

Mutha Subbarao and ors. Vs. the Official Receiver, West Godawari at Eluru and ors.

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Court : Andhra Pradesh

Decided On : Jan-04-1963

Reported in : AIR1965AP52

Judge : Venkatesam, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 64 and 73 - Order 21, Rule 52; [Provincial Insolvency Act, 1920](#) - Sections 4, 5 and 28-A

Appeal No. : A.A.A.O. Nos. 128 of 1958 and 84 to 89 of 1960

Appellant : Mutha Subbarao and ors.

Respondent : The Official Receiver, West Godawari at Eluru and ors.

Advocate for Def. : K. Ramachandrarao, ;K. Venkateswararao and ;T.V. Narasimhamurthi, Advs.

Advocate for Pet/Ap. : N.C.V. Ramanujachari, Adv.

Judgement :

(1) This batch of Civil Miscellaneous Second Appeals arises out of the order of the learned District Judge, Eluru, in C. M. As. 20 of 1958 and A. S. Nos. 85 to 90 of 1958, which were disposed of by a common judgment. C. M. S. A. 128 of 1958 is

against C. M. A. No. 20 of 58, which was itself an appeal against the order in I. A. No. 479 of 1957. That application was filed by the Official Receiver, Eluru, under Sections 4 and 5 of the Provincial Insolvency Act (hereinafter referred as 'the Act'), and Sec. 151 of the Civil Procedure Code, on behalf of the general body of creditors. Respondents 1 and 2 therein are the sons of one of the insolvents, Satyanarayana, and the third respondent is the son of another insolvent, Shesha Rao, both of whom were adjudicated insolvents on their own application in I. P. No. 20 of 53 on the file of the Sub Court, Eluru. Respondents 4 to 8 are the creditors of the two insolvents, who filed suits both against the insolvents and their sons (respondents 1 to 3), and obtained decrees. The 4th respondent obtained two decrees, one in O. S. 35 of 53, on the file of Sub Court, Eluru another in O. S. 307 of 57 on the file of the District Munsif's Court, Tanuku. In execution of the decree in O. S. 35/53, he filed E. P. 160/56 and brought the 5/6 share of the sons of insolvents (R. 1 to R. 3) in some of the joint family properties to sale, which fetched Rs. 10,250/- The 4th respondent, and the other respondents 5 to 8, filed E. Ps. in the Sub Court, Eluru for rateable distribution of those sale proceeds towards the satisfaction of the decrees in their favour. C. M. S. A. 128/58 was filed by respondents 4 to 8 in I. A. 479 of 57, while the other C. M. S. As. 84 to 89 of 60 were filed by each of the respondents 4 to 8 against the sons of insolvents, R. 1 to R. 3 against the order of the E. Ps. filed by them for rateable distribution of the sale proceeds in satisfaction of the decrees obtained by them.

(2) The question arising in all these second appeals is, whether the appellants in C. M. S. A. 128/58 are entitled to claim the sale proceeds in E. P. 160 of 1956 to the exclusion of the other creditors of the insolvents.

(3) The facts leading to this litigation may shortly be stated. The 4th respondent, Mutha Subbarao, filed O. S. No. 35 of 1953 on 1-4-1953 on the file of Sub Court, Eluru against the two insolvents and their sons R. 1 to R. 3 and got an order for attachment before judgment of their immovable properties on 24-4-53, and had them attached on 2-7-53. The two insolvents filed on 26-8-53 I. P. No. 20 of 53 on the file of Sub Court, Eluru for their being adjudicated as insolvents, and an order of adjudication was passed on 31-8-54. O. S. 35/53 was decreed on 12-4-1954, i.e., after the filing of the insolvency petition and before the order of adjudication.

By reason of the order of adjudication, 4th respondent brought only the shares of the sons of the two insolvents to sale in E. P. 160/56. At that stage, Official Receiver (the first respondent in C. M. S. A. 128/58) filed I. A. 479/57 in I. P. No. 20/53 for a declaration that the debts mentioned in the schedule annexed to the petition are binding on the sons of the insolvents, and for an order vesting their 5/6 share in him, and for stay of execution of the decree in O. S. 35/53 and the other decrees obtained by respondents 4 to 8. The Official Receiver prayed that the entire sale proceeds in E. P. 160/56 be made over to him, if the court did not think it fit to stop the execution of the sale.

(4) The case of the Official Receiver was that the respondents 1 to 3 and the insolvents were all members of a joint Hindu family, and that the several debts referred to in his petition were admittedly neither illegal nor immoral, and as such binding upon their sons under the doctrine of pious obligation. O. S. 35/53 in which the first appellant in C. M. S. A. 128/58 obtained 2 decrees as well as the other suits, were all decreed against the two insolvents, and their sons on the basis of pious obligation. That being the case the Official Receiver contended that the appellants in the C. M. S. as, are not entitled to the sale proceeds of the sons' shares to the exclusion of the general body of creditors of the insolvents, and that all of them should be paid rateably.

(5) This application was resisted by respondents 4 to 8, contending that the attachment before judgment was effected in O. S. 35/53 even before the filing of the insolvency petition and the order of adjudication, that the shares of the undivided sons could not vest in the Official Receiver by reason of the order of adjudication, and that he has locus standi to exercise the power of sale of the father over the son's shares by reason of the attachment, nor any power of sale or administration over the son's shares. The sons of the insolvents remained ex parte.

(6) The learned Subordinate Judge found that the debts mentioned in the schedule attached to the petition, are binding on the shares of the sons in the joint family properties. He also found that the attachment did not entitle the attaching decree-holders to any precedence over the other creditors of the insolvents, because the

assets were not realised by the date of the filing of the insolvency petition, and as the Official Receiver filed the present application before the sale of the sons' shares. He also held that the attachment did not prevent the Official Receiver having recourse to independent proceedings to make the sons' shares liable for the debts of the insolvents, notwithstanding the loss of power of sale by reason of the attachment. He accordingly held that the Official Receiver was entitled to the declaration prayer for. He also held that as per the order dated 1-7-1957 in I. A. No. 488 of 1957 the sale was held, and the proceeds were deposited in e. P. 160/56 and that should be made over to the Official Receiver for distribution amongst all the creditors. By reason of this order, the several E. Ps filed by the appellants in C. M. S. A. 128/58, which are the subject-matter of C. M. S. As. 84 to 89/60, were all dismissed.

(7) Against this order of the Subordinate Judge, appeals were preferred to the learned District Judge, Eluru, who dismissed the appeal. Hence all these C. M. S. As. by the attaching creditors.

(8) Sri Ramnujachari, the learned counsel for the appellants in all these appeals in an elaborate argument, raised the same contentions as in the courts below, viz.,

(1) I. A 479/57 is not maintainable under Secs. 4 and 5 of the Act:

(2) the sons' shares in the joint family properties of the insolvents having been attached, and in fact sold, the Official Receiver is not entitled to exercise the power of sale under Sec. 28-A of the Act.

(3) The Official Receiver is not entitled to pray for a declaration that the debts of the creditors of the insolvents are binding on the shares of the sons, and get at the shares of the sons, or their sale proceeds; and

(4) in any event, the Official Receiver should adopt the procedure indicated in Secs. 63 - 65 and 73 of the C. P. C., and claim rateables on behalf of the creditors, but not pray for the amount to be handed over to him, for being administered in the insolvency proceedings.

(9) It may be mentioned at the outset that it is not now in dispute that the debts due to the attaching creditors, which are decreed, as also of the other creditors, are binding on the sons, on the theory of pious obligation. But the ground on which the attaching creditors claimed priority over the other creditors is that, in execution of the decree in O. S. 35 of 53 the shares of the sons were attached, and actually brought to sale on 1-7-1957, and that the other decree-holders filed E. Ps. claiming the rateables in the sale-proceeds. They also contend that under Sec. 28-A of the Act, what vests in the Official Receiver is not the sons' shares as such, but only the power to sell which the father had, and that that power could not be exercised by the father, much less the Official Receiver, after the sons' shares had been attached.

(10) An incidental argument was also raised on behalf of the appellants, that whatever might have been the position prior to the sale, after the sons' shares were actually sold, the Official Receiver is not entitled to any more rights in respect of the same. This argument can immediately be disposed of. The Official Receiver prayed that the sale of the sons' shares may be stayed pending disposal of the petition filed by him. But the learned Subordinate Judge passed an order that the sale would go on, and that the sale proceeds would not be paid to the decree-holder pending disposal of the main petition. From this order it is clear that refusal to stay the sale was not intended to affect the rights of the creditors for whose benefit the petition was filed by the Official Receiver. On the other hand, the sale proceeds into which the sons' shares have been converted were expressly made subject to the orders on the petition. I am unable, therefore, to accede to this contention of the appellants.

(11) The law on the points raised on behalf of the appellants may now be considered. It is well settled that an attachment, whether before or after judgment, does not create any charge on the attached property. An attaching creditor, is not a secured creditor. Hence, if an order of adjudication is made after attachment but before sale, the property vests in the Official Assignee or Receiver for the benefit of the general body of creditors and the attaching creditor is not entitled to obtain satisfaction of his decrees by sale of the attached property. The order of adjudication divests the rights of the attaching creditor and remits him to the

position of an ordinary creditor : (Vide page 589, 'Law of Insolvency in India' by Mulla, 1958 Edition), This is the position with respect to an attachment of an insolvent's property.

(12) The rights of the Official Receiver as regards the shares of the sons may now be examined.

(13) On the Insolvency of a father of a joint Hindu Family governed by the Mitakshara law, there vests in Official Assignee or Receiver-

(a) the separate property of the insolvent father; and,

(b) the power which the father of a joint family has to alienate the joint family property, including his sons' share in the joint family property for paying his antecedent debts, not contracted for an immoral purpose. In case governed by the Presidency Towns Insolvency Act, this power vests in the Official Assignee under Sec. 52(2) of that Act and the power can be exercised by him subject to all the limitations under which the father himself could exercise it; (vide page 492, *ibid*). The divergence of judicial opinion on this question under the Provincial Insolvency Act was settled by the Provincial Insolvency (Amendment) Act, 1948 (XXV of 48), which introduced a new Sec. 28-A 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 : Provided that nothing in this section shall effect any sale, mortgage or other transfer of the property of the insolvent by a court or receiver or the Collector acting under Sec. 60 made before the commencement of Provincial Insolvency (Amendment) Act, 1948 which has been the subject of a final decision by a competent Court;

(14) The authorities on this question may now be considered.

(15) In *Satnarain v. Behari Lal*, AIR 1925 PC 18 : ILR 6 Lah 1, which was a case under the Presidency Towns Insolvency Act, the Privy Council held that the share

itself of the son did not vest in the Official Assignee, although under Sec. 52(2)(b) of that Act, or in some other way, the entire joint family property including the sons' share therein may be made available for the payment of the father's personal debts.

In *Official Assignee v. Ramachandra Aiyar*, AIR 1928 Mad 735 : ILR 51 Mad 417 (FB), decided by a Full Bench of the Madras High Court, a partition deed was executed between the insolvent father and his sons, whereupon the Official Assignee took out a notice of motion, asking that it should be declared void, and for an order that the interests of the minor sons in the family property should be vested in the Official Assignee. It was held by the High Court in Second Appeal No. 49 of 1921, reported in *Official Assignee of Madras v. Ramachandra Iyer*, AIR 1923 Mad 55 : ILR 46 Mad 54 that the partition deed was void, and that though the interests of the minor sons in the property did not vest in the Official Assignee, but, inasmuch as the Official Assignee stood in the shoes of the insolvent, his rights as the managing member so far as they can be exercised for his own benefit passed to the Official Assignee, i.e., he could alienate the minor sons' interest in the joint family property for the purpose of paying the insolvent's debts, unless they were incurred for illegal or immoral purposes. Thereafter, the Official Assignee took out a notice of motion, praying (1) that it may be declared that the debts mentioned therein are binding upon the insolvent's sons, and (2) that the Official Assignee may be authorised to sell the family properties to the extent of the interest of the minors mentioned therein. By a majority, the Full Bench held that once there is a division in status, as by a suit for partition, the father's right to sell was at an end. Referring to the authorities, Ramesam, J. observed :

'But all that is contended for the respondent is not that the substantial right of the Official Assignee to proceed against the sons for the father's debts is lost, but only one of the several remedies open has been extinguished. Now, the Official Assignee has got several remedies against the sons : first, as representing creditors, or associating himself with them, he can file suits against the sons, obtain decrees and sell the sons' share also ; and secondly, in the partition suit now pending at Madura wherever it may be tried ultimately, at Madura or Madras, he can apply for the creditors to be made parties, so that the findings as to the

nature of the debts may bind all and ask for a decree providing for the payment of such debts as are not illegal or immoral ; see Venku Reddi v. Venku Reddi, AIR 1927 Mad 471 : ILR 50 Mad 535 (FB). There is possibly a third remedy open. We have held in the connected Full Bench decision that, in garnishee proceedings, a question can be decided by the insolvency Judge if necessary. This power is subject only to his discretion, but he is not bound to go into all questions that arise before him. In the present case the Judge sitting in insolvency may, if he thinks proper decide the questions raised by the Official Assignee as between himself and the sons, provided the sons fill the character of the garnishee. These are matters for him to determine, the Official Assignee can then obtain formal decrees. The only remedy lost to the Official Assignee is the right of selling the sons' share by private sale. This is merely a processual right. The substantial right of the Official Assignee to enforce the debts due to the creditors against the sons remains by reason of our decision in Ramachandra Jagannatha Rao v. Viswesam, AIR 1924 Mad 682 : ILR 47 Mad 621. One mode of enforcing it, a right which is merely ancillary and auxiliary to the main right, out of several modes, is all that is lost.'

The learned Judge later observed :

'Though by reason of the decision of the Privy Council in AIR 1925 PC 18 : ILR 6 Lah 1 the actual share of the sons does not vest in the Official Assignee the property of the father and his power certainly pass, but they pass on the principle of the above decision exactly as they stood in the hands of the father with all the advantages and all the burdens. One of the disabilities attached to the power is that it is extinguished on a division in status. To say that it continues in the hands of the Official Assignee after division is not to say that he gets it exactly as it stood in the father's hands. For these reasons I am of opinion that the power as passed to the Official Assignee cannot enlarge the nature of the power and to it qualities which it did not possess before. All the other remedies open to the Official Assignee, whatever they are, continue as before. The sons' liabilities continue as before and they can be worked out by suitable proceedings but not by private powers of sale.'

Finally, the learned Judge observed :

'If the Judge sitting in insolvency thinks it serves any purpose that he should enquire into the binding nature of the debts so far as the sons are concerned and make a declaration on it he may do so, provided the sons fill the character of garnishees or he may leave it to the original suit when the matter is bound to be enquired into: AIR 1927 Mad 471 : ILR 50 Mad 535 (FB)'.

The other learned Judge, Madhavan Nair, J., also made similar observations, and agreed with the view of Ramesam, J. This case, therefore, is authority for the position that even in cases where the power to sell belonging to the father, and which vests in the Official Assignee, is lost on account of division in status, the only remedy lost to the Official Assignee is the right of selling the sons' share by private sale, but the substantial right to enforce the debts due to the creditors against the sons remains, and that he can work out by suitable proceedings, though not by private sale, the liabilities of the sons.

(16) In *Ramachandra Iyer v. Official Assignee of Madras*, AIR 1931 Mad 317 it was laid down by a Bench of the Madras High Court that notwithstanding the suit for partition and the consequent division in status, the right of the father have his just debts paid out of the entire family property subsists, and where the father has been adjudged insolvent, such right vests in the Official Assignee as 'Property of the insolvent divisible among his creditors'. It was pointed out that although by reason of the division of status brought about by a suit for partition instituted by the sons after the father's insolvency the father and the Official Receiver 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 included in their shares therein sold by or through court. It was observed that Sec. 7 gave the widest power to the insolvency court to go into such question and to declare the liability of the sons' shares in the family property for the proved and just debts of the father insolvent, and make all necessary orders for their realisation. The learned Judges referred to AIR 1928 Mad 735 :ILR 51 Mad 417 (FB). With regard to Sec. 52(2)(b) of the Presidency Towers Insolvency Act (which corresponds to Sec. 28 sub-secs (3) to (5) of the Provincial Insolvency Act),

Curgenven, J. observed :

'It is clear, I thin, that the section does not require that the property itself in respect of which the powers are to be exercised should in the ordinary sense be property of the insolvent. So long as he has a capacity to take certain proceedings in respect of some other persons's property, that capacity passes to the Official Assignee and it seems to follow that the proceeds realised by taking advantage of that capacity must themselves become the property of the insolvent. If this were not so it would lead to the result that, whereas the capacity to take proceedings in an asset, no benefit could accrue to the creditors as the outcome of such proceedings, which appears an irrational position. The effect of this provision would seem therefore in some cases artificially to enlarge the meaning of the term 'property of the insolvent' and to include in it funds which according to ordinary tests would not be so classified.'

The learned Judge, after referring to the Indian authorities and the English decision in *Moreley v. White*, (1873) 8 Ch. A 214 concluded thus :

'There is no ground for holding that a Court of Insolvency in India has powers more circumscribed than these, and I cannot find any convincing answer to the contention that whatever a court of law may do, an insolvency court, subject to the provisions of the Act, may do under Sec. 7. I think therefore the learned Judge was acting with jurisdiction in giving the declaration asked for by the Official Assignee. We have not to adjudicate upon this power to direct sale of the property but upon the line of reasoning I have accepted, it seems that the insolvency court must possess that consequential power.'

The other learned Judge, Bhasyam Ayyangar, J., referring to the Full Bench decision in AIR 1927 Mad 471 : ILR 50 Mad 535 (FB), held thus :

'The Full Bench has held that owing to the division of status brought about by the suit for partition instituted by the sons after insolvency, the father and consequently the Official Assignee, also lost the right of private sale. The only other course open to him is therefore to obtain a declaration against the sons and get the family property including their shares therein sold by or through Court.'

The contention, that the sum being strangers to the insolvency proceedings, the Official Assignee can get any order or relief against them only in and means of an independent action against them, was rejected on the ground that Sec. 7 of the Presidency Towns Insolvency (which corresponds to Sec. 4 of the Provincial Insolvency Act) gives the widest power to the Insolvency Court to go into case of insolvency for the purpose of doing complete justice, or making a complete distribution of the properties in any case. The learned Judge concluded :

'It must be therefore be open to the Insolvency Court in a case of this sort to declare the liability of the sons' shares in the family property for the proved and just debts of the father insolvent and make all necessary orders for their realisation.

The mere fact that the father alone is the insolvents and the sons are not does not preclude the insolvency Court from exercising jurisdiction over the latter to the extent necessary for the realisation of all the assets divisible among the creditors of the former.'

The learned Judge also observed :

'It was said that it is of the essence of the distribution of assets in insolvency that it should be rateable among all the simple creditors of the insolvent and as the sons' shares in the family property can be made liable only for such debts of the father as are just, that is, not illegal or immoral, these shares cannot be proceeded against and realized in insolvency but only, if at all, in suits by individual creditors. This contention cannot however be accepted. It will be observed that if this objection were good, it would equally apply against the exercise of the Official Assignee of the power of selling the shares of the sons on the adjudication of their undivided father. But the power of the Official Assignee to effect such a sale is undoubted and has been upheld by the Full Bench of the Court in *Balavenkata Seetharama Chettiar v. Official Receiver of Tanjore*, AIR 1926 Mad 994 (FB).

It must be held for these reasons that the learned Judge in insolvency had full power and jurisdiction to grant the declaration asked for by the Official Assignee under Sec. 7 of the Act.'

(17) A Full Bench of the Allahabad High Court in *Bankey Lal v. Durga Prasad*, AIR 1931 All 512 : ILR 53 All 868 (FB), held that, if the members of a joint Hindu family governed by the Mitakshara law choose to divide the family property and to separate without making any arrangements for the payment of the family debts, a creditor of the father is entitled to proceed against the separated shares given to the sons and grandsons of the father, to enforce the payment of the debt, the debt being one which it is the pious duty of the sons and grandsons to pay. It was also held that the Receiver in insolvency of the father can proceed in the insolvency proceedings without recourse to a suit against the shares received by the sons and grandsons in the partition. Sulaiman, Ag. C. J., observed thus :

'The father's right to insist on the payment of his debts before the actual division of the property had not been extinguished inasmuch as the pious obligation of the sons has not been discharged. If the father is declared insolvent, the Receiver who takes his place should have the right to enforce the same remedy.'

The question whether this right can be enforced in the insolvency court or by a separate suit, is purely a matter of procedure and not of substantive law.'

(18) In *S. M. Jakati v. S. M. Borker*, : [1959]1SCR1384 , it was laid down by the Supreme Court that even though the father's power to discharge his debt by selling the share of his sons in the property may no longer exist as a result of partition, the right of the judgment-creditor who has obtained the decree against the father to seize the erstwhile coparcenary remains unaffected, and undiminished because of the pious obligation of the sons.

(19) Following these decisions, I hold :

(1) that it is open to the Official Receiver to file an application under Sec. 4 of the Provincial Insolvency Act for a declaration that the shares of the sons of the insolvents (R. 1 to R. 3) are liable to discharge the debts of the creditors enumerated in his petition;

(2) that in the instant case there being no division of status between the insolvents and their sons, the power of the father to dispose of his sons' shares for binding

debts is not extinguished and, consequently, the father's power vested in the Official Receiver under Sec. 28-A of the Act is not extinguished; and

(3) that even assuming that the power of the father, and, consequently, that of the Official Receiver to sell the sons' shares is extinguished, it is only the power of the private sale of the Receiver that is lost, but not his right to have their shares sold through the insolvency court.

(20) Sri Ramanujachari, the learned counsel on behalf of the appellants, contends that even though the power of the Official Receiver to sell the sons' shares is not lost by reason of any division of status between the sons, the fact of the attachment of the entire property including the share of the sons renders it impossible for the Official Receiver to proceed in the insolvency court to get at their shares in any manner whatsoever. According to him, the remedy of the Official Receiver is only to leave the creditors to file suits, obtain decrees, and invoke the provisions of O. XXI, R. 52 and Sec. 73 of the Code of Civil Procedure.

(21) Before referring to the authorities cited by him. It is as well that Sec. 64 of the Civil Procedure Code is noticed. It is in the following terms :

'Where an attachment has been made any private transfer or delivery of the property attached or of any interest therein, and any payment to the judgment-debtor of any debt, dividend, or other monies contrary to such attachment shall be void as against all claims enforceable under the attachment.

EXPLANATION : For the purposes of this section claims enforceable under an attachment include claims for the rateable distribution of assets.'

(22) A reading of this section makes it manifest that an attachment has merely the effect of preventing a private alienation of the property to the prejudice of claims enforceable under the attachment. It conveys no title, charge, lien, or priority in the property in favour of the attaching creditor. It, therefore, does not prevent a transfer by operation of law, such as an involuntary sale under a decree of Court, or enforced execution.

(23) Sri K. Ramachandrarao, the learned counsel on behalf of the Official Receiver, contends that the attachment of the properties of the insolvent including the shares of the sons by the appellants can only prevent the power of sale of the father, which has become vested in the Official Receiver, as the attachment is prior to the vesting of the insolvent's properties in the Official Receiver. But Official Receiver from selling the sons' shares through Court after obtaining a declaration that they are liable to be proceeded against for the discharge of the debts of the general body of creditors on the ground that the debts are not illegal or immoral. That is exactly the prayer in the present petition.

(24) The cases relied on by the learned counsel for the appellants may now be considered.

(25) The decision in AIR 1928 Mad 735 : ILR 51 Mad 417 (FB), has already been referred to. The majority of the Full Bench in that case recognised that the Official Receiver can by appropriate proceedings against the sons' shares in the insolvency proceedings themselves. A reference was also made on behalf of the appellants to the decision of the Supreme Court in Nageswaraswami v. Viswasundara Rao, : [1953]4SCR894 . This case lays down that under Sec. 28-A, the powers of the father under the Mitakshara law to alienate the joint family property including the interests of his sons not contracted for an illegal or immoral purpose vests in the Receiver on the adjudication of the father as an insolvent, and that Sec. 28-A has retrospective operation. I fail to see how this case helps the appellant.

(26) In Gopalakrishnayya v. Gopalan AIR 1928 Mad 479 (1) a Bench of the Madras High Court laid down that only the power of the father to sell the shares of the sons passes to the Official Receiver, but the power is subject to the same qualifications as it is in the father's hands. In that case, the sons' shares were attached, and it was held that after such attachment the Official Receiver cannot exercise the power of sale. This case does not lay down that the Official Receiver cannot have the liability of the sons determined by the insolvency Court in an application under Sec. 4 of the Act, or that their shares could not be proceeded against by a sale through Court.

(27) In *Official Receiver, Coimbatore v. Arunachalam Chettiar*, AIR 1934 Mad 217 which was an appeal under the letters Patent against the decision of Madhavan Nair, J., reported in *Official Receiver, Coimbatore v. Aunachala Chettiar*, AIR 1931 Mad 118 it was held that where a person attaches before judgment the property of the father of a joint Hindu family including the sons' shares, and the same is sold in execution of the decree against the father alone, sons not taking any objection, and the father having been adjudicated insolvent before the sale, the price of the sons' shares would go in satisfaction of the decree, and the price of the father's share only vests in the Official Receiver. The reasoning of the learned Judges was that the attachment or sale of the shares of the sons will hold good till it has been established that the debt is not binding on their shares. But in that case no attempt was made to show that the debt was not so binding. That being so, it was held that the fact that the sons' shares were sold would not make any difference to the position, and that the fact that the sons' shares had been sold and converted into money did not make any difference by Bardswell, J. thus :

'Nor can Sec. 51, Provincial Insolvency Act, have any applications. By that section where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition. In so far as there has been execution against the shares of the sons it is not an execution against the property of the insolvent. As to his own quarter share the sale proceeds of it have gone to the Official Receiver for the benefit of the general body of creditors.'

(28) The learned Judge, Madhavan Nair, J. in his judgment in AIR 1931 Mad 118 had expressed his opinion thus :

'The petition for adjudication was presented after the date of the attachment. It therefore follows that the father's power of disposal of the son's shares had been destroyed by the existing attachment of those shares; and the Official Receiver cannot therefore get any power to deal with the sons' shares by reason of the order of adjudication.'

(29) This observation makes it clear that what all that Madhavan Nair, J., as well as the Bench decided was that it is the power of the father to sell sons' share that it is the power of the father to sell sons' share that is destroyed by reason of the attachment. That case did not deal with the power of the insolvency court to decide the liability of the sons' shares to be proceeded against for the discharge of the father's debts which are not illegal or immoral. It may be noted that the decision in AIR 1931 Mad 317 was not even referred to by the learned Judges. I cannot, therefore, accept the contention of Sri Ramanujachari that the Bench must be deemed to have laid down a principle different from that laid down in AIR 1931 Mad 317.

(30) In *Arunachalam Chettiar v. Sabaratnam Chettiar*, AIR 1939 Mad 572 it was laid down that the right of the Official Receiver to sell the sons' interest only exists so long as the sons' interest in the family property exists, and that while the interest of the sons remains unsold or unattached the Official Assignee has the right to sell the properties for the lawful debts of the insolvent father, but unless he exercises his right he may lose it and he loses it if the interest of the son is attached by a creditor of the son. This case is again distinguishable as it only lays down that the power of the Official Receiver to sell son's share (i.e., by private sale) is put an end to by the attachment, by his creditor. In the instant case, it is not the power of the Official Receiver under Sec. 28-A that is sought to be enforced. Nor is the attachment made by the appellants as creditors of the sons of the insolvents. The attachment, it may be remembered, was only made as creditors of the insolvent himself, and the sons' shares were sought to be made liable on the ground of pious obligation.

(31) In *Nagaportharao v. Subbarao*, AIR 1942 Mad 360 again it was laid down that the reason of the insolvency of a Hindu father the shares of the sons did not vest in the Official Receiver, but what vest in him is the right of the father to sell sons' shares for the discharge of such debts as will be binding against the sons. The insolvency of the father does not prevent the sons' alienating their shares. This decision also does not in any way advance the case of the appellants.

(32) In *Diravyam Pillai v. Veeranam Ambalam*, AIR 1939 Mad 702 it was laid down that, if for any reason the insolvent father has lost the power to sell his son's interest in the joint Hindu family property for his antecedent debts, the conveyance executed by the Official Receiver can have no greater effect because the Official Receiver has no greater power than the insolvent father himself had. It was also laid down that all that Sec. 64 of the Civil Procedure Code provides is that any private transfer by the judgment-debtor of the property attached shall be void as against all claims enforceable under the attachment, that it will not be accurate to read Sec. 64 as putting an end to the power of sale, because as between the transfer and the transferee, the alienation will undoubtedly be operative, and that if the attaching creditor is paid of or for any reason the attachment ceases to subsist, the alienee's title will be unassailable. It was pointed out that the only effect of Sec. 64. is that such transfer shall not prejudice the rights of the attaching creditor, and that the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell, and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment debtor. It was observed :

'Nor can it be said that the sale by the contracting parties executed in pursuance of the pre-existing contract to sell prejudices the attaching creditor, because the sale is merely the fulfilment of the obligation to which the judgment-debtor was already subject. The utmost that the attaching decree-holder will be entitled to, in such circumstances, is the payment of the balance of the purchases-money if anything remained due on the date of the attachment.'

(33) It was also held that where the sons' interest in the joint family estate has been attached in execution of decree against father, and the father has been adjudicated insolvent, a sale by Official Receiver, under the Insolvency Court's order, of joint family in pursuance of a contract of sale entered into by father prior to attachment is not contrary to Sec. 64, and that the sale would be effective to convey not merely the interest of the father but also of his son who continued to remain joint with the father.

(34) This case only lays down that a sale by the Official Receiver, either by himself or under orders of the court, pursuant to a contract of sale, of the share of the insolvent and his sons, is not affected by the attachment of the son and has no bearing on the question in issue.

(35) In *Seethayya v. Venkanna*, : AIR1951 Mad1010 , it was held that though under Sec. 28 of the Provincial Insolvency Act the father's power to dispose of the sons share vested in the Receiver with retrospective effect, it did not make away the power of the son to sell the property in his own right, and much less prevented the execution creditor from proceeding with the sale of the son's share. It was further held that there being no bar under the law to prevent the decree-holder from executing the decree against the son's share notwithstanding the insolvency of the father, the application filed nearly nine years after the decree was barred by limitation against the son.

(36) Sri Ramanujachari next contended that the decision in AIR 1931 Mad 317 cannot be considered to be good law in view of the decision in *Krishnamurthy Pillai v. Sundaramurthy Pillai*, AIR 1932 Mad 381. In that case, Rameswam and Cornish JJ., laid down in the case of a joint Hindu family where a father is largely indebted and becomes an insolvent the insolvency of a father does not involve the insolvency of the son, and the son's share does not vest in the Official Assignee though the father's power to sell the son's share for debts binding on the family may vest in the Official Assignee and that such power of sale terminates with the severance of the joint family status. It was further held that in such case the insolvency court has no jurisdiction under Sec. 36 (of the Presidency Towns Insolvency Act.) to summon the son at the instance of the Official Assignee who wants to decide the binding nature of the debt between the father and son.

This case deals with the scope of Sec. 36 (which corresponds to Sec. 59-A of the Provincial Insolvency Act). It laid down that Sec. 7 of the Presidency Towns Insolvency Act. corresponding to Sec. 4 of the Provincial Insolvency Act enables the insolvency court to decide only questions which incidentally arise, but that the Official Assignee cannot summon the son when he is not a party to the insolvency proceedings. This decision reiterates the principle that the father or creditor has

the right to sell the sons' share. The learned Judge Ramesam, J., at p. 387 took exception to the observation of Justice Curgenvin in AIR 1931 Mad 317 that the Official Assignee, as representing the insolvent under Security. 7 of the President Towns Insolvency Act, could bring what in effect would be a suit for partition in the insolvency Court. But the learned Judge has nowhere indicated that the decision in that case was otherwise wrong or erroneous.

(37) The decision in AIR 1931 Mad 317 (supra) was followed by Abdur Rahman, J., in *Murugappa Mudali v. Official Receiver, Chittoor*, (1943) 1 Mad LJ 24 : (AIR 1943 Mad 303). The learned Judge held that under Sec. 4 of the Provincial Insolvency Act it will be open to the insolvency court to decide all questions whether of title or priority or of any nature whatsoever which arise for its determination, hence it will be competent to the Court to deal with the minors' share in the joint family property if the debts due by the insolvent would be such as would be binding on the family. The Official Receiver, it was held, could show that the debts due by the insolvent were such as would be binding on the minor members.

(38) None of these decisions, therefore, supports the contentions advanced on behalf of the appellants. On the other hand, the decisions reported in AIR 1928 Mad 735 (FB), (1943) 1 Mad LJ 24: (AIR 1943 Mad 303) all lay down that the prayers asked for by the Official Receiver can be granted under Sec. 4 of the Provincial Insolvency Act. They also lay down that where the father and the sons have been divided in status, the power of the father to alienate the sons' shares is not lost, that the liability of the sons can be adjudicated upon by the Insolvency court, and that their shares can be got at by the Official Receiver. The effect of an attachment of the son's share is not to create a charge or lien in favour of the attaching creditor. But it only puts an end to the power of disposal of the father and of the Official Receiver under from obtaining a declaration from the insolvency Court that the sons' shares are liable for discharge of the debts due to the several creditor which are not illegal or immoral and have the property sold through court.

(39) The contention on behalf of the appellants that the shares of the sons were sold during the pendency of the proceedings is equally of no avail as the order of

the court made it clear that the sale proceeds would not be paid to the decree-holders pending disposal of the main petition i.e., that the sale proceeds were made subject to the result of the orders on I. A. No. 479/57. If really an authority is needed, reference may be made to AIR 1934 Mad 217 (at p. 219), where Bardswell, J., observed thus :

'The fact that the sons' shares have now been sold cannot make any difference to the position. The sale proceeds of them represent those shares, though they have taken another form.'

(40) It is also clear that a sale by a Court is equally subject to the doctrine of lis pendens like a private sale, and consequently, the sale of the sons' share, during the pendency of I. A. 479/57 cannot effect the right of the creditor on whose behalf the petition was filed by the Official Receiver.

(41) Since the appellants as well as the creditor represented by the Official Receiver are all creditors in respect of the debts which are not illegal or immoral and therefore binding on the shares of the sons, the contention of Sri. Ramanujachari that Secs. 63 - 65 and 73 of the Civil Procedure Code shall apply to the latter class of creditor cannot be accepted. To permit the appellants to have the exclusive benefit of the sale proceeds of the sons' shares to the prejudice of the general body of creditors, who are similarly situate, is opposed to the scheme and object of the Insolvency law. In this view the order of the Courts below that the sale proceeds in deposit in E. P. No. 60 of 56 should be made available to the Official Receiver for distribution among the creditors is perfectly correct.

(42) Sri K. Ramachandra Rao, the learned counsel on behalf of the Official Receiver has not argued before me that the properties which are attached are the self-acquisitions of the father, though such a contention appears to have been raised in the courts below.

(43) In the result, all the contentions raised by the learned counsel for the appellants fail, and the appeals are dismissed with costs of the Official Receiver in C. M. S. A. No. 128 No. 85 of 1960. Leave refused.

(44) Appeals dismissed.

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