Privy Council Appeal No. 35 *of* 1942
Allahabad Appeal No. 3 *of* 1939

Babu Jyoti Bhushan

v.

Babu Shiva Prasad Gupta

B. Gokul Chand and others

v.

Babu Shiva Prasad Gupta and another

CONSOLIDATED APPEALS

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JULY, 1943

Present at the Hearing:

LORD ATKIN
LORD THANKERTON
LORD PORTER
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* SIR GEORGE RANKIN]

This appeal arises out of execution proceedings taken to enforce a partition decree dated 25th February, 1926. The decree which was based on an award dated 30th November, 1925, directed the members of one branch of a Hindu family to pay to the respondent Shiva Prasad, who represented another branch, the sum of Rs.13,68,358 for the purpose of equalising the values of the allotted shares. The question is whether the sum still due and unpaid in respect of this obligation is a " debt " within the meaning of the United Provinces Encumbered Estates Act, 1934 (United Provinces Acts XXV of 1934 and IV of 1935), herein referred to as " the Act ", or whether, as held by the High Court, the Act has no application thereto.

Section 2 of the Act is a definition section in the sense indicated by its openings words and the first of a number of words and phrases therein defined or explained is the word " debt ".

> 2. In this Act unless there is anything repugnant in the subject or context:
>
> (*a*) " debt " includes any pecuniary liability except a liability for unliquidated damages, . . .

The branch whose members became by the partition decree judgment debtors for the money now sought to be recovered is represented by the appellants Jyoti Bhusan and Gokul Chand together with their sons and grandsons. These two families are however divided since 1934.

On the 3rd February, 1934, the respondent Shiva Prasad applied to the Civil Judge of Allahabad for execution of the partition decree against the appellants and obtained an order for the attachment and sale of a house at Allahabad, and for the issue of transfer certificates to other courts in the Province—at Benares, Jaunpur and Gonda and also to a court at Calcutta. On the 5th October, 1936, Gokul Chand and his descendants applied to the Collector of Benares under section 4 of the Act requesting that the provisions thereof be applied to him and the Collector duly forwarded the application to the Special Judge pursuant to section 6.

On the 9th October application was made by the same parties to the Civil Judge of Allahabad for a stay of the execution proceedings and recall of the transfer certificates; and on the 10th October an order was made by the Civil Judge to that effect. On the 21st October the appellant Jyoti Bhusan also applied to the Collector of Benares for the benefit of the Act and the Collector forwarded his application also to the Special Judge as required by section 6.

In that state of the proceedings the respondent Shiva Prasad on 19th February, 1937, applied to the High Court of Allahabad to set aside or vary the order of the Civil Judge dated 10th October, 1936, staying the execution proceedings and recalling the transfer certificates. For some reason this application was made in revision under section 115 of the Code but it was treated as an appeal and was referred to a Full Bench. On 12th October, 1938, Bennet, Ismail, and Varma JJ. allowed the appeal and directed that execution should proceed. In their joint judgment they say: " We do not think that the Act was intended at all to apply to the subject of partition among the members of a joint family and accordingly in our opinion the subject is one which is repugnant to the definition of the word ' debt ' in section 2, clause (*a*) of the Act." Hence in their view " the present Act does not apply the word ' debt ' to the present case." The learned Judges point out that under the Act the sum decreed in the present case would come in the last of the six classes mentioned by section 16 being merely an unsecured debt; so that if the property be not sufficient to discharge all the other classes of debt, the result of applying the Act would be as they put it, " to deprive the appellant of part of his share in the joint family property." They do not think that this can ever have been the intention of the legislature. " We do not see why the Encumbered Estates Act should be introduced in order to give one member of the family more than his share and to give another member of the family less than his share."

The interpretation of the Act upon the point now raised cannot depend upon any facts special to the present case but their Lordships will make some reference to its special features in due course. The first question is whether it can be held that the Act has no application to an obligation imposed or assumed at the time of partition to pay money by way of " owelty "—that is, in order to equalise the division of the property or to make it correspond with the parties' shares in the joint property. Their Lordships are unable to accept the conclusion of the Full Bench upon this point, and think that such an obligation is a debt in the ordinary meaning of the word and in the meaning indicated by section 2. The Act contains no exception in respect of such an obligation, and must in their Lordships' view be applied to the present case.

The benefit which the Act confers upon a landlord who is subject to private debts and has requested that its provisions be applied to him includes a stay of legal proceedings against him and the avoidance of execution processes; the ascertainment by the Special Judge of his debts which are then ranked in a particular manner for priority; and the realisation of his property and payment of his debts by a process of execution carried out by the Collector. This process is designed to preserve to the debtor landlord so far as possible his proprietary interests in land by meeting his debts in the first instance and so far as possible out of other property or by granting mortgages. Where these methods do not suffice provision is made for further measures. These have been altered and added to since 1936 when the present case arose and they need not be here detailed.

It is enough to say that the Act involves a species of administration of the debtor's property more favourable to the debtor than the ordinary law of insolvency provides and that while debts due on account of goods supplied and services rendered rank before other unsecured debts, the ordinary unsecured creditor comes last.

If the Act is to be regarded as a new provision it seriously interferes with the ordinary rights of persons who have given credit to the landlord. The particular reason for which the credit was given may make the hardship greater or less, but it is at least clear that the Act makes no discrimination between debts according as they were incurred before or after it was passed. Again it is always possible to put the case of a landlord obtaining credit on one day and claiming the benefit of the Act on the next. Even so, it may doubtless be considered that it would be wise to exempt from the operation of the Act a number of matters. Indeed the High Court make mention *inter alia* of maintenance, trust money, trade debts, rent of houses or shops and somewhat incautiously say:

> " There are no doubt many other amendments which might be made and in our opinion the present case is one which should not come under this subsection. Instead of specifying all the matters which should be excepted from the operation of this definition the legislature has made provision for the discretion of Courts in these words ' unless there is anything repugnant in the subject or context.' "

Their Lordships express no opinion upon the policy of the Act or the desirability of the suggested exceptions but they cannot omit to observe that difficulties might arise if processes of execution for certain kinds of debt were to go on at the same time as the processes of realisation contemplated by the Act. On this point analogies taken from insolvency law and the exception made by the Act for a liability for unliquidated damages may prove to be deceptive. But with all respect to the learned Judges of the High Court, the words which they stress and which govern all the clauses in section 2, are not intended to entrust the Courts with a discretion, and do not justify them in cutting down the ordinary meaning of the word " debt " or the phrase " any pecuniary liability except a liability for unliquidated damages " on the ground that they do not think that a particular case should come under the Act. This is a question and a debateable question of policy and not a question of something in the subject or context being repugnant to what is expressly stated to be the meaning of the word.

In the United Provinces, arbitrators, commissioners of partition, and Courts, before making an unequal partition and providing for payment of money to equalise the shares, would do well to consider the provisions of the Act: and in all Provinces attention must be given in such cases to the risk that the payment ordered may not be made. For lack of proper care upon this point a scheme of partition may work injustice, being effective in part and in part failing of effect. The time of partition is the time to provide against this. Where land is unequally divided, it may be possible to give a charge upon the portion allotted in severalty to one sharer for the money which he is directed to pay to a co-sharer: or the money may be made payable at the time of partition: or the transaction may be put in the form of a future sale or of an option to buy some part of the land. There are doubtless other methods which may be taken in a proper case to exclude the element of credit. But if credit be given and no security of any kind provided for there is always a risk that the property allotted in severalty may be dealt with or taken in execution and the co-sharer left unpaid. The ordinary law of insolvency may have that result—an unfortunate result no doubt and one which defeats the expectations with which the partition was made. But if the debtor is a landlord and is involved in debt so that administration—partial or total—of his property has become necessary, it is far from plain that an unsecured creditor should have preferential treatment on that account or should be allowed to ignore the liquidation and attack the debtor's property on his own behalf. An Act which is expressed to say the contrary cannot be interpreted as though the contrary were " repugnant to the subject or context."

The assets partitioned in the present case included besides zemindari and house property and Government securities the assets of a firm with an extensive money lending business. It may well have been undesirable to have a complete division of the business assets and very necessary to provide against the sudden withdrawal of a large amount of capital. The partition award of 1925 contained elaborate provisions postponing in certain events the liability which it imposed upon that branch of the family which the appellants now represent. It would seem that in 1934 the sum outstanding amounted to more than 9 lacs and in 1936 to more than 11 lacs. This debt though large and though postponed was unsecured and the assets which were allotted to the appellants' branch became the property of that branch in severalty and indeed its business assets. Such a provision entailed manifest risk of non-payment though it may well have been fair enough in all the circumstances and the best arrangement that could be devised. The respondent Shiva Prasad may be in no way to blame for the delay. But in a competition between creditors of the appellants in 1936, the claim that such a debt cannot be treated like any other unsecured debt seems to have little force.

It has been drawn to their Lordships' attention that though the appellant Jyoti Bhusan was a party to the appeal brought in the High Court, he never obtained a separate order from the Civil Judge staying execution proceedings against his branch, but no point was made of this in the High Court and there is no substance in the objection. Their Lordships agree that the transfer certificate sent to the Court at Calcutta was rightly recalled by the Civil Judge of Allahabad as well as those sent to Courts within the Province.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be allowed, the decree of the High Court dated 12th October, 1938, set aside, and the order of the Civil Judge of Allahabad dated 10th October, 1936, restored. The respondent Shiva Prasad will pay the appellants' costs in the High Court and one set of costs in respect of this appeal. There will be a set-off of such costs against the sums owing under the partition decree.

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