Raghunath Keshava Kharkar

Vs

Ganesh and Others

Civil Appeal No. 98 of 1962

(P. B. Gajendragadkar, K. N. Wanchoo, K. C. Das Gupta JJ)

02.05.1963

JUDGMENT

WANCHOO J. –

This is an appeal on a certificate granted by the Bombay High Court and arises out of a suit filed by the appellant as a Hindu reversioner to recover possession of properties alienated by a Hindu widow. The property in suit was the self-acquired property of one Ganpatrao Jairam who died in 1894 leaving behind two widows, Annapurnabai and Sarswatibai. Ganpatrao had executed a will by which property in village Dahisar was given to Annapurnabai and property in village Nagaon was given to Sarswatibai. The will further provided that a dwelling house together with structures and open land situate at Thana would remain with his two wives who would enjoy the same. There were other dispositions in the will with which we are however not concerned now. Annapurnabai was also authorised to make an adoption on the advice of the executors appointed under the will; but the adopted son was to have no right or connection with the movable and immovable property devised to Annapurnabai during her life-time and was to take the property devised to her only after her death. The adopted son was also to take the immovable property bequeathed to Saraswatibai after her death. It may be added that no son was adopted by Annapurnabai and this aspect of the matter therefore need not be considered further. Annapurnabai died on September 17, 1915, and she had executed a will before her death. After Annapurnabai's death, Saraswatibai began to manage the property. It may be added that Sarswatibai had adopted a son, but this was said to be against the provision in the will of her husband which specifically directed that she could only adopt if Annapurnabai died without making an adoption from amongst the family on the advice of the executors. There was therefore litigation in connection with the adoption between Saraswatibai and Balkrishna Waman, one of the legatees under will of Ganpatrao, which ended in favour of Balkrishna Waman. Saraswatibai died in 1943.

The case of the appellant was that the will of Ganpatrao merely gave widow's estate to Annapurnabai an Saraswatibai. Consequently Annapurnabai could not dispose of the property given to her by will and the bequests made by her were not binding on the appellant as the next reversioner. It was also alleged that the will made by Annapurnabai was vitiated by the exercise of undue influence brought to bear on her by Balkrishna Waman, who was the husband of her niece. Saraswatibai also made certain alienations and the appellant contended that the sale by Saraswatibai was due to the undue influence exercised on her by Balkrishna Waman, and in any case there was no legal necessity for transfer and therefore the transfer was not binding on the appellant. The main defendant in the suit was Ganesh, a son of Balkrishna Waman. In addition there were twelve other defendants who were alienees in possession of the property and were joined in the suit as the appellant prayed for recovery of possession from them also.

The suit was resisted by the main defendant Ganesh for two main reasons. It was first contended that the appellant was an undischarged insolvent at the time succession opened in 1943 and therefore whatever property might come to him as a reversioner vested in the official receiver. Therefore, the appellant had no right to bring a suit to recover possession even after his absolute discharge because the property never vested in him. Secondly, it was contended that by his will Ganpatrao had granted an absolute estate to the two widows and therefore Annapurnabai had full right to make a will with respect to the property given to her and Sarswatibai had the right to make alienations if she thought fit. Besides these two main defences, it was also contended that the appellant was not the nearest reversioner and the alienations made by Sarswatibai were for legal necessity. The same defence was raised by the other defendants. In addition the alienees from Sarswatibai contended that they were bona fide purchasers for value without notice of the defect in their vendor's title and therefore the alienations made in their favour could not be set aside. They further pleaded that they had made substantial improvements on the properties purchased by them.

On these pleadings as many as eighteen issues were framed by the trial court. Two of these issues covered the two main defences which were raised, namely,

> (1) Is the plaintiff entitled to maintain the suit due to his insolvency as alleged by the defendants ?
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> (2) Had Annapurnabai no authority to will away the properties in her possession ?

The trial court held that the plaintiff was entitled to maintain the suit. The third issue obviously raised the question whether the bequest to Annapurnabai was that of widow's estate or an absolute bequest, and the trial court held in that connection that the bequest to Annapurnabai was that of widow's estate and therefore she had no right to will away the properties in her possession. The trial court also gave findings on the remaining issues and finally declared that the alienations made by Saraswatibai on March 29, 1930 and April 16, 1935 were not for legal necessity and therefore were not binding on the appellant and the defendants of the suit were directed to deliver possession of the suit properties to the appellant. Inquiry as to mesne profits was also directed and finally the trial court ordered that notice be given to the receiver in the insolvency application No. 48 of 1939 to consider if he wanted the property to be made available for distribution amongst creditors in the aforementioned application.

The defendants then went in appeal to the High Court and two separate appeals were filed one by original defendant No. 3 and the other by original defendant No. 1 and some others. The two appeals were heard together by the High Court and the two principal questions which arose, according to the High Court, were as to -

> (i) the effect of the dispositions made by Ganpatrao under his will, and
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> (ii) the right of the plaintiff to maintain the suit when he was, at the date when the succession opened, an undischarged insolvent.

These two questions, it will be seen, correspond to the two issues raised by the trial court, which we have set out above. The High Court first considered the right of the plaintiff to maintain the suit and held that the plaintiff had no right to maintain the suit, as he was an undischarged insolvent at the time the succession opened and he could not maintain the suit even after his absolute discharge. The High Court further held that the disposition in favour of Annapurnabai of the property in Dahisar

amounted to conferment of absolute estate on her and further that the disposition in favour of Saraswatibai of the property in Nagaon amounted to conferment of absolute estate on her. On these findings the High Court dismissed the suit. Thereupon the appellant applied for a certificate which was granted; and that is how the matter has come up before us.

The first question that falls for consideration is whether the appellant can maintain the suit. It is necessary in that connection to see what the facts are with respect to the insolvency of the appellant. The appellant had filed an insolvency application in 1939 and was adjudged insolvent on March 11, 1940 and two years time was granted to him to apply for discharge. The appellant applied for discharge on July 6, 1942 and he was granted an absolute discharge in January, 1944. The succession to the estate of Ganpatrao had however opened on May 4, 1943 when the appellant was still an undischarged insolvent. Consequently, the case of the defendants-respondents was that under s. 28(4) of the Provincial Insolvency Act, No. 5 of 1920, (hereinafter referred to as the Act), the property which devolved on the insolvent after the date of the order of adjudication and before his discharge forthwith vested in the court or receiver. It is further urged that the property having vested in the court or receiver it must remain so vested even after the absolute discharge of the appellant for the order of absolute discharge merely absolved the insolvent from liability from payment of debts other than those mentioned in s. 44 of the Act. Therefore when the suit was brought in 1947 after the discharge the appellant had no title in the property as the title still vested in the court or receiver, and consequently the appellant could not maintain the suit for ejectment against those in possession of the property as he had no title on which he could base his right to sue for ejectment.

The question therefore that arises for determination is whether an insolvent on whom property devolves when he is an undischarged insolvent can maintain a suit for the recovery of the property after his absolute discharge. The decision of that depends on what effect the order of absolute discharge has on the insolvent's title to the property which developed on him when he was still an undischarged insolvent. It is to this narrow question, (namely, whether a suit brought by an insolvent after his absolute discharge with respect to property which devolved on him when he was an undischarged insolvent can be maintained by him), that we address ourselves hereafter. In view of this narrow question it is in our opinion unnecessary to consider those cases on some of which the High court has relied which deal with the right of the insolvent to maintain a suit while he is still an insolvent. What we say hereafter will only apply to a case where the suit is brought by an insolvent after his absolute discharge, though the right to property which is in suit devolved on him when he was an undischarged insolvent.

It will be necessary in this connection to consider briefly the scheme of the Act, to decide exactly what the consequences are when an absolute discharge is granted to an insolvent. Section 6 of the Act defines what are acts of insolvency. Section 7 gives power to a debtor or a creditor to make an application for insolvency, if the debtor has committed an act of insolvency. Section 9 deals with applications made by creditors and section 10 by debtors. Section 19 provides for the procedure for hearing an insolvency petition. Sections 20 and 21 provide for interim proceedings against the debtor and appointment of an interim receiver. Section 25 provides for dismissal of the petition on grounds mentioned therein. Section 27 gives power to the court to make an order of adjudication and the Court also has to fix a time therein within which the debtor shall apply for his discharge.

Section 28 with which we are mainly concerned lays down the effect of an order of adjudication. Sub-section (2) thereof provides that on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the court or in a receiver and shall become divisible among the creditors. Under sub-s. (7) this vesting will relate back to and take effect from the date of the

presentation of the petition on which the order of adjudication is made. Sub-section (4) which is also material lays down that "all property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the court or receiver, and the provisions of sub-s. (2) shall apply in respect thereof". This sub-section undoubtedly vests in the court or receiver any property which the insolvent acquires after the order of adjudication and before his discharge or which devolves on him in any manner, and such vesting takes place forthwith. Section 33 provides for the making of a schedule of creditors after the order of adjudication and s. 34 lays own what debts are provable under the Act. Section 56 provides for the appointment of receiver and s. 59 lays down the duties and powers of the receiver. Section 61 provides for priority of debts and s. 62 for calculation of dividends. Section 64 lays down that when the receiver has realised all the property of the insolvent or so much thereof as can, in the opinion of the court, be realised without needlessly protracting the receivership, he shall declare a final dividend. But before doing so, the receiver has to give notice to persons whose claims as creditors have been notified but not proved, that if they do not prove their claims within the time limited by the notice, he will proceed to make a final dividend without regard to their claims. After the expiration of such time, the property of the insolvent shall be divided amongst the creditors entered in the schedule without regard to the claims of any other persons. Then comes s. 67, which lays down that "the insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest as provided by this Act, and of the expenses of the proceedings taken thereunder".

It is clear from this scheme of the Act that the entire property of the insolvent belonging to him on the date the petition for insolvency is made vests in the receiver under s. 28(2). Further under s. 28(4) if any property is acquired by the insolvent or devolves on him after the order of adjudication and before he is discharged, that property also vests in the court or receiver forthwith. The receiver has to administer the property so vested in him and he has the power to sell the property and do various other acts provided in s. 59 for the purpose of the administration of the property. Generally speaking the receiver sells the property which vests in him and then distributes the money amongst the creditors who have proved their debts. But before the receiver declares the final dividend he has to give one more opportunity under s. 64 to creditors who might not have proved their debts at the earlier stage, to come and prove their debts. This will generally happen when all the property of the insolvent has been disposed of by the receiver, though s. 64 contemplates that the final dividend may be declared even if some property has not been disposed of when in the opinion of the court it will needlessly protract the receivership. Section 67 then finally provides that if any surplus is left in the hands of the receiver after payment in full to the creditors with interest and of the expenses of the proceedings under the Act, the surplus is to be paid to the insolvent. As we have said already, the final dividend is generally declared after all the property of the insolvent is disposed of but there may be cases when a final dividend may be declared without the disposition of all the property of the insolvent if in the opinion of the court that would result in needlessly protracting the receivership. But it is clear that under s. 67 if there is any surplus remaining in the hands of the receiver that surplus has to go to the insolvent.

Though this is the general scheme of the Act with reference to administration of property which vests in the receiver after an order of adjudication, there are two exceptions which may be noticed. Section 35 provides that where, in the opinion of the court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the court that the debts of the insolvent have been paid in full, the court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication. Section 37 then provides that "where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all

acts therefore done, by the court or receiver, shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the court may appoint, or, in default of such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the court may, by order in writing, declare". Special stress has been laid on behalf of the respondents on the provision in s. 37 which specifically lays down that the property of the debtor in case of annulment shall vest in such person as the court may appoint or in default of such appointment shall revert to the debtor, thus divesting the court or the receiver of the property which had vested in them under s. 28(2) or s. 28(4).

The second exception is to be found in s. 38 which allows compositions and schemes of arrangement. Section 39 then provides that if the court approves the composition or the scheme of arrangement, the terms shall be embodied in the order of the court and the order of adjudication shall be annulled and the provisions of s. 37 shall apply to such annulment.

Lastly, we come to what happens where the estate of the insolvent has been administered in the usual way which we have set out already. Section 41 authorises the debtor to apply for an order of discharge. On such an application the court has to consider the objections, if any, made by any creditor and also the report of the receiver in case a receiver has been appointed and thereafter the court may -

> (a) grant or refuse an absolute order of discharge; or
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> (b) suspend the operation of the order for a specified time; or
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> (c) grant an order of discharge subject to any conditions with respect to earnings or income which may afterwards become due to the insolvent, or with respect to his after acquired property.

Section 42 then lays down in what circumstances the court shall refuse to grant an absolute order of discharge; and we may refer to only cl. (a) of s. 42(1) in that connection which gives power to the court to refuse to grant an absolute order of discharge if it finds that the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, unless the insolvent satisfies the court that the fact that the assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible. Section 43 provides that if the debtor does not apply for discharge within the period fixed by the court, or does not appear on the day fixed for hearing his application for discharge, the court may annul the order of adjudication or make such other order as it may think fit, and if the adjudication is so annulled, the provisions of s. 37 shall apply. Section 44 then provides for the effect of the order of discharge. Sub-section (1) thereof mentions the debts from which the insolvent will not be released on an order of discharge. Sub-section (2) then provides that "save as otherwise provided by sub-section (1), an order of discharge shall release the insolvent from all debts provable under this Act". Stress is laid on behalf of the respondents on this provision and it is urged that though sub-s. (2) provides that the insolvent shall be released from all debts provable under the Act, it does not provide for revesting any property in the insolvent on an order of discharge.

It is thus clear from the above analysis of the provisions of the Act that if there is no annulment of the adjudication and no sanction of a composition or scheme of arrangement resulting in an order of annulment, insolvency proceedings terminate generally after the administration of the properties is

complete and a discharge is granted. The discharge may be absolute in which case the consequences mentioned in s. 44(2) apply. On the other hand discharge may be conditional in which case also the consequences of s. 44(2) apply subject to the conditions attached to the discharge in accordance with sub-s. 41(2)(c). Further in considering whether an absolute order of discharge should be granted or not, the court has to consider whether the insolvent's assets are of a value equal to eight annas in the rupee on the amount of his unsecured liabilities. Further before granting a discharge the court has to consider the report of the receiver if one is appointed. It is therefore reasonable to think that generally speaking an order of discharge will only be made after the court has considered the report of the receiver and has also considered that the assets of the insolvents are of a value equal to eight annas in the rupee on the amount of his unsecured liabilities. It is also not unreasonable to think in view of all the provisions that no order of discharge will generally be made till all the assets of the insolvent are realised, (see s. 64), though, as we have already pointed out, it is possible to declare a final dividend even though all the property of the insolvent has not been realised if in the opinion of the court such realisation would needlessly protract the receivership. In such a case however the court would generally pass an order protecting the interests of the creditors with respect to the property which has not been realised before the order of discharge. Finally there is s. 67, which provides that if there is any surplus remaining after payment in full of his creditors with interest and of the expenses of the proceedings taken under the Act, it shall go to the insolvent.

The key to the solution of the narrow question posed before us is in our opinion to be found in s. 67. It is true that s. 44 when it provides for the consequences of an order of discharge does not lay down that any property of the insolvent remaining undisposed of will revest in him and to that extent it is in contrast to s. 37, which provides for the effect of an order of annulment and in effect lays down that all sales and dispositions of property made by the receiver shall be valid, but if any property remains undisposed of it shall vest in such person as the court may appoint or in default of any appointment shall revert to the debtor-insolvent. The reason why s. 44 has not provided specifically for the reversion of undisposed property to the insolvent obviously is that the scheme of the Act does not contemplate where there is no annulment that any property which vested in the receiver would remain undisposed of. If as s. 74 shows the final dividend is generally declared when he receiver has realised all the property of the insolvent there would be no property left unadministered usually when an order of discharge comes to be passed. It is however urged on behalf of the respondents that there is nothing in ss. 41 and 42 to suggest that a discharge can only be granted after a final dividend is declared and therefore there may be cases where administration by the receiver may still go on after discharge has been ordered. This argument, in our opinion, is not quite correct, for cl. (a) to s. 42(1) definitely requires the court to consider whether the assets are of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, and this the Court generally speaking can only find out after all the property has been realised and final dividend has been declared. But, as we have pointed out, it is possible to declare a final dividend and thereafter to get an order of discharge even though some property may not have been disposed of where in the opinion of the court the realisation of such property would needlessly protract the receivership. Therefore it may be possible in some cases that all the property of the insolvent may not be disposed of before an order of discharge is made. But in such a case the court will generally pass the orders with respect to the property not disposed of when granting an order of discharge. It is true that the Act does not contemplate that an insolvent might get an order of discharge and yet retain part of his property free from the liability to pay debts provable under the Act, in case all the debts have not been paid off. But it is here that we have to look to the effect of s. 67 of the Act. That section lays down that the insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest as provided by the Act and of the expenses of the proceedings taken

thereunder. Now, often this surplus would be in the form of money. But take a case where an insolvent has come into property by devolution after he became insolvent and before his discharge; and suppose that the property which was devolved on him is worth a few lacs while his debts are only a few thousands. In such a case the receiver would not proceed to sell all the property; he would only sell so much of the property as would satisfy the debts in full and meet the expenses of the proceedings in insolvency; the rest of the property whether movable or immovable would not be converted into money. It seems to us that it would not be wrong in such a case to call such property whether movable or immovable which remains after payment in full to the creditors with interest and of the expenses of the proceedings in insolvency as "surplus". To this surplus the insolvent is entitled. In such a case therefore it would be proper to hold that if any property remains undisposed of in the shape of surplus that vests back in the insolvent, just as surplus in the shape of money would. It is true that cases may arise where what devolves on the insolvent after the order of adjudication and before his discharge may not be easily realisable or may be a matter of dispute which may lead to litigation lasting for many years. In such a case the receiver would be entitled to declare a final dividend if the court is of opinion that the property which has devolved on the insolvent is subject of protracted litigation and it cannot be realised without needlessly protracting the receivership. Such property would also in our opinion be surplus to which the insolvent would be entitled under s. 67 subject to his complying in full with the provisions of that section i.e. paying his creditors in full with interest and meeting the expenses of the proceedings taken under the Act. A third class of cases may arise where the court may not come to know of the property which devolves on the insolvent and grants a discharge in ignorance of such devolution, may be because the insolvent did not bring it to the notice of the court. In such a case also in principle we see no difficulty in holding that the property which vested in the receiver under s. 28(4) and which remained undisposed of by him before the discharge of the insolvent would still be surplus to which the insolvent would be entitled, though he may not be permitted to make full use of it until he complies with the conditions in s. 67, namely, until payment in full is made to his creditors and the expenses of the proceedings in insolvency are met by him out of the property so remaining undisposed of. Though therefore there is no specific provisions in terms in s. 44(2) with respect to property that may remain undisposed of by the receiver or by the court, like the provision in s. 37 on an order of annulment, it seems to us that s. 67 by necessary implication provides the answer to a case like the present. All the property which remains undisposed of at the time of discharge must be treated as surplus to which the insolvent is entitled. The insolvent will thus get title to all such property and the vesting in the receiver whether under s. 28(2) or s. 28(4) would come to an end on an order of discharge subject always to the insolvent complying in full with the conditions of s. 67 in case they have not been complied with before his discharge for he is entitled only to the surplus after the creditors have been paid in full and the expenses of all proceedings in insolvency have been met. Any other view of the effect of discharge would result in this startling position that though the insolvent is freed from his debts under s. 44(2) and is a freeman for all purposes the property which was his and which vested in the receiver under s. 28(4) will never come back to him and will always remain vested either in the court or the receiver. We have no doubt that the Act did not contemplate such a situation. We have already indicated the reason why s. 44 does not provide for revesting of property in the insolvent in contrast to the provision therefore in s. 37. Generally speaking it is not expected that there would be any property left to revest in the insolvent after the administration in insolvency is over. We have therefore to look to s. 67 which provides that the insolvent is entitled to any surplus remaining after payment in full of his creditors and after meeting the expenses of the proceedings taken under the Act; and it is that section which gives title to the insolvent in the property which remains undisposed of for any reason before his discharge subject to the conditions of that section being fulfilled even after the discharge. Just as the Act does not contemplate that an

insolvent would get an order of discharge and yet retain part of his property without meeting the debts provable under the Act in full, it is to our mind equally clear that the Act does not contemplate that after an insolvent has been discharged his undisposed of property, if any, should for ever remain in the possession of the court or receiver, even though in a particular case the creditors may have been paid in full out of the property disposed of and all the expenses of the proceedings under the Act have been met. In such a case it seems to us that it is s. 67 which must come to the aid of the insolvent and the property which remains undisposed of must be treated as surplus and he gets title to it. Where however the insolvent has been discharged without fully meeting the conditions of s. 67, he would in our opinion be still entitled to the surplus, even if it be in the shape of undisposed property, subject to his fulfilling the conditions of s. 67. It may be added that there is nothing in the Act which takes away the right of the insolvent to sue in courts after he has been granted a discharge, for he then becomes a free man. In such a situation we are of opinion that he would certainly be entitled to sue in court for recovery of his undisposed of property, if it is in the possession of a third party, after his discharge and such property cannot for ever remain vested in the court or receiver. All that justice requires is that in case the conditions of s. 67 have not been fulfilled such property should be subject to those conditions, namely, that he should be liable to discharge his creditors in full with interest and to meet the expenses of all proceedings taken under the Act. Subject to these conditions the insolvent in our opinion would be entitled to undisposed of property on discharge and would be free to deal with it as any other person and, if necessary, to file a suit to recover it.

It remains now to consider some of the cases which were cited at the bar. We have already pointed out that it is unnecessary to consider those cases which deal with the right of the insolvent to file a suit while he is still undischarged, though even on this point there seems to be difference of opinion in various High Courts as to the power of the insolvent; nor is it necessary to refer to the rule in Cohen v. Mitchel [(1890) 25 Q.B.D. 262.], which has found statutory expression in s. 47 of the Bankruptcy Act, 1914, (4 & 5 Geo. 5, ch. 59). Section 47 of the English Bankruptcy Act deals with transactions by a bankrupt with any person dealing with him bona fide and for value, in respect of property, whether real or personal, acquired by the bankrupt after the adjudication, and provides that all such transactions shall be valid if completed before intervention by the trustee (i.e. the receiver). In England, therefore intervention by the trustee (i.e. the receiver) is required before completion of the transaction and if the trustee does not intervene the transactions are generally speaking good. That position of law however does not apply in India because of s. 28(4), which specifically lays down that all the property which is acquired by or devolves on an insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the court or receiver.

Learned counsel for the parties have not been able to cite any case which deals exactly with a case like the one before us. We may however refer to certain observations of learned Judges which may be helpful to show how the position has been understood by some High Courts with respect to surplus and also with respect to what happens to undisposed of property after a discharge, though there is no discussion on the subject in the cases cited.

In Sayad Daud Sayad Mohd. v. Mulna Mohd. Sayad [(1926) 82 Bom. L.R. 554.], the Bombay High Court was dealing with a case where an insolvent had filed a suit to recover property four days after he had been adjudicated insolvent. Later the official assignee wanted to join as a new plaintiff when he came to know of the suit; but by that time it appears that limitation had expired, and the question arose whether the suit would be said to have been filed afresh on the date the official assignee intervened. It was held that that was so, for the insolvent could not maintain a suit after he had been adjudicated insolvent and so far as the official assignee was concerned the suit must be held to have

been filed on the date he asked for intervention and would therefore be barred by time. It will be seen that the case deals with a suit brought by an undischarged insolvent and not with a suit as in the present case brought by a discharged insolvent. But the learned Judges observed that the vesting order for the time being was paramount, even though an insolvent might eventually be entitled to what might remain as surplus after satisfying his creditors, thus showing that what remains as surplus becomes the property of the insolvent.

Yellavajjhula Surayya v. Tummalapalli Mangayya [A.I.R. (1941) Mad. 345.], is a case more directly in point. In that case the plaintiff was declared an insolvent in 1919. He was still an insolvent in 1929 when certain property devolved on him as reversioner. He was granted an absolute discharge in August 1931. No creditors had come to prove their debts or to take steps between 1919 and 1929; nor did the official receiver take any step prior to 1929 or between 1929 to 1931. After his absolute discharge, the plaintiff instituted a suit for recovering the property. In that suit, Varadachariar J. observed - and, if we may say so with respect, rightly - that the construction of cl. (4) of s. 28 was not free from difficulty; but went on to add that there was nothing in the policy of the Insolvency Law to suggest that it was intended to benefit strangers, and in the circumstances the plaintiff could maintain the suit, though the learned Judge added that nothing that was said in the judgment would prejudice the right, if any, of the official receiver or of the creditors of the plaintiff to assert such rights and remedies as they might have in law in respect of the suit properties. It will be seen that this case was almost similar to the case before us and the court held that in such circumstances the discharged insolvent could maintain the suit, though the reasoning was only in one sentence, namely, that there was nothing in the policy of the Insolvency Law to suggest that it was intended to benefit strangers.

In Rup Narain Singh v. Har Gopal Tewari [I.L.R. (1933) 55 All. 503.], an insolvent acquired some property after the order of adjudication. It was apparently not brought to the notice of the receiver and was mortgaged by the insolvent while he was still undischarged. Later after his discharge the mortgagee brought a suit to enforce the mortgage. The insolvent mortgagor had transferred part of the property to other persons who were also made parties. These persons raised the defence that as the mortgagor was an undischarged insolvent when he executed the mortgage, it was void. The High Court negatived this contention and relying on s. 43 of the Transfer of property Act decreed the suit. In the course of the judgment the High Court however observed that after the order of discharge was passed, the property had been divested from the receiver and revested in the insolvent, though no reason was given for this view.

In Dewan Chand v. Manak Chand [A.I.R. (1934) Lah. 809], the facts were that a certain property devolved on an insolvent, who made a mortgage of it, apparently without bringing it to the notice of the receiver. After the insolvent was discharged, a suit was brought to enforce the mortgage and a question arose whether s. 43 of the Transfer of property Act would apply. In that connection the High Court observed that after the insolvent was discharged the property in question must be considered to have revested in the mortgagor on his discharge in the absence of any order to the contrary by the court.

We may now notice some cases on which reliance is placed to suggest that undisposed of property can never vest in the insolvent, even after he gets a discharge. In Arjun Das Kundu v. Marchhiya Telinee [I.L.R. (1937) I Cal. 127.], it was held that "an absolute order of discharge of an insolvent does not release any property acquired by him before such order from the liability to meet his debts provable in insolvency". That case, however, was only dealing with the effect of s. 44(2) of the Act and it was held that if there was any property which vested in the official receiver either under s.

28(2) or under s. 28(4) and that property was not disposed of before the order of discharge, the creditors would still have a right to get their debts discharged by the sale of that property even though they might not have proved the debts at an earlier stage. This case does not in our opinion support the proposition contended for by the respondents. It only lays down that the property which remains undisposed of would still be subject to the debts provable under the Act, and this is what in our opinion is the effect of s. 67 where only the surplus revests in the insolvent.

The next case is Kanshi Ram v. Hari Ram [A.I.R. (1937) Lah. 87.], there the facts were that a discharge was granted on the report of the official receiver to the effect that the insolvent's assets had been completely disposed of. Thereafter it was discovered that some property had devolved on the insolvent before his discharge and was not within the knowledge of the receiver. The High Court held that such property was liable to meet the debts which had not been paid in full before the discharge. This case also in our opinion only lays down that any surplus in the hands of the insolvent after his discharge is liable to the debts provable under the Act if they have not been paid in full, and this is in accordance with the provisions of s. 67, for the insolvent is only entitled to that property or money as surplus which remains after payment of his debts in full and after meeting all expenses of the proceedings under the Act.

The last case to which reference may be made is Parsu v. Balaji [I.L.R. (1944) Nag. 14.]. In that case also the insolvent had been discharged but his debts had not been paid in full. It was held in those circumstances that any undisposed of property would still be liable to meet the debts provable under the Act. This again in our opinion is in accord with s. 67 where the insolvent is only entitled to that surplus which remains after his debts have been paid in full and all the expenses of the proceedings taken under the Act have been met.

Therefore, on a careful consideration of the scheme of the Act and on a review of the authorities which have been cited at the bar, we are of opinion that an insolvent is entitled to get back any undisposed of property as surplus when an absolute order of discharge is made in his favour, subject always to the condition that if any of the debts provable under the Act have not been discharged before the order of discharge, the property would remain liable to discharge those debts and also meet the expenses of all proceedings taken under the Act till they are fully met. The view of the High Court that the suit is not maintainable is therefore not correct. The order of the trial court by which it held that the suit was maintainable and provided that notice should be given to the receiver in insolvency application No. 48 of 1939 to consider if he wanted the property to be made available for distribution amongst creditors, is correct.

Now we come to the second point raised before the High Court, namely, the effect of the will of Ganpatrao. By the first clause of the will, Ganpatrao appointed three executors. The bequest in favour of Annapurnabai was in these terms :-

> "The entire immovable property situate at the village of Dahisar, Taluka Kalyan, consisting of lands and tenements etc. is given to my senior wife, Annapoorna. During her life-time she shall enjoy, as owner, the income therefrom, in any manner she may like. No one shall have (any) right, title or interest therein".

The bequest in favour of Sarswatibai was in these terms :-

> "The entire immovable property situate at the village of Nagaon, Taluka Kalyan, consisting of lands and tenements etc. is given to my junior wife, Sarswati. During

> her life-time, she shall enjoy, as owner, only the income therefrom in any manner she may like".

Then there was another clause which gave them some property jointly, which was in these terms:-

> "The property consisting of a dwelling house and other structures and open space etc. situate at Thana shall remain with my two wives. Hence, they should live amicably and enjoy the same".

The High Court has held that the estate given to Annapurnabai in the lands at village Dahisar and to Sarswatibai in the lands at village Nagaon and the estate given to them in the house at Thana was an absolute estate subject to defeasance of the estate on their deaths in case a son was adopted by Annapurnabai.

It is true that the two clauses with respect to the demise of properties in villages Dahisar and Nagaon to the two widows use the words "owner"; but we have to read the clauses as a whole together with the surrounding circumstances then prevailing as also in contrast to the other clauses in the will to determine the intention of the testator. Now the clause with respect to village Dahisar is that the property in Dahisar was given to Annapurnabai and then goes on to say that during her life-time she would enjoy as owner the income therefrom in any manner she liked and no one else would have any right, title or interest therein. Reading the clause as a whole it seems to us fairly clear that the intention of the testator was that the property given to Annapurnabai was for her life and she was entitled to enjoy the income therefrom in any manner she liked without any interference by any one. If the testator's intention had been to give an absolute estate to Annapurnabai, there was no reason why he should have gone on to say in that clause, "during her life-time she shall enjoy as owner the income therefrom, in any manner she may like", for that would have been unnecessary in the case of a person who was given an absolute estate. Therefore these words appearing in the second clause are clearly words of limitation and show on the reading of the whole clause that the intention of the testator was to confer a life estate on Annapurnabai. In the case of the property in village Nagaon, the matter is clearer still, for the testator said that Sarswatibai shall enjoy as owner, only the income during her life-time. These are clear words of limitation and show on reading the clause as a whole that the intention of the testator was to confer only life estate on Sarswatibai. As to the clause relating to the dwelling house etc. in Thana, it is remarkable that that clause does not even use the word "given"; it only says that the dwelling house etc. "shall remain with my two wives" i.e. that they will be in possession so long as they live. The further sentence that they should live amicably and enjoy the same, makes in our opinion no difference to the intention of the testator, which is clear from the fact that he wanted these properties to remain with his two wives, i.e. he was only giving them the possession of the property for enjoyment for their lives.

In this connection it may be well to contrast the language of some other clauses in the will where the bequest was obviously of an absolute estate. Take the bequest relating to Sirdhon village in favour of Balkrishna Waman Kharkar. It is in these terms :-

> "The entire immovable property situate at Sirdhon village, taluka Panvel, consisting of lands and tenements etc. is given to Chiranjiv Balkrishan Waman Kharkar. He shall enjoy the same as owner. Neither my two wives nor others whosoever shall have any right, title or interest etc. whatever therein".

This is a clear bequest of an absolute estate. There is no mention of any income in this clause and

also no mention of the life time of the legatee. Obviously, therefore, where the testator was intending to bequeath an absolute estate he used enquiry different language from that used in the three clauses with respect to his wives.

Contrast again the language relating to the bequest of movable property in favour of the two wives. That clause is in these terms :-

> "Movable property such as ornaments and trinkets and clothes and raiments etc. which may have been given to any party shall remain with the said party and my two wives shall be fully entitled thereto. They shall deal with the same in any manner they like".

The use of the words "fully entitled" clearly indicates the bequest of absolute estate so far as movable property is concerned; but we find no similar words in the clauses relating to bequests of property in villages Dahisar, Nagaon and Thana.

This conclusion as to the nature of the interest bequeathed to the two wives is strengthened by another provision in the will. Under that provision Annapurnabai was authorised to adopt a fit boy from amongst the family, on the advice of the executors. It was also provided that the adopted son shall have no right of any kind whatever to the movable and immovable properties so long as Annapurnabai remained alive. But on her death he was to be entitled to these properties. It was further provided that on the death of Sarswatibai the adopted son would become entitled to the immovable property bequeathed to her. Now if the estate bequeathed to Annapurnabai and Sarswatibai was an absolute estate, it is difficult to see how the testator could provide that on the death of Annapurnabai and Sarswatibai the properties bequeathed to them would go to the adopted son. The holder of an absolute estate would be entitled to sell it if she so desired, and therefore there could be no provision in the will that on the deaths of Annapurnabai and Sarswatibai, the property bequeathed to them would go to the adopted son. This provision therefore read with the provisions in the three clauses relating to the bequests of properties in Dahisar; Nagaon and Thana clearly shows that the bequest of those properties in favour of the two wives was only a life estate. We cannot therefore agree with the High Court the estate given to Annapurnabai and Sarswatibai whether in Dahisar, Nagaon or Thana was an absolute estate. In our opinion it was life estate only. It may also be added that Ganpatrao died in 1894 when it was more usual to give life estate to widows and the terms in the various clauses in the will are in our opinion in consonance with the prevailing practice in those times.

In the view that we have taken it follows that the judgment of the High Court must be set aside. However as the High court has only considered these two questions, the case will have to be remanded so that the High Court may go into the other issues raised and decided by the trial court.

Lastly we may refer to another contention on behalf of the respondents. It appears that Shamdas Narayandas and Jaigopal Narayandas purchased property in village Dhokali-Manpada in Taluka and sub-division of Thana, described as lot No. 8 in the first schedule to the plaint. It appears that there was one sale deed in favour of these two defendants. Of these defendants, Jaigopal Narayandas died on April 19, 1960, after the decree of the High Court which was given on March 7, 1957, and also after the grant of the certificate by the High Court in May, 1958, and the order admitting the appeal by the High Court in April, 1959. The record was despatched to this Court in 1962. No application was however made to the High Court till August 13, 1962, for substitution of the heirs of Jaigopal Narayandas. When the application was made in August 1962, for substitution, the High Court

dismissed it on January 9, 1963, on the ground of limitation. There was then a review application filed before the High Court, which was also dismissed on February 12, 1963. Thereafter the petition of appeal was filed in this Court on March 13, 1963. Then on April 3, 1963, an application was made to this Court for substitution of the heirs of Jaigopal Narayandas. The respondents contend that as the heirs of Jaigopal-Narayandas were not brought on the record within the time allowed by law, the entire appeal abates. We are of opinion that the interests of the various defendants who are in possession of various properties are independent and therefore the whole of the appeal cannot abate because the heirs of certain deceased defendant in possession of one property have not been brought on the record. So far as lot No. 8 is concerned it was the common property of Shamdas Narayandas and Jaigopal Narayandas, which they apparently acquired by one sale-deed. We are not prepared to condone the delay in bringing the heirs of Jaigopal Narayandas on the record and therefore dismiss the application dated April 3, 1963. The effect of this will be that the suit will abate in so far as the property in lot No. 8 is concerned. It is not shown that the interest of the two purchasers who are presumably members of an undivided family were separate and distinct and so there cannot be partial abatement only in regard to the share of the deceased purchaser; but that cannot affect the appeal in so far as the property in other lots is concerned. The High Court on remand will therefore go into the other issues with respect to properties in lots other than lot No. 8. We therefore allow the appeal and remand the case to the High Court for decision on other issues so far as lots (other than lot No. 8) in the first schedule to the plaint are concerned. So far as lot No. 8 is concerned, the appeal abates and is dismissed. In the circumstances we pass no order as to the costs of the appeal with respect to lot No. 8, so far as the costs of the appeal with respect to other lots are concerned, the respondents will pay the costs of the appellant including advocate's fee of this court & the Court fees also.

Appeal allowed.

Case remanded.

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