ORIGINAL CIVIL.

Before Mr. Justice Latham.

1883
July 10, 13 ;
August 30.

FAKIRCHAND MOTICHAND, PLAINTIFF, *v.* MOTICHAND HURRUCKCHAND, DEFENDANT.*

Hindu law—Ancestral property—Father and son—Right of father to alienate for debts—Insolvency of father—Vesting order—Indian Insolvent Act, 11 *and* 12 *Vict, Sec.* 7*—Death of insolvent—Subsequent sale by Official Assignee—Title of purchaser—Rights of son.*

A father and son were possessed of immoveable ancestral property consisting of certain houses. The father, becoming insolvent, took the benefit of the Insolvent Act; and the usual vesting order, under section 7 of the Indian Insolvent Act, 11 and 12 Vict., c. 21, was thereupon made. Shortly afterwards the father died, and, soon after is death, the Official Assignee sold the houses in question to the defendant in order to raise money to pay off the deceased insolvent's debts. The son now brought a suit to recover the whole, or a portion, of the said houses, contesting the right of the Official Assignee to convey any interest, or at least his interest in the said houses, to the purchaser.

Held that the sale was valid, and conveyed to the purchaser the interest of the plaintiff as well as that of his deceased father.

Under the Mitakshara law a father has the right to dispose of his son's interest in ancestral immoveable estate for the payment of his own debts not contracted for immoral purposes; and a vesting order, made under section 7 of the Indian Insolvent Act, vests that right in the Official Assignee, who can, therefore, give a good and complete title to such ancestral immoveable estate to a purchaser.

The death of the insolvent has no effect on the proceedings in his insolvency, or on the power of the Official Assignee. The ancestral estate previously vested in the Official Assignee is not thereby divested from him and vested in the son by right of survivorship.

In the legal aspect of the matter the natural existence of the insolvent is, for the purpose of dealing with his estate, artificially continued in the Official Assignee, who can after the insolvent's death deal with the estate as he could have dealt with it had the insolvent been still alive.

Semble.—In the event of the father's estate producing a surplus over and above the amount required to satisfy his debts, such surplus might be made available to answer the claims of the son in respect of his interest in ancestral immoveable property sold in the realization of the father's estate.

DETERMINATION of a preliminary issue of law under section 146 of the Civil Procedure Code (Act XIV of 1882).

* Suit No. 214 of 1882.

The facts, so far as they bear on the points of law involved, are sufficiently set out in the head-note above.

Telang (*Inverarity* with him) for the plaintiff.

Hon. *J. Marriott*, Advocate General (*Lang* with him), for the defendant.

The arguments of counsel and the cases cited are fully dealt with in the judgment.

Cur. adv. vult.

August 30.—Judgment was delivered by

LATHAM, J.—The plaintiff in this case alleges that he and his father, Motichand Nathoo, were jointly entitled to four houses in Champagully as their ancestral property; that his father carried on separate business as a shroff, and stopped payment on the 13th, and filed his schedule on the 17th of January, 1879, having in the interval made a fictitious equitable mortgage of the said four houses to the defendant; that his father died in December, 1881; and that on the 22nd of March, 1882, Mr. Lynch, then acting as Official Assignee, was induced by the misrepresentation of the defendant to sell and convey to him the said four houses for the sum of Rs. 24,000, being an utterly inadequate consideration, from which sum the debt claimed by the defendant from the insolvent's estate was deducted. He prays that the said mortgage and sale may be declared of no effect as against him; and that he may be declared entitled either to the whole, or a part, of the said four houses. The defendant denies the fraud and misrepresentation charged against him; and further submits that such allegations of fraud and misrepresentation are irrelevant in this suit, and he relies on the conveyance to him by the Official Assignee.

Seven issues were settled, of which the sixth was in these terms:—"Whether on the insolvency of the said Motichand Nathoo the plaintiff's share (if any) in the properties in the plaint mentioned vested in the Official Assignee." The other issues went to the merits of the case on the facts alleged. During the opening of the plaintiff's case it was, with the consent of counsel for the plaintiff and defendant, ordered that, under section 146 of the

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Civil Procedure Code, the sixth issue, being an issue of law, on which if decided in favour of the defendant the case might be disposed of, should be tried before the remaining issues. It was admitted by the plaintiff's counsel, Mr. Telang, that the insolvency was good, and for debts which the plaintiff could not challenge. From the course which the arguments in the case took, I have found it necessary to reframe the issue as follows :— "Whether on the insolvency of the said Motichand Nathoo the right to dispose of the plaintiff's share (if any) in the immoveable properties in the plaint mentioned for the payment of the debts of the said Motichand Nathoo vested in the Official Assignee ; and, if so, whether such right was divested on the death of the said Motichand Nathoo." The points raised in the issue as so framed were fully discussed before me.

The first question which arises is, what under Mitakshara law is the extent of the right of a father to bind the interests of his sons in ancestral immoveable property by disposing thereof for the payment of his own debts. This question has of late years been the subject of numerous decisions, especially in the High Court of Calcutta. But I am unable to see that these decisions have added anything to the clear rules laid down by the Privy Council in the two leading cases of *Girdhari Lall* v. *Kantoo Lall*(1) and *Suraj Bunsi Koer* v. *Sheo Prasad Singh*(2), and most clearly enunciated in the latter case under the two following propositions :—" First, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for father's debts, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted ; and, secondly, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

(1) L. R., 1 I. A., 321. (2) L. R., 6 I. A., 88.

These rules have been implicitly accepted in Bombay in the cases of *Narayanacharya* v. *Narso Krishna*(1), *Sadashiv Dinkar Joshi* v. *Dinkar Narayan Joshi*(2), and they, and the Indian decisions consequent on them, will be found discussed in Mayne's Hindu law (3rd ed.), paras. 280A to 280B, and 302, in which last paragraph Mr. Mayne says: "It must be owned that the principle of the Mitakshara, that sons have a right to control their fathers in the alienation of the family property, is almost nullified by the other principle, that they are bound, after his death, to pay his debts, even though contracted without necessity; and by the logical extension of that principle, recently laid down by the Privy Council, that the father is entitled to sell the family property in order to pay off his own debts, which were not contracted for the benefit of the family, but which the sons would be under a moral obligation to discharge." But for the purposes of the present case it is unnecessary to travel outside the two propositions above cited. I may, however, say that I apprehend there may be some difficulty, now that the test of necessity has gone, in preserving for any time the test of immorality as distinguished from that of illegality.

The second question is, what is the effect of a vesting order made under the Indian Insolvency Act, 11 and 12 Vict., c. 21, on the petition of the father, or a creditor of the father, upon the right of the father to dispose of the interests of his sons in ancestral immoveable property for the payment of his debts. Such vesting order presupposes the existence of antecedent debts of the father which he cannot, or will not, discharge. Under section 7 of the Act, all the real and personal estate and effects of the insolvent, and all his future estate right title interest and trust in or to any real or personal estate or effects, with the exceptions therein specified which do not affect the present case, vest in the Official Assignee. Under these words I cannot doubt but that the right of the father to dispose of his son's interest in ancestral immoveable estate for the payment of his debts vests in the Official Assignee. It has been suggested that this right vests in the Official Assignee as being a 'power' within

(1) I. L. R., 1 Bom., 262. (2) I. L. R., 6 Bom., 520.

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the meaning of section 30. But I think that it falls more appropriately within the words of section 7; and that there is no occasion to resort to section 30, which seems to apply to powers in the ordinary legal sense of the term, created by will or instrument *inter vivos*. Now, when the property and effects of the father are vested in the Official Assignee, it is his duty, under section 31, to make sale thereof with all convenient speed: and I think, therefore, that he not merely may, but ought to sell the ancestral immoveable estate, including the interests of the sons therein, so far at least as is necessary for the payment of the debts of the insolvent; and that he can make a good title to such ancestral immoveable estate, including the above mentioned interests.

It is contended for the plaintiff, relying on *In re Atkinson*(1), that the Official Assignee is not a purchaser for value, but stands in the place of the insolvent, taking only such interests as he can give, and subject to all equities by which he is bound. And doubtless this is so, save so far as special statutory rights have been conferred on the Official Assignee, as for instance under section 24, which enables him to set aside conveyances and transfers which would have been binding upon the insolvent himself. But, in my opinion, the proper mode of asserting such equities is by suit or other proceeding against the Official Assignee. For instance, if the sons of an insolvent alleged that certain of his debts had been incurred for immoral purposes, and were not binding upon their interests in ancestral immoveable estate, I think that they might maintain these allegations in a suit against the Official Assignee; and, in effect, seek to have the property marshalled so as to apply the property, other than such interests of theirs, to the payment of such debts. Further, I think that all questions as to whether debts admitted by or alleged against the insolvent are valid debts, or whether dispositions of property made by the insolvent are valid dispositions, are questions the decision of which belongs to the Insolvent Court. And I cannot doubt but that if the sons of an insolvent showed good cause for challenging any such debt or disposition, and were willing to provide the funds necessary to contest the same,

(1) 2 DeG. M. & G., 140.

the Official Assignee, or, in the event of his refusal, the Insolvent Court, would in a proper case give full opportunity to investigate the validity of the debt or disposition. Cases are familiar to us in which creditors have been allowed to contest, and have successfully contested, an admitted debt; and I think that the same liberty would, as a matter of course, be given to a son in a case where his interests might be affected. In the same manner I think that the son would be allowed to set the Official Assignee in motion for the purpose of setting aside a conveyance, which he could show reasonable cause to suppose had been made in fraud of the Official Assignee, and to his own detriment. But I cannot conceive that it is possible for the son to lie by, and afterwards of his own motion dispute the acts and conveyances of the Official Assignee done and made in the exercise of his statutory powers. I may add that, in the event of the father's estate producing a surplus over and above the amount required to satisfy his debts, I apprehend that such surplus might be made available to answer the claims of the son in respect of his interest in ancestral immoveable estate sold in the realization of the father's estate.

Next in order is the question, what is the effect of the death of the insolvent on the proceedings pending in his insolvency? It is somewhat remarkable that there is no provision in the Indian Insolvent Act, corresponding to those in the more recent English Acts, for the continuance of the proceedings after the death of the insolvent, as, for instance, section 80, cl. 9, of the Bankruptcy Act, 1869. There is perhaps less authority on the point in India than might have been expected. But in *In re Sitaram Abbaji* (1) it was held by Gibbs, J., that the Official Assignee was to proceed, so far as circumstances would permit, in the same manner as he would have done had the insolvent been living. The law seems to have been assumed to be the same in *In re Ramsabuck Misser* (2), where Norman, Officiating C. J., and Markby, J., affirmed an order of Phear, J., which made a rule to continue certain proceedings absolute against the representatives of deceased insolvents, as well as the surviving

(1) 10 Bom. H. C. Rep., 58.

(2) 6 Beng. L. R., 119.

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insolvents and the Official Assignee. But the most striking case is that of *In re Kaleechurn Khettry* (1), cited in Millet and Clarke's edition of the Insolvent Act, p. 15, where a prisoner in custody on a charge of murder had filed his petition, and a vesting order had been made; but he was convicted and executed without filing any schedule. It was held by Sir Charles Jackson that the insolvency should proceed, and that the Official Assignee should deal with the estate. I may also mention *Bromley* v. *Goodeve* (2), where Lord Hardwicke held that a commission of bankruptcy (the then course of procedure) might be renewed, though the bankrupt were dead; and that notwithstanding the statute then in force mentioned only the bankrupt, yet it extended to his representatives. And, lastly, I may refer to the notorious insolvency of *Aga Mahammed Rahim Shirazi*, pending in the Bombay Court of Insolvency since the time of Sir Erskine Perry, in which repeated proceedings have been taken since the death of the insolvent, and in the interests of which estate I believe that the Official Assignee is at the present moment carrying on a suit.

The last question that remains for decision is whether, as ingeniously contended by Mr. Telang, the ancestral immoveable estate upon the father's death vested by survivorship in the son, divesting the Official Assignee, but subject to the son's liability to pay the father's debts. I am not aware of any authority deciding the point expressly or by necessary inference. If Mr. Yate Lee (Law of Bankruptcy, p. 225,) is right in considering that the Commissioners in Bankruptcy could, under 6 Geo. IV, c. 16, sec. 65, after the bankrupt's death convey an estate tail of which he had been seized in his lifetime, that case is closely analogous to the present. I must, however, say that the authority to which he refers—*Ex parte Somerville* (3)—is less positive in its language than the opinion which he bases on it. But it does seem to me that, when once it is established that the proceedings in insolvency and the powers of the Official Assignee continue after the insolvent's death, the legal aspect of the matter is that the natural existence of the insolvent is for the purpose of

(1) Ind. Jur. O. S., 16. (2) 1 Atkins, 75.
(3) 1 Mont. & Ayr., 408; 3 Dea. & C., 668.

dealing with and realizing his estate artificially continued in the Official Assignee, who can after such death deal with that estate as he could have dealt with it while the insolvent was still alive. To hold the contrary would certainly lead to the most wasteful circuity of action; as it cannot be doubted but that the Official Assignee, as representing the creditors of the father, could by suit compel the son to dispose of the ancestral immoveable estate, so far as might be required to discharge the father's debts not being immoral.

In conclusion, I may very briefly refer to the case of *Deendayál Lall* v. *Jugdeep Narayan Sing* (1), as that case was relied on by the plaintiff's counsel. I must say that I cannot see how that case is applicable here, as in the conveyance of March 22, 1882, the Official Assignee has expressly conveyed to the defendant "all the right title and interest," not merely of "the said Motichand Nathoo, deceased," but also of "him Michael Placid Lynch as such Assignee as aforesaid," *i. e.*, as Official Assignee as well as Assignee of the estate and effects of the insolvent, so passing everything which the Official Assignee could pass. The case itself has been the subject of much comment; and considerable difficulty seems to have been felt, especially at Calcutta, as to how it is to be harmonized with the Privy Council decisions above referred to. But the tendency of recent judgments has been to consider whether it was intended to sue the father in his representative capacity or not; and if such was the intention, to hold the son's interest bound, though the decree may have been made against the father alone, and only his right, title and interest expressly specified as sold in execution. See *Umbica Prosad Tewary* v. *Rám Sahay Lall* (2); *Sheo Prosad* v. *Jung Báhadoor*(3); *Rámdut Singh* v. *Mahender Prasad*(4); *Baso Kooer* v. *Hurry Dáss* (5).

For the reasons above given, I find on the issue now under consideration that "on the insolvency of Motichand Nathoo the right to dispose of the plaintiff's share (if any) in the immove-

(1) L. R., 4 I. A., 247.
(2) I. L. R., 8 Cal., 898.
(3) I. L. R., 9 Cal., 389.
(4) I. L. R., 9 Cal., 452.
(5) I. L. R., 9 Calc., 495.

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able properties in the plaint mentioned for the payment of the debts of the said Motichand Nathoo vested in the Official Assignee; and that such right was not divested on the death of the said Motichand Nathoo." And as on this finding of law the case may be disposed of, I give my judgment for the defendant with costs.

Attorneys for the plaintiff.—Messrs. *Macfarlane and Edgelow.*
Attorneys for the defendant.—Messrs. *Graigie, Lynch and Owen.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

1883
July 11.

SHRI SHAILAPA HADLAPA (PLAINTIFF), APPLICANT, *v.* BALAPA LOKANNA AND OTHERS (DEFENDANTS), OPPONENTS.*

The Code of Civil Procedure, Sec. 43—Bond with alternative conditions for repayment of loan—Decree for interest—Second suit for further interest.

A bond provided for the repayment of a loan with interest by a stated time. In default of payment by that time it was provided that the loan might be added to an existing mortgage for a term of years, and repaid at the end of the term, together with the mortgage-debt. After the expiration of the time fixed for the repayment of the loan the obligee sued and obtained a decree for the interest which had accrued due at the date of the suit. He now sued for the further interest which had since become due.

Held that the second suit was not barred by section 43 of the Code of Civil Procedure, for that the first suit being for interest merely, and not for principal and interest, which were then both due, the plaintiff must be taken to have elected, under the bond, to add the principal sum to the previously existing mortgage-debt, in which case he forfeited nothing by suing merely for arrears of interest as they became due.

THIS was an application, under the High Court's extraordinary civil jurisdiction, for the reversal of the decree of C. F. H. Shaw, Judge of Belgaum, confirming the decree of Rav Saheb Venkatarav Lakshmaya, Subordinate Judge of Chikodi.

The first defendant, Balapa, with the other two defendants as securities, passed to the plaintiff on the 28th of August, 1874, a bond for Rs. 400, with interest at a certain rate, and agreed that

* Extraordinary Civil Application, No. 3 of 1883.