

Official Receiver Vs. Imperial Bank of India and anr.

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Court : Chennai

Decided On : Aug-28-1935

Reported in : AIR1936Mad193

Appellant : Official Receiver

Respondent : imperial Bank of India and anr.

Judgement :

Stone, J.

1. This is an appeal against an order passed by the learned District Judge of East Godavari in an execution application and it is an order that raises a point of some interest. The facts can be shortly stated. The action was brought by what I will call the execution creditor against the father and manager of a joint Hindu family and his son and nephew. In that action the plaintiff was successful and obtained a decree against the father personally and against the son and nephew in respect of their share in the joint family property. Following upon that decree the judgment creditor attached the family property, that is to say, the interest therein, both of the father and manager and of his son and nephew.

2. The next step was that the father became an insolvent. The Official Receiver took charge of his properties. He communicated with the executing Court claiming the whole of the attached property and sought to stop the sale. The executing Court decided to continue the sale and everything thereafter has proceeded on the

basis that the sale took place without in the least affecting the rights of the Official Receiver to the sale proceeds, that is to say, if the Official Receiver has a right in respect of the whole property the whole of the sale proceeds are his and on the other hand if he has a right in part, he is entitled to part of the sale proceeds. The learned District Judge has held in fact that the Official Receiver is not entitled to such part of the sale proceeds which represent the interests of the son and nephew in the joint family property. It is urged before us that the Official Receiver is entitled to the whole of the sale proceeds on the ground that the action was in respect of the father's debts, that the father had subsequently become an insolvent and that the judgment creditor should be in no better position than the general body of creditors, that the attachment has not affected the sale, for the relevant time is when the petition was filed, and that Sections 51 and 52, Provincial Insolvency Act, apply. In our opinion however the legal position that arises in circumstances such as this can be shortly expressed as follows: Section 52 provides:

Where execution of a decree has issued against any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that an insolvency petition by or against the debtor has been admitted, the Court shall, on an application, direct the property if in the possession of the Court, to be delivered to the Receiver, but the costs of the suit in which the decree was made and of the execution shall be a first charge on the property so delivered, and the Receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge.

3. That section in our opinion relates to a decree which was issued against the property of a debtor. Section 51 restricts the rights of a creditor in execution in the following terms:

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.

4. Both these sections are concerned with the property of the debtor. The question we have to determine is, what does the property of the debtor include? We apprehend that the property of the debtor includes all personal assets including his rights and one of such rights is the right of the father and manager of a joint Hindu family to alienate the joint family property which right passes together with his other valuable rights to the Official Receiver on his becoming an insolvent. Did this right, which the father and manager of a joint Hindu family normally possess exist in the circumstances of this case? If it did, then it passed on to the Receiver; if it did not, then it did not pass on to the Receiver; in *Subraya v. Nagappa* (1909) 33 Bom 264 it was held that:

When the right, title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him and its private alienation by him has been prohibited by an order of Court under Section 276, Civil P.C., his father is deprived of the power of alienation of that interest in satisfaction of his own debts.

5. From that it appears to follow that once a decree has been followed by an attachment of the son's interest in the joint family property, the normal power of the manager of that property to alienate it for payment of debts from the moment of attachment ceases to be his right. Therefore the right in him having ceased it cannot be transferred on his insolvency to the Official Receiver. This appears to be the ground on which a Bench of this Court (*Ramesam and Devadoss, JJ.*) in *Gopalakrishnayya v. Gopalan* 1928 51 Mad 342 considered the position that arises on the insolvency of the father of a joint Hindu family as regards the power of the father to sell the son's share in the family property. Although that right passes to the Official Receiver, it was held in those circumstances:

If the son's share was attached by a creditor, the Official Receiver has no power to sell the share after attachment, but the attaching creditor is entitled to proceed with the execution by selling the son's share.

6. They observe:

Only the power of the father to sell the shares of the soils passes to the Official Receiver. But the power is subject to the same qualification as it is in the father's hands. In this case the son's shares have been attached and after such attachment, the Official Receiver cannot exercise the power of a sale.

7. More recently my learned brother had to consider a similar point in *Subba Rao v. Official Receiver of Guntur* 1935 42 MLW 295 and he held that:

When a Receiver is appointed by the Insolvency Court on a petition in which the father of a Hindu joint family is sought to be adjudicated an insolvent, the property of that insolvent is vested in the Receiver, but the shares of his undivided sons do not actually vest in the Receiver, but only the father's power to sell such shares. When such shares of the sons have been attached before the vesting in the Receiver had taken place, there can be no vesting of even this power to sell the son's shares in the Receiver and the Receiver in insolvency is not therefore entitled to apply under Section 52, Provincial Insolvency Act for delivery of the entire property.

8. Now it is urged before us that though. it is sound law that where the attachment which affects the son's interest arises out of a case in which the son is sued as a person primarily liable, it does not apply where the son's interest is attached in a case in which the father is sued as a person primarily liable and the sons are merely joined in order to have a decree passed against them so that in execution proceedings the son will not be at liberty to oppose the execution on the ground that their shares should not have been made liable because the debt of the father was illegal or immoral. But in our opinion there can be no difference in principle between a case where the son's interest is made liable in an action brought by the plaintiff with whom the father has contracted and a case where the son's shares are made liable in an action in which the plaintiff sues the sons in respect of the sons' own contractual liability. Because in the first case the only reason why a decree can make liable the son's interest is that under the Hindu Law the son is liable under the pious obligation rule for his father's debts. His liability in such a case is not contractual but it is nevertheless a liability and a liability that is imposed upon him by law and is one which placed him subject to certain exceptions and

safeguards in the position of a person that is responsible in the eye of the law for his father's debts as if he had himself contracted. We can see therefore no difference in principle between a case where the son's interest is attached because he is held to be liable under the pious obligation rule and a case where the son's interest is made liable because he is himself the principal debtor.

9. In both cases the son's interest is made liable. In both cases assuming the attachment has begun, the son's interest is attached. Once the son's interest is attached, then the father's right to alienate the joint family property in order to pay the father's debts is gone. Once the right is gone the power of the law to transfer that right to the Official Receiver in insolvency is gone too, because there is nothing to transfer. In our opinion therefore the learned District Judge arrived at a correct conclusion and this appeal must be dismissed with costs.

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