellant Venumula Mallu Dora has been adjudged insolvent by the Subordinate Judge, Kakinada and a receiving order has been passed against him. The respondents before us are one of the petitioning creditors and the legal representatives of the other petitioning creditor who died during these proceedings. The first petitioning creditor held a decree for money which he had obtained in OS 67 of 1949. He also held another money decree in OS 473 of 1948. The second petitioning creditor held a decree which she had obtained in OS 17 of 1955. The application was based upon three acts of insolvency which the appellant was stated to have committed and on the general facts that he was indebted to the tune of Rs two lakhs, and was unable to pay his debts. The three acts of insolvency alleged against him were (*a*) evasion of arrest in execution of the money decree in OS 67 of 1949; (*b*) sale of some of his properties on September 26, 1956 in execution arising from OS 73 of 1952; and (*c*) sale of some of his properties on September 19, 1956 in execution of money decree in OS No. 9 of 1950. It was also alleged that he was fraudulently transferring properties in the name of his wife and brother-in-law and had suffered a collusive charge decree for maintenance in favour of his wife, 'to delay and defeat his creditors.

2. The Subordinate Judge, Kakinada did not accept the first two acts of insolvency. The evidence regarding evasion of arrest was not found convincing and the second act of insolvency was rejected because the sale of the property was in execution of a mortgage decree. In respect of the third act of insolvency the Subordinate Judge held that it satisfied Section 6(*e*) of the Provincial Insolvency Act and an adjudication and a receiving order were justified in the case. An appeal was taken to the District Court at Rajahmundry (CA No. 41 of 1958) which was dismissed on October 15, 1959. A Revision Application filed under Section 75 of the Provincial Insolvency Act was dismissed by the High Court of Andhra Pradesh on March 14, 1963. The appellant, however, obtained special leave of this Court and has filed the present appeal against the order of the High Court.

3. The contention of the appellant was, and still is, that the third act of insolvency was not established as he had deposited, within one month of the sale, the entire decretal amount together with poundage and commission and the sale was set aside on his petition under Order 21 Rule 89 of the Code of Civil Procedure. He contended, therefore, that as none of the acts of insolvency remained, the petition ought to have been dismissed as incompetent or he was entitled to have the petition dismissed, in any event, under Section 25 of the Provincial Insolvency Act which allows a creditor's petition to be dismissed on sufficient cause. He submitted that as the sale was set aside before the order of adjudication was made there existed sufficient cause for the dismissal of the creditors' petition. The Subordinate Judge relying upon ***Venkatakrishnayya* v. *Malakondayya*** [AIR 1942 Mad 306] and on decisions of the Lahore and the Calcutta High Courts rejected the submission and made the order against the appellant. The District Judge, Rajahmundry agreed with the conclusion of the Subordinate Judge and the High Court rejected the petition for revision. In this appeal the same points are urged again for our acceptance. In our judgment the view of the law taken in this case by the

Subordinate Judge and approved by the District Court is right and does not warrant any interference.

4. The object of the law of insolvency is to seize the property of an insolvent before he can squander it and to distribute it amongst his creditors. III is, however, not every debtor, who has borrowed beyond his assets or even one whose property is attached in execution of his debts, who can be subjected to such control. The jurisdiction of the court commences, when certain acts take place which are known as acts of insolvency and which give a right to his creditors to apply to the Court for his adjudication as an insolvent. The Provincial Insolvency Act lays down in Section 6 what acts are to be regarded as acts of insolvency. It is a long list. Some are voluntary acts of the insolvent and some others are involuntary. The involuntary acts are of a kind by which a creditor is able to compel a debtor to disclose his insolvent condition even if the insolvent is careful enough not to commit a voluntary act of insolvency. One such act is that the insolvent has been imprisoned in execution of a decree of any court for payment of money, and another is that any of his property has been sold in execution of a decree of any court for payment of money. In this case the property of the appellant was sold on September 19, 1956 in execution of a money decree against him and therefore there is no question that he was guilty of an act of insolvency described in Section 6(*e*) of the Provincial Insolvency Act.

5. Under Section 7, a creditor is entitled to present a petition in the Insolvency Court against a debtor if he has committed an act of insolvency provided [as laid down in Section 9(1)(*c*)] the petition is made within three months of the act of insolvency on which the petition is grounded. In this case both these conditions are fulfilled. There is thus no doubt that the petitioning creditors' application under Section 7 complied with Section 6(e) and Section 9(1)(*c*) of the Provincial Insolvency Act. The petitioning creditors alleged that the appellant was indebted to the extent of Rs two lakhs and this was not denied by the appellant. In the trial of one of the execution petitions filed against him by a decree-holder the appellant admitted that he had "no means to pay the decree debt" because "all his properties" were "under attachment and were being brought to sale". He also stated that he was not "in a position to discharge the debts". It is, therefore, clear that the appellant who was in more than embarrassed pecuniary circumstances was unable to pay his debts. It was also clear from the evidence, which the District Court and the Subordinate Judge have concurrently accepted, that had made some transfers to screen his properties from his creditors and had suffered a decree for maintenance in a suit by his wife. In view of these facts, which the appellant cannot now deny, he is driven to support his case by argument on law. The argument, as we have seen, is twofold. We are not inclined to accept either leg of the argument.

6. An act of insolvency once committed cannot be explained or purged by subsequent events. The insolvent cannot claim to wipe it off by paying some of his creditors. This is because the same act of insolvency is available to all his creditors. By satisfying one of the creditors the act of insolvency is not erased unless all creditors are satisfied because till all creditors are paid the debtor must prove his ability to meet his liabilities. In this case the petitioning creditors had their own decrees. It was in the decree of another creditor that the payment was made but only after the act of insolvency was committed. Besides the petitioning creditors there were several other creditors to whom the appellant owed large sum

of money and his total debts aggregated to Rs two lakhs. It is plain that any of the remaining creditors, including the petitioning creditors, could rely upon the act of insolvency even though one or more creditors might have been paid in full. The act of insolvency which the appellant had committed thus remained and was not purged by payment of decretal amount after the sale in execution of the money decree.

7. The next question is whether the Subordinate Judge should have exercised his discretion under Section 25 to dismiss the petition of the creditors treating the deposit of the money as sufficient cause. Section 25 of the Provincial Insolvency Act is in wide terms but it is impossible to give effect to those wide terms so as to confer a jurisdiction to ignore an act of insolvency at least in cases where the debtor continues to be heavily indebted and there is no proof that he is able to pay his debts. The section reads as follows:

> **25. *Dismissal of petition*.** (1) In the case of a (petition presented by a creditor, where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.

The section expressly mentions three circumstances in which the petition made by a creditor must be dismissed, namely, (*i*) the absence of the right of the creditor to make the application; (*ii*) failure to serve the debtor with the notice of the admission of the petition: and (*iii*) the ability of the debtor to pay his debts. In addition, the Court has been given a discretion to dismiss the petition if it is satisfied that there is other sufficient cause for not making the order against the debtor. The last clause of the section need not necessarily be read *ejusdem generis* with the previous ones but even so there can be no sufficient cause if, after an act of insolvency is established, the debtor is unable to pay his debts. The discretion to dismiss the petition can only be exercised under very different circumstances. What those cases would be it is neither easy nor necessary to specify, but examples of sufficient cause are to be found when the petition is malicious and has been made for some collateral or inequitable purpose such as putting pressure upon the debtor or for extorting money from him or where the petitioning creditor having refused tender of money, fraudulently and maliciously files the application. An order is sometimes not made by the receiving order the only asset of the debtor would be destroyed such as a life interest which would cease on his bankruptcy. Cases have also occurred where a receiving order was not made because there were no assets and it would have been a waste of time and money to make a receiving order against the debtor. These examples merely illustrate the grounds on which orders are generally made in the exercise of the discretion conferred by the last clause of Section 25. This case is clearly one which cannot be treated under that clause. There are huge debts and no means to pay even though there are properties which, if realised, may satisfy at least of part the creditors of the appellant. The appellant was clearly guilty an act of insolvency and an act of insolvency cannot be purged by anything he may have done subsequently. There is no proof of malicious or inequitable dealing on the part of the petitioning creditors. They have proved the necessary facts and have established both the act of insolvency and the inability of

the appellant to pay his debts. The appellant has not been able to prove that he is able to pay. In fact, he has admitted that he unable to pay his debts.

8. The High Courts have taken a similar and uniform view of such cases. These rulings are quite numerous but the following may be seen: ***Pratapmal Rameshwar* v. *Chunnilal Jahuri*** [AIR 1933 Cal 417], ***Lal Chand Chaughuri* v. *Bogha Ram*** [AIR 1938 Lah 819] and ***Venkatakrishnayya* v. *Malakondayya*1**. We do no consider it necessary to examine the facts in those cases because they apply correctly the principles, which we have set out above to the facts in the cases then present. It is, therefore, quite clear that the adjudication of the appellant and the receiving order against him were properly made. In the result the appeal fails and is dismissed.

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Chhatrapat Singh Dugar v. *Kharag Singh Lachmiram*

AIR 1916 PC 64

SIR LAWRENCE JENKINS - Chatrapat Singh Dugar, the present appellant, on the 21st May, 1909 presented as a debtor an insolvency petition under the Provincial Insolvency Act, 1970, to the District Court of Murshidabad for an order adjudging him an insolvent,

His application was opposed by the present respondents and was dismissed. The debtor's consequent appeal to the High Court in Bengal was dismissed by an order of the 12th April, 1912 and an application for review of the High Court's Judgments was equally unsuccessful. This appeal has been preferred by the debtor to His majesty in Council from the High Court's order of the 12th April, 1912.

The Provincial Insolvency Act presents a complete and exact delineation of a debtor's right to an order of adjudication, on his own petition. Subject to the conditions specified in the Act, if a debtor commits an act of insolvency an insolvency petition may be presented by the debtor, and the Court may on such petition make an order adjudging him an insolvent. The presentation by him of a petition is deemed an act of insolvency, and on that petition the Court may make an order of adjudication (Section 5).

Provision is made by the 6th and succeeding section for the presentation and admission of the insolvency petition, and other matters of procedure, but no express reference to them need be made in the circumstances of this case. It will suffice to say that all that is thus prescribed has been observed by the present debtor.

By the 14th section it is enacted that on the day fixed for the hearing of the petition or on any subsequent day to which the hearing may be adjourned, the Court shall require proof that the debtor is entitled to present the petition, and shall examine him if he is present.

Then it is provided by section 15 and 16 as follows:-

> "15(1). Where the Court is not satisfied with the proof of the right to present the petition or of the service of notice on the debtor as required by section 12, subsection (3), or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.
>
> 16(1). Where a petition is not dismissed under the preceding section...the Court shall make an order of adjudication."

The dismissal of Chhatrapat's petition by the District Court does not purport to rest on any failure to comply with the express terms of the Act. What was held was that the application was an abuse of the process of the Court and so must be dismissed. Presumably it was on this ground, too, that the High Court dismissed, the appeal; no other reason is indicated. It is to be regretted that the Courts in India allowed themselves to be influenced by this plea instead of being guided to their decision by the provision of the Act. In clear and distinct terms the Act entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend on the Court's discretion but is a statutory right; and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on

so treacherous a ground of decision as an ''abuse of the process of the Court.'' This case illustrates the peril of this doctrine in India, for what has been treated by the Courts below as such an abuse appears to their Lordships in no way to merit this censure. It may, perhaps, give rise to contest for priority between competing creditors, but that will be, if necessary, a matter for decision hereafter in the course of the insolvency. Be that, however, as it may, their Lordships are now concerned only with the debtor's position and so to that they are satisfied that he has complied with all the conditions specified in the Act, and is entitled as of right to an order adjudging him an insolvent. This conclusion, apart from the decision under appeal, is in agreement with the current of authority in India, where it has been rightly held that the stage at which to visit with its due consequences any misconduct of a debtor is when his application for discharge comes before the Court, and not on the initial proceeding. As the dismissal of Chhatrapat's petition, they will humbly advise His majesty that the order of the High Court of the 12th April, 1912, be reversed with costs, and in lieu there of, an order be made discharging the order of the District Court and adjudging Chhatrapat Singh Dugar an insolvent.

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Pirthi v. *Budh Singh*

AIR 1982 All 179

B. N. SAPRU, J. - The appellant Pirthi has been adjudged insolvent. The respondent Budh Singh applied to the Court for adjudging Pirthi an insolvent on the ground that Pirthi has taken a loan on pronote dated 10-1-1971 for Rs. 16,000/-bearing interest at the rate of 12 per cent per annum. The amount due, according to Budh Singh, was Rs 20, 025/- It was asserted that the appellant had sold a major portion of his Bhumidhari property on 20-2-1973 in favour of Rura and Tilka sons of Mohan Lal and Inder Singh son of Daryao with an intent to delay and defeat the creditor. It was asserted that this sale deed had been effected by Pirthi after the filing of the Suit No. 65 of 1973 by the creditor in the Court of the Civil Judge, Muzaffar Nagar on 16-2-1973 for the recovery of the amount of the loan.

2. The appellant contested the petition. He denied taking of loan of Rs. 16000/-as alleged by the creditor. He also asserted that the sale deed had been effected in pursuance of an agreement of sale executed by him prior to the institution of the suit by the petitioner against him in the Court of the Civil Judge, Muzaffarnagar. The appellant further asserted that he possessed agricultural property worth about Rs. 20, 000/-and that he also had a Gher worth about Rs. 15000/-He denied having committed any act of insolvency.

3. The Insolvency Judge found that the appellant had taken a loan on a pronote as asserted by the creditor. The Insovency Judge further found that the though the agreement to sell had been entered into between the debtor and the vendees on 15-2-1973, nevertheless such an agreement did not create an interest or charge in the property and the sale was calculated to dealy and defeat the creditor. It further found that the land possessed by the appellant-debtor was unirrigated land; whereas the land sold by him was irrigated land. The value of the land possessed by the appellant was held to be not more that Rs. 100/-per Bigha. It further took note of the fact that the creditor had filed the lease deed, Ex, 7 executed by the appellant which showed that one Bigha 19 Biswas of land was sold for Rs. 500/- and the land sold was of the same quality as the land still possessed by the debtor-appellant. As regards the Notha, it found that it was practicaly of no value. It recorded a finding that the appellant's assets were less than the amount of the debt. The Insolvency Judge also found that the fact that the value of the appellant's might exceed his debt was of no consequense if the debtor did not have liquid assets to pay of the debt. For arriving at this conclusion the Insolvency Judge relied upon two decisions, namely a decision of Nagpur High Court in the case of ***Gadi Bhikaji* v. *Govindrao Bapuji*** [AIR 1937 Nag 127] and a decision of Lahore High Court in the case of ***Bhagvan Dass* v. *Mahammad Nawaz Shah*** [AIR 1939 Lah 349. The Insolvency Judge took note of the fact that in the suit filed by the creditor, respondent, the debtor-appellant had applied to the Court to pay the decretal amount in instalments. In the circumstances, the Insolvency Judge allowed the petition and adjudged Pirthi an insolvent,

4. Aggrieved, Pirthi has come in appeal. The learned counsel for the appellant has not challenged the finding that the appellant was indebted to the respondent and, therefore, we would proceed on the basis that the appellant is, in fact, indebted to the respondent to extent determined by the Insolvency Judge.

5. The learned counsel for the appellant has, however, assailed the finding of the Insolvency Judge that the appellant did not posses sufficient assets to pay debt as incorrect. He pointed out that in the application for attachment of the appellant's property the creditor had sought attachment of 5-5-0 of Bhumidhari land belonging to the appellant. The creditor had shown the value of the attached property at Rs 16,000/-vide paper No. 35c. It is urged and rightly so that the creditor must have valued the attached property at a lower price than what would have actually fetched if it would have been sold. 5-5-0 of Bhumidhari land which was sought to be attached by the creditor, was valued at Rs. 16,000/-. This shows that, even according to the creditor, the value of the land was little over Rs. 3, 000/-per Bigha. From the statement of Kailash Chand, the Assistant Record Keeper, it is cleat that apart from the property which was attached, Pirthi possessed 3-19-0 of land. If this land is valued at the same rate as the land which was attached, its value would come approximately to Rs.12,000/-.

6. The learned counsel has then referred to the statement of Kailash Chand, the Assistant Record Keeper, Muzaffarnagar Collectorate, who deposed on the basis of Form No. 45 that Pirthi possessed 5-19-0 of land in Khata No. 466 and 3-19-0 of land in Khata No. 1137. In cross examination he deposed that Pirthis's name had been expunged from plot NO. 126 having an area of 14 Biswas. This shows that Pirthi on the date of the statement of the Assistant Record Keeper possessed 9-4-0 of land.

7. It is necessary to mention here that subsequent to the decision of the Insolvency Judge, the Zamindari Abolition and Land Reforms (Amendment) Act NO. 1 of 1977 came into force whereby all sirdari land had become Bhumidhari land and the afore said holdings of Pirthi which were sirdari holding, had become Bhumidhari land. It is well Known that agricultural land in Muzaffarnagar is very valuable. The statement of the respondent that the value of the land after the execution of the sale deed by Pirthi, was only Rs. 100/-per Bigha, cannot be accepted. The creditor, as mentioned earlier, valued himself the land which was sought to be attached, at Rs. 16,000/- The other remaining land of Pirthi which was not attached measured 3-9-0 of land. This land valued at a cosservative figure of Rs. 3,000/- per Bigha would be worth about Rs. 12,000/-. Thus, when the insolvency petition was presented Pirthi possessed agricultural land worth Rs. 16,000/- which was attached plus other land worth Rs. 12,000/- The total value of the agricultural property come to at least Rs. 28,000/-. Since the amount due to Budh Singh was Rs. 20,025, the value of Pirthi's assets exceeded this liability. He could, thus, not be declared an insolvent on the ground that his assets were less than his liabilites.

8. The Insolvency Judge was of the view that the insolvency petition had to be allowed because the cash available with Pirthi was not sufficient to discharge his debt. In the case of ***Gadi Bhikaji* v. *Govindrao Bapuji*** [AIR 1937 Nag 127] Justice Pollock held that under S. 25 of the Provincial Insolvency Act the burden of proof lies on the debtor that he is able to pay his debt. He further went on to hold that in a case where there is no evidence to show that the debtor had sufficient assets which, if liquidated, would enable him to pay his debt, the petiton must be allowed. The learned Judge relied upon a decision of the Calcutta High Court in the case of ***Pratap Mall Rameshwar* v. *Chunilal Johuri*** [AIR 1933 Cal 417] wherein Rankin, C. J., had remarked that a preson cannot be declared insolvent if he cannot meet his debts in the ordinary way by making legal tender and discharging his debts. The other decision relied

upon by the Insolvency Judge is the decision of Rangoon High Court in the case of ***Maj Kyin Myaing* v. *M. L. R. M. Mthaya Chettyar*** [AIR 1930 Rang 147]. The decision does not support the conclusion of the Insolvency Judge. In that case the debtor had been declared an insolvent. In appeal, the learned Judge observed as follows :

> It would seem that he has not taken the trouble to read S.6, Provinical Insolvency Act, which sets out the various acts which amount to acts of insolvency. That section does not provide that the mere fact that a person's assets are less that his debts is an act of insolvency. The respondent-petitioner failed entirely to establish any ground on which the appellent, could be adjudged Insolvent.

9. The appeal was allowed. This case is a clear authority of the proposition that the mere fact that a person's assest are less than his liabilities, is not per se an act of insolvency.

10. Tha act of insolvency are defined in S. 6 of the Provincial Insolvency Act. Clause (b) provides that a debtor who makes a transfer of his property or of any part therefore with intent to defeat or dealy his creditiors he commits an act of insolvency. In order to adjudge him an insolvent the Court has to record a finding that the debtor had made a transfer of his property with an intent to dealy or defeat his creditors. Therefore, unless the Court can find that a transfer of property by a debtor has been made with an intent to dealy or defeat the creditors, it cannot adjudge the debtor an insolvent, one of the tests to determine wheather the transfer is made by the debtor to dealy and defeat the creditor, is to find out whether after the transfer the debtor has assets sufficient to pay his creditors.

11. In fact, we have found that the assets remaining with Pirthi after the transfer made by him were sufficient to discharge his debts.

12. Now coming to the question as to wheather a debtor can be declared an insolvent if he does not have in hand sufficient liquid assets to pay his debts, no absolute proposition can be laid down that in all circumstances where the debtor while possessing assets, had not enough liquid assets in hand, he must be adjudged an insolvent. It all depends on the circumstance of each individual case, If the assets in normal case can be liquidated within a reasonable time and the creditor paid, the debtor cannot be declared an insolvent. If, however, the assets are not presently saleable or are encumbered then the debtor may be declared an insolvent.

13. In the instant case the agricultural land can be sold and the sale proceeds can be applied towards the liquidation of assets (liabilities?) and, therefore, Pirthi cannot be declared insolvent. A creditor cannot file an insolvency petition and get the debtor decleared an insolvent as an alternative to the porceedings in execution of a decree that he may have obtained against the debtor. It appears that it is exactly this what the creditor is seeking to do in the instant case.

14. Having come to the conclusion that the assets in hands of Pirthi exceed the amount of his debt, the appeal must necessarily be allowed.

15. In the result, the appeal is allowed and the order adjudging Pirthi an insolvent is set aside.

* * * * *

Chellathurai Nadar v. *Ramaswami Pillai*

AIR 1966 Mad. 143

GOVARDHAN, J. - 2. The petitioner's case is as follows: The petitioners field a petition under Section 9 of the Provincial Insolvency Act to adjudge the first respondent as an insolvent, contending that the first respondent who has borrowed Rs. 100/- from the petitioner on a promissory note had committed an act of insolvency on 25-8-1979 by entering into an agreement of sale of the 8th respondent. The first respondent has borrowed to the tune of Rupess 48, 230-50/-under various respondents 2 to 7. The property for which he had entered into an agreement is the only property owned by him. The 5th and 6th respondents have filed suits against the first respondent for the recovery of the amounts due to them under promissory notes. The 4th respondent has been transposed as the second petitioner after the death of the first petitioner.

3. The first respondent in his counter has admitted the borrowing from respondents Nos. 2 to 7. He has stated that he is not in a position to pay of the dues and that he is entitled to the benefits under the provisions of the Tamil Nadu Debt Relif Act. According to the first respondent, he had entered into an agreement of sale of the property with the 8th respondent with the bona fide belief of paying off his debts out of the consideration.

4. The respondents 2, and 3 have filed separate counters contending that the first respondent has borrowed money from them on executing promissory notes. They have also stated that the first respondent has filed the suit for specific performance. The 5th and 6th respondents to whom the first respondent in collusion with the 8th respondent has filed the suit for specific performance. The 5th and 6th respondents to whom the first respondent owes certain amount, had filed two separate suits against them.

5. The 8th respondent in his separate counter has stated that the promissory note in favour of the first petitioner is a sham and nominal one and the first petitioner was set up by the first respondent to defeat the interests of the creditors. According to the 8th respondent, an agreement of sale in his favour was executed by the first respondent on 25-5-1979 and the petition having been field beyond a period of three months is not maintainable.

6. On the above pleadings the learned Sub-judge held an enquiry and passed an order adjudging the first respondent as insolvent.

7. Against the said order, the 8th respondent had preferred an appeal before the District Court.

8. The learned District Judge has held that the petitoner have failed to establish that the first respondent has committed any act of insolvency and allowed the appeal dismissing the insolvency petition.

9. It is against this judgment, the 2nd petitioner had preferred the Civil Revision petition.

10. The learned cousnsel appearnig for the revision petitioner would argue that the petitioner who has filed the Insolvency Petition to adjudge the first respondent as an insolvency died and the 4th respondent from whom also the first respondent had borrowd money, had been transposed as the secnd petitioner and after the enquiry, the trial court has

held that the first respondent has committed an act of insolvency by entering into an agreement of sale and declared him as an insolvent and the 8th respondent who had entered into an agreement of sale with the first respondent, had preferred an appeal to the District Court and the District Court has held that the execution of an agreement of sale would not amount to transfer of an interest in the property and therefore, it cannot be stated that there is an act of insolvency committed by the first respondent and that the District Court has also held that the petition to adjudicate the first respondent and insolvent having been filed beyond a period of there months, the petition is not maintainable and tha said finding of the District Court is erroneous on the ground that the debtor viz., the first respondent himself has stated that he is unable to pay the debts to the creditors. Section 2(i) of the Provinical Insolvency Act defines a transfer of property as one includes a transfer of any interest in the property and the creation of a charge upon the property. By virtue of the agreement in which 8th respondent had with the first respondent, there is no transfer of any interest in the property for which the said agreement has been entered into and there is no creation of any charge on the property. Section 54 of the Transfer of property Act does not by itself create any interest or charge over the property. Therefore, under the provisions of the Transfer of Property Act, the execution of an agreement for sale cannot be h eld to be sufficient to attract the provisions of Section 6 of the Provinical Insolvency Act. It is only if the debtor conveys a right which he had in the property, in favour of another, that too with the intention of defeating the interests of his creditors, Section 6 of the Provincial Insolvency Act can be attracted. In the present case, the 8th respondent who has entered into an agreement of sale with the first respondent on 25-5-1979, has issued the notice under Ex. A.2 after nearly six months since the agreement provides for six months period for the execution of one sale deed. In this notice, the 8th respondent had expressed his readiness and willingness to purchase the property and called upon the first respondent to have the sale deed executed. The first respondent had sent a reply to the 8th respondent in which he has stated that some of the creditors are contemplating to file Insolvency Petition. Within two days of the said notice, the Insolvency petition has been filed by first petitioner. The version of the second petitioner who is the Revision Petitioner herein that the first respondent had colluded with the 8th respondent and had filed the suit for specific performance, there-fore cannot be given any weight on the ground that there is no evidence for the alleged collusion between them. On the other hand, from the correspondence and the fact of the filling of the Insolvency Petition, it appears that the first respondent and first petitioner have colluded together. The filling of the Insolvency petition even before the 8th respondent has filed the suit for specific performance, would only indicate that there cannot be any collusion between the first respondent and the eighth respondent and the version of the eighth respondent that there is collusion between the first petitioner and the first respondent is more probable. As I have already observed, mere agreement of sale by debtor does not confer any transfer of interest. Therefore, the execution of the agreements of sale by debtor cannot be considered as an act of insolvency committed by the first respondent. The Insolvency petition was relied on 21-12-1979 nearly after six months after the agreement dated 25-5-1979. Section 9(1) (c) of the Provincial Insolvency Act contemplates the filing of an Insolvency Petition only within three months of the alleged act of insolvency. Therefore even assuming the act of execution of the agreement is an act of insolvency the filing of the insolvency petition by the first petitioner is barred by limitation cannot be disputed. In this

connection, I only wish to refer to the Decision reported in ***Chenchuramana* v. *Arunachalam*** [AIR 1935 Mad 857] and ***G. Curuvamma* v. *C.Gopalam*** [AIR 1969 AP 338] wherein it has been held that Section 9(1) (c) is a condition precedent to the filing of the petition, that is to say, the petitioning creditor must, on the day when he presents his petition, have in view some act of insolyency which the debtor has committed within the preceding three months. It has also been held in the above decision that an Insolvency Petition cannot be presented where three months have expired during the alleged act of insolvency. The learned District Judge has rightly allowed the appeal before him after considering the above propositions of law and there is nothing to interfere with the same. The contention of the revision petitoner that the debtor has admitted that he is unable to pay and therefore, the finding of the lower appellate court that he had not committed an act of insolvency is improper cannot hold water in view of the fact that the petition filed by the petitioner is a creditor petition and not a debtor petition. It is only in a debtor petition, where the debtor has made a statement that he is unable to pay the amount due to his creditors, the said representation can be taken as an act of insolvency and on that basis, he could be adjudged as an insolvent. In view of the fact that the present petition is a creditor petition, it cannot be done. In that view also, I hold that the order passed by the learned District Judge is well founded and does not call for any interference by this court. In the result, the Civil Revision Petition is dismissed.

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K. D. Nagappa v. *Sannakka*

AIR 1983 AP 13

SEETHARAMA REDDY, J. - In this revision the sole but important point that arises for determination is as to whether a single creditor can levy the insolvency proceedings against the debtor. The relevant facts in brief are: The petitioner herein is the husband of the respondent. The respondent filed a petition under Section 9 of the Provincial Insolvency Act, 1920, against the petitioner herein to adjudge him as insolvent. She had filed earlier a petition in M. C. 11/66 before the Judicial First Class Magistrate, Adoni, claiming maintenance for herself and her minor daughter and the same was allowed by his order dated 17-2-1967 fixing maintenance amount of Rs. 60/- and Rs. 20/- per month to herself and her minor daughter respectively. In spite of repeated demands, the petitioner did not pay and consequently the respondent had to resort to stop for the realization of the amount for which the petitioner was sent to jail. The petitioner also in order to defeat the rights of the respondent and her minor daughter alienated all his lands on 11-5-1967 for a consideration of Rs. 6,500/- in favour of his mother, sister and the maternal aunt. He also alienated two residential houses to them. All these transactions were nominal and were intended to defeat the rights of the respondent. It is also quite apparent from the nature of the transactions as they were made only subsequent to the maintenance amount was ordered by the Court. Thus, the petitioner has committed acts of insolvency. Therefore, he is liable to pay a sum of Rs. 1,500/- to the respondent and her minor daughter towards maintenance. Hence the petition by the respondent herein for adjudication the petitioner herein as insolvent be ordered. The petitioner resisted this stating. That the respondent instituted various cases against the petitioner and in order to resist the same the petitioner had to incur debts, and that apart the petitioner had to attend various Courts frequently and so he could not cultivate the lands, and so for all these reasons the petitioner had to sell the properties in order to discharge the same. Further the respondent is not a creditor within the meaning of Section 9 of the Provincial Insolvency Act and inasmuch as the petitioner underwent imprisonment for a period of one month due to his failure to pay maintenance amount, the obligation is discharged and therefore the respondent is not entitled to fall back upon the claim. The 1st Court allowed the rotation which was also affirmed by the appellate Court. Hence, this revision petition.

2. The sole point that is canvassed by the learned counsel for the petitioner is that the single creditor cannot successfully maintain insolvency petition against the debtor for which he relied upon the following decisions. In ***Sanjeevi Reddy* v. *Ellappa Reddy*** [AIR 1967 AP 243, 245] Gopalarao Ekbote, J., held:

> I am clearly of the opinion that Section 6 (b) applies only when a debtor transfers his property with a view to defeat or delay all the creditors. Where therefore a debtor transfers his property to any creditor of his and pays out of the sale proceeds some of his creditors the transfer not being. One with an intent to defeat or defraud all the creditors, the transfer does not amount to an act of insolvency on the part of the debtor within the meaning of S. 6 (b) of the Act.

It was further held:

A mere finding that the effect of a transfer would be to defeat one crediting obviously is insufficient. It must be proved if that provision is to be attracted, that as matter of fact the transfer was made with an intent to defeat the creditors as a whole.

In ***M. Somiah* v. *P. Padma Bai*** [(1969) 2 Andh WR 274] Knodaiah, J., held:

(T)he Jurisdiction to the Insolvency Court could be exercised only, if there are more than one creditor and not otherwise.

In ***Maung Nyun Tin* v. *Saw Eu Hode*** [AIR 1935 Rang 281], a Division Bench of the Rangoon High Court held:

Moreover under Section 6 (d) of Provincial Insolvency Act, it is an essential feature of an act of insolvency that the act should be done with intent to defeat or delay the creditors generally of the debtor. It is insufficient to allege or to prove that the act was done with intent to defeat or delay any particular creditor...and an attempt by a debtor to deprive any one creditor of the fruits of a decree against him is not an act of insolvency.

In ***Niyati Bhusan* v. *Bejoy Chandra*** [AIR 1958 Cal 319], a Division Bench of the Calcutta High Court held (para 9):

(I)n order that a creditor may file an insolvency petition against a debtor on the ground that he has committed an act of insolvency by transferring his property it must be shown that the transfer was made with intent to defeat or delay the creditors of the debater generally and not some particular creditor or creditors.

In ***Sarangapani* v. *Perumal*** [AIR 1968 Mad. 216], a Division Bench of the Madras High Court, wherein a single creditor as there were no creditors to the debtor, filed an application under Section 9 for adjudication of the debtor as an insolvent and also under Section 6 (d) (ii) and (iii) of the Provincial Insolvency Act, after referring the decision in ***Maine Nyun Tin* v. *Saw Eu Hoke*** held:

But, we are clearly of the opinion that this argument is fallacious. When we proceed into the facts of, AIR 1935 Rang 281, we see that there were several creditors of the parties concerned, and that the attempt was only to defeat or delay the execution of the decree of one particular creditor, who was clearly attempting to run a race ahead of the rest. But, on the facts of the present case, this proposition cannot apply, for, here we have only the sole creditor, who represents in himself the general body of creditors. We think it is obvious that a man may attempt to elude or evade a particular creditor amongst several creditors, for reasons of his own, which may not at all amount to enact of insolvency; for instance, that particular creditor may be obnoxious in pursuing methods in realizing his debt, even thought the debtor has sufficient means to pay off all the creditors. The decision cited has to be clearly distinguished, for, in the present case, there is only the sole creditor, and the appellant definitely attempted to evade this creditor, who represents the general body of creditors, by departing from his dwellinghouse and usual place of business and by seedling himself.

In ***G. Ramchander* v. *Collector, Excise Hyderabad*** [AIR 1977 AP 346], a Division Bench of this Court, where in the decision of Gopalrao Ekbote, J., in ***Sanjeevi Reddy* v. *Ellappa Reddy*** [AIR 1966 AP 243], was not cited and therefore did not discuss the implication of the said decision, but the decision of Kondayya, J., in ***Somiah* v. *Padma Bai*** [1963 (2) Andh WR 274] cited supra was cited and after referring to the said decision hold:

> The question of maintainability of an insolvency petition against a single creditor came up for consideration in ***Somiah* v. *Padma Bai*** [1969-2 Andh WR 274]. That was a case arising under the Hyderabad Insolvency Act. But the material provisions of that Act are almost identical with the provisions of the Provincial Insolvency Act. The learned Judge, noticing the words ''debts'' and 'creditors' used in several of the provisions. Opined that ''as far as the scheme to the Hyderabad Insolvency Act as well as the scheme of the Provincial Insolvency Act, 1920 are concerned, the very purpose of the exercising of the insolvency jurisdiction, in any given case, is only for the benefit of the body of the creditors and not for the benefit of any single creditor.'' We are unable to endorse the view of the learned Judge in that case. The object of enacting the insolvency law is to give relief to a debtor, who is unable to discharge the debts and protect him from harassment by his creditors and also to prevent a scramble among creditors to somehow get at the assets of debtor fraudulently or in collusion between creditor and debtor. The Act also provides a machinery by which the claims of genuine creditors could be equitably met. We see no special significance, in the legislature using the words 'creditors' and 'debts'. From the mere use of those words in plural, the object or the underlying policy of the insolvency law cannot be ascertained. The scheme, object and purpose of the Act can be ascertained on a proper construction of the relevant provisions. The expressions 'creditor' and 'debtor' have been defined. 'Creditor' includes a decree-holder, 'debt' includes a judgment-debt and debtor includes a judgment debtor. Section 6 details the acts of insolvency in each of the cases enumerated in Cls. (a) to (h). Sec. 7 entitles a creditor or debtor to make an application for adjudicating a debtor as insolvent. A debtor can file an application if he commits an act of insolvency. Section 10 lays down the conditions to be satisfied to entitle a debtor to present an insolvency petition

It further held (para 5):

> Therefore, on special signification need be attached to the words 'debts' or 'creditors' used in several of the provisions of the Provincial Insolvency Act.

4. The contention of the learned counsel for the respondent is that, in the case on hand, it may not be necessary to adjudicate upon as to whether a single creditor can file an insolvency petition against the debtor, for here, admittedly the decree has been granted by the learned Magistrate in maintenance case, in favour of the respondent, who is the wife of the petitioner herein as well as the minor child, the daughter of the petition separately granting maintenance at the rate of Rs. 60/- and Rs 20/- per month respectively. If that be so, the argument further goes, the question of plurality of the creditors does not arise, even if it is to satisfy the conditions in the case before me is in compliance with the said requisites. Even other wise, the contention is that as per the decision of a Division Bench of this Court in ***G. Ramchander***

v. *Collector, Excise Hyderabad* [AIR 1977 AP 346] at the instance of even a single creditor an insolvency petition is maintainable.

6. No doubt, the decisions of this Court by two learned single Judges, which have taken the contra view namely that a single creditor cannot institute an insolvency petition against the debtor but one such decision has been overruled by a Division Bench of this Court. Thought, it is true that a Division Bench of the Rangoon High Court as well as the Calcutta High Court have taken the view at variance with the Division Bench's decision of this Court as well as Madras High Court but in my judgment the view adopted by the Division Bench of this Court as well as Madras High Court, is correct. In order to examine the position as to whether even a single creditor can file an insolvency petition for adjudication of the debtor as insolvent, the object of the Act as has been very rightly stated by the Division Bench of this Court, is to give relief to a debtor, who is unable to discharge the debts and protect him from harassment by his creditors and also to prevent a scramble among creditors to somehow get at the assets of debtor fraudulently or in collusion between creditor and debtor, of the Madras High Court (***Sarangapani* v. *Perumal***). Now, coming to the factual side of the case there are two decrees in effect, though drawn up under a single decree, one in favour of the respondent, who is the wife of the petitioner and another in favour of the daughter of the petitioner herein, therefore, that obviates the necessity of adjudicating as to whether a single creditor can institute an application for adjudicating the debtor as insolvent. Even otherwise, I am of the undoubted view that a single creditor is certainly entitled to successfully maintain the insolvency petition. Viewed from any angle the petition filed by the respondent herein under Section 9 of the Provincial Insolvency Act, is maintainable. In the circumstances no interference is warranted with the order under revision, and, the contentions of the learned counsel for the petitioner which are devoid of merit and substance are rejected.

7. In the result, the revision petition is dismissed.

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M/s. Mansa Ram & Sons v. *M/s. Janki Dass Om Prakash*

AIR 1984 All 267

B.D. AGARWAL, J. - 2. Respondent Nos. 1 and 2 presented the petition giving rise to this appeal as creditors under Section 9 (1) of the Act on July 20, 1971. Appellant No. 1 is a registered partnership firm of which appellant No. 2 is a partner. M/s. Mansa Ram & Sons was a registered partnership firm carrying on extensive business as bankers. Its partners were Mahabir Pershad and his four sons, namely, Chander Sen, Kailash Chand, Moti Lal and Sri Mander Dass. Chander Sen died on August 5, 1953, whereupon his widow Smt. Madan Kumari (Sundari) Jain. respondent No. 3, was taken in as partner. Mahabir Pd. died in the year 1960. Respondents Nos. 6 to 9 are also his heirs. The death of Sri Mander Dass has taken place on October 24 1976. The respondent creditors had the following deposits with M/s. Mansa Ram & Sons:-

I	Fixed Deposit Account	Deposit of Rs. 10,300/- dated 7th July, 1954, for the period of July 5, 1954 to July 5, 1955 carrying interest @3% p.a.
II	Fixed Deposit Account	Deposit of Rs. 13.390/- dated 7th July, 1954, for the period of August 1, 1954 to August 1. 1955 carrying interest @ 3% p.a.
III	Current Account	Deposit of Rs. 10,000/- dated March 18, 1955 and of Rs. 15/- dated March 22. 1955 bearing interest @ 6% p.a.
IV	Savings Bank Account	Balance of Rs. 708/4/-dated April 2, 1955 in the account commencing on March 24, 1954.

The deposits mentioned at Items I to III aforesaid were made by respondent No. 1 that is to say, the firm Janki Dass Om Prakash, and the deposit at Item No. IV was made by Om Prakash respondent No. 2, who is a partner of this firm. The deposits were acknowledged from time to time. Respondent No. 2 made demand of the amount due under these deposits in the month of July. 1971 at Dehra Dun, but the appellants Nos. 2, 4 and Sri Mander Dass deceased, the Managing partners of the firm, Mansa Ram & Sons, expressed inability to pay. The payment of their debts was suspended. On June 2, 1971, certain immovable properties of the firm Mansa Ram & Sons were sold in execution of the decree passed in O. S. No. 82 of 1957. The judgment-debtors did not raise any objection and the auction sale held in execution was confirmed by the execution Court on July 3, 1971. Despite notice and the opportunity repeatedly given the appellants or the pro forma respondents did not put in objections to the petition made by the respondant creditors. Time was obtained on various dates to put in objections the Courts below granted time on several occasions, but no objections came to be filed nor were the costs paid. The appellants did not adduce any evidence either. The Official Receiver was appointed interim receiver by the Insolvency Judge under order dated October 1, 1971.

3. The appellants were adjudged insolvents under the impugned order finding that under the law a firm can also be adjudged insolvent upon the requisite conditions being satisfied. The respondents before the Insolvency Judge were found to be creditors and it was also found that the appellants had committed an act of insolvency inasmuch as the immovable properties had been sold in execution of a decree within three months immediately preceding the petition. Respondent No. 3 was also found to be a partner of the firm subsequent to the demise of her husband and it was held further that the respondent Nos. 6 to 9 were not the partners and hence there was no question to adjudge them as insolvents.

4. Shri Radha Krishna, learned counsel for the appellants, urged that the appellants have not committed any act of insolvency. The debts referred to by the respondent creditors are barred by limitation. In the alternative it is contended that the claim raised by them is premature. The appellants were possessed of assets worth several lacs. Respondent No. 3 relinquished her interest in favour of the remaining partners and hence she could not be adjudged insolvent.

5. Sri G. P. Bhargava, learned counsel for the respondent creditors, countered these contentions submitting that the limitation for return of the deposits commenced from the date when the demand was made by the creditors and is governed under Art. 22 of the Limitation Act, 1963. Certain immovable properties of the appellants were sold in execution on June 2, 1971 arising out of Original Suit No. 82 of 1957 within three months preceding the petition made on July 20, 1971 and this was an act of insolvency on the part of the appellants within the meaning of S. 6 (c) of the Act. Respondent No. 3 was also a partner and admitted as such Sri. S. N. Misra, appearing for the Official Receiver, pointed out that the appellants are indebted to the tune of several lacs and the properties were dissipated by them to defeat or delay the creditors.

6. Taking up the first contention of the appellants that the return of the deposits made with them was barred by limitation, it is submitted that the acknowledgment could not avail the respondent creditors. From the material placed on record it would appear that Kailash Chand, one of the partners of the firm Mansa Ram & Sons, acknowledged and admitted the deposits referred to above as items Nos. 1 and 2 in writing under his signature on June 4, 1958. Endorsing under his signature for self and general attorney of Lala Mahabir Pd, Sri Mander Dass and Moti Lal. Thereafter on June 2, 1961 and June 1, 1964 he admitted and acknowledged the liability under these deposits under his signature with the endorsement ''for self and general attorney of Shri Mander Dass''. On May 30, 1967 he made the endorsement ''admitted subject to payment of the amount due on 6-6-1955 within 16 years from the termination of insolvency''. This was under his signature by Kailash Chand. Likewise in relation to the deposit under Item No. III Kailash Chand admitted and acknowledged liability on April 2, 1958 on the pass book issued by the appellant and made the endorsement for self and General attorney of Mahabir Parsed, Shri Mandar Dass and Moti Lal. The liability was admitted and acknowledged in writing thereafter by him on April 1. 1961 and March 30, 1964 under his signature with the endorsement for self and as General Atlorney of Shri Mander Dass. The last endorsement on this pass-book is to the effect ''admitted submit to payment of the amount as on 6-6-1955 within 16 years from termination of insolvency''. This is dated March 28, 1967. In relation to the deposit shown as item No. 4, Kailash Chand admitted the

liability in writing under his signature for self and as General Attorney of Mahabir Pershad. Shri Mander Das and Moti Lal on April 2, 1958. On June 2, 1960 and June 1, 1963, he admitted and acknowledged for self and as General Attorney of Shri Mander Dass. The last endorsement on this pass-book (Ex. 7) dated May 30, 1966 provides' ''admitted submit to payment of the amount due on 6-6-1955 within sixteen years from the termination of insolvency''.

7. The infirmities urged in connection with the acknowledgment are:

(i) Kailash Chand could not be competent to acknowledge for or on behalf of the firm:

(ii) the last endorsement in each of these deposits is by Kailash Chand alone not specifying that he made this as representing the firm or other partners thereof:

(iii) in relation to items Nos. 1 and 2 the acknowledgment made on 2nd April, 1958 was itself beyond limitation the period having expired on Its April, 1958.

8. Under the general law of Partnership a partner is an agent of the firm. The act of a partner which is done to carry on, in usual way, business of the kind carried on by the firm binds the firm. Implied authority to bind the firm might include the power to acknowledge the liability in the usual course in respect of a deposit accepted in banking transaction (Section 18/20. Partnership Act), Lindley : Law of Partnership (14th Ed) (1979) observes at page 381 that an acknowledgment by an agent being sufficient to affect his principal acknowledgment by one partner will, it is apprehended, be regarded as an acknowledgment by the firm. In the first endorsement dated 4-6-1958, relating to items 1 and 2 and the endorsement dated 2-4-1958 in items 3 and 4, Kailash Chand acknowledged and admitted the liability under his signature describing this as being ''for self and as General Attorney of Lala Mahabir Pershad, Shir Mander Dass and Moti Lal''. The endorsement dated 2-6-1961 and 1-6-1964 in items Nos. 1 and 2 and the endorsement deated 1-4-1961 and 30-3-1964 in item No. 3 as also the endorsement dated 2-6-1960 and 1-6-63 in item No. 4 were described by Kailash Chand as being ''for self and as General Attorney of Shri Mander Dass''. The last endorsement dated 30-5-1967 relating to items 1 and 2 that dated 28-3-1967 and 30-5-1966 concerning items 3 and 4 were, however, made by Kailash Chand for self alone without any specification as to the same being for or on behalf of the firm or the remaining partners. Considered in the entire context it is arguable that in the last endorsement in any case Kailash Chand did not purport to acknowledge the liability of the firm as such or of the co-partners. Wherever he intended to represent other partners he specified the same but in the last endorsement there is no such mention nor is any power of attorney referred to. The contention for the appellants therefore that there was no acknowledgment as required by Ss. 18/20 of the Limitation Act. 1963 is not deviod of force. Interpreting the corresponding S. 21 of the Limitation Act, 1877 a Division Bench of this Court held in ***Gadu Bibi* v. *Parsotam*** [1888) (ILR 10 All 418] that ''the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partners, unless also it can be shown that he had power to bind that partner for the purpose of making such an acknowledgment, and in effect purported as to bind him.'' This is in the light of sub-sec. (2) of Sce. 20 which lays down that partners are not chargeable by reason ''only'' of a written acknowledgment signed by one of them.

9. Sri Bhargava, learned counsel for the respondents creditors, urged, however, that the absence of acknowledgment duly made under Sections 18/20, Limitation Act, 1963 is not of consequence because limitation is governed by Article 22 and not Article 21 of the Schedule to this Act. These Articles which correspond to Article 59 and 60 respectively of the old Limitation Act, 1908, read as under:-

Description of suit	**Period of limitation**	**Time from which begins period to run.**
9. For money lent under an agreement that it shall be payable on demand	Three years	When the loan is made
10. For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands his banker so payable	Three years	when the demand is made

10. The deposit under Item No. 1 mentioned above was in this case made under the following Fixed Deposit Receipt dated 7th July, 1954:

"Not transferable.
Mansa Ram & Sons (Bankers) Mussoorie.

7th July, 1954

Received from M/s. Janki Dass Om Prakash 35 Panchkuin Road, New Delhi, the sum of rupees ten thousand three hundred only to be placed to their credit in 3% (three) Fixed Deposit Account for a period of one year from 5th July 1954 to 5th July, 1955 after which date interest will cease.
Rs. 10,300/-
Sd. Illegible
Accountant.

For Mansa Ram and Sons (Bankers)
Sd. Mahabir Pd. Manager."

On the reverse of the receipt there is the following note:

"No part of this deposit can be with drawn before due date and is payable on or after the due date subject to two months'' previous notice on the receipt being returned bearing the endorsement of the depositor."

11. The other receipt for Fixed Deposit (Item No. 2) is in the same form the only difference being that this is for the sum of Rs. 13,390/- and the period specified is August 1, 1954 to August 1, 1955. The note appears in identical terms on the reverse of this receipt also.

12. Article 21 is applicable to loans and the period of limitation runs from the date when the loan is made. In case the money is a deposit under an agreement that it shall be payable on demand then Article 22 applies and the limitation starts from the date when a demand is made for payment. The terms 'loans' and 'deposit' are not mutually exclusive. The test formulated is ''whether on the admitted facts in the case there was an obligation on the appellant to ''seek out'' the respondent and repay him or whether he was to keep the moneys till the respondent asked for them.'' ***Vide Mohd. Akbar Khan* v. *Attar Singh*** [AIR 1936 PC 171] ***Suleman Haji* v. *Haji Abdulla***. [AIR 1940 PC 132]; ***Jagannath Pd* v. *Mst. Ram Dularey***, [AIR 1956 All 63]. The Supreme Court approved this test in ***Ram Janki Devi* v. *M/s. Juggilal Kamlapat*** [AIR 1971 SC 2551]. It was observed that the case of a deposit is something more than a mere loan of money. It will depend on the facts of each case, whether the transaction is clothed with the character of a deposit of money. The surrounding circumstances, the relationship and character of the transaction and the manner is which parties treated the transaction will throw light on the true form of the transaction. The characteristic of deposit as distinct from loan is that it becomes repayable upon demand being made and the limitation does not commence to run unless the demand has been made. In Halsbury's Laws of England, 3rd Ed. Vol. 24, at page 217, the position stated is:-

> "If money is paid into a bank on deposit account, the statute does not run against an action to recover it until demand is made for its return. Similarly in the case of money on current account, the statute does not run in the absence of special contract or waiver, until after demand or payment as a demand, either by the issue of a writ or otherwise, is an essential ingredient in the cause of action against the banker for money lent."

13. In **Sheldan's** ***Practice and Law of Banking*** (10th Ed.) at page 145 it is observed:

> "The Statute begins to operate immediately the money is due to be repaid i.e. after the expiration of the specified notice of withdrawal. If the deposit is for a fixed period, the statute begins to run immediately upon expiration of the agreed period. If the repayment of the money is conditional upon the return of the receipt then the date of its return is the date upon which the statute begins to run." (emphasis supplied)

14. In ***Abdul Hamid* v. *Rahmal Bi*** [AIR 1965 Mad 427] the distinguishing feature of 'deposit' was thus explained by Veeraswami, J. Speaking for the Division Bench (At p. 429):

> The terms 'loans' and 'deposits' are not mutually exclusive terms. There are a number of common features between the two. In a sense a deposit is also a loan with this difference that it is a loan with something more. Both are debts repayable. But, when the repayment is to be, in our opinion, furnish the real point of distinction between the two concepts. A loan is repayable the minute it is incurred. But this is not so with a deposit. Either the repayment will depend upon the maturity date fixed there for or the terms of the agreement relating to the demand, on making of which the deposit will become repayable. In other words, unlike a loan there is no immediate obligation to repay in the essence of the distinction between a loan and a deposit. This view of ours is supported by the observations of the (Privy Councilo in 63 Ind 279 : AIR 1936 PC 171).

15. A similar matter came up before Patna High Court in ***Firm Nokhilal Sarju Prasad* v. *Bibi Mojihan*** [AIR 1939 Pat 261] wherein Faxl Ali J. (as he then was) observed that after the expiry of the fixed period, the amount deposited was to be deemed payable as demanded by the depositor and the claim for recovery of the money was governed by Article 60 of Old Limitation Act 1908 (Corresponding to Article 22 of the new Act). In ***Jammu and Kashmir Bank* v. *Nirmala Devi*** [AIR 1959 J & K 85] also it was held that the essential character of the deposit as a deposit does not change even if it be for a fixed term. To the same effect is the, view taken in the ***Hindustan Commercial Bank Ltd.* v. *Jagtar Singh*** [AIR 1974 P & H 208]. We are in respectful agreement with this view.

16. Applying this test it will be noticed that the firm M/s. Mansa Ram and Sons was admittedly engaged in banking on large scale in Mussoorie. Dehradun. Hardwar, Saharanpur. The firm accepted Fixed Deposits and also maintained current Accounts and Savings Bank Account. Receipts were issued for Fixed Deposits; Pass Books were given for the Current and Savings Bank Accounts on the pattern observed by Banking companies. It is observed in **Sheldon's *Practice and Law of Banking*** at p. 143 that the receipt issued for deposit is ''merely a written acknowledgment by the banker the he hold a certain sum to the use of the customer. The document is usually marked ''Not transferable (as in the instant case) and it is also not negotiable'' (page 143). If the signing of the receipt is made a condition precedent to the withdrawal of the money then the deposit receipt must be returned when the money is handed over. Frequently, it is further observed, instead of issuing a deposit receipt, bankers issue deposit pass books (such as Exts. 6 and 7 in the present case). These contain a note of deposits and withdrawals and they usually contain the main conditions to which the account is subject (p. 145). It is true that the deposits under Items Nos. 1 and 2 were for specified term but regard being had to the kind of relationship between the parties, the nature of the transactions entered into and the business carried on by the appellants it cannot be said that on the expiry of the specified period they were to ''seek out'' the respondent depositors and require them to withdraw the amount. The period specified in our opinion, laid the upper time limit; the withdrawal could not be made befor the expiry of the stipulated period but subsequent thereto the amount was to continue in deposit till the depositors demanded back the same. The requirement of two months' notice and the return of the receipts in original to the appellants suggests clearly that the repayment was conditional upon demand being made. The limitation is governed, therefore, under Article 22 of the Limitation Act, 1963. The demand in this case having been made in July, 71 the petition was thus within limitation.

17. In relation to Items Nos. 3 and 4 aforementioned the applicability of Article 22 is equally clear. Those were deposits pure and simple in the form of current and Savings Bank Account respectively. There is no specified term for withdrawal. Limitation commenced when the deposer made the demand. Each of these Items Nos. 3 and 4 is of more than Rs. 500/- and so even if on ground of limitation or otherwise the deposits under Items 1 and 2 are ignored the maintainability of the petition under Section 9 of the Act is not adversely affected.

18. Sri Radha Krishna contends in the alternative that the claim of the respondent-creditors for return of the depositors is premature. He has based this argument upon the last endorsement dt. May 30, 1967 appearing on the Fixed Deposit receipts (Ex. 4/5) and the endorsement dated March 28 1967 and May 30, 1966 on the Current Deposit and the Saving

Bank Account Pass Books respectively (Ex 6/7) wherein it is said ''admitted subject to payment of the amount due on 6-6-55 in 16 years from termination of insolvency''. It appears that certain creditors namely. Anoop Singh and others had earlier petitions for these appellants being adjudged insolvents. That was registered as. Insolvency case No. 1 of 1955. An interim receiver was also appointed therein. That proceeding terminated by order of this Court dated April 22, 1968 in First Appeal From Order 415 if 1958. The submission of the appellants' counsel is that computed from April 22, 1968 the period of 16 years is still to expire and hence the deposits did not become mature for return. The argument though attractive at its face is devoid of merit. The stipulation that the payment shall be in 16 years from the termination of insolvency may amount to the endorser executing a bond to that effect and this required that requisite stamp be affixed. In the absence however, of any objection raised for the appellants despite opportunity to these instruments being admitted in evidence the admission may not be called in question now on the ground that these were not duly stamped (Section 36 Stamp Act). It may also be accepted that the respondent creditors denote their concurrence to this last endorsement by their conduct and hence this was not a mere unilateral act of Kailash Chand appellant. The provision contained in Sectoin 9 (1) (b) of the Act however furnishes a complete answer to the submission for the appellants in this behalf. This entitles a creditor to present an insolvency petition against a debtor where ''the debt is a liquidated sum payable either immediately or at some certain figure time.'' It is not disputed that subsequent to demand for return of these deposits being made they acquired the character of debts: the amount is liquidated and ascertained: the fact the this was not payable immediately but on the expiry of 16 years from April 22, 1968. (When the earlier insolvency terminated) is inconsequential. Clause (b) of Section 9 (1) is attracted equally where such a sum is payable at some certain future time. The petition cannot, therefore, be objected to as premature.

19. It was next argued by the appellants' learned counsel that the appellants were possessed of immovable properties worth several lace and hence they could not be adjudged insolvents for non-payment of paltry sums. Our attention is drawn in this connection to auction sales made by the interim Receiver in these proceedings of vast properties for huge amounts during March 31, 1978 to June 28, 1978. In reply. Sri S. N. Misra learned counsel appearing for the Official Receiver pointed to the heavy outstanding against the appellants in the tune of several lacs including Rs. 23.50 lilacs towards income tax and various other dues. In face of these liabilities the appellants could not satisfy the court that they are able to pay their depth. As provided in Section 6 (e) of the Act a debtor commits an act of insolvency ''if any of his property has been sold in execution of the decree of any court for the payment of money'' provided further that as required by Section 9 (1) (c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of petition. Evidence of the record show that in Original Suit No. 82 of 1957 Bhagwan Das and others obtained decree for money against M/s. Mansa Ram and Sons and the partners. This decree was put to execution in Execution Case No. 33 of 1970 vide Ex. 3. In execution certain immovable properties of the partnership firm were sold in auction on June 2, 1971 as is revealed from the report of the Court Amin (Ex. 1). No objection was filed by the judgment debtors and on July 3, 1971 the sale in execution was confirmed by the I Additional Civil Judge, Dehradun vide certified copy of the order (Ex. 2). The petition under Section 9 being

presented on July 20, 1970 this was within three months preceding. It is rightly contended for the respondents that this sale in execution of the decree against the firm constituted an act of insolvency against the firm its partners the Act (***Firm Mukund Lal Veerkumar* v. *Purshottam Singh*** [AIR 1968 SC 1182].

20. In ***Pirthi* v. *Budh Singh*** [AIR 1982 All 179] cited for the appelants the Insolvency Judge was of the view that the insolvency petition had to be allowed because the cash available with Pirthi was not sufficient to discharge his debt. In appeal this Court reversed that decision on ground that the mere fact that a person's assets are less than his liabilities is not per sea an act of insolvency. In that case it was found that the transfer by sale inter vivos made by Pirthi was not shown to be with intent to defeat or delay his creditors within the meaning of Section 6 (b) of the Act as after the transfer the debtor had assets sufficient to pay his creditors. This may not be said to be of assistance to the appellants in the present case because herein there is clear evidence of act of insolvency as contemplated under Section 6 (e) and the appellants did not establish that they were able to pay their debts.

21. The last submission of Sri Radha Krishna was that Smt. Madan Sundari (the widow of Chander Sen) could not be judges insolvent. Chander Sen died on August 5, 1953. It is argued that his widow relinquished her interest in favour of the surviving partners. For this reliance was places on the statement of Kailash Chand one of the partners in Original Suit No. 105 of 1960 dated 2-6-1964. From the side of the respondent creditiors on the other hand it is pointed that upon the death of her husband Smt. Madan Sundari was aslo taken in as a partner. Thie statement of particulars filed under Section 69 Partnership Act dated 2-4-1952 reveals that initially Mahabir Pershad and his four sons (including Chander Sen) were partners (Ex. 10). Soon after the death of Chander Sen the firm was reconstituted and his widow replaced the deceased in the array of partners as is shown by the statement of Particulars dated 21-8-1958 (Ex. 12). The alleged relinquishment of the interest as partner on her part is thus not substantiated by reliable evidence and the Insolvency Judge has not errd in finding accordingly.

22. To sum up it is established that:-

(i) the appellants committed an act of insolvency within the meaning of Section 6 (e) of the Act:

(ii) the act of insolvency took place within three months preceding the petition as required under Section 9 (1) (e) of the Act:

(iii) the aggregate amount of the debt exceeds Rs. 500/-:

(iv) the debt which is liquidated is payable in any case at ascertainable future date if not immediately as contemplated under Section 9 (1) (b) of the Act:

(v) the appellants did not satisfy the Court that they are able to pay their debts.

23. In the result, therefore, the appeal fails and is dismissed with costs.

* * * * *

Kumarathal v. *Balasubramania Gounder*

AIR 1996 Mad. 277

S. S. SUBRAMANI - 2. The material averments are, what the petitioner herein obtained a decree against the first respondent herein in O. S. No. 243 of 1978, on the file of the District Munsif's Court, Pollachi and on the date of the filing of the insolvency petition, a sum of Rs 13,467.75 p. was due to her.

3. In the execution of the said decree, the petitioner herein attached the properties of the first respondent, and when the property was brought for sale, the insolvency petition was filed by the first respondent herein, to adjudicate him as an insolvent. In that petition, he has stated that he is an agriculturist and that he has no source of income. He is the owner in possession of B Schedule property, owing an area of nearly ten acres, with a newly dug well and also a 5 H.P. Motor. It is said therein that he depends only on seasonal rains and that he is incurring loss every year due to failure of monsoon. It is also stated that due to failure of monsoon he had to borrow heavily from outside 'A' Schedule contains the debts, First Item in A Schedule is the decree debt obtained by the petitioner herein. The second item is said to be a debt due to the second respondent in a sum of Rs. 50,000/- under three promissory notes. He has stated in that petition that the respondents therein are pressing for payment of their dues, but he is not in a position to discharge his debt. He has said that his assets are for less than the debts due by him to his creditors, and in such circumstances, he wanted himself to be adjudicated as an insolvent.

4. The petitioner herein filed a counter stating that the application is an abuse of process of Court and the same is liable to be dismissed in limine. It is said that he has got a source of income, and the income from the B. Schedule property alone comes to more than Rs. 1 lakh. It is also said that he has not disclosed his other assets, and that the debt alleged to be due to the second respondent is a fictitious debt, and in fact, the second respondent is a close relative of the petitioner and that the insolvency petition was a collusive one beween the two, and the claim made by the petitioner is bogus. Ultimately, revision petitioner herein said that the petitioner was not entitled to be adjudicated as an insolvent.

5. During trial, the first respondent herein got himself examined as PW 1. No other witness was examined. In his deposition, the first respondent has stated that the petitioner herein had obtained a decree, and in so far as the second respondent is concerned, he has borrowed a sum of Rs. 50,000/- on three occasions by executing three promissory notes, i.e., Rs. 15,000/- was borrowed twice and a sum of Rs. 20,000 was borrowed under another promissory note. He said that the total value of the assets will be around Rs. 25,000/- and in the well, there is no water, and he is not in a position to pay the debts. He said that his annual income will be Rs. 1500/-. He also denied the suggestion that he has disclosed bogus debts. He has also said that he has no building of his own and that he has no asset anywhere. In his cross-examination, he has said that he has no asset anywhere. In his cross-examination, he has said that the land value per acre will be about Rs. 2,000/- to Rs. 3,000/- and there is a well in his property. He has also said that there is a motor and there are about 400 coconut trees. So far as the second respondent is concerned, he said that it must be either in 1983 or 1984 that he borrowed the amounts and he made the borrowed even before the attachment. He admitted

that the second respondent is his relative. In re-examination, he said that the 400 coconut trees are not yielding.

6. It is on the basis of the above evidence, the courts below held that the first respondent herein is entitled to get himself adjudicated as an insolvent.

7. Section 10 of the Provincial Insolvency Act, 1920 enables a debtor to file an application to get himself adjudicated as an insolvent. It says that if the debt due exceeds five hundred rupees, or if he is under arrest or imprisonment in execution of the decree of any court for the payment of money, or an order of attachment in execution of such a decree has been made, and is subsisting, against his property, he can present an application for insolvency. Section 13 of the said Act deals with the contents of the petition. There, it is said that there must be a statement that he is unable to pay his debts and also other particulars. Section 13 (1) (e) of the Act further says that he must declare his willingness to place at the disposal of the Court all his property, say in so far as it includes such particulars (not being his books of accounts) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of decree. Section 24 deals with the procedure at the time of hearing. It reads thus:-

> "1) On the day for the hearing of the petition, or on any subsequent day to which the hearing may be adjourned, the Courts shall require proof of the following matters, namely:-
>
> > a) That the creditor or the debtor, as the case may be, is entitled to present the petition :
> >
> > Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are prima facie grounds for believing the same and the court, if and when so satisfied, shall not be bound to hear any further evidence thereon:
> >
> > b) that the debtor, if he does not appear on a petition presented by a creditor, has been served with notice of the order admitting the petition; and :
> >
> > c) that the debtor has committed the act of insolvency alleged against him.
>
> 2) the Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon.
>
> 3) The court shall, if sufficient cause is shown, grant time to the debtor or to any creditor to produce any evidence which appears to it to be necessary for the proper disposal of the petition.
>
> 4) A memorandum of the substance of the examination of the debtor and of any other oral evidence given shall be made by the Judge, and shall form part of the record of the case."

8. In AIR 1928 Mad 394 (***Alametumangathayammal* v. *T. S. Balusami Chetti***), a similar question came for consideration. Their Lordships said that unless the debtor proves before Court, he will not be entitled to present a petition. In that case, the learned counsel for the debtor or the alleged insolvent put forward a contention that by filing an application of insolvency, it amounts to an act of insolvency and nothing more need be proved. All the other

matters have to be proved. All the other matters have to be relegated when the insolvent wants himself to be discharged. This contention was not accepted by the Bench of this Court. By separate, but concurring judgment, this Court held thus:-

(In the main judgment, the officiating Chief Justice held):

> Coming to the merits, it is urged that inasmuch as petitioner has committed an act of insolvency by filing her petition and as her debts exceed Rs. 500/- the Courts is bound to make an order of adjudication and that order cannot be annulled and that any misconduct of hers must be dealt with only at the time of discharge and reliance is placed on a case reported in ***Chhatrapati Singh Dugar* v. *Kharag Singh Lachmiram*** [AIR 1916 PC 64]. That decision only lays down that when a debtor applies for adjudication the Court has only to be satisfied that the debtor is entitled under the Act to an adjudication and any question of misconduct must be left to be dealt with at the time of discharge. That, however, does not dispose of the question before us which is whether the Court should have made an order of adjudication, for under S. 21, Presidency Town Insolvency Act, where in the opinion of the Court a debtor ought not to have been adjudged insolvent the Court may annul the adjudication. In this case it has been held that the appellant has been guilty of an abuse of the process of Court in coming forward and saying falsely that she was unable to pay her debts. This is a question which goes to the root of the insolvency law for it is only in cases of inability to pay that the insolvency law is applicable. The argument for the appellant is that so long as she makes a statement that she is unable to pay her debts, whether it is true or false, she is entitled to an order provided that she is otherwise entitled to an adjudication order.

Reliance is placed on two English cases ***Ex Parte Painter, In Re Painter*** [1895 (1) QB 85] and ***In Re Taylor*** [1901 (1) KB 744]. The facts in ***In Re Taylor***, are somewhat similar to these, for there the debtor had been adjudged insolvent and it was subsequently found that he concealed his assets and that he was able to pay his debts; but in that case the application for annulment was made by the debtor himself and the Court held that he had committed such serious crimes in bankruptcy that no such order could be made, at any rate, until he had expiated them by continuing bankrupt for a considerable period. Here it is the creditor that seeks to set aside the adjudication and not the debtor. In the case in Ex. Parte Painter in Re Painter, a debtor who had been ordered to pay his debts by installments and who had no other means except an inalienable pension, applied for adjudication and it was held although his object was to get rid of the oppression of his creditor that was not a sufficient ground for refusing him an adjudication order. That is distinguishable on the ground that in that in that case the debtor was unable to pay off his debts. It is also argued that both under the Provincial Insolvency Act of 1907 and under the Presidency Town Insolvency Act it is only necessary for a debtor to make a statement that he is unable to pay his debts and that the truth of the statement is not one of the facts essential for an order of adjudication. The two sections are not the same, for in the Provincial Act of 1907 the statement of inability to pay appears merely as one of the many particulars to be noted in on insolvency petition, whereas in the Presidency Towns Insolvency Act there a separate sanction dealing with this point. S. 15 (1) which says:

''A debtor's petition shall allege that the debtor is unable to pay his debts, and, if the debtor proves that he is entitled to present the petition, the Court may thereupon make an order of adjudication''.

The wording of this section looks as if this allegation of inability to pay the debts was a substantial part of the debtor's claim to be declared insolvent, and that, if that fact is not proved he would not be entitled to present a petition. This is certainly a possible interpretation of the section and that it is the correct interpretation supported by the fact that the Provincial Insolvency Act of 1920 so as to make it essential that the debtor shall prove that he is unable to pay his debts before he can present any application. This is only natural in view of the fact that the whole of the Insolvency Jurisdiction is provided for the case of persons who are unable to pay their debts and not of persons who are merely unwilling to pay their debts although able to do so. It, therefore, appears that the appellant's petition was not one for any of the purposes for which the insolvency law was created and it is consequently an abuse of the process of the Court in that it obtained the jurisdiction of the Court by a false declaration. That being so, the Court certainly ought not to have made the order of adjudication and is consequently bound to annul that order on proof that the petitioner was not entitled to present the petition....."

In the concurring judgment, Reilly, J. held thus:-

But, as I have said, there is one essential disqualification under which the appellant was in this case. The learned Judge in the Insolvency Court has found in effect that she was unable to pay her debts at the time when she presented her petition. Mr Narayana Ayyangar, who appears for the appellant, has contended that is not a disqualification under the Act. His contention is that in S. 14 of the Act certain conditions are set out. One of which a petitioning debtor must fulfil; he must either have debts amounting to Rupees 500/- or he must have been arrested or imprisoned in execution, or his property must have been attached in execution. If one of these conditions is fulfilled, Mr. Narayana Ayyangar contends that a petitioning debtor is entitled to be adjudged insolvent. It is true, he admits, that under S. 15 of the Act a petitioning debtor must state in his petition that he is unable to pay his debts. But that Mr. Narayana Ayyangar says, is neither here nor there; it does not matter whether it is true or not; it is not the concern of the Court to ascertain either then or subsequently, when considering the question of annulment under S. 21, whether the debtor was unable to pay his debts or not at the time of presenting the petition. The contention appears to me to rest upon an entire misconception of the scope of the Act. An insolvent is a person who cannot pay his debts. But it is not every insolvent who is entitled to the benefit of the Act. Something more is required for an insolvent to that benefit. Besides being unable to pay his debts, he must comply with one of the conditions set out in S. 14: his debts must amount to Rs. 500/- or he must have been arrested in execution, or his property must have been attached in execution. But those are additional conditions. The essential condition, the heart of the whole matter is that he is unable to pay his debts.

9. In AIR 1933 Pat 43 (***Ganesh Lal Sarawgi* v. *Sanehi Ram and Aliar Ram***), a Division Bench considered the scope of inquiry under Sections 13 and 24 of the Insolvency Act. Their Lordships held thus:

> The learned Judicial Commissioner apparently thought that the requirements of the law was that he must simply have the evidence of the petitioning debtors as it were merely to verify the statements of the petition. That however is not the case. S. 13, Provincial Insolvency Act, imposes upon the petitioning debtor the obligation to state the amount and particulars of all his property and of all his debts and he is to make a statement that he is unable to pay his debts. The requirements of such a petition are set forth in S. 13 of the Act. S. 24 of the Act imposes upon the Court the duty of requiring proof of the following matters:
>
> > "(a) that the creditor or the debtor, as the case may be, entitled to present the petitions.
> >
> > Provided that where the debtor is the petitioner, he shall, for the purpose of providing his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are prima facie ground for believing the same."
>
> Under sub-section (2):
>
> "The Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor there on."

The Court in this case does not seem to have proceeded to carry out that obligation imposed upon it by sub-section (2). Moreover this procedure is to be adopted as preliminary to the decision as to whether to grant the petition or not and therefore the matters disclosed by that procedure are material to be taken into consideration. Otherwise sub-sec. (2) would have to be considered superfluous. By sub-sec. (3):

> "The Court shall, if sufficient cause is shown, grant time to the debtor or to any creditor to produce any evidence which appear to it to be necessary for the proper disposal of the petition."

It is further incumbent upon the petitioning debtor under S. 22 of the Act when his petition is admitted to produce all books of account. The debtor has stated here that he has no books of account but necessarily in order to consider the debtor's conduct of the business as directed by sub-see. (2) of S. 24, the Court shall make an investigation as to whether the statement that he did not keep account books is to be believed or not. Indeed it is clear that the Court must treat the evidence produced by following the procedure prescribed in S. 24 as material to its decision as to whether or not to allow the petition and in deciding whether such evidence has satisfied the Court that there are prima facie grounds for believing the statements in the petition. The statements in the petition by themselves if merely repeated formally in the evidence, are not sufficient prima facie grounds for believing such statements. There has been a tendency for Courts administering the Insolvency Act to believe that the hearing of a petition is a more or less formal matter and that if the petition is as it were merely verified by the evidence of the debtor the Court is bound to accede to the petition. That is not the case. It is the duty of the Court to be satisfied prima facie and after following the necessary procedure

and making the necessary investigation to come to a conclusion that the statements by the debtor are true. After all the procedure of insolvency is for the protection of the debtors. It is unfortunately more often need by debtors than by creditors with the consequence that the interest of the creditor has a tendency to be forgotten.

The said decision was followed by the same High Court in the decision reported in AIR 1958 Pat 528. (***Ram Narain Lal* v. *Abdul Kalam***) paragraphs 9 and 10 and 10 read thus:-

> "To answer this question, it is necessary to read Section 13 (1) (4) provided that every insolvency petition presented by a debtor shall contain the amount and particulars of all pecuniary claims against him, together with the names and residences of his together with the names and residences of his creditors so far as they are known to, or can by the exercise of reasonable care and diligence be ascertained by him. In the present case, the debtor simpley mentioned names of two persons in whose favour the alleged hand notes had been executed by the debtor for different items. The debtor did not mention in his application the dates of two hand notes from which it could be inferred whether these were subsisting loans.
>
> The question, therefore is, if this mentioning only of the names of the creditors and amount of loans is sufficient compliance with Section 13 (1) (4) of the Act. In my opinion, it is not. In order to determine whether the loans taken on the basis of the two hand notes were subsisting or not, or, when they would be barred by limitation, it was necessary to mention further the dates of the han dnotes in order to enable the Court to find out whether these two hand notes really existed either in fact or in law. In my opinion, the insolvency petition presented by the debtor did not therefore, comply with the provisions of Section 13 (1) (d) of the Act."

10. In (1982) 1 Mad LJ 274 (***P. Thangaraju Pillai* v. *Periaswamy Pillai***) this Court had occasion to consider the scope of inquiry under Sections 10 and 24 (1) of the Provincial Insolvency Act. A learned Judge of this Court has held thus:-

> The provisions of Section 10 of the Provincial Insolvency Act read in conjunction with the proviso to Section 24 (a) may be said to steer a middle course in the matter of inquiry into an insolvency petition. On the one hand the clear intendment of the legislature is that the debtor cannot have an order of adjudication for the mere asking in. On the other hand it is not within the contemplation of the Act that the Court should be engaged in a full-fledged or all out inquiry on the debtor's petition before rendering its finding, one way or the other, whether the petition should be allowed or rejected. In between the two possible extremities of trial, what the Act provides for is the conduct of a prima facie inquiry so that the Court may be satisfied that the debtor is unable to pay his debt. The proviso, in terms, rules out any insistence by the Court on the debtor furnishing any proof beyond that which can be regarded as prima facie proof. The proviso further provides, in a negative fashion, that the Court shall not be bound to hear any further evidence if it is satisfied that there are prima facie grounds for believing the evidence of the petitioner. The Courts should not embark on an elaborate trial procedure for the purpose of deciding the correctness or the probative value of the petition filed by the debtor for adjudicating himself as insolvent. Hence, if the Court exceeds the bounds of this limited prima facie inquiry, then it would be

committing an excess of jurisdiction and the order is liable to be set aside on that ground.

12. In respect of the liability scheduled as ‘A’ in the petition, as against the second respondent, is only stated as three promissory notes for Rs. 50,000/- The details of the promissory notes are not given. The dates on which the liabilities were incurred are not stated, and whether, in fact, those liabilities are subsisting is also not clear. In the petition, there is also no statement or declaration as enjoined under Section 13 (1) (e) that the first respondent is surrendering his properties. Of course, the said defect was cured by a subsequent declaration. But when we consider the maintainability of the petition, that is also a added circumstance to be taken note of. The time at which the petition is filled is a material. When the insolvent property about to be sold, the present petition filed, alleging that there is another creditor for Rs. 50,000/- and he is unable to pay the debts. The second respondent, who has been served has not come before Court to give the detail about the alleged debt. Even when P. W. was examined, he did not speak anything about the debt due to the second respondent, except for the statement that the debt due to the second respondent is on the basis of there promissory notes. Even in the chief examination, he did not say the date of borrowing and what is the exact amount due on the date of the application. In cross-examination also, he was not in a position to explain the details of those promissory notes. No attempt was also made by the first respondent herein to get them proved either through the second respondent or by taking steps for production of those documents. When the genuineness of the very transaction is disputed, there must some evidence to show that the first respondent herein is a debtor to the second respondent. Even to prove the debt, there no legal evidence before Court. Only if there some legal evidence, the Court can come the conclusion whether the first respondent herein has prima facie proved his adjudicated as an insolvent.

13. This Court is well aware at the initial stage we are not concerned about the nature of the transaction whether it is sham nominal, and whether the debt is subsistent. But, initially, there must be at least evidence to prove that there is a debt due to the respondent, by the first respondent.

14. Coupled with the absence of evidence we have to take note of the fact that second respondent is a relative of the first respondent. In the main petition, it is said that the petitioner has borrowed heavily from outside. If there are various debts, they would have been made mention of in the petition itself. But we find that apart form the petitioner herein, the second respondent alone is impleaded as creditor. So the allegation that the first respondent herein had to borrow heavily from outside is also a statement without any basis. Mere repetition of the wordings of the section both in the petition and in the evidence of P. W.1 is not sufficient. There must be something more for the satisfaction of the Court to arrive at a finding that there is a debt and the applicant is not in a position to discharge the same. It is for the first respondent to prove that he is entitled to present a petition under Section 10 (1) of the Act.

15. The learned counsel for the respondent No. 1 submitted that both the Courts below have accepted the case of the first respondent that he is entitled to be adjudicated as insolvent and the same is purely a question of fact. I agree that there is such a finding by the Courts below. I also agree that this is a finding of fact entire on the basis of prima facie evidence, and

if the same is appreciated in accordance with law, the same should not be lightly interfered in revisions. But in this case, the Courts below did nit consider the scope of Section 10 (1), 13 and 24 of the Act in proper perspective. The trial Court did not consider the impact of the non-mentioning of the debt alleged to be due to the second respondent. When there is lack of details, the Court can only enter finding that there is no such debt. We have to assume that what the petition has stated is prima facie evidence. The burden of proof was also wrongly cast on the creditor. The trial Court assumed that is it for the creditor to prove the value of the property, and also the fact that there are no other debts and that the first respondent has got other properties. The entire burden was cast on the creditor mainly relying on the averments in the petition. As stated earlier, apart form the repetition of the wordings in the section, there must be some piece of acceptable evidence to arrive at a prima facie conclusion. That evidence is totally lacking in this case. It is not a question of believing or not believing the first respondent. The question is, whether there is at least some material on the basis of which the Court can arrive at such a finding.

16. When the matter was taken in appeal, this question was not considered. The lower appellate Court assumed that mere presentation of the petition by a debtor amounts to an act of insolvency and the statement that he is prepared to place all his assets for management by Court, is sufficient. The assumption of the lower appellate Court that the alleged inability of the first respondent to pay debts is prima facie proof of insolvency is only a result of misreading of the Section.

17. I hold that the first respondent has not proved his eligibility to present a petition, and there is total lack of evidence to arrive at a prima facie concussion that he is entitle to be adjudicated as insolvent. When there is total lack of evidence, this Court is entitled to invoke the powers under Section 115 of the Code of Civil Procedure, to hold that the decisions of the Courts below are tainted with illegality and without jurisdiction.

18. In the result, I set aside the orders of both the Courts below, and allow this Revision Petition.

* * * * *

Chaman Lal v. *Sudhir Chandra*

AIR 1972 All 229

SATISH CHANDRA, J. -These two appeals arise out of insolvency proceedings and have been field by the petitioning creditor.

2. It appears that certain transferees of the debtor applied for being impleaded as party to insolvency proceeding before an adjudication order was made. The learned Insolvency judge rejected the application on the ground that the transferees have no locus standi for appearing in the proceeding at that stage. The purchaser can be made a party only in proceeding under Section 53 of the Insolvency Act. The learned Judge observed that from a perusal of Section 7, 9 and 10 of the Provincial Insolvency Act, it would be apparent that a purchaser is not interested either in the allowing or dismissal of the application. His remedy is under Section 53 of the Insolence Act which will not be barred by any order that may be passed under Section 9.

3. The transferees went up in appeal and succeeded. The learned District Judge held that Section 5 of the Provincial Insolvency Act makes the provincial of Civil P. C applicable to the proceeding under that Act. Consequently, Order 1. Rule 10 Civil P. C was applicable. He held that it will be necessary to implead the transferees to enable the court effectually and completely to adjudicate upon and settle the question involved in the proceedings. The transferees were in any event. proper parties to the petition. The appeal was allowed and the transferees were directed to be impleaded as opposite parties to the insolvency petition.

4. When the present appeals came up for hearing reliance on behalf of the petitioning creditor was placed on a Single Judge decision in ***Chandan Lal*** **v.** ***Ram Charan*** in Civil Revn. No 178 of 1969, D/- 27-1-1969 (All). That Civil Revision was directed against an order refusing an application for implement of a transferee of the debtor. The learned Judge observed that under Section 9 of the Act what has to be seen is the conduct. of the debtor and whether the debtor has committed and act of insolvency. Once the order has been passed under Section 9 of the Act adjudging the debtor an insolvent, it will always be open to a transferee to plead in proceeding under Section 53 and 54 of the Act that the transfer was valid. The learned Judge relied upon a Division Bench case. ***Ram Lakshman*** **v.** ***J. K Kapoor*** [AIR 1965 All 80] and observed that he was bound by this Division Bench decision which had specifically overruled another single Judge decision. ***Sheoraj Bahadur Mathur*** **v.** ***Abkul Aziz.*** [AIR 1956 All 68]. The learned Judge hearing the present appeals felt that the decision in ***Chanda Lal*** case required reconsideration and so he referred the appeals to a larger Bench. That is how these cases has come before this Bench.

5. Section 5 (1) of the Provincial Insolvency Act provides that subject to the provisions of this Act the Court in regard to the proceedings under the Act shall have the same power and shall follow the same procedure as it follows in exercise of the original civil jurisdiction. It will be seen that the insolvency jurisdiction is conferred on existing Civil Courts. Section 5 only clarifies that the existing jurisdiction possessed by the Civil Courts will continue to be available to it while exercising jurisdiction under the Provincial Insolvency Act. The procedure provided for in the Civil P. C which is applicable to the Civil jurisdiction will

equally be applicable to those courts while exercising functions under the Provincial Insolvency Act. Order 1, Rule 10, Civil P. C would hence equally be applicable to the proceedings under the Provincial Insolvency Act. Under that rule the court has jurisdiction to implead necessary as well as proper parties to the insolvency proceedings. Ex hypothesi persons who feel that they are either necessary or proper parties will have to validly approach the Insolvency Judge for being impleaded as party to the proceedings before it. The learned Judge deciding ***Chanda Lal*** case, Civil Revn. No. 178 of 1969, D/-27-1-1969 (All) admitted that the Bench in ***Ram Lakshman*** case [AIR 1965 All 80] took a contrary view. ***In Ram Lakshman*** case the dispute for adjudication was whether a decision as to the validity of a transfer rendered in proceedings under Section 9 operates as res judicata. The Division Bench answered this question in the negative. It gave several reasons for holding that the orders in proceedings under Section 9 and so they would not operate as res- judicata. There is nothing in that judgment from which it may be inferred that the transferees have no locus standi in proceedings under Section 9 or that the court has no jurisdiction to impaled parties under Order 1. Rule 10 Civil, P. C. Ram Lakshman's case is therefore not an authority for the proposition that the court has no jurisdiction to impaled transferees in proceeding under Section 9 of the Provincial Insolvency Act. It is true that ***Ram Lakshman*** case overruled the decision in ***Sheoraj Bahadur*** case in which the question of res judicata was also decided. These two decisions are in our opinion distinguishable from the present case. The implication in ***Chandu Lal*** case that the court has no jurisdiction to impaled transferees in proceeding under Section 9 does not, with respect, represent a correct view of law. Under Section 9 the insolvency petition can be presented by a creditor on three grounds mentioned in it.

6. Under Section 5, a debtor commits an act of insolvency if he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors or if he makes a transfer of his property or any part there of with the intent to defeat or delay his creditors or if he makes a transfer which would be void as a fraudulent preference. If such an act of insolvency is committed any creditor can move an insolvency petition under Section 9. The ground of attack in an insolvency petition is directed against the transfer made by the debtor. In order to defend such an attack a transferee can well choose to appear and participate in the proceedings. A transferee who so volunteers could legitimately be treated as a proper party to the proceedings. The debtor after having transferred a substantial portion of his property may not feel interested enough to adequately defend the insolvency petition. The interests of a transferee are in that situation bound to suffer. It cannot hence be gainsaid that the transferees respondents in the present case who wanted to appear in order to show that the insolvency petition was itself not maintainable and not made bona fide were proper parties to the proceedings. The learned District Judge was right in permitting them to participate in these proceedings. One of the grounds upon which the insolvency petition filled by the appellant proceeded was the invalidity of the transfer made by the debtor in fovour of the respondents. The respondents were therefore interested in contesting the application. They were rightly held to be proper parties.

7. For the appellant reliance was placed upon AIR 1968 mad 287, ***Mahadeo Rice and Oil Mills* v. *Chennimalai Gounder.*** Therefore it was held that the court has no jurisdiction to. add a party unless. It is necessary to add a proper party. There can be no quarrel with the

proposition. But the jurisdiction u/o. 1. R. 10 Civil P. C. extends to proper parties also Reliance was also placed upon ***M. A Jaleel Shaib* v. *Seeniappa Ramaswami Mudaliar and Co.*** [AIR 1951 Mad 665]. There it was held that a creditor who had a grievance of his own against the conduct of the petitioning creditor can come by way of an application for being substituted and not for being added as an additional party and so he could not take advantage of Order 1. Rule 10. Civil P. C. No such factual situation arises in the present case. The respondents wanted to participate in the proceedings in order to defend the transfers in their favour and contest the insolvency petition filed on a ground affecting the transfer in their favour. That case is not applicable.

8. In this view it is not necessary to decide the other technical questions as to whether the appeal was maintainable. In the result the appeal fails and is accordingly dismissed.

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M/s. K. Venkataramanasetty and Sons v. *M. Venkataramanaiya Setty*

AIR 1984 Kant. 102

G. N. SABHAHIT, J. - This appeal by third petitioner is directed against the judgment and order dated 14th Nov., 1975 made by the District Judge, Chickmagalur in Insolvency Case No. 1 of 1972 on his file dismissing the petition of the creditors/petitioners for adjudging the debtors as insolvents.

2. The petitioners averred that the respondents 1 (a) to 1 (d) formed a joint family firm and that they being indebted to the petitioners and some of the respondents in the petition alienated their properties mentioned in the petition in favour of some of the creditors, in preference of those creditors, and with a view to defraud or delay the payments of the other creditors including the petitioners. They further averred that substantial portion of the properties belonging to the firm was sold and there was not much left with the respondents-debtors. The same was denied by respondent-debtors. During hearing, P.Ws. 1 to 4 were examined on behalf of petitioners. P. W. 1-second petitioner, Dhanaraj S. Jain, who is the elder brother of the first-petitioner has stated inter alia that they have advanced a sum of Rs. 10,000/-and Rs 5,000/- respectively in favour of Malali Venkataramana Setty and Sons under promissory notes. They have produced the promissory notes. He has also stated that after the death of their father, the present respondents have constiuted themslves into the joint family firm under the name and style of ''MALALI VENKATARAMANA SETTY AND SONS'' and they have started running the business under the name and style of ''MYLARAGUPTA''. He has further deposed that the respondents creditors have sold on 23-6-1972 under Exhibit P-1 some properties in favour of respondent 4. He has further stated that they have sold properties in favour of respondent 5 as per Exhibit O-2 dated 23-6-1972. They have also sold their residential house in favour of respondent 6 as per the original of Exhibit P-3 on 23-6-1972. They have further sold Ambassador Car No. MYC-1165 and a lorry belonging to them bearing No. MYS-3726 within a few days thereof.

3. He has further deposed that the Oil Mill with building and godown is mortgaged in favour of the Vijaya Bank and that the Vijaya Bank has advanced them a sum of Rs. 1,50,000. He has also deposed that a suit was filed for recovery of rent against them in Original Suit No. 126 of 1973 on the file of the Munsiff, Kadur. The Plaint and the written statement in the suit are produced at Exhibits P-4 and P-5. Thus, he has deposed that the respondents within a short time before the filing of the petition have disposed of substantial portion of the properties obviously with intent to defraud or delay the payment in favour of the creditors.

P. W. 2 B. L. Ranganna was the Shanubhogue at Kadur for 20 years or more. He knew firs-respondent, late Malali Venkataramanaiah Setty, in the petition. H has spoken to the fact that in the year 1972 a shop by concerned respondents was run under the name and style ''MALALI VENKATARAMANAIAH SETTY & SONS'' and subsequently the name is changed as ''MALARAGUPTA''. He has also deposed that the Oil Mill was closed in about the year 1972.

P. W. 3 is Gopalakrishna. He is also on the point that the name of the shop has been changed. P. W. 4 is K. V. Adinarayana Shetty. He was originally the 3rd respondent in the

petition and subsequently he has been transposed as petitioner. He has spoken to the petition averments. He has stated that he had to file O. S. 24 of 1972 for the recovery of his dues. He has produced the certified copies of the plaint, written statement and other documents at Exhibits P-6, P-7, P-8, P-9 and P-10. He has further deposed to the sales made by the concerned respondents. He has also spoken to the mortgage in favour of Vijaya Bank. According to him, the alienation were made with a view to defraud or delay payment to the creditors. As against this respondents have examined R. Ws. 1 to 4. R. W. 1 is Revanaiah. He speaks to the shop run by the concerned respondents. According to him one of the brothers is looking after the shop. Shop is running. R. W. 2 is Bhagyalakshmi. She has stated that she is the daughter of Malali Venkataramana Shetty who died prior to the deposition, on 5-9-1975. She has purchased a house from her brothers after the death of her father. The sale deed is at Exhibit R-1. The consideration is Rs. 2,000/-. The sale deed is dated 23-6-1972. R. W. is M. V. Parathasarthy. He speaks to the facts as to when the partnership was established. The firm Malali Venkataramana Shetty and Sons was established in the year 1961, under the Partnership Act. Exhibit R-2 is the acknowledgment of registration of the partnership firm. Respondents 1 (a) to 1 (d) are the partners of the firm. He states that the assets of the partnership firm are the building in which the oil mill is housed and six sites shop and godown. Apart from the mill there are the stocks in the shop. He has further stated that item No. 8 did not belong to the partnership firm. Item No. 9 also did not belong to the joint family firm. Similarly item No. 5 did not belong either to the firm or to the joint family. He denies that the management of the shop was changed R. W. 4 K. Yalahanka Rai, is the Manager of Vijaya Bank, Birur. He has deposed that the Bank advanced to the extent of Rs. 1,75,000/- Rs 60,000/- and Rupees 19,000/- to the firm known as Malali Venkataramana Shetty at Kadur on the Hypothecation of the mill building with the Oil Mill machinery along with the 5 site For Rs. 60,00/- Loan they have pledged the L.I.C. Policy apart from the security referred to above. He has further deposed that pigmy deposit of Rs. 50,000/- has been made over in favour of the Bank. He has also deposed that the loans are still subsisting even after the adjustments. The Bank was obliged to file suits with reference to the mortgage in O. S. No. 5 of 1974 before the Civil Judge, Chhickmagalur and they obtained the decree as per Ex. R-18. Even after the decree they were unable to pay. They paid only one installment and that was due in March 1975 and thereafter they did not pay anything. The execution was taken out. The learned District Judge appreciating the evidence on record came to the conclusion that the properties that were left with the concerned respondents namely respondents 1 (a) to 1 (d) were sufficient to discharge all the debts of the debtors and as such it could not be said that the firm committed acts of insolvency under Section 6 (1) (a) and in that view he dismissed the petition of the creditors for adjudging respondents 1 (a) to 1 (d) as insolvent. Aggrieved by the said judgment and order, the third petitioner has instituted the present appeal.

4. The learned Advocate appearing for the appellant has filed an application on I. A. No. II praying for admitting into evidence the sale proceedings conducted in exception filed by the Bank. The other side no doubt objected to admit the additional evidence. It is seen, however, that the sale is subsequent event, it is after the judgment of the trial Court was pronounced in 1975, sale is in the year 1978. In fact R. W. 4 in his evidence has stated that the Bank had taken out execution proceedings against the firm all the debtors. He has also deposed that the installments were defaulted. That being so, the subsequent sale in favour of the creditor bank

by the Court would be relevant and admissible to do substantial justice between the parties and to pronounce judgment in the case. Hence the additional document namely the sale proceedings is admitted into evidence. It is now marked as Exhibit No. P-6 on behalf of the petitioner (appellant).

5. The learned Counsel appearing for the appellants strenuously urged before us that the lower Court was mainly guided by the fact that the valuation of the Mill was given at Rs. 5,00,000/- and the lower Court naturally took the view that the being so the entire debts of the firm could be wiped off with the assets and in that view the trial Court proceeded to dismiss the application of the creditors to adjudge the partners as insolvent. But he invited our attention to the fact that the entire Mill was sold in favour of the Bank itself in Court auction for Rs. 1,05,000/- and the Bank dues were not fully satisfied. The took away according to him the very basis of the reasoning of the lover Court and hence he submitted that the appeal was entitled to succeed. As against that, the learned Counsel appearing for the debtors-partners submitted that they have made an application for setting aside the sale and that they were hopeful of getting the sales set aside. He maintained that the sale price would be not less than Rupees 3,06,000/- with which the partners would be able to discharge all the debts.

6. The sole point therefore that arises for our consideration in this appeal is whether the lower Court was justified in observing that the debtors could satisfy the debts of all the creditors with the properties namely the Mill and its accessories as they could be valued at Rs. 5,00,000/-.

7. The Exhibit P-6 is the sale proceedings; that clearly shows that the sale of the Mill was effected in favour of the creditors Bank for Rs. 1,05,000/-. It says that the decree holder purchased the properties as per the sale warrant, he being the highest bidder. That sets at rest the controversy with regard to the valuation of the Mill which was estimated to be worth Rupees 5,00,000/- by the debtors. Now it is made very clear that the Mill and the accessories are not even able to satisfy the debts of the Bank itself which itself which runs into Rs. 3½ lakhs. That being so, it is obvious that the lower Court was entirely in error in thinking that the Mill with its accessories were sufficient to satisfy all the debts of the creditors and the learned District Judge entirely erred in thinking that the creditors under-valued the properties. In fact he went to the extent of criticising the Marwari Community which only exhibits that he has an inherent prejudice against the Marvaries. In this case the learned District Judge has revealed consciously or unconsciously his bias against the Marvaries by observing in the course of the judgment thus :

> Merely because there is any unsecured debt they cannot be allowed to ride rough shod on the debtor to suit their whims and fancies, the reputation of the Marvarics being at a discount as is the common knowledge. That only perhaps with their reputation the Government of late have taken stringent measures on the pawn brokers, 99 per cent of them being Marvaries.

He has of course no sympathy for respondents 1 (a) to 1 (d) also they being Vyshayas. In the course of the next para he has remarked against that community also when he says:

> The less said the better as to this gross under-valuation of the properties by the 3rd respondent who also hails from the same community as the partners of the 4th

respondent firm the respective stands taken by them indicating diamond cutting diamond as was rightly urged by the other respondents.

It is needless for us to point out that the Judicial Officers should try their best to contain their prejudices and predictions and should not allow them to prop up while deciding a case between the parties before them Justice Holmes pointed out long ago that these inherent prejudices and predilections of a Judge are likely to prop up in the judicial process, describing them as the inarticulate major premises and cautioned the judges to exercise judicial self-restraint. In fact the Supreme Court of India in ***S. P. Gupta* v. *Union of India*** (popularly known as the ***Judges'*** case) [AIR 1982 SC 149], speaking through his Lordship Justice Venkataramaiah at para 1256 of the Judgment, has observed:

> But if the judiciary should be really in dependent something more is necessary and that we have to seek in the Judge himself and not outside. A Judge should be independent of himself. A Judge is a human being who is a bundle of passions and prejudices, likes and dislikes, affection and recklessness. In order to be a successful Judge these elements should be curbed and kept under restraint and that is possible only be education, training continued practice and cultivation of sense of humility and dedication to duty. These curbs can neither be bought in the market nor injected into human system by the written or unwritten laws. If these things are there even if any of the protective measures provided by the Constitution and the laws go, the independence of the judiciary will not suffer. But with all these measures being there, still a Judge may not be independent. It is the inner strength of the Judges alone that can save the Judiciary. The life of a Judge does not really call for great acts of self sacrifice, but it does insist upon small acts of self-denial almost every day.

8. The Court sale proceedings produced now in this appeal would clearly show that the creditors have not under-valued the properties as was thought by the learned District Judge. They have made the valuation properly. It is the District Judge who was in error in thinking that they under-valued the properties.

9. That being so, it is obvious that the debtors have sold substantial portion of the property and the deeds indicate that they have sold them practically on the same day. The intention of a party has to be inferred and this move on their part to sell substantial portion of the properties in favour of some of the creditors and others would clearly go to show that their intention was to prefer some of the creditors and to defraud or to delay the payment to rest of the creditors. That being so, we are satisfied that they have committed an act of insolvency as contemplated under Section 6 (b) of the Act.

10. This Court explaining the same in ***Nazir Mohammed Khan* v. *Murthuza and Sons***, [1967 (2) Mys LJ 196] has ruled that there is a difference between a transfer of all or substantially all the property, and a part of the property; in a case where there has been a transfer of all or substantially all the property of a debtor, the law presumes that the debtor had the intention to defeat or delay his creditors, and if such a transfer is alleged and proved, the Court would be justified in declaring that the debtor has committed an act of insolvency.

11. On the facts of this case, the debtors have transferred substantially all the unencumbered properties including the residential house the car and the lorry. This intention

is obvious, it is to delay if not defraud the creditors. Hence, we have no hesitation to hold that the respondents in the petition at 1 (a) to 1 (d) being the partners of the firm have committed an act of insolvency. Accordingly the appeal is allowed on setting aside the impugned judgment and order of the lower Court and the original respondents 1 (a) to 1 (d) are adjudged as insolvents.

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Sarat Chandra Roy v. *Harak Chand Damani*

(1973) 3 SCC 187 : AIR 1972 SC 2127

K. S. HEGDE, J. - This appeal by special leave arises from insolvency proceedings initiated by the first respondent Petitioning Creditor on the original side of the Calcutta High Court against the appellant. No other creditor had either joined the proceedings or was a party thereto. Excepting the fact that the petitioner alleged that some other debts were also due from the insolvent there is no satisfactory proof about those debts. At any rate, there is no satisfactory proof to show that the insolvent was unable to discharge the debts due from him. The prayer for adjudicating the appellant as an insolvent had primarily proceeded on the basis of the failure of the appellant to discharge the decree debt due to the petitioning creditor. At the hearing of the appeal the appellate Bench of the High Court determined on September 23, 1964, that the balance amount due from the insolvent to the petitioning creditor was Rs 46,623'49 paise. The court directed the appellant that if he paid to the petitioning creditor Rs 28,186.40 P. by December 2, 1964, and the balance with interest by June 30, 1963, the order of adjudication would be set aside. On the same day i. e. September 23, 1964, the appellant to the petitioning creditor Rs 28,186.49 paise. The balance amount was not paid within the time fixed. For that reason the appellate court confirmed the adjudication of the insolvent by its judgment, dated July 12, 1966. Thereafter on July 30, 1966, the appellant's solicitors sent a cheque for Rs 20,466.06 paise' to the solicitors of the petitioning creditors in full satisfaction of the balance due to the petitioning creditor. That cheque was returned by the solicitors of the petitioning creditor on August 1, 1966, on the sole ground that the amount in question had not been paid within the time fixed by the court. There was no justification in doing so. After the tender in question the appellant applied to the appellate court to review its order. That application was dismissed mainly on the ground that the petitioning creditor opposed the same and that there was difference between the two. We fail to see how the creditor was interested in the adjudication of the appellant as an insolvent even after the entire amount due to him was tendered. The court was not justified in maintaining the adjudication of the appellant under the circumstances of the case. From the records we are satisfied that there was no justification for initiating the insolvency proceedings in question. Non-payment of a decree promptly by itself is no ground to adjudicating a person insolvent. Appellant appears to be a person of substantial means. In this case insolvency proceedings appear to have been initiated as an alternative to execution proceedings.

2. We are informed that at the time of the application for certificate before the High Court the insolvent had given a cash security of Rs 1,32,311.00. As mentioned earlier the solicitors for the petitioning creditor had not accepted the cheque for Rs 20, 466.06 paise. That being so, that amount yet remains to be paid to the petitioning creditor. In addition the insolvent has also to pay a sum of Rs 2,500 as costs as agreed to by him under his letter, dated September 23, 1964.

3. For the reasons mentioned above we allow this appeal and set aside the order of adjudication of the appellant. The petitioning creditor will be entitled to draw from the security given before the High Court a sum of Rs *22,* 966.06 paise. The balance amount with the interest accrued thereon will be returned to the appellant.

M/s. Shadi Ram Ram Sarup Dass v. *Ravi Chander Mangla*

AIR 1977 Del. 187

B. C. MISRA, J - This revision petition has been heated as under S. 115 of the Civil P. C. but it is really under S. 75 of the Provincial Insolvency Act 5, 1920, ('the Act'), against the appellate order of Mr. M. K. Chawla, Additional District Judge, dated 5th Oct. 1972. by which he has dismissed the appeal and affirmed the order of the Insolvency judge. dated 10th Feburary, 1972, refusing to dismiss the Insolvency petition filed by the creditors, respondents 1 and 2, against, the petitoners.

2**.** The material facts of the case lie in a narrow compass. The creditors, who are constesting respondents before me deposited some amounts with the petitioners, the details of which it is not necessary to state at this stage. They has received part of the payment, but had not received the balance inspite of repeated demands. The respondents filed an application under S. 9 of the Act for adjudication of the petitioners as insolvent and claiming that the petitioners before me had committed various acts of insolvency mentioned in the petition. They also alleged that the petitioners owed a sum of Rs. 12 lakhs to the various creditors. Upon the issue of the notice of the same the petitioners filed a written statement contesting the material allegations and raising various disputes. Eventually, the petitioners deposited the amount claimed by the respondents in court and they filed an application under S. 25 of the Act alleging that they were not insolvent and had means to pay the debts. and so the insolvency petition be dismissed. In the meantime, another firm by name Jamna Dass Balkishan Dass (which is not represented before me) filed a petition for adjudication of the petitioners as insolvents and they claimed that a sum of Rs. 5, 0000 was due to them and the petitioners had committed various acts of inselvency and that their petition be consolidated with the petition giving rise to this revision. The petitioners have disputed the claim of the aforesaid second petitioning creditor and the same is still to be investigated.

3. The Insolvency Court held that the respondents 1 and 2 had alleged that the petitioners owed debts to the tune of Rs 12 lakhs to the various creditors and that the second petitioning creditors' claim was yet to be investigated. so it may be safely contended that the debt due to the first petitioning creditors had been or could be deemed to be satisfied, but it had not been established that the petitioners were able to pay their debts. As a result the insolvency petition could not be dismissed. The court consequently dismissed the petition of the petitioners filed under S. 25 of the Act. Feeling aggrieved, the petitioners filed an appeal before the District Court and the Additional District Judge affirmed the findings. of the Insolvency Judge and dismissed the appeal.

4. For purpose of this appeal, it may be assumed that debt due to the first petitioning creditors has been discharged. while the liability to pay the debt of the second petitioning creditors is disputed. Under these circumstances, the question that arises for determination is whether the expression ''able to pay his debts'' includes the debts other than those of the petitioning creditor.

5**.** Under the Act, a creditor is entitled to present an insolvency petition if he fulfils the conditions laid down in S. 9 of the Acts beside particulars prescribed by sub-s. (2) of S. 13 of

the Act. Section 14 prohibits the withdrawal of an insolvency petition without the leave of the court. Section 15 provides for consolidation of two or more insolvency petitions. Section 16 prescribes that if a petitioner does not proceed with the insolvency petition with the insolvency petition with due diligence, the court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount not less than required by the Act in case of petition by a creditor. Section 17 prescribes that in the event of the death of the debtor the proceeding shall not abate, but shall continue as prescribed.

6. The scheme of the Act showed that the proceedings in the insolvency are really in rem and ensure for the benefit of all the creditors of the insolvent. The petition cannot be withdrawn without the leave of the court, nor does it abate on the death of the debtor and provision has been made for consolidation of two or more petitions of various creditors and also for substitution of the petitioner. Section 25 prescribes the available defenses and one of the defenses is that if the debtor satisfies the court that he is able to pay his debts, then the court shall dismiss the petition. Nevertheless if he is unable to pay his debts and commits some act of insolvency, the insolvency petition must continue notwithstanding the wishes or conduct of the particular petitioning creditor. The contention of the counsel for the petitioners is that if the debtor has satisfied the debts of the petitioning creditor. then he has established his defense of ability to pay his debts within the meaning of Section 25 and it is not material whether any other debts survive.

7. In ***Kalu Ram*** **v.** ***Gitwar Singh*** [AIR 1930 Lah 592], the learned single Judge held the under S. 25 on a petition presented by the creditor for adjudication a debtor as insolvent. it lies on the debtor to satisfy the court that he is able to pay his debts. In ***Bhagwan Das*** **v.** ***Mohammad Nawas Shah*** [AIR 1939 Lah 349], the facts before the Division Bench were that the debt due to the petitioning creditors, (who were four in number) was only Rs. 10,537/- while it had been established that beside committing an act of insolvency the amount owed by the debtor was Rs. 18, 691/- which had been outstanding for years. The contention of the debtor was that he possessed unliquidated assets. The High Court on appeal came to the conclusion that the debtor did not possess any liquid assets to pay the debts and he had not made any attempts to voluntarily raise money to pay his creditors. The controversy raised before the court elated to the meaning of the expression 'able to pay his debts.' The Division Bench held that it would be idle to contend that the mere fact that the debtor owned valuable properties was per se sufficient to justify a finding that he was'able to pay his debts'. The court. therefore, held that the debtor had failed to prove that he was able to pay his debts. On the finding that the creditors had fulfilled the conditions laid down in S. 9, and the respondent had failed to make out a case for dismissal of the petition. the Division Bench allowed the appeal and reversed the order of the Insolvency Judge and the debtor was adjudged insolvent.

8**.** This authority does show that in consturing the expression occurring in S. 25 of the Act, the court took into consideration the debts owed to other persons in arriving at the finding. Similarly, in ***Gadi Bhikaji Dhangar*** **v.** ***Govindrao Bapuji Pruanik*** [AIR 1937 Nag 127], the learned single judge took the view that the burden of proof lay upon the debtor to show that he was able to pay his debts within the meaning of S. 25 of the Act, In that case also that debt due to the petitioning creditors was only Rs. 850 while there were two other debts of Rs. 330 and Rs. 525 standing due against the debtor which he had failed to pay and

the court came to the conclusion the debtor was unable to pay all the three debts and so it affirmed the finding of the court below that the debtor had failed to prove that he was able to pay his debts; hence the insolvency petition could not be dismissed.

9. The expression 'able to pay his debts' occurring in S. 25 is to be used in normal commercial sense. The debtor must. therefore, satisfy the court that he has the ability to discharge his debts presently; hence he is not insolvent. The expression 'debts' refers to all the debts that he is legally bound to discharge at once and which he has failed to discharge. In this view of the matter, the mere fact that the petitioners have deposited the amount due to the petitioning creditor in the court does not discharge the burden placed upon the debtor to show that he is able to pay his debts within the meaning of S. 25 of the Act. One of the debts clearly alleged is the one relating to the second petitioning creditor, who. if the first petitioning creditor does not proceed with the petition, is likely to be substituted as the petitioner in the instant insolvency petition. It is true the debt due to him is under investigation and will have to be verified. But that does not show that the petitioners before me did not have any other debt to pay. The order of the lower appellate court by which it has affirmed the order of the trial court does not call for interference and the same is affirmed.

10. As a result, the revision petition is dismissed.

* * * * *

A. K. Kaimal v. *Sudarsen Trading Co. Ltd., Mysore*

AIR 1976 Kant 203

B. VENKATASWAMI, J. - 2. This appellant preferred a petition under Section 7 of the Insolvency Act, to be adjudged as an insolvent as he was unable to pay two items of debts due to the respondents. One of the items represents a debt of Rs. 3,010/- and evidenced by a decree passed in O. S. No 543 of 1971 on the file of the First Munsiff at Mysore, The other item consists of a sum of Rs. 13,319-96 with interest alleged to be due to the second respondent on account of supplies of superphosphate made by the second respondent to the appellant.

3. The learned District Judge on an examination of the appellant came to the conclusion that the first debt had been established and the second could not be accepted as subsisting even if the transaction alleged was true. He, however dismissed the petition on the ground that the appellant who on his retiring from service under Chamundy Curing Works in the year 1969 had received a sum of Rs. 6, 000 to 7, 000 presumably as a retirement benefit, was unable to account as to the manner in which he dealt with or spent the said amount. In short, the Court, as it appears to us, came to the conclusion that the petitioner's claim that he was unable to pay the said debts could not be believed. Hence this appeal.

4. In support of the appeal. Sri M Shivappa, the learned counsel. contended that having regard to the provisions of Sections 7 and 10 (1) of the Insolvency Act, it was premature for the Court to have examined the bona fides of the appellant in the context of his inability to pay the debts. He further contended that at that stage all that the Court was required to examine was whether or not a prima facie case had been made out having regard to the provisions of the Act particularly Section 10 (1) of that Act. It seems to us that this contention is well founded and this appeal clearly deserves to succeed.

5. It is sufficient for this purpose to refer to the enunciation of the true legal position in regard to a matter of this nature where a debtor himself approaches the Court to be adjudged as an insolvent. in the case of ***Krishnappa Chettiar* v. *Kasiviswanathan Chettiar***. (AIR 1996 Mad 331), with which we are in respectful agreement. The relevant passage reads :

> As pointed out by the Privy Council in ***Chhatrapat Singh Dugar* v. *Kharg Singh Lachmiram***, (AIR 1916 PC 64), when all the conditions specified under the Provincial Insolvency Act are satisfied, a debtor is entitled on order of adjudication. The matter does not depend on the discretion of the Court. but is a statutory right of which he cannot be deprived by the Court on the ground of abuse of process. There is a stage at which the Court could visit on the petitioner its due consequences of misconduct, that is when the application for discharge comes before the Court. At the time of the initiation of the proceeding, the Court has only to be satisfied that the essential conditions for adjudication as provided under the Act are present.

6. In the result, this appeal succeeds and is accordingly allowed. Consequently the order made by the District Judge at Mysore in Insolvency Case No. 4 of 1972 is hereby set aside and the petition concerned there with stands allowed. The matter, however, is remitted to the Court below to proceed further in accordance with law.

Bhagwan Das* v. *Mohammad Nawaz Shah

AIR 1939 Lah 349

TEK CHAND J. - This petition of revision raises questions of law of considerable importance on which there appears to be a serious divergence of judicial opinion. The petitioners, who are four of the creditors of the respondent and to whom a sum of Rs. 10,537 has been found to be due, applied for his adjudication as insolvent, alleging that he had transferred a part of his property with intent to defeat and delay the creditors and that he was unable to pay his debts. The respondent is a member of a notified agricultural tribe of Jhang District and owns a considerable area of agricultural land. He resisted the application on the two-fold ground that he had not committed any ''act of insolvency'' as defined in S. 6, Provincial Insolvency Act, and that he was ''able to pay his debts.'' The Insolvency Judge upheld both these contentions and dismissed the application. On appeal the learned District Judge disagreed with the finding on the first point and found that the respondent had committed an act of insolvency. He held however that the respondent owned a considerable area of agricultural land which was worth about Rs. 42,000 and that therefore he was able to pay his debts ''if he so desires.'' He accordingly dismissed the appeal. The creditors have come in revision and it is contended on their behalf that on the facts as found by the learned District Judge, he has erred in law in dismissing the application for the adjudication of the respondent as insolvent. The first contention raised is that where the creditors of a debtor apply for his adjudication as insolvent and successfully prove that he has committed an act of insolvency and that Rs. 500 or more is due to the petitioning creditors, the Insolvency Court has no jurisdiction to decide whether such debtor owns sufficient property to pay his creditors. In this connection reliance is placed on a Single Bench decision of Skemp J. reported in AIR 1937 Lah 6181 which certainly supports the contention of the learned counsel for the petitioners. As at present advised, I venture to think that the broad proposition laid down in this decision is not correct. It appears that the attention of the learned Judge was not drawn to S. 25, Insolvency Act, where it is laid down that a creditor's application shall be dismissed if the Court is satisfied by the debtor that he is able to pay his debts. The onus of proving this no doubt lies upon the debtor, but if he alleges that he is able to pay his debts and attempts to prove this allegation the Court is bound to go into this matter.

It is next contended that the debtor in this case being a member of an agricultural tribe, the mere fact that the value of the land owned by him exceeds his total liabilities is no criterion of his "ability to pay his debts", as according to the provisions of the Punjab Alienation of Land Act, such land cannot be sold in execution of decrees, and under the recent relief of indebtedness legislation, a large part of his land cannot be made available even for temporary alienation. It is also pointed out that whatever the value of the respondent's and might be, he is not possessed of liquid assets, sufficient to pay even a fraction of his debts, as is clear *inter alia* from the fact that he has not yet discharged any of the decrees which have been outstanding against him for years and which were payable in easy installments. It is therefore argued that he must be held to be ''unable to pay his debts.'' In support of these arguments, the petitioner's counsel relies upon a Single Bench decision of Dalip Singh J. in ***Karim Baksh* v. *Gaja Dhari*** [AIR 1934 Lah 63] and the leading judgment of Rankin C.J. in

Pratapmal* v. *Chuni Lal Jahuri [AIR 1933 Cal 417] in which it was laid down that although a debtor may have assets, which if liquidated, would provide sufficient money to discharge his debts, yet if he has no liquid assets wherewith to pay his debts at present, he must be held not to be able to pay his debts (within the corresponding provision of the Presidency Towns Insolvency Act) so as to resist a creditor's petition for adjudication.

The respondent's counsel on the other hand, relies on ***Dad Khan* v. *Chandi Ram*** [AIR 1925 Lah 630]; ***Moti Ram Prem Chand* v. *Kewal Ram Dharam Chand*** [AIR 1928 Lah 202]; ***Kashmira Singh* v. *Badar Din*** [AIR 1929 Lah 573]; ***Allah Ditta* v. *Dewa Singh*** [AIR 1935 Lah 183], which are all Single Bench decisions of this Court, in which it has been held that in determining whether a debtor of an agricultural tribe is able to pay his debts within the meaning of the insolvency law his land cannot be excluded from consideration. It is not easy to reconcile the various decisions cited above, and in any case, it is a matter for consideration, whether the view taken in the cases cited for the respondents still holds good, having regard to the recent indebtedness relief legislation. The questions raised are of great importance and are frequently arising and I think, they should be authoritatively decided by a larger Bench. I accordingly refer the case to a Division Bench. The papers will be laid before the Hon'ble Chief Justice for constituting a Bench to hear this case at an early date. [*This was Order of Reference*].

Order of Division Bench

DALIP SINGH J. - The facts of this case are given in the referring order dated 10th March 1938. The question involved in the reference was the proper interpretation of the term ''able to pay his debts'' in S. 25, Insolvency Act. This question has been answered in and in a Single Bench ruling of this Court in which the term was interpreted as meaning that a debtor is not able to pay his debts, although he has assets which, if liquidated, would provide sufficient money to discharge his debts, yet if he has no liquidated assets with which to pay his debts at present he must be held not to be able to pay his debts and therefore liable to adjudication as an insolvent. On the other hand, in four Single Bench cases of this Court, in the case of debtors' petitions to be declared insolvent, it was held that such a petition was bad if it was shown that the debtor had property which, if liquidated, would be sufficient to pay his debts. I do not think that it is necessary to consider the correctness or otherwise of these decisions for the simple reason that these are all decisions in debtors' petitions to be declared insolvent and the criterion for determining whether a debtor is able to pay his debts or not in such a case may be different from the criterion whether the debtor is able to pay his debts or not in a creditor's petition. I express therefore no opinion one way or the other on this point.

It is sufficient to say that I can see no reason why in a creditor's petition it should be held that a debtor is ''able to pay his debts'' because he has unliquidated assets which, if liquidated, would provide sufficient money to discharge his debts. In the first place, the mere presence of unliquidated assets does not necessarily prove that these assets are capable of being liquidated. For instance, in the case of land, as in the present case, there may be land whose market value is greater than the debts, but it may well be a question of fact that there is no purchaser available and hence, though the market value of the land may be greater than the debts, the land may not be at all convertible into liquid assets capable of discharging the

debts. But, apart from this altogether, it appears to me that, at any rate, unliquidated assets cannot be sufficient to discharge debts until they are liquidated and until those steps are taken, whether willingly or unwillingly by the debtor, it cannot be said that, at the time when the petition is put in praying for his insolvency, he is able to discharge his debts in the ordinary sense of the term, namely that he is able to pay them off by making legal tender of the sum demanded. The fact that he might pay them off if a purchaser was available and if he had time given to convert his assets into cash does not appear to me to affect the question whether at the time of the presentation of the petition and up to the time when this point arises for decision he is or is not able to pay his debts. From this point of view therefore it appears to me that, at any rate in a creditor's petition the debtor is ''unable to pay his debts,'' if he has no sufficient liquid assets to discharge the same. It is a totally different question that in certain circumstances and under proper conditions the Court might view with sympathy a request by the debtor to have time to discharge the debts by liquidating his assets or not. The Court might, further, in a proper case, dismiss the petition as being unwarranted by the circumstances. But none of these considerations can apply to the case of a man whose counsel very frankly conceded on his behalf that he was unwilling to pay his debts and who claimed that this Court should hold that he was ''able to pay his debts'' because he had unliquidated assets sufficient to discharge the debts if liquidated.

I would therefore hold that, so far as this point is concerned, the learned District Judge was wrong in holding that the debtor could not be declared an insolvent. I have only to add that the ruling referred to by the petitioners' counsel and in the referring order in appears to have overlooked the provisions of S. 25, Insolvency Act and only to have considered what the petitioning creditor ought to have proved in order to have his petition for insolvency entertained. The provisions of S. 25 however relate to the defence that the debtor may put up even though the petitioning creditor satisfies the conditions required by the Insolvency Act and therefore it cannot be said that his ability or inability to pay his debts is not a circumstance into which a Court may enter when once the act of insolvency has been proved. The only other point left to be decided is the question whether the learned District Judge was right in holding that the debtor had committed ''an act of insolvency.'' It appears that the debtor had parted with 414 kanals 7 marlas of land out of a total unencumbered property of 1211 kanals 10 marlas in order to save the property of his brother which otherwise was to be farmed out to somebody who had stood surety for the debt of his brother. The learned District Judge held that, in the circumstances of this case, the transfer was ''an act of insolvency'' within the meaning of S. 6 (b), Insolvency Act. The point does not appear to have been raised at all before the learned Single Judge at the time of the referring order. It is essentially a question of fact and, ordinarily speaking, the decision of the learned District Judge in the case would be final; but even without this on examining the facts of the case, it would appear that the evidence on the record would show that, so far as the creditors are concerned, all they can get is the lease of certain land and the value of this lease would be insufficient to discharge the total debts of the debtor. To have such property further reduced by nearly one-fourth would obviously tend to defeat and delay his creditors, and I think the law should imply an intent to defeat and delay, though this may not have been the primary motive of the debtor in effecting this transfer. I would therefore accept this petition and hold that the debtor should be

adjudicated an insolvent. The respondent will pay the petitioner's costs throughout.The case will go back to the InsolvencyCourt at Jhang for taking further proceedings, according to law.

TEK CHAND J. - I agree in the conclusion reached by my learned brother that this petition must be accepted and the respondent adjudicated insolvent. On behalf of the petitioners two contentions are raised before us. Firstly, it is urged that where the petitioning creditors successfully prove that Rs. 500 or more is due to them and that the debtor has committed an 'act of insolvency' as defined in S. 6 of the Act, the requirements of S. 9 are fulfilled and the Insolvency Court must adjudicate the debtor an insolvent forthwith, and it has no jurisdiction to enquire as to whether the debtor is able to pay his debts. In support of this contention, reliance is placed upon a Single Bench decision of this Court reported in ***Harbans Singh* v. *Kahla Singh*** [AIR 1937 Lah 618]. With great respect, I am unable to accept this decision as laying down the law correctly. It apparently proceeded upon the assumption that S. 9 is the only Section in the Act governing a creditor's application for adjudication of the debtor as insolvent and it entirely overlooked S. 25 of the Act. S. 9 however lays down the conditions on which a creditor is entitled to present an insolvency petition against a debtor; while S. 25 enumerates the defenses that the debtor may put forward and on proof of which he may successfully resist the petition and ask for its dismissal. That Section expressly provides that the creditor's petition shall be dismissed if the debtor satisfies the Court (inter alia) that he is ''able to pay his debts,'' or that for ''any other sufficient cause'' no order ought to be made on the petition. The onus to prove this, of course, lies upon the debtor; but if he alleges that he is able to pay his debts, the Court is bound to Enquirer into the matter and, if satisfied of his ability to do so, it must dismiss the petition. In this connection, reference may be made to ***Murli* v. *Sohan Lal Bansi Lal*** [AIR 1930 Lah 855]; ***Maung Po Sai* v. *Bank of Chettinad Ltd.*** [AIR 1936 Rang 26] where the proposition accepted in AIR 1937 Lah 618 was put forward but rejected. The provisions of the Act are explicit, and the respondent is clearly entitled to show that he is "able to pay his debts." This contention of the learned counsel for the petitioners is therefore without force and must be overruled.

His second contention is that on the facts found the respondent must be held to have failed to prove that he is ''able to pay his debts,'' and the lower Court has erred in law in coming to the contrary conclusion. It is common ground, that the onus to prove that the respondent is ''able to pay his debts'' lies on him; and the question is whether he has succeeded in discharging it. The facts found or admitted by the parties are : (a) that the respondent owes debts, amounting to Rs. 18,691 which have been outstanding for years against him : decrees have been obtained on some of these debts, payable in easy installments, but the respondent has not paid anything substantial towards them; (b) that he is not possessed of any liquid assets with which to pay these debts; (c) that he owns agricultural land, the value of which has been found by the lower Appellate Court to be more than twice the aggregate amount of his liabilities; (d) that the respondent, being a statutory agriculturist, cannot be compelled to sell this land for payment of his debts. Therefore, unless he voluntarily sells or mortgages it to another agriculturist all that his creditors can do is to have a temporary alienation, for a period not exceeding 20 years, of such portion of it as is left after setting apart a sufficient area for the maintenance of himself and his family : it is conceded that the

amount for which such temporary alienation can be made, will be much less than the debts due and (e) that the respondent has made no attempt whatever to voluntarily raise money on this land for paying off his creditors nor is he willing to do so now. On these facts, I have no doubt that it must be held that he has not proved that he is ''able to pay his debts.'' There has been some controversy before us as to the exact meaning of the expression ''the debtor is able to pay his debts'' as used in S. 25. The petitioners' learned counsel has contended that this means that ''he has no liquid assets where with to pay his debts at present'' and in support of this contention he has referred to certain observations in the judgment of Rankin C.J. in 60 Cal 3453 which was a case under the corresponding provision of the Presidency Towns Insolvency Act which is in identical terms with S. 25, Provincial Insolvency Act. But with great deference, I venture to think that this goes much further than the Section. Neither S. 13 (4), Presidency Towns Insolvency Act nor S. 25 of Act 5 1920 contains the words ''at present'' and there is nothing in the context to justify their being imported in it so as to hold that whatever be the extent of the marketable assets of the debtor if he is unable to meet all his liabilities forthwith by ''making legal tender'' of the total amount due, he is liable to be adjudicated insolvent. This would lead to startling consequences which if I may say so with respect are not warranted by the statute. As pointed out by Mukherjee J. in ***Samiruddin* v. *Kadar Moyee Dassi*** [(1910) 7 IC 69] although a debtor may not be able to satisfy the Court that he is then and there able to pay his debts, yet he may be able to satisfy the Court that there is a reasonable prospect of his being able to make such payment, the Court will dismiss the creditor's petition for adjudging him an insolvent. At the same time I am unable to accept the contention put forward by the respondent's counsel and accepted by the lower Court that the mere fact that the ''value'' of the immovable property owned by the debtor is in excess of his liabilities is sufficient to prove his ability to pay his debts regardless of all other considerations. A person may own very valuable properties but they may not be marketable at all or there may be no prospect of any purchaser forthcoming to buy them within a reasonable time even though the owner has made and is willing to make every possible effort to raise money on them to meet his liabilities. It will be idle to contend in such cases, that the mere fact that the debtor owns valuable properties is per se sufficient to justify a finding that he is ''able to pay his debts.'' What he has to show in each particular case is whether he possesses such realizable assets, as can within a reasonable time be made available to meet all his liabilities. In the case before us, it is obvious that the assets realizable at the instance of the creditors are much less than the debts due to them, and there is no reasonable prospect of the debtor paying them by voluntary alienation of his land. The debts have been due for a considerable time; the insolvency petition has been pending since 25th October 1935; but no effort whatever has been made by the respondent to pay off the creditors. Indeed, counsel frankly stated that the respondent has no present intention of paying them anything by liquidating any of his assets. In the circumstances, it is obvious that the respondent is ''unable to pay his debts'' and that no ''other sufficient cause'' has been shown under S. 25 of the Act for the dismissal of the creditors' petition.

Before concluding this part of the case, it may be mentioned, that the respondent's counsel relied upon ***Dad Khan, Moti Ram Prem Chand, Kashmira Singh*** and 1935 Lah. 183. These cases are however all distinguishable and it is not necessary to discuss them in detail. They all arose out of debtor's petitions for adjudication as insolvent, and the criteria for

determining the question in such petitions are different. It may by stated however that the view taken therein is in accord with the rulings of the other High Courts. Where the debtor himself is the petitioner and is invoking the jurisdiction of the Court on the ground that he is ''unable to pay his debts,'' he must make out a prima facie case that his liabilities exceed his assets and that he has made every effort to liquidate them but has not been able to raise the requisite funds. If, therefore, he possesses agricultural land or other rights in immovable property, which he can sell and which, if sold, would bring in sufficient money to pay off the creditors, but he does not wish to do so, it cannot be said that he is ''unable to pay his debts.'' It is however not necessary to pursue the matter further in this case.

At the close of his argument before us, respondent's counsel raised another point, which he had not urged at the hearing before the Single Bench. He contended that the lower Appellate Court was in error in holding that in making the transfer in favour of the mortgage bank the respondent had committed an ''act in insolvency'' within the meaning of S. 6 (b), Provincial Insolvency Act. It was admitted that out of a total of 1211 kanals 10 marlas of unencumbered land, the debtor had mortgaged 414 kanals 7 marlas to the bank within three months of the petition, but it was contended that this was not done with the ''intent to defeat or delay the creditors.'' The intent however is to be gathered from the consequences of his act, and it is obvious that the transfer had the effect of substantially reducing the area, which was available to the creditors for realizing their debts by temporary alienation, and which itself was not enough to bring in sufficient money to discharge his existing liabilities. I hold that the petitioning creditors have fulfilled the conditions laid down in S. 9, and the respondent has failed to make out a case for the dismissal of the petition under S. 25. For these reasons, I agree that this petition must be accepted and the respondent adjudicated insolvent.

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Firm Mukund Lal Veerkumar v. *Purushottam Singh*

(1968) 2 SCR 862 : AIR 1968 SC 1182

V. RAMASWAMI, J. - 2. Appellant I is a registered firm of which Appellant 2, Mukund Lal and Respondent 7, Ram Surat Misra are the only two partners. The firm carried on 'Arhat' (Commission Agency) business. Three petitions under the Provincial Insolvency Act (Act 5 of 1920), hereinafter called the "Act", were made against the firm and its two partners under Section 7 of the Act. Purushottam Singh, Respondent I and Sat Narain Singh, Respondent 2 filed the first petition (Petition No. 9 of 1958) on April 28, 1958. The second petition was filed by Smt Tara Devi, Respondent 3 and Shyam Das, Respondent 4 on May 30, 1958 which was registered as Petition No. 19 of 1958. The third petition was filed by Jivenda Mal on January 20, 1959 which was registered as Petition No. 2 of 1959. In Petition No. 9 of 1958, a sum of Rs 15,760 was claimed; in Petition No. 19 of 1958, a sum of Rs 14,545 was claimed and in Petition No. 2 of 1959 a sum of Rs 3884 was claimed but other creditors also filed their claims to the extent of Rs 96,000. In all these petitions it was alleged that the firm and its two partners had committed acts of insolvency and therefore they should be declared insolvents. The firm and its partners contested the petitions and asserted that they had already paid a sum of Rs 3,50,000 to other creditors and they were in a position to pay all the creditors and had not committed any acts of insolvency. All the three insolvency petitions were consolidated together and were heard by the Insolvency Judge, Varanasi who by his judgment dated August 8, 1959 adjudicated the firm and its two partners as insolvents. Thereafter the firm and its two partners filed three appeals under Section 75 of the Act but all these appeals were dismissed by the Additional District Judge, Varanasi by his judgment dated February 28, 1960. Thereafter the firm and its two partners took the matter in revision to the Allahabad High Court which partly allowed the revision applications and set aside the order of the lower courts adjudging Rain Surat Misra, Respondent 7, one of the partners of the firm as insolvent. The rest of the order declaring the firm and its other partner, Mukund Lal as insolvent was confirmed.

3. The main question to be considered in these appeals is whether the deed of gift executed by Mukund Lal in favour of his son, Veer Kumar on October 31, 1957 and registered on March 11, 1958 could be treated as an Act of insolvency committed within three months of the presentation of the petition.

Section 6(*b*) of the Act states:

> "6. A debtor commits an act of insolvency in each of the following cases, namely:
>
> (*b*) if, in India or elsewhere, he makes any transfer of his property or of any part thereof with intent to defeat or delay his creditors;"

Section 9 (1)(*c*) states:

> "9. (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless -
>
> (*c*) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition:

Provided that where the said period of three months referred to in clause (*c*) expires on a day when the Court is closed, the insolvency petition may be presented on the day on which the Court re-opens."

4. Section 122 of the Transfer of Property Act (Act 4 of 1882) is to the following effect:

"Gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Such acceptance must be made during the life-time of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void."

5. Section 123 of the Transfer of Property Act states:

"For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered."

6. Section 47 of the Indian Registration Act, 1908 is to the following effect:

"A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."

7. Section 49 of the Indian Registration Act states as follows:

"No document required by Section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall —

(*a*) affect any immovable property comprised therein, or

(*b*) confer any power to adopt, or

(*c*) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument."

8. It was contended on behalf of the appellants that under Section 47 of the Indian Registration Act a registered document operates from the date of its execution even though it may require registration and consequently the registration of the document should be taken to date back to the date of execution by a fiction of law. It was therefore submitted that the starting point of the three months' period prescribed under Section 9(1)(c) of the Act should be the date of execution of the deed of gift and not the date of registration. We are unable to accept this argument as correct. Section 123 of the Transfer of Property Act states that for the

purpose of making a gift of immovable property the transfer must be effected by a registered instrument in the prescribed manner. Under this section therefore a gift of immovable property is not valid unless it is effected by a registered instrument. It is true that under Section 47 of the Indian Registration Act once a document is registered the effect begins to commence from the date of execution, but if the document is not registered it can never have any legal effect as a deed of gift. Under Section 49 of the Indian Registration Act it is provided that no document required by Section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall affect any immovable property comprised therein unless it has been registered. The section necessarily implies that such a document by reason of its execution alone cannot have the effect of transferring the property. In the present case, therefore, the deed of gift executed by Mukund Lal in favour of Veer Kumar dated October 31, 1957 cannot be considered to be an act of insolvency unless a valid transfer of property was made by that document and such a valid transfer could be said to have been made only when the document was registered on March 11, 1958. The question in the present case is not what was the effect of the registration of the deed of gift, but when did the event take place which effectively transferred the property. We are not concerned with the point of time from which the document became operative but with the point of time at which the deed of gift became legally effective. The contrary view-point for which the appellant contends would ignore the circumstance that if the registration of the deed of gift was not effected within the period of three months the creditor would be deprived of his remedy of relying upon the act of transfer as constituting an act of insolvency. Such an interpretation should be avoided as it would nullify the intention of the statute.

9. On this question there has been divergence of opinion among the various High Courts. In ***Lakhmi Chand* v. *Kesho Ram*** [ILR 16 Lah 735], it was held by the Full Bench of Lahore High Court that when a petition was presented alleging that a debtor had committed an act of insolvency by a registered deed, the period of limitation prescribed by Section 9(1)(*c*) of the Act ran from the date of the registration of the deed and not from the date of the execution thereof. The same view was expressed by the Madras High Court in ***Sarvathada Iswarayya* v. *Kuruba Subbanna*** [ILR 58 Mad 166]. In that case, the execution of the sale deed was relied upon as an act of insolvency by a petitioning creditor and it was held by Madhavan Nair and Bardswell, JJ. that the three months' period prescribed by Section 9(1)(c) of the Act must be calculated from the date of the registration of the deed and not from the date of its execution. The same view was also enunciated by the Allahabad High Court in ***District Board, Bijnor* v. *Mohammad Abdul Salam*** [ILR 1947 All 624]. A contrary view has been taken by the Full Bench of the Rangoon High Court in ***U On Matung* v. *Maung Shwe Hpaung*** [AIR 1937 Rang. 446]. It was held that the period of three months referred to in Section 54, Provincial Insolvency Act, began to run from the date of execution of the transfer provided it had been properly registered within the specified time. But for the reasons already expressed we hold that the decisions in ***Lakhmi Chand* v. *Kesho Ram*, in *Sarvathada Iswaraya* v. *Kuruba Subbanna*** and in ***District Board, Bijnor* v. *Mohammad Abdul Salam*** correctly state the law on the point.

10. It was next argued that no order of adjudication could be made against a firm but it can only be made against the partners individually. We are unable to accept this argument as

correct. It is true that according to the English law the act of bankruptcy must be a personal act and no act of bankruptcy could be committed by a firm as such, and no adjudication could be made against a firm in the firm's name. But under Section 99 of the Presidency-towns Insolvency Act (Act 3 of 1909) an adjudication order may be made against a firm in the firm's name and such an order operates as if it were an order made against each of the persons who at the date of the order was a partner in the firm. There is, however, no provision in the Act corresponding to Section 99 of the Presidency-towns Insolvency Act. But Section 79(2) (*c*) of the Act provides for rules to be made by the High Court as to the procedure to be followed when the debtor is a firm. This section therefore assumes that an adjudication order can be made under the Act against the firm in the firm's name. Rules have been made under this section by the Allahabad High Court. Reference was made on behalf of the respondents to Rule 26 which states:

> "26. An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm."

It is manifest that an order of adjudication could be made against the firm in the present case if the proper conditions were satisfied. We therefore reject the argument of the appellants on this aspect of the case.

11. It was further contended on behalf of the appellants that there is no finding of any of the courts to the effect that the firm committed any act of insolvency. The allegation of the respondents was that Appellant 2 transferred to his son, Veer Kumar his personal house property by way of a gift deed dated October 31, 1957 and this was done by him with the intent to defeat or delay his creditors. It was pointed out that Ram Surat Misra was adjudged not to be insolvent by the High Court on the ground that there was no allegation against him of any act of insolvency. It was therefore contended that the firm should not have been declared insolvent merely because of the deed of gift executed by Appellant 2, Mukund Lal. In our opinion, this argument is well-founded and must be accepted as correct. We think that in order to support an adjudication against a firm there must be proof that each of the partners has committed some act of insolvency. If, however, a joint act of insolvency is relied upon it must be shown to be the act of all the partners. An order for adjudication can also be made against a firm if there was an act of insolvency by an agent of the firm which was such as must necessarily be imputed to the firm. The Explanation to Section 6 of the Act says "for the purpose of this section the act of the agent may be the act of the principal". The Explanation does not lay down that an act of insolvency of the agent shall be attributed to the principal but that it may be treated as the act of the principal. Section 2(*a*) of the Indian Partnership Act (Act 9 of 1932) defines "an act of a firm" to mean "any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm". The effect of this section read with the Explanation to Section 6 of the Act appears to be that the question whether an act of insolvency of one or more partners can be regarded as an act of all the partners is a question of fact to be determined on the facts and circumstances of each particular case. For instance, In ***Re Mahomed Hasham & Co.*** [24 Bom LR 861], one of the partners in a firm consisting of two partners departed from the usual place of business with intent to delay and defeat the creditors of the firm. It was held by the Bombay High

Court that an adjudication order could not be made against the firm in such a case unless the other partner had also departed with like intent. Similarly, in ***Gopal Naidu* v. *Mohanlal Kanyalal*** [ILR 49 Mad 189], it was held by the Madras High Court that it is a question of fact whether the act of one partner in closing the business of the firm and thus committing an act of insolvency so far as he is concerned was imputable to another partner so as to entitle the creditors of the firm to get the other also adjudicated an insolvent. In the circumstances of that particular case it was held that the mere fact of closing the firm by one partner without more evidence to show that the other either expressly or impliedly authorized the same was insufficient to lead to such imputation. In the present case, the property of which Mukund Lal made a gift to Veer Kumar was not partnership property and there was no collective act of insolvency alleged on behalf of all the partners of the firm. In the circumstances of the present case it cannot also be held that the act of insolvency committed by Mukund Lal should be attributed to Ram Surat Misra. The High Court has, in fact, allowed the appeal of Ram Surat Misra and set aside the order of the lower courts declaring him as insolvent. We are consequently of opinion that the order of the lower courts, so far as it adjudicates the registered firm as insolvent, should be set aside, but the rest of the order of the lower courts declaring Mukund Lal as insolvent will stand.

12. Subject to this modification these appeals are dismissed.

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Jayantilal Mohanlal v. *Narandas & Sons*

AIR 1983 Bom. 226

SHARAD MANOHAR, J. - This is a revision application filed by a retired partner of the firm against which firm money decree has been passed by the Court. After passing of the decree, the decree-holder wanted to execute the same against the petitioner on the ground that he was a partner of the firm at the time of the suit transaction. The petitioner claims to have retired from the partnership. The plaintiff filed the requisite application to the Executing Court under O. 21, R. 50 (2) of the Civil P. C. for bringing on record the petitioner and other partners of the defendant-firm so that he could execute the decree against them individually. This was done by him by taking out a notice in that behalf. This notice was opposed by the present petitioner on various grounds, all of which have been negatived by the trial Court and an order has been passed that the execution should proceed against the present petitioner. It is this order which the petitioner wants to be revised by this Court.

2. For the sake of convenience, the parties will be referred to with reference to their position in the trial Court save and except that the petitioner, who was respondent No. 4 in the trial Court, will be referred to as 'petitioner' only. One Miss Geetaben N. Jatania who was defendant No. 2 in the suit had deposited a sum of Rs. 7,000 with the firm M/s. Damoder Vithaldas, which was defendant No. 1 in the suit. The firm/defendant No. 1 executed a deposit receipt in favour of said Miss Jatania/defendant No. 2. It is not disputed the said Miss Jatania/defendant No. 2 assigned her right, title and interest in the said deposit receipt in favour of the plaintiff.

About the next fact there is a slight ambiguity. Contention of the present petitioner is that he retired from the partnership firm/defendant No. 1 on 31-10-1976. However, this date is also referred to as 24-10-1976 in the judgment of the trial Court, Whatever that may be, it is an admitted fact that the present petitioner retired from the partnership firm/defendant No. 1 after the execution of the deposit receipt by the firm in favour of defendant No. 2.

On 15-10-1979 the plaintiffs filed a suit against the firm-defendant No. 1 and also against defendant No. 2. Miss Jatania for recovery of the amount due under the deposits. In the said suit decree was passed on 17-6-1980 against the firm/defendant No. 1 for a sum of Rupees 9,992.91 ps. The decree directed that amount was to be refunded by instalment of Rs. 300 each. The first instalment was to be paid on or before 15th day of each month. On 26-9-1980, the plaintiffs took out Miscellaneous Notice No. 1781/80 against the present petitioner Jayantilal Mohanlal, who was shown as respondent No. 4 in the said notice and against some other respondents. By the application in question the plaintiffs sought to bring on record the partners of the firm/defendant No. 1 so that the planitiff could execute the decree against the said partners also. Evidently, the application was made under O. 21, R. 50 (2) of the Civil P.C. The learned Judge who heard the notice, however, appears to have taken the view that such an application was not competent because the original judgment-debtor, defendant No. 1, had not made any default in payment of the decretal instalment. The learned Judge observed that the original judgment-debtor, defendant No. 1, was always ready and willing to pay the amount. I may state here that the fact that on the date when the said application viz. Miscellaneous Notice No. 1781/80 was made, the firm/defendant No. 1 was ready and willing

to pay the amount of decretal instalent, is not disputed before me. As a matter of fact it has been the specific contention of the present petitioner in the trial Court that the original firm/defendant No. 1 against whom the decree was passed had in fact offered the amount of the instalments to the plaintiff but that the plaintiff themselves refused to accept the amount. This position appears to be to have been accepted by the learned Judge also. Evidently, according to the learned Judge, the decree was an instalment decree and question of the execution of the decree would not arise unless there was any default made in payment of any instalment. Since no default was proved to have been made by the defendant-firm, question of execution of the decree does not arise. It was with this reasoining, evidently, that the learned Judge dismissed the said notice by order dated 29-10-1980.

3. On 24-11-1980, the plaintiff took out second notice Miscellaneous Notice No. 2260/80 to bring the names of persons mentioned as respondents Nos. 1 to 5 on record in the decree. Evidently, this application was also made under O. 21, R. 50 (2). Respondent No. 4 is none other than the present petitioner and the present petitioner and other respondents were sought to be brought on record on the ground that they were the partners of the judgment-debtor firm. It is the order on this application that has given rise to the present revision application. Only the present petitioner and original respondent No. 5 appeared in response to the notice. The present petitioner filed his reply on behalf of original respondent No. 5. To the reply there was rejoinder filed by the plaintiff-decree-holder and to the rejoinder the present petitioner filed a surrejoinder. It is unnecessary to set out the contentions reaised to the reply and surrejoinder separately. The substance of the contentions of the present petitioner in reply to the plaintiff's notice was as follows:

(a) Firstly, according to the petitioner the second application under O. 21, R 50 (2) of the Code was barred by the principles of the res judicata, having regard to order dismissing its first notice for similar relief.

(b) Secondly, according to the petitioner he was only a dormant partner of the defendant-firm and hence, was not liable for the dues of the partnership firm.

(c) Thirdly, the defendant-firm was always ready and willing to pay the decretal amount by instalments as fixed by the decree. Contention was that the amount of each instalment was in fact offered by the defendant-firm to the plaintiff-decree-holder which amount was unjustifiably rejected by the plaintiff.

(d) Fourthly, it was contended that the petitioner had retired from the partnership on 31-10-1976 much before the date of the filing of the suit and hence on decree could be passed against him.

(e) Lastly, it was contended. by was of sur-rejoinder that firm-defendant No. I was adjudicated insolvent by an order of adjudication passed by this Court on 17-2-1981. Contention was that in view of the said order of adjudication no partner of the firm could be proceeded against and hence the application had become infructuous.

4. All the adovementioned contentions of the petitioner were rejected by the trial Court. As regards the first contention, the trial Court found that the first notice which was dismissed on 29-10-1980 was not dismissed by the Court on merits at all but it was dismissed because according to that Court the question of execution had not arisen at all. The Court dealing with the first notice had found that there was no default committed by the defendant-firm in the

matter of payment of the instalments fixed by the decree and hence there was no question of any execution of the decree and if that was so there was no further question of decree being executed against any of the partners of the firm. The second plea relating to the petitioner being mere dormant was not seriously pressed at all and hence the Court found it to be wholly untenable. So far as the 3rd contention was concerned, it does not appear to have been pressed into service at all before the trial Court. The only contentions which were really adjudicated seriously were that:

(i) The plaintiff's second notice which was an application under O. 21, R. 50 (2) of the Civil P. C. was not maintainable.

(ii) That the defendant having been adjudicated insolvent each of the partners of the firm, must be deemed to have become insolvent and he could not be proceeded against in any Court.

The plea that the petitioner was absolved from the liability because he had retired from the liability because he had retired from the partnership on 31-10-1976 was repelled by the Court on the ground that the notice of his retirement was not given by his as required under the Partnership Act. So far as the plea of insolvency was conecrned, the learned Judge held that the firm which was declared insolvent was a totally different entity from the firm-defendant No. 1. The learned Judge further found that original respondents Nos. 1, 2, 3 and 5 were also the partners of the firm M/s. Damodardas Vithaldas (Export) and that they were adjudicated insolvents but the present petitioner was not a party to the insolvency proceedings and was not adjudicated insolvent in the said proceedings. In this view of the matter, the learned Judge held that so far as the present petitioner was concerned, there was absolutely no reason why the application under O. 21, R. 50 (2) of the Civil P. C. should not be allowed and as to why the execution should not proceed against the petitioner. By his order dated 24-7-1981, the learned Judge made the notice absolute so far as the present petitioner was concerned and discharged the notice as against rest of the original respondents.

5. The only points that were urged before me by Mr. Adhia, the learned Advocate appearing for the petitioner are the following:

(a) That the second notice taken out on 24-11-1980 was barred by the principles of res judicata in view of the order of dismissal of the earlier notice dated 29-10-1980 for the same relief.

(b) The proceedings under O. 21, R. 50 (2) could not be decided on affidavits. Contention was that since facts were in dispute, the question in issue had to be decided in the same manner as the trial of a suit and by deciding the question on the strength of the affidavits only, the petitioner was deprived of the opportunity to lead evidence to prove that the firm was defendant No. 1 in the suit against which firm the decree is passed by the Court.

(c) In view of the insolvency of the defendant-firm, the decree could not be executed even against its partners having regard to the provisions of Ss. 7 r/w. 99 of the Presidency Towns Insolvency Act.

The answer to the first contention of Mr. Adhia is already indicated above while stating the facts. The answer given by both the Courts below to this contention is quite correct. The order dated 29-10-1980 dismissing the petitioners' application for bringing the partners of the

firm on record was not dismissed on merits: it was dismissed on the ground that after all the partners were sought to be brought on record with a view to execute the decree against them, but that the question of execution of the decree did not arise because there was no default in the payment of the instalment decree passed against the firm. The Court, on the previous occasion did not hold that in no circumstances the partners could be brought on record. The Court held, by necessary implication, that if there was a default committed by the partnership, decree could be executed by the plaintiff against the firm and at that time the question of bringing the partners of the firm on record would be relevant. I do not mean to suggest that the reasoning is correct or unassailable or that it might be approved of by this Court. The point is that the previous Court had not rejected the application for bringing the partners of the firm on record for all the times. On the other hand, by necessary implication, the Court had given liberty to the firm to make such an application if occasion for execution of the decree against the firm arose. It is nobody's case that on the date of the second application under O. 21, R. 50 (2) such occasion had not arisen. There is no evidence to show that the firm had in fact paid all the instalments due till date of the second application. It that is the position, the second application under O. 21, R. (50) (2) could certainly be entertained. The plea of res judicata in such a case would be misconceived.

6. The plea about want of jurisdiction for the Court to decide the dispute on affidavits is equally misconceived. The contention is that the liability of the petitioner for a decree passed against the firm was disputed by the present petitioner and under O. 21, R. 50 (2) such a dispute has got to be tried in the same manner in which the suit may be tried. A suit cannot be decided, contends Mr. Adhia, only on the basis of affidavits. He contends that this constitutes a material irregularity in the exercise of its jurisdiction by the Court.

This aspect is further sought to be highlighted by reference to the finding record by the learned Judge, viz. that the firm which was adjudicated insolvent was not the same firm against which the decree was passed in the present suit. Contention is that if the proceeding was tried as a suit oral evidence would be led by the petitioner to show that the firm against which the decree was passed in the suit was the self-same firm which was adjudicated insolvent in the insolvency proceedings.

In the first place, to my mind, the contention has no statutory basis at all O. 21, R. 50 (2) specifically stated that if the partner who is sought to be brought on record disputes his liability, the liability shall be tried in any manner in which any issue in the suit may be tried and determined. The words ''any manner in which any issue in a suit may be tried'' are the key-note for this purpose. Under O. 19, R. 1 of the Code, any Court may at any time, for sufficient reasons order that any particular fact or facts may be proved by affidavit. The proviso to the said rule enjoins that if either of the parties bonafide desires the production of the witness for cross-examination and that such witness is available for cross-examination, the evidence shall not be recorded by the Court by affidavits. Applying that provision to the procedure in this case, it will be seen that whatever may be the contentions of the present petitioner with a view to dispute his liability, that dispute does give rise to certain issues between parties and such issues could be tried by affidavit by virtue of the provision of the said O. 19, R. 1. It is to be noted that at no time the present petitioner even gave an indication to the Court that he wanted oral evidence to be led in support of his contention nor did he

express any desire to cross-examine any of the affiants of the affidavits. The grievance is being made for the first time only before me. That being the position. I find no jurisdictional irregularity in the order passed by the Court after examining the affidavits filed by the parties.

7. But even apart from the factual position mentioned above and apart from the question of the inter-action of the provisions of O. 21, R. 50 (2) and O. 19 (1) of the Code, what is to be noted is that the question to be decided under O. 21, R. 50 is the narrow question as to whether he was a partner of the firm at the relevant time or not. He cannot question the liability of the firm itself. It was open for him to contend that he was not the partner of the firm in question at the relevant time. It was also open for him to contend that the decree passed against the firm of which he was a partner, was the result of collusion, or fraud or of similar other circumstances. But save and except the above contentions, no contention was available for him to defeat the decree passed against the firm as such. Further, once the decree against the firm was found not to be collusive or fraudulent, every partner of the firm would be bound by the decree. If any authority is necessary for this proposition, it is to be found in the decision of the Supreme Court in the case of ***Gambhir Mal Pandiva* v. *J. K. Jute Mills*** [AIR 1963 SC 243]. The head-note of the report correctly sets out the reatio of the decision as follows:

> Order 21, R. 50 (2) deals with executions, but really is a part of the provisions relating to suits against firms contained in O. 30 and must be viewed along side to get the true meaning of the word ''The liability of such person.'' O. 30 permits suits to be brought against firms. The summons may be issued against the firm or against persons who are alleged to be partners individually. The suit, however, proceeds only against the firm. Any person who is summoned can appear, and prove that he is not a partner and never was: but if he raises that defence, he cannot defend the firm. Persons who admit that they are partners may defend the firm, take as many pleas as they like but cannot enter upon issues between themselves. When the decree is passed, it is against the firm. Such a decree is capable of being executed against the property of the partnership and also against two classes of persons individually. They are : (1) persons who appeared in answer to summons served on them as partners and either admitted that they were partners or were found to be so, and (2) persons who were summoned as partners but stayed away. The decree can also be executed against persons who were not summoned in the suit as partners, but R. 50 (2) of O. 21 gives them an opportunity of showing cause and the plaintiff must prove their liability. This enquiry does not entitle the persons summoned to reopen the decree. He can only prove that he was not a partner, and in a proper case, that the decree is the result of collusion, fraud or the like. But he cannot claim to have other matters tried, so to speak, between himself and his other partners. Once he admits that he is a partner and has no special defence of collusion fraud etc. the Court must give lease forthwith. The proper meaning of the words ''The liability of such person'' in Order 21, R. 50 (2) thus is that primarily the question to try would be whether the person against whom the decree is sought to be executed was a partner of the firm, when the cause of action accrued, but he may question the decree on the ground of collusion, fraud or the like but so as not to have the suit tried over again or the raise issues between

> himself and his other partners. It is to be remembered that the leave that is sought is in respect of execution against the personal property of such partner and the leave that is granted or refused affects only such property and not the property of the firm. Ordinarily, when the person summoned admits that he is a partner, Ieave would be granted unless he alleged collusion, fraud or the like.

In the lower Courts, the petitioner's contention was that he was not a partner of the firm on the date of the suit or on the date of the decree but it was rightly negatived by the courts below and it was rightly not even urged before me. In the circumstances, the only question that remains for the Court to decide is as to whether the petitioner proves that he was not a partner of the firm at the relevant time. The relevant time, in the instant case, is the date 20-10-1976 when the deposit receipt was executed by firm in favour of the defendant No. 2. On this date, the petitioner was admittedly a partner of the firm. The question to be decided by the Court, therefore, was a very narrow question. This question could be decided conveniently on affidavits and the answer to it could not be anything but that the petitioner was liable for the decree passed against the firm. This is so for the simple reason that no partner of the firm can get himself absolved from the liability, towards the creditor of the firm by resorting to the simple expedient of retiring from the firm after the firm becomes indebted to the creditor. The lower Court has held that petitioner was liable for the dues because he had not given notice of retirement. But to my mind apart from the question of absence of the notice of retirement. even if the notice of retirement was given, still the petitioner could not be absolved from the liability by giving his unilateral notice of the retirement. He would have to satisfy the Court that after the notice of retirement, the creditor acquiesced in that position and agreed to get his dues satisfied from the newly constituted partnership firm. Nothing of this kind has happened in this case. This being the position the liability of the petitioner for the partnership dues till the date of his retirement cannot be avoided by him.

8. But to my mind, the above objection is capable of being repelled by assuming that whatever the petitioner wanted to prove was in fact proved by him. He wanted to prove that the firm M/s. Damodardas Vithaldas against whom the decree was passed by the Court was the self-same firm M/s. Damodardas Vithaldas (Export) against which an order of adjudication of insolvency was passed in the insolvency proceedings. I may assume that he has proved the fact that the two firms are one and the same. If that is assumed, then the second objection vanishes. Because no prejudice is caused to him by virtue of decision by the lower Court on the basis of the affidavits. I am assuming this position because the last point raised by Mr. Adhia arises only if the two firms are assumed to be the same. I make it clear that I do not find any fault with the reasoning of the trial Court in holding that two firms are not established to be the one and the same firm. But for the sake of argument, I will assume that they are the same. In that event, the second objection of Mr. Adhia will vanish but the third objection will have to be considered. His third objection is that once the firm is adjudicated insolvent, the decree passed against the firm cannot be executed against any of its partners. In support of this contention, reliance is placed upon the provisions of S. 7 read with S. 99 of the Presidency Towns Insolvency Act. But I am not at all satisfied that the said provision warrants any such conclusion S. 7 of the Act provides that the Insolvency Court shall have full powers to decide all question arising in any case of insolvency coming within

the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property of the insolvent. Section 99 of the Act provides that any two or more persons, being partners, or any person carrying on business under a partnership names may take proceedings or be proceeded against under this Act in the name of the firm. But from the above provisions, it doesn't necessarily follow that once the partnership is adjudicated insolvent, all the persons who appear in the Register or Firms as the partners of the firm on the date of the adjudication automatically become insolvent. Under the general law, every partner may be individually liable for the dues of the partnership, but that does not mean that if the partnership firm is adjudicated insolvent without the partner being made party to the insolvency proceedings, the partner automatically becomes insolvent. It any authority is necessary for the proposition, it can be found in the judgment in AIR 1925 Lah. 379. It was held by a learned single Judge of the Lahore High Court in that case that where a decree has been passed against the firm but all the members have been served individually, the decree can be executed against them personally though the firm has been declared insolvent and though there has been no application under O. 21, R. 50. From this it necessarily follows that the insolvency of the firm does not result ipso facto into the insolvency of the partner of the firm.

But for the purpose of this petition, it is not necessary for me to give a final decision on this aspect of the matter. The point is that so far as the present petitioner is concerned, on his own admission, he was not a partner of the firm on the date when the firm was adjudicated insolvent. The provisions of S. 99 of the Insolvency Act, therefore do not come into picture at all and if that is the position, it is difficult to see as to how S. 7 of the Insolvency Act would bar the execution to the decree against the petitioner, who was the partner of the firm but who is not amenable to the jurisdiction of the Insolvency Act under S. 7 of the Act. The question between the decree-holder and the partner is not a question arising out of the insolvency proceedings. If the firm be comes insolvent, all the properties of the firm vests in the official assignee, but the property of the partner who has not become insolvent cannot vest in the official assignee and if the decree-holder has recourse against such property of the individual partner, the Insolvency Court has no function to perform at all so far as the questions arising in insolvency are concerned. In this connection, it is to be noted that on the petitioner's own showing the present petitions was not one of the partners of the firm who was adjudicated insolvent in the insolvency proceedings. The trial Court has pointed out that the other respondents who were sought to be impleaded were adjudicated insolvent in the said proceeding, but the present petitioner was not one amongst those who were adjudicated insolvent. In fact, it is not his case that he was ever adjudicated insolvent. If he was, and the insolvency was subsisting, he could not have filed this Revision Application at all. In this view of the matter, it cannot be said that the petitioner was amenable to the jurisdiction of the Insolvency Court or that he was declared insolvent by the Court. If that is the position, it is impossible to see any justification for the contention that the proceeding against the petitioner under O. 21, R. 50 (2) could not be taken and order under said provision could not be passed against the petitioner. For all the above reasons the Revision Application fails.

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Shivagouda Ravji Patil v. *Chandrakant Neelkanth Sadalge*

(1964) 8 SCR 233 : AIR 1965 SC 212

K. SUBBA RAO, J. - This appeal by certificate raises the question whether a minor who was admitted to the benefits of a partnership can be adjudicated insolvent on the basis of debt or debts of the firm after the partnership was dissolved, on the ground that he attained majority subsequent to the said dissolution, but did not exercise his option to become a partner or cease to be one of the said firm.

2. The facts are not in dispute and may be briefly stated. Mallappa Mahalingappa Sadalge and Appasaheb Mahalingappa Sadalge, Respondents 2 and 3 in the appeal, were carrying on the business of commission agents and manufacturing and selling partnership under the names of two firms "M. B. Sadalge" and "C.N. Sadalge". The partnership deed between them was executed on October 25, 1946. At that time Chandrakant Nilakanth Sadalge, Respondent 1 herein, was a minor and he was admitted to the benefits of the partnership. The partnership had dealings with the appellants and it had become indebted to them to the extent of Rs 1,72,484. The partnership was dissolved on April 18, 1951. The first respondent became a major subsequently and he did not exercise the option not to become a partner of the firm under Section 30(5) of the Indian Partnership Act. When the appellants demanded their dues, Respondents 2 and 3 informed them that they were unable to pay their dues and that they had suspended payment of the debts. On August 2, 1954, the appellants filed an application in the Court of the Civil Judge, Senior Division, Belgaum, for adjudicating the three respondents as insolvents on the basis of the said debts. The 1st respondent opposed the application. The learned Civil Judge found that Respondents 2 and 3 committed acts of insolvency and that the 1st respondent had also become partner as he did not exercise his option under Section 30(5) of the Partnership Act and, therefore, he was also liable to be adjudicated along with them. The first respondent preferred an appeal to the District Judge, but the appeal was dismissed. On second appeal, the High Court held that the 1st respondent was not a partner of the firm and, therefore, he could not be adjudicated insolvent for the debts of the firm. The creditors have preferred the present appeal against the said decision of the High Court.

3. Learned counsel for the appellants, Mr Pathak, contends that the 1st respondent had become a partner of the firm by reason of the fact that he had not elected not to become a partner of the firm under Section 30(5) of the Patnership Act and, therefore, he was liable to be adjudicated insolvent along with his other partners.

4. The question turns upon the relevant provisions of the Provincial Insolvency Act, 1920 (5 of 1920) and the Indian Partnership Act. Under the provisions of the Provincial Insolvency Act, a person can only be adjudicated insolvent if he is a debtor and has committed an act of insolvency as defined in the Act: see Sections 6 and 9. In the instant case Respondents 2 and 3 were partners of the firm and they became indebted to the appellants and they committed an act of insolvency by declaring their inability to pay the debts and they were, therefore, rightly adjudicated insolvents.

5. But the question is whether the first respondent could also be adjudicated insolvent on the basis of the said acts of insolvency committed by Respondents 2 and 3. He could be, if he

had become a partner of the firm. It is contended that he had become a partner of the firm, because he did not exercise his option not to become a partner thereof under Section 30(5) of the Partnership Act. Under Section 30(1) of the Partnership Act a minor cannot become a partner of a firm but he may be admitted to the benefits of a partnership. Under sub-sections (2) and (3) thereof he will be entitled only to have a right to such share of the properties and of the profits of the firm as may be agreed upon, but he has no personal liability for any acts of the firm, though his share is liable for the same. The legal position of a minor who is admitted to a partnership has been succinctly stated by the Privy Council in *Sanyasi Charan **Mandal*** **v.** ***Krishnadhan Banerji*** [ILR 49 Cal. 560, 570], after considering the material provisions of the Contract Act, which at that time contained the provisions relevant to the law of partnership, thus:

> "A person under the age of majority cannot become a partner by contract ... and so according to the definition he cannot be one of that group of persons called a firm. It would seem, therefore, that the share of which Section 247 speaks is no more than a right to participate in the property of the firm after its obligations have been satisfied."

It follows that if during minority of the 1st respondent the partners of the firm committed an act of insolvency, the minor could not have been adjudicated insolvent on the basis of the said act of insolvency for the simple reason that he was not a partner of the firm. But it is said that sub-section (5) of Section 30 of the Partnership Act made all the difference in the case. Under that sub-section the quondam minor at any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, may give public notice that he has elected to become or that he has elected not to become a partner in the firm and such notice shall determine his position as regards the firm. If he failed to give such a notice, he would become a partner in the said firm after the expiry of the said period of six months. Under sub-section (7) thereof where such person becomes a partner, his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership and his share in the property and profits of the firm shall be the share to which he was entitled as a minor. Under the said two sub-sections, if during the continuance of the partnership, a person, who was admitted at the time when he was a minor to the benefits of the partnership, did not within six months of his attaining majority elect not to become a partner, he would become a partner after the expiry of the said period and thereafter his rights and liabilities would be the same as those of the other partners as from the date he was admitted to the partnership. It would follow from this that the said minor would thereafter be liable to the debts of the firm and could be adjudicated insolvent for the acts of insolvency committed by the partners. But in the present case the partnership was dissolved before the first respondent became a major; from the date of the dissolution of the partnership, the firm ceased to exist, though under Section 45 of the Act, the partners continued to be liable as such to third parties for the acts done by any of them which would have been the acts of the firm if done before the dissolution until public notice was given of the dissolution. Section 45 *proprio vigore* applies only to partners of the firm. When the partnership itself was dissolved before the first respondent became a major, it

is legally impossible to hold that he had become a partner of the dissolved firm by reason of his inaction after he became a major within the time prescribed under Section 30(5) of the Partnership Act. Section 30 of the said Act presupposes the existence of a partnership. Sub-sections (1), (2) and (3) thereof describe the rights and liabilities of a minor admitted to the benefits of partnership in respect of acts committed by the partners; sub-section (4) thereof imposes a disability on the minor to sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm. This sub-section also assumes the existence of a firm from which the minor seeks to sever his connection by filing a suit. It is implicit in the terms of sub-section (5) of Section 30 of the Partnership Act that the partnership is in existence. A minor after attaining majority cannot elect to become a partner of a firm which ceased to exist. The notice issued by him also determines his position as regards the firm. Sub-section (7) which describes the rights and liabilities of a person who exercises his option under sub-section (5) to become a partner also indicates that he is inducted from that date as a partner of an existing firm with co-equal rights and liabilities along with other partners. The entire scheme of Section 30 of the Partnership Act posits the existence of a firm and negatives any theory of its application to a stage when the firm ceased to exist. One cannot become or remain a partner of a firm that does not exist.

6. It is common case that the first respondent became a major only after the firm was dissolved. Section 30 of the Partnership Act, therefore, does not apply to him. He is not a partner of the firm and, therefore, he cannot be adjudicated insolvent for the acts of insolvency committed by Respondents 2 and 3, the partners of the firm. The order of the High Court is correct. In the result, the appeal fails and is dismissed with costs.

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Kishan Gopal v. *Suraj Mal*

AIR 1964 Raj. 218

I. N. MODI J. - This is a miscellaneous appeal by Kishan Gopal and four others against an order of adjudication passed by the District Judge, Kotah, dated the 20th August, 1960 in an insolvency matter, and raised an interesting question of law as to whether all the members of a joint Hindu trading family can be adjudicated as insolvents irrespective of the consideration whether their liability to discharge the family debts is personal or not.

(2) The material facts may be shortly stated as follows: Appellants Nos. 1 to 3 are the sons of one Bhanwarlal, and the latter's remaining son Kunwar Lal has been impleaded as respondent No. 18 in this appeal. Appellants Nos. 4 and 5 are the sons of Kunwar Lal Bhawar Lal died during the pendency of this litigation in the trial Court. Respondent Surajmal and certain other moved in application against the appellants and Kunwar Lal and Bhanwarlal in the Court. Of the District judge Kotah alleging that the latter carried on a joint Hindu family business in the name of M/s. Ganeshram Bhawarlal in the town of Kotah, that the said Kunwar Lal was the managing member thereof that they were indebted to the respondents and cartain other creditors, the total indebtedness amounting to Rs. 1,85,000/- that they were unable to pay their debts and had committed certain acts of insolvency which were set forth in paragraph 4 of the application, and consequently, they prayed that the appellants here and Kunwar Lal and Bhanwarlal, be adjudicated as insolvents Among certain alleged acts of insolvency reference may be made to the allegation that the debtors finding themselves unable to pay their debts and in order to make a settlement with their creditors, entered into a so-called composition deed (Ex. 4) on 8th June, 1956, by which they agreed to hand over to a board of trustees all the family properties which were set out in a schedule annexed to the deed and it was further agreed between the parties thereto that the said trustees would collect all the assets due to the joint family and distribute them among the various creditors in complete satisfaction of their debts and the latter would so accept them. It was, however, alleged that this arrangement fell through and was not given effect to by the debtors.

(3) This application was opposed on behalf of the debtors and the principal contention raised was that there were two shops of the name Ganeshram Bhanwarlal one of which was situate in mohalla Nayapura in the town of Kotah and respondent Bhanwarlal was the sole proprietor of that business while the other shop was situate in mohalla Rampura and respondent Kanwar Lal was its sole proprietor, and that the remaining members of the family had no connection with the family debts. It was also contended that the debtors had not committed any act of insolvency and that the composition deed referred to above had been procured from them by coercion. The learned District Judge gave his findings on all the aforesaid points raised on behalf of the appellants adversely to them and passed his order dated the 20th of August, 1960, allowing the application of the respondent-creditors and adjudicated the appellants and Kanwar Lal as insolvents. So far as Bhanwarlal was concerned, as he had died during the pendency of the proceedings before the trial Court, no order was passed against him. The learned judge also appointed a Receiver for collecting the entire assets of the insolvents.

(4) The present appeal has been filed against this order, and the main contention raised before us is that the learned judge below had fallen into an error of law in declaring the appellants an insolvents. The principal ground which has been raised before us in this connection is that the leaned Judge had not come to any finding as to the personal liability of the appellants to discharge the various family debts in question, and consequently his order adjudicating them as insolvents could not be sustained in law.

(5) At the very outset we should like to point out that this question does not appear to have been raised in so many words before the Court below and, therefore, the learned Judge does not seem to have addressed himself to this aspect of the case. The question, however, is one which, in our opinion, goes to the root of the matter so far as the adjudication of the appellants is concerned, and therefor, we have thought it fit to allow it to be raised before us in the present appeal.

(6) Now, Section 7 of the Provincial Insolvency Act, 1920, lays down that subject to the conditions specified in this Act, a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Courts may on such petition make an order adjudicating him an insolvent. The next question that arises is what is the precise connotation of the expression ''debtor'' and whether a joint Hindu trading family can fall within the ambit of the term. Unfortunately, no precise definition of the expression ''debt'' or ''debtor'' is to be found in the Insolvency Act, and all that is to be found in Section 2 (1) (a) of the Insolvency Act is that the expression ''debt'' includes a judgment-debt, and ''debtor'' includes a judgment-debtor. It has, however, been held in a series of judicial decisions that for purposes of the Insolvency Act nobody is a debtor unless he is personally liable for the debt; or, in other words, whether his separate or self-acquired property can be sold out to satisfy the debt; for if that cannot be done, then, the necessary foundation for adjudication would be lacking. Thus it was held in ***Nagasubramania Mudali* v. *Narasimhachariar*** [AIR 1927 Mad. 922], that where a Hindu had incurred certain liabilities and died, and his son succeeded to the assets of his father, and the petitioner creditor had obtained a decree against the son as representing his father and applied to have him adjudicated as insolvent, the debt was not personally enforceable, and so the son could not be adjudicated an insolvent. In coming to this conclusion, reliance was placed on an earlier decision of the same High Court in the ***Official Assignee of Madras* v. *Palaniappa Chetty,*** [AIR 1919 Mad. 690]. In that case a Hindu father carried on a trade and his son took an active part in the business both while he was a minor and after he became a major, and the question arose whether the son was liable to be adjudicated an insolvent in respect of the debts incurred in the course of the trade while he was a minor. The test employed to decide this question was laid down to be whether the son was personally liable, and it was held that if he was so liable be could be adjudicated. It may be pointed out that some of the Judges who decided the case took the view that the son was personally liable, while certain others were of the view that he was not; but notwithstanding that all the Judges were agreed in the view that if the debts were not personally enforceable, could not be adjudicated an insolvent.

(7) Again, in ***N. C. Krishan Ayyar* v. *Pierce Leslie and Co.*** [AIR 1936 Mad 64], the question arose whether certain respondents other than the manager of a joint Hindu family business were rightly adjudicated as insolvents by the Insolvency Court. The same test to

which we have referred above was relied upon, and it was laid down that an act of insolvency, to serve as the basis of and adjudication upon a creditor's petition, must be an act committed by his debtor, and unless there is a personal liability in respect of the debt, there is no such relation of debtor as will serve to support an order of adjudication and as it was found that there was no sufficient evidence to hold that the other coparceners were in reality parties to the debts, or that they had subsequently ratified the same, or they could otherwise be treated as parties to the contract they were not personally liable to satisfy the debts incrust in family business, and consequently their adjudication was set aside.

(8) Again, in ***Chennana Gowd* v. *Official Receiver, Bellary*** [AIR 1940 Mad 241], it was laid down that in a joint Hindu family business those members who do not partake in the direction of a joint family business will not be personally liable for the debts of those members who actually conduct the business, and that only those members would be personally liable who are in control and management of it or who have acquiesned in the course of the business in which the particular contract was entered into, so as to warrant their being treated as parties to the contract. It was therefore, held that where a manager of an undivided family business commies an act of insolvency, the other coparceners cannot be deemed to have committed that act.

(9) Reference may also be made to ***V. R. C. T. V. R. Chidambaram Chettyar* v. *Mutaya Chettyar*** [AIR 1936 Rang. 160], which throws a flood of light on the position of a joint Hindu family as contradistinguished from an ordinary partnership firm in this connection. Put in a nutshell, that difference is that while a partnership firm arises from contract, a joint Hindu family business arises from status. Thus the interest of partners in a firm, property so-called, is determined by contract, while the rights and obligations of coparceners in a joint Hindu family business are not governed by any contract into which they might have entered as such, but by the personal law to which they are subject. Again, a partnership is ordinarily dissolved by the death of a partner, but the death of a member of a joint Hindu family cannot dissolve a joint Hindu family business and the result of such an event would be the an accession is made to the share of the surviving members. These are some but, by no means all the characteristics, in which a partnership differs from a Hindu joint family which owns and carries on a business, but they are enough to show how inapposite and misleading it would be to apply the term ''partnership'' or ''firm'' to the relations inter se of the members of a joint Hindu family which owns and careers on a family business.

(10) From what we have discussed above, the following concussions clearly emerge : first, that a joint Hindu family as such as contra distinguished form a partnership firm, cannot be adjudicated insolvent and it is the individual members thereof who could be so declared second that in order that members of a joint Hindu trading family other than the managing member may be lawfully adjudicated as insolvent it must be proved not merely that the debts are owned by the family but that such other members have actively participated in the business of the family by actual conduct or otherwise so that they may be held liable to personally satisfy the debit; and therefore, where these conditions are not satisfied it cannot but follow that the order adjudicating the members of such a family other than the managing member could not be sustain in law. We hold accordingly.

(11) How do these principle apply to the case before us? As already stated, this point was not specifically raised before the learned Insolvency Judge, and consequently we are inclined to think that there is extremely insufficient material on the record of the case to hold whether the appellants' liability to discharge the debts of the family, with which we are concerned, was really personal. The first three of these appellants are the. The first three of these appellants are the sons of Bhanwarlal and the remaining two are the sons of Kanwar Lal. So far as Kanwar Lal's own liability is concerned, there is ample material on this record to show that he was the karta of this joint Hindu trading family business and there can therefor be no doubt as to his personal liability in the matter. But for the reason with we have already stated, the same cannot be predicated so far as the appellants are concerned. In this view of the matter, we have no alternative but to hold that the order of adjudication, so far as the appellants are concerned, cannot be sustained no the material which exist on the record. In order, however, to do complete just between the parties we think that the proper course to adopt under the circumstances would be to frame a specific issue on the point of their personal liability and to remit it to the trial Court for a decision. That issue would be this:-

> "Whether the liability of the appellants Kishan Gopal Ram Pal, Ram Kishan, Badri Lal and Chanda Lal to satisfy the debts of the family business conducted in the name of Ganeshram Bhanwarlal is personal?"

If the learned Judge comes to the concussion that the is personal, we have no doubt that these persons could also be adjudicated as insolvents. But, if he comes to a contrary conclusion, then they could not be so adjudicated.

(12) Before this issue can be properly decide we think that opportunity shoud be allowed to both parties to lead evidence on it. The contesting respondents will lead their evidence first and thereafter the appellants will lead their rebuttal evidence. The learned Judge will then hear arguments and dispose of the case a fresh, so far as the appellants are concerned, in the light of the observations made above.

(13) In the result, we allow this appeal, set aside the order of adjudication of the learned District Judge so far as the appellants are concerned and send the case back to him for a fresh decision on the lines indicated above.

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Official Assignee, High Court v. *Haradagiri Basavanna Gowd*

1963 Supp (1) SCR 809 : AIR 1963 SC 754

P. B. GAJENDRAGADKAR, J. - This appeal by special leave arises out of insolvency proceedings taken against the firm of T.A. Doshi, Bombay (hereinafter called "the firm") by its creditors on the original side of the Bombay High Court, as well as in the District Court, Bellary. The orders of adjudication passed against the said firm by the two courts have led to some avoidable complications and delay, with the result that the claim made by the respondents in respect of a portion of the property of the insolvent before the District Court at Bellary still remains to be tried, though the insolvency orders were passed as early as 1950.

2. It appears that on January 25, 1950 an application was presented (IP No. 2 of 1950) in the District Court, Bellary, by some of the creditors of the firm in for adjudicating the firm as insolvent, and on December 13, 1950, an order of adjudication was passed. Pending the adjudication proceedings, the District Court appointed the Official Receiver as interim Receiver at the instance of the petitioning creditors The Receiver was authorised to take possession of certain goods alleged to belong to the insolvent which were then in transit to Bombay. Accordingly, the Receiver took possession of the said goods and under the orders of the court, disposed of them. The sale-proceeds were then deposited in court. Thereupon, the respondents moved the District Court and claimed that they were entitled to a part of the money deposited by the Official Receiver, because the railway receipt in respect of the goods which had been sold by the Receiver had been made over to them by the insolvent for consideration. On this allegation, they prayed that as an interim measure, the sale proceeds should be paid over to them, because they had borrowed money from a bank on the security of the railway receipt in question and since the goods had been taken over by the Receiver, the bank was demanding immediate repayment of the loan. This application was allowed by the court and the respondents were permitted to withdraw the amount on giving security and an undertaking to re-deposit the amount in court with interest @ 6% per annum when called upon to do so. In accordance with this order, the respondents withdrew the money on April 6, 1950. The claim made by the respondents in this way still remains to be tried though they withdrew the amount as far back as 6-4-50.

3. Whilst the insolvency proceedings before the District Court had proceeded in this manner, similar proceedings had already been taken against the firm by some other creditors on the original side of the Bombay High Court on April 14, 1950, (IP No. *52* of 1950). On this application, an adjudication order was passed on April 17, 1950. As a result of this order of adjudication all the properties of the insolvent vested in the Official Assignee of Bombay. The Official Assignee then moved the District Court at Bellary (IA No. 183 of 1950), and prayed that insolvency proceedings pending against the firm in that court should be stayed and that all the assets and books of account belonging to the insolvent should be transferred to Bombay. To this application, the respondents were made parties.

4. On December 13, 1950, whilst making an order of adjudication, the District Court passed an order on the application made before it by the Official Assignee of Bombay. It directed its Official Receiver to move the Bombay High Court to annul the adjudication order made by it on April 17, 1950. It observed that when such an application is made before the

Bombay High Court, the said Court will consider all the relevant facts and circumstances and decide whether it would be convenient for all concerned to allow the assets and effects of the insolvent to be administered at Bellary or at Bombay. Having made this order, the District Court instructed the Official Receiver not to part with any portion of the assets and effects of the insolvent until he moved the Bombay High Court and final orders were passed on his application. It, however, added that if the High Court decides that the assets and effects of the insolvent should be administered from Bombay, all the assets, documents and account books belonging to the insolvent will be handed over to the Official Assignee at Bombay. Pending the final decision of the application to be made by the Official Receiver, status quo was allowed to be maintained. This order was not challenged by the respondents by preferring an appeal against it.

5. Though the District Court had directed the Official Receiver to move the Bombay High Court, no action was taken by him for a long time; and so, the Official Assignee had to file another application before the District Court (IA No. 171 of 1951) on October 15, 1951. By this application, the Official Assignee brought it to the notice of the court that the Official Receiver had taken no action in accordance with the orders already passed by the court and so it was necessary in the interests of justice that the court should direct the respondents to deposit all the amounts drawn by them on furnishing security and to transfer the said sums and other sums in deposit in court and all the assets, moveables and the books of account of the insolvent's firm together with the file of the Insolvency Case No. I.P. 52/1950 to the Bombay High Court. It was alleged that unless these steps were taken, the estate would suffer irreparable loss and injury.

6. Meanwhile, the Official Receiver moved the Bombay High Court for annulment of the adjudication order already passed by it. The High Court declined to annul its adjudication orders and directed the continuance of the insolvency proceedings before it because it took the view that the estate of the insolvent could be administered more conveniently in Bombay than in Bellary.

7. When the application made by the Official Assignee (No. 171/1951) came to be heard by the District Court, it was duly apprised of the order passed by the Bombay High Court on the application made by the Official Receiver. Having regard to the fact that the Bombay High Court had declined to annul its adjudication order, the District Court took the view that the application made by the Official Assignee should be allowed. It, therefore, directed the Official Receiver to transmit all the accounts and deposits lying in court and called upon the respondents to refund the amounts drawn by them on furnishing security with interest @ 6% per annum, so that the same could as well be transferred to Bombay.

8. This order was challenged by the respondents by preferring an appeal before the High Court of Andhra Pradesh. The High Court has allowed the appeal. It has held that the application made by the Official Assignee did not satisfy the requirements of Section 77 of the Provincial Insolvency Act and that, on the whole, it would be more convenient that the estate of the insolvent should be administered by the District Court at Kurnool which had been clothed with jurisdiction to try the said proceedings as a result of the reorganisation of the States. It is against this decision of the High Court that the Official Assignee (hereinafter called "the appellant" has come to this Court.

9. The first question which calls for our decision in this appeal is: in whom does the property of the insolvent vest? For deciding this question: the relevant provisions of the Provincial Insolvency Act and the Presidency Towns Insolvency Act have to be considered. Section 17 of the Presidency Act provides, inter alia, that on the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the Official Assignee and shall become divisible among his creditors Under Section 51 of the said Act it is provided, inter alia, that the insolvency of a debtor shall be deemed to have relation back to, and to commence at, (*a*) the time of the commission of the act of insolvency on which an order of adjudication is made against him, or (*b*) if the insolvent is proved to have committed more acts of insolvency than one, the time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition. It is thus clear that when an adjudication order is made under Section 17, it relates back to the date specified by Section 51. As a result of the combined operation of the said two sections, the insolvency under the Presidency Act commences on the commission of the act of insolvency and it is on that date that the property of the insolvent vests in the Official Assignee. Section 51 clearly shows that the insolvency is deemed to commence from the moment when the debtor committed the earliest act of insolvency which is proved to have been committed within three months before the presentation of the petition on which the order of adjudication is made. This petition can be made either by the debtor himself or by any of his creditors This position about the effect of the doctrine of “Relation back” is not in dispute. Applying this principle, it would follow that the adjudication order passed by the Bombay High Court on April 17, 1950, on the insolvency petition filed before it goes back not only to the date on which the said petition was presented viz April 14, 1950, but to the earliest act of insolvency within three months prior to the said presentation which is March 14, 1950. In other words, the adjudication order passed by the Bombay High Court relates back to March 14, 1950.

10. Let us now exercise the effect of the order of adjudication passed by the District Court at Bellary. Section 28(2) of the Provincial Insolvency Act provides, *inter alia*, 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 as hereinafter provided, and shall become divisible among the creditors This corresponds to section l7 of the Presidency Act. Section 28(7) of the Provincial Act which provides for relation back of the adjudication order, lays down that an order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made. Unlike Section 51 of the Presidency Act which relates back the adjudication order to the earliest act of insolvency within three months before the presentation of the insolvency petition, Section 28(7) of the Provincial Act relates back the adjudication order to the date when the petition was presented; and that means that the order of adjudication passed by the District Court on December 13, 1950, will relate back to January 25, 1950 when the petition was presented in the said Court. This position also is not in dispute.

11. The question which then arises is in whom does the insolvent’s estate vest? Does it vest in the Official Assignee by reason of the fact that the order of adjudication was made by the Bombay High Court before the District Court made a similar order, or does it vest in the

Official Receiver of the District Court because the adjudication order passed by the District Court relates back to a date earlier than the date to which the Bombay High Court's adjudication order relates? In our opinion, the property of the insolvent vests in the Official Assignee by virtue of the operation of section 17 of the Presidency Act. Section 17 provides for the vesting of the property on the making of the order of adjudication, and so, when the District Court at Bellary passed an adjudication order in the insolvency proceedings pending before it, Section 28(2) could not in law operate in respect of the insolvent's property because the said property had by virtue of the statutory provisions contained in section 17 of the Presidency Act already vested in the Official Assignee. The doctrine of relating back on which Section 28(7) of the Provincial Act and Section 51 of the Presidency Act are based, could have no application in the present case because the vesting in the Official Assignee is the result of a statutory provision; and so, in the absence of any provision in the Provincial Act for the divesting of the property which has already vested in the Official Assignee, it cannot be said that the doctrine of relating back has that effect. The object of providing for the vesting of the insolvent's property in the court officer obviously is to protect the said property in the interests of the creditors of the insolvent and to facilitate its fair and just administration. If for achieving that object by operation of an adjudication order passed by the Bombay High Court in exercise of its jurisdiction under Section 17 the said property has vested in the Official Assignee, there would be no purpose in providing that the said property should be divested from the Official Assignee and vested in the Official Receiver of the District Court.

12. In a case where adjudication orders are made by two different courts, the procedure to be followed may depend upon considerations of convenience, fair play and justice; but there is no justification for the argument that because Section 28(7) takes the adjudication order of the District Court to an earlier date, the property which has vested in the Official Assignee should be divested and should be deemed to be vested in the Official Receiver. The reasonable way to reconcile Section 28(2) read with Section 28(7) of the Provincial Act with Sections 17 and 51 of the Presidency Act is to hold that the doctrine of relation back prescribed by Section 28(7) has no application to cases where the insolvents' property has already vested in the Official Assignee. Therefore, we must hold that the property of the firm has validly vested in the Official Assignee.

13. A similar question fell to be considered by the Madras High Court in ***Official Assignee of Madras* v. *Official Assignee of Rangoon by his Agent Subramania Aiyar*** [ILR 42 Mad 121]. Wallis, C.J. who delivered the judgment of the court held that where there are successive adjudications in insolvency by two courts, all the property of the insolvent vests in the Official Assignee appointed by the court in which the prior adjudication was made and it will not be divested from him by the subsequent adjudication of the other court, even if the later adjudication be based on acts of insolvency committed earlier in date than those upon which the prior adjudication was made. It is true that in that case both the competing orders of adjudication had been passed by the High Courts in proceedings which were governed by the provisions of the Presidency Act. But the principle which was enunciated by Wallis, C.J. in dealing with that case would apply as much to the present case where the competing adjudication orders have been passed under the provision of the Presidency and the Provincial Acts respectively. "The provision in Section 17", observed Wallis, C.J., "that on the making

of an order of adjudication the property shall vest in the Official Assignee is express, and there is no provision in the Act divesting the property so vested in that Official Assignee and transferring it to another Official Assignee under a later adjudication" (p. 125). Section 51 like Section 28(7) is really intended to enable the Official Assignee or the Official Receiver to recover property from third parties and it is with that object that the said provisions prescribe the doctrine of relation back. The said doctrine is not intended to divest the property which has already vested in the Official Assignee by virtue of an order of adjudication and vesting it in another Official Assignee or Official Receiver. As Dicey has observed, the property to be vested in the court officer under the insolvency law must be in strictness property of the bankrupt. Property which once belonged to the bankrupt, if it has before the commencement of the bankruptcy become already vested in some other person, e.g., the trustee under a Scottish bankruptcy, is not the property of the bankrupt, and does not vest in the trustee under the English bankruptcy". Therefore, in dealing with the present dispute, we must proceed on the basis that the property of the firm has vested in the Official Assignee at Bombay and the Bombay High Court is entitled to deal with all matters arising in respect of the insolvency of the firm.

14. The High Court of Andhra Pradesh has held that the application made by the Official Assignee does not meet the requirements of Section 77 of the Provincial Act; and so, it has set aside the order passed by the District Court directing the transfer of the assets and account books to Bombay. Section 77 of the said Act lays down that courts should be auxiliary to each other, and it provides that all courts having jurisdiction in insolvency and the officers of such courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of insolvency; and it adds that an order of a court seeking aid with a request to another of the said courts shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either of such Courts could exercise in regard to similar matters within their respective jurisdictions. Substantially, the same provision is contained in Section 126 of the Presidency Act. According to the High Court, an application made by the Official Assignee cannot be said to be a request made by the Bombay High Court to the District Court at Bellary, and unless a request is made as required by Section 77 of the Provincial Act, the Bellary Court should not have acted upon the application made by the Official Assignee. In our opinion, this view is substantially correct insofar as the construction of Section 77 is concerned. Section 77 lays down the procedure whereby one court can make a request to another court, and in that behalf it provides that considerations of decorum and courtesy require that the request should be made by the court itself and not by its officeRs Therefore, if the Bombay High Court had to make a request to the court at Bellary under Section 77, it would have been necessary for the said High Court to make an order in that behalf and follow it up by a letter of request addressed to the District Court at Bellary.

15. The difficulty in accepting the conclusion of the High Court that the District Court at Bellary should not have allowed the Official Assignee's application however arises from the fact that the said application does not purport to have been made and is, in fact, and, in law, not made under Section 77. It will be recalled that the order passed by the District Court at Bellary on December 13, 1950 calling upon the Official Receiver to move the Bombay High Court for annulment of its adjudication order had not been complied with by the said

Receiver, and so, the principal object of the Official Assignee in making the subsequent application was to invite the attention of the court to the failure of its officer to comply with the order already passed and to request the court etc. transfer the assets and books of account of the firm to Bombay. The Official Assignee, in substance, contended that since the earlier order of the court had not been complied with, the last operative portion of the order should be enforced and transfer made as requested by him. We have already noticed that meanwhile the Official Receiver moved the Bombay High Court without success, and before the District Court finally dealt with the Official Assignee's application, the said earlier order became fully operative. Therefore, the order passed by the District Court directing the transfer of the assets and account books of the firm to Bombay, was, in a sense, a corollary to the earlier order passed by it on December 13, 1950. That being the nature of the proceedings taken by the Official Assignee before the District Court, it is inappropriate to hold that Section 77 of the Provincial Act came into play and it had not been complied with.

16. Dealing with this aspect of the matter, the High Court was inclined to take the view that the earlier order was not a final order and did not amount to res judicata between the parties. In our opinion, this view is erroneous. The said order was passed in proceedings to which the respondents were parties, and so far as the District Court was concerned, it dealt with the whole of the dispute then pending between the Official Assignee and the respondents. In terms, the order had provided that if the Bombay High Court decided that the assets and effects of the insolvent should be administered from Bombay, the said assets and account books should be handed over to the Official Assignee at Bombay, and so, there can be no doubt that the said order was complete and final. In view of the subsequent events, the said order became effective and the Official Assignee was entitled to request the District Court to act upon it and send the assets and account books and documents to Bombay. We must accordingly hold that the High Court was in error in reversing the order of the District Court and directing instead that the insolvency proceedings insofar as they related, to the dispute between the Official Assignee and the respondents should be tried at Kurnool. It would be noticed that when the Official Assignee moved the District Court by his second application, he was really claiming that the assets of the insolvent should be transferred to him because they had vested in him already, and he wanted that the claim made by the respondents has to be tried between him and them and that can be done by the Bombay High Court which had passed an adjudication order under Section 17 of the Presidency Act. This aspect of the matter does not appear to have been properly placed before the High Court.

17. Mr Ram Reddy for the respondents, however, contends that though the Bombay High Court may be the principal Court entitled to deal with the insolvency proceedings against the firm, the subsidiary question raised by the respondents can nevertheless be tried by the District Court at Bellary. This argument is based mainly on grounds of convenience of parties. We do not propose to express any opinion on this point in the present appeal. We are satisfied that the assets which have been ordered by the District Court to be transferred to Bombay include the amounts allowed to be withdrawn by the respondents on conditions imposed by the District Court in that behalf. If the respondents desire that their claim to the said amount should be tried by the Bellary Court on grounds of convenience, it is open to them to make an application to the Bombay High Court in that behalf. The entire insolvency

proceedings against the firm must be tried by the Bombay High Court. It would, however, open to the Bombay High Court to allow the dispute between the respondents and the Official Assignee to be tried by the Bellary Court if it came to the conclusion that it would be convenient, fair and just to adopt such a course. Therefore, we will not direct the respondents to re-deposit the amount in the Bellary Court with interest accrued due because we propose to allow the respondents liberty to make an application in that behalf to the Bombay High Court within two months from today. If the Bombay High Court accepts their plea and orders that the dispute between the respondents and the Official Assignee should be tried at Bellary, the said High Court may also decide whether the amount alrealy withdrawn by the respondents should be re-deposited before the said dispute is disposed of, or only after it is decided against them. That is a matter which would be in the discretion of the Bombay High Court. If, however, the respondents do not make an application to the Bombay High Court within two months, they will have to redeposit the entire amount in Bellary Court and the said Court will thereupon transfer the said amount to the Bombay High Court to be dealt with in accordance with the provisions of the insolvency law. We ought to add that Mr Ram Reddy has conceded, and we think, rightly, that if the Bombay High Court allows the matter in dispute between the respondents and the Official Assignee to be tried in the District Court, it should be so tried not in the District Court of Kurnool but in the District Court of Bellary.

18. In the result, the appeal is allowed, the order passed by the High Court is set aside and that of the District Court restored with the modification in respect of the amount withdrawn by the respondents, as indicated above.

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Patel Jeshbhai Revendas v. *Patel Narsinbhai Girdharbhai*

AIR 1968 Guj. 101

N.G. SHELAT, J. - The suit from which this second appeal arises was instituted by the plaintiffs-appellants in the Court of the Civil Judge (J.D.) at Anand for recovering possession of the suit filled bearing survey No. 1937/1 admeasuring 1 acre and 15-1/4 gunthas situated in the sim of Sarasa after redeeming the same on payment of the amount due under the mortgage deed dated 1st November 1925 passed in favour of the defendant by on Parshottam and for costs of the suit together with mesne profits.

(5) Before we actually consider the points raised before this Court, it is essential to set out certain other and undisputed facts in this case. Parshottam Raghnath held certain properties in the then State of Baroda and had also a portion of land admeasuring 1 acre and 15-1/4 gunthas said to be a part of S.No. 1937 situated in the limits of the town of Sarsa in the then British Territory. He was a resident of Baroda. Since he was unable to pay his debts, he had filed insolvency Application No. 1/33-34 in the district Court of Baroda under the provisions of the Law of insolvency prevailing in the then State of Baroda. He was adjudicated an insolvent by the Court and one Mr. R.A.Chiplunkar was appointed a receiver. The receiver had thereupon administered the estate of insolvent. The amount realised by sale of properties etc. came to Rs. 1969-12-0 as against the total amount of the creditors of Rs. 3551-14-6. After deducting the expenses the creditors got 46% of their claims before the Insolvency Court. While dealing with the properties of the insolvent the receiver tried to take certain steps for realizing the amount out of the property comprised in the present suit which was situated at Sarsa within the British Territory. It further appears that some of the creditors had presented even an application Ex. 51 for having right of the equity of redemption of the insolvent in the Sarsa property being sold and the amount if realised, be taken for the distribution to the creditors that application does not appear to have been prosecuted any further and the Court passed an order saying that nothing is require to be done in that respect. That order is dated 25-6-36. Then we find from Ex. 52 the report of the receiver that the attempts were made by him for disposing of the property or equity of redemption of the insolvent in respect of that property, but no one was able to offer any amount more than the mortgage amount due on that property to the defendant. He also felt that any expenditure incurred on obtaining the transfer deed in respect of that property from the insolvent would be an unnecessary burden on the plaintiffs themselves as no advantage is likely to accrue out of that right of the insolvent in that property. On those grounds he solicited the orders of the Court and in that respect the learned Judge by his order dated 22-8-36 said that nothing is necessary to be done in respect of that Sarsa (sic) upon the final dividend was awarded to the creditors on the basis of the amount realised and at last as per the report Ex. 53 the insolvency proceedings appear to have come to an end. Before that, the insolvent was given an absolute discharge under the provisions of the Baroda Insolvency Act. In fact even the defendant in his evidence at Ex. 49 has admitted that the property was then worth Rs. 500 to Rs. 600 and none was out to offer or give more than his mortgage amount. In other words, the right of the insolvent in this property was not considered to be of any benefit to the creditors and since it was not likely to fetch any amount moré than the amount that was required to be paid to the mortgagee in respect of that

property, that was left off by the receiver and that too under the orders of the Court. It is the right of the equity of redemption in this property that the insolvent had chosen to transfer by a deed Ex. 46 dated 23rd July 1941 to one Bhikhabhai Zaverbhai for a sum of Rs. 1500. That such a right of equity of redemption as it is called in the property is transferable and such a right passes on to the transferee is not in dispute. That Bhikhabhai then sold his right or interest in that property to the plaintiffs for a sum of Rs. 1900 under a deed Ex. 47 dated 8th March 1943. It is that way that the plaintiffs have filed the present suit for redemption of that property which was mortgaged with the defendant by the original owner, namely, Parshottam Raghnath. It was mortgaged by him with the defendant as per Ex. 24 for a sum of Rs. 700 on 1-11-1925. The point that arises to be considered would be as to the effect arising out of those insolvency proceedings taken out by Parshottam himself in the Baroda Court vis-à-vis the property in suit which was situated then in a foreign territory such as Sarsa in British India.

(6) The points raised by Mr. Amin, the learned advocate for the appellants are as to whether the suit property which was situated in the foreign State vested in the insolvency Court or its receiver appointed in the case in the insolvency petition filed by Parshottam Raghnath in the Court of Baroda. According to him, much though the property of the insolvent vests in the receiver no sooner an order of adjudication is passed against him, in so far as the property in suit was outside the territory of the then State of Baroda, it could not be affected in any manner and that, therefore, at any rate, after Parshottam was discharged as an insolvent, he became entitled to get the right of equity of redemption in the said property in any manner as he chose and that way the right in that property has validly come to the plaintiffs. He further contended that even if the property can be said to have vested in the receiver, the receiver gets no right over the property unless it was transferred to him by the insolvent by executing an authority of transfer as is required in accordance with the law prevailing in British India where the property was situated. Since no such document was obtained by the receiver till he came to be discharged by the Court in the insolvency proceedings, the property had remained unaffected by any orders passed in the insolvency proceedings and that, therefore, at any rate, after his discharge he was entitled to deal with the property in any manner he chose.

(7) The next point raised by him was that by reason of the order of discharge passed under the Baroda Insolvency Law, he became free from all debts and since this property was obviously abandoned not only by the creditors but also by the receiver under the orders of the Court and since the administration even of the insolvent's property had come to an end with the termination of the insolvency proceedings after due distribution of the debts of the creditors after the income realised from the property of the insolvent, this undisposed of property automatically reverted in the insolvent himself and that being so, he was entitled to transfer his right or interest in the property in favour of Bhikhabhai Zaverbhai who in turn was entitled to transfer his interest in favour of the plaintiffs.

(8) The counter arguments advanced by Mr. Shan in respect of the points referred to above shall be considered hereafter while dealing with the points in the order in which they have been set out. It may, however, be mentioned that the learned advocates appearing for the parties in this Court concede that the provisions of the Baroda insolvency Law are exactly similar as we have in the Provincial Insolvency Act with no doubt the difference in the

number of sections in the respective Acts. I shall, therefore, for the sake of convenience refer to the provisions of the Provincial Insolvency Act. It is also a common ground that the State of Baroda was an independent foreign State where the insolvent resided and had filed Insolvency Application No. 1/33-34. The suit property, however, was situated in the British territory viz. at Sarsa in the District of Kaira in the then Province of Bombay.

(9) In the insolvency proceedings the court had passed an order of adjudication and a receiver was also appointed for the administration of his estate. The effect of this order of adjudication as contemplated in section 28 (2) of the Provincial Insolvency Act, (hereinafter to be referred to as 'the Act') was that 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 proceedings, except with the leave of the Court and on such terms as the Court may impose. Then sub-section (4) provides that all property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver, and the provisions of sub-section (2) shall apply in respect thereof, and sub-section (7) then says that an order of adjudication shall relate back to, and take effect from the date of presentation of the petition on which it is made. It is, therefore, clear that as soon as the adjudication order is passed by the Court, the whole of the property of the insolvent would vest in the Court or in a receiver appointed by the Court and that would be with effect from the date of the application made in those proceedings. Any other property, if acquired by the insolvent after the date of an order of adjudication and before his discharge, similarly would vest in the Court or the receiver. Then such a property would become divisible amongst the creditors of that insolvent. That would have to be done by the Court or the receiver as provided in the various provisions of this Act. During the pendency of the insolvency proceedings no creditor would have any remedy against the property of the insolvent in respect of any such debt and cannot file any suit or the other legal proceeding without the leave of the Court. Now, the first part of the argument advanced by Mr. Amin was that since the suit property was situated in a foreign territory, it did not vest in the receiver appointed in the insolvency proceedings and in support thereof he referred to a case of ***Anantapadmanabhaswami* v. *Official Receiver of Secunderabad*** [AIR 1933 PC 134]. In that case an order of adjudication was made by the District Court at Secunderabad in 1928 adjudging as insolvents plaintiffs in a partition suit in the Madras High Court. The preliminary decree in the partition suit was attached in 1926 by a decree-holder against the plaintiffs in execution of his decree. The question arose as to whether the adjudication order passed by the Distict Court at Secunderabad was to be regarded as the order of a foreign Court and if so what was the effect thereof on the attachment made of the property by the Madras High Court, Secunderabad was obviously a part of the Hyderabad State and the administration of justice according to British enactments by the District Court established there did not render the orders of that Court anything but the orders of a foreign Court in relation to the Courts of British India. In other words, it was an order of a foreign Court vis-à-vis the order passed by the Madras High Court in respect of the

property attached in the execution proceedings. The observations relied upon by Mr. Amin were :

> The rule of private international law is clearly laid down in ***Galbraith* v. *Grimshaw***, (1910) AC 508 as regards movable estate, for it is settled that no adjudication orders is recognized as having the effect of vesting in the receiver any immovables in another country.

It was held in that case that the adjudication order was to be regarded as the order of a foreign Court, that it could not be recognized as having the effect of vesting in the receiver any immovable property of the insolvent and that the decree-holder was entitled to the benefit of his prior attachment. Now there arises no difficulty so far in saying that the adjudication order was one passed by the foreign Court, but the further observation that a property did not vest in the receiver may well be on the basis of English authorities and the enactments existing in England. That, however, cannot be taken as settled law in India and we have to consider as to whether any such property situated in independent State would vest in the receiver appointed in a proceeding in a foreign Court as soon as the adjudication order is passed. Besides, the question there was not as to whether the property vested in the receiver or not, but with regard to the process of Court in Madras in respect of a property situated in that territory. In this connection however, it would be convenient to refer to another case of ***Jayantilal Kashavlal* v. *Kantilal Jesingbhai*** [AIR 1955 Bom 170] relied upon by Mr. Amin to say that even if any such property were to vest, such vesting could not be in any way effective and that it could only become effective on a proper transfer deed passed by the insolvent in favour of the receiver. Now before we turn to this case, we may incidentally observe in the first place that sub-section (2) of Section 28 makes no distinction in respect of the property of insolvent whether situated in the State where he resides or elsewhere and the words used are "the whole of the property of the insolvent shall vest in the Court or in a receiver". It follows there from that it contemplates the entire property belonging to the insolvent wherever situated. It will make no difference whether the property was situated in the same State or in a foreign State. Sub-section (4) of Section 28 also relates to "all property" without making any such distinction or reservation. In this respect, Mr. S.G.Shah, the learned advocate for the respondents, referred to a case of ***Chandulal Hathichand* v. *Mulchand Ratanchand*** [ILR 50 Bom 439] where it has been clearly laid down that the property of a debtor, who has been adjudicated insolvent under the Presidency Towns Insolvency Act, 1909, vests in the Official Assignee under Section 17 wherever it may be situated, irrespective of the question whether the latter will be able to get possession of the property if it is in fact situated outside British India. Section 17 of the Presidency Towns Insolvency Act, 1909, is similar to S.28 of the Provincial Insolvency Act. It is, therefore, clear that the property of the insolvent, referred to in Section 28, sub-section (2) and (4) embraces the whole of the entire property of the insolvent wherever situated though it may or may not be possible to recover possession of any such property situated in a foreign State. The same view has been expressed in the case of AIR 1955 Bom 170, where it is observed that it cannot be disputed that the expression "the whole of the property of the insolvent" as used in sub-section (2) of Section 28 would include all properties of the insolvent wherever situate. His Lordship Justice Shah as he then was, then observed that that provisions has apparently extra-territorial operation;

but that extra-territorial operation can become effective only if its validity is recognized in the foreign State. It is on the basis of this decision that Mr. Amin contended that unless the receiver had obtained a valid transfer deed from the insolvent in respect of the property in the suit, the same having been situated in a foreign territory, the property much though may be said as in an ideal sense vesting in the receiver cannot be said to have effectively vested in him. In this case one Gajjar who was a cousin of the insolvent filed on 20-2-1946, Suit No. 118 of 1945-46 in the Court of the Subordinate Judge at Kalol for a money decree and obtained on 3-3-1946 an order for attachment before judgement of S.No. 291 and the bobbin factory standing thereon. The property attached was outside British India. Similarly the Court at Kalol was a court in the Broda State which was not a part of the British India as it then was. On 29-3-1946, a decree ex parte was passed in Gajjar's suit and the order of attachment before judgement was confirmed by the Court at Kalol. Gajjar thereafter filed a Darkhast for executing the decree and on 21-9-1946 the property attached was brought to sale and was ultimately purchased by a stranger to these proceedings. The auction-purchaser deposited in the Court at Kalol Rs. 5,200 being the amount for which he purchased the property and the amount was paid under order of the Court to Gajjar on 6-11-1946. On the other hand, on 27-2-1946 one Mohanlal Lallubhai filed Application No. 5 of 1946 in the Court of the Civil Judge (Senior Division) at Ahmedabad, in the exercise of insolvency jurisdiction, for adjudicating one Gordhandas Suthar an insolvent. On 28-2-1946 the Insolvency Court appointed an interim receiver of the estate of Gordhandas Suthar and an order of adjudication was passed on 2-10-1946 and a receiver of his property was appointed. It appears that the insolvent had certain property in British India as it then was. He was also the owner of S.No. 291 of the village of Adivad in the Baroda State, and of a factory for manufacture of bobbins standing thereon. Then the insolvent having failed to apply for discharge, the Insolvency Court at Ahmedabad annulled the adjudication by an order dated 24-4-1948, but it was directed by order of annulment that all the properties of the insolvent-debtor and in particular his half share in Pethapur property and the sale amount of Rs. 5,200 recovered by one of his creditors and cash held by him (receiver) at present are vested in the receiver. The receiver was to continue his work and after deducting his costs and remuneration and the costs of the appellant-creditor should distribute the surplus when realised among the proved creditors in the Schedule. On 17-2-1949 the receiver filed Suit No. 54 of 1949 in the Court of the Civil Judge (Senior Division) at Ahmedabad against Gajjar for a decree for Rs. 5,200 which Gajjar had received from the Kalol Court. Gajjar resisted the claim. During the pendency of the suit, Baroda State merged with the Indian Union on 1-5-1949. The trial Court held that Gajjar having failed the challenge the order vesting Rs. 5,200 in the Receiver in Insolvency. The suit was maintainable against him and that the civil Courts in India were bound to recognize the validity of the order passed by the Insolvency Court in India and to enforce the order passed by the Court. That point came to be considered by the High Court and it was observed that:

> The assumption made by the learned trial judge that a Receiver in Insolvency in whom the estate vested by order of the Court in British India was entitled to ignore proceedings competently entertained by a foreign Court in respect of immovable property of the insolvent and the order passed therein and to claim the amount received by a creditor of the insolvent by those proceedings as if the amount was the

property of the insolvent to which the receiver was entitled by reason of the order of adjudication, is in my judgment fallacious.

Then it has been observed as under:

Indisputable, the Kalol Court had jurisdiction to entertain the suit against the insolvent when filed. That Court was competent to attach the property and to sell it in enforcement of the decree passed by it.

The Kalol Court was not bound to recognize the title of the receiver even if by the law of British India, which has no operation in the Baroda State, the property had vested in the Receiver. Gajjar received the amount paid by the auction-purchaser under orders of the Court at Kalol and the operation of that order was not liable to be questioned under the extraterritorial operation of a statute which might have been under the rules of private international law respected, if steps had been taken for obtaining recognition of the title of the Receiver but which it was not obligatory upon the Court at Kalol to respect.

Then after referring to Section 28 (2) of the Provincial Insolvency Act, it is observed, as stated here above, that the extra territorial operation can become effective only if its validity is recognized in the foreign State. Then continuing the discussion in respect of private international law etc. it has been then observed that:

It need hardly be said that Legislature in one State cannot legislate in respect of land situate in a foreign State. Even if the land in a foreign State be regarded as vested on adjudication in the Receiver in Insolvency in an ideal sense, unless the law of the foreign State recognizes the vesting as a transfer of the property to the Receiver, the vesting cannot operate of confer title upon the Receiver in Insolvency and the property situate in the foreign State would continue to be liable for satisfaction of the claims against the debtor according to the law of that state and unaffected by the insolvency.

Thereafter referring to Section 28 (1) of the Act, it has been observed as under:

By Section 28 (1) Provincial Insolvency Act duty is imposed upon an insolvent to aid to the utmost of his power in the realisation of his property and the distribution of the process among his creditors. But the provisions imposes a purely personal obligation upon the insolvent which may be enforced by process of the insolvency Court to compel compliance of all acts necessary for completing the title of the receiver to property situate in a foreign territory. But the personal obligation cannot affect the jurisdiction of the Courts in the foreign State to deal with property situate in that State, nor can it compel the creditors who are not amenable to the jurisdiction of the Insolvency Court which has adjudicated the debtor an insolvent, to allow other creditors to participate in the satisfaction obtained by them by taking proceedings in a foreign State. By the rules of private international law immovable property can only be transferred in accordance with what is called lex refsitae.

Later on, it has been observed that it is clear from the observation made by the Court in the case of ***Yokohama Specie Bank Ltd.* v. *Curlender and Co.*** [AIR 1926 Cal. 898], that immovable property in a foreign country is not transferred to the Receiver in Insolvency by

operation of an Indian statute relating to insolvency. It follows there from that though in an ideal sense, having regard to sub-section (2) of Section 28 of Act, such a property situate in a foreign State would be covered by the whole of the property of the insolvent and that way can be said to have vested in the receiver appointed on adjudication of an insolvent by foreign State, the vesting cannot be said to be such as to be recognized in a foreign State, the vesting cannot be said to be such as to be recognized in a foreign territory unless a valid transfer in accordance with law of that land is made in favour of the recover. The insolvent is bound to or even can be compelled to pass any such transfer deed in respect of his right or interest in any such property situate in a foreign State so as to complete the title in the receiver to that property situate in a foreign State. When such is the effect of the adjudication order in relation to any property or right in a property situate in a foreign State, it would be difficult to say that there was an effective vesting of the right in that property in the receiver by operation of law viz. under Section 28 (2) of the Provincial Insolvency Act. The utmost that can be said is that the insolvent, as Mr. Shah put it, would be stopped from dealing with that property or even deal with that property (sic) by reason of the fact that an order of adjudication has been passed against him. Till he has obtained his discharge under the provisions of the Act, he would not be entitled to deal with that property. But the question that arises is as to whether he can deal with the property or right in the property in any manner he chooses after his having obtained on order of discharge under Section 44 of the Act. It is, however, enough to say as observed in the case just referred to above, that no title had passed in favour of the receiver in so far as that property was concerned since he had not obtained any deed to transfer from the insolvent during the pendency of insolvency proceedings in the Court. It is true that a receiver could have filed a suit for redemption or could have taken any other action permissible in law, but no such steps were also taken by him by having recourse to the remedy in the foreign territory viz. in the Court within which the suit property was situate. On that basis, after having obtained an absolute discharge under section 44 of the Act, the insolvent would be entitled to deal with the property or his right in the property as any other person can and if he did so, that transfer can not said to be invalid.

(10) The other point made out by Mr. Amin was with regard to the effect of absolute discharge given to the insolvent by the Court under Section 44 of the Act. In other words, he remains to be liable in respect of any debts referred to in sub-section (1) but he becomes free from his liability to pay all other debts which can be proved under this Act by the creditors. Now apart from making any reference to the provisions of the Act, the object with which the insolvency jurisdiction is assumed by the Court is mainly two-fold. The first is the realisation of the whole of the insolvent's property and the distribution of the amount to all his creditors. The second object is to give a complete release to the debtor from the liability to pay his debts except those referred to in sub-section (1) of Section 44 of the Act and to allow him a new start in life. For realising the first object behind the insolvency proceedings, the various provisions of law relating to the appointment of a receiver and the manner in which he has to realise the property belonging to the insolvent, the manner in which the creditors are paid and the procedure in relation to the distribution of the assets realised to the creditors, are provided. It is only when that part of the object is achieved and if some part thereof remains to be carried out which can be done later, but on that basis, the discharge is being given to the debtor under Section 44 of the Act. Now the Court has been given ample powers either to

grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvency, or with respect to his self-acquired property. Before passing any such order of discharge as contemplated under section 41 of the Act, the Court apart from hearing the application and any objections which have been raised the report of the receiver. Then by reason of Section 42 the Court is empowered to refuse to grant an absolute order of discharge under Section 41 on proof of any of the following facts, namely (a) that the insolvent assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of value equal to eight annas in the rupee on the amount of his unsecured liabilities has arisen from the circumstances for which he cannot justly be held responsible; (b) that the insolvent has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency ; (c) that the insolvent has continued to trade after knowing himself to be insolvent, and several other clauses have to be taken into account before any order of discharge is ultimately passed. It was on the basis of assets having been realised to the extent of a value equal to eight annas in the rupee and by reason of the Court being satisfied that the insolvent had not been guilty of any fraud etc. and having been certified to be a person deserving discharge by the receiver himself, that the final order of absolute discharge was given to him under section 41 of the Act. That order did not impose any conditions with regard to any property which remained to be dealt with. There was no property of any kind which had come to him after adjudication and not shown to the Court or the receiver during the pendency of the insolvency proceedings. It is, in these circumstances, that we have to consider the effect of the discharge vis-à-vis the property in question. The points made out in this respect are of two-fold character. The first is that the property or right in the property in question was not one which came to be realised after his adjudication and before his discharge and that he had not disclosed the same nor is it a case of a property which he had willfully suppressed and that latter on tried to dispose it of to his advantage after obtaining the order of discharge. The right in the property was amply known not only to the creditors in the insolvency proceedings but also to the receiver and the Court itself. On the report of the receiver submitted to the insolvency Court it appears abundantly clear that he tried to make all possible attempts to get something out of such a right of insolvent in that property but on all possible inquiries and efforts made by him, he found that no useful purpose whatever would be served by even trying to obtain a transfer deed from the insolvent so as to entitle him to file a suit for redemption in the Court within whose jurisdiction that Sarsa village was situate or for having that property sold to the advantage of the creditors. On the contrary his effort was to show that the expenses incurred in that direction would be wasted and that would be rather to the disadvantage of the creditors of the insolvent. The application presented by some of the creditors was also not prosecuted any further and the Court after having considered the effect of all the material before it found that no useful purpose will be served by taking any steps whatever in respect of that right of the insolvent in the property situate as such. The property was termed as 'useless' and not at all beneficial to the creditors. In act, as already pointed out here above from the admission of the defendant himself, that the property was then worth Rs. 500 to Rs. 600 as against the sum

of Rs. 700 due on that property under the mortgage deed taken from the insolvent. He has also stated that there was no body who offered any bid for any amount higher than the sum of Rs. 700. There was, thus, no purpose whatever in taking any steps in realising any amount by sale of the insolvent's right in that property, for, after all, the insolvency Court is supposed to look to the interest of the creditors of that insolvent and it is that way that the property came to be abandoned by the insolvency Court. The other aspect of the case is that not only by reasons of the property being useless or rather not beneficial to the creditors but that with the disposal of the insolvency petition by the Court, the administration of the estate of the insolvent came to be exhausted and there remained nothing to be done in that matter. The obvious result would be that the Court ceased to have power or jurisdiction to deal with any such property over again not only after the discharge order is passed, but after the matter is completely disposed of and the administration of the receiver having come to an end. It is by reasons of these two aspects of the matter that it was urged that after the absolute discharge obtained by the insolvent he was entitled to redeem the property in the same manner as any other free man would have been able to do under the provisions of the Transfer of Property Act.

(11) Now on this aspect of the case, we have some authorities pointed out by the learned advocates appearing on each side. The first case refereed to by Mr. Amin was of ***Sheonandan* v. *Kashi*** [AIR 1917 All 302]. In that case one Bipat was declared insolvent on the 1st of October 1910. Among his assets he had shown his mortgagee right under a certain mortgage of the year 1907. The receiver who was appointed in the insolvency proceedings considered those right worthless and after making such efforts as he thought proper to realise the insolvent's assets for the benefit of his creditor that receiver made a report to the District Judge that there were no other assets of the insolvent which, in his opinion were capable of realization. Upon this Bipat was discharged by an order of the 24th June 1913. Since that date, that is to say on the 20th October 1914 Bipat found one Kashi who was willing to pay him Rs. 500 for his right under the mortgage of 1907. The present suit was by Kashi to enforce the right. If any, acquired by her under this transfer. The trial Court disposed of this suit on the ground that Bipat after his order of discharge had nor right left under the mortgage in question. The point taken was that Bipat's right had vested in the Court or the receiver under section 16 of the Provincial Insolvency Act, III of 1907, and that the order of discharge does not operate so as to revert those right in Bipat. The learned District Judge reversed that finding and remanded the case to the first Court for trial on merit. The Division Bench of the Allahbad Higher Court before whom an appeal against that order was preferred, held that:

> The receiver having abandoned this particular item of property as worthless Bipat became entitled to deal with it after the order of discharge, and if he succeeded in getting anyone to pay something for his right, the circumstance that he was declared insolvent in 1910 and got an order of discharge in 1913 would not in itself make the transfer in favour of Kashi bad.

It was, however, pointed out by Mr. Shah, the learned advocate for the respondent, that this decision does not given any reasons for arriving at such a conclusion, and that has been so observed in the case of ***Tarak Das Dhar* v. *Santosh Kumar Mallik*** [ILR (1937) 2 Cal 386] which has laid down that the property or right therein by the insolvent even after his discharge cannot pass any good title to the purchases. He, therefore, urged that the decision of Calcutta

High Court deserves to be accepted in preference to the one in Allahbad Case relied upon by Mr. Amin for the appellants. A reference may well be made to the observations made by that distinguished and learned author, ***Sir Dinshaw Mulla***, in his lecture No. 8 of the Lectures, which he delivered as Tagore Professor of Law at Calcutta University and which were afterwards published in a book under the title of 'Law of Insolvency'. The relevant paragraph appears at page 346 of the book with the heading "property abandoned by official Assignee as worthless". They run as under:

> Where a particular item of property belonging to the insolvent e.g., a mortgage security, is abandoned by the Official Assignee or receiver as being of no value at all, and the insolvent obtains his discharge, the property belongs to the insolvent, and the sale thereof by the insolvent after his discharge will pass a good title to the purchaser.

These observations, as also the decision in the Allahabad Case above referred to were disapproved by the High Court of Calcutta, and it was held that once a particular item of property has vested in the Official Assignee by virtue of the operation of section 17 of the Presidency towns. Insolvency Act, that property cannot become revested in the insolvent without any other action on the part of the Official Assignee save an expression of opinion that the property is of no value and that he does not propose to do the property available for the creditors of the insolvent and that accordingly he is abandoning it. It was further held that the sale by the insolvent after his discharge of such property abandoned by the Official Assignee will not pass a good title to the purchaser. Now if we turn to the reasoning of his Lordship Justice Castello, what he thought was that the bare idea that immovable properties can vest or revest in any one in that kind of way is obviously directly contrary to the express provisions of the Transfer of Property Act, which make it quite clear that property of the kind with which they are now concerned, can only be transferred from one person to another by means of an appropriate instrument in writing which is subsequently registered. It is again, with respect, difficult to understand how the Official Assignee or the receiver as the case may be, will be required to pass any deed of transfer under the provisions of the Transfer of Property Act for the simple reasons that the receiver of the Official Assignee as the case may be, is to deal with the property only for a particular purpose viz. for the benefit of the creditors of the insolvent, and that again for a period viz. till that purpose, which also required the administration of any such property, is over. The Court will have to find out as to in whom the property remained either after fully paying off all the creditors or by reason of happening of any event that some property is found so useless as is not required to be dealt with under the express orders of the Court. The Official Assignee or the receiver as the case may be, became entitled to deal with the property by reason of the vesting order passed by the Court in the insolvency proceeding and the insolvent of any such property was thereby debarred from dealing therewith. It is true that insolvent may not be able to deal with the property mentioned in the insolvency application till at any rate he obtains discharge from the Court. But to say that by reasons of any such deed of transfer he can only get back his own property does not sound to be so very convincing. Whatever that be, even under section 67 of the Act, there is nothing about re-vesting of any property in an insolvent, but what is essential is that the insolvent would be entitled to get back his surplus property subject to the conditions laid down therein. The other reasons giving in the case that none of the provisions say that such a

property would re-vest in the insolvent and that, therefore, the property would continue to remain in the receiver for all time to come again to my mind does not appear to be very convincing. It may well be that even after the order of discharge given by the Court, some realisation may have to be made for which suits are filed and it wound take some time before the finality is reached. But once finality is reached in respect of an insolvency proceeding, the receiver shall be discharged and the matter disposed of by the Court unless some orders are passed by the Court which would justify one to say that the insolvent had nor right to deal with any such property. In absence of any such orders passed by the Court, for the benefit of the creditors, the property if remained undisposed of, obviously should revert back to the discharged insolvent from whom it was taken over under the provisions of Insolvency Act. In the present case absolute discharge is given to the insolvent, and insolvency proceedings have terminated and receiver discharged. The creditors have been paid up, though no doubt not fully, and in fact they had not chosen to proceed afresh for having this very property dealt with and have the right of the insolvent sold. In those circumstances, there remains the property which is found by every one concerned in an insolvency proceeding as useless and when such is the position and if the insolvent finds as we find in the Allahabad case, that someone came forward to purchase his right, the insolvent sold his right, title and interest, the transfer by a registered deed cannot be said to be invalid in law. With respect, it is difficult to agree with the decision of the Calcutta High Court referred to here above which was followed in a case of ***Vijiaranga Naidu* v. *Narayanappa*** [AIR 1946 Mad 371].

(12) There are two other cases which lend support to the view of the Allahabad Court. The first case if of ***C. D. Desikachari* v. *Official Receiver, Chingleput*** [AIR 1943 Mad. 26]. It is a decision of the Division Bench of the Madras High Court. In that case, the appellant who was adjudicated an insolvent in December 1930, came to be granted an absolute discharge in July 1932 by the Insolvency Court. The reasons for granting such an absolute discharge were two (1) because there was no malafide conduct on the part of the insolvent, and (2) because no creditor had proved his debt before the Official Receiver and therefore no one was entitled to oppose his petition for an order of absolute discharge. The property had already vested in the Official Receiver. Naturally when the order of discharge was granted, the Official Receiver had done nothing in regard to the disposal of the property as there were no creditors property before him. More than seven years later, one of the Official Receiver's creditors applied that the insolvent's property should be sold and the learned District Judge of Chingleput ordered that the property can be sold at the instance of the creditor by the Officials Receiver. When the matter went to the High Court the Division Bench observed that :

> It is clear that if such an order can be justified, it amounts to a complete frustration of the intention of the insolvency law. The whole purpose of the Insolvency Act is that proceedings in insolvency shall be dealt with as expeditiously as possible, that the creditors shall be satisfied as expeditiously as possible from the property of the insolvent, and that the insolvent shall then be free to start life again unburdened by his debts. The situation in 1932 clearly was that for whatever reason it is impossible now to say none of the creditors of the insolvent took the slightest interest in the insolvency proceedings.

That way it was said that the proceedings had come almost automatically to an end because none of the creditors took any interest in it. The contention made out before the High Court was that the receiver's creditor can proceed at any time he pleases against the insolvent's property no matter how many years he may have waited after the insolvency proceedings began before he attempted to prove his debt. To that position, they observed that no Court can possibly approve. With regard to the argument that the granting of an absolute order of discharges does not necessarily put an end to the administration of the insolvent's property, it was observed that there is nothing to prevent the Court granting an absolute order of discharge when it has been satisfied for instance, that the insolvent had placed all his property within the control of the Official Receiver so that from his - insolvent's - point of view nothing more remains to be done. Then they referred to S. 37 of the Act and observed as under:

> We think that although S.37 of the Act does not in terms apply to the circumstances of his case, the principle which is embodied in the section should apply. It is clear that when an adjudication is annualled, it is for the Court to decide whether the property should continue to vest in the Official Receiver or not. Nothing specified has been stated on this point in the order of 1932 granting an absolute order of discharge, and if there were anything to show that the Court had in mind any contemplation of the future administration of the insolvent's estate we would agree that the order could not have the effect of revesting the property in the insolvent. It is however clear that when the learned Subordinate Judge gave as one reason for his order of absolute discharge the fact that no creditor had proved his debt that means in effect that there is no chance of any administering of the insolvent's property. We cannot confirm the order of the learned District Judge passed eight years later which in effect thus cancels and nullifies the order of 1932. That in our opinion, would be a complete breach of faith on the part of the Court towards the insolvent.

Lastly they held that the administration of this particular insolvency was brought to an end by the Court's order granting the absolute order of discharge in 1932 and therefore there is no longer power in the Official Receiver to bring any of the properties of the ex-insolent to sale. The next case referred to was of ***Mutha Sarvarayuduv* v. *Vammi Kondalarayudu*** [AIR 1961 AP 219]. In this case also the Division Bench took almost a similar view while observing that

> (T)he discharge does not by itself operate to divest the Official Receiver of the insolvent's estate or to make the insolvency court functus officio. Unless there are directions in this respect in the order of discharge all that can be presumed is that the status quo was not immediately altered. However, the main object of vesting the insolvent's property in the insolvency Court or a receiver is to realise the assets and distribute the proceeds among the creditors and if an Official Receiver closes or abandons the administration and no creditor opposes such a course, the vesting order must be deemed to have worked itself out and the residue of the estate would naturally revert to the insolvent even without a specific order reverting it.

On the facts of the case it was held that the administration was eight abandoned or closed by the Official Receiver long prior to the suit and the vesting order was allowed to work itself out, and, therefore, the contention that the suit was not maintainable without impleading the

Official Receiver could not be upheld. I may incidentally refer to an observation made by Bose C.J. in the case of ***Kisan Sitaram* v. *Sitaram Tulsiram*** [AIR 1951 Nag. 241], saying that an order of adjudication denudes the insolvent of all right, title and interest to and in the property. He has then observed that "in my opinion this continues during the whole period of the insolvency." This observation has the effect of showing that whatever right, title and interest of an insolvent that came to be vested in the receiver or the Official Assignee as the case may be, continued to remain till the disposal of the insolvency proceedings. It cannot extend any further at any rate beyond the termination of those proceedings. Once a proceeding is terminated with the administration of the estate completely over, it can be said to have exhausted or, as observed in the Andhra Pradesh Case, 'worked itself out and the residue of the estate would revert to the insolvent even without a specific order reverting it. In fact having regard to the facts of the present case, with the passing of the order by the Court whereby this property was exonerated as it were, from being dealt with for the benefit of the creditors during that insolvency proceeding it can be taken as being allowed to revert back to the insolvent and more so as after his having obtained the absolute order of discharge, the administration of his estate will be over and the insolvency proceeding being completely terminated. With respect, I agree with the decisions of the Madras, Allahabad and Andhra Pardesh High Courts referred to here above, in so far as they hold that the vesting order in respect of the right over the property of the insolvent has completely exhausted with the termination of the insolvency proceedings, and that the property would, therefore, revert back to the insolvent after his having obtained the absolute order of discharge in the proceedings. Neither any transfer deed is essential to be passed in favour of the insolvent, as held by the Calcutta Case, nor any specific orders of the Court are so essential to be passed. Absence of any orders to the contrary passed by the Court, would justify one to presume that with the termination of insolvency proceedings after absolute discharge is given to the insolvent the property automatically reverts to him and nothing remains in the receiver or the Insolvency Court.

(13) It was, however, pointed out by Mr. Shah, the learned advocate for the respondent, that the right in the property would be in the nature of an undisposed of property in that it can only revert to the insolvent after his discharge provided the conditions of Section 67 to the Act are fulfilled. Reliance was placed on a case of ***Raghunath Keshava* v. *Ganesh*** [AIR 1964 SC 234]. The observations relied upon by him are as set out in paragraph 27 of the judgment:

> Therefore, on a careful consideration of the scheme of the Act and on a review of the authorities which have been cited at the bar, we are of opinion that an insolvent is entitled to get back any undisposed of property as surplus when an absolute order of discharge is made in his favour, subject always to the condition that if any of the debts provable under the Act have not been discharged before the order of discharge, the property would remain liable to discharge those debts and also meet the expenses of all proceedings taken under the Act till they are fully met. The view of the High Court that the suit is not maintainable is therefore not correct.

In this case, the question that arose before their Lordships of the Supreme Court as stated in Para 8 of the judgement itself, was whether an insolvent on whom property devolves when he is an undischarged insolvent can maintain a suit for the recovery of the property after his

absolute discharge. The decision of that depends on what effect the order of absolute discharge has on the insolvent's title to the property which devolved on him when he was still an undischarged insolvent. While considering this "narrow question", their Lordship have referred to various provisions of the Act and then observed that

> (I)if any property remains undisposed of in the shape of surplus that vests back in the insolvent, just as surplus in the shape of money would, and that the insolvent becomes entitled to get the same by reason of Section 67 of the Act but it is essential for him to fulfil and comply with the conditions set out therein namely, that there is any surplus remaining after payment to his creditors in full with interest and meeting the expenses of the proceedings taken under the Act.

On that basis, it was urged that this was an undisposed of property which the insolvent chalims as having reverted back to him, and that he can only get provided the conditions set out in Section 67 of the Act are complied with. According to Mr. Shah, the creditors are not paid in full as they are paid on the basis of eight annas in a rupee in the insolvency proceedings, and therefore since the insolvent has not so far fulfilled that condition, he cannot be held entitled to claim such property or has a right in the property so as to enable him to transfer the same to any other person. Broadly speaking, the observations made by the Supreme Court tend to suggest and in facts as observed therein that there is no specific provision with respect to undisposed of property of the insolvent and in their view it is Section 67 which tends to meet that contingency in the case, namely, the property which remains undisposed of at the time of discharge must be treated as surplus which the insolvent would be entitled to only on the condition that the pays the creditors in full with interest and meets the expenses made in the proceedings taken under the Act. While considering that aspect of the case, the Supreme Court has referred to certain types of cases in which that provision applies. The first type of cases would be where an insolvent has come into property by devolution after he became insolvent and before his discharge, and if that property which devolved on him is far in excess of his meeting the debts of his creditors, the receiver would not proceed to sell the entire property but he would only sell so much of the property as would satisfy the debts in full and meet the expenses of the proceedings in insolvency. In such a case, the rest of the property whether movable or immovable would go to the insolvent under Section 67 of the Act. That is in a way a clear case of the "surplus" of the property to which the insolvent would become entitled on the basis of its being surplus, Another type of cases referred to is where what devolves on the insolvent after the order of adjudication and before his discharge may not be easily realisable or may be a mater of dispute which may lead to litigation lasting for many years. In such a case, the receiver would be entitled to declare a final dividend if the Court is of opinion that the property which has developed on the insolvent is subject to protracted litigation and it cannot be realised without needlessly protracting the receivership. Such property would also be surplus to which the insolvent would be entitled under S.67 subject to his complying in full with the conditions set out therein. The third class of cases referred to therein is where the Court may not come to know of the property which devolves on the insolvent and grants a discharge in ignorance of such devolution, may be because the insolvent did not bring it to the notice of the Court. In such a case also in principle there will be no difficulty in holding that the property which vested in

the receiver under S.28 (4) and which remained undisposed of by him before the discharge of the insolvent would still be surplus to which the insolvent would be entitled, though he may not be permitted to make full use of it until he complies with the conditions set out therein. Then their Lordships have said that though therefore there is no specific provision in terms in S. 44 (2) with respect to the property that may remain undisposed of by the receiver or by the Court like the provisions in S.37 on an order of annulment, it seems that section 67 by necessary implication provides the answer to a case like the present. All the property, thus, as observed by their Lordships which remains undisposed of at the time of discharge must be treated as surplus to which the insolvent is entitled and the will thus get title to all such property and the vesting tin the receiver whether under section 28 (2) or Section 28 (4) would come to an end on an order of discharge subject always to the insolvent complying in full with the conditions of Section 67 and then it is observed further that

> (H)e would be entitled to undisposed of property on discharge and would be free to deal with it as any other person and, if necessary, to file a suit to recover it.

Now, in none of the three categories of cases referred to here above, the present case would fall. This is not a case in which the property had devolved or come to the insolvent subsequent to the order of adjudication and before his discharge. Nor is it a case where such property devolved on him was suppressed from being brought to the notice of the receiver or the Court and, at any rate it was not a case where the proceedings were to continue after the insolvent is discharged and the receiver is continued after the insolvent is given a discharge. The receiver has already declared the final dividend in favour of all the creditors. The present case, as we have already pointed out, is of a peculiar character. The right in the suit property was quite known not only to all the creditors but to the receiver and the insolvency Court. All of them tried to deal with the property. All of them failed to make use of any such property for the benefit of the creditors for it was found ultimately by the Court that instead of bringing any benefit to the creditors it would be a burden to them in the sense that they may have to spend for either obtaining the transfer deed or having the property sold, for, it carried a burden of Rs. 700 of mortgagee the defendant in the case. So what remained was a property which was at the date of his discharge purely a burdensome property and that burden was allowed to remain with the insolvent himself. Not only that, but the Court did not allow the insolvency proceeding to continue any further and in fact apart from the absolute discharge given to the insolvent, terminated the proceedings on the final report submitted by the receiver. The insolvency proceeding came to an end. The receiver came to be discharged. There remained therefore nothing which the insolvency Court was expected to deal with later even on any contingency that may arise. Such a case was not contemplated in any of the three cases referred to where the application of section 67 were applied to (Sic.) In the Supreme Court case the property had come to be devolved on the insolvent during the pendency of the proceedings and in any way after adjudication and before the order of discharge was passed by the Court. It was, in those circumstances, held that such a property was an undisposed of property and reverted back to the insolvent on this complying with the conditions, namely, of paying in full with interest the dues of the creditors. It is, therefore, clear that this is not such an undisposed of property as in respect of which the Supreme Court was required to deal with and in relation to which the observations have been made so as to call it a property in surplus,

and thus fall within the ambit of section 67 of the Act. In my opinion, it was a property which by implication under the orders of the Court was allowed to revert back to the insolvent without attaching any conditions thereto for the reason that it was in no way beneficial to the creditors and being of a burdensome character. The burden was consequently allowed to remain with the insolvent and if in future so late as in 1941 somebody comes forward to play him Rs. 800/- more than the amount for which he had mortgaged the same in 1925, there is no reason to thik that any such right in the receiver continued to exist after the termination of the insolvency proceeding. Nor could the insolvency Court be said to continue to have any jurisdiction over the same after the proceedings came to an end.

(14) Besides, the defendant-respondent has not in any way raised a contention about the receiver being a necessary party to this case. Nor do we find any creditors coming forward to claim any such property during all these years till the date of the suit which was filed in 1954. No creditors have chosen to take any action for pursuing this property on the ground that the said property continued to be yet of the insolvent after his full discharge and after the termination of the insolvency proceedings. I do not, therefore, think that it would come within the ambit of the Supreme Court case as undisposed of property and to which the insolvent would only become entitled under Section 67 on fulfilling the conditions set out therein. The defendant has no right to challenge the right of the insolvent original mortgagor in the property viz. of redemption, and if that were so, since such a right in the property is transferable after the insolvent is discharged and, at any rate, after the insolvency proceeding came to an end, he had every right to deal with that property in any manner as any other man would have been able to do. If, therefore, the insolvent had the right of redemption of the said property, and since he transferred the same in favour of Bhikhabhai, Bhikhabhai got the same right and interest in the said property, and he can similarly transfer the same in favour of the plaintiffs. Any such transfer cannot, therefore, be said to be invalid or contravening any of the provisions of the Insolvency Act so as to defeat the right of the plaintiffs from claiming redemption of the property in the case.

(15) Mr. Shah has then referred to a decision of ***Ramchandra Narayan Datar* v. *Nipunge*** [AIR 1924 Bom 49] and urged that if at all any person had a right to redeem the property, he would be only the insolvent and at any rate, none in his transferees. All that the case has laid down is that an assignee cannot by virtue of such assignment interfere with the administration of the estate. It is at the most an assignment of a contigent interest which can give no right to the assignee to intervene until it is ascertained whether or not there is a surplus. It is further held that an insolvent is a liberty to assign to a purchaser the prospective surplus that may remain over after his estate has been administered in insolvency. In the view that I have taken as discussed hereabove, there arises no question of any surplus and it is not that the surplus is sought to be assigned in favour of the plaintiffs, transferor by the insolvent. Nor does there arise any question of interfering with the administration of the estate. The administration of the estate has already come to an end long ago in 1936. It would be too much to say that the administration continues even thereafter till 1954 when the suit was filed. Any such point cannot at all arise.

(16) In the result, therefore, the plaintiffs are entitled to file the suit for redemption of the suit property and that the transfers in their favour are not in any way invalid or violating any

of the provisions of the Insolvency Act. The right of the insolvent in the property reverted back to him no sooner the insolvency proceedings came to be terminated by the orders of the Court, and the property by implication was allowed to revert back to the insolvent as he obtained absolute discharge and with the termination of the insolvency proceedings. The result, therefore, is that the order passed by the Court below whereby the plaintiffs, suit is dismissed is wrong and it is liable to be set aside.

(18) The appeal is allowed and the decree passed by the trial Court and the same being confirmed by the learned Assistant Judge, is set aside. The suit is remanded back to the trial Court for proceeding further in accordance with law.

* * * * *

Kala Chand Banerjee v. *Jagannath Marwari*

AIR 1927 PC 108

LORD SALVESEN - The material facts are as follows. The appellant is the Receiver of the estate of Amulya Krishna Bose, who was adjudicated an insolvent on the 21st February 1914, by the District Judge of Bankura who, by the same order, appointed a Receiver of Amulya's estate. Amulya was the son of Tara Prasann Bouse, who, in February 1913, had executed a mortgage for the sum of Rs. 40,000 in favour of the defendants over certain properties that belonged to him. He failed to pay the mortgage interest, and on the 11th January 1915, mortgagees instituted a suit for foreclosure of the mortgage. After some procedure to which it is unnecssary to refer, a Solenamah was executed by the mortgagor and mortgagees under which it was agreed that the time for payment of the mortgage debt should be extended on the undertaking of the mortgagor to pay the interest regularly every year within the month of Chaitra. Failing such payment the mortgagees were to be entitle to foreclose. This Solenamah (or deed of compromise) was filed by the mortgagees on the 6th March 1915, but before any order was made the mortgagor, Tara Prasanna Bose, died on the 7th September. On his death it is matter of admission that the properties subject to the mortgage or the equity of redemption therein devolved by inheritance on the insolvent Amulya.

By Act 3, 1907, which contains the law applicable to the facts of the case it is provided, S. 16, CL. 4, as follows:

> All such property as may be acquired by or devolve on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or Receiver and become divisible among the creditors in accordance with the provisions of sub-S. 2 CI (a).

This provision is perfectly clear. The moment the inheritance devolved on the insolvent Amulya, who was still undischarged, it vested in the Receiver already appointed, and he alone was entitled to deal with the equity of redemption. The alternative in the section applicable to vesting in the Court was no doubt inserted to provide for the case of a Receiver not being appointed at the same time as the adjudication of insolvency was made and to foreclose an argument that vesting was suspended until the actual appointment of a Receiver. The difficulty suggested by Ghose, J., is thus entirely unsubstantial. The Court only acts through a Receiver, and any estate acquired by or devolving on an insolvent is vested in him as from the date of acquisition or devolution whatever the date of the Receiver's actual appointment.

The mortgagor was of course a necessary party to the suit for foreclosure, Civil P. C., O. 34, R. 1; and, as on his death his interest devolved on the Receiver in the insolvency of Amulya Krishna Bose, the plaintiffs became entitled to continue the suit by leave of the Court against the Receiver : O. 22 R. 10. Instead of adopting this procedure, they chose to transact with the insolvent exactly on the same footing as if he were still undivested, and obtained from him a ratification of the deed of compromise. Proceeding on this as the interest stipulated had not been paid they obtained a preliminary decree against him on the 15th March 1916, and notwithstanding the subsequent in prevention of the Receiver, which

reference is subsequently made in detail a final decree was pronounced on the 31st August by which Amulya was debarred from all right to redeem the mortgaged property.

This procedure is said to be justified by the terms of S. 16 (CI. 5) of the Act already referred to, which runs as follows:

> Nothing in this section shall affect the power of any secured creditor to deal with the security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

The learned Judges of the High Court interpret this clause as inferring that the secured creditor is entitle to deal with the security as though there had been no vesting in the Court or the Receiver. Their Lordships are clearly of opinion that this construction of the clause cannot be supported. That the rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent is of course, plain, but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it, and he and not the insolvent, has the sole interest in the subject matter of the suit. To him, therefore, must be given the opportunity of redeeming the property. The contrary view would encourage collusive arrangements between the secured creditor and the insolvent and might involve the sacrifice of valuable equities of redemption which ought to be made available for the benefit of the unsecured creditors of the insolvent with whose interests the Receiver is charged. On this point their Lordships are in entire accord with the opinion of the Subordinate Judge.

The ratification by Amulya of the deed of compromise on which the decree against him proceeded was therefore a nullity, and the whole proceedings by which he was made a party to the suit were equally ineffective to bind the equity of redemption vested in the Receiver.

Counsel for the respondents was unable to adduce any argument in support of the above ground of decision of the High Court. He however, strenuously maintained that the second ground which is only expounded in the judgment of Ghose, J., was well founded. This is in effect a plea of res judicata, and is based on the intervention of the Receiver in the former suit. Having learned that the preliminary decree of the 15th March 1916 had been passed against Amulya, he filed two petitions on the 11th and the 16th April 1916. In these he contended that he and not Amulya should have been substituted for the deceased Tara Prasanna. He accordingly prayed that the Court should set aside the preliminary decree and make him a party in the suit as Receiver and to try the suit in his presence. It is admitted that he was never made a party -obviously on the ground that the Subordinate Judge took the same erroneous view of his rights as the Judges of the High Court in the present case. He was, however heard on his objections and his objection to a final decree were repelled. In effect, therefore, it was urged that a decision had been given against him on the same argument which he has submitted here, and not merely so, but that he had appealed to the High Court, who had found the appeal incompetent—not specifically on the ground that he was not a party to the suit but on a special ground, of the soundness of which their Lordships have no means of forming an opinion. All this, however, will not avail the respondents. The decree, which is pleaded as constituting resjudicata, on the face of it bears that it was pronounced in a suit to which the

appellant was not a party, and therefore does not come within the rule as to res judicata in S. 11 of the Civil Procedure Code, which only applies to matters which were in issue in a former suit between the same parties. The refusal to make the appellant a party to the suit cannot be treated as having the same effect as an order to the opposite effect, although it is plain enough from the judgments that if he had been made a party the result would have been the same in both the Courts in which he was heard on his petitions. It was suggested that the Receiver ought to have appealed from the decision of the High Court to this Board, but whether such an appeal at the instance of a person who was not a party to the suit would have been entertained may well admit of doubt. In any case the appellant who had done his best to be made a party to the suit and had failed was quite entitled to proceed on the view that the decree against Amulya was not binding on him and to take action in his own name to vindicate the equity of redemption as he has now done.

Their Lordships accordingly will humbly advise His Majesty that the appeal be allowed, that the decision of the High Court be reversed, and that of the Subordinate Judge restored.

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Tata Iron & Steel Co. Ltd. v. *Sultan Khan Kabuli*

AIR 1968 Pat. 297

MAHAPATRA, J. - These two appeals arise out of an objection filed in two insolvency cases. The objectors are the appellants in both the appeals. After the adjudication of the applicants in the insolvency cases as insolvent, orders of interim attachment were passed in both these cases on the 5th of September 1959 and 15th July, 1958 respectively. Objection was raised against this attachment in respect of the retiring gratuity available to the insolvent. The court below has held that they were attachable and against that these two miscellaneous appeals have been directed.

(2) The point involved is whether the retiring gratuity for which provision has been made in the employer company's Retiring Gratuity Rules 1937 would vest in the insolvency court after the workman has been adjudged as insolvent. Strictly speaking there is no question of attachment. Under section 28 of the Provincial Insolvency. Act 1920 it has been provided in clause (2) ‘‘ 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 here in after provided, and shall become divisible among the creditors and there- after, 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. Expect with the leave of the Court and on such terms as the Court may impose.''

Thus it appears that the effect of the interim order that was passed by the insolvency court was that the property mentioned therein were to vest in the court or in the receiver, one of such properties being the retiring gratuity. The creditors claim. that should also be taken as vested in the court being the property of the insolvent. The objection was that it would not so vest because it does not become the property of the insolvent as long as it is not paid to him: he does not exercise the power of disposal over that gratuity before it is paid out to him by the employer company.

(3) The Retiring Gratuity Rules 1937 of the Tata Iron & Steel Company Limited provides in rule 10 that:

> All retiring gratuities granted under these Rules other than special gratuity to be paid under the provisions of Rule 22 here of shall be at the absolute discretion of the Company irrespective of whether an employee has or has not performed all or any of the conditions hereinafter stated, and no employee howsoever otherwise eligible shall be deemed to be entitled. as of right to any payment under these Rules.

(4) On the basis of this rule it is contended on behalf of the appellant company that over the gratuity, until it is actually granted by the company and paid to the employee, the employer company reserves to itself absolute discretion and that the employee cannot have, as a matter of right, a claim to it, it is, however, conceded that once the gratuity is sanctioned and is paid out to an employee it becomes his property and that would vest within the meaning of section 28 (2) of the Provincial Insolvency Act. Before it is actual delivered. it remains in the hands of the employer to be given as bounty or gift. A gift becomes complete either by actual

delivery to the donee or by its expression in a registered instrument. In the instant two cases, out of which these two appeals arise, admittedly the company had not paid the gratuities to the two insolvents although the amounts had been determined and sanctioned for payment. The contention of learned counsel is that as long as actual payment is not made, that is to say. as a long as the delivery of the amount to the employee is not made, it does not become the property of the employee and he does not exercise any power of disposal over such amount in spite of its determination of sanction for payment by the company.

In support of this contention reliance is placed on the case ***Secretary of State* v. *Jamuna Das*** [ILR 11 Pat 584] corresponding to A.I.R. 1932 Pat. 311. There, the Railway Company had asked one of its employees as to in which Bank his gratuity could be deposited to his credit. At that stage one of his creditors wanted to attach the gratuity in an insolvency proceeding. It was held that gratuity had not become a recoverable debt or a completed gift and as such could not be the subject matter of attachment.

To the same effect is the case of ***Janki Das* v. *East Indian Rly. Co.*** [(1884) I.L.R. 6 All 634]. There. six months' bonus was granted by the Railway Company and was sent to the District Pay Master of the Railway Company for payment to one of the employees, Mr. Kelly, but the money was attached before the actual payment was made. It was held that although the money had been sanctioned and although it had been sent to the District Pay Master with a direction for payment to Mr. Kelly. Yet it had not become a debt due by Railway Company to Mr. Kelly but was in the nature of a gift of moveable property which could be effected by delivery. In that view the attachment was not allowed, In another case. ***Usman Abubakar Sani* v. *Chief Accounts Officer GIP Rly*** [A.I.R. 1943 Bom 453] a sum of gratuity had been credited to the account of a deceased employees and when that was sought to be attached that was not allowed because the money had not been paid to the deceased, though it had been put after his death to his account. It had not become. before his death his property.

(5) I am inclined to agree with the contention of learned counsel and hold that the gratuity, until it is paid out to the employee, cannot be treated as a property of the insolvent within the meaning of S. 28 (2) of the Provincial Insolvency Act. 1920.

(6) Learned counsel appearing for the respondent however, contended that the basis of the decisions in the aforesaid reported cases has already disappeared and the concept of gratuity has now changed. No doubt he says it was considered to be a bounty in the past, but on account of change in the industrial laws of the country and also series of decisions and awards given by the Industrial Tribunals, an employee has now become entitled to receive bonus and gratuity in the nature of retiring gratuity for his benefit on account of his services rendered to the employer. In that view, learned counsel continued, the decisions cited on behalf of the appellant would no longer give a correct approach to the case. He referred to a passage in ***Indian Hume Pipe Co. Ltd.* v. *The Workmen*** [AIR 1960 S.C. 251] which reads as follows, to buttress his contention:

> On the contention raised in the tribunals below, the principal point which call for our decision is whether a scheme of gratuity can be framed by industrial tribunals of workmen who are entitled to the benefits of section 25F of the Act. This question had been frequently raised before industrial tribunals and has generally been answered in

> favour of the employees. In dealing with this question it is important to bear in mind the true character of gratuity as distinguished from retrenchment compensation Gratuity is a kind of retirement benefit like the provident fund or pension. At one time it was treated as payment gratuitously made by the employer to his employee at his pleasure, but as a result of a long series of decisions of industrial tribunals gratuity has now come to be regard as a legitimate claim which workmen, can make and which, in a proper case, can give rise to an industrial dispute. Gratuity paid to workmen is intended to an industrial dispute. Gratuity paid to workmen is intended to help them after retirement, whether the retirement is the result of the rules of superannuation or of physical disability. The general principle underlying such gratuity schemes is that by their length of service workmen are entitled to claim a certain amount as a retiral benefit.

Learned counsel very much relied upon this observation and urged that since a workman has got a claim on receiving the gratuity from the employer it can no longer be considered as gift or bounty. It becomes a kind of property to which the workmen has got his legitimate claim. Broadly speaking this is so. But what kind of claim is that? Is that a claim which can be enforced in the civil court? Is that a claim which can be determined without the intervention of any statute or statutory authority, such as Industrial Disputes Act or Industrial Tribunal? Is that a claim which can uniformly be enforced by every workman against every kind of employer? Answers to these questions are obviously in the negatie and therefore, though there may be a claim on the part of the workman to receive either bonus or gratuity or retrenchment benefit or retiring gratuity from the employer that claim has to be determined with reference to the circumstances of a particular case the financial ability of the employer, the period of employment of the workmen and other relevant facts.

I do not think that learned counsel for the respondent is right in this contention that the observation of the Supreme Court as quoted above means that the payment of gratuity is on the same basis as that of salary or wages for, which contract are entered into between the two parties, employer and employee. In that view of the matter, the retiring gratuity in the instant case could not have been taken to have vested in the insolvency court or could not have been attached by it. The order of the court below is therefore set aside and the appeal is allowed.

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Samanthapudi Surannamukhi v. *Samanthapudi Virupakshamma*

AIR 1969 AP 23

SHARFUDDIN AHMED, J. - The short question that falls for determination in this Civil Revision Petition is whether the petitioner-plaintiff has a right to sue on the date of the institution of the suit.

2. The petitioner-plaintiff filed a Small Cause suit No. 362 of 1965 for recovery of a sum of Rs. 700/- and odd being half the share payable to him by the defendant in the suit. It was her case that she and the defendant were coadjutant-debtors in O. S. 88 of 1961 on the file of the Court of the Subordinate Judge, Kavali, in which a joint and several decree was passed against them. In the execution of the decree in E. P. 230 of 1962, the plaintiffs property was brought to sale and she was compelled column to pay the entire amount totalling Rs. 1400 and odd in full satisfaction of the detrital amount. She, therefore, brought a suit for contribution against the co-judgment-debtor, the defendant, on 24-9-1965. Unfortunately for her she was adjudged insolvent on 1-8-1964 i.e., nearly one year prior to the filing of the suit. She then filed a petition under Order 1 Rule 10 C. P. C. For impleading the official receiver as defendant in the suit. This petition was resisted by the respondent-defendant on the ground that it was barred by limitation and that the plaintiff had no locus standi to institute the suit. The learned Subordinate Judge, Kavali, on a consideration of the arguments advanced before him, held that the present petition was not within time and, therefore, dismissed the I. A. And consequently dismissed the suit also on the same day. The revision is filed against his order.

3. The learned counsel for the petitioner, Sri N. Subba Reddy contends that the lower Court did not consider the provisions of the new Limitation Act which provides that "where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted at any earlier date."

He submits that the case is fit for remand to the lower Court for a re-consideration of the issue in the light of the proviso the Section 21 of the Limitation Act.

4. On the other hand the learned counsel for the respondent contends that as the petitioner had been adjudged insolvent on 1-8-1965 as the right to sue for contribution had vested in the official receiver under Section 28 of the Insolvency Act. Section 28 (5) of the Insolvency Act provides ''that the property of the insolvent for the purposes of this section shall not include any property which is exempted by the Code of Civil Procedure, 1908 or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree''. Under Section 60 (e) of the Civil Procedure Code, ''a mere right to sue for damages'', is exempted from attachment. As such it is only a right to sue for damages that does not vest in the official recover being a right in personam. In the instant case, the suit was for contribution which does not find a place in the list mentioned under Section 60 of the Civil Procedure Code. I think the contention of the learned counsel for the respondent that the plaintiff-petitioner had no right to sue on 24-9-1965 is in accordance with law. Therefore the question of the application for amendment being within time or not does not arise in the present case. No doubt if the suit had been filed by the official receiver beyond the period of

limitation, the Court would give the benefit of proviso to Sec. 21 of the Limitation Act, to the official receiver if it was found later that the right vested in the insolvent. But in the instant case, the position being that the suit has been filed by a person who was not competent to institute a suit, the question of applicability of the provision to Section 21 of the Limitation Act does not arise.

5. I, therefore, see no reason to interfere with the finding of the lower Court. The revision is accordingly dismissed.

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Official Assignee v. *Merchantile Bank*

AIR 1935 Rang. 61

PAGE, C. J. - In my opinion these appeals must be allowed. The facts are simple and not in dispute. The S.A.R.M. Chettyar firm were indebted to the Imperial Bank of India, the Mercantile Bank of India, Limited, and Lloyds Bank, Limited respectively for large sums of money in current account. On Ist April 1933, upon a creditor's petition of even date, an order was passed on the original side of this Court adjudicating the S.A.R.M. Chettyar firm insolvent. On 2nd June 1933, an order was passed by the learned Juged sitting in insolvency annulling the adjudication. On 8the July 1933, an appeal was filed against the order annulling the adjudication. On 21st August 1933, the appeal was allowed, and the order annulling the adjudication was set aside. Meanwhile on Ist August 1933, the S.A.R.M. Chettyar firm had paid to the Imperial Bank of India Rupees 33, 747-7-0, the Mercantile Bank, Ltd., Rs. 20, 361-7-6 and Lloyds Bank Ltd., Rs. 11,919-1-3.

The applications out of which the present appeals arise have been filed by the official assignee of the S.A.R.M. Chettyar firm for a declaration in each case that the transfers of these sums to the Banks respectively were void as against the official assignee of the estate of the S.A.R.M. Chettyar firm. Now, under S. 51, Presidency Towns Insolvency Act, the title of the S.A.R.M. Chettyar firm is deemed to relate back to the time of the commission of the act of insolvency upon which the order of adjudication was made:

> "Relation back of the title of the trustee in bankruptcy (meaning thereby the person in whom the bankrupt's estate becomes vested by the bankruptcy, by whatever name he may have been called) has existed under English statute law ever since 13 Eliz. C. 7. In that statute the formal bankruptcy might take place at any time subsequent to an act of bankruptcy and the title of the trustee dated back to the date of the act of bankruptcy, i.e., he was entitled to the possession of the bankrupt's property, such as was at that date. The effect of subsequent legislation has been, not to create, but merely to limit, this relation back until under the Acts now in force its period has been, reduced to a maximum of three months, so that if the requisite bankruptcy proceedings are not taken within that period the act of bankruptcy ceases to be effective, and there can be no relation back of the date of that act of bankruptey even though bankruptey should subsequently supervene...Nothing is more firmly established in bankruptcy law than that a man who has committed an act of bankruptcy is not entitled to deal with his estate. He has no right to gather it in if it is not already in his hands, or to make payments of his creditors out of that which he has actually at his command. He can give no good discharge to a debtor who pays him with notice of the act of bankruptcy, because the debt may by subsequent bankruptcy proceedings be turned into a debt due to his trustee, and not to himself. This is a principal and fundamental part of our bankruptcy administration... Until commission of the act of bankruptcy he was, of course, the beneficial owner of whatever assets he possessed, but by the act of bankruptcy his title to be regarded as such beneficial owner is no longer absolute, but is contingent on no bankruptcy petition being presented within three months of the date of the act of bankruptcy

which leads to a receiving order being made. If such receiving order be made the whole of the assets vests in his trustee as from the date of the act of bankruptcy. He is therefore in the position that should such a contingency occur he is from the date of the act of bankruptcy something less than a mere trustee of his assets for the creditors in his bankruptcy. Until this state of suspense has been removed either by a receiving order or by lapse of time he has no right to deal with this assets that were in his hands, and can give no title in them to any transferee with notice: per Fletcher Moultion, L. J., in ***Ponsford Banker & Co.* v. *Union of London & Smith's Bank, Ltd*.** [(1906) 2 Ch D 444]."

The object for which the law relating to insolvency was enacted was to provide a scheme under which an insolvent debtor's estate should be distributed, so far at any rate as unsecured creditors were concerned, pari passu among the creditors of his estate.

In the events that happened the title of the official assignee in the present case related back to the first available act of insolvency upon which the insolvency upon which the insolvency petition was based; and it follows therefore that prima facie the transfers by the insolvent on Ist August 1933, to the three banks were void as against the official assignee of the estate of the S.A.R.M. Chettyar firm. Indeed, if they are upheld the result will be that these creditors will receive an advantage over the other creditors in the insolvency which they would not have obtained if the estate of S.A.R.M. Chettyar firm had been distributed in accordance with the insolvency law. The onus therefore lies upon the respondents to satisfy the Court that they are entitled to claim the protection and the benefit of S. 57, Presidency Towns Insolvency Act, ***Ex parte Cartwright*** [(1881) 44 LT 883]. Under S. 57 of the Act it is provided inter alia that payment by an insolvent to any of his creditors is not invalid:

> "Provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor."

Now, on behalf of the respondents it is contended that the transfers under consideration fall within the proviso to S. 57. As regards the first branch of the proviso it is urged that, as the respondent Banks were creditors who had received payments of the sums in dispute from the debtor firm before 21st August 1933, when the appellate order setting aside the order annulling the adjudication was passed, for the purpose of S. 57 the date of the order of adjudication must be treated as being 21st August 1933, when the appellate order was passed, and not Ist April 1933, when the order of adjudication was in fact passed. In support of the respondents' contention reliance was placed upon the decision of Philimore and Bray, JJ. in ***In re Teale*** [(1912) 2 KB 367]. In that case it was held that, notwithstanding that the receiving order was passed on 24th October 1910, it must be treated as having been passed on 22nd July when the petition was wrongly dismissed and an order for a receiving order ought to have been made.

In like manner, in my opinion, the effect of the order passed by the appellate Court on 21st August 1933, was that the date of the order of adjudication was the date upon which that order was in fact passed, namely, Ist April 1933. In (1912) 2 KB 367 it appears that between

22nd July 1910, and 24th October 1910, the debtor had paid into and drawn out of his account at the Union and London Smith's Bank certain sums of money and that at the time when he did so the Bank was wholly unaware that any proceedings in bankruptcy had been taken against him, and had no notice of any act of bankruptcy that had been committed by him until 25th November 1910. Upon that footing Phillimore and Bray, JJ., held that if would be inequitable to hold that the receiving order should be treated quoad the Bank as having been made on the date when it ought to have been made and not on the date when in fact it was made. I desire to reserve my opinion as to whether I should be prepared to follow (1912) 2 KB 367 in circumstances similar to those obtaining in that case; but that case, in my opinion, differs toto coelo from the present 'case upon the facts, because, whereas in (1912) 2 KB 367 the Bank had no notice at any material time of the bankruptcy proceedings that had been taken against their customer, in the present case it is common ground that before it received the payment in dispute each of the respondent Banks was fully aware of the bankruptcy proceedings that had been taken in respect of the estate of the S.A.R.M. Chettyar firm. On Ist August 1933, when the transfers were made to them it is admitted that each of the Banks knew that the insolvency petition upon which the adjudication order was made had been presented on Ist April 1933, and that an order adjudicating the S.A.R.M. Chettyar firm insolvent had been passed on the same date.

Mr. Nuttall, the agent of the Imperial Bank of India was the only witness called on behalf of any of the respondents at the hearing of the application; and the other two Banks concede that they stand in the same position as that indicated by Mr. Nutall on behalf of the Imperial Bank. This witness stated that he was aware of the nature of the insolvency proceedings that had been taken against the S.A.R.M. firm before Ist August. He made no inquiries however before he accepted the payment in question from the debtor as to whether any appeal had been lodged against the order annulling the adjudication of the insolvency of the S.A.R.M. Chettyar firm. In his own words :

"I think there was no necessity to inquire beyond the fact that the adjudication had been annulled."

If he had made the most superficial inquiry he would have ascertained that an appeal had been lodged against the order annulling the adjudication on 8th July 1933, and that an appeal from that order was pending. Now, the learned advocates who have argued the appeals on behalf of the respondents have asked:

> "Why should not the Banks on Ist August 1933, without making any inquiry, have been at liberty to receive payment from the S.A.R.M. Chettyar firm of their debts, inasmuch as on 2nd June, an order annulling the adjudication of the firm had been passed?"

The answer is that there was no reason why they should not have accepted payment of their debts from the S.A.R.M. Chettyar firm on Ist August 1933; but that if they did so they ran the risk that ultimately it might be held that those payments were made by the S.A.R.M. Chettyar firm at a time when the estate of the firm had become vested in the official assignee on behalf of the creditors of the firm, and that as against him the transfers were void.

As regards the second branch of the proviso to S. 57 it was contended on behalf of the respondents that after the order annulling the adjudication of the S.A.R.M. Chettyar firm there was no insolvency petition subsisting or in existence of the presentation of which they could have had notice. Indeed, the argument went to this length that in effect the filing of the memorandum of the grounds of appeal against the order annulling the adjudication was a fresh insolvency petition. I cannot so read the proviso to S. 57 of the Act, and in my opinion if the contention of the respondents were to prevail it would have the effect pro tanto of stultifying the procedure laid down under the law of insolvency for the distribution of an insolvent debtor's estate. I am of opinion that the object and effect of S. 57 was to provide that the hardship which otherwise might fall upon a transferee without notice from the insolvent should be obviated if the transfer was made before the date of the order of adjudication and the transferee was ignorant of the grave financial embarrassment which had befallen the debtor by the presentation of an available insolvency petition by or against him. (1912) 2 KB 367 is a case that concerned a transferee without notice. On the other hand when a payment is made by an insolvent to his creditor who has had notice of the present action of an available insolvency petition by or against the debtor the creditor receives the payment or accepts the transfer at his peril, unless at the time when the payment is made the insolvency proceedings had necessarily reached finality.

The present case affords a simple illustration of the position. There was nothing in law or in fact which prevented the Banks from receiving payment from the insolvent in the way they did, but it would, in my opinion, be idle to contend that on Ist August 1933, there was not subsisting an available insolvency petition against the S.A.R.M. Chettyar firm of which the respondent Banks had notice. Of course if in the event the appeal from the order annulling the adjudication had failed or it had not been presented within the prescribed limit of time or had been withdrawn the payments to the Banks would have been valid and effective. In the events that happened however the appeal was allowed and the order annulling the adjudication was set aside, with the result that the title of the trustee to possession of the estate of the S.A.R.M. Chettyar firm form Ist April 1933 was confirmed. It follows therefore that on Ist August 1933, the insolvent had no title to or right to transfer the property which he transferred to the respondent Banks, and the payment of the sums now under consideration was void as against the official assignee. That was the risk that the Banks ran in accepting the payments in the circumstances obtaining on Ist August 1933. It must be borne in mind that if the appeal from the order annulling the adjudication had failed the recipients of these sums would have obtained an advantage over the general body of creditors of the estate of S.A.R.M. Chettiyar firm. In the events that have happened however they will have to restore the money that has been to paid to them by the insolvent.

The principles underlying the doctrine of lis pendens, in my opinion, are not dissimilar from the principles which are to be applied in construing S. 57, Presidency Towns Insolvency Act For these reasons the appeals are allowed, the order from which the appeals are brought is set aside, and in each case a declaration will be made as sought by the official assignee and an order passed that the respondent Banks do refund to the official assignee the money transferred to the Banks by the insolvent firm.

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Official Assignee of Madras v. *Mercantile Bank of India, Ltd.*

LXI (1933-34) LR 416 (PC)

LORD WRIGHT. The appellant is the Official Assignee of Madras in whom the property vested on insolvency of C.K. Narayana Ayyar & Sons (the insolvents); the question in the appeal is whether the appellant or the respondents are entitled to the proceeds of certain consignments of groundnuts; the primary issue is whether the respondents who had advanced moneys on the security of the railway receipts in respect of these groundnuts obtained a valid pledge of the goods.

The appellant succeeded before Wailer J.; his decision was, however, reversed on appeal by the High Court of Judicature of Madras, Appellate Jurisdiction; the appellant now appeals to His Majesty in Council.

There is little dispute about the facts. The insolvents did a large business in groundnuts, which they purchased *from* the up-country growers; the nuts were then dispatched by rail and arrived in Madras by one or other of two railways, the Madras & Southern Mahratta Railway or the South Indian Railway. There was a working arrangement between these railways and the Madras Port Trust, which worked its own railway system within the port and took over the consignments of nuts when they arrived at the port. The Port Trust had its transit sheds, but there were also on its premises godowns leased to traders. One such godown, referred to as the X warehouse, was leased to the insolvents, but there was on it a signboard bearing the name of the respondents. For many years the respondents had financed the consignments of nuts purchased and consigned by the insolvents; their method was to grant loans against particular consignments. The general course of business was for the insolvents to obtain from the railway companies in respect of each consignment or wagon load a railway receipt which will later be more particularly described; sometimes, however the up-country seller appeared as consignor and consignee, in which event the receipt was indorsed and (delivered to the insolvents; sometimes the seller was named on the receipt as consignor, while the insolvents were consignees; in other cases the insolvents were named on the receipt both as consignors and consignees. Each receipt gave full particulars relating to the goods, the wagon number the marks of the bags, the number, and so forth. It contained the following condition:

> "That the railway receipt given by the N.G.S. Railway Company for the articles delivered for conveyance must be given up at destination by the consignee to the railway company or the railway may refuse to deliver and the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery. If the consignee does not himself attend to take delivery he must indorse on the receipt a request for delivery to the person to whom he wishes it made, and if the receipt is not produced the delivery of the goods may, at the discretion of the railway company be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the railway company."

The condition recognizes a practice of allowing delivery without production of the receipt analogous to that often followed in the case of bills of lading, whereby delivery is made on an indemnity if bills of lading are not forthcoming. As in general the insolvents wanted loans

against consignments their practice was to bring or send to the respondents the railway receipts, duly indorsed by them in blank, with a letter of hypothecation and a promissory note, and, if the values wore satisfactory and the transaction was in order, the loan was granted, the insolvents executing a promissory note for the amount and the letter of hypothecation, which was duly completed with full particulars of the security. The railway companies were, no doubt, aware of this general course of business, but were not notified that it had been followed in respect of any particular transaction. When the goods arrived at the port, delivery was taken from the Port Trust against the railway receipts; these the respondents had retained, but in order to enable them to obtain delivery the practice was to hand them to the representative of the insolvents, who paid freight and unloaded the goods from the wagons into the X warehouse, where they came into the actual possession of the respondents.

The insolvents were adjudicated bankrupt on February 11 1929, the date of the insolvency being February 7, 1929. At that latter date the goods, which are the subject of this appeal, consisted of 7993 bags of groundnuts, represented by 46 railway receipts; all the goods were at the time either in transit on the railway or in the transit sheds or godowns of the Port Trust. Of the 46 receipts, 14 representing 2975 bags had been presented on February 7, 1929, to the Port Trust by the insolvents, who had received them from the respondents, in accordance with the method and for the purpose described above, but the Port Trust refused to give delivery and unloaded these bags into its own sheds or godowns because payment of the freight was not forthcoming; the remaining 32 receipts were presented by the respondents after the insolvency; in view, however, of the dispute which culminated in the present suit, delivery was refused by the Port Trust, and all the goods were eventually sold under orders of the Court, the proceeds being held by the respondents to abide the result of these proceedings.

The main question (putting aside for the moment any consideration of the letter of hypothecation) is whether the pledging of the railway receipts was a pledge of the goods represented by them or merely a pledge of the actual documents, that is, what has been called a pledge of the *ipsa corpora* of the documents. The solution of the question depends on the true effect of s. 178 of the Indian Contract Act, 1872, as then in force; that section, which has since been repealed by the Indian Contract (Amendment) Act, 1930, and replaced by a new s. 178, was in the following terms: "A person who is in possesion of any goods or of any bill of lading, dock warrant, warehouse keeper's certificate, wharfinger's certificate or warrant or order for delivery or any other document of title to goods, may make a valid pledge of such goods or documents: Provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly: Provided also that such goods or documents have not been obtained from their lawful owner or from any person in lawful custody of them by means of an offence or fraud."

By s. 172 a pledge is defined as "a bailment of goods as security for payment of a debt or performance of a promise."

The first matter to be decided is whether a railway receipt such as those in question is a document of title to the goods within the section. Their Lordships are of opinion that it is. In ***Ramdas Vithaldas* v. S. *Amerchand & Co*.**[LR 43 IA 164], this Board held that a railway receipt was an "instrument of title" within s. 103 of the Contract Act; the Board said in that case that no distinction could be drawn between the term "document of title" and the term

"instrument of title"; and accordingly also held that the railway receipts were documents of title to goods within s. 178. Their Lordships likewise in the present case see no reason for giving a different meaning to the term in s. 178 from that given to the terms in ss. 102 and 103; in addition a railway receipt is specifically included in the definition of "mercantile document of title to goods" by s. 137 of the Transfer of Property Act, 1882, which, in virtue of s. 4 of the Act, is to be taken as part of the Contract Act as being a section relating to contracts. A railway receipt is now included in the definition of documents of title to goods in s. 2, sub-s. 4, of the Indian Sale of Goods Act, 1930.

The two questions which next arise on s. 178 are: (1.) Whether the words "a person who is in possession of any goods or of any bill of lading," etc., include the owner, and (2.) whether a. pledge of the documents is a pledge of the goods as distinct from the documents. The questions must be separately considered; both depend on the words of the section read in connection with the rest of the Act.

But the arguments advanced on behalf of the appellant have sought to treat the matter as concluded by the history and present state of the relevant law in England, which will now be briefly summarized. At the common law a pledge could not be created except by a delivery of possession of the thing pledged, either actual or constructive. It involved a bailment. if the pledgor had the actual goods in his physical possession, he could effect the pledge by actual delivery; other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him from the pledgor to hold for the pledgee, the change being perfected by the third party atoning to the pledgee, that is acknowledging that he thereupon held for him; there was thus a change of possession and a constructive delivery: the goods in the hands of the third party became by this process in the posseion constructively of the pledgee. But where goods were represented by documents the transfer of the documents did not change the possession of the goods, save for one exception, unless the custodier (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was the case of bills of lading, the transfer of which by the law merchant operated as a transfer of the possession of, as well as the property in, the goods. This exception has been explained on the ground that the goods being at sea the master could not be notified; the true explanation may be that it was a rule of the law merchant, developed in order to facilitate mercantile transactions, whereas the process of pledging goods on land was regulated by the narrower rule of the common law and the matter remained stereotyped in the form which it had taken before the importance of documents of title *in* mercantile transactions was realized. So things have remained in the English law: a pledge of documents is not in general to be deemed a pledge of the goods; a pledge of the documents (always excepting a bill of lading) is merely a pledge of the *ipsa corpora* of them: the common law continued to regard them as merely tokens of an authority to receive possession, though from time to time representations were made by special juries that in the ordinary practice of merchants transfers of documents were understood to pass possession, as for instance in 1815, in ***Spear* v. *Traver*** [(1815) 4 Comp. 251]. But there also grew up that legislation which is compendiously described as the Factors

Acts, the first in 1823, then an Act in 1825, then an Act in 1842, then an Act in 1877, and finally, the Act in 1889 now in force. The purpose of these Acts was to protect bankers who made advances to mercantile agents: that purpose was effected by means of an inroad on the common law rule that no one could give a better title to goods than he himself had. The persons to whom the Acts applied were defined as agents who had in the customary course of their business as such authority to sell goods or to consign goods for sale or raise money on the security of goods; in the case of such persons thus entrusted with possession of the goods or the documents of title to the goods, the possession of the goods or documents of title to the goods was treated in effect as evidence of a right to pledge them, so that parties bona fide and without notice of any irregularity advancing money to such znercantile agents on the goods or documents were held entitled to a good pledge, even though such mercantile agents were acting in fraud of the true owner. Sect. 3 of the Factors Act, 1889, provides that "a pledge of document of title to goods shall be deemed to be a pledge of the goods." It has been held that this section only applies to transactions within the Factors Act: ***Inglis* v. *Itobertam***.

Thus the curious and anomalous position was established that a mercantile agent, acting it may be in fraud of the true owner, can do that which the real owner cannot do, that is, obtain a loan on the security of a pledge of the goods by a pledge of the documents, without the further process being necessary of giving notice of the pledge to the warehouseman or other custodier and obtaining the latter's attornment to the change of possession. But it is obvious that the ordinary process of financing transactions in goods is much facilitated by ability to pledge the goods by the simple process of pledging the documents of title. It need not be repeated that bills of lading stand apart, nor need it be observed here that some warehousing companies have, by means of private Acts, assimilated their warrants or delivery orders to bills of lading for this purpose.

It has been strenuously contended on behalf of the appellant that s. 178 of the Contract Act of 1872 must be construed as embodying the same principles as those of English law, that is, as being limited to mercantile agents, or at any rate to persons other than the owner of the goods. The Indian Factors Act, 1844, which extended to India the provisions of the English Factors Act, 1842, was invoked in argument on both sides, particular reliance being placed on s. 4 of that Act. That section defines documents of title in the same terms as the English Act, and proceeds to enact that any agent duly entrusted and possessed of any such documents of title shall be deemed to have been entrusted with the possession of the goods represented by it, and that all pledges of, and liens upon, the documents shall be deemed to be pledges of, and liens upon, the goods to which the same relate. The latter provision is the same in substance as that which is now reproduced in s. 3 of the English Act of 1899.

But s. 178 of the Contract Act, 1872, has omitted the word "agent" and has without express qualification made the section apply to "a person who is in possession of any goods or of any bill of lading. etc." The Appellate Court have decided that these unqualified words are wide enough to cover the owner as well as any mercantile agent. Their Lordships agree with that ruling. It was pointed out. by this Board in ***Ramdas*** case that the Act of 1872 was an amending as well as a consolidating Act, and that beyond the reasonable interpretation of its provisions, there is no means of determining whether any particular section is intended to

consolidate or amend the previously existing law. Their Lordships did not in that case see any improbability in the Indian Legislature having taken the lead in a legal reform.

It may well have seemed that it was impossible to justify a restriction on the owner's power to pledge which was not imposed on the like powers of the mercantile agent. The same observation may well be true in regard to the words now being considered. The reasonableness of any such change in the law is well illustrated by the facts of the present case, where it was clearly intended to pledge the goods, not merely the railway receipts, and the respondents have paid in cash the advances they made on that footing. In these circumstances, it would be indeed a hardship that they should lose their security. That such a hardship would still be experienced in England, in the like case is no argument against their Lordships' conclusion. Nor is it an argument that s. 178 as subsequently amended in 1930, and now in force, has in terms limited the privileges under it to the case of pledges by mercantile agents. The construction of the section now in question must depend on its precise words; these words would, no doubt, include cases where the pledgor was a mercantile agent, but there is nothing in the section requiring its scope to be so limited or to exclude the owner from its operation. The Indian Legislature may well have appreciated in 1872 the exigencies of business, even though in 1930 they recanted. Or perhaps they did not appreciate fully the effect of the actual words of the section. But these words must be construed as they stand. There has been, in fact, no decision in India contrary to the view that "any person, etc.," includes an owner; the decisions appear to have turned on the meaning of the word "possession," and on such distinctions as that between mere custody and juridical possession. An examination of ss. 103 and 108 of he Act seems rather to strengthen than to weaken the construction which the respondents contend for, and which appears to their Lordships to be right.

The other question arising under s. 178, namely, whether under its terms a pledge of the documents amounts to a pledge of the goods should also, in their Lordships' judgement, be answered, as it was by the Appellate court, in favour of the respondents. The principle that goods might be pledged by pledging the documents of title had been fully established by the Act of 1844, as already explained; the actual words of s. 178 are susceptible of being construed as meaning that under that section the same rule was intended. No doubt the language of s. 178 is abbreviated; but "a valid pledge of such goods or documents," may more properly be interpreted as identifying the pledging of one with the pledging of the other. It is to be noted that the list of documents enumerated is headed by the "bill of lading," the pledging of which admittedly involves a pledging of the goods, and it seems that as the language of the section applies equally to bills of lading and all the other documents, all these documents are intended to be assimilated for purposes of pledge, so that the pledging of any one of the classes of documents enumerated has the same effect as the according pledging of a bill of lading. This was the view adopted in regard to railway receipts in ***Ramdas*** case. In that case it purpose was held that the pledging of a railway receipt had the same effect on the right of stoppage in transitu under s. *103* as a pledging of the goods; the railway receipt quoad this matter was assimilated to a bill of lading. It seems difficult to deny the same consequence under s. 178 to a pledge of the documents especially as the Board held in ***Ramdas*** case that documents and instruments of title had the same meaning in both sections. A "pledge" is

defined as stated above to be a bailment of goods as security (s. 172), hence it seems that s. 178, the marginal note to which is "pledge by the possessor of goods or of documentary title to goods," can only be dealing with pledges of goods, though the section uses the words "pledge of such goods or documents." In other words it is describing a pledge of goods, either by pledging the goods *eo nominee* or by pledging the relative documents.

On this construction of s. 178 the respondents were, on the facts of the case, entitled to their security in the groundnuts represented by the 46 railway receipts as being validly pleded to them.

It was contended that even on this view the goods represented by the 14 railway receipts presented on February 7, 1929 were in a different position, because, it was said, the respondents had parted with their pledge on these goods by giving back possession of the railway receipts to the insolvents. In their Lordships' judgement this contention is based on a misuse of the word "possession." The respondents did not part with the possession of the goods or receipts in the juridical sense of that word; they merely parted with the custody, by entrusting the receipts to the insolvents as their agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and unloading them from the railway wagons or transit sheds and putting them into the X godown warehouse on behalf of the respondents. Such action does not involve a parting with possession and accordingly it does not in any way affect rights of pledge; the redelivery by the pledgee to the pledgor for a limited purpose without the pledgee thereby losing his right, is illustrated by ***North Western Bank, Ld.* v. *Poynier*** and the more recent case ***In. re David Allester, Ld***. In both these cases the limited purpose was in order that the goods should be realized by the pledgors as experts in that class of business. In this case the limited purpose was that the goods should be handled, not by the respondents who were bankers, but by those whose business it was to do so. Such procedure is in the usual course of business, and is obviously either necessary, or at least convenient for the conduct of the business in question. This point also fails the appellant.

The above conclusions are sufficient to dispose of the appeal, but a further point taken on behalf of the respondents would in itself, in the opinion of the Board, be sufficient to decide the appeal in their favour. Reference has already been made to the letter of hypothecation. which, in the case of each advance, was completed by the insolvents. The finding of the trial judge on this point is that "in order to finance the transaction the insolvents took the railway receipts to the bank with promissory notes awl letters of hypothecation." The letter of hypothecation was in terms an acknowledgment by the insolvents that they had deposited the property documents and securities thereunder mentioned as collateral security for the advance, with a power of sale in the case of default and various ancillary provisions. This letter, in their Lordships' judgment constitutes a good equitable charge which is binding between the insolvents and the respondents, and is equally binding on the appellant who, for this purpose, merely stands in the insolvents' shoes, and has as against the respondents no higher or better right than the insolvents had at the date of the insolvency. An analogous case was considered in ***Lx pane North Western Bank***, where a letter of lien over wools of the bankrupt which were in his warehouse, was held to create a good equitable charge in favour of bankers who had made advances; no delivery of the warrant for wools had been made; but

it was held that the hankers had a good title against the trustee in bankruptcy. This authority was followed and approved ***In re Hamilton Young & Go.*** In that case the traders who had obtained advances from bankers on the security of cloth of the traders then in the hands of bleachers, gave letters of lien to the bankers accompanied by the bleachers' receipts for the goods. The Court of Appeal rejected the argument that the letters of lien were void under the Bills of Sale Act: such matters are not here material, because in India there is no legislation corresponding to the Bills of Sale Acts. Apart from that question Vaughan Williams L.J. thus summed up the general position: "The result of the practice detailed seems to be that, in respect of the matter and preparation and shipment of the goods, the management and direction of these goods, for the purposes of bleaching, dyeing, and shipping, until the bills of lading were handed over, rested entirely with [the debtors], and that no property. other than by way of lien or charge, would pass to the bank until the bills of lading were handed over, but that the bank had in equity a right to an injunction restraining [the debtors] from doing anything inconsistent with their holding the goods on account of the bank and under lien to the bank."

There was in that case notice by the bank of their lien to the bleachers shortly before the insolvency, but the statement of the bankers' rights in equity as against the debtors, and consequently as against the trustee in bankruptcy, is not made with reference to any question of notice. The rights between the immediate parties is not depend on notice, just as in the case of an equitable assignment of a debt notice is not necessary to complete the equitable right as between assignor and assignee. Thus in ***William Brandis Sons & Co.* v. *Dunlop Rubber Co.***, it is clear that there was a good equitable assignment as between the merchants as assignors and the financiers as assignees, though the assignment was not completed in the sense that the debtors to the merchants were bound by it or bound to pay the assignees, without receiving notice of it. Thus Lord Macnaghten says: "As between Kramrisch & Co. [the merchants] and Brandts [the bankers] the assignment was perfect without them" (sc. the documents giving notice to the debtors). In the same way in the present case, though it is true that no third party holding the goods or dealing with them without notice of the respondents' lien, would be affected by that lien, this is a consideration which is irrelevant to the equitable rights constituted as between the respondents and the insolvents. In this case nobody's rights are concerned except the rights as between these immediate parties: the appellant merely stands in the insolvents' shoes.

Some objection was raised on the hearing of the appeal that the question of the effect of the letters of hypothecation had not been an issue in the Courts below, and indeed that the letters of hypothecation had not been proved except in general terms. But both in the first Court and in the Appellate Court this issue is referred to, and the trial judge finds the facts. Before this Board the point was argued as an alternative, and in view of the conclusions stated above as to the application of s. 178 of the Contract Act, it may be regarded as not calling for decision. But this point by itself would be enough to decide the case against the appellant even if he were right in the construction of s. 178, for which he has contended.

A still further point was raised on behalf of the respondents; it was argued that if under s. 178 the respondents did not get a good pledge at law by the delivery of the railway receipts still that delivery, considered on all the facts of the case, was evidence of a good equitable

charge as least as between the immediate parties even ignoring the accompanying letters of hypothecation. That argument found favour with the Appellate and their Lordships think it is well founded. Even if the documents of title are regarded as merely tokens of an authority to receive possession, it seems that their transfer for value by way of security for advances must at least raise an equity as between transferor and transferee entitling the latter to an order restraining the former from himself claiming delivery of the relative goods without producing the receipts; if so, the appellant must be subject to the same equity.

There still remains for consideration a final point, raised on behalf of the appellant, which is that on any view of the case the consignments of nuts in question constitute property divisible among the creditors in virtue of s. 52, sub-s. 2 (c), of the Presidency-towns Insolvency Act, 1909, which corresponds with the similar clause in the English Bankruptcy Act, as "goods being at the commencement of the insolvency in the possession order and 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." This point can be shortly here disposed of. If the goods in question were validly pledged under s. 178 as their Lordship's have held, they were not in the possession of the insolvents, the because the railway company held the goods as bailees of the respondents, the possession by the respondents of the documents of title being equivalent to the possession of the goods: hence these goods were not within the possession order and disposition of the insolvents at all; it is the respondents who were entitled to obtain delivery of the groundnuts from the railway company. A similar conclusion was arrived at on analogous facts in ***Fakeerappa* v. *Thippanna***. It was argued that a distinction must be drawn in this connection in regard to goods represented by the 14 railway receipts that were handed over to the insolvents' representative for the special purpose explained above, of unloading the goods into the X warehouse. Their Lordships, however, do not think that these goods are in any different position from the remainder for this purpose. The pledge was not affected by the handing over of the railway receipts for the limited purpose; it was only for that purpose that the insolvents had the temporary possession. or rather custody, of the railway receipts, and, that being so, there is no ground for saying that the goods were in the possession order and disposition of the insolvents, still less that they were so with the consent of the true owners, that is the respondents, as pledgees. Nor could it be said either as to the consignments as a whole or as to the 14 consignments that the circumstances were such as to make the insolvents the reputed owners. Reputation in this connection has reference to a hypothetical individual who is assumed to know "those facts which are capable of being generally known to those who make inquiry on the subject," in the sense explained by Lord Selborne in ***Ex parte Watkins***: the general course of business and the relationship of the interested parties to the consignments and in particular the purpose for which the insolvents had custody of the 14 receipts were inconsistent with any reputation of ownership in that sense. Reference may he made in this connection to the English eases of ***Ex porte North Western Bank*** and ***In re Hamilton Young & Co***. The whole question under the clause is a question of fact, and their Lordships agree with the reasoning of the Appellate Court on this point also. In the result the appeal should, in their Lordships' opinion, be dismissed with costs.

* * * * *

Official Receiver, Krishna v. *Uppalapati Babu Rao*

AIR 1982 AP 260

SEETHARAMA REDDY J. - 2. The sole but important question which arises in these revisions is, what are the rights of an official receiver vis-à-vis the son's share in the joint family property in order to discharge the untainted debts of an insolvent-father even though such share in the property stands attached in execution of a decree obtained against the father and sons.

4. The circumstances that led to the filing of these revisions may be set out. One S.Basavapunnaiah filed I.P. No. 29 of 1969 in the Subordinate judge's Court, Vijayavada on 1-11-1969 on the ground that he was unable to discharge his debts. The debts owed by him were shown in the A schedule to the Insolvency petition and the entire properties belonging to him and his son Jaganmohan Rao were shown in the B. Schedule to the said Insolvency Petition. But the Insolvency Petition was dismissed. However, on appeal in A.S.NO. 10 to 1971, the District Judge, Krishana, by his order dt. 19-8-1971, adjudged him an insolvent, and the properties were vested in the Official Receiver for the purpose of administration. Needless to mention that the order of adjudication relates back to 1-11-1969, the date of presentation of the Insolvency petitions.

5. One Babu Rao obtained a decree against the insolvent Basavapunnaiah and his son in O.S.No. 5 to 1971 and filed E.P.No. 158 of 1971 before the Subordinate Judge; Vijayawada and sought attachment and sale of the properties of both the judgment-debtors. Attachment was ordered on 16-9-1971. On that, the son Jaganmohan Rao filed a counter-objecting that inasmuch as his father was adjudged an insolvent and the property had vested in the Official Receiver, the decree-holder had no right to bring his share in the properties to sale. The learned Subordinate Judge, Vijayawada, rejected his objection by his order dt. 6-3-1971. Aggrieved by that, he preferred C.R.P. NO. 1109 to 1977 to this Court.

6. One Dharma Das obtained a decree in OS.No. 117 of 1970 and filed E.P. No. 362 of 1970 against four judgement-debtors two of whom are the judgment-debtors in E.P. No. 158 of 1971. The Official Receiver in whom the properties of the insolvent vested filed E.A. 1030 of 1971 for delivery of the properties. The decree-holder opposed the petition on the ground that the share of the son of the insolvent cannot be devlivered. Rejcting that contention, the court directed delivery of possession to the Official Receiver by its order dt. 25-9-1971. Against that order, the decree-holder preferred C.M.A. No. 15 of 1972. As a consequence of the order in E.A. NO. 1030 of 1971, E.P.No. 362 to 1970 was dismissed. Against the said dismissal, the decree holder preferred C.M.A. 464 to 1971.

7. The aforesaid C.R.P. 1109 of 1972, C.M.A. NO. 464 of 1971 and C.M.A. No. 15 of 1972 were disposed of by a common order by a Full Bench of Court; and that decision is reported in AIR 1975 Andh Pra 278. In the said judgment, this court held, that the decree holder is entitled to attach the son's interest as the Official Receiver had not exercised the right of the father to bring the son's share of the property to sale, and accordingly dismissed the C.R.P. As regards E.A. NO. 1030 of 1970 filed by the Official Receiver u/s. 52 of the Insolvency Act for delivery of possession of the properties desired in the schedule to E.P. No.

362 of 1970, this court held that the objections of the decree holder were rightly rejected by the Court below and consequently dismissed C.M.A. No. 15 of 1972. This Court also allowed C.M.A. No. 464 of 1971 holding that, since only the insolvent father's property and the insolvent's father's right to dispose of the son's interest in the joint family property vest in the Official Receiver and not the share of the son as such, E.P. No. 362 to 1970 was maintainable and therefore the executing Court could proceed with the attachment and sale of the son's share.

8. Thereafter, the Official Receiver filed I.A. No. 1375 of 1975 in I.P. No. 29 of 1969 u/s. 4 & 5 of the Provincial Insolvency Act impleading the insolvent and his son as respondents 1 and 2 and the creditors as respondents 3 to 7 praying for a declaration that the half share of the 2nd respondent in the joint family properties of the respeondents 1 and 2 is liable for discharge of the debts shown in the schedule annexed to the petition in I.P. NO. 29 to 1969 and to vest the 2nd respondent's share in him. The Court, however, dismissed the said application holding that it does not lie. Thereupon, the Official Receiver preferred C.M.A. No. 68 to 1978 before the District Judge, Krishna, who, by his order dt. 9-11-1979, allowed the Civil Miscellaneous Appeal and set aside the order in A.I. NO. 1375 to 1975 in the following terms :

> It is declared that the half share of the 2nd respondent in the joint family properties of the respondents 1 and 2 is liable for discharge of debts shown in the A schedule annexed to I.P. No. 29 of 1969 and the executing Court shall deliver possession of even the 2nd respondent's share in the joint family properties to the Official Receiver. This order shall not be construed as deciding that the Official Receiver can sell the second respondent's half share in the joint family properties for the purpose of satisfying the debts of the general body of creditors of the insolvent, 1st respondents.

Thereafter, when the decree-holder in E.P.No. 158 of 1971 and E.P. No. 362 of 1970 filed petitions in the court of the Subordinate Judge, Vijayawada, for bringing the properties to sale in public auction for realising the decretal amount, the Official Receiver sent a letter dt. 8-8-1980 to the executing Court wherein E.P. No. 158 to 1971, E.P.No. 362 of 1970 and E.P.No. 270 of 1975 were sought to be executed, requesting that in view of the orders, of the District Court in C.M.A. No. 68 to 1978, the attachment over the schedule property be raised and the properties delivered to him for the benefit of the general body of the creditors. The executing court dismissed the letter of the Official Receiver by holding as under:-

> It is no doubt true that the Hon'ble District Judge left the question whether the son's share is vested in the Official Receiver and whether the Official Receiver can sell such share of the son in private sale, open. But at the same time a perusal of the High Court Full Bench decision of our High Court clearly goes to show that the Official Receiver is at liberty to apply to the Insolvency Court for bringing the son's interest also to sale provided the debts of the Insolvent father to be discharged are proved to be not incurred for illegal or immoral purposes for the pious obligation of the son to discharge the debts of the father incurred while he was joint which are not tainted with illegality or immorality continued even after partition. In the said circumstances, it is the duty of the Official Receiver to approach the Insolvency Court and prove that the said debts of the insolvent father of the 2nd respondent are

> not immoral or illegal and on the other hand they are binding on the 2nd respondent and he is also liable to discharge them for the reason that the debts are not tainted with immorality or illegality and then the Official Receiver should proceed against the properties of the son of the insolvent. So at this stage I do not thin that the execution court has got any power to decide whether the debts are tainted with immorality or illegality and on the other hand it is for the Official Receiver to prove to the insolvency court and get the findings in his favour to that effect and then sell the property of the son of the insolvent in private sale.

The executing Court further held,

> On the other hand this court is bound to execute the decree and proceed with the above said execution proceedings. So I order further steps in both the said E.Ps. and I also further hold that the letter of the Official Receiver to the extent to raise the attachment is liable to be dismissed, and the same is dismissed accordingly. As the Official Receiver is already in possession of the property I roder that he should continue to be in possession of the same subject to the above. So far as the said E.Ps. are concerned, they have to be proceeded with till the Official Receiver gets the necessary declaration or relief to the effect that the said debts are not tainted with illegality or immorality and they are binding on the interest of the undivided son of the insolvent in the joint family properties, in the meanwhile the decree-holder in the above said E.Ps. are entitled to proceed with further.

Hence these two revision:

9. Shri C. Seetharamaiah, learned counsel for the petitioner, raised twofold contention. One, when once the insolvency Court grants a declaration that the son's share is liable for the debts of the father, an individual creditors cannot proceed with the execution of his decree against the son's share for his exclusive benefit. Secondly, a decision under Ss. 4 and 5 of the Provincial Insolvency Act is judgment in remand and is binding on al. In any events, the two decree-holder, being parties to those proceedings, are bound by the decision.

10. The contra contentions of Shri Appa Rao and Shri Haranath appearing for the respondents decree-holder are: Under Ss. 4 and 5 of the Provincial Insolvency Act, the Court cannot vest the son's share in the Official Receiver. It is only a right to sell the share u/s. 28-A of the said Act that is vested. The order under revision does not arise u/s. 4 and 5 of the Provincial Insolvency Act, as the said order arises under Execution proceedings initiated by the decree-holder and till a final decision is arrived at u/ss. 4 and 5 of the Provincial Insolvency Act. when the son's share of property is sought to be sold, no intervention in execution proceedings could be allowed. Therefore, the question of handing over the property of the Official Receiver does not arise. The application filed u/s. 4 & 5 of the Provincial Insolvency Act was rejected and also on appeal it was confirmed and the same became final. In any event, the resting of the son's share in the Official Receiver can never arise as it is only a right of the Official Receive to deal with the son's share, on being proved that the debts of the father are not illegal or immoral, it can at best to be said to arise. So unless that stage is reached, the Official Receiver cannot interfere with the decree-holder's right to sell the properties attached in the execution proceedings.

11. On the basis of the above contentions two questions stand out distinct for being answered: (1) Whether the Official Receiver has to initiate any proceedings in order to exercise his right to deal with or dispose of the property of the son's share, to establish that the debts of the father were (not?) illegal or immoral? (2) whether the Official Receiver has initiated action u/s. 4 and 5 of the Provincial Insolvency Act to exercise the rights vested in him for the disposal of the son's share in the undivided property for the benefit of the general body of the creditors.

12. At the outset, it may be stated that the decree-holder creditors have been parties to the proceedings arising out of the insolvency proceedings initiated by or at the instance of the Official Receiver on the one hand and the son on the other which eventually culminated in the decision of the Full Bench of this Court wherein C.R.P. No. 1109 of 1972, C.M.A. No. 15 of 1972 and C.M.A. No. 464 of 1971 were decided and disposed of by a common judgment.

13. IN E.P.No. 158 of 1971, the son raised on objection that the creditor cannot execute the decree inasmuch as the property of the joint family is vested in the Official Receiver in insolvency proceedings wherein the father was adjudged an insolvent and, therefore, the decree cannot be proceeded with E.A. No. 1030 of 1971 filed by the Official Receiver in E.P.No. 362 of 1970 was on the ground that the property attached may be given delivery of to the Official Receiver for the discharge of the debts stated in the (Annexure) to the Insolvency Petition. In all these cases, the son himself being a party admitted that the debts of the father are binding on the joint family property and, therefore, it was taken to be that the debts are not tainted debts and the same became final and binding. In fact, the decree-holder could have raised such objections if they so desired. Inasmuch as the only person who could have raised any such objection was the son and since he himself volunteered by conceding that said debts were not for immoral or illegal purposes, his share also came to be subjected to defray the debts contracted by the father. That apart, in C.M.A. No. 68 to 1978 which arose out of insolvency proceedings filed in I.A. No. 13575 in I.P.No. 29 of 1969 to which the father, the son and the decree-holder in the aforesaid E.P. were parties, it was held.

> But it may be stated that the 2nd respondent had not disputed the fact that the debts of his father are just debts and that his share in the joint family properties is liable for the satisfaction of these debts. In fact, the contention of the 2nd respondent in E.A. No. 1030 of 1971 (is) that his share also vested in the Official Receiver and the Official Receiver alone was competent to sell the share for the satisfaction of the debts of the creditors, who are shown in schedule of the Insolvency Petition. Therefore, there cannot be any objection and in fact, there is no objection for granting the declaration that the 2nd respondent's half share in the joint family properties is liable for the discharge of debts shown in the a schedule annexed to I.P. No. 29 of 1969. The opposition is only to the prayer of the Official Receiver for vesting the 2nd respondent's share in him.

14. If that be so, and it clearly emerges from the foregoing, it is too late in the day of conted that the Official Receiver , has once again to initiate the necessary proceedings to get it adjudicated that the debts of the father as shown in Annexure to I.P. No. 29 of 1969 were untainted ones. Hence, I am of the undoubted view that it is no more necessary for the

Official Receiver to take any steps for getting the debts of the father adjudicated as (not?) immoral and illegal.

15. The salient features of the Full Bench decision in ***S. Jaganmohan Rao* v. *U. Bahu Rao*** [AIR 1975 AP 278 (FB)] covering CRP No. 1109 of 1972, C.M.A., No. 464 of 1971 and C.M.A. No. 15 of 1972 may be set out: The Full Bench summed up in para 41 as under:

> To sum up : Upon a father, who is the Kartha of a joint Hindu family consisting of himself and his sons, being adjudged an insolvent, what vests in the Official Receiver under the Provincial Insolvency Act is his self-acquired property. his undivided share in the joint family property and his power of alienation over the interests of the sons in the joint family property provided the debts of the father are not tainted with illegality or immorality. The interest of the sons or their shares as such in the joint family property does not vest in the Offical Receiver. It is only the farther's power to alienate this interest or share that vests in the Offical Receiver. On such vesting the Official Receiver has three courses open to him with respect to the interests of the sons in the joint family property:
>
> (1) to exercise the power of insolvent father to dispose on by private sale,
>
> (2) to apply to the insolvency Court u/ss. 4 and 5 of the Provincial Insolvency Act, and
>
> (3) to apply u/s. 52 of the Provincial Insolvency Act to the Court executing the decree u/s. 52 for delivery of possession of the property and take proceeding for bringing the properties to sale.
>
> The power of the father to dispose of his son's share in the joint family properties by private sale, however, subsists only so long as there is no disruption of the joint family statues. That power comes to an end when that status is disturbed either by the institution of a suit for partition by the sons or by the attachment of the son's interest in the joint family properties by a creditor. Just as the father's power to alienate the son's interest is extinguished on the happening of any of the above mentioned contingencies, so also the power of the Official Receiver in this behalf is co-extensive with that of the father. If before the exercise of this power by the Official Receiver any of the above contingencies occur, i. e. the joint family status is disrupted by actual partition, or by the institution of a suit for partition, or by the attachment of the son's interest by any creditor, then the Official Receiver cannot proceed to dispose of the son's interest by private sale.
>
> Whether the attachment of the son's interest in before the adjudication of the father as an insolvent or after the adjudication, it makes no difference so far as the son's interest in the joint family properties is concerned. Once there is an attachment of the son's interest by a creditor whether before or after the adjudication the Official Receiver's power to dispose of their interest or share by private sale is lost. that power could have been exercised only before the attachment.
>
> The Official Receiver. however, may apply to the Insolvency Court for bringing the son's interest also to sale provided the debts of the insolvent father to be discharged are proved to be incurred for illegal or immoral purposes, for the pious obligation of the son to discharge the debts of the father incurred while he was joint

> which are not tainted with illegality or immorality continues even after partition. However as the attaching creditor is not forthwith entitled to possession of the son's interest in the property the Insolvency Court may, notwithstanding the attachment put the Official Receiver in position of the son's interest in the joint family property.

Having so held, the Full Bench eventually dismissed the Civil Revision Petition and allowed E. A. No. 1030 of 1970 filed u/s. 52 of the Provincial Insolvency Act for delivery of possession of the property described in the schedule annexed to the Execution Petition, and allowed E. P. No. 362 of 1970 filed by the Official Receiver, resulting in the dismissal of C.M.A. No. 15 of 1972. However, C.M.A No, 464 of 1971 was allowed directing the execution of the decree in O.S. No. 117 of 1970 under E.P. No. 362 of 1970. In view of this pronouncement, and as per the guidelines therein, the Official Receiver filed before the 2nd AddI. Subordinate Judge, Vijayawda, I. A. No, 1357 of 1975 in I.P. No. 29 of 1969 specifically use. 4 and 5 of the Provincial Insolvency Act impleading the insolvent father and the son as respondents 1 and 2 respectively and the decree-holders creditors as respondents 3 to 7, for a declaration that the half share of the 2nd respondent in the joint family properties of the respondent 1 and 2 is liable for discharge of the debts shown in the schedule annexed to the Insolvency Petition and for vesting the 2nd respondent's share in him (Official Receiver). The learned Subordinate Judge dismissed I.A. No 1357 of 1975 holding that the declaration sought does not lie. However, on appeal in C.M.A No. 68 of 1978. the District Judge, Krishna, farmed the point for consideration as under :

> Whether the Official Receiver is entitled to get the declaration as proved for and for an order vesting the 2nd respondent's (son's) share in him?

and answered the same in the following terms.

> As already pointed out, it is not the contention of the respondents 1 and 2, that the 2nd respondent's share is not liable for the satisfaction of the debts of the creditors shown in A schedule of the insolvency petition, and the declaration sought for by the Official Receiver is unnecessary because nobody has disputed that proposition and therefore, there can be no objection for the respondent to grant the declaration. The only objection raised by the respondents 3 to 7 is that the 2nd respondent's share cannot be vested in the Official Receiver for the purpose of selling the same by private sale.

After making those observations, the District Judge allowed the C.M.A. on 9-11-1979 in the following terms:

> It is declared that the half share of the 2nd respondents 1 and 2 is liable for discharge of debts shown in the A schedule annexed to 1. P. No. 29 of 1969 and the executing Court shall deliver possession of even the 2nd respondent's share in the joint family properties to the Official Receiver. This order shall not be construed as deciding that the Official Receiver can sell the 2nd respondent's half share in the joint family properties for the purpose of satisfying the debts of general body of creditors of the insolvent. Ist respondent.

16. It is thereafter when the decree holders initiated proceedings in E.P.No. 158 of 1971, E.P.No 270 of 1975 and E.P.No. 362 of 1970 in the Court of the Subordinate Judge,

Vijayawada, the Official Receiver sent a letter at. 8-8-1980 in E.P. No. 362 of 1970 requesting that in view of the order of the District Judge in C.M.A. No 68 of 1978, the attachment of the schedule property has to be raised and the property should be delivered to him for the benefit of the general body of creditors. The learned Subordinated Judge rejected that letter observing:-

> (I)t is duty of the Official Receiver to approach the Insolvency Court and prove that the said debts of the insolvent father of the 2nd respondent are not immoral or illegal...........and then the Official Receiver should proceed against the properties of the son of the insolvent.

The learned Subordinate Judge, however, thereafter held that the Court was bound to execute the decree and proceed with the execution proceedings. It is this order that is challenged in this revision.

17. The order under revision is erroneous, and it is apparent for two good reasons. Firstly, the learned Subordinate Judge has not correctly comprehended the decision of the Full Bench of this Court in S. Jaganmohan Rao v. U. Babu Rao (AIR 1975 Andhpra 278) (FB) (supra) and also the Judgment in C.M.A. No 68 of 1978, when he held that the Official Receiver, in order to exercise his right to sell the son's share of the property which was in his possession, should first establish that the debts of the insolvent-father are not tainted ones. Neither the Full Bench decision nor the judgment in C.M.A. No. 68 of 1978 has held any where that it is incumbent on the Official Receiver to first establish that the debts of the insolvent-father were not contracted for immoral or illegal purposes before he seeks to exercise the right of sale of the son's share. On the contrary the finding of the Court in C.M.A. No. 68 of 1978 is categorical, namely, that the son has not disputed the fact that the debts of his father are just debts and that his share in the joint family property is liable for the satisfaction of the debts. The Court further found that the son's contention in F.A. No. 1030 of 1971 was that his share also vested in the Official Receiver and the Official Receiver alone was competent to sell his share for the satisfaction of the debts of the creditors. This apart, it is quite obvious that the son, despite being a party to the decrees and also to the insolvency proceedings through, has not raised any objection or dispute as to the nature of the debts. Therefore, the irresistible inference is obvious, and that is, he admitted that the debts of his insolvent-father were untainted. Hence the insistence by the Lower Court that the Official Receiver will have to de novo take steps to get the debts of the insolvent-father adjudicated as not tainted with immorality or illegality, is clearly erroneous.

18. Secondly, the lower court again failed to appreciate and comprehend properly the conclusions and operative portion of the judgment in C.M.A. No. 68 of 1978. The operative portion of the judgment in C.M.A No. 68 of 1978 is emphatic in that it declared that the half share of the son in the joint family properties is liable for discharge of the debts shown in the A schedule to the Insolvency Petition and that the executing Court shall deliver possession of even the son's share to the Official Receiver. So the language is quite clear and does not bristle with any ambiguity whatsoever. However, it may be stated that there is ambiguity in the later part of the operative portion of the judgment in C.M.A. No. 68 of 1978 as it reads,

This order shall not be construed as deciding that the Official Receiver can sell the 2nd respondent's half share in the joint family properties for the purpose of satisfying the debts of the general body of creditors of the insolvent.

But, in my judgment, what all it means is that the Official Receiver cannot sell the half share of the son by private sale. So construed, there is no equivocally in the judgment in C.M.A. No 68 of 1978, and the executing Court has to allow the Official Receiver by delivering to him the possession of the son's share in the joint family property to effect its sale for the benefit of the general body of creditors other than by private sale.

19. It must, however, be stated that neither the insolvency Court in its judgment in C. M. A. No. 68 of 1978 nor the executing Court in its order under revision, has adjudged as to what steps the Official Receiver should take in discharging the untainted debts of the insolvent-father vis-a-vis the son's share in the joint family property, otherwise than by private sale.

20. In ***Official Assignee, Madras* v. *Ramachandra*** [AIR 1928 Mad 735], the Full Bench of the Madras High Court held,

> After the adjudication of the father an insolvent and the vesting of his rights in the Official Assignee. the institution of a partition suit by the sons of the insolvent effects a severance of the joint family statues and, therefore, the power to sell their shares by privates sale, of the Official Assignee, who steps into the shoes of the father, is extinguished, although the Official Assignee by proper proceedings in the insolvency Court may proceed against their shares.

In ***Ramachandra* v. *Official Assignee*** [AIR 1931 Mad 317], a Division Bench of the Madras High Court held,

> Although owing to the division of status brought about by a suit for partition instituted by the sons after their father's insolvency, the father and Official Assignee lose the right of private sale of the family property including the shares of the sons, it is open to the Official Assignee to obtain a declaration against. the sons and get the family property including their shares therein sold by or through Court. Section 7 gives the widest powers to the Insolvency Court to go into such a question and to declare the liability of the son's shares in the family property for the proved and just debts of the father insolvent and make all necessary orders for their realisations.

In ***Subba Rao* v. *Official Receiver*, *West Godavari*** [AIR 1965 AP 52], Vendatesan, J., held:

> The effect of an attachment of the son's is not to create a charge or lien in favour of the attaching-creditors, But it only puts an end to the power of disposal of the father and of the Official Receiver u/s. 28-A of the Act to dispose of son's shares. It does not preclude the Official Receiver from obtaining a declaration from the Insolvency Court that the son's shares are liable for the discharge so the debts due to the several creditors which are not illegal or immoral, and have the property sold through Court.

Similarly, Kumarayya, J., in ***Official Receiver* v. *Suryanarayana*** [AIR 1969 AP 437] held:

> Under S. 4 of the Provincial Insolvency Act the Insolvency Court has full power to decide question arising in any case of insolvency which is within the cognisance of the Court * * * The Court has full plenary powers, subject of course to the provisions of the Act, to decide, if it thinks it necessary or expedient in the interest of justice and for purpose of making a complete distribution of the property.....After the declaration of the father as insolvent, on account of partition which was effected by reason of a institution of a suit, only the remedy of the Official Receiver to sell the property privately is lost; but the substantial right to enforce the debts due to the creditors against the son remains and that he can work out by suitable proceeding, though not private sale, the liabilities of the sons.

Similar is the view taken by the Full Bench of this court in ***S. Jaganmohan Rao*** **v.** ***U. Babu Rao*** [AIR 1975 AP 278 (FB)], in analogous circumstances, when it held that, on vesting of the power to alienate the son's interest in the joint family property in the Official Receiver, it is open to him under the provision of Provincial Insolvency Act ''to take proceedings for bringing the properties to sale.''

21. It clearly emerges from the above conspectus that it is competent for the Official Receiver to get the son's share in the joint family property sold through Court though not by private sale, notwithstanding that it is attached in execution proceedings by its creditors-decree-holders, so as to discharge the debts of the insolvent father for the benefit of the general body or creditors.

22. In this case, it is established that the debts are not tainted and, the O.R. having initiated proceedings u/ss. 4, 5 and 52 of the Provincial Insolvency Act, came to be in possession of the son's share though it is subject to the order of attachment obtained by the creditors-decree-holders.

23. To sum up:

(1) Under S. 4 of the Provincial Insolvency Act, the insolvency Court has full plenary powers to adjudicate upon all the question arising in any case of insolvency, if it thinks expedient and in the interests of justice for due and proper distribution of the insolvent's property.

(2) Upon a father being adjudged an insolvent, what vestes in the Official Receiver under the Provincial Insolvency Act is his self-acquired property, his undivided share in the joint family property and his power of alienation over the interests of the sons in the joint family property provided the debts of the father are not tainted with illegality or immorality. It is only the father's power to alienate the interest or share of the son that vests in the Official Receiver but not the interest of the son or his share as such in the joint family property.

(3) On such vesting, the Official Receiver has three courses open;

(a) to exercise the power of the insolvent-father to dispose of by private sale;

(b) to apply the Insolvency Court u/s. 4 of the Provincial Insolvency Act; and

(c) to apply u/s. 52 of the Provincial Insolvency Act to the Court execution the decree, for delivery of possession of the property.

(4) Once there is an attachment of son's interest of share in the joint family property by a creditor, whether before or after the adjudication of the father as an insolvent, the Official Receiver's power to dispose of such interest of share by private sale is lost.

(5) The Official Receiver, however, is entitled to delivery of possession of the son's share by getting the attachment raised.

(6) The Official Receiver, after taking delivery of possession of the son's share, stand vested with a right to get it sold through or by Court but not by private sale.

24. In view of the above, the order under revision is set aside. The attachment made in E.P.No. 158 of 1971, E.P. No. 362 of 1970 and E.P. No. 270 of 1975 is raised. The Official Receiver, who is in possession of the son's share in the joint family property u/s. 52 of the Provincial Insolvency Act, shall continue to be in possession; and he shall be entitled to get the son's share sold only through Court by taking appropriate proceedings, for the benefit of the general body of creditors mentioned in B Schedule to the insolvency petition, I. P. No 29 of 1969. The Civil Revision petitions are accordingly allowed.

* * * * *

Moti Ram v. *E. H. Rodwell*

AIR 1923 All. 159

PIGGOTT AND WALSH, JJ. - We entirely agree with the judgment of the learned Judge. It really could not have been better put than he has put it. It is not necessary to follow him and speculate as to what would be the result under the Provincial Insolvency Act or under the English law. It is sufficient to say that the mortgage in this case which was registered is not challenged as such. Before the insolvency, the Bank of Uppar India were a secured creditor holding a legal charge upon movable property of the debtor. On the making of the order of adjudication against the debtor, property in his possession or ownership or within his order or disposition under such circumstances as constituted him the reputed owner, vested in the Receiver, subject to the rights of a secured director. Sub-section (6) is as clear as it can possibly be, and provides unambiguously that no property over which a secured creditor has a legal charge, shall be affected by any of the provisions in the sub-section which precede it. The Bank were a secured creditor within the meaning of sub-section (6), and their charge is not affected by any of the other provisions of sections 28. We are convinced that in as much as the existence of a mortgage over immovable property, which remains in the possession of the debtor would raise all sorts of questions as to the meaning of the terms ‘‘true owner’’ and ‘‘reputed owner’’ used in section 28, that was why the Legislature went out of its way to enact sub-section (6). It must be clearly understood, indeed it does appear clear from the Judge’s order, that if the Receiver realises the property, the debt due to the Bank at the date of such realisation, constitutes a charge payable to the Bank out of the amount so realised. Section 47 indicates what a secured creditor in such a case can do, but of course his rights under section 47 must be necessarily postponed when the legality of his alleged charge is called in question, as it was here. It is presumably in effect too late for this the provisions of section 47 to be applied, or any rate the Bank has not chosen to object to the course proposed by the Receiver of realising by sale and discharging the debt due out of the proceeds. But it must not be supposed as a matter of practice that the judicial proceeding which had now come to an end has affected the option given to the creditor under section 47. The appeal must be dismissed.

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Cheruvu Nageshwaraswami v. *Vadrevu Viswasundara Rao*

1953 SCR 894 : AIR 1953 SC 370

MUKHERJEA, J. - The appellant before us is the sixth defendant in a suit, commenced by the plaintiff-respondent in the Court of the Subordinate Judge at Masulipatam (being Original Suit No. 29 of 1937) for recovery of a sum of Rs 99,653 annas odd by enforcement of a simple mortgage bond. The mortgage bond is dated 28th September, 1930, and it was executed by Defendant 1 for himself and as guardian of his two minor sons Defendants 2 and 3 - all of whom constituted together a joint Hindu family at that time. The plaintiff mortgagee happens to be the son-in-law of Defendant 1 and at the time of the execution of the mortgage the first defendant was indebted to a large number of persons including the mortgagee himself, and being hard pressed by his creditors requested the plaintiff to lend him a sum of Rs 1,25,000 on the hypothecation of the properties in suit, to enable him to tide over his difficulties and discharge his debts. The total consideration of Rs 1,25,000 as stated in the deed is made up of the following items:

(*1*) Rs 13,065, which was the amount due on a promissory note executed in favour of the plaintiff by the first defendant on 17th January, 1928.

(*2*) Rs 13,285 due under another promissory note dated 18th August, 1930 executed by Defendant 1 in favour of the wife of the plaintiff and later on transferred by her to the plaintiff on 28th September, 30.

(*3*) Rs 25,000 paid by the plaintiff by endorsing in favour of Defendant 1 a cheque for that amount drawn in his name by the Co-operative Central Bank, Ramchandrapuram on the Central Urban Bank, Madras.

(*4*) Rs 937-8-0, the amount paid in cash by plaintiff to Defendant 1 for purchasing stamps for the mortgage document.

(*5*) Rs 72,712-8-0, the amount of future advances which the plaintiff promised to make from time to time to Defendant 1 according to his convenience.

5. The money lent was to carry interest at 7½ per cent simple per annum and the due date of payment of the principal money was 30th September, 1933. The interest would, however, have to be paid annually on the 30th of September every year, in default of which the whole of the principal and interest in arrears would become repayable immediately with interest at 9 per cent compound per annum with yearly rests. It was expressly stated in the mortgage deed that if the mortgagee was unable to advance the entire amount of Rs 1,25,000 the terms set out above would apply to the amount actually advanced. It appears that after the execution of the mortgage bond a sum of Rs 3000 only was paid by the mortgagee to Defendant 1 on 5th of November, 1930. In the plaint, which was filed by the plaintiff on 15th September, 1937, the total claim was laid at Rs 99,653 annas odd, out of which Rs 55,287 annas odd constituted the principal money as stated above and the rest was claimed as interest calculated at the rate of 9 per cent per annum compound with yearly rests.

6. Besides the original mortgagors, who were Defendants 1 to 3 in the suit, there were three other persons impleaded as parties defendants. Defendant 4 was the Receiver in insolvency in whom the entire estate of the Defendant 1 vested by reason of his being adjudged a bankrupt by an order of the District Judge of Kistna dated 18th January, 1932 in

Insolvency Proceeding No. 20 of 1931, started at the instance of another creditor of the first defendant. Defendant 5 was a lessee in respect of the mortgaged properties under Defendant 4, while the sixth defendant was the purchaser of all the mortgaged properties from the Receiver in insolvency. The Receiver, it seems, had put up all the suit properties to sale subject to the mortgage on 19th April, 1937, and they were knocked down to Defendant 6 for the price of Rs 1340. A registered deed of sale was executed by the Receiver in favour of the purchaser on 20th January, 1939.

7. The Defendants 1 to 3 did neither appear nor contest the suit. Defendant 4 appeared in person but disclaimed any interest in the suit properties. The Defendant 5 contended that he was a lessee under Defendant 4 for one year only and was not a necessary party to the suit at all. The suit was really contested by Defendant 6, the purchaser at the Receiver's sale. The defence taken by Defendant 6 in his written statement was substantially of a two-fold character. It was pleaded in the first place that the bond in suit was a collusive document not supported by any consideration and was executed by Defendant 1 in favour of his own son-in-law, with a view to shield his properties from the reach of his creditors. The other contention put forward was that the interest claimed was penal and usurious. After the passing of the Madras Agriculturists' Relief Act in March 1938, this defendant filed an additional written statement, with the permission of the court, in which he raised the plea that as an agriculturist he was entitled to the reliefs provided in that Act and that the mortgage debt should be scaled down in accordance with the provisions of the same.

8. The trial Judge by his judgment dated 29th July, 1940, decreed the suit in part. It was held that the mortgage bond was not a collusive document executed with the intention of defrauding the creditors of the mortgagor; it was a genuine transaction and was supported by consideration. On the other point, the court held that Defendant 6 was an agriculturist and was entitled to claim the reliefs under Madras Act 4 of 1938. After deducting all outstanding interest which stood discharged under Section 8(1) of the Agriculturists' Relief Act, the principal money due to the creditor on that date was found by the trial court to be Rs 42,870 annas odd. This figure was arrived at by taking only the original amounts actually advanced on the two promissory notes mentioned above and further, deducting from them, the payments made by the debtor towards the satisfaction of the principals in each. Thus a preliminary decree was made in favour of the plaintiff entitling him to recover a sum of Rs 42,870-4-0 together with interest at 6¼ per annum from 1st October, 1937, to 1st November, 1940, the date fixed for payment under the preliminary decree. In default, the whole amount was to carry interest at 6 per cent per annum. It may be mentioned here that the Subordinate Judge in deciding Issue 3 held expressly that the provision relating to payment of compound interest at an enhanced rate in default, of payment of the stipulated interest on the due dates was in the nature of a penalty and should be relieved against; but as the court scaled down the interest under Madras Act 4 of 1938, it became unnecessary to consider in what manner this relief should be granted under Section 74 of the Indian Contract Act.

9. Against this decision, two appeals were taken to the High Court of Madras, one by the plaintiff and the other by Defendant 6. The plaintiff in his appeal (being Appeal No. 56 of 1941) assailed that part of the judgment of the Subordinate Judge which gave the Defendant 6 relief under the Madras Agriculturists' Relief Act; while the appeal of the sixth defendant

(being Appeal No. 192 of 1941) attacked the very foundation of the mortgage decree on the ground that the mortgage being a collusive and fraudulent transaction, the plaintiff's suit should have been dismissed in toto. The Defendants 2 and 3, although they remained ex parte during the trial in the first court, filed, in forma pauperise, a memorandum of cross-objection challenging the decree of the Subordinate Judge on the ground that as their interest in the mortgaged properties did not pass to the Defendant 6 by virtue of the Receiver's sale, their right of redemption remained intact and ought to have been declared by the trial Judge.

11. The High Court affirmed the finding of the trial Judge that the bond in suit was supported by consideration to the extent of Rs 55,287-8-0 as alleged in the plaint and that it was a valid and bona fide transaction. The learned Judges held, differing from the trial court, that the Defendant 6 was not entitled to claim any relief under the provisions of the Madras Agriculturists' Relief Act, and that in any event the court below was not right in reducing the amount of the principal money from Rs 55,287-8-0 to Rs 42,870, there being no renewal of a prior debt so far as Defendant 6 was concerned. The court agreed in holding that the provision relating to payment of enhanced interest in case of default amounted to a penalty and reduced the rate of interest from 9 per cent compound to 7½ per cent compound with yearly rests. Lastly, the High Court allowed the cross-objection of Defendants 2 and 3, being of opinion that their interest in the mortgaged properties could not vest in the Receiver on the insolvency of their father and that Defendant 6 could not acquire the same by virtue of his purchase from the Receiver. Defendants 2 and 3 were, therefore, allowed the right to redeem the mortgaged properties along with Defendant 6. The result was that the plaintiff was given a decree for a sum of Rs 55,287-8-0 with interest at 7½ per cent compound with yearly rests up to the date of redemption and subsequent interest was allowed at the rate of 6 per cent per annum. Interest was to be calculated from 28th September, 1930, on Rs 52,287-8-0 and from 5th November, 1930, on the amount of Rs 3000. Against this decree, Defendant 6 obtained leave to appeal to the Privy Council and because of the abolition of the jurisdiction of the Privy Council, the appeal has come before us.

12. Mr Somayya, who appeared in support of the appeal, did not press before us the contention raised on behalf of his client in the courts below that the mortgage was a fraudulent transaction or was void for want of consideration. He assailed the propriety of the judgment of the High Court substantially on three points. His first contention is, that the decision of the High Court allowing a right of redemption to Defendants 2 and 3 cannot stand in view of the amendment introduced by the Provincial Insolvency Amendment Act, 1948, which has been expressly made retrospective. The second point taken by the learned counsel is that Defendant 6 should have been given relief under the Madras Agriculturists' Relief Act and the debt should have been scaled down in accordance with the provisions thereof. It is said that Defendant 6 was an agriculturist himself and even if he was not, the relief under Madras Act 4 of 1938 was still available to him by reason of the original mortgagors being agriculturists. The third and the last point urged is that in any event having regard to the finding arrived at by the High Court that the stipulation to pay compound interest at an enhanced rate was a penalty, adequate relief should have been granted against it and no compound interest should have been allowed at all.

13. The first point raised by the learned counsel, in our opinion, is well founded and must succeed. There was some difference of judicial opinion as to whether the powers of a father under the Mitakshara law to alienate the joint family property including the interest of his sons in the same for discharge of an antecedent debt not contracted for illegal or immoral purposes vests in the Receiver on the adjudication of the father as an insolvent. Under the Presidency Towns Insolvency Act, this power was held to vest in the Official Assignee under Section 52(2) of the Act. As regards cases governed by Provincial Insolvency Act, it was held by a Full Bench of the Madras High Court that the father's power to dispose of his son's interest in the joint family property for satisfaction of his untained debts was not "property" within the meaning of Section 28(2)(*d*) of the Provincial Insolvency Act; while a contrary view was taken by a Full Bench of the Patna High Court. The conflict has now been set at rest by the enactment of Section 28-A in the Provincial Insolvency Amendment Act of 1948 which came into force on the 12th April, 1948. The new section reads as follows:

> The property of the insolvent shall comprise and shall always be deemed to have comprised also 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.

14. The language of the section indicates that its operation has been expressly made retrospective. The result, therefore, is that the power of the Defendant 1 to alienate the interest of his sons, Defendants 2 and 3, in the mortgaged properties for satisfaction of his antecedent debts did pass to the Receiver as "property" within the meaning of the Provincial Insolvency Act and consequently a sale by the Receiver the interest of Defendants 2 and 3 did vest in the sixth defendant, and he alone must be held competent to exercise the right of redemption.

15. The second point urged by Mr Somayya raises the question as to whether the appellant could claim relief under the Madras Agriculturists' Relief Act. The High Court decided this point against the appellant firstly on the ground that the appellant was not a debtor at the date of the commencement of the Act, he having acquired no interest in the equity of redemption at that time. The other reason given is that Defendant 6 was not an agriculturist within the meaning of the Agriculturists' Relief Act and although he was possessed of agricultural lands and hence prima facie came within the definition of an "agriculturist" as given in Section 2(*ii*) of the Act, he was excluded from the definition by the operation of proviso (D) attached to the sub-section.

16. So far as the first ground is concerned, Section 7 of the Agriculturists' Relief Act expressly lays down that "all debts payable by an agriculturist at the commencement of this Act, shall be scaled down in accordance with the provisions of this chapter". The essential pre-requisite to the application of the provisions of the chapter, therefore is the existence of a debt payable by an agriculturist on the date when the Act commenced, that is to say, on 22nd March, 1938. The learned Judges of the High Court were certainly right in saying that the sixth defendant was not a debtor on that date, as he did not become the owner of the equity of redemption till the 20th of January, 1939, when the deed of sale was executed in his favour by the Receiver in insolvency. But this by itself is not sufficient to disentitle the appellant to the privileges of the Agriculturists' Relief Act. It is not necessary that the applicant for relief

himself should be liable for the debt on the date that the Act came into force. The right to claim relief as is well settled by decisions of the Madras High Court is not confined to the person who originally contracted the debt, but is available to his legal representatives and assigns as well; nor is it necessary that the applicant should be personally liable for the debt. The liability of a purchaser of the equity of redemption to pay the mortgage debt undoubtedly arises on the date of his purchase; but the debt itself which has its origin in the mortgage bond did exist from before his purchase, and if it was payable by an agriculturist at the relevant date, the purchaser could certainly claim the privileges of the Act if he himself was an agriculturist at the date of his application. The material question, therefore, is whether the mortgage debt was payable by an agriculturist on 22nd March, 1938? The appellant argues that it was payable by the mortgagors and they were certainly agriculturists. We do not think that there is warrant for any such assumption on the materials as they exist on the record. The only issue before the trial Judge was, as to whether Defendant 6 was an agriculturist. There was neither any question raised nor any evidence adduced as to whether Defendants 1 to 3 were agriculturists as well. In fact, this aspect of the case was not adverted to by the trial Judge at all. Before the High Court it was argued on behalf of Defendant 6 that even if he was not an agriculturist himself, yet if Defendants 2 and 3 were given relief as agriculturists, that would enure for his benefit as well and accordingly he invited the court to go into the question and hold that the original mortgagors were agriculturists. This the learned Judges refused to do and dismissed this part of the claim of Defendant 6 with these remarks:

> In the present case, the mortgagors have not claimed such a benefit, nor have they adduced *any evidence to show that they are agriculturists*. We therefore cannot accede to the request of the sixth defendant that the right of the mortgagors to relief should be investigated merely with the object of giving an accidental relief to the non-agriculturist purchaser.

17. As the point was not investigated at all, it is not possible for us to hold that the debt was payable by an agriculturist on the relevant date. It may be that the mortgaged properties were agricultural lands but it is not known whether the mortgagors did possess other estates which might bring them within the purview of any of the provisos attached to the definition. In these circumstances, the appellant must be deemed to have failed to show that there was in existence a debt payable by an agriculturist on 22nd March, 1938.

18. The High Court has held further that Defendant 6 was not an agriculturist because he was the purchaser of certain villages at a court sale in respect of which Peishkush exceeding Rs 500 was payable. Consequently, he became "land-holder of an estate" under the Madras Estates Land Act and could not claim to be an agriculturist as laid down in the proviso (D) to Section 2(*ii*) of the Act. Mr Somayya lays stress upon the fact that this purchase on the part of his client was merely as a benamidar for Defendant 5 as has been held by the courts below and consequently the proviso did not affect him at all. This is a debatable point upon which the judicial opinion of the Madras High Court itself does not seem to be quite uniform. A distinction can certainly be drawn between the rights of a person in his own individual or personal capacity and those which he exercises on behalf of another. On the other hand, if we look to the definition of "land-holder" as given in Section 3(5) of the Madras Estate Land Act, it may be argued that a benamidar of an estate, who is entitled to collect rents and is at least

the titular owner of the estate could come within the description. Having regard to the view taken by us that Section 7 of the Agriculturists' Relief Act is not applicable on the facts of the present case, this question does not really become material and it is not necessary for us to express any final opinion upon it. For the identical reason Section 8(1) of the Act cannot also be invoked in favour of the appellant. It may further be mentioned that Mr Somayya in course of his arguments made it plain that he would not press for relief under the Agriculturists' Relief Act if the high rate of interest allowed by the High Court was substantially reduced.

19. This takes us to the third point and we think that the stipulation as to payment of compound interest in case of default, being held to be a penalty by both the courts below, the High Court should not have allowed interest at the rate of 7½ per cent compound with yearly rests. The High Court seems to have been misled by a statement occurring in the judgment of the trial Judge that the original rate of interest was 7½ per cent compound with yearly rests. This is not true and as a matter of fact, the original agreement was to pay interest at 7½ per cent simple. We consider it proper that the mortgage money payable to the plaintiff should carry interest at the rate of 7½ per cent simple up to the expiry of the period of redemption which we fix at six months from this date.

20. The result, therefore, is that we allow the appeal in part and modify the judgment of the High Court. A preliminary decree should be drawn up in favour of the plaintiff against Defendant 6 alone for a sum of Rs 55,287 annas odd which will carry interest at 7½ per cent simple per annum. Interest will be calculated on Rs 52,287 on and from the date of the mortgage, while on the balance of Rs 3000 interest will run from 5th November, 1930. We make no order as to costs of this Court or of the High Court. The plaintiff will have his costs of the trial court.

* * * * *

Hans Raj v. *Rattan Chand*

(1967) 3 SCR 365 : AIR 1967 SC 1780

G.K. MITTER, J. - This is an appeal by a certificate against a judgment of a Division Bench of the High Court at Chandigarh in Letters Patent Appeal No. 212 of 1961. The High Court allowed the appeal on the ground that the application out of which it arose was incompetent as barred by limitation and, in our opinion, it did so correctly. The short question before us is, whether the application leading to this appeal was one under Section 68 of the Provincial Insolvency Act, and as such having been made beyond the period of 21 days from the date of the act of the receiver complained of, was covered by the proviso to that section? In substance, the argument on behalf of the appellant was that the application was one under Section 4 of the Act in which there is no mention of any period of limitation.

2. The facts necessary for the disposal of this appeal are as follows: Brij Lal and Hans Raj were two brothers. On an application having been made by the creditors of Brij Lal in the year 1949, the insolvency Judge, Barnala adjudicated him as an insolvent, on 23rd November, 1954. Two days thereafter, one Mohinder Lal was appointed as a receiver in insolvency by the order of the Court and he was directed to take possession of the property of the insolvent. On 26th and 27th November, 1954 the receiver took possession of various properties of the insolvent and attached some urban property and agricultural land which are the subject matter of the present litigation. Hans Raj filed an objection application on 21st December, 1954 alleging that the property detailed therein belonged to him and was exclusively in his possession. He prayed for release of the property from attachment and restoration of possession to him. The receiver pleaded that he had taken possession thereafter at the instance of two creditors. The insolvency Judge framed two issues, namely, (*1*) Is the objector owner of the suit property and in possession thereof and is it accordingly not liable to be attached by the receiver? and (*2*) whether the objection petition was time-barred? The learned Judge decided the first issue against the objector but held that the application was not covered by Section 68 of the Act. In appeal, the District Judge differed from both the findings. He held that there had been no partition of the joint Hindu family of the insolvent and his brother, but, on the point of limitation he found against the objector. In the result, he accepted the appeal and dismissed the objection petition. Hans Raj went up in Second Appeal to the Punjab High Court. The learned Single Judge of the High Court came to the conclusion that the property in dispute must be deemed to be the separate property of Hans Raj and held that the application was within time. Rattan Lal who replaced the original receiver on the latter's death filed a letters patent appeal to the High Court. The High Court, as already noted, held that the Application of Hans Raj was not within time resulting in the dismissal of the objection petition.

3. We must first consider the nature of the application made by the objector and then find out whether it is covered by Section 68 of the Act. Section 4 of the Act on which great reliance was placed by learned counsel for the appellant is one of the three sections in Part I of the Act i.e. Sections 3, 4 and 5. Section 3 lays down that the District Courts shall be the courts having jurisdiction under the Act.

4. Under Section 20 (contained in Part II) the court when making an order admitting the petition may, and where the debtor is the petitioner ordinarily shall appoint an interim receiver of the property of the debtor or of any part thereof and the interim receiver shall thereupon have such of the powers conferable on a receiver appointed under the Code of Civil Procedure as the court may direct. If an interim receiver is not so appointed, the court may make such appointment at any subsequent time before adjudication. Under Section 21, at the time of making an order admitting the petition or at any subsequent time before adjudication the court may either of its own motion or on the application of any creditor make orders to suit the occasion, namely, direct the attachment by actual seizure of the whole or any part of the property in the possession or under the control of the debtor, order a warrant to issue with or without bail for his arrest, or order the debtor to give reasonable security for his appearance until final orders are made on the petition. Under Section 28(2) on the making of an order of adjudication, the whole of the property of the insolvent is to vest in the court or in a receiver as provided in the Act and become divisible among the creditors in terms of the Act. Under Section 56(1) the court may at the time of the order of adjudication or at any time afterwards, appoint a receiver for the property of the insolvent, and such property shall thereupon vest in such receiver. Under sub-Section (3) of the section, where the court appoints a receiver, it may remove the person in whose possession or custody any such property as aforesaid is from the possession or custody thereof but nothing in this section is to be deemed to authorise the court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove. Under sub-Section (5) the provisions of this section shall apply so far as may be to interim receivers appointed under Section 20.

5. It will be noted from the above that Section 4, sub-section (1) lays down the ambit of the powers of the court exercising insolvency jurisdiction. Its primary object is to empower such courts to decide all questions whether of title or priority or of any nature whatsoever and whether involving matters of law or fact which may arise in any case of insolvency coming within the cognizance of the court. In other words, the aim of this provision is that all questions of title or priority arising in insolvency should primarily be disposed of by the insolvency courts so as to achieve expedition. It will be noted at once that resort to ordinary courts of law is not proscribed and at the same time the legislature provided that a person could resort to the insolvency court if the matter arose in insolvency proceedings. Under sub-section (2) however every such decision arrived at by the insolvency court was to be final and binding for all purposes as between on the one hand, the debtor and the debtor's estate, and, on the other hand, all claimants against him or it and all persons claiming through or under them or any of them. This provision is however subject to the other provisions of the Act and notwithstanding anything contained in any other law for the time being in force. It is also to be noted that this section does not lay down what procedure or what steps should be taken by any person who is aggrieved by any order of the insolvency court or of any act or omission or commission of the receiver.

6. Section 20 of the Act empowers the court to appoint an interim receiver of the property of the debtor as soon as an order is made admitting the petition. For the preservation of the insolvent's property, the court may direct such interim receiver to take immediate possession of the whole or any part thereof. A duty is therefore cast on the interim receiver to see that the

property of the debtor is not lost and for that purpose he must act quickly. As it is not possible for him except on the application of the debtor to know all the details of the insolvent's property, he may take the help of the creditors to ascertain what they are. In this case, on the day of the making of the order for adjudication, the court did not appoint a receiver but did so two days afterwards directing him to take possession of the property of the insolvent. It is possible that the receiver may be misled by the creditors and he may attach properties in which as a matter of fact, the insolvent has no interest. In such a case, the stranger to the insolvency proceedings is not without a remedy. He need not resort to the ordinary and dilatory proceedings by filing a suit and getting an adjudication of title to his property, removal of the attachment, etc. Section 68 is aimed at giving him speedy relief by enabling him to make an application to the court straight way against any act or decision of the receiver and asking for appropriate relief. If however the party aggrieved seeks to benefit by this provision, he must also bring his case within the four corners of the section and prefer his application within 21 days from the date of the act or decision of the receiver complained of. When the receiver does an act under the express directions of orders of the court, an application by a third party complaining thereof does not fall within Section 68 because the receiver's act is a ministerial one. The aggrieved person is however not without a remedy. He can inter alia apply to the insolvency court for undoing the wrong complained of and the court can give such relief as the circumstances may call for. The jurisdiction of the court and the ambit of its powers are as contained in Section 4 which however does not lay down any procedure for obtaining such relief. It is not therefore correct to describe an application for relief as one under Section 4.

7. Leaving aside the decisions which were cited at the Bar, it appears to us, on a plain reading of the sections mentioned above and in particular, Sections 4 and 68, that there can be no doubt that a person (like the appellant before us) complaining of the receiver taking possession of or attaching property in which the insolvent has no interest, must apply for relief within 21 days of the wrongful act of the receiver. He cannot be heard to say that his application is not under Section 68 but under Section 4 and thus seek to avoid the short period of limitation prescribed under Section 68. Moreover, sub-section (1) and sub-section (2) of Section 4 both start with the phrase "subject to the provisions of this Act" and even if it was possible to construe that Section 4 envisaged the making of an application for relief, such application would be subject to Section 68 of the Act.

9. The sheet anchor of the appellant's case is the decision of the Allahabad High Court in ***Nathu Ram* v. *Madan Gopal*** [AIR 1932 All 408]. There the Official Receiver, in pursuance of an order of the insolvency court, attached a property on 8th June, 1929. On 2nd July following, the son of the insolvent applied to the insolvency court alleging that the property belonged to him and not the insolvent. The court decided in favour of the son but was not called upon to go into the question as to whether the application was within time. This question of limitation was raised before the District Judge and the objection was over-ruled by him. It was observed by a Division Bench of the Allahabad High Court that:

> The house was attached under an order of the Insolvency Court, and not by any independent decision of the Official Receiver. The actual attachment was a mere ministerial act done in pursuance of the order of the Court. The objector was not

> challenging the act of the receiver, who had no voice in the matter, but the order of attachment passed by the Court ex parte. It seems to us that it was not an act or decision of the receiver within the meaning of Section 68. On the other hand, it was a claim put forward by a stranger to the insolvency proceedings setting up his own independent title, and it fell within the scope of Section 4, Provincial Insolvency Act.

The learned Judges distinguished the cases of ***Bhairo Prasad* v. *S.P.C. Dass*** [AIR 1919 All 474] and ***Hussaini* v. *Muhammad Zamir Abdi*** [AIR 1924 Oudh 294] on the ground that in those cases there was no order of the court directing attachment but the act complained of was an act of the receiver himself.

10. In ***Bhairo Prasad*** case the Provincial Insolvency Act, 1907 was in operation and there a stranger to the insolvency complained of an act of attachment after the lapse of 21 days. A Division Bench of the Allahabad High Court held that the application was barred by limitation observing at the same time:

> "A stranger to the insolvency is not bound to go to the Insolvency Court at all. He has the ordinary right, which every individual has, to seek redress in the ordinary civil courts for any grievance or trespass to his property, whether committed by an Official Receiver or anybody else, but he can, if he pleases, if he complains against the act of the receiver, apply under Section 22 to the insolvency court itself …. But similarly if he applies under Section 22, he must comply with the terms of Section 22."

In ***Mt. Husaini Bibi*** case certain houses were proclaimed for sale on 14th June, 1922 and on 1st July the appellant, the wife of the insolvent, put in a claim that the properties belonged to her. The insolvency court referred the appellant to the civil court and a suit was filed on 4th July, 1922. The properties were sold by the receiver on 5th July before an injunction of the civil court restraining a sale could be served on the receiver. On 3rd August 1922 the appellant applied to the District Judge for the cancellation of the sale. This was dismissed. The subject of appeal before the High Court was the order of dismissal. The learned Single Judge relied upon ***Bhairo Prasad*** case and observing that the application presented on 3rd of August was apparently one under Section 68 of the Act held that it was barred before the 3rd of August. It was further pointed out that a stranger to the insolvency may seek his redress in ordinary civil court when aggrieved by any act of the Official Receiver, or he may apply under Section 68 of the Act (corresponding to Section 22 of the previous Act). Reference may also be made to an earlier decision of the Allahabad High Court in ***Mul Chand* v. *Murari Lal*** [AIR 36 All 8]. There the receiver in insolvency seized certain movable property on the information laid by one of the creditors as property of the insolvents. The appellant before the High Court claimed that the property was his and presented an objecting purporting to be one under Order XXI Rule 58 of the Code of Civil Procedure. This was dealt with by the Second Additional Judge of Meerut on the merits who after taking evidence came to the conclusion that the property seized belonged to the insolvents and dismissed the appellant's application. The Allahabad High Court pointed out that the appellant's position was that of a person aggrieved by an act of the receiver and his remedy was by an application under Section 22 of Act 3 of 1907.

11. These decisions, in our opinion, do not assist the appellant on whose behalf it was argued that an application might be made either under Section 68 or under Section 4 of the Act. It is clear from the above decisions that a person complaining of the act of the receiver may either apply under Section 68 or proceed under the ordinary law of the land. Section 4 does not prescribe any application for relief under that section. Its object is to define the limits of jurisdiction of the courts exercising powers in insolvency. It is not correct to say that a person aggrieved by an act of the receiver has the choice of making an application under Section 4 or under Section 68. Section 4 comes into operation whenever any question of the nature mentioned therein is sought to be canvassed before a court exercising insolvency jurisdiction. Such questions may arise because of acts or decisions of the receiver complained of. A question as to whether an insolvent has any interest in the property attached by the receiver would fall within the purview of Section 4, but the application for the adjudication of such a question when the receiver acts otherwise than under the order of a court would be covered by Section 68 and as such the period of limitation of twenty one days would be attracted to any such application.

12. Mr Bishan Narain referred us to a few decisions of different High Courts as illustrating his proposition that applications are permissible under Section 4 of the Provincial Insolvency Act. In ***Vellayappa Chettiar* v. *Ramanathan Chettiar*** [ILR 47 Mad. 446] cited on behalf of the appellant, the facts were as follows. The respodent obtained a mortgage decree against a person who was subsequently adjudicated an insolvent and the Official Receiver assumed jurisdiction over his properties. While the latter was taking steps to realise the assets, the appellant asserted that some of the properties covered by the mortgage decree were his and denied the right of the insolvent to such properties, at the same time, preferring a claim petition before the Official Receiver. The Receiver enquired into the same and allowed it. Against that order, the mortgagee-decree-holder filed a petition before the District Judge under Section 68 who set aside the order of the Official Receiver and further directed that the claim petition also do stand dismissed. The claimant went up in appeal to the Madras High Court. The learned Judges of the Madras High Court said that the whole of the proceedings was misconceived observing that the Official Receiver had no power to make any order in a claim petition as this was not a power delegated to him under Section 80 of the Provincial Insolvency Act of 1920. According to the High Court, if the claimant wanted to prevent the sale of the property as belonging to the insolvent, he should have applied to the District Judge direct to take action under Section 4 of the Act. He did not however do so. In the result, the High Court set aside all the proceedings in the lower court and left the parties in *status quo ante*, commenting at the same time, that if the claimant found that the Official Receiver proposed to sell the properties he might apply to the District Judge under Section 4 of the Act. The last portion of the above paragraph was quoted as supporting the proposition that an application lay under Section 4 of the Act. That is not what the learned Judges of the Madras High Court meant. In our view, what was meant was that the claimant might make an application to the District Judge who would under Section 4 of the Act have jurisdiction to pass a proper order thereon.

13. Our attention was also drawn to the case of ***Venkatarama* v. *Angathayammal*** [AIR 1933 Mad. 471] where the above Madras decision was cited and at more than one place, the

learned Judge used the expressions "an application under Section 4" and "an appeal under Section 68". With all respect to the learned Judge, it seems to us that these expressions were not accurate for Section 68 although headed "appeals to court against receiver" does not, as a matter of fact, use the word "appeal" in the body of the section. The application under Section 68 however in reality amounts to an appeal to a court from a decision of the receiver but the section itself lays down that the party aggrieved must "apply to the court". Similarly, a proceeding in which jurisdiction under Section 4 may be exercised is not an application under Section 4. The proceeding has to be started by way of an application whenever anybody seeks to have an adjudication by the Court of the nature described in Section 4.

14. In this connection, our attention was drawn to several other decisions; it is not necessary to go into the facts of these cases. In ***G.N. Godbole* v. *Mt. Nani Bai*** [AIR 1938 Nag. 546] and ***Muthupalaniappa* v. *Raman Chettiar*** [AIR 1941 Mad 75] the expression "proceedings under Section 4" had been used while in ***Heerabai* v. *Official Receiver*** [AIR 1963 AP 296] the petitioner before the High Court, mother of the two insolvents, laid a claim to 1/3rd share in the properties which the Official Receiver sold on 16th April, 1960 purporting to be those of the insolvents. According to the judgment "the petitioner filed IA No. 1900 of 1960 on 28th June, 1960 purporting to be under Sections 4 and 68 of the Provincial Insolvency Act." She also filed IA No. 1899 of 1960 for condoning the delay in filing this application as ordinarily "the appeal under Section 68 should have been filed by her on or before 5th July, 1960". The insolvency court held in the proceedings under Section 68 that there could be no condonation of delay but failed to ascertain with reference to the nature of IA No. 1900 of 1960 whether it fell under Section 4 of the Provincial Insolvency Act. The learned Judge found that the petitioner had not made any claim before the Official Receiver and even if she chose to make any such claim, the Official Receiver had no power whatever to decide upon such claim petitions. It was observed:

> "Therefore, an application such as IA No. 1900 of 1960 cannot be taken in any sense to be an appeal against the act of the Official Receiver as such. On the other hand, when the petitioner herein wanted that her share should be untouched, it is certainly a case where the petitioner approached the court to determine the question of her title, which it is competent to do only under Section 4 of the Provincial Insolvency Act. Therefore, in my view, it is idle to contend that IA No. 1900 falls within the purview of Section 68, and that it should be taken to be an appeal and not an application which is contemplated and competent under Section 4 of the Provincial Insolvency Act."

It is difficult to accept the soundness of some of the dicta in the above judgment. The Official Receiver's act in selling the property on 16th April, 1960 may have been wholly wrong, but if the petitioner wanted the same to be set aside, she could either have made an application under Section 68 to the court or she could have filed a suit for relief under the ordinary law of the land. She could not, after a period of 21 days, start a proceeding in the insolvency court describing it as one under Section 4 so as to get out of the bar of limitation imposed by Section 68. She need not have waited till the sale of property. She might have applied to the court as soon as the receiver took the first step by attaching the property.

15. In our opinion, Jai Lal, J. correctly pointed out the correlation between Sections 4 and 68 in ***Daulat Ram* v. *Bansilal*** [AIR 1937 Lah 2]. The appellant had a money decree against the insolvents which he executed by attachment of a moiety of a share in a house which he alleged belonged to the judgment- debtors. This was before the order of adjudication. An objection was raised by the respondent, Bansilal, that he was a purchaser for consideration of the attached property. The objection having been allowed, a suit was filed under Order 21, Rule 63 CPC by the attaching decree-holder and ultimately decreed, it having been held that the sale by the judgment-debtors was fraudulent as against the creditors. The receivers in insolvency then took possession of the property attached by the appellant and sold the same in the insolvency proceedings. Bansilal thereupon made an application under Section 63 on the ground that the action of the receivers was illegal. The District Judge allowed the application holding that the decree passed in the suit under Order 21 Rule 63 was operative only so far as the execution proceedings were concerned and that it did not enure for the benefit of the other creditors. He therefore set aside the sale by the receivers. The creditors including the appellant came up in appeal from the order of the District Judge. An objection was raised by the respondents that no appeal lay without the leave either of the District Judge or of the High Court. In disposing of this, Jai Lal, J. observed:

> "I am inclined to think that though the District Judge was moved under Section 68 which is not one of the sections mentioned in Schedule I, the investigation, which he is expected to make in a case like the present, should be under Section 4, Provincial Insolvency Act, and any order passed by him under Section 4 is appealable as of right to this Court."

An observation similar to the above was made by the same learned Judge in ***Mul Raj* v. *Official Receiver,*** AIR 1937 Lah. 297. This point was also brought out in ***Ganda Ram* v. *Shiv Nand Ganesh Das,*** AIR 1937 Lah. 757. The scope of the two sections was brought out even more clearly in a judgment of the Rangoon High Court in ***Ma Sein Nu* v. *U Mg. Mg.,*** AIR 1934 Rang. 97 where it was said:

> "Now, Section 4 defines the powers of the Insolvency Court to decide questions of law and fact arising in insolvency proceedings, but it does not lay down how the court is to be moved to exercise those powers … of course, the powers of the court in deciding such an application are defined in Section 4, but this does not mean that the application itself is made under Section 4, and clearly it cannot be for Section 4 contains no provision as to how the court is to be moved to exercise its powers, and for the mode of invoking the authority of the Court other provisions of the Act, such as Sections 53, 54 and 68, have to be consulted."

16. In the result, we hold that the application being one under Section 68 was incompetent on the ground of limitation after the lapse of 21 days from November 25, 1954. The appeal is therefore dismissed with costs.

* * * * *

Johrilal Soni v. *Bhanwari Bai*

(1977) 4 SCC 59 : AIR 1977 SC 2202

S. M. FAZAL ALI, J. - To what extent is Section 4 of the Provincial Insolvency Act, 1920 controlled by Section 53 of the said Act in the matter of determination of the question of title of a property transferred by the insolvent before he was declared insolvent is the serious question of law which is involved in this appeal by certificate. The insolvent Pyarelal Gupta appears to have executed a deed of gift in favour of his wife on November 7, 1961. About seven years later i.e. on April 1, 1968 an application under Section 10 of the Provincial Insolvency Act was made for adjudging Pyarelal as an insolvent. On April 5, 1968 the appellant Johrilal Soni an Advocate was appointed receiver by the Court. On October 15, 1968 Pyarelal was on his own application adjudged as an insolvent by the Additional District Judge, Jodhpur. On January 4, 1969 the appellant who was the receiver moved the Court under Section 4 of the Act for declaring the deed of gift dated November 7, 1961 as void and inoperative inasmuch as it was a sham transaction. On March 3, 1972 the Insolvency Court of the Additional District Judge, Jodhpur, after making an inquiry, upheld the plea of the receiver/appellant and declared the deed of gift dated November 7, 1961 as being void and inoperative. Thereafter the respondent Smt Bhanwari Bai (donee) went up in appeal to the High Court assailing the judgment of the Insolvency Court on the ground that it was legally erroneous. The plea of the respondent Bhanwari Bai seems to have found favour with the High Court of Rajasthan which allowed the appeal and set aside the judgment of the Insolvency Court declaring the deed of gift as void by its judgment dated September 26, 1973. The appellant thereafter applied for grant of certificate of fitness for leave to appeal to this Court which was granted by the High Court on October 27, 1975, and this is how the appeal has been brought to this Court.

2. The High Court was of the opinion that in view of the express provision of Section 53 of the Act, the Insolvency Court had no jurisdiction to determine the question of title, nor could it go into the question of the validity of a transfer which was made more than two years before the Insolvency proceedings had started. According to the High Court, while Section 4 of the Act undoubtedly conferred a power on the Insolvency Court to decide questions of title, but this power could not be exercised in respect of transfers made during a period beyond two years of the insolvency proceedings.

3. In support of the appeal, learned Counsel for the appellant submitted that the High Court had taken an erroneous view of the law and had misconstrued the scope and ambit of Section 53 of the Act. Learned Counsel for the respondent, however, supported the stand taken by the High Court and submitted that as the gift was made about 61 years before the proceedings began, the Insolvency Court could not examine the question of title. A number of authorities have been cited by Counsel for the parties in support of their respective submissions, but we think the question lies within a very narrow compass. It would appear that Section 4 of the Act was not there in the Insolvency Act of 1907, but was introduced for the first time by Act 5 of 1920. Before 1920, the Provincial Insolvency Act did not contain any such provision as a result of which there was a serious divergence of judicial opinion on the question as to whether or not an Insolvency Court could determine a question of title

regarding a transfer made by the insolvent. Act 5 of 1920, however, set at rest this controversy and gave wide powers to the Insolvency Court to determine questions of title.

4. We now proceed to interpret the provisions of Section 4 itself. It would be seen that the section has been couched in the widest possible terms and confers complete and full powers on the Insolvency Court to decide all questions of title or priority, or of any nature whatsoever, which may arise in any case of insolvency. The only restriction which is contained in Section 4 is that these powers are subject to the other provisions of the Act. In other words, the position is that where any other section of the Act contains a provision which either runs counter to Section 4 or expressly excludes the application of Section 4, to that extent Section 4 would become inapplicable. Counsel for the respondent strongly relied on the provision of Section 53 which runs thus:

53. Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court.

It was submitted that the effect of Section 53 of the Act clearly is that it bars the jurisdiction of the Insolvency Court to determine the validity of any transfer made beyond two years of the transferor being adjudged insolvent. It is no doubt true that the words "within two years after the date of the transfer being voidable as against the receiver does fix a time-limit within which the transfer could be annulled by the Court. But a plain construction of Section 53 would manifestly indicate that the words "within two years after the date, be voidable as aigainst the receiver, and shall be annulled by the Court" clearly connote that only those transfers are excepted from the jurisdiction of the Court which are voidable. The section has, therefore, made a clear distinction between void and voidable transfers — a distinction which is well-known to law. A void transfer is no transfer at all and is completely destitute of any legal effect: it is a nullity and does riot pass any title at all. For instance, where a transfer is nominal, sham or fictitious, the title remains with the transferor and so does the possession and nothing passes to the transferee. It is manifest, therefore, that such a transfer is no transfer in the eye of the law. Such transfers, therefore, clearly fall beyond the purview of Section 53 of the Act which refers only to transfers which are voidable. It is well settled that a voidable transfer is otherwise a valid transaction and continues to be good until it is avoided by the party aggrieved. For instance, transfers executed by the transferor to delay or defraud his creditors may be avoided under Section 53 of the Transfer of Property Act. Similarly transfers made under coercion, fraud or undue influence may be avoided by the party defrauded. It is only such transfers which, if they take place beyond two years of the date of transfer, cannot be enquired into by the Court by virtue of Section 53 of the Act. This appears to us to be the plain and simple interpretation of the combined reading of Sections 4 and 53 of Ihe Act. Indeed if a different interpretation is given, it will render the entire object of the section nugatory, because the Court would be powerless to set at naught transfers which are patently void, merely because they had been made at a particular point of time.

5. Reliance was placed by Counsel for the appellant on a Full Bench decision of the Allahabad High Court in ***Haji Anwar Khan* v. *Mohammad Khan*** [AIR 1929 All 105], where the following two questions were referred for the decision of the Full Bench:

> (1) Whether an insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication, having regard to the provisions of Section 53, Insolvency Act
>
> (2) Would it make any difference if the receiver alleges that no transfer had been intended from the very beginning and no title had passed, the transaction being a mere paper transaction and void?

This extract is taken from ***Johri Lal Soni v. Bhanwari Bai*** [(1977) 4 SCC 59, 64]:

> After discussing a large number of authorities, Dalal, J., answered the first question in the affirmative and held that an Insolvency Court could try a question of title raised on the basis of a transfer which took place two years prior to the adjudication, but the learned Judge, however, refrained from giving any opinion on the other question, which in our opinion was the most pertinent question to be answered having regard to the specific distinction made by Section 53 between void and voidable transactions. Sen, J., appears to have sounded a discordant note in observing as follows:
>
>> My answer to the reference is (1) An Insolvency Court cannot try a question of title relating to a transfer which has taken place more than two years before the order of adjudication having regard to the provisions of Section 53, Insolvency Act.

(2) Where the transfer was intended not to be operative from the beginning and the insolvent had remained in possession of the property the receiver may apply for its annulment. But where the transfer was executed by a proper instrument and duly registered and was intended to put the property beyond the reach of the creditors and a third party is claiming under the transfer, such a transaction cannot be treated as a mere paper transaction.

We feel that the view of Sen, J., appears to be based on a correct interpretation of Sections 4 and 53 of the Act. King, J., agreed with Dalal, J., and observed as follows:

> I see no difficulty, therefore, in giving a meaning and effect to the words "subject to the provisions of this Act" without construing them in the restrictive sense suggested by my learned brother Sen, J. In my opinion they do not bar the jurisdiction of the Insolvency Court to decide a question of title under the ordinary law when the special provisions of the Act do not apply.

6. In a later decision of the Allahabad High Court in ***Madan Kumar* v. *M/s Hari Narain Agarwal*** [AIR 1977 All 141], following the Full Bench decision referred to above, it was observed as follows:

> As observed earlier, Section 53 refers to transfers which are only voidable and it does not cover a case where the transfer is claimed to be void since its inception. The bar of two years provided for in Section 53 should not therefore, apply to a transaction which is claimed to be void.

We are of the opinion that the learned Judge has laid down the correct law on the subject.

7. A Full Bench of the Bombay High Court in ***Padamsi Premchand* v. *Laxman Vishnu Deshpande*** [AIR 1949 Bom 129], has taken the same view, which we have taken. In that case, and which we feel is based on a correct and true interpretation of Sections 4 and 53 of the Act, after considering the history of the Act, Chagia, C.J., speaking for the Court observed as follows:

> It is perfectly true that Section 4 is merely declaratory of the jurisdiction of the insolvency Court…..Therefore, Mr Desai is right when he says that if a transaction rails within the ambit of Section 53, then it can only be challenged provided the conditions laid down in that section are satisfied ....
>
> In our opinion transactions which are challenged on the ground of their being fictitious or nominal do not fall within the ambit of Section 53, then Section 4 is wide enough to confer upon the Insolvency Court jurisdiction to decide whether these transactions were in fact nominal or fictitious.

We find ourselves in complete agreement with the view expressed by Chagia, C. J., in the aforesaid decision. The Bombay High Court further pointed out that the same view was taken by the Calcutta High Court in ***Radha Krishna Thakur* v. *Official Receiver*** [AIR 1932 Cal 642] by the Patna High Court in ***Biaeswar Chaudhuri* v. *Kanhai Singh*** [AIR 1932 Pat 129] the Nagpur High Court in ***G.N. Godbole* v. *Mi. Nani Bai*** [AIR 1938 Nag 546] and the Lahore High Court in ***Budha Mal* v. *Official Receiver*** [AIR 1930 Lah 122]. The only decision which appears to have taken a contrary view is of the Oudh Chief Court in ***Amjad Ali* v. *Nand Lal Tandem*** [AIR 1930 Oudh 314], which appears to be the sheet-anchor of the argument of the learned Counsel for the respondent. The Oudh Chief Court observed as follows:

> We do not consider that where in Section 53 which is governed by this heading the Act gives the Court power to annul transactions entered into within two years we should go out of our way to find that a general section in the same Act gives power to the Court to annul transactions which may have been entered into at any time and which are voidable under the ordinary law under Section 53, T. P. Act In our opinion transactions of this nature must be challenged, if at all, in an ordinary Civil Court and not in the Insolvency Court.

With due respect, however, we are unable to agree with the view expressed by the learned Judges of the Chief Court Oudh, because they seem to overlook the distinction made by Section 53 between a void and a voidable transaction. Moreover, the Oudh Chief Court was concerned with a benami transaction and it is not Necessary for us to say anything about such a transaction, because in the instant case we are concerned with a transfer which was sought to be challenged on the ground that it was a nominal and sham transaction and thus a void transaction which clearly falls within the four corners of Section 4 of the Act and is not covered by Section 53 of the Act so as to deprive the Insolvency Court of its jurisdiction to determine the question of title of the transfer.

8. For these reasons, therefore, we are clearly of the opinion that in the president case the Additional District Judge was right in holding that the Insolvency Court had complete jurisdiction to decide the validity of the transfer when it was challenged on the ground that it

was a sham and a fictitious transaction which need not have been set aside and a declaration that the transfer was void was sufficient. The view taken by the High Court is legally erroneous and is not in consonance with the correct interpretation of Sections 4 and 53 of the Act.

9. We, therefore, allow the appeal, set aside the judgment of the High Court and remit the case back to it for a fresh disposal of the appeal on merits.

* * * * *

Chandra Nageswaran v. *T.R. Balakrishnan*

(1991) I M L J 378

SRINIVASAN, J. - The concurrent findings of the Courts below are wholly unseasonable. The first respondent herein was adjudged insolvent and the Official Receiver brought his property to sale. As regards the subject matter of present dispute, the appellant purchased the same in the sale held on 12.1.1977. The first respondent filed a petition under Sec. 68 (1) of the Provincial Insolvency Act to set aside the sale. In the petitions three grounds were urged. The first was that there was no proper notice of sale issued to all the 170 creditors. The second objection was that the sale was adjourned from 17.12.1976 to 12.1.1977 and the Official Receiver had no jurisdiction to adjourn a sale in the midst of the holding of the sale. Thirdly it was contended that the mortgage over the property was not disclosed in the proclamation for sale and therefore the sale was invalid.

2. When the matter was heard by the Subordinate Judge, Salem, on material was placed before him in support of the above three contentions. But a fourth objection was raised in the arguments that the first respondent had only a life interest in the property, which could not be sold by the Official Receiver. It was argued that under Sec. 28 (5) of the Provincial Insolvency Act, a property of an insolvent, which was exempt from attachment under the Code of Civil Procedure could not vest in the Official Receiver and he cold not take any proceedings against the same. That objection was upheld by the Subordinate Judge purporting to follow a judgment of this Court in ***Chenchulakshmi Ammal* v. *Subramanian*** [(1972) 1 M.L.J 206]. The Subordinate Judge held that the first respondent had only a life interest in the properties and the sale was not valid. Consequently, he set aside the sale.

At the outset, it must be pointed out that the judgment in ***Chenchulakshmi Ammal* v. *Subramanian*** [(1972) 1 M.L.J. 206], has no bearing on this case. K.S.Venkataraman, J., had to consider in that case whether a mere right to enjoy the income from a house property could be attached or sold. Learned Judge held that when the interest was not transferable, it could not be attached and sold and in such a case, only an equitable execution could be granted by appointment of a receiver to collect the rents and profits and after payment of municipal taxes and provision for repairs, the balance could be made available to the decree-holder. That was not a case in which a life estate was conferred on the judgment-debtor. But in the present case, there is no doubt that the first respondent had a life estate, under the partition deed dated 26.11.1938, which is relied on by him for the purpose of contending that he has only a right to enjoy the income and no alienable interest in the property. The relevant recital in the document is to the effect that the first respondent shall not alienate the property in any manner by mortgage or sale; but he shall lease out the same and enjoy the rental income and after his death, the parties 2 and 3 in the document and their heirs shall take the property equally with absolute rights. This document clearly confers a right to immediate possession of the property equally with absolute rights. This document clearly confers a right to immediate possession of the property itself by the first respondent herein and enjoyment thereof by leasing out, if necessary. The document does not prevent the first respondent from enjoying a property by himself occupying the same. Just because he is permitted to lease out the property and enjoy the rental income, it does not mean that what is granted to the first respondent under the

document is only a right to enjoy the income and not any interest in the property. This is made clear further by the provision in the same document to the effect that if the first respondent gets married, he can take the property absolutely. Thus, there is a provision for the life estate enlarging into an absolute estate in the event of the first respondent getting married. Therefore, there is no difficulty in holding that the first respondent got a life estate in the property. He is therefore entitled to enjoy the property during his lifetime. Such life estate can always be the subject matter of attachment and sale. Whoever purchases the life estate will be entitled to take possession and enjoy the property till the death of the first respondent. Hence the Courts below are in error in setting aside the sale, taking the view that the Official Receiver was not entitled to sell the property or any portion thereof.

5. It is argued by learned counsel for the first respondent that the sale is liable to be set aside because it is with reference to entire property as such and it is not a sale of the life estate. I do not agree. Whatever was owned by the first respondent on the date of sale would undoubtedly pass on to the purchaser. Even if the description in the sale proclamation is that of the property, that would only mean that the right, title and interest of the first respondent would be the subject matter of sale and that would pass on to the purchaser.

6. Learned counsel for the appellant draws my attention to Ex. B-15. It is an order passed by this Court in C.R.P.No.1131 of 1978. That revision arises out of an application filed by the first respondent herein objecting to the receiver's proceedings against the property now in dispute. His objection at that time was that the property was exempted from attachment under Sec. 60 of the Code of Civil Procedure and consequently, the Official Receiver was not entitled to take possession of the same because of the provisions of Sec. 28 (5) of the Provincial Insolvency Act. Insofar as the question, which was considered by the Courts below is concerned, the objection that was put forward by the first respondent in the said revision petition is the same and it was in no way different. The Courts below negatived the objection reaised by the first respondent and directed the receiver to take possession. This Court upheld the orders of the Court below and dismissed the revision petition. It was clearly held by this Court that the property was liable to be sold at the instance of the Official Receiver. The contention put forward by the first respondent that he had only a right of maintenance *vis-a-vis* the property negatived by this Court.

7. Hence it is not open to the first respondent to contend in the present proceedings that the sale should be cancelled in view of the fact that he had only a life estate in the property.

8. In the result, the orders of the Courts below are set aside and I.A.No. 104 of 1977 filed by the first respondent herein to set aside the sale dated 12.1.1977 is dismissed.

* * * * *

Maharaj Hari Ram v. *Sri Krishan Ram*

(1926) 25 ALJR 152

DALAL, J. - A decree-holder applied for the arrest of the judgement debtor, who was insolvent, and it was granted by the first executing court of the Subordinate, Judge. On appeal the learned District Judge held that in consequence of an order of adjudication in favour of the judgment-debtor passed by the Insolvency Court under section 27 of the Provincial Insolvency Act, the respondent was protected from arrest. The decree-holder has come here in second appeal. It was first argued that the application for execution was timebarred because the insolvent was automatically discharged six months after the order of adjudication, that is, on the 13th November, 1921. The application was made by the appellant on 2nd March. 1925. We are of opinion that the provisions of section 43 of the Insolvency Act do not contemplate any automatic discharge. A Bench of the Calcutta High Court was of the opinion in ***Abraham* v. *Sookias*** [(1923) I. LR 51 Cal. 337]. Without an order of the Insolvency Court the insolvent is not discharged automatically at the end of the period fixed in the order of adjudication for an application for discharge.

In section 28 of the Provincial Insolvency Act the effect of an order of adjudication is described and protection from arrest in execution of a decree is not provided. If it bad been the intention of the legislature to protect insolvent, the provisions of section 31 which permit an insolvent to apply to the Insolvency court for a protection order, would have been superfluous. We find that one of the learned Judges of this Court, Mr. Justice Daniels, held in Oudh that under the present Act the creditor can proceed to arrest as if no adjudication had taken place. ***Radhey Shiam* v. *Hakim Saiyed*** [72 Ind. Cas. 911]. The first court was correct in its opinion. We set aside the decree of the lower appellate court, restore the decree of the first court and decree this appeal.

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Beni Prasad v. *Phula Mal Madan Mohan Lal*

AIR 1933 All. 591

NIAMATULLAH, J. - This is an appeal from an order passed in insolvency proceedings. The applicant, Beni Prasad, was adjudged insolvent on 29th November 1930. He was directed to apply for his dicharge after the expiry of a year. He applied within that time for a protection order under S. 31, Provincial Insolvency Act, on 2nd May 1931, but his application was rejected. After expiry of one year, on 27th November 1931, he applied for his discharge. This application was also not granted, but he was directed to apply for his discharge after the expiry of six months. Before the expiry of that period one of the creditors, namely, Shyam Lal, applied, on 20th February 1932, for his arrest and imprisonment in civil jail and the appellant was arrested and committed to prison. On the same date, that is 20th February 1932, he applied for a protection order. The application was dismissed by the learned District Judge of Aligarh. The present appeal is from his order refusing to grant protection.

The order appealed from proceeds on the solitary ground that a previous application for protection was dismissed on 2nd May 1931, and no circumstances have since come into existence which can justify a protection order. Referring to the previous order, dated 2nd may 1931, I find that protection was refused for the following reasons:

> There are heavy debts about which the insolvent keeps no accounts. A very large amount of debts is said to have been incurred on account of a cocaine case. The amount is said to be Rs. 2,600. I am not prepared to believe that so much was spent in a cocaine case. Nor do I believe that he spent so much over his illness as he means to show. I refuse the application for protection order.

I do not think a previous order refusing protection is a bar to a protection order being made at a subsequent stage. Lapse of time and the fact that no misconduct can be attributed to the insolvent in the meantime are circumstances which may justify a Court in granting an order of protection which has been previously refused. S. 31, Provincial Insolvency Act, is so worded as to confer a wide discretionary power on the insolvency Court. The discretion is not to be exercised arbitrarily but with due regard to the circumstances of each case.

I am unable to understand the reasons on which the order of 2nd May 1931, proceeds. It has been already quoted, and the only thing definite which can be gleaned from it is that the appellant was heavily in debt. Most insolvents are heavily in debt. No order of adjudication is ordinarily passed unless the debts of an insolvent exceed the value of his assets. This is hardly a ground for refusing to pass a protection order. Some reference is also made to the debt having been incurred on account of a cocaine case. The Judge did not positively find that it was so. He merely mentions the fact that a large amount of debt is said to have been incurred on account of a cocaine case." In the next sentence he discredits this assertion. At the same time he disbelieved the insolvent's story that the debt had been incurred by him because of his illness. The order then winds up by a refusal to grant protection. I do not think that the order of 2nd May 1931 was passed on any ground amounting to more than some vague prejudice in the mind of the learned Judge against the appellant. If a debtor has been adjudged insolvent, has placed all his assets at the disposal of the insolvency Court without concealing any

material facts relating to his pecuniary position and has not been guilty of any fraud or dishonesty in relation to his creditors or his estate, an order of protection should ordinarily be granted. Refusal to grant protection in spite of the insolvent having done all he could be expected to do may lead to grave abuses.

A creditor may feel tempted to apply for the arrest of the insolvent, not because he is believed to be in a position to pay but to coerce his well-to-do relatives, who may feel obliged to satisfy the claim of such creditor in the interest of the honour of the family. In my opinion unless some misconduct or want of good faith can be imputed to an insolvent, a protection order should not be refused on vague and general assumption. In the present case the order appealed from does not proceed on any ground of its own, but is based solely on the view expressed in the order of 2nd May 1931 and on the absence of anything further having happened since. It should be observed that the appellant was arrested subsequent to the order of refusal of 2nd May 1931. There is nothing to suggest that he has since been released. There is no suggestion that beyond his inability to pay he did anything to defraud or baffle his creditors or attempted to give undue preference to one or more of them or concealed his assets. No act of dishonesty is even alleged. In all these. circumstances, I hold that the lower Court should have passed the order of protection prayed for by the appellant. Accordingly I allow this appeal, set aside the order of the lower Court and grant an order of protection from arrest and imprisonment in execution of Shyam Lal's decree. I refuse to pass a general order of protection as the appellant can apply for his discharge and if he does so all aspects of the case will come under review.

* * * * *

R. Kalyanasundaram Pillai v. *M. N. Palaniappa Mudaliar & Sons*

AIR 1966 Mad. 29

RAMAMURTI, J. - One Kalyanasundaram Pillai who was adjudged insolvent in I.P. 5 of 1958 on the file of Subordinate Judge, Mayuram, is the petitioner in this revision petition. The short point that arises for decision is whether the unconditional annulment of his adjudication under S 43 of the Provincial Insolvency Act is valid and binding upon the creditors, as the annulment was made without notice to them.

(2) In this case, the petitioner was adjudged insolvent on 4-12-1959 and one year's time was fixed for the debtor to apply for discharge. As no application was filed for obtaining discharge, the Official Receiver moved the insolvency court on 21-12-1960, for the annulment of the adjudication, and it was accordingly annulled by order of court dated 23-12-1960. The petitioning creditor filed an application, out of which this revision petition arises, on 13-3-1961 for extending the time for discharge, and the petition was returned on the ground that the adjudication had already been annulled. He amended the petition praying that the order of annulment of adjudication should be set aside, as no notice was issued to him. The learned Subordinate Judge took a too narrow and technical view of the petition of the petitioning creditor and dismissed it, holding that so long as the order of annulment stood the petitioner (first respondent herein) was not entitled to file a petition for extension of time for applying for discharge. But on appeal, the learned District Judge came to a contrary conclusion, holding that the petition filed by the petitioning creditor could be well regarded as containing a prayer for setting aside the order annulling the adjudication, since no notice was given to the general body of creditors or at least to the petitioning creditor. In this view, he set aside the order of the Subordinate Judge and remanded the matter giving liberty to the petitioning creditor the apply for extension of time for applying for final discharge.

(3) Mr. T. R. Ramachandran, learned counsel for the petitioner, contended that, of the various provisions which provide for annulment of adjudication like Ss. 35, 37, 39, 41 and 43, certain sections provide for notice to the creditors, while S. 43 does not contain any provision that, when adjudication is annulled, notice should go either to the petitioning creditor or to the general body of creditors. He also urged that in the rules framed under the Provincial Insolvency Act, containing the form of notice and the formalities to be complied with when notice of particular proceedings is published, there is no provision for any notice to be issued in respect of annulment of adjudication under S. 48. From this alone. I am not inclined to hold that no notice need be issued to the petitioning creditor or the general body of creditors, when the adjudication is annulled under S. 43. In ***Shankarlal* v. *Bansidhar*** [AIR 1937 All 686] it was held that notice should be issued at least to the petitioning creditor before the adjudication was annulled under S. 43. The observations of Venkatasubba Rao J. in ***Jethaji Peraji Firm* v. *Krishnayya*** [AIR 1930 Mad 278, 279] lend support to this view that notice should be issued before the adjudication is annulled. It must be noticed that when the adjudication is annulled under S. 43, it is in the nature or a punishment imposed upon the insolvent for not having applied within the time fixed for discharge, with the result that the protection which is available to him under the provisions of the Insolvency Act is no longer available; Learned counsel for the respondents contends that in such a situation, especially

when the order of annulment is unconditional and, there is no order under S. 37 vesting the properties in the Official Receiver for distribution for benefit of the general body of creditors, their interests would be seriously prejudiced. It is obvious that, if the adjudication is annulled without any condition as to vesting of the properties in the Official Receiver under S. 37, the purpose for which the petitioning creditor filed the insolvency petition and got the debtor adjudged insolvent would be completely frustrated; principles of natural justice clearly require that before an adjudication is so annulled, notice should be given at least to the petitioning creditor.

(4) It is settled law, that, even though there is no specific provision in the Provincial Insolvency Act conferring powers of review, the insolvency court can review its orders under S. 5 of the Provincial Insolvency Act. It is sufficient to refer to the Bench decision of this court in ***Satyanarayana Rao* v. *Official Receiver of West Godavari*** [AIR 1948 Mad 233] which followed the earlier decisions in ***Abbi Reddi* v. *Venkata Reddi*** [AIR 1927 Mad. 175] and ***Ayyaswami Chetti* v. *Official Receiver, Coimbatore*** [AIR 1932 Mad 63]. The petition filed by the petitioning creditor can well be regarded as a petition to review the order. The order on the insolvency court in not setting aside the annulment is set aside. The matter shall be disposed of as indicated in the judgment of the learned District Judge.

(5) The civil revision petition is dismissed with costs.

* * * * *

Mul Chand v. *Official Receiver*

AIR 1930 All. 471

MUKERJI, J. - This is an appeal in an insolvency matter, by the insolvents Mul Chand and Jagannath, who are brothers. It appears that the appellants were declared insolvents and they were directed to apply for discharge within one year of their adjudication. They accordingly applied and the learned Judge has rejected that application. Hence the appeal.

The judgment of the learned District Judge, who is the insolvency Judge in this case, is rather short and runs as follows:

> This is an application for discharge. Not an anna has been paid. The debts are Rs. 6,000 or 7,000. The applicants had apparently a large business. They have produced no books. They had some zamindari property and some houses which were sold in execution of decrees but only after the amounts due had been expended by delay and unavailing litigation. The applicants are not entitled to a discharge. The application is rejected.

It appears to me that the learned Judge has not taken into consideration whether the appellants were not entitled to a conditional discharge. The Official Receiver reported that under circumstances detailed in his report dated 28th March 1928, "a clear discharge cannot be recommended." Evidently, even the Official Receiver was not prepared to say that the appellants were not entitled to even a conditional discharge or a discharge, the operation of which may be suspended for some specified time, or whether an order suspending the operation of the order and also attaching conditions might not serve the interests of justice.

A consideration of the principles on which the law has been framed will enable us to arrive at proper conclusions having regard to the facts of a particular case. As pointed out by the Court of appeal in the judgment of Vaughun Williams, L. J., ***In re, Gaskell*** [(1904) 2 K.B. 478] (to which two other learned Lord Justices concurred.)

> After all, the overriding intention of the legislature in all Bankruptcy Acts is that the debtor on giving up the whole of his property shall be free man again, able to earn his livelihood and having the ordinary inducements to industry. Sometimes, it is not right that the bankrupt should be free immediately; he must pass through a period of probation; and theoretically there may be cases in which he ought not to be free at all, but prima facie, he is to give up everything he has and on doing that he is to be made a free man.

That being the true principle of bankruptcy laws it would be only in extreme cases that an insolvent will be refused a discharge either absolute or conditional or of any kind whatsoever.

Section 41 read with S. 27, Provincial Insolvency Act, 1920, in my opinion, contemplates the same rule as has been pointed out by Vaughan Williams, L. J. S. 41 of the Act says:

> A debtor may at any time after the order of adjudication and shall within the period specified by the Court apply to the Court for an order of discharge.

This, when read with the provisions of S. 27 viz., that when an order of adjudication is made, the Court must specify a period within which the debtor shall apply for his discharge

and the further provision that on sufficient cause being shown, the period within which the debtor shall apply for a discharge may be extended, lead me to the conclusion that there can ordinarily, at least be only one application for discharge. The interpretation that a debtor may apply for a second or third time, so long as he has complied with the rule of applying once within the period specified by the Court is not a valid one. The old law did not require an insolvent to apply for discharge and therefore so long as he did not apply, the Court had no hold over him. Now, the insolvent is under the obligation of applying for a discharge and then all his previous behavior will come under the scrutiny of the Court, including a review of what he has done since he was adjudicated insolvent, to assist the receiver or the Court in paying up his debts. If he fails to make an application within the period limited by the Court, the adjudication may be annulled with the result that the insolvent may be again arrested in execution of the decree and be subjected to all the other worries of execution. If more than one application had been in contemplation there would be no object in saying in sub-S. 2, S. 27 that the Court might on sufficient cause being shown, extend the period within which the debtor should apply. Further, the language of the words in para. 2, S. 41 indicates that ordinarily a discharge shall be granted, but what would be the nature of the discharge is left to the discretion of the Judge.

I am not deciding - the question does not arise in this case—that where an insolvent's application for discharge has been totally refused, he may not, under any circumstances, come in again and apply for a discharge. He may for example, have been able to pay his creditors in full, long after his first application was totally refused, and he may be allowed to have a full discharge. What I do decide is that, ordinarily, no second application by the insolvent is contemplated by the law, the first application being sufficient.

An order like the one passed by the learned insolvency Judge can be interpreted only as an order refusing to grant any sort of discharge to the applicants and this is not what is, ordinarily, contemplated by the legislature. It may be that the appellants is an extreme case of dishonest behavior so as to merit that they shall continue to be undischarged insolvent for the rest of their days. I am not sure whether the learned insolvency Judge contemplated making any such order of far reaching consequence. If he had meant to pass such an order, he would surely have written a longer order explaining all that appears against the applicants. On the report of the Official Receiver and on the facts mentioned in the learned Judge's order, no case has been made out for branding the applicants with the ignominy of undischarged insolvent and burdening them with the disabilities of such persons, for their whole life. In my opinion, the order of the learned insolvency Judge should be discharged and the case sent back to him with the direction that he should reconsider the application and having regard to the remarks contained in the judgment, he should approach the case with a fresh mind and pass proper orders. I would make the applicants pay their own costs in this Court and in the Court below.

KING, J. - I concur in the proposed order, but am not prepared to endorse the view that when an insolvent has applied for discharge within the period specified in the order of adjudication under S. 27 (1), and his application has been refused, then it is not open to him to

make a further application for discharge and he must remain an undischarged insolvent for life.

I interpret the order under appeal as refusing to grant an absolute order of discharge on the ground specified in S. 42 (1) (b). The Court had jurisdiction to pass such an order, since under S. 41 (2) (a) the Court is expressly empowered to refuse an absolute order of discharge.

In my opinion such an order does not prevent the insolvent from making a fresh application for discharge in case such an application were justified by fresh encumbrances. The refusal of an absolute order of discharge is distinct from the absolute refusal of an order of discharge. The language of S. 41 (1) seems to me sufficiently wide to cover a fresh application made after the refusal of and application made within the period specified.

Moreover, this view appears to have been consistently taken by the High Courts i.e., it has been taken in every reported case which has come to my notice.

In ***M. Gopalan Nair* v. *K. Gopalan Nair*** [AIR 1925 Mad. 915 (F.B.)], a Full Bench of the Madras High Court held that there is nothing in S. 44, Provincial Insolvency Act, 1907, to warrant the suggestion that an application for discharge when refused is refused for ever, and that no later application on renewal of the former application can be made.

Section 44 of the Act, 1907, corresponds to Ss. 41 of the Act, 1920, and the slight amendment of the old section does not seem to have the effect of rendering the Full Bench ruling absolute, or of less authority.

In ***Velayutha Nadar* v. *Subramania Pillai*** [AIR 1925 Mad. 609] a single Judge of the Madras High Court held that the dismissal of the application for discharge (under S. 41 (2) (a) of the Act, 1920) will not prevent the insolvent from presenting further applications for discharge at any later time.

In ***Tan Seik Ke* v. *C. A. M. C. T. Firm*** [AIR 1928 Raug. 109] a Division Bench of the Rangoon High Court held that the refusal of an application for discharge does not prevent the insolvent from renewing his application for discharge in case fresh circumstances might justify him in doing so.

In view of this consensus of judicial opinion, which seems to me correct, I cannot, which seems to me correct, I cannot endorse the contrary opinion expressed by my learned brother.

I do, however, agree with him that the Court's order is not altogether satisfactory. The learned District Judge did not expressly state that he was only refusing an absolute order of discharge, and it is not clear whether he considered the advisability of granting a conditional discharge, or of suspending the operation of the order for a specified time. On these grounds I agree to the order proposed

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Gulabchand Hiralal v. *Hakimchand Chothmal*

AIR 1972 Bom. 192

K. K. DESAI, J - This is a revisional application on behalf of the original petitioner in application Ex. 413 in Insolvency Petitions Nos. 12 and 14 of 1935. The petitioner had obtained a decree for Rupees 27,000/-in Special Suit No. 349 of 1930 against Chhaganlal Hardee in February, 1935. He then filed Insolvency Petition No. 12 of 1935 on March 14, 1935, for adjudication of the judgment-debtor Chhaganlal Hardee. Another Insolvency Petition No. 14 of 1935 was filed by other two creditors of Chhaganlal. The petitions were consolidated and by an order of adjudication dated July 30. 1936, Chhaganlal was adjudicated an insolvent. The order of adjudication provided that Chhaganlal should make an application for his discharge from insolvency within one year. This time expired on July 30, 1937. Chhaganlal's appeals against the order of adjudication were dismissed in 1938. Chhaganlal died in December 1942 without making an application for his discharge. Several intervening litigations are referred to in the judgment of the trial Court and the District Court with which I am not concerned in this revision application. About 18/20 years after the death of Chhaganlal the petitioner filed the above application Ex. 413 for annulment of adjudication of Chhaganlal under the provisions of Sec. 43 (1) of the Provincial Insolvency Act ("the Act"). Now this section, inter alia, provides that if the debtor does not apply for an order of discharge within the period specified by the Court, the Court may annul the order of adjudication or make such order as it may think fit, and if the adjudication is so annulled, the provisions of Section 37 shall apply. The petitioner's case was that since Chhaganlal had failed to make any application within the time fixed by the above order and/or otherwise, the adjudication order must be set aside (annulled). 'The trial Court held that this was a fit case in which the order of adjudication was liable to be annulled and thus granted the petition of the petitioner. Whilst annulling the adjudication it directed that the properties of the insolvent comprised in Municipal No. 2412 do vest under Section 37 in the receivers-trustees for three of the proving creditors.

2. Some of the creditors of Chhaganlal who had not proved the debts due to them by Chhaganlal in the above insolvency filed Civil Appeal No. 1 of 1962 and the District Judge, Jalgaon, by his appellate order of remand dated December 31, 1962, set aside the order of the trial Court and directed that the application Ex. 13 in the appellate Court made on behalf of the receivers in insolvency on July 21, 1962, for leave to receivers to apply for discharge should be considered by the trial Court. The District Judge remanded the whole matter once again for further consideration by the trial Court. Whilst making the above order, the learned District Judge negatived the submission made on behalf of the petitioner that the creditors who had not proved their claims in insolvency had no locus standi in preferring the appeal. The learned Judge was of the view that it was open to the receivers to have the time for applying for discharge extended.

3. Mr. Divekar for the petitioner has submitted that the learned Judge should have held that the receivers had no right to apply for extension of time to make an application for discharge and further that the appellants (in the District Court) had no locus standi to institute

the appeal, because they had not proved their claims for debts in insolvency. He therefore, submitted that the learned Judge's order should be set aside in this revisional application.

4. Whilst Mr. Divekar made the above arguments. I called upon him to explain to me how the provisions in Section 43 (1) were applicable to the facts of the present case. I asked him to satisfy me that the liability to make an application for discharge survived against the heirs of the insolvent Chhaganlal on his death in 1942. I asked him to explain to me how the failure of a deceased insolvent to apply for discharge can entitle his creditors to have the insolvency annulled. Mr. Divekar has pointed out to me that he has not found any such case in the books. But he insists that a creditor of an insolvent is given a right under Section 43 (1) of the Act to have insolvency of a debtor annulled upon proof that the debtor had failed to make an application for discharge within the time fixed for the purpose. It appears to me that the application for annulment of adjudication order can never be made against a deceased insolvent. In law the right to apply for annulment of an adjudication order cannot survive against the heirs of a deceased insolvent. Now in this connection, it is important to notice that ordinarily an order of adjudication is made in connection with a debtor and his estate for the protection of his creditors and the society. Ordinarily the order of adjudication is made at the instance of one or more creditors. The purpose and effect of the law of insolvency is to have the estate of insolvents delivered in possession of represntatives of Court and to have it distributed pro rata amongst the ordinary creditors. The disability that is inflicted against an insolvent under this law is that he cannot freely trade during the continuance of his insolvency until he obtains an order of discharge as is provided under Section 41. A debtor is compelled to apply for an order of discharge from insolvency so that the circumstances in which he involved himself in debts are made evident to the Insolvency Court. A debtor who might have incurred unreasonable speculative debts and/or unreasonable commercial debts can be held to be unworthy of discharge and the discharge order may be refused from time to time for a considerable number of years. The refusal to grant and order of discharge is for the purpose of continuing disabilities of an insolvent from trading freely and/or otherwise so as to cause injury and harm to unwary dealers and the society. When an insolvent debtor obtains an order of discharge. he becomes free from his previous debts and free from his disabilities which he incurs under the Act and thus is free to trade once again without any restrictions and disabilities. The right to apply for and obtain discharge is thus for personal benefit of the insolvent and has no relation whatsoever with the heirs of a deceased insolvent. The compulsion for application for discharge as contained in Section 41 is a personal liability inflicted against an insolvent debtor and has no relevance to the heirs surviving him upon his death. The penalty of annulment of adjudication order is visited on an insolvent debtor under Section 43 (1) upon his failure to apply for discharge. This penalty and/or liability is also intended by the Legislature to be personal and has nothing to do with the heirs of a deceased insolvent. Now, it is a well recognised and established maxim of law "Actio personalis moritur cum persona" that personal causes of action and/or personal liabilities die with a deceased person. In my view. the right to apply for discharge is a personal right of an insolvent debtor which cannot survive in favour of any one upon his death, Similarly the punishment of annulment of order of adjudication upon failure of application for discharge under Section 43(1) cannot be inflicted on the receivers in insolvency and/or creditors and/or heirs of a deceased insolvent. The right to inflict this penalty does not survive against any of

these parties. Having regard to the above situation. in my view, the application Ex. 413 instituted by the petitioner in Insolvency Court was entirely misconceived and not maintainable. The order of adjudication made against Chhaganlal was not liable to be annulled by the trial Court for the reasons mentioned above.

5. As I have come to the above conclusion. I do not find it necessary to deal with the contentions made by Mr. Divekar relating to the locus standi of the creditors who had not proved their debts to institute the Civil Appeal No. 1 of 1962 in the District Court. Now. it requires to be stated that the application made by the receivers in the appellate Court for extension of time to apply for discharge was also entirely misconceived. Receivers in insolvency and/or heirs of a deceased insolvent can have no right of any kind to make an application for order of discharge under Section 41. The application Exh. 13 was also misconceived.

6. Under the circumstances, the petition for annulment of adjudication order being Ex. 413 in Insolvency Nos. 12 and 14 of 1935 that was originally filed by the petitioner is dismissed.

* * * * *

Arora Enterprises Ltd. v. *Indubhushan Obhan*

(1997) 5 SCC 366

K. S. PARIPOORNAN, J. - 2. There are three appellants in these appeals. Appellant 1 is a firm wherein Appellants 2 and 3 are partners. The appellants were original plaintiffs in Suit No. 133 of 1989 in the High Court of Bombay. These two appeals are preferred against the Judgment and Orders dated 10-7-1996 passed by a Division Bench of the Bombay High Court in Civil Appeals Nos. 464 of 1996 and 513 of 1996, dismissing the appeals. The first respondent was originally the first defendant. Respondents 1(*a*) to 1(*d*) are his legal heirs. Respondents 2 and 3 are co-owners of the property in question. Respondent 4 is M/s Kamal Construction Co. (a firm).

3. Original Defendant 1, Indubhushan M. Obhan, died pending the suit. He owned and possessed 1/3rd undivided share in the property measuring 20,569.51 sq. mts. situate in Kanjur Village, Kurla Taluk, Bombay. The other two co-owners are his brothers. Indubhushan was adjudicated as an insolvent on 29-7-1971. Evidently, this aspect seems to have been published in the Gazette and also in the newspapers. On 9-5-1988, while Indubhushan was still an undischarged insolvent, an agreement for sale of the suit property was entered into between the plaintiffs in the suit and the said Indubhushan. Under the said agreement, the plaintiffs seem to have deposited a sum of Rs 7 lakhs with Indubhushan, towards the sale of the share in the property owned by Indubhushan. Stating that Indubhushan, the first defendant committed breach of the said agreement and has also started construction work on the land agreed to be sold to the plaintiffs, Suit No. 133 of 1989 was laid in the High Court of Bombay by the appellants herein claiming the following reliefs:

> (*a*) to declare that there is a valid, subsisting and binding agreement between the appellants and the first defendant, as contained in the agreement dated 9-5-1988;
>
> (*b*) that the properties be properly partitioned by metes and bounds in three separate parts and one plot marked in red colour be allotted to the appellants;
>
> (*c*) that the defendants in the suit (Indubhushan and his two brothers) be ordered to specifically perform the said agreement;
>
> (*d*) in the alternative, the defendants be ordered to pay a sum of Rs 2 crores;
>
> (*e*) in the alternative, a decree may be passed against the first defendant for recovery of a sum of Rs 7 lakhs with 18% interest per annum;
>
> (*f*) that upon failure of the defendants to pay the said amount, the property may be sold to the appellants to the extent of the share owned by the first defendant; etc.

(It may be mentioned that Defendants 2 and 3 are the brothers of Indubhushan - the first defendant). It appears that Indubhushan had initiated proceeding by taking notice of motion for annulment of his insolvency. While so, the first defendant - Indubhushan died on 22-4-1989. The proceeding initiated for annulment of insolvency proceedings was withdrawn by his counsel. The appellants took out Chamber Summons No. 769 of 1989 in the suit to bring on record Respondents 1 to 4 therein, as Defendants 1(*a*) to 1(*d*) [respondents 1(*a*) to 1(*d*) in the present appeals], in place of deceased Defendant 1 as his legal heirs and also to appoint guardian for the minors Respondents 2 to 4 and add Respondent 5 - the official assignee of the High Court of Bombay as party Defendant 4 in the suit. Prayer to amend the plaint in

terms of the draft amendment mentioned in the schedule containing the above prayers was also specified. The chamber summons is dated 21-7-1989. The above chamber summons came up for hearing and disposal before Variava, J. on 2-2-1990. It seems the suit was not posted to that day. After hearing the counsel for the parties, the learned Judge passed the following order on 2-2-1990:

> "Suit to enforce agreement entered into by Defendant 1, who was an insolvent. Till date leave of insolvency court not obtained. Clear that agreement is void and unenforceable and suit not maintainable.
>
> *Amendments seek to convert this suit.* In my view, cannot be *allowed to this.*
>
> Chamber summons dismissed. No order as to costs."

The appellants (plaintiffs in the suit) filed Appeal No. 413 of 1991 against the aforesaid order of the learned Single Judge of the High Court of Bombay dated 2-2-1990, before a Division Bench. The Division Bench summarily dismissed the appeal by its Judgment and Order dated 9-7-1991. The result of the above proceedings is that the suit (No. 133 of 1989) stood abated against Indubhushan's (estate) legal heirs.

4. It appears that the legal heirs of the original first defendant entered into an agreement with M/s Kamal Construction Co. (a firm) for sale of the suit property. M/s Kamal Construction Co. have filed IAs Nos. 5 and 6 of 1997 to implead them as a party respondent in the appeals. (We have allowed the same.) On 30-5-1994, the insolvency of Indubhushan was annulled. It is stated that a fresh agreement to sell the property was entered into between the legal heirs of Indubhushan and M/s Kamal Construction Co. on 20-9-1995. On 20-11-1995, the appellants took out fresh Chamber Summons No. 1123 of 1995 (in Suit No. 133 of 1989), praying to amend the plaint by deleting the name of Defendant 1 - Indubhushan - from the title of the suit and in his place to add the names of Defendants 1(*a*) to 1(*d*) - respondents herein, as the legal heirs of deceased Defendant 1. According to the appellants, as a result of annulment of insolvency by Order dated 30-5-1994, the adjudication of insolvency stands wiped out and the agreement entered into by the appellants with the original first defendant dated 9-5-1988 revived and binding on his estate, and the dismissal of the earlier chamber summons declining to implead the legal heirs and the consequent abatement of the suit are of no consequence, as they are *non est and ineffective*, that the appellants are entitled to have the said heirs on record of the suit and to have *the abatement, if any*, set aside as *a matter of law* and so, the proposed amendments to implead the legal heirs of Defendant 1 should be allowed. The legal heirs of the first defendant (respondents herein) as also M/s Kamal Construction Co. opposed the above motion and contended inter alia that the earlier order passed in Chamber Summons No. 769 of 1989, declining to implead the legal heirs and to implead the official assignee has become final and conclusive and the suit (No. 133 of 1989) stood dismissed by a learned Single Judge and affirmed by a Division Bench. It was further stated that the above suit itself has abated by non-impleadment of the legal heirs within the time allowed by law and, so the present notice of motion should be rejected. Similarly, the appellants took out another Chamber Summons No. 14 of 1996 in the said suit to implead M/s Kamal Construction Co. and also praying to declare that the agreements entered into by the legal heirs of Defendant 1 and M/s Kamal Construction Co. dated 13-4-1994 and 20-9-1995 are invalid. The above two Chamber Summons i.e. No. 1123 of 1995 and 14 of 1996 were

dismissed by a learned Single Judge of the Bombay High Court by his Order dated 8-3-1996. While passing the order in Chamber Summons No. 1123 of 1995, the learned Single Judge adverted to the earlier proceedings which resulted in the dismissal of Chamber Summons No. 769 of 1989 by Variava, J., and held that there was no change in the circumstances for the appellants to take fresh Chamber Summons No. 1123 of 1995, that the order passed on 2-2-1990 holding (*a*) that the agreement between the appellants and the first defendant is void and the suit is not maintainable, has become final, and (*b*) *that no case has been made out by the appellants for setting aside the abatement of the suit, as against the estate of the first defendant*. As a sequel thereto, Chamber Summons No. 14 of 1996 to implead M/s Kamal Construction Co. as the 5th respondent was also dismissed. The appeals filed by the appellants from the aforesaid common judgment and order as Appeal No. 513 of 1996 and Appeal No. 464 of 1996 were dismissed by a Division Bench of the High Court of Bombay by its Judgments and Orders dated 10-7-1996. The original plaintiffs have come up in appeals against the aforesaid judgments and orders so rendered by the High Court in Civil Appeals Nos. 464 of 1996 and 513 of 1996 dated 10-7-1996.

5. We heard Shri Soli J. Sorabjee, Senior Counsel who appeared for the appellants, and M/s Dr Dhanuka and Shri K.K. Venugopal, Senior Advocates who appeared for the respondents. The arguments advanced before us covered a wide range. It may not be necessary to adjudicate the rival contentions urged before us in detail, in the light of our conclusion regarding the scope of the order passed in Chamber Summons No. 769 of 1989 dated 2-2-1990. We shall only indicate in brief the rival pleas urged before us and our conclusion thereon.

6. At this juncture, we should bear in mind a crucial aspect in these cases. The appellants filed the suit against Indubhushan (Defendant 1) on 13-1-1989. Indubhushan died on 22-4-1989. On that day he was an undischarged insolvent. The appellants took out Chamber Summons No. 769 of 1989 in Suit No. 133 of 1989. After hearing the parties, a learned Single Judge of the Bombay High Court by Order dated 2-2-1990, rejected the chamber summons on two distinct and different grounds. They are: (1) the agreement dated 9-5- 1988 between the appellants and Indubhushan is void and unenforceable and so, the suit for specific performance of the said agreement is not maintainable; (2) *the amendments sought by the appellants to delete the name of the first defendant and to implead Defendants 1(a) to 1(d) (as Respondents 1 to 4) in place of the deceased Defendant 1, and to add the official assignee* as a party defendant, were disallowed.

7. Though, the motion to implead the legal heirs seems to have been made in time, the prayer to amend the plaint to bring the legal heirs of Defendant 1 on record was declined after hearing the parties, by passing a judicial order as early as 2-2-1990. Thereby, the suit (No. 133 of 1989) stood abated against Defendant 1 and his legal heirs. It is long thereafter, after a lapse of five years, the appellants initiated proceedings for the issue of another Chamber Summons, No. 1123 of 1995 (in the suit — which has abated against the estate of the first defendant), making a fresh attempt to bring the legal heirs of the first defendant on record and prayed for appropriate amendment of the pleading in that regard. According to the appellants, the abatement of the suit as against Defendant 1 by reason of the *non-impleadment of the heirs of the Original Defendant 1, is non est and ineffective* and the abatement of the suit, *if*

any, requires to be set aside, as *a matter of law*, in view of the annulment of insolvency by Order dated 30-5-1994. We shall advert to these aspects, later in our judgment.

8. Shri Soli J. Sorabjee, Senior Counsel for the appellants, urged the following points:

> The adjudication of Indubhushan as insolvent on 29-7-1971 stood wiped out by the order of the annulment of the same on 30-5-1994. The legal effect of annulment is to wipe out the insolvency and to restore the state of affairs as on the date of adjudication. In this perspective, the Order dated 2-2-1990 passed in Chamber Summons No. 769 of 1989 declining to implead or bring on record the legal heirs of Indubhushan is of no effect. There is no prohibition in law to enter into an agreement with an undischarged insolvent. In view of the annulment of the insolvency, the property revested in the insolvent and the original proceeding stands wiped out and the original agreement to sell dated 9-5-1988 entered into by the appellants with Indubhushan, is alive and enforceable. In this view, the High Court was in error in holding that the earlier order passed in Chamber Summons No. 769 of 1989 is a bar for the present motion by way of Chamber Summons No. 1123 of 1995 to bring on record the legal representatives of Indubhushan and for grant of appropriate reliefs. The agreement entered into by the legal heirs of Indubhushan with Respondent 4 was also before the annulment of the insolvency proceedings and so it is also vitiated.

According to the counsel, the entire matter requires a fresh look in view of the legal effect of annulment of insolvency proceedings which is to restore the state of affairs as on the date of adjudication and to ignore all subsequent events. To substantiate the above points, the counsel brought to our notice the following decisions.

9. On the other hand Mr Dhanuka and Mr Venugopal, Senior Counsel, who appeared for the respondents, submitted thus:

The effect of the order passed in Chamber Summons No. 769 of 1989 dated 2-2-1990 is a dismissal of Suit No. 133 of 1989 and that is the end of the matter. There is no pending suit in which the proceedings by way of Chamber Summons No. 1123 of 1995 could be filed. The suit had abated long ago and the abatement has not been set aside. There is inordinate delay in the matter. Even in the present Chamber Summons No. 1123 of 1995 there is no prayer factually, as such, to set aside the abatement of the suit. The only plea is that the abatement of *the suit, if any*, requires to be set aside, as *a matter of law.* This plea is untenable. The suit stated to be pending, is against a dead person. No proceeding will lie in the said suit. Suit No. 133 of 1989 itself was filed without obtaining leave, which is a condition precedent. The defect is fatal. It has no existence in law. In any view of the matter, since the earlier Order dated 2-2-1990 refusing to implead or bring on record the legal heirs of Indubhushan, has become final and conclusive, the suit has abated. By initiating the present Chamber Summons No. 1123 of 1995 in a non-existent suit, the attempt is (to bring on record) to implead the legal heirs of Indubhushan; such indirect attempt to implead the legal heirs of Indubhushan, after the suit has abated and after inordinate delay, is patently unsustainable. The legal heirs of Indubhushan had entered into a valid contract with the 4th respondent after the annulment of the insolvency on 20-9-1995. In pursuance thereto, the 4th respondent took possession of the property, made vast improvements therein and has built 12 flats and has sold the same.

Even though insolvency was annulled on 30-5-1994, the proceeding by way of Chamber Summons No. 1123 of 1995 was initiated only on 20-11-1995, more than 18 months after the annulment of insolvency. There is inordinate delay in the matter and the rights of third parties have intervened; and the court below was justified in dismissing Chamber Summons No. 1123 of 1995 taking into account the earlier proceedings.

10. Though the arguments addressed before us covered a wide range, we are of the view that it is unnecessary to pronounce in detail on the various aspects involved in the matter at this stage. Suffice it to say that the preponderance of judicial opinion is in favour of the view that the effect of annulling the adjudication in insolvency proceedings, is to wipe out the effect of insolvency and to vest the property retrospectively in the insolvent. The consequence of annulling an order of adjudication is to wipe out *altogether the insolvency and its effect.* The property will revest in the insolvent retrospectively from the date of the vesting order. We hold that the law is fairly clear to the above extent. But, this does not solve the problem arising in this case. The effect of the suit (independently) filed by the appellants and the orders passed therein have to be considered. That is a distinct and different matter, which has its own existence and legal impact, unimpaired by the annulment of the insolvency. In other words, by the annulment of the insolvency and wiping out its effect retroactively, in law, the suit and the judicial orders passed thereon are not wiped out, or rendered void or a nullity, automatically. The order passed in the suit is not non est or ineffective. In the suit laid by the appellants (Suit No. 133 of 1989), praying for declaration that the agreement between the appellants and Indubhushan dated 9-5-1988 is valid and subsisting, that the property should be properly partitioned and that a decree may be passed against Indubhushan — the first defendant for recovery of a sum of Rs 7 lakhs etc.; on the demise of Indubhushan on 22-4-1989, the appellants took out Chamber Summons No. 769 of 1989 in the suit (No. 133 of 1989). The court rejected the chamber summons by a composite order on two different and distinct points — (1) the agreement dated 9-5-1988 entered between the appellants and Indubhushan is void and unenforceable and so, the suit is not maintainable; (2) the amendments sought by the appellants to implead Defendants 1(*a*) to 1(*d*) as Respondents 1 to 4 in place of deceased Defendant 1 and to add the official assignee as a party defendant, were disallowed. The legal effect of the said order is that Suit No. 133 of 1989 stood abated against the legal heirs of the first defendant, Indubhushan and the order passed on 2-2-1990 reached finality. It so happened, as a result of the judicial order passed by the court in a proceeding between the parties to this proceeding as early as 2-2-1990. This order is valid until set aside or annulled, in appropriate proceedings. *It cannot be ignored. It will have legal effect of its own, until appropriate proceedings are taken to establish its invalidity and to get it annulled by a person entitled to avoid it.* The said order stands even today; it has not been set aside. So long as the said order stands, the abatement of the suit has become unassailable in these proceedings. Nearly five years thereafter, the appellants filed fresh Chamber Summons No. 1123 of 1995 in a non-existent suit. No factual plea as such was made to set aside the abatement. The plea in that regard is that by the annulment of insolvency, the abatement of *the suit, if any*, requires to be set aside *as a matter of law.* For reasons stated earlier, the abatement of the suit (an independent proceeding), that ensued, cannot be ignored or the proceedings in the suit revived, by the annulment of insolvency, as a matter of law. Moreover, there is inordinate delay, even if such prayer was made in the application. The attempt made

in Chamber Summons No. 1123 of 1995 to bring the legal heirs of the first defendant on record is a futile attempt to bring back to life a suit which no longer existed. The legal effect of the order passed in Chamber Summons No. 769 of 1989 dated 2-2-1990 has resulted in the abatement of the suit against the legal heirs of the first defendant — Indubhushan. In such state of affairs, the fresh chamber summons taken (No. 1123 of 1995) in a non-existent suit, is patently barred, unsustainable in law and merits no consideration. In this view of the matter, we affirm the judgments and orders passed by the High Court and no interference is called for in these appeals. The appeals are without merit and are dismissed.

* * * * *

Tukaram Ramchandra Mane v. *Rajaram Bapu Lakule*

(1998) 4 SCC 317

K. VENKATASWAMI, J. - A short question that arises for consideration in this appeal is that what is the meaning to be ascribed to the words "all acts theretofore, done, by the court or receiver, shall be valid;" occurring in Section 37(1) of the Provincial Insolvency Act, 1920 ("the Act").

The deceased respondent Rajaram Bapu Lakule ("the debtor") was the original owner of a suit property, namely CTS No. 926, Peth Baug, Sangli, Bombay. By a deed of mortgage by conditional sale dated 22-1-1962 (Ex. 41), he transferred the suit property in favour of the appellant ("the creditor") for a sum of Rs 7500. The condition was that on the amount of Rs 7500 if repaid within five years of the execution of the document, the property was to be reconveyed to the debtor. On 8-1-1963 within one year from the date of conditional sale, the debtor executed another document a regular sale deed after receiving an additional amount of Rs 500. On 9-4-1963 Insolvency Application No. 5 of 1963 was filed by one of the creditors of the debtor to get an adjudication as insolvent against the debtor. In 1964, the debtor himself filed Insolvency Application No. 7 of 1964 for being adjudicated as an insolvent. By proceedings of the Court dated 8-1-1965, the debtor was adjudicated as an insolvent and an official receiver was appointed in respect of the properties belonging to the insolvent/debtor including the suit property. In the year 1965, the receiver moved the Insolvency Court for a declaration that the sale deed, namely, Ex. 42 dated 8-1-1963 in favour of the creditor (appellant) was a sham and nominal transaction and as such it was null and void. After taking evidence, the Insolvency Court held that the said sale deed (Ex. 42) was a sham transaction and that it was the result of the collusion between the debtor and the creditor. It was also found by the Insolvency Court that possession of the suit property was never taken over by the creditor. Against that order of the Insolvency Court, an appeal was filed being MCA No. 50 of 1968 and the same was dismissed by the Extra Assistant Judge, Sangli. By an order dated 26-6-1971, the Insolvency Court passed an order of annulment.

2. Thereafter the debtor filed a Civil Suit No. 62 of 1976 for redemption of the mortgage Ex. 41. This suit for redemption was on the footing that the sale deed Ex. 42 was a sham and bogus document and it was never acted upon. Simultaneously the debtor moved the authority under the Maharashtra Debt Relief Act, 1975 for a declaration that the debt which was the subject-matter of the mortgage stood extinguished as the mortgagor was a debtor within the meaning of the said Act. The appellant contested the said application contending that in view of the order of annulment and in the light of Section 37(1) of the Act, Ex. 42 (sale deed) in his favour stood revived and therefore, there was no relationship of debtor and creditor to move the application under the Debt Relief Act. The authorised officer on a consideration of the documents overruled the stand taken by the appellant and by order dated 14-4-1980 held that in view of the declaration regarding Ex. 42 (sale deed) by the Insolvency Court and by the appellate court that the sale was void, the earlier document, viz., conditional sale Ex. 41 stood revived and the debtor's relationship existed. On that basis he allowed the application under the Debt Relief Act. The result was that the debt stood wiped out.

4. It was contended on behalf of the appellant before the High Court that the authorised officer was not right in holding that even after the order of annulment, the declaration made by the Insolvency Court holding Ex. 42 (sale deed) as null and void, holds the field. In other words, it was the case of the appellant that the effect of the order of annulment was to wipe out altogether the insolvency and its effect including the adjudication made on Ex. 42 by the courts and the saving clause in the first part of Section 37(1) shall not keep the order passed by the Insolvency Court, affirmed by the appellate court, declaring Ex. 42 (sale deed) as null and void in force any longer. According to the case of the appellant, the words "all acts theretofore" occurring in Section 37(1) of the Act, will not include the judicial orders passed by the Court declaring Ex. 42 (sale deed) as sham and nominal. In support of that, judgments from some High Courts were placed before the Bombay High Court.

5. Contending contrary, it was argued on behalf of the debtor that in view of the declaration by the Insolvency Court, declaring Ex. 42 (sale deed) as null and void, being a sham transaction and affirmed by the appellate court, the same is saved by the first part of Section 37(1) as it will come within the purview of the acts done by the court.

6. The Division Bench of the Bombay High Court, after referring to several judgments of different High Courts placed before it, preferred to follow a judgment of the Kerala High Court reported in ***Kumaran* v. *Cheriyambadan Ayidru*** [AIR 1969 Ker 211]. Ultimately the Division Bench held that the view taken by the authority under the Debt Relief Act cannot be faulted and Ex. 42 (sale deed) was non est in the eye of law and consequently the position occupied by the parties as debtor and creditor continued till the appointed date as contemplated by the Debt Relief Act. Since all other conditions were satisfied, the authority was justified in ordering the extinguishment of the debt. On that view, the writ petition filed by the appellant was dismissed. Hence the present appeal.

7. Mr V.N. Ganpule, Senior Counsel appearing for the appellants, reiterated the same argument, namely that the effect of annulment on the facts of this case was to revive the validity of regular sale (Ex. 42) notwithstanding the declaration of the Insolvency Court and the appellate court during the pendency of the insolvency proceedings.

9. Mr U.U. Lalit, learned counsel appearing for the respondents, submitted that the judgment of the Kerala High Court lays down the correct law and even ***Jethaji*** [AIR 1930 Mad 278] supports his case and not the case of the appellant. Mr Lalit also pointed out that after the annulment order was passed, the Insolvency Court did not pass any order regarding the vesting of the property in any person and in the absence of such direction, the property shall revert to the debtor to the extent of his right or interest therein as per Section 37(1) of the Act. He submits that the judicial pronouncement declaring Ex. 42 (sale deed) as null and void and the outcome of collusion between the mortgagor and mortgagee is saved by the first part of Section 37(1). The contention to the contrary that the word "acts" will not include orders passed by the court, according to the learned counsel, is contrary to a plain reading of the section.

11. A plain reading of the above section will show that the orders passed by the court or receiver including adjudication of disputed question on title, will come within the purview of "all acts". The Kerala High Court in ***Kumaran* v. *Cheriyambadan Ayidru*** after referring to a

judgment rendered, construing a corresponding section of the English Bankruptcy Act, 1869 held that an order passed by the Insolvency Court or the official receiver could be an act within the meaning of Section 37 of the Act.

12. Following the judgment of the Kerala High Court, the Division Bench held as follows:

> "At least prima facie and upon the plain reading of the said Section 37(1), we find no justification for holding that the declaration dated 26-8-1968 did not answer the description of the 'acts' referred to in the said Section 37(1). After all, the court acts in a number of ways. When the court grants any declaration, it cannot be said not to have performed some 'act'. A decree passed by the court is one of the acts. An order passed by the court is another such act. Even a mere declaration given will be another act. Point is that the expression 'acts' is wide enough to take in its fold the declaration made by the court such as the one dated 26-8-1968. On the plain reading of the section, therefore, it is somewhat difficult to accept Mr Apte's contention.
>
> Mr Apte relied upon certain authorities in support of his contention that, upon the order of annulment, every order passed by the court became non-existent or non est. Mr Shah, on the other hand, relied upon quite a few authorities in support of his submission that the order of annulment had no effect upon the declaration already given by the Insolvency Court holding the particular sale deed to be void. We will presently examine those authorities. Here, we are concerned with the interpretation of the section on the basis of its plain reading.
>
> In this connection, Mr Apte also relied upon the subsequent portion of the said clause (1) of Section 37. By the subsequent portion, the effect of the order of annulment is provided for. The effect is that the property which stood vested in the court or in the receiver till the date of the annulment would, from the date of the annulment, stand vested in such person as the court may appoint and if the court does not make any appointment of any person for that purpose, the property, it is provided, shall revert to the debtor, no doubt, to the extent of his right and interest therein. On the basis of this provision, the counsel argued that no order was passed by the Insolvency Court appointing any person in whom the property should vest. He argued that the property must, therefore, go back to the person to whom it was to belong before the date of the adjudication.
>
> We are afraid, the argument is not quite correct. In the instant case, the effect of the declaration was that the property vested in the receiver because the order of appointment of the receiver was very much there. If no order was passed by the court directing the property to continue to vest in the receiver or if there was no other order passed by the court directing the property to vest in any other person, the third result contemplated by the said clause (1) is that it would revert back to the debtor. That means it would vest back in the debtor. The incident of vesting is not mentioned in the order because there is no order passed in that behalf. It could be, therefore, legitimately argued that it would vest in the debtor entirely. We make it clear that we are not called upon to decide this question as to whom, in given circumstances, the property would revert for certain. Point here is that it would either vest in the person

> appointed by the court or it would revert back to the debtor. No position is contemplated by the said clause (1) that the property would revert back, in the case such as the present one, to the ostensible purchaser under the sale deed Ex. 42. The purchaser under sale deed Ex. 42 was the mortgagee/creditor. The said clause (1) does not provide that the property would go to the mortgagee/creditor. If at all it reverts back, it would revert to the mortgagor/debtor. The argument advanced by Mr Apte, in fact, boomerangs against his own contention."

13. We are in full agreement with the view taken by the Division Bench in the judgment under appeal. We would have considered the authorities cited by the learned counsel for the appellant, claiming to support his contention that the effect of annulment was to the effect that the adjudication of the Insolvency Court holding Ex. 42 (sale deed) null and void, would become non est and ineffective but for the fact that a recent judgment of this Court in ***Arora Enterprises Ltd.*** **v.** ***Indubhushan Obhan*** [(1997) 5 SCC 366], which had escaped the attention of the counsel on both sides settled the issue. This Court in the said case had considered the scope of Section 37(1) and the effect of order of annulment. The facts of the case dealt with by this Court in ***Arora Enterprises Ltd.*** briefly are as follows:

One Indubhushan along with his two brothers owned certain properties. The said Indubhushan was adjudicated as an insolvent on 29-7-1971. While the said Indubhushan was continuing as undischarged insolvent, one Arora Enterprises entered into an agreement on 9-5-1988 for sale of the suit property (Indubhushan's share) and paid a sum of Rs 7,00,000.As the said Indubhushan failed to execute the sale pursuant to the agreement, the said Arora Enterprises filed a suit (No. 133 of 1989) on the basis of the said agreement. Pending the suit, Indubhushan died on 22-4-1989. In order to bring the legal heirs of Indubhushan on record, Arora Enterprises moved a chamber summons before a learned Single Judge of the High Court, Bombay. The said chamber summons was disposed of by the learned Single Judge holding, inter alia, that the agreement of sale was void and unenforceable as leave of Insolvency Court was not obtained and, therefore, the suit itself was not maintainable. An appeal was filed against the learned Single Judge's said order which was also dismissed by the Division Bench on 9-7-1991. The result of the above orders was that the suit filed by Arora Enterprises stood abated against Indubhushan's (estate) legal heirs. On 30-5-1994 the insolvency of Indubhushan was annulled. Thereafter the legal representatives of Indubhushan entered into a fresh agreement to sell the property with one M/s Kamal Construction Co. Taking advantage of the order of annulment, Arora Enterprises, the original agreement-holder, took out fresh chamber summons in an original suit (No. 133 of 1989) filed by it in the year 1989 praying to amend the plaint by deleting the name of Indubhushan and to add his legal heirs. It was the contention of Arora Enterprises that the order of annulment wipes out the adjudication of insolvency and the result of that was that his agreement with Indubhushan dated 9-5-1988 automatically revives and binds on his estate. It was also the contention that the dismissal of earlier chamber summons declining to implead the legal heirs and the consequent abatement of the suit are of no consequence. The said application was opposed by the legal heirs as well as M/s Kamal Construction Co. The learned Single Judge as well as the Division Bench rejecting the contention advanced on behalf of Arora Enterprises, dismissed the second chamber application. Aggrieved by that, an appeal by special leave came to be

filed in this Court and this Court after noting as many as sixteen judgments of various High Courts on the scope of Section 37 of the Act held as follows:

> "*10.* Though the arguments addressed before us covered a wide range, we are of the view that it is unnecessary to pronounce in detail on the various aspects involved in the matter at this stage. Suffice it to say that the preponderance of judicial opinion is in favour of the view that the effect of annulling the adjudication in insolvency proceedings, is to wipe out the effect of insolvency and to vest the property retrospectively in the insolvent. The consequence of annulling an order of adjudication is to wipe out *altogether the insolvency and its effect.* The property will revest in the insolvent retrospectively from the date of the vesting order. We hold that the law is fairly clear to the above extent. But, this does not solve the problem arising in this case. *The effect of the suit (independently) filed by the appellants and the orders passed therein have to be considered. That is a distinct and different matter, which has its own existence and legal impact, unimpaired by the annulment of the insolvency. In other words, by the annulment of the insolvency and wiping out its effect retroactively, in law, the suit and the judicial orders passed thereon are not wiped out, or rendered void or a nullity, automatically. The order passed in the suit is not non est or ineffective*. In the suit laid by the appellant (Suit No. 133 of 1989) praying for declaration that the agreement between the appellant and Indubhushan dated 9-5-1988 is valid and subsisting, that the property should be properly partitioned and that a decree may be passed against Indubhushan - the first defendant for recovery of a sum of Rs 7 lakhs etc.; on the demise of Indubhushan on 22-4-1989, the appellant took out Chamber Summons No. 769 of 1989 in the suit (No. 133 of 1989). The court rejected the chamber summons by a composite order on two different and distinct points - (1) the agreement dated 9-5-1988 entered between the appellant and Indubhushan is void and unenforceable and so, the suit is not maintainable; (2) the amendments sought by the appellant to implead Defendants 1(*a*) to 1(*d*) as Respondents 1 to 4 in place of deceased Defendant 1 and to add the official assignee as a party defendant, were disallowed. The legal effect of the said order is that Suit No. 133 of 1989 stood abated against the legal heirs of the first defendant, Indubhushan and the order passed on 2-2-1990 reached finality. It so happened, as a result of the judicial order passed by the court in a proceeding between the parties to this proceeding as early as 2-2-1990. This order is valid until set aside or annulled, in appropriate proceedings. *It cannot be ignored. It will have legal effect of its own, until appropriate proceedings are taken to establish its invalidity and to get it annulled by a person entitled to avoid it*. The said order stands even today; it has not been set aside. So long as the said order stands, the abatement of the suit has become unassailable in these proceedings. Nearly five years thereafter, the appellants filed fresh Chamber Summons No. 1123 of 1995 in a non-existent suit. No factual plea as such was made to set aside the abatement. The plea in that regard is that by the annulment of insolvency, the abatement of *the suit, if any,* requires to be set aside *as a matter of law*. For reasons stated earlier, the abatement of the suit (an independent proceeding), that ensued, cannot be ignored or the proceedings in the suit revived, by the annulment of insolvency, as a matter of law."

14. The above judgment of this Court squarely applies to the facts of this case which are given in the earlier part of this judgment. Therefore, we observed earlier that the need to go into the matter elaborately does not arise in view of the pronouncement in *Arora Enterprises*[5] with which we are in respectful agreement.

15. In the result there is no merit in this appeal and the judgment under appeal is in conformity with the recent ruling of this Court in ***Arora Enterprises*** case. Accordingly the appeal fails and is dismissed.

* * * * *

In Re : Prafulla Chandra Mitra

AIR 1973 Cal 99

HAZRA, J. - The insolvent. in this case, is one Prafulla Chandra Mitra. An order of adjudication was passed on February 16. 1971 by this Court on his own application. This application is made by the decree-holder M/s. Coal Products Pvt. Ltd. for annulment of the order of adjudication dated Febraury 16, 1971 under Section 21 of the Presidency Towns Insolvency Act. 1909. The relevant portion of Section 21 is as follows:

> Where in the opinion of the Court, a debtor ought not to be have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full the Court shall. on the application o any person interested, by order annul the adjudication.

2. The case of the decree-holder, Coal Products Pvt. Ltd., is that the debtor, in this case, ought not to have been adjudged insolvent. Mr. B. K. Bachawat placed before me certain facts which appear form the petition and affidavits of the parties and the records and proceedings of this matter and submitted that I should in the facts of this case, as admitted or proved in this application and in the insolvency proceedings, annul the order of adjudication.

4. On July 2. 1967 a decree was passed by the Court of appeal in favour of the petitioner. Thereafter on July 10, 1968 an application was made for execution by the petitioner for examination of the judgment-debtor and at the request of the judgment-debtor the matter was adjourned from time to time. On February 4, 1969 the judgment-debtor Prafulla Chandra Mitra made an application under Section 13 (1) of the Provincial Insolvency Act, 1920 in the Court of the District Judge. 24-Parganas, Alipur being Insolvency Case No. 4 of 1969.

5. In the petition, the said judgment-debtor, Prafulla Chandra Mitra, gave particulars of pecuniary claims and particulars of creditors and decree-holders. He also gave schedule of particulars of his properties. On May 2, 1969 the judgment-debtor Prafulla Chandra Mitra made a petition for amendment in the Insolvency Case No. 4 of 1969 in the Court of the District Judge at Alipore and stated that through inadvertence he omitted to include his undivided 2/11th share in the property at 5/C. Ramkrishna Lane, Calcutta.

6. M/s. Coal Products Pvt. Ltd. filed an affidavit of objection on March 28, 1969 to the petition for Insolvency by the judgment-debtor in the Alipore Court. Thereafter on February 16, 1970 and on February 18, 1970 the judgment-debtor Prafulla Chandra Mitra was examined in the said insolvency case. On March 9, 1970 the petition for adjudication was dismissed. A judgment was delivered by Mr. S. N. Koley, Addl. District Magistrate/Judge, Alipur and in the judgment the learned Additional District Judge said that the petitioner was not a resident of any local area under the jurisdiction of the Court of the District Judge, 24-Paraganas at the time of the presentation of the Insolvency petition. Accordingly, the District Judge, 24-parganas. had not the territorial jurisdiction to entertain the insolvency petition. The learned Judge refrained from making any observation with regard to the question whether the petitioner is unable to pay his debts or whether the insolvency petition contains particulars of all his properties. The judgment-creditor Coal Products Pvt. Ltd., in the meantime, proceeded with the application for execution of the decree obtained by it by examination of the

judgment-debtor under O, 21, R. 41 of the Code of Civil Procedure and the execution matter appeared in the list of this Court for hearing from time to time. The judgment-debtor failed to attend the Court and on February 2, 1971 a warrant of arrest was directed to be issued and the Sheriff was directed to act on the signed copy of the minutes. The matter was mentioned on behalf of the judgment debtor and this Court directed that the judgment-debtor should appear in Court on February 19, 1971. On February 2, 1971 the judgment-debtor Prafulla Chandra Mitra made a second application for adjudication before this Court being case No. 4 of 1971 and obtained an order of adjudication on the same day.

7. The application before this Court for being adjudged as insolvent was filed by Prafulla Chandra Mitra on February 16, 1971, Certain statements which were made by him in this application for an order of adjudication, are relevant for the purpose of this application. The relevant portion of the said application for adjudication order is as follows:

''I, Prafulla Chandra Mitra. at present residing at 5/C. Ramkrishna Lane, Calcutta 3. and lately residing at Gaipur, District 24-Parganas and formerly carrying on coal supply business at 5/C. Ramkrishna Lane under the name and style of P. C. Mitra & Co. from 1921 to 1962 and at present of no occupation and being unable to pay my debts which exceed Rs. 500/- and having within the last year ordinarily resided at 5/C. Ramkrishna Lane in the town of Calcutta within the Ordinary Original Civil Jurisdiction of this Hon'ble Court hereby petition this Court that an adjudication order may be made in respect of my estate and that I may be adjudged insolvent.

There is at present no petition for adjudication by or against me pending in this or any other Court.

This is my first petition in insolvency.

The business was closed about 8 years ago in the year 1962 and the books of accounts etc. of the said business were not properly preserved and therefore, damaged and ultimately destroyed.''

8. On the same day namely on February 16, 1971 Prafulla Chandra Mitra made a statement before the Official Assignee. He stated that he was aged 78 years and resident of 5/C, Ramkrishna Lane. Calcutta, In this statement he stated as follows:

> In or about 1921 I started my own business of coal supply under the firm name and style of P.C. Mitra & Co. Since then I did business all and sundry and sometime in the year 1962 I had to close my said business due to losses in my said business and in the share market. Besides that I also had to incur considerable costs to defend myself in various litigation's instituted by my creditors. The house at which I am presently residing is a leasehold property which I along with my co-sharers let out to tenant and I receive Rs. 150/- being my share of rent in the said premises as also from 16/6, Bagbazar Street and 9 Anil Roy Road, Calcutta. Besides the said lease-hold interest I have also 1/11th undivided share in 9, Anil Roy Road. P. S. Tollygunge, Calcutta and undivided 1/2 share of a hut situate on the land measuring 1.02 acre in mouza Gaipur, P. S. Habra. I have six sons and three daughters and all my said daughters are marries. I am completely dependent on my sons and as my income is inadequate to maintain myself. I have to take money from my sons.

I have neither any banking account nor any isurance policy. I have no other property except as above.

Since the stoppage of my business in 1962 I have not been able to take any care of my books of account due to my old age. Worries and anxieties and litigations and penury and for such neglect the said books of account have been destroyed and/or mislaid and/ or moth-eaten.''

9. Relying on the facts stated above Mr. B. K. Bachawat made his submission as hereunder: (a) the order of adjudication in this case has been made ex parte by the learned Master; (b) necessary averment to constitute jurisdiction has not been made; (c) rules of the High Court, Original Side. Part II, Form No. 7-A at page 816 have not been complied with. Mr. Bachawat invited my attention to the relevant portion of Form No. 7-A (Rule 66) of the Rules of the High Court, Calcutta Vol. II which is as follows:

"Form No. 7-A (Rule 66)

Debtor's Petition.

There is at present no petition for adjudication by or against me pending in this or any other Court.

This is my (first, second or as the case may be) petition in insolvency (if not the first give particulars of previous petitions and the manner in which they were disposed of and also if any previous adjudication was annulled for want of prosecution).

I never kept any books of account and have no such books. I have deposited in the Official Assignee's office my books of account for the years as will appear from the annexed receipt (if books have been kept and are not produced give reasons for not doing so and state in whose custody they are at present.)

Dated the day of 19 (Signature).''

10. This form, according to Mr. Bachawat has not been complied with. Mr. Bachawat then placed before me certain facts as to suppression made by the said Prafulla Chandra Mitra. These facts are as follows: (a) The petitioner Prafulla Chandra Mitra deliberately suppressed that the petition before the High Court was not the first application and alleged in the petition before the High Court that was the first application; (b) The petitioner alleged in the petition before this Court that he ordinarily resided at 5/C. Ramkrishna Lane, Calcutta. whereas in the petition before the Alipur Court he alleged that he ordinarily resided at Guipur, 24-Parganas. (c) In the petition before the High Court the petitioner alleged that the business was closed in 1962. This statement as to closure of business in 1962 was also made in the petition for the order of adjudication on February 16, 1971. Similar statement was also made on February 16. 1971 before the Official Assignee that the business was stopped in 1962. But this statement must be untrue and false, because the said judgment-debtor Prafulla Chandra Mitra in his cross-examination before Shri S. N. Koley. Additional District Judge, stated as hereunder :

''No brick field is running there now. I closed the brick field in 1967 or 1968. I did not go there since the closure.''

In the affidavit-in-opposition affirmed by Prafulla Chandra Mitra on May 11, 1971 in this Court in paragraph 8 he stated as follows:

> ''I say that the said sum is due to the Collector, 24-Paraganas in respect of my coal depot at No. 35-A, Ultadanga Railway Siding and the said business of coal depot was closed down in or about 196.''

The petitioner Prafulla Chandra Mitra again suppressed that he carried on business under the name and style of Yubak Byabasayee Dal and Coal depot at Ultadanga Railway Siding as will appear from paragraph 8 of the affidavit-in-opposition.

11. So far as the books of account are concerned the statement made in the Insolvency Petition in the High Court was that the books of account of the said business were not properly preserved and therefore damaged and ultimately destroyed. The statement made before the Official Assignee is that ''since the stoppage of my business in 1962, I have not been able to take any care of my books of account due to my old age, worries and anxieties and litigation's and penury and for such neglect the said books of account have been destroyed and/or mislaid and /or moth-eaten.''

12. Mr. Bachawat submitted that from the statement of Prafulla Chandra Mitra it is clear that he carried on business not up to 1962 but up to 1968 and he carried on also other business apart from the business he disclosed in the petition before the High Court. He had books of account and maintained the same as will appear form the affidavit filed by Bholanath Bose. Income-tax Officer. District I & II affirmed on September 10, 1971. Paragraph 3 (a) of the affidavit of Bholanath Bose is as follows:-

> "From the relevant assessment register it appears that the assessments of the said Prafulla Chandra Mitra upto the assessment year 1965-66 have been completed and return for the year 1966-67 was filed in March. 1971. The assessment for the said year has not yet been completed and the same still remains pending."

13. Paragraph 3(b) of the affidavit of Bholanath Bose. Income-tax Officer, is as follows:

> "I have further caused searches to be made in the relevant records in possession of this Department and have not been able to find out any return submitted after the said assessment year. I further state that from the balance sheet filed by and/or on behalf of said Prafulla Chandra Mitra in respect of the assessment year 1965-66 i.e. to say for the accounting year ended on April 13, 1965. it appears that the following was shown as the assets belonging to the said assesee...."

14. From the said affidavit of the Income-tax officer it appears that balance sheets were there in possession of Prafulla Chandra Mitra in respect of assessment year 1965-66, i. e. upto the accounting year ending 13th April. 1965. When balance sheets were there upto 1965, the books of account must be there at least upto 1965, otherwise how the balance sheets could be prepared? Therefore, conditions in Form 7-A of the rules of the Original Side. High Court, which provides that.

> ''In a debtor's petition it should be stated either the applicant never kept any books of account and have no such books or he must say that he has deposited in the offical assignee's office his books of account for the year.....or if the books have been kept

and are not produced, the petitioner must give reasons for not doing so and state in whose custody they are at present''

are not complied with.

15. This is a very important averment according to the rules of the High Court and this averment must be stated in the debtor's petition; but although the debtor had in his custody such books at least upto the year 1965 he has not complied with the rules. On the other hand, he alleged that his business was closed in 1962 and did not produce any books at all.

16. With regard to the books of account Mr. Bachawat stated that although the said Prafulla Chandra Mitra made allegations in petition before the High Court that the books of accounts have been destroyed and/or mislaid and/or moth-eaten but no such allegation was made in the petition, in the Court of the District Judge at Alipore on or about February 4, 1969.

17. Mr. Bachawat submitted that the insolvent has made material mis-statement : (a) as to the names of the business, (b) as to the period of the business. (c) he did not state that this is second application for adjudication and (d) he did not state anything about the existence of his other business.

18. Again, in the list of assets given in the High Court he did not mention his interest in 5/C. Ram Krishna Lane, Calcutta which he stated in the petition in the Alipore Court namely that he had 2/11th share in premises No. 5/C, Ram Krishna Lane. Calcutta.

19. Regarding Anil Roy Road property, Prafulla Chandra Mitra stated in the petition in the High Court that he had 2/77th share. But in the statement before the official assignee he stated that he had 1/11th undivided share.

20. Regarding 16/6 Baghbazar Street Calcutta in his evidence before the district Judge at Alipore on February 16, 1970 Prafulla Chandra Mitra stated that land comprised in 16/6 Baghbazar Street, Calcutta was taken on lease in the name of his wife about 30 years ago. Land comprised in the premises was purchased by Prakash Chandra Majumdar, brother-in-law of the insolvent who executed a deed of gift in favour of his wife. It is stated in the petition before the High Court that he had undivided 1/11the share. In the petition in the Alipore Court so far as the Anil Roy Road is concerned he stated that he had undivided 2/77th share.

21. Mr. Bachawat relied on (AIR 1917 Cal 117) (Malchand v. Gopal Chandra Ghosal) and submitted that the insolvency petition of Prafaulla Chandra Mitra is an abuse of the process of the Court. And, therefore, the order of adjudication should be annulled on this ground. This is a case under Presidency Towns Insolvency Act. The headnote of the report runs thus :

''The Court has power to refuse or annul an adjudication order when the presentation of the petition for insolvency amounts to an abuse of the process of the Court.''

22. Sanderson. C. J. in this case said that.

''The Court had jurisdiction under the Act to make the order for annulment. if it thought that the application for bankruptcy was made as an abuse of the process of

the Courts; or to use the words of the learned Judge Mr. Justice Vaughan ''for a purpose foreign to the Bankruptcy Laws.''

23. The fact of the case before Sanderson, C. J. is of course a little different because there the insolvency petition was made for the third time and for the purpose of preferring an old creditor and it appears that the judgment-debtors wanted to shelter themselves from such proceedings as the creditors may take against them. Mookerjee, J. also said that under the law of England it is well settled that when the presentation of a petition is an abuse of the process of the Court the Court may decline to make any order on it or may rescind the receiving order made on the petition. At page 304 Mookherjee. J. said

> ''if an application of this character were entertained, the result would be inevitable that an ivsolvent would be encouraged to make an application for insolvency to obtain an adjudication order, to take no substantial steps thereafter or to abandon the proceedings and when pursued by his creditors again to seek relief in the Insolvency Court whenever convenient to him.''

24. Mr. Bachawat invited my attention to S. 15. sub-section (3) and submitted that on making of an order on a debtor's petition for adjudication unless the Court otherwise directs, the debtor shall produce all his books of accounts and file such list of creditors and debtors and afford such assistance to the Court as may be prescribed failing which the Court may dismiss the petition.

25. Mr. Bachawat submitted that the whole purpose of the debtor here is to mislead and to conceal from the Court the books of account and suppress his properties. He is not making true and faithful disclosure of his properties and cncealing the books of account. Mr. Bachawat next cited AIR 1930 Md 544, (R, Viswanatha Chetty v. Official Assignee of Madras) and relied on a passage as p. 546 which runs thus.

> ''We do not think it makes any difference whether the allegation is deliberately untrue or whether the debtor's misstatement is due to carelessness or an honest mistake.''

He submitted that it does not matter whether the debtor has willfully made suppression or not but the fact remains that he did suppress and made untrue and false statements.

26. The next case cited by Mr. Bachawat is (AIR 1923 Cal 703). (***In re Ballav Chand Serowgee***). The headnote of this case runs thus:

> ''An insolvent was adjudicated on his own petition but having failed to apply for his discharge within the time provided by the Act his adjudication was annulled. Subsequently on his own application, on the same facts and materials his second adjudication took place, and a creditor applied to annul the adjudication.''

It was held that the presentation of the second insolvency petition by the debtor was an abuse of the process of the Court, and the second adjudication order founded upon it must be annulled.

27. The judgment in the aforesaid case was delivered by Greaves. J. and it appears that the decision of the Privy Council reported in (AIR 1964 PC 64). (***Chhatrapat Singh Dugar* v.**

Kharag Singh Lachmiram) was placed before Greaves. J., but Greaves. J. said that the facts of that case before the Privy Council stand on a different footing.

28. In the aforesaid case, the debtor's petition for an order of adjudication under the Provincial Insolvency Act was dismissed on the grounds of the abuse of the process of the Court. The Privy Council was considering questions 15 and 16 of the Provincial Insolvency Act and said as follows:

> ''It is to be regretted that the Courts in India allowed themselves to be influenced by this plea instead of being guided to their decision by the provisions of the Act. In clear and distinct terms the Act entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend on the Court's discretion but is a statutory right and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground of decision as an 'abuse of the process of the Court'.''

29. Under Section 21 of the Presidency Towns Insolvency Act where in the opinion of the Court a debtor ought not to have been adjudged an insolvent on the application of any creditor the Court shall annul the adjudication.

30. What is meant by the words ''a debtor ought not to have been adjudged an insolvent''? The words ''abuse of the process of the Court'' do not appear in Section 21 but if there is abuse of the process of the Court, then the Court can form an opinion that a debtor by reason of the abuse of the process of the Court ought not to have been adjudged insolvent.

31. What is ''abuse of the process of the Court?''

32. As to the meaning of the words ''abuse of the process'' in Halsbury's Laws of England. Third Edition, Vol. VIII. para 27, page 16, it appears as follows :

> ''Abuse of the process : ... ... Abusing the process of the Court is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious. or oppressive. the ordinary remedy in such a case being to apply to strike out a pleading or stay the proceedings, or to prevent further proceedings being taken without leave. Beyond this the Court has jurisdiction to punish abuse of the process by committal or attachment as a contempt.''

33. In **Halsbury's** ***Laws of England***, Third Edition Volume II. Article 691 at page 354, the following passage occurs :

> "691. Orders which should not have been made : An adjudication order made under proceedings which are an abuse of the process of the Court or foreign to the purpose of the Bankruptcy Acts may be annulled and so may an order made under a defective petition which has not been amended before the making of the receiving order or adjudication order."

34. As to the meaning of the words ''debtor ought not to have been adjudged insolvent'' Mr. Bachawat contended that it means that adjudication order should not have been made. He submitted that there may be variety of reasons: (a) lack of bona fide; (b) suppression of material facts; (c) the rules forms and procedures are not complied with and (d) any other ground when party ought not to have been adjudged insolvent Mr. Bachawat relied very much

on the non-compliance of the rules framed by the High Court being Rule 66 and Rule 67. He submitted that under Rule 66 a debtor's petition shall be in forms Nos. 7-A and 7-B as prescribed by the High Court. Under Rule 67 the petition presented by a debtor shall also state whether any previous petition has been presented to the Court either by or against the debtor with particulars of any such petition and the manner in which it was disposed of.

35. With regard to From No. 7-A, prescribed by the High Court under R. 66 Mr. Bachawat submitted that it should be stated whether the debtor's petition for adjudication is the first. second (or as the case may be) petition in insolvency. If it is not the first petition then particulars of previous petitions and the manner in which they were disposed of has to be stated. Mr. Bachawat contended that this was not done by the debtor in the instant case. He said that admittedly the forms are not complied with and the debtor's petition was defective.

36. Mr. Bachwat next contended that insolvency law is to protect not only the debtors but also the interest of the creditors and as such the debtor must disclose all his properties; but what has been done in this case is that the debtor omitted to disclose his valuable properties. One property which belonged to the debtor was completely omitted. This is 5/C, Ram Krishna Lane property. This is a very material suppression apart from other suppression as to the nature or interest of the debtor in respect of other properties. Further the order of adjudication was obtained on material irregularity, fraud and suppression. The debtor failed and neglected to produce his books of account.

37. In this connection Mr. Bachawat referred to AIR 1958 SC 1 at p. 9 and submitted that the law of insolvency is calculated to advance the interest of the business community. On the one hand it protects the creditors by compelling the insolvent to place all his assets at the disposal of the Court without concealing his assets; similarly it protects the interest of the honest debtor.

38. The Insolvency, Act. he submitted is meant to protect an honest debtor if two donations are fulfilled : (a) He is not dishonest and (b) he discloses all his properties.

39. Mr. Bachwat relied on AIR 1931 All 162 (***Anand Prakash* v. *Narayandas Borilal***) at p. 168 which says as follows:

> "The Insolvency Act is designed to give relief to a debtor. When a man has incurred several debts which he is unable to pay, the Insolvency Court grants him relief from being harassed by his creditors if to speak broadly two conditions are fulfilled: One is that the debtor has not done any act of dishonesty with respect to the debts and the second is that he gives over the entire property that he possesses (excepting those enumerated in sub-section (5) Section 28) into the hands of the Court."

40. In this connection Mr. Bachawat also relied upon S. 15 (3) of the Presidency Towns Insolvency Act and said that on making of the order admitting the petition a debtor shall, unless the Court otherwise directs, produce all his books of account and file the list of creditors and debtors and afford such assistance to the Court as may be prescribed, failing which the Court may dismiss the petition.

41. The Contention of Mr. Bachawat is that by reason of the above mentioned defaults, breahes and non-compliance with the rules and procedures of this Court the debor ought not to have been adjudged insolvent.

42. Mr. Gopal Law appearing for the insolvent Profulla Chandra Mita submitted that I should not decide the case on affidavits but try this matter on evidence. I granted opportunity to Mr. Law to produce his client as wittiness. if he so desired, but he did not do so, and stated that his client was not available. I think that this matter can be decided on facts which are either admitted or proved on the petition and affidavits and on the matters appearing on record. Mr. Law relied on AIR 1931 All 331 (***Mohanlal* v. *Madhava Prasad***). The head note of this case runs as follows:

> ''The debtor released certain debts due to him before presenting the insolvency petition and nevertheless showed the debts as still due to him. The court further found him to be dishonest in his dealings and that he was entering recklessly into transactions and incurring debts which he never hoped to pay. Upon these grounds the Judges annulled the adjudication. It was held in this case that the facts found might furnish grounds for refusing an absolute order of discharge, but they furnished no grounds for dismissing an insolvency petition and that consequently no legal grounds for annulling an adjudication. The learned Judges relied on the decision of the Privy Council in (AIR 1916 PC 64)''

43. On the materials placed before me by Mr. Bachawat learned Counsel for the petitioner. It seems to me that the debtor Prafulla Chandra Mitra is taking recourse to insolvency proceedings not for the purpose of Insolvency Law but for some other purpose.

44. In Ringwood's ***''Principle of Bankruptcy''*** 18th Edn. there is a passage which is appropriate to quote in this connection.

> "The Law of Bankruptcy is designed to meet the ease of an individual who has no reasonable prospect of being able to pay his debts. Its aim is two-fold. firstly to distribute the debtor's property among the creditors in the most expeditious and economical manner, and secondly, to give the debtor a new start in life, freed form the demands of his creditors. when he has not been guilty of certain serious offences.
>
> Both of these objects are beset with difficulties. What is the last resources of an honest man in misfortune is a great opportunity for the rogue.
>
> The task of weaving a mesh coarse enough to let the honest man through, but fine enough to catch the scoundrel, has proved to be one of extraordinary difficulty, and the tendency to tighten up the bankruptcy law has been pronounced in recent years.''

45. From the facts appearing from the records of this case. it appears to me, that not only there is suppression of several materials by the debtor, but the debtor has also not made the petition in conformity with the rules of this court. The rules provide that if it is not the first petition for adjudication he must state so. But this he has not done. The rules also provide that he must either state that he never kept any books of account or if the books have been kept and not produced, he must give reasons for not doing so and state in whose custody they are at present. Here, in this case, the debtor has not given a correct statement and has not complied with the forms. In the petition for insolvency he stated that his books were not

properly preserved and therefore, damaged and ultimately destroyed. Then in the statement before the Official Assignee he says that the books of account have been destroyed and/or mislaid and/or moth-eaten.

46. I am satisfied from the facts which are either admitted or proved in this case, that the debtor carried on business till 1968. He had books of account. He prepared balance-sheet. There was Sales Tax certificate case being case No, 82-ST of 1967-68 for the recovery of sales tax for the year 1971 BS which corresponds to 1965-66.

48. From the affidavit of Income-tax Officer it appears that certain balance sheets ending 13th April, 1965 were filed. Therefore no balance sheet could be prepared without having any books. The debtor did not comply with the statement necessary to be state in Form No, 7-A, (Rule 66). The debtor himself stated in his evidence before the learned District Judge at Alipore that premises No. 9, Anil Roy Road was purchased in or about 1930. Admittedly he purchased this premises. But he stated that he executed a Deed of Gift in favour of his wife in 1946. A two storeyed building was constructed after the gift. The monthly rental of the said premises is Rs. 2.500/-. He gives different statement as to his interest in the several immovable properties. He is an old man and having regard to his age. I cannot believe that he wants to pay off all his debts through the insolvency proceedings and then apply for an order for his discharge. Nothing has been done by him as an honest debtor to pay off his creditors. Insolvency petition was made just at the time when application was made for his examination as judgment-debtor under Order 21. Rule 41 of the Code of Civil Procedure as to his means to pay off the debts. The debtor did not place the true facts in the insolvency petition but got an ex parte order for adjudication without stating that there was a previous petition for insolvency filed by him in the Alipore Court.

49. Under the facts of this case and for the reasons stated above. I am of opinion that in the instant case the debtor ought not to have been adjudged insolvent. I am also inclined to accept the contention of Mr. Bachwat that this is a case where the debtor has abused the process of this court. In the premises the order of adjudication dated February 16, 1971 is annulled and the petition dated Feb. 16, 1971 be and the same is hereby dismissed.

* * * * *

Ibrahim Chhitubhai v. *A. G. Pancholi Vakil*

AIR 1968 Guj. 272

P. N. BHAGWATI J. - This Revision Application raises an interesting question of law relating to the interpretation of section 28 of the Provincial Insolvency Act and section 47 of the Registration Act. The question is as to what is the effect of an order of adjudication on a transfer of immovable property in respect of which the instrument of transfer is executed between the date of the presentation of the petition and the date of the order of adjudication but the registration has taken place subsequent to the date of the order of adjudication. The facts giving rise to the question are very few and may be briefly stated as follows. On 17th February 1956, a creditor named Gulamhusain Farukbhai presented a petition for adjudicating Usmanmiya Mohamad Miya and his wife Bai Mumtaz Kunvarba as insolvent in the Court of the Civil Judge, Senior Division, Baroda. During the pendency of the petition Bai Muntaz Kunvarba executed in favour of the original opponent on 9th April 1956 an instrument of transfer of certain immovable property belonging to her by virtue of a gift deed executed in her favour by Usmanmiya Mahamadmiya on 23rd February 1955. Before the instrument of transfer could be registered, an order was made on the petition on 30th June 1956 adjudicating Usmanmiya Mahamadmiva and Bai Mumtaz Kunvarba as insolvents and the properties of the two insolvents as at the date of the presentation of the petition vested in the Official Receiver. The instrument of transfer was thereafter registered on 18th July 1956. It appears that the two insolvents namely Usmanmiya Mahamadmiya and Bai Mumtaz Kunvarba failed to make an application to the Court for an order of discharge within the period granted by the Insolvency Court and the Insolvency Court, therefore by an order dated 31st August 1959 annulled the order of adjudication and directed that the property of the insolvents shall continue to vest in the Official Receiver. This order was obviously made by the Insolvency Court under section 37 of the Provincial Insolvency Act. The Official Receiver thereafter made an application to the Insolvency Court on 18th February 1960 for a declaration that the transfer of the said immovable property effected by Bai Mumtaz Kunvarba in favour of the original opponent was void since it was effected after the presentation of the petition for adjudication and for recovery of possession of the said immovable property from the original opponent. The original opponent resisted the application inter alia on the ground that the transfer of the said immovable property was for valuable consideration and since the transfer had taked place before the date of the order of adjudication and the original opponent had at the time no notice of the presentation of the petition for adjudication against Bai Mumtaz Kunvarba, the original opponent was protected under section 55 of the Provincial Insolvency Act and the transfer was not invalidated by the making of the order of adjudication. The trial Court took the view that at the date of the order of adjudication, the transfer of the said immovable property in favour of the original opponent was not complete since the instrument of transfer was not registered and the said immovable property, therefore, continued to belong to Bai Mumtaz Kunvarba and, therefore, on the making of the order of adjudication, the said immovable property vested in the Official Receiver as property of Bai Mumtaz Kunvarba and there was accordingly no question of the applicability of section 55 which could be invoked only if the transfer had taken place prior to the date of the order of adjudication. The trial Court accordingly did not permit the original opponent to lead evidence for the purpose of showing

that the transfer was for valuable consideration and that the original opponent had at the date of the transfer no notice of the presentation of the petition for adjudication. The trial Court also rejected another contention raised by the original opponent, namely, that the present application was not maintainable since it was preferred by the Official Receiver after the annulment of the order of adjudication. The argument was that once the order of adjudication was annulled, the insolvency proceedings came to an end and thereafter no application could be made by the Official Receiver for declaring a transfer of immovable property made by the insolvent void but this argument was negatived by the trial Court. The trial Court in this view of the matter declared that the transfer of the said immovable property made by Bai Mumtaz Kunvarba in favour of the original opponent was void and directed the Official Receiver to take possession of the said immovable property from the original opponent. The original opponent thereupon preferred and appeal to the Distric Court, Baroda. The learned District Judge who heard the appeal also took the same view as the trial Court and held that the transfer of the said immovable property could not be complete without the registration of the instrument of transfer and since the instrument of transfer was not registered until after the making of the order of adjudication there was no valid and complete transfer at the date of the order of adjudication and the sai immovable property continued to be the property of Bai Mumtaz Kunvarba and accordingly vested in the Official Receiver as property of Bai Mumtaz Kunvarba. The learned District Judge observed that since there was no valid and effective transfer of the said immovable property prior to the date of the order of adjudication, the benefit of the protection conferred under Section 55 was not available to the original opponent and the original opponent could not claim to validate the transfer under that section. The learned District Judge also held that inasmuch as there was no transfer of the said immovable property prior to the date of the order of adjudication and the said immovable property, therefore, vested in the Official Receiver as the property of Bai Mumtaz Kunvarba, the Official Receiver in whom all the property of the insolvents was vested by an express order of the Insolvency Court on the annulment of the order of adjudication, was entitled to make an application to the Insolvency Court for a declaration that the transfer was void and for possession of the said immovable property from the original opponent. The learned District Judge accordingly confirmed the order passed by the trial Court and dismissed the appeal with costs. The original opponent thereupon preferred the present Revision Application in this Court.

(2) The main grievance of the original opponent in this Revision Application was that the learned District Judge had fallen into an error in holding that no transfer of the said immovable property had taken place prior to the date of the order of adjudication and that there was accordingly no question of considering whether the protection of Section 55 was available to the original opponent. It was contended on behalf of the original opponent that the instrument of transfer was executed by Bai Mumtaz Kunvarba in favour of the original opponent prior to the date of the order of adjudication and though it was undoubtedly registered after the making of the order of adjudication, the registration related back to the date of execution and once the instrument of transfer was registered, the instrument of transfer took effect from the date on which it was executed and the transfer, therefore, took place on the date of execution of the instrument of transfer and not from the date of registration. The argument was that since the instrument of transfer was executed prior to the date of the order

of adjudication. the transfer took place prior to the making of the order of adjudication and, therefore, it was necessary for the learned District Judge to consider whether the case of the original opponent fell within the protection conferred under section 55 of the Insolvency Act. If the case came within the four corner of section 55, the transfer, though made subsequent to the date of the presentation of the petition for adjudication, would be protected and the Official Receiver would not be entitled to have it declared null and void. It was frankly conceded on behalf of the original opponent that if he could not bring his case within the language of Section 55, the transfer would be void, but, contended his counsel, the requirements of Section 55 were satisfied in his case and he was in a position to establish that the transfer was protected under that Section. This contention raises a question as to when the transfer could be said to have taken place, whether on the date of the execution of the instrument of transfer or on the date of registration effected subsequent to the date of the making of the order of adjudication. The answer to this question depends on the true interpretation of Section 28 of the Provincial Insolvency Act and Section 47 of the Registration Act.

(3) Now it is an elementary proposition of law that where immovable property is of the value of over Rs. 100/- the transfer of such immovable property by way of sale can be effected only by a registered instrument executed by the transferor. The transfer would not be effective so as to pass title in the immovable property to the transferee unless the instrument of transfer is registered. But says Section 47 of the Registration Act:

> "A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration."

Though the transfer cannot be effected except by a registered instrument, as soon as the instrument of transfer is registered, it operates from the time from which it would have commenced to operate if no registration was necessary and the transfer takes effect not from the date of registration of the instrument of transfer but from the date on which the instrument was executed. So far as the transferor is concerned, all that he is required to do for the purpose of effecting the transfer conveying the immovable property to the transferee. Once the instrument of transfer is executed by the transferor he has done everything in his power to convey the immovable property to the transferee. Then comes the next step of registration. Registration does not depend upon the consent of the transferor but is the act of an officer appointed by law for the purpose, who, if the instrument of transfer is executed by or on behalf of the transferor, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death nor express revocation by the transferor is a ground for refusing registration if the other conditions are complied with. Registration is therefore, a necessary solemnity in order to make the transfer by way of sale enforceable but as soon as that necessary solemnity is carried out and the instrument of transfer is registered, the transfer becomes effective not from the date of registration but from the date of execution of the instrument of transfer. This view is clearly supported by the decision of the Privy Council in ***Kalyanasundaram* v. *Karuppa*** [AIR 1927 PC 42].

(4) The instrument of transfer in the present case was executed by Bai Mumtaz Kunvarba afger the filing of the petition for adjudication but prior to the date of the order of adjudication

though it was registered subsequent to the making of the order of adjudication. When Bai Mumtaz Kunvarba executed the instrument of transfer in favour of the original opponent. She did all that was in her power to complete the transfer of the said immovable property in favour of the original opponent and thereafter it was immaterial as to when the necessary solemnity of registration was carried out and the instrument of transfer was registered. Of course, unless the instrument of transfer was registered, the title in the said immovable property could not pass to the original opponent but as soon as that necessary solemnity was carried out and the instrument of transfer was registered, the transfer became effective from the date of the execution of the instrument of transfer. The transfer of the said immovable property, therefore, took place prior to the date of the order of adjudication and not subsequent to such date. Once the registration of the instrument of transfer was made, the Insolvency Court was bound to take into account the registration and it was not open to the Insolvency Court to say that there was no transfer of the said immovable property in favour of the original opponent at the date of the order of adjudication. The instrument of transfer was executed by Bai Mumtaz Kunvarba and all that remained to be done was registration of the instrument of transfer which was undoubtedly a necessary solemnity but which could be carried out at any time within the prescribed period. Once that necessary solemnity was carried out within the prescribed period, the instrument of transfer began to speak from the date on which it was executed and the Insolvency Court could not say that it spoke only from the date of registration and not from the date of execution. To say that there was no valid transfer of the said immovable property on the date on which the instrument of transfer was executed would be to ignore the registration of the instrument though validly and lawfully made and to refuse to give effect to section 47 of the Registration Act. I am, therefore, of the view that in the present case the transfer of the said immovable property in favour of the original opponent took place on the date on which the instrument of transfer was executed in his favour by Bai Mumtaz Kunvarba and since that was prior to the date of the order of adjudication, the original opponent was entitled to claim the protection of section 55 if he satisfied the other conditions set out in that Section. This view appears to be fairly clear on principle but I may add that I find considerable support for this view in the Full Bench decision of the Rangoon High Court in ***U On Maung* v. *Maung Shwe Hpaung*** [AIR 1937 Rang 446 (FB)]. I must, therefore, reach the conclusion that the learned District Judge was in error in holding that there was no transfer of the said immovable property vested in the Official Receiver as property belonging to Bai Mumtaz Kunvarba at the date of the order of adjudication. The transfer of the said immovable property in my view took place on 9th Aprill 1956 when the instrument of transfer was executed in favour of the original opponent and had Bai Mumtaz Kunvarba not been adjudicated insolvent, the original opponent and had Bai Mumtaz Kunvarba not been adjudicated insolvent, the original opponent would have been entitled to claim that he became the owner of the said immovable property from the said date on the execution of the instrument of transfer. But Bai Mumtaz Kunvarba was adjudicated insolvent by the order of adjudication dated 30th June 1956 and the transfer made subsequent to the filing of the petition for adjudication was, therefore, null and void under section 28 of the Provincial Insolvency Act which declares that the order of adjudication shall relate back to and take effect from the date of presentation of the petition on which the order was made, so that the whole of the property of the debtor at the date of the presentation of the petition shall

on the making of the order of adjudication, vest in the Receiver. The transfer could be held valid only if the original opponent could show that his case came within section 55 of the Insolvency Act. The original opponent wanted to lead evidence to show that the transfer fell within section 55 of the Insolvency Act but he was not given an opportunity to do so. It is, therefore, necessary that the matter should be remanded to the trial Court for the purpose of giving an opportunity to the original opponent to lead evidence for the purpose of showing that the transfer in his favour was protected under section 55 of the Insolvency Act.

(5) I must also mention one other contention raised on behalf of the original opponent and that was that the present application made by the Official Receiver was not maintainable since it was preferred after the annulment of the order of adjudication. This contention is without substance for it is clear that by this application the Official Receiver does not seek to set aside any transaction effected by the insolvent but merely seeks a declaration of the trial Court with a view to giving effect to the order passed by the Insolvency Act at the time of annulment of the order of adjudication that all the property of the debtor shall continue to vest in the Official Receiver. If the case does not come within the protection of section 55 of the Insolvency Act, the said immovable property would, on the making of the order of adjudication, vest in the Official Receiver as the property of Bai Mumtaz Kunvarba, the insolvent, at the date of the presentation of the petition for adjudication and it would continue to vest in the Official Receiver even after the annulment of the order of adjudication by virtue of the order made by the Insolvency Court while annulling the adjudication. The Official Receiver would, therefore, be entitled to maintain the present application for the purpose of establishing his right to the said immovable property under the order made by the Insolvency Court at the time of annulling the adjudication. The contention regarding the maintainability of the application by the Official Receiver must consequently be rejected.

(6) I therefore, allow the Revision Application, set aside the orders passed by the trial Court and the learned District Judge and remand the application to the trial Court with a direction to dispose it of in accordance with law in the light of the observations contained in this judgment.

T H E E N D