Privy Council Appeals Nos. 23 *and* 24 *of* 1932.

Sat Narain and another - - - - - - - - *Appellants*

v.

Rai Bahadur Sri Kishen Das, since deceased, and others - *Respondents*

Same - - - - - - - - - - - *Appellants*

v.

The Bank of Upper India, Limited, Delhi, and others - - *Respondents*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH JULY 1936

Present at the Hearing:

LORD THANKERTON.
LORD ALNESS.
SIR GEORGE RANKIN.

[*Delivered by* LORD THANKERTON.]

These are consolidated appeals from two decrees of the High Court of Judicature at Lahore, dated the 20th January, 1926, which, subject to some modification, affirmed two decrees of the District Judge of Delhi, dated the 13th April, 1916, dismissing two suits instituted by the present appellants, who are the two sons of Lala Sri Kishen Das, originally respondent No. 1 to these appeals.

Sri Kishen Das, along with the appellants, formed a joint Hindu family, of which he was the managing member. The joint family owned considerable immoveable property, and a business, the headquarters of which were at Delhi.

On the 5th April, 1913, Sri Kishen Das mortgaged to respondents No. 3, the Bank of Upper India Limited, a large part of the immoveable property owned by the joint family, in security of his indebtedness to the Bank. On the 26th September, 1913, Sri Kishen Das was adjudicated insolvent by the High Court of Bombay under the Presidency Towns Insolvency Act, 1909.

On the 14th April, 1914, the Bank instituted a suit in the Court of the District Judge at Delhi for recovery of their mortgage debt, amounting to Rs.4,64,021-15-8, by sale of the mortgaged properties, against Sri Kishen Das, the present appellants, who were then minors, and the Official

Assignee, Bombay. The present appellants contested the suit. The Official Assignee also contested the suit, but later he admitted the Bank's claim.

On the 2nd October, 1914, the present appellants, then minors, through a next friend instituted the first suit now under appeal at Delhi against their father, Sri Kishen Das, the Bank, and the Official Assignee, asking for a declaration that one-half of the mortgaged properties was owned by them and that, to the extent of their share, the mortgage was not binding on them, and also for an injunction to restrain the defendants from selling or alienating their one-half share in the said properties.

On the 11th January, 1915, the present appellants instituted at Delhi the second suit now under appeal against Sri Kishen Das, the Official Assignee, the Bank, and sundry purchasers of immoveable properties sold by the Official Assignee, claiming partition and a half share of the immoveable properties belonging to the joint family, two lists of which were filed by the plaintiffs, the first list setting out the mortgaged properties in dispute, and the second detailing the properties free from the mortgage.

The three suits were tried together by the District Judge, and on the 13th April, 1916, he delivered judgment in the partition suit and dismissed the suit; for the reasons set forth in that judgment he also dismissed the declaratory suit. On the 27th April, 1916, he gave decree in the Bank's suit for Rs.4,64,021-15-8 with interest, but made no order for sale, in respect that the larger portion of the mortgaged properties had already been sold by the Official Assignee; this decree has now become final, as an appeal therefrom was dismissed in default.

The present appellants appealed from the decrees of the District Judge in the declaratory suit and the partition suit to the Chief Court of the Punjab (now the High Court of Judicature at Lahore) and on the 20th January, 1926, the High Court delivered a judgment disposing of both appeals. In the declaratory suit a decree was made affirming the dismissal of the suit by the District Judge. In the partition suit it was ordered by decree of the same date that the decree of the District Judge, Delhi, dated the 13th April, 1916, dismissing the plaintiffs' suit be varied " to the extent of giving the plaintiff-appellants a preliminary decree declaring their share in the unsold properties, as detailed below," (here follow particulars of nine properties), " to be one-half, and directing that division shall only be made after provision for the satisfaction of the remainder of the debt due to the Bank and of such other antecedent debts of Rai Bahadur Sri Kishen Das as the plaintiffs fail to show are immoral or illegal." There was also a variation as to costs, which is not now material.

The present appeals are from these two decrees of the High Court, but the decision of the declaratory suit will follow the decision of the two questions raised in the appeal in the partition suit.

In opening the appeals on behalf of the appellants Mr. Upjohn made clear that no question was raised by them as to the joint family properties so far as they were included in the mortgage to the Bank, whether these properties had already been sold or remained to be sold, and that the appeals related only to the joint family properties which were not included in the mortgage. As to these properties, exception was taken to the decree of the High Court in the partition suit in two respects, vizt., (*a*) because it confined the declaration in the appellants' favour to these properties so far as unsold, and did not include those which had already been sold, and (*b*) in regard to the direction as to provision for the remainder of the antecedent debts.

Certain of the respondents to these appeals were only interested in the matter as purchasers of some of the properties subject to the Bank's mortgage, and, on the second day of the hearing before their Lordships, Mr. Upjohn, on behalf of the appellants, agreed that they should be dismissed from the appeals, as he was no longer challenging these sales. These respondents were respondents Nos. 4, 5, 7 and 8 in appeal No. 23 of 1932 in the partition suit. Their Lordships held that respondents Nos. 4 and 8, who had appeared on the appeal, were each entitled to their costs from the appellants.

Another preliminary matter relates to original defendant No. 12 in the partition suit, Ghulam Mohi-ud-Din, who was a purchaser of one of the properties, and who had died more than six months before an application was made on the 4th October, 1920, by the plaintiffs for substitution of his legal representatives. In fact he had died on the 20th March, 1918, and, in their judgment of the 20th January, 1926, the High Court declined to extend the time, and held that the appeal had abated, and rejected the application. The legal representatives of Ghulam Mohi-ud-Din, respondent No. 12 in appeal No. 23 of 1932, are called along with Sheo Baran Singh, who has judicially established his right of pre-emption of the property purchased by Mohi-ud-Din, and who appeared in this appeal. Mr. Upjohn did not seek to press the appeal as regards this property, and the appeal falls to be dismissed as against respondent No. 12, with costs to the respondent Sheo Baran Singh.

Turning to the first contention of the appellants, it is clear that Sri Kishen Das, as father of the two appellants, had the power, so long as it remained undivided, to sell or mortgage the joint family property, including the interest of the appellants, for payment of his own debts, provided such debts were antecedent and were not incurred for immoral or illegal purposes. It is also clear that his interest

in the joint family property vested in the Official Assignee, who would be entitled to obtain partition. But the question in these appeals relates to the power of the Official Assignee to deal with the interest of the appellants.

Under a previous decision of this Board, in a pre-emption suit instituted by the present appellants, it has been held that the adjudication order did not vest in the Official Assignee the appellants' interest in the family property; *Sat Narain* v. *Behari Lal*, (1925) 52 I.A. 22. But the Official Assignee claims the right to exercise the insolvent's power, as father, to sell the joint family property for payment of the insolvent's antecedent debts, so far as not incurred for immoral or illegal purposes, by virtue of the provisions of section 52 (2) (*b*) of the Presidency Towns Insolvency Act. Section 52 provides as follows:—

> "52.—(1) The property of the insolvent divisible amongst his creditors, and in this Act referred to as the property of the insolvent, shall not comprise the following particulars, namely:—
>
> "(*a*) property held by the insolvent on trust for any other person;
>
> "(*b*) the tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessels, and furniture of himself, his wife and children, to a value inclusive of tools and apparel and other necessaries as aforesaid, not exceeding three hundred rupees in the whole.
>
> "(2) Subject as aforesaid, the property of the insolvent shall comprise the following particulars, namely:—
>
> "(*a*) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before his discharge;
>
> "(*b*) 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; and
>
> "(*c*) all goods being at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof:
>
> "Provided that things in action other than debts due or growing due to the insolvent in the course of his trade or business shall not be deemed goods within the meaning of clause (*c*):
>
> "Provided also that the true owner of any goods which have become divisible among the creditors of the insolvent under the provisions of clause (*c*) may prove for the value of such goods."

Their Lordships agree with the decision of the High Court that the claim of the Official Assignee is well founded, and that, under section 52 (2) (*b*) the capacity to exercise the insolvent's power to sell the joint family properties for his antecedent debts, these not having been incurred for immoral or illegal purposes, vested in the Official Assignee. The decision of the High Court was based on two decisions of the Madras High Court, and two decisions of the High Court of Allahabad, to which it is unnecessary to refer further. (*Official Assignee of Madras* v. *Ramchandra*, (1923) I.L.R.

46 Mad. 54; *Re Sellamuthu Servai*, (1924) I.L.R. 47 Mad. 87; *Bawan Das* v. *Chiene*, (1922) I.L.R. 44 All. 316; *Sita Ram* v. *Beni Prasad*, I.L.R. 47 All. 263; cf. also *Re Balusami Ayyar*, (1928) 51 Mad. 417.) It was contended for the appellants that the limited class of creditors, who would benefit by such a sale, was not among those classes whose debts are expressly given a priority by section 49 of the Act, and that to distribute the proceeds of sale among such a limited class would be in contravention of sub-section 5 of section 49, which provides 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." But if, as their Lordships hold, section 52 (2) (*b*) entitles the Official Assignee to exercise the power in question, it is clear that such power must be exercised subject to its limitations, and the provisions of section 49 (5) do not apply. Equally, the provisions of section 17 are in no way inconsistent with the exercise of the power of sale subject to its limitations. The sales by the Official Assignee in the present case were completed before the partition suit was instituted.

Accordingly their Lordships are of opinion that the appeal fails in regard to the joint family properties which are not included in the Bank's mortgage and which have been sold by the Official Assignee.

As regards the unsold properties, not included in the Bank's mortgage, it is not disputed that the appellants are entitled to the preliminary decree declaring their share, on partition, to be one-half, but the appellants maintain that the High Court erred in directing that division should only be made after provision for satisfaction of the remainder of the insolvent's antecedent debts, in so far as the appellants fail to show that they are immoral or illegal.

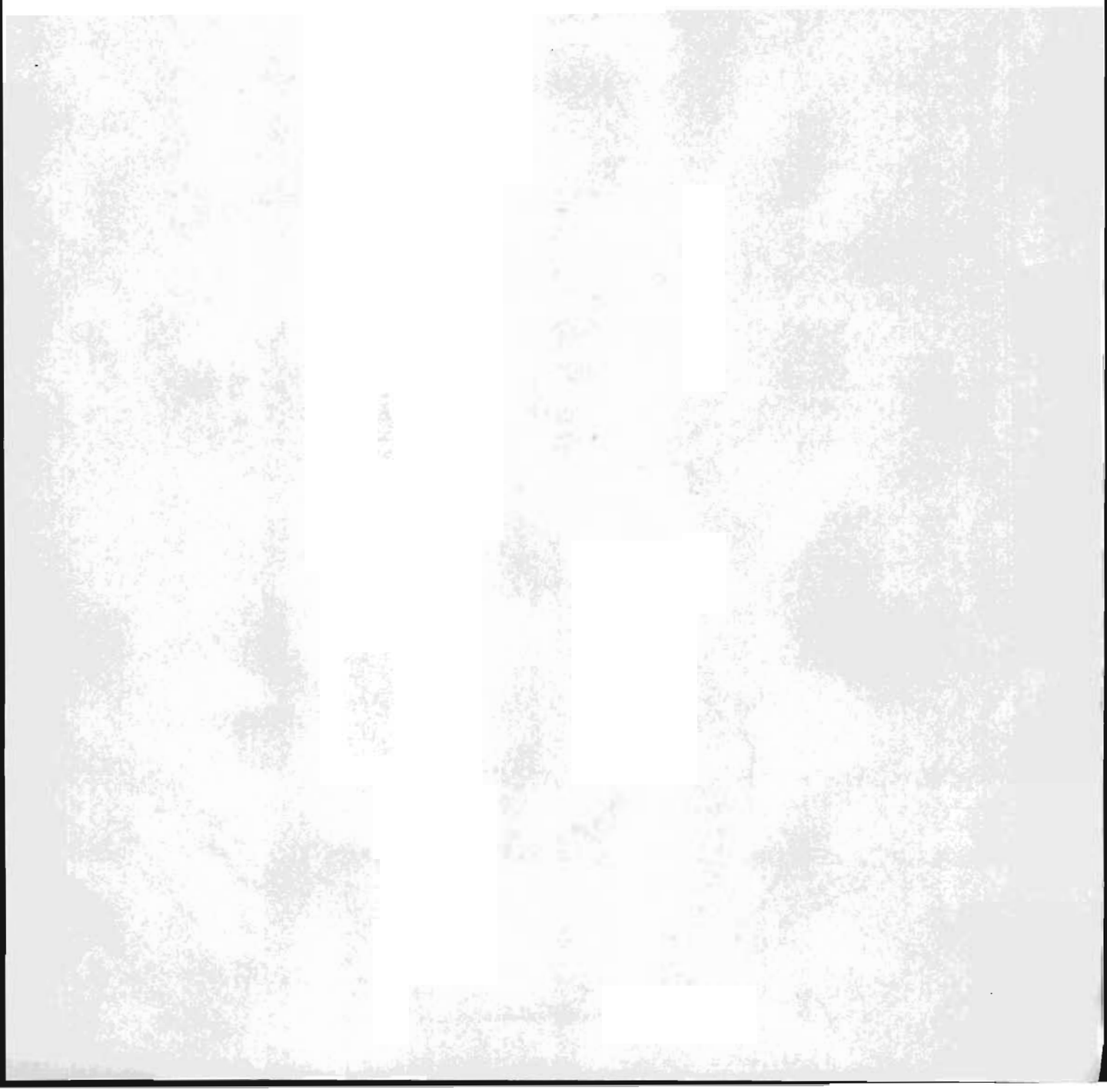
In their Lordships' opinion, the High Court have rightly made the direction. The father's power of sale for his debts exists only so long as the joint family property is undivided, and the capacity of the Official Assignee must be similarly limited. In their Lordships' opinion, this was rightly held in *Re Balusami Ayyar*, *supra cit.*, and the decision in *Sita Ram* v. *Beni Prasad*, (1925) I.L.R. 47 All. 263, to the contrary effect was incorrect. When the family estate is divided, it is necessary to take account of both the assets and the debts for which the undivided estate is liable. The appellants maintained that the pious obligation of the sons was an obligation not to object to the alienation of the joint estate by the father for his antecedent debts, unless they were immoral or illegal, but that these debts were not a liability of the joint estate, for which provision required to be made before partition. This argument was sought to be supported by the judgment of this Board delivered by Lord Dunedin in *Brij Narain* v. *Mangla Prasad*, (1923) I.L.R. 51 I.A. 129, which was a case dealing with the rights of the father's mortgagee or creditor against the joint estate in the hands of the sons. That decision was important in that it

corrected certain *obiter dicta* in the earlier decision of this Board in *Sahu Ram* v. *Bhup Singh*, (1917) I.L.R. 44 I.A. 126, and made clear, *inter alia*, that the doctrine was not based on any necessity for the protection of third parties but was based on the pious obligation of the sons to see their father's debts paid, and also that it was immaterial to the liability of the family estate whether the father was alive or dead. There can be no doubt that it is a liability of the joint estate, and, in the opinion of their Lordships, it follows that it is right to make provision for discharge of this liability on partition of the joint estate. It was so decided in *Bawan Das* v. *Chiene*, (1921) I.L.R. 44 All. 316; reference may also be made to *Venkureddi* v. *Venku Reddi*, (1926) I.L.R 50 Mad. 535, at 539. Accordingly, the appellants' second argument must be rejected.

There seems to be a reasonable doubt as to the correctness of the list of properties in the decree of the High Court, and parties were agreed that the matter would be safeguarded by varying the decree in so far as it gives the appellants a preliminary decree so as to read, " a preliminary decree declaring their share in the properties not subject to the Bank's mortgage and remaining unsold to be one-half, and directing that division shall only be made after provision for the satisfaction of the remainder of the debt due to the Bank and of such other antecedent debts of Rai Bahadur Sri Kishen Das as the plaintiffs fail to show are immoral or illegal."

Their Lordships will accordingly humbly advise His Majesty that the appeals should be dismissed, and that the decrees of the High Court, subject to the variation above stated, should be affirmed. The respondents the Bank of Upper India will be paid their costs in these appeals by the appellants. The position of the respondents, 4, 5, 7, 8 and 12 has been referred to. As regards their costs: Nos. 5 and 7 did not appear, so no question of their costs arises; the appellants must pay the costs of Nos. 4, 8 and of Sheo Baran Singh as representing No. 12, with separate sets of costs to each.

(36822—3A) Wt. 8136—2 190 7/36 P.St G.338



In the Privy Council.

SAT NARAIN AND ANOTHER

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SAME

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DELIVERED BY LORD THANKERTON

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
Pocock Street, S.E.1.

1936