Privy Council Appeal No. 30 *of* 1941

Pr. N. Sm. Chockalingam Chettiar – – – – *Appellant*

v.

The Official Assignee of Madras – – – – *Respondent*

Same – – – – – – – – – – *Appellant*

v.

Same – – – – – – – – – – *Respondent*

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH OCTOBER, 1942

Present at the Hearing:
LORD RUSSELL OF KILLOWEN
LORD MACMILLAN
LORD ROMER
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This is an appeal from a decision of the High Court of Madras (in its appellate jurisdiction), which varied an order made by the same Court (in its insolvency jurisdiction), which had reversed an order made by the official assignee of Madras. It will be convenient in the first place to state shortly the events which led up to this appeal.

In 1919 there existed an undivided Hindu family, consisting of the father A. R. Somasundaram and his four sons Arunachalam, Ramanathan, Sundaresan and Lakshmanan, which carried on business in divers places in British India, and at Jaffna and Colombo in Ceylon. In 1919 Ramanathan died and in 1923 the father died. On the 14th May, 1925, letters of administration were granted by the District Court of Jaffna to Arunachalam and Sundaresan, on the footing that their father had died intestate; but subsequently the Secretary of the Court was associated in the administration as official administrator, and was virtually in charge of the administration.

By an order of the High Court at Madras dated the 15th July, 1925, it was ordered that Arunachalam and Sundaresan be adjudged insolvents, and that their properties, wherever situate, do vest in the official assignee of that Court. By an order of the High Court dated the 6th August, 1928, and made in those insolvency proceedings, it was ordered that sanction be accorded to an agreement by way of compromise, and that the entire interest of the insolvents' firm, including the interest of Lakshmanan and the two sons then living of the insolvent Arunachalam, in the properties of the insolvents' firm situate within and outside British India, movable and immovable, do vest in the official assignee.

At some time in or about the year 1928 it was discovered that A. R. Somasundaram had left two wills, by one of which (dated the 2nd October, 1922) he disposed of his own separate property consisting of businesses carried on at Rangoon and Jaffna: by the other (dated the 23rd October, 1922) he purported to dispose of the property of the joint family. As a result a grant of letters of administration with the said wills annexed was made by the High Court at Madras to the official assignee. A similar grant was made by the District Court of Jaffna to Messrs. Harding and Thornton of Colombo who were the duly constituted attorneys of the official assignee.

Meanwhile a suit had been instituted on the 19th January, 1926, in the District Court of Colombo (No. 18800) by one Panya Reena Navenna Soranna Mana Somasundaram (hereinafter for brevity referred to as Panya) against the Secretary of the Court of Jaffna, the official administrator of the father of the insolvents, praying for judgment against the defendant as official administrator for a sum of Rs.1,61,127, being the amount alleged to be due to the plaintiff in respect of moneys advanced to the said father and interest thereon. Panya died in March, 1929, and subsequently his son the appellant was substituted as plaintiff and Messrs. Harding and Thornton were substituted as defendants in the Colombo suit No. 18800. Judgment was delivered in that suit on the 12th January, 1933, and resulted in a decree of that date, by which it was ordered that Messrs. Harding and Thornton as administrators of A. R. Somasundaram do pay to the appellant as administrator of the estate of Panya " the sum of Rs.1,61,127/22 with interest thereon at the rate of 9 per centum per annum from the 20th January, 1926, till payment in full and costs of suit." Following on this judgment the appellant seems to have attached a fund in the Jaffna Court.

From this judgment an appeal was lodged, on which on the 17th November, 1933, an order was made in the following terms:—

> " Of consent it is considered and adjudged that the decree made in this action by the District Court of Colombo and dated the 12th January, 1933, be and the same is hereby affirmed and this appeal is dismissed subject to the terms of settlement arrived at between the parties and filed herewith. And it is further ordered and decreed that each party do bear his costs of this appeal."

The terms of settlement referred to run thus:—

> " Substituted plaintiff is to be paid his taxed costs incurred in 18800 D.C. Colombo, such costs not to exceed Rs.9,000. He agrees to share *pro rata* with all the other creditors the assets of the deceased. He is entitled to proceed for the recovery of any balance that may be due to him in action No. 18800 D.C. Colombo from assets that may exist out of Ceylon. The Official Administrator undertakes to withdraw his appeal in 18800 D.C. Colombo."

In accordance with these terms (which will be referred to as the compromise) the appellant received out of the Ceylon assets of A. R. Somasundaram, as his share *pro rata* with the other creditors of that person, a sum of Rs.47,573, leaving a balance of Rs.1,13,554 unpaid of the said judgment debt of Rs.1,61,127.

The appellant then lodged a claim in the insolvency proceedings in Madras. From the wording of his affidavit in support he would appear to be claiming to be paid the full amount of the judgment debt and interest out of the joint family property in priority to the creditors of the insolvents; but in fact his claim is limited (as of necessity it should be) to the unpaid balance. His claim was rejected *in toto* by the official assignee. The appellant thereupon applied to the Judge of the High Court sitting in insolvency asking that the order of the official assignee rejecting his claim be rescinded and that his claim be admitted, for the following reasons (among others) viz. (III) because the claim was to make the joint family assets in the hands of the official assignee liable for the debts due by the father of the insolvents and (IX) because the official assignee was estopped by the compromise from repudiating or rejecting the claim.

On the 23rd August, 1937, Wadsworth J. made an order on that application allowing the appeal and declaring and ordering as follows:—

> " 1. That the claim of the applicant herein for the sum of rupees one lakh sixty one thousand one hundred and twenty seven (Rs. 1,61,127) with interest thereon excluding the sum of rupees forty seven thousand five hundred and seventy three (Rs. 47,573) received under the compromise dated the 21st October 1933 due under the decree in Suit No. 18800 of 1926 on the file of the District Court, Colombo, be and is hereby allowed;
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> " 2. that the applicant shall be at liberty to prove the balance of his debt due under the said decree before the said Official Assignee subject to the limit that it shall not exceed the assets of the joint family and the assets of Somasundaram Chettiar, deceased, the father of the applicant herein, which have come into the hands of the sons;
>
> " 3. that the applicant shall not be entitled to any priority over the separate estate of Somasundaram Chettiar, deceased, which has come down to the sons."

Against that order the present appellant appealed in so far as it declined to give him priority; and the official assignee appealed against it in so far as it allowed him to prove in the insolvency proceedings at all. The appeals were heard by the High Court in August, 1939. Judgment was reserved and was delivered on the 16th October, 1939. The appeal of the present appellant was dismissed, and the appeal of the official assignee was in part allowed, i.e., the order of Wadsworth J. was modified to the following extent:—

> " Order and decree that the claimant . . . shall be entitled to prove in the above insolvency for the balance of the debt due to him after giving credit for the amount realised by him in the Jaffna administration . . . and that the said claimant shall not be entitled to interest in respect of the said debt due to him from the date of the adjudication of the insolvents . . . and that save as aforesaid the said order of the High Court dated the 23rd August, 1937 . . . be and is hereby confirmed in other respects."

Each appellant was ordered to pay the costs of the respondent to his appeal.

The present appellant obtained leave in Madras to appeal to His Majesty in Council in regard to the variation as to interest. He was refused leave to appeal from the dismissal of his own appeal, but he subsequently obtained special leave from His Majesty in Council. It is in these circumstances that the order of the High Court of the 16th October, 1939, has come up in its entirety for consideration before their Lordships' Board. The official assignee has not appealed.

The resultant effect of the variation of the order of the 23rd August, 1937, and its confirmation in other respects by the High Court, is that the order of Wadsworth J. stands *verbatim* as before set forth with the single exception that the words " with interest thereon " are omitted from the first paragraph. Whether an order so framed is to any and what extent wrong, is the question which their Lordships now proceed to consider.

A few preliminary observations are advisable. It had been contended by the official assignee that he was in no way affected or bound by the compromise; but both Courts in India held that it was binding on him. With this view their Lordships agree; indeed the contrary contention was not raised before them. In the next place it is to be observed that owing to lack of clear and definite information, there has arisen in this case much uncertainty and confusion as to what property is being administered by the official assignee in the insolvency and in particular whether it includes any property which was the separate property of the father of the insolvents. Some complication no doubt springs from the fact that during the two years which intervened between the death of A. R. Somasundaram and the adjudication of insolvency, the two insolvents had (acting on the footing of intestacy) carried on businesses which were the separate property of their father, a proceeding which may well have resulted in making them creditors of their father's estate. Further the official assignee may, as administrator of the father, have obtained possession

or control of his separate property. However this may be, it seems clear to their Lordships that before any of the father's separate property can be applied in payment of any of the son's creditors in the insolvency proceedings, all creditors of the father must first have had their claims satisfied thereout. All that can vest in the official assignee under section 17 of the Presidency Towns Insolvency Act is the property of the insolvents, and therefore as regards separate property of the father, all that can properly be dealt with in the insolvency proceedings for the benefit of the creditors of the insolvents, is the interest of the insolvents which will remain after the father's debts have been ascertained and paid. This may well necessitate some proceedings in the nature of a suit for administration. Their Lordships were, however, given to understand that the only separate estate of the father (beyond the Ceylon assets which have been distributed as contemplated by the compromise) consists of the business carried on by him at Rangoon. Of its value they know nothing. It will, however, be open to the present appellant to take such administration or other proceedings (if any) as he may be advised, to secure that any separate estate of the father which exists is properly administered by the administrator before any part thereof is made available in the insolvency proceedings for payment of the creditors of the insolvents.

The doubts and difficulties which their Lordships have felt as to the property which is being administered in the insolvency proceedings, have been to a great extent cleared by what the judges have indicated in the High Court on appeal. They say that by the agreement sanctioned by the order of the 6th August, 1928, " all the property possessed by the joint family became vested in the official assignee "; and later on in their judgment they state: " The separate property in British India left by the father was the business in Rangoon and its assets. The rest of the properties were owned by the father and sons as joint family property."

It thus becomes apparent that the only property with which this appeal can be concerned is the joint family property which on the death of the father devolved by survivorship. It is out of this property, the entirety of which has (with the Court's approval) been vested in the official assignee, and is being administered in the insolvency proceedings, that the appellant claims to be paid his debt in priority to the creditors of the insolvents. He bases this claim (1) upon a right to priority which he says is conferred upon him by the compromise, and (2) upon a right alleged to be conferred upon him by the Hindu Law, which makes sons (to the extent of their interest in joint family property) liable to pay their father's debts, provided they are not debts incurred for an illegal or immoral purpose. This claim to priority which is the first and most important question raised on this appeal, must now be dealt with.

The contention that any priority is conferred by the compromise appears to their Lordships to be without foundation. The compromise merely provides that the taking by the appellant of a dividend on his judgment debt out of the Ceylon assets, shall be no bar or prejudice to his proceeding to recover the balance from assets outside Ceylon. Their Lordships are unable to find in the compromise any words which purport to confer any priority in recovery. It was said that under the compromise he was to be entitled to recover the balance, and that such a right necessarily postulated priority. But the compromise gives him no such right; it merely ensures to him the right to proceed to recover, i.e., to take proceedings to recover. As already stated, it ensures to him that his taking a dividend in Ceylon shall not prejudice or bar his proceeding against assets elsewhere.

His claim to priority under Hindu Law is founded mainly, if not entirely, on a text of *Brihaspati* referred to in Mayne's Hindu Law (§ 313) in the following words:—" The father's debt must first be paid and next a debt contracted by the man himself." No other authority in relation to Hindu Law was cited in support of the proposition. Although the question must frequently have arisen as a matter of great practical importance, it is strange that, if it existed, no case is found in the books establishing such

priority. As was pointed out by Abdur Rahman J. in *Thumbalam Gooty Thimmial* v. *The Official Receiver* (A.I.R. 1939 Madras 276), if a father's debts have priority, a son's creditor could not obtain payment out of the son's undefined share in the family property. He would have to wait until all the father's creditors had been paid; in other words a son's creditor would be driven to enforce his claim in some kind of administration suit in which the father's creditors would have to be ascertained and their debts paid. The case referred to above is to some extent an authority against the appellant's claim to priority under the Hindu Law, but in fact the learned Judge rejected the claim to priority in that case by reason of the statutory provisions of the Provincial Insolvency Act.

There is no trace of any such priority being recognised by the provisions of the Indian Succession Act which in terms assign specific priorities to the debts of a dead man (see sections 320-322), although no doubt the concluding words of section 322 would preserve any priority which in law existed. Section 323 however indicated a prima facie condition of equality by enacting that " Save as aforesaid, no creditor shall have right of priority over another." Reference may also be usefully made in the same connection to the Civil Procedure Code O. XX. r. 13 (2), in the case where the deceased's estate is insolvent.

There can be no doubt that, in many respects, the Hindu Law as administered to-day has departed from the old Hindu Law, the tendency being to restrict and not to extend the limits of its doctrine. Thus while under the old Hindu Law the liability for a father's debt extended to the personal property of the son, it is now limited to his interest in the joint family property. Again while under the old Hindu Law the liability of sons and grandsons *as heirs*, for the debts of their deceased father or grandfather, extended to their own property, this rule was only followed, in British India, in the Bombay Presidency. Elsewhere the liability of sons and grandsons *as heirs* was limited (as in the case of other heirs under Hindu Law) to the extent of the property inherited by them from the deceased; and by the Bombay Hindu Heirs Relief Act, 1866, the liability of sons and grandsons as heirs in that Presidency was placed upon the same footing.

Their Lordships are not prepared to depart from this tendency by holding that a priority of payment out of the joint property, which so far as they are aware has never prevailed in practice among the Hindus in British India, exists to-day in favour of the creditors of a father as against the creditors of a son.

But even if such a priority had existed under the Hindu Law, it would have had to yield to any statutory provision inconsistent therewith; and in the present case the provisions of the Presidency Towns Insolvency Act afford a complete answer to the appellant's claim. He is proceeding to recover the balance of his judgment debt by proving in the insolvency proceedings; he is therefore subject to the provisions of the Act, unless the compromise to any extent excludes them, and their Lordships have already stated that the compromise confers no priority. The appellant is therefore subject to section 49 of the Act which after providing for certain priorities in the payment of debts enacts (by sub-section 5) that " subject to the provisions of this Act, all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference." Nowhere in the Act is any priority conferred on the debts of an insolvent's father, and by sub-section 5 the appellant is bound.

The second claim put forward by the appellant was that the High Court had erred in striking out the reference to interest from the order of Wadsworth J., and that he was entitled to prove for a sum amounting to the said sum of Rs.1,13,554 together with interest at 9 per cent. thereon down to the lodgment of his claim with the official assignee. On the respondent's behalf it was contended that no interest on the principal sum

could be claimed because of rule 23 in the 2nd schedule to the Act which provides:—

> " 23. (1) INTEREST.—On any debt or sum certain whereon interest is not reserved or agreed for, and which is overdue when the debtor is adjudged an insolvent and which is provable under this Act, the creditor may prove for interest at a rate not exceeding six per centum per annum—
>
> (*a*) if the debt or sum is payable by virtue of a written instrument at a certain time, from the time when such debt or sum was payable to the date of such adjudication; or
>
> (*b*) if the debt or sum is payable otherwise, from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication.
>
> " (2) Where a debt which has been proved in insolvency includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding six per centum per annum without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full."

This rule does not appear to their Lordships to apply to this case in which the date of adjudication is antecedent to the judgment debt, and in which by the decree express provision is made for the debt to carry interest. Moreover the compromise authorises a proof by the appellant for " any balance that may be due to him in action No. 18800," words which would appear to include the interest given by the judgment. On other grounds however there is a difficulty in the way of the appellant. His counsel in the High Court at Madras on the hearing of the appeal conceded that if the provisions of the Insolvency Act were to be applied his client would not be entitled to this interest; but he argued that under the compromise his client was entitled to " get " the balance of the amount due under the decree of the Colombo Court, and that the official assignee had therefore agreed that he should get interest on the decreed amount. This contention their Lordships have already said to be unfounded. The compromise gives the appellant no right to " get " or recover any sum. It only ensures to him the right to take proceedings against assets outside Ceylon. In the result the High Court, after rejecting the suggested construction of the compromise, relied upon the concession by counsel and rejected the claim to prove for interest on the sum of Rs.1,13,554. Their Lordships think that in view of these facts the disallowance of this interest must stand.

One further point remains for consideration. Counsel for official assignee claimed that the official assignee was entitled to dissect the claim for Rs.1,13,554 by ascertaining how much of the original judgment debt of Rs.1,61,127 represented interest on the father's debt and that the proof could only be admitted subject to the provisions of rule 23, with the result that the proof could be rejected to the extent to which it was composed of interest subsequent to the date of the adjudication. With this contention their Lordships do not agree. One thing which they think the compromise clearly does is to prevent any one bound by the compromise from going behind, or in any way disputing, the judgment debt. Another is that it fixes the amount, which the appellant is to be entitled " to proceed to recover," at the balance due under the judgment, viz. (in the events which have happened), Rs.1,13,554. It would not be right if in the face of that agreement the proof was only admited for the smaller sum. A further answer to this contention lies in the fact that the order of the High Court on appeal fixes the proof at Rs.1,13,554, and against that order there has been no appeal by the official assignee. Moreover while no doubt the provisions of rule 23 (2) are applicable to the case where a creditor proves for a debt and in addition for interest added thereto as provided by rule 23 (1), their Lordships are of opinion that they do not apply to the present case of a judgment debt obtained against the representative of the father, which by a special agreement of compromise by which the official assignee is bound, the parties are precluded from going behind or disputing in any way.

The ultimate result of this appeal may now be stated as follows:— There being no question but that the father's separate property must be administered in such a way that all the father's creditors are paid thereout before any interest of the insolvents therein can be made available in the insolvency proceedings for the benefit of the creditors of the insolvents, the question of the priority in respect of the father's separate property does not arise in the insolvency proceedings at all. The order of the 23rd August, 1937, as varied by the order of the 16th October, 1937, requires to be recast and should run as follows:—

> " 1. That the claim of the applicant herein for the sum of rupees one lakh sixty one thousand one hundred and twenty seven (Rs.1,61,127) excluding the sum of rupees forty seven thousand five hundred and seventy three (Rs.47,573) received under the compromise dated the 21st October, 1933, due under the decree in Suit No. 18800 of 1926 on the file of the District Court, Colombo, be and is hereby allowed.
>
> " 2. That the applicant shall be at liberty to prove the said balance of his debt due under the said decree before the said Official Assignee subject to the limit that it shall not exceed the assets of the joint family.
>
> " 3. That the applicant shall not be entitled to any priority over the said assets of the joint family."

The provisions of paragraph 4 of the said order will remain unaltered.

The appellant, although their Lordships have indicated the manner in which he may (if so advised) proceed in order to obtain payment (together with other creditors of the father) out of the father's separate property, if it be of any value, has nevertheless failed in establishing the main part of his claim, viz., for priority in payment out of the joint family estate. He has, however, established that the debts of the father should be paid before the separate estate of the father is applied to any extent in paying creditors of the insolvents, and that his proof in the insolvency should stand at Rs.1,13,554.

For the reasons herein appearing their Lordships are of opinion that the order appealed from should be varied as indicated, and they will humbly advise His Majesty accordingly.

There will be no order as to the costs of this appeal; but the costs of the Official Assignee will form part of his expenses of administering the estates of the insolvents.

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IN THE PRIVY COUNCIL

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