(1967) 06 CAL CK 0024

Calcutta High Court

Case No: Appeal from Order No. 160 of 1966

Sitaram Sawhney and Another		APPELLANT
	Vs	
Kundanlal Sahni and Others		RESPONDENT

Date of Decision: June 13, 1967

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1, Order 23 Rule 3, Order 30 Rule 6, Order 41 Rule 33, Order 43 Rule 1(m)
- Partnership Act, 1932 - Section 18, 19
- Presidency Towns Insolvency Act, 1909 - Section 10, 116, 12, 13, 16

Citation: 71 CWN 1062

Hon'ble Judges: S.K. Mukherjea, J; A.N. Ray, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

A.N. Ray, J.

This appeal is from the judgment and order of Banerjee, J., in insolvency proceedings. The judgment is dated 21 June 1966. It will appear from the order that the parties appearing having consented to an order being made it was ordered that the debtors Bharat Tea Co. and its partners Krishanlal Sawhney, Sitaram Sawhney and Sri Ram Sawhney shall pay to the applicant creditor a sum of Rs. 3,000/- on 25 June, 1966 and shall thereafter pay month by month beginning from the month of July 1966 within the last date of each succeeding month a sum of Rs. 3,0001-and shall go on making such payments until the debt is paid up and liquidated. It was further provided in the order that in default of paying the money within 25 June 1966 and in default of making two successive payments of Rs. 3,000/- an adjudication order is deemed to have been made in respect of the estate of Bharat Tea Company, Krishanlal Sawhney. Sitaram Sawhney and Sri Ram Sawhney and in respect of partnership firm Bharat Tea Company, the said persons and the said firm carrying on business at 17, Ezra Street, Calcutta and Sitaram Sawhney and Sri Ram

Sawhney at present residing at 67/7, Main Rothak Road (also known as New Rohtak Road), New Delhi-5. The further order was that the Official Assignee shall continue to act as such Receiver until the debt is paid off and the Official Assignee as such Receiver shall be entitled to his commission under Rule 13 of the Accounts Rule at one per cent on the valuation of the properties at Rs. 55,000/-. It is also provided that if the debtors do not pay the commission to the Receiver the applicant creditor shall pay the same to him in the first instance and any sum so paid to the Official Assignee be added to the amount of the debt and the same shall be repaid by the debtors by installments. Finally it is provided that the Official Assignee as Receiver will hand over the property to the debtors after the debt is paid off and liquidated including the commission. In the first paragraph of the judgment of the it is said that by consent it was ordered that the debtors shall pay to the creditor a sum of Rs. 3,000/- within a week of the judgment and thereafter would pay month by month a sum of Rs. 3,000/- until the debt was paid off and liquidated. It is also stated in the judgment that if the debtors make default in payment of the installments month by month, an order in terms of prayer (i) of the Notice of Motion shall be deemed to have been made on the date of such default and in that event the debtors will be liable to the costs of this application. The Official Assignee was also directed by the judgment to continue as interim Receiver until the debt was paid off. The Official Assignee was also entitled under the judgment to commission and if the Official Assignee was not paid, the petitioner was at liberty to pay the same and add the amount so paid to his claim and the debtors would be liable for the entire amount.
2.The appellants are Sitaram Sawhney and Sri Ram Sawhney.

3. Counsel on behalf of the appellants contended first, that the order is contrary to law inasmuch as it was made without proof of service of the petition upon the appellants as required under the Insolvency Act and Rules there under. The second contention was that the order was contrary to law inasmuch as the court did not require proof nor make any finding as to act of insolvency which is the very foundation of an adjudication order. Reference was made to sections 9, 10, 12, 13, 51 and 52 of the Presidency Towns Insolvency Act and Rules 74-80, 94(1) & 94(2) & Form No. 10 in support of the contention that the order violated the provisions of the Act and Rules by not mentioning the act of insolvency. The third contention was that the entire order was bad because it is made by consent of parties and the court did not have any such power to make the order.

4. The contentions on behalf of the respondents are first that the order is not appeal able because the parties consented to the order, secondly that the order is not entirely based on consent but the court applied its mind to the facts of the case and made an order at the invitation of and accompanied by the consent of the parties and thirdly that the questions raised by the appellants are not the subject-matter of appeal.

5. The application was made on 2 March 1966 and the Notice of Motion was taken out on 23 March 1966. The parties to the Notice of Motion were Bharat Tea Company, a firm, Krishan Lal Sawhney, Sitaram Sawhney and Sri Ram Sawhney. The firm was described as carrying on business at No. 17. Ezra Street, Calcutta, Krishan Lai Sawhney carrying on business at No. 17, Ezra Street, Calcutta and Sitaram Sawhney and Sri Ram Sawhney were described as regarding at No. 67/7, Main Rohtak Road, New Delhi. The applicant was Kundanlal Sahni a creditor The applicant asked for an adjudication order in respect of the estate of (a) Bharat Tea Company, (b) Krishanlal Sawhney, (c) Sitaram Sawhney and (d) Sri Ram Sawhney and in respect of partnership firm of Bharat Tea Company, the said persons and the firm carrying on business at No. 17, Ezra Street. Calcutta and Sitaram Sawhney and Sri Ram Sawhney residing at No. 67/7. Main Rohtak Road, New Delhi-5.

6. In paragraph 4 of the petition the creditor alleged that on or about 1 August 1963 the creditor instituted a suit in this court upon six hundis which were made and drawn by Bharat Tea Company for the total sum of Rs. 30,058 and 6 paise upon Krishanlal Sawhney Krsihanlal Sawhney accepted the said hundis. In the said suit Bharat Tea Company and Krishan Lal Sawhney made an application for leave to defend. They were granted leave to defend on condition that the defendants would furnish security of Rs. 30,000/-within 18 November 1963. The defendants made three applications for extension of time to furnish security and time to furnish security was extended till 21 December 1963. The defendants failed to furnish security. On or about 24 January 1964 a decree was passed by this court for a sum of Rs. 30,058,06 paise with interest on the principal sum of Rs 30.000/- at the rate of six per cent from 1 August 1963 till realisation.

7. In paragraph 9 of the petition the creditor alleged the acts of insolvency. First, it is alleged that in execution of the decree the creditor made an application for attachment of the goodwill of the business of Bharat Tea Co., and its tenancy rights in respect of two rooms on the first floor of premises No. 17, Ezra Street, Calcutta. Secondly, it is alleged that on or about 2 December 1965 an ad-interim order of attachment of the goodwill and of the tenancy rights of Bharat Tea Company was passed by this court. The ad-interim order was made absolute on consent by Bharat Tea Company. Pursuant to the ad-interim order of attachment, the Officer of the Sheriff of Calcutta duly levied attachment on the goodwill and tenancy of the debtor firm on 4 December 1965. The said attachment was alleged by the creditor to be valid and subsisting on the date of the petition on 2 March 1966. Finally it is alleged that Bharat Tea Company and its partners failed and neglected to furnish the security and pay the decretal dues.

8. The interim order of attachment will appear at page 13 of the paper book. The interim order of attachment is dated 2 December 1965. The final order of attachment will appear at page 15 of the paper book. The final order of attachment is dated 18 January 1966.

9. It will appear from section 9 of the Presidency Towns Insolvency Act that a debtor commits an act of insolvency if any of his properties has been sold or attached for a period of not less than twenty-one days in execution of the decree of any court for the payment of money. According to the English law the act of bankruptcy must be a personal act and under English law no adjudication can be made against a firm in the firm name. Under the Presidency Towns Insolvency Act it will appear from section 99 of the Act that any two or more persons being partners or any person carrying on business under partnership name may take proceedings or be proceeded against under the Presidency Towns Insolvency Act in the name of the firm. There is a proviso to section 99 that in that case the count may, on application by any person Interested, order the names of the persons who are partners in the firm, or the name of the person carrying on business under a partnership name, to be disclosed in such manner and verified on oath or otherwise, as the court may direct. In the present case there is an adjudication order against the firm. It was rightly contended by counsel for the respondents that the adjudication order against the firm was effective against all the partners and all the partners were bound by the adjudication order against the firm. In other words, it was said that the firm not having appealed against the order, the partners of the firm who compromised with the firm could not impeach the adjudication order which has been made gains the firm.

10. The contention on behalf of the appellants was that the appellants did not appear, they did not consent and no warrant of attorney was filed on behalf of them. Here again, certain facts are to be referred to. First, it will appear from the order at page 95 of the paper book that on the part of the debtors an affidavit of Krishanlal Sawhney affirmed on 25 May 1966 and filed on 14 June 1966 was read. It will secondly appear from the order that Sitaram Sawhney and Sri Ram Sawhney debtors numbered 3 and 4 waived service of the notice on 13 May 1966. It will thirdly appear that Mr. Lahiri appeared for the debtors. The affidavit referred to in the order will appear at page 23 of the paper bock. Krishanlal Sawhney describes himself as a partner of the debtor''s firm and brother of debtors numbered 3 and 4 and in paragraph 1 of the affidavit he states that he is fully competent to affirm the affidavit on behalf of all the debtors. In the affidavit Krishanlal Sawhney stated in paragraph 4 that the hundis were stolen and were filed by the petitioner by committing forgery. The deponent thereafter said that though no payment had been made by the petitioner to the deponent the petitioner filed the suit. In paragraph 5 of the affidavit the deponent Krishanlal Sawhney stated that statements in paragraphs 5, 6 and 7 of the petition were matters of record. Paragraphs 5, 6 and 7 of the petition referred to the institution of the suit, the application of the defendants for leave to defend and the passing of the decree on 24 January 1964 for Rs. 30,058.06 ainst the debtors. In paragraph 9 of the affidavit Krishanlal Sawhney submitted as follows: "We honestly intend to repay the petitioner in full in suitable instalments failing which your Lordship may be pleased

to proceed with the adjudication proceeding against us."

11. The minutes of the court dated 13 May 1966 will show that Mr. Lahiri appeared for the debtors and that there was an extension of time to file the affidavit-in-opposition and the judgment debtors who had defaulted to file the affidavit-in-opposition within the time previously granted were directed to pay costs to the creditor assessed at 10 gold mohurs. The minutes further show that the creditor''s counsel was allowed to hand over the notice previously sent under registered post with acknowledgment due and subsequently received back undelivered to the counsel for the debtors-respondents and service on respondents Nos. 3 and 4 was waived. Reference may also be made to the letter dated 12 May 1966 written by Mr. Private Kumar Mitter to B. R. Lodge. In that letter the solicitor wrote as follows : "Please note that my counsel will mention the above matter on behalf of all the respondents before court on the 13th May 1966 at 10-30 A.M. when please attend." The matter mentioned was the Insolvency Case No. 6 of 1966 and the subject-matter of the letter was the pending petition for adjudication and appointment of a Receiver. These facts show that the appellants appeared and participated in the proceedings.

12. In the context of these facts counsel for the respondents contended that the grounds urged by the appellants that they did not appear, that they were not served with notice of the petition and that the court did not make any finding with regard to the proof of debts and acts of insolvency could not be agitated in this appeal. Counsel for the appellants contended that there was no warrant of attorney filed by the plants and therefore the court would proceed on the basis that there was no appearance on behalf of the appellants. It was not disputed that there was a warrant filed on behalf of the firm. The warrant that was filed on behalf of the firm was rightly contended by counsel for the respondents to be an appearance of all the partners of the firm.

13. One of the preeminent questions in this appeal is whether the order is by consent of parties. Counsel for the appellants did not contend that the order as it was drawn up showed that it was entirely by consent of parties. His contention was that the judgment showed that it was by consent and that there could be no order of adjudication by consent. Counsel for the appellants relied on the decision reported in Inamati Mallappa Basappa Vs. Desai Basavaraj Ayyappa and Others, in support of the contention that if an order was made by consent of parties it would be illegal and bad. In the decision reported in (1935) 1 Ch. 353 the question arose as to whether before a petition of bankruptcy was presented by moneylenders it was the duty of the Registrar before making and receiving the order to satisfy himself that all the requirements u/s 5(2) of Bankruptcy Act, Rule 171 of the Bankruptcy Rules 1915 and section 10 of the Money Lenders'' Act, 1959 had been complied with. In the Oudh case the question was whether the provisions contained in Order 23. Rule 3 of the CPC had any application to insolvency proceedings. In the Oudh case

there was no order either dismissing the petition or making an order of adjudication as required by section 27 of the Presidency Towns Insolvency Act. In the decision in (1) Inamati Mallappa Basappa Vs. Desai Basavaraj Ayyappa and Others, . the question was whether the provisions contained in Order 23 Rule 1 of the CPC were applicable to election petition and there could be a withdrawal of the election petition. None of these decisions is of any aid to the appellants in the present case. There is no question of application of the provisions contained in Order 23 of the Code. In the English case the question was whether the rate of interest under the Money-Lenders'' Act was complied with. The finding of the Registrar was not disturbed and there is an observation that apart from consent there should be other proof.

14. The question is whether there was any proof of debts. The creditor alleged the debt, alleged the suit and alleged the decree. The debtors did not impeach the decree. The decree was not challenged. It appears from the minutes, the order as drawn up and the judgment that the court took into consideration, the petition, affidavits and submission of parties. The submissions of the debtors were that they were willing to pay by instilments. In that context counsel for the respondents relied on the decision (2) In re. A Debtor, reported in (1943) Ch. 210 where the debtor had not given notice that he intended to dispute the petitioning creditors'' debt and he admitted it at the hearing of the petition it was held that it was not necessary for the petitioning creditors at the hearing of the petition to prove the debt by production of the usunl affidavit but that it was competent for the Registrar to make the receiving order subject to the filing on the same day of an affidavit proving the debt. In the present case the affidavit evidence is that the creditor gave affidavit evidence of the debt and the debtors did not give any evidence to rebut the evidence adduced by the creditors. On the contrary, the submissions made by the debtors were that the debts would be paid by instilments and those statements amount to acceptance of the debt. Rule 81 of the Insolvency Rules in the present case indicates that on the appearance of the debtors to show cause against the petitioning creditors'' debt, and the act of insolvency or such of those matters as the debtor shall have given notice that he intends to dispute, shall be proved, and if any new evidence of those matters, or any of them, shall be given, or any witness or witnesses to such matter shall not be present for cross-examination, and further time shall be desired to show cause, the court shall, if the application appears to the court to be reasonable, grant such further time as the court may think fit. Thereafter Rule 81A states that the court shall in the absence of an affidavit or oral evidence to the contrary presume the debt, mentioned in the creditors'' petition duly verified by affidavit as aforesaid, to be subsisting at the date fixed for the hearing of such petition or at such other date or dates to which the hearing of such petition may be adjourned. It therefore follows from the affidavit evidence, the order, minutes and the Rules under the Presidency Towns Insolvency Act that in the present case the debt was not impeached and the debt was proved by the petitioning creditor.

15. Counsel for the appellants referred to various decisions in support of the contention that if the order and the minutes and the judgment all taken together showed that there was consent as well as an order of the court it would be a composite order and therefore the appellants would have the right to appeal against the composite order. Recourse was taken to the provisions contained in Or. 43, Rule 1 (m) of the CPC and reliance was placed on the decisions reported in Kiran Singh and Others Vs. Chaman Paswan and Others, : AIR 1931 107 (Privy Council) : Jethmal Narandas Vs. Mahadeo Anandji Dhoria, : Jagdish Narain Vs. Rasul Ahmad and Others, . In the decision in (3) Kiran Singh and Others Vs. Chaman Paswan and Others, it is said that a decree passed by a court without jurisdiction was a nullity and that its invalidity could be set up at the stage of execution and in collateral proceedings. The question as to whether a decree which is without jurisdiction can be challenged in collateral proceedings or at any stage of execution is entirely different to the question as to whether a decree which is impeached on the ground of lack of jurisdiction can be so done in a appeal from an order which is said to be by consent or an order of court accompanied by consent of parties. In the decision in (4) Paban Sardar v. Bhupendra Nath Nag, reported in AIR 1917 Cal. 607, it is said that a decree under Order 23. Rule 3 of the Code would be said to be passed only after there had been an order that the compromise be recorded and if a consent decree be passed without such order the party had the right to appeal. There was a compromise. The court did not record the compromise but passed a decree. It therefore followed that if it would be recording or refusing to record a compromise it would be appeal able under the provisions contained in section 43, rule I, clause (m) of the Code. The decision in (5) AIR 1931 107 (Privy Council) was that where a decree or any part of a decree, was passed by consent of parties, it should always so appear on the face of the decree when drawn up. In that case there was some controversy as to whether the decree and the judgment were in consonance or in conflict. The decree did not mention consent but the judgment did. Therefore the Judicial Committee sent the case on remand to find out whether it was a judgment and decree by consent. In the decision in (6) AIR 1932 251 (Privy Council) when the same case came back from remand it appeared that the judgment and decree being upon the consent of the parties the court could not go into the question of sufficiency or otherwise of the consent.

16. The decisions on which counsel for the appellants relied are on the question as to whether a compromise which is either recorded or refused to be recorded is appeal able. The CPC confers the right of appeal. There is a reason for that. In proceedings under Order 23, Rule 1 of the CPC the court adjudicates upon what has come before the court by consent of parties. The adjudication by the court is not a consent order. When parties say that by consent there should be a compromise, it is a different proposition altogether when the court records or refuses to record the compromise.

17. In the present case it is established that of the debtors, the firm appeared and has not appealed against the adjudication order. Counsel for the appellants made a distinction between appearance of the partners and appearance of the firm by contending that the provisions contained in Order 30, Rule 6 of the Code related to appearance of partners. In the present case there is warrant filed on behalf of the firm. There is appearance of the firm. The firm represents all the partners. The partners appeared through the firm. Furthermore, it appears from the minutes that the debtors including the appellants appeared and they waived service. It also appears that the debtors by the affidavit lied submitted that they wanted time to pay. As far as the firm and the appearing debtors are concerned the order as drawn up, the minutes, the judgment all show that the entire order was passed on the submission of the parties to an order and the parties gave their consent and the court heard the parties and their submissions as well as their consent to the order proposed to be passed and in that context the court passed the order. There is an element of consent in the order and there is also the element that the court took into consideration the submissions of the parties as well as their consent to submit to the order. In that context the question of consent is of importance from two points of view; first if there is consent is it open to the appellants to appeal and secondly if there is consent is it competent to the appellants to impeach and challenge the consent as it appears from the materials on record.

18. With regard to the first point that if there is consent it is not open to the appellants to impeach that consent and contend to the contrary. Counsel for the respondents submitted that the question really rested on what is described as equitable estoppels and the principle that a party who has consented to an order is stopped from challenging the same. Counsel for the appellants relied on the recent decisions in (7) Pulavarthi Venkata Subba Rao and Others Vs. Valluri Jagannadha Rao and Others, , in support of the contention that a compromise decree is not a decision by the court and it is the acceptance by the flict. The decree did not mention consent but the judgment did. Therefore the Judicial Committee sent the case on remand to find out whether it was a judgment and decree by consent. In the decision in (6) AIR 1932 251 (Privy Council) when the same case came back from remand it appeared that the judgment and decree being upon the consent of the parties the court could not go into the question of sufficiency or otherwise of the consent.

19. The decisions on which counsel for the appellants relied are on the question as to whether a compromise which is either recorded or refused to be recorded is appeal able. The CPC confers the right of appeal. There is a reason for that. In proceedings under Order 23, Rule 1 of the CPC the court adjudicates upon what has come before the court by consent of parties. The adjudication by the court is not a consent order. When parties say that by consent there should be a compromise, it is a different proposition altogether when the court records or refuses to record the compromise.

20. In the present case it is established that of the debtors, the firm appeared and has not appealed against the adjudication order. Counsel for the appellants made a distinction between appearance of challenged by way of appeal more especially if the party appealing has taken advantage of the order. In the present case counsel for the respondents not only raised the bar of consent against the appellants but also rightly contended that the debtors including the appellants had taken advantage of the order by having submitted to the court to give time to the debtors to pay by installments and therefore it was no longer open to them to impeach the order. Counsel for the respondents also rightly relied on the Bench decision in (13) re. Bahirdas Chakravarti and others v. Nobin Chandra Pal and another, reported in 6 CWN 121 in support of the proposition that where the parties among themselves came to an agreement and in accordance with that agreement the court proceeded to make an order the parties by representation and an undertaking procured the order and were therefore stopped from acting contrary to deliberate representation and undertaking. This proposition means in essence that a party who invites the court to pass an order cannot thereafter turn round to attack the order. A classic illustration of this principle is to be found in the decision in (14) re. Ex part Pratt, reported in 12 QBD 334 where on the hearing of a bankruptcy petition, the debtor appeared and did not raise the objection to the proof of the bankruptcy petition and the receiving order was made, he was thereafter not allowed on an appeal from that order to raise the objection that the debt had not been proved. It should be stated here that in the present case as far as the proof of debt is concerned I am of opinion that the debt and the acts of insolvency were proved.

21. Counsel for the appellants relied on the decision reported in ILR 31 Cal. 357: AIR 1937 Mad. 239: Jethmal Narandas Vs. Mahadeo Anandji Dhoria, in support of the proposition that authority of a person to consent and want of power of a pleader to settle could be gone into by court on appeal from the order or decree. In the decision in (15) re. Monmohini Guha v. Bagla Charan Das, reported in ILR 31 Cal. 357 the question arose as to whether an agreement or a compromise as regards genuineness and execution of a will as lawful. It was said that any party to a suit had the right to repudiate the action of an agent compromising the suit without his knowledge and consent. In that case one of the signatories denied authority in the trial court. The trial court did not investigate that matter. Therefore it was not a consent order. In the decision in (16) re. Nandamani Anangabhima and another v. Modono Mohono Deo, reported in AIR 1937 Mad. 239 a pleader purported to do something which he had no power or capacity to do. An application for execution was presented by the pleader without any authority in his favour. It was not a question of defect in the pleader''s authority nor it was a question of an irregularity nor of an illegality. It was merely a question of want of power. This decision is of no aid to the appellants because the authority that was impeached in the Madras case was in the application itself.

22. In the present case the question is whether after there has been submission of the parties to the order it is open to the appellants to question the consent in the manner it has been agitated in the present case. If the judgment and order contained reference of consent the question for consideration is whether the appellate court will or will not go into the question the partners and appearance of the firm by contending that the provisions contained in Order 30, Rule 6 of the Code related to appearance of partners. In the present case there is warrant filed on behalf of the firm. There is appearance of the firm. The firm represents all the partners. The partners appeared through the firm. Furthermore, it appears from the minutes that the debtors including the appellants appeared and they waived service. It also appears that the debtors by the affidavit lied submitted that they wanted time to pay. As far as the firm and the appearing debtors are concerned the order as drawn up, the minutes, the judgment all show that the entire order was passed on the submission of the parties to an order and the parties gave their consent and the court heard the parties and their submissions as well as their consent to the order proposed to be passed and in that context the court passed the order. There is an element of consent in the order and there is also the element that the court took into consideration the submissions of the parties as well as their consent to submit to the order. In that context the question of consent is of importance from two points of view; first if there is consent is it open to the appellants to appeal and secondly if there is consent is it competent to the appellants to impeach and challenge the consent as it appears from the materials on record.

23. With regard to the first point that if there is consent it is not open to the appellants to impeach that consent and contend to the contrary. Counsel for the respondents submitted that the question really rested on what is described as equitable estopped and the principle that a party who has consented to an order is estopped from challenging the same. Counsel for the appellants relied on the recent decisions in (7) Pulavarthi Venkata Subba Rao and Others Vs. Valluri Jagannadha Rao and Others, , in support of the contention that a compromise decree is not a decision by the court and it is the acceptance by the where there was consent. It may be open to the parties to imp peach or attack the consent by a suit or other collateral proceeding but that is entirely a different aspect. What was rightly contended by counsel for the respondents was that if the appellants'' grievances were that they did not consent or that they did not authorise the firm or Krishanlal Sawhney or their lawyers to consent, there should have been either an application for review or other collateral proceedings to canvass that question before the trial court. The reasons are first that if the order refers to consent of parties it is not within the scope of the appeal whether there was consent or not because that itself is a dispute which is not within the scope of the appeal. Secondly, if that issue is raised as to whether there was a consent or not it will require evidence and investigation of facts, raising of issues which were not before the trial court in the

matter appealed from and therefore it would not be open to the appellants to have a right of attack to a consent order. Thirdly, the appellants might have had an application for review or might have had other proceedings but under no circumstances it would be open to the appellants to canvass this question in this appeal because this very dispute as to whether there was consent or not was not before the trial court.

24. Reference may be made to the Bench decision in 5 CWN 877 : ILR 10 Cal. 612 : ILR 30 Cal. 613, in support of these reasons. In the decision in (17) re. Biraj Mohini Dasi v. Sm. Chinlamoni Dasi reported in 5 CWN 877 it was said that the decree was passed by consent of parties. The question as to whether of not the compromise decree was valid could not be gone into on an appeal against that decree. After the final decree was made the defendants applied for a review and that application was dismissed. The defendants thereafter appealed against the preliminary as well as the final decrees in the partition suit. The compromise that was sanctioned by the court was on behalf of some minors and a decree was made in terms of that compromise. It was said by Maclean, C.J. "They cannot, upon the present appeal, go into the question of whether or not the consent decree is or is not binding upon the parties, that is a new and entirely distinct case raising new and distinct issues of fact, and may be of law, and which must be determined in a fresh and distinct proceeding. The appellants must get rid of that consent decree, they must have it set aside, if a proper case for setting it aside be made out; they cannot affect this object by appealing against it." Counsel for the appellants distinguished this decision by relying on the observation of Banerjee, J., in the same case that in so far as the appeal sought to show that there was no valid compromise to support the decree, it might be conceded that an appeal for that limited purpose might lie as a matter of law against a decree passed on compromise and contended that in the present case the order of adjudication was by consent and therefore it could not be sustained. Banerjee, J., in Biraj Mohini Dasi''s case, (5 CWN 877), referred to the case of (18) Brojo Durlav Singh v. Roma Nath Ghose, (1 CWN 597) in support of the observation. In Brojo Durlav''s case, (supra), a compromise was made and the agreement was recorded u/s 375 of the Code of 1882. In other words there was recording of compromise. The legality of that compromise could be attacked in an appeal. That is a different matter. In my opinion the order in the present case read in the light of the judgment and the minutes of the court and the affidavits shows that it was an order of the court accompanied by consent and submission to the order by the parties. Therefore it is not open to the appellants to contend that the order can be attacked on a question of law.

25. In the other Bench decision in (19) re. Aushootosh Chandra and another v. Tara Prasanna Roy, reported in ILR 10 Cal. 612, it was said that for the purpose of setting aside a decree passed in pursuance of a compromise there are two available modes of procedure - first by suit and secondly by review of the judgment sought to be set aside. The application for review was said to be preferable to a suit. In another

Bench decision in (20) re. Rakhalmoni Dassi v. Adwyta Prosad Roy, reported in ILR 30 Cal. 613, a compromise under a decree based upon it was sought to be set aside on the ground that a compromise was entered into by the guardian of a minor without the leave of the court having been granted and it was said that the proper course to set aside such a decree would be by way of an application for review but not by an appeal from the compromise decree. It was said that an appellate court could determine the appeal only upon the materials before it on record. In the present case the question is whether the order is entirely by consent or not. I have already expressed the view that it is not entirely a consent order, but it is an order of court which is accompanied by the consent of parties and submissions of parties to an order made by the court in the facts and circumstances of the case and on the basis of sub missions made orally and on affidavits. Therefore the consent aspect cannot be impeached on appeal in the present case because first it is not entirely an order by consent, secondly, the consent cannot be challenged on the record for reasons indicated earlier.

26. Counsel for the appellants relied on the Bench decision in (21) Abinash Chandra Bidyanidhi Bhattacharjee Vs. Dasarath Malo and Others, and contended that where some people appealed and others did not the court was sometimes put in a position having to make impossible or contradictory or unworkable orders and accordingly the court has been given power to make a decree in favour of persons who have not even approached the court. In other words, it was contended that the provisions contained in Order 41, Rule 33 might be attracted by the appellants in the present case by contending that though the firm and other partners had not preferred an appeal against the order the appellants wanted relief and such relief could be given even though the other parties had not preferred an appeal. Counsel for the respondent on the other hand relied on the Bench decision in (22) Amulyadhan Sinha Vs. Kanak Chandra Mustafi and Others, , in support of the contention that where some of the defendants filed petitions of compromise whereby they gave up their interest in the suit property in favour of the plaintiff the Appellate Court would not be justified in setting aside the decree in to against the non-contesting and non-appealing, defendants. In the present case it was said on behalf of the appellants that the court should hold that the appellants did not appear and therefore the order should be pronounced to be bad though the firm had not appealed. I have already expressed the opinion that the appellants appeared. The conduct of the appellants in the proceedings before the trial court repels any case of non-appearance. Further such totally conflicting position is indefeasible in the facts and circumstances.

27. It was contended by counsel for the appellants that as far as the appellants are concerned no warrant was filed. The minutes indicate that the appellants appeared through lawyers. The solicitor''s letter indicates that the solicitor acted for the appellants. The warrant field on behalf of the firm is an appearance of all the partners. It was said by counsel for the appellants that want of power of pleader to

consent would be a consideration in ascertaining whether there was consent or not. Counsel for the respondents, on the other hand, rightly contended that the filing of warrant of the firm would be appearance of each of the partners. Counsel for the respondents rightly relied on the decision in (23) Purushottam Umedbhai and Co. Vs. Manilal and Sons, . At page 330 of the report there is an observation of the Supreme Court that the power of attorney in that case was signed only by Manubhai Maganbhai Amin himself and not for the firm and though the power was not signed by all the partners of the firm Manilal and Sons but only by Manubhai Maganbhai Amin, it was not necessary that the power should have been signed by all the partners of the firm because Manubhai Maganbhai Amin was the Manager of the firm. The Supreme Court said that u/s 18 of the Act a partner is an agent of the firm for the purposes of the business of the firm and Manubhai Maganbhai Amin was the agent of the firm as well as its Manager. The Supreme Court also observed that in clauses (a) to (h) of section 19 of the Partnership Act, there was no prohibition against a partner executing a power of attorney in favour of an individual authorising him to institute a suit on behalf of the firm. Counsel for the respondents also relied on the decision in (24) Machireddi Narappa Vs. Proddatur Subbarayadu and Others, in support of the proposition that presentation of an execution petition by a vakil who has no vakalatnama from the decree-holder is a mere irregularity. The application in that case was filed within the period of 12 years and the subsequent filing of the vakalatnama after the period of 12 years was held to cure the formal defect The decision in (16) Nandamani Anangabhima & ors. v. Modono Mohono Deo reported in AIR 1937 Mad. 239 on which counsel for the appellants relied was a case where the pleader had not been appointed and it was not a question of defect in authority. In the present ease as I have already indicated the appellants appeared and made their submissions and the absence of a warrant of attorney on behalf of the appellant does not have the effect of showing that there was either no appearance or no authority to the lawyers to appear. The intrinsic evidence in the minutes and in the solicitor''s letter repels the contentions of the appellants.

28. It was contended by counsel for the appellants that the order as drawn up did not show that there was an act of insolvency and therefore, the order violated the provisions contained in sections 9, 10, 12, 13, 51 and 52 of the Presidency Towns Insolvency Act and Rules 74-80, 94(1) and (2) and Form No. 10. It was also contended on behalf of the appellants that the order was therefore made without jurisdiction. Counsel on behalf of the respondents on the other hand, contended that the order was not without jurisdiction and the statutory provisions were complied with. In my opinion if the court had jurisdiction to make an adjudication order and if the respondents did not contest and dispute the debt and the acts of insolvency, the court was not called upon to go into the question any further and the statutory conditions were all fulfilled as will appear from the order, the minutes and the judgment. The order in the present case is that the debtors were to pay certain

sums of money month by month and if the debtors made any default in payment of money an order in terms of prayer (i) -in the application would be deemed to have been made on the day of such default and in that event the debtors would also be liable to pay costs of the application. Form No. 10 on which reliance was placed by counsel for the appellants shows inter alia that it appeared to the court that the act or acts of insolvency has or have been committed and an adjudication order is made against the person named in the order. It appears in the Form that the nature and date or dates of the act or acts of insolvency on which the order was made are to be set out. It was therefore said that the acts of insolvency were not set out and it could not be said as to from which date there was insolvency. It will appear from Rule 94 following in Presidency Towns Insolvency Rules that an order of adjudication shall be made in one of the Forms Nos. 9 and 10 in the Appendix, with such variations as cir cumstances may require. Rule 96 states that a copy of every adjudication order, and order for the appointment of the Official Assignee as interim Receiver of the debtor''s property, sealed with the seal of the Court, shall forthwith be sent by the Registrar of this court to the Official Assignee. Rule 97 states that that the Official Assignee shall cause a copy of the adjudication order sealed with the seal of the Court, to be served on the debtor. Rule 99 states that when an adjudication order is made, the Official Assignee shall forthwith send notice thereof to the official gazette, and to such newspapers as the court may direct or in default of such direction as he may think fit. The notice shall be in Form No. 11 in the Appendix, with such variations as circumstances may require. Form No. 11 is that on a certain day an order was made by the High Court in its Insolvency Jurisdiction adjudging the person named therein as an insolvent. It therefore follows that after the Gazette Notification there is the publication in the Gazette of the adjudication and the date from which adjudication speaks.

29. In the case of (25) Exparte Learoyd In re. Foulds reported in (1878) 10 Ch. 3 a question arose that the Notification in the Gazette did not state the act of insolvency. The Notification of the adjudication order in Ex Parte Learoyd, (supra), did not set forth the act of bankruptcy and a point was made of it in the argument of Counsel but no notice was taken of it in any of the judgments. It was also stated that even if the acts of insolvency were stated in the Notification, the Notification would only have been evidence that act of insolvency mentioned in it was committed and not conclusive evidence thereof. It was also held that the adjudication Presidency Towns Insolvency Act and Rules 74-80, 94(1) and (2) and Form No. 10. It was also contended on behalf of the appellants that the order was therefore made without jurisdiction. Counsel on behalf of the respondents on the other hand, contended that the order was not without jurisdiction and the statutory provisions were complied with. In my opinion if the court had jurisdiction to make an adjudication order and if the respondents did not contest and dispute the debt and the acts of insolvency, the court was not called upon to go into the question any further and the statutory conditions were all fulfilled as will appear from the order, the minutes

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30. In the case of (25) Exparte Learoyd In re. Foulds reported in (1878) 10 Ch. 3 a question arose that the Notification in the Gazette did not state the act of insolvency. The Notification of the adjudication order in Ex Parte Learoyd, (supra), did not set forth the act of bankruptcy and a point was made of it in the argument of Counsel but no notice was taken of it in any of the judgments. It was also stated that even if the acts of insolvency were stated in the Notification, the Notification would only have been evidence that act of insolvency mentioned in it was committed and not conclusive evidence thereof. It was also held that the adjudication having been duly made must be founded on proof of a proper act of insolvency. The Notification must therefore be treated as a conclusive evidence that the act of insolvency was committed and not mere evidence of that fact. The provisions contained in sections 51 and 116 of the Presidency Towns Insolvency Act are that the insolvency of a debtor shall be deemed to have relation back to and to commence at the time of the commission of the act of insolvency on which the order of adjudication is made against him or if the insolvent is proved to have committed more acts of insolvency

than one, the time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition. The Notification in the Gazette is stated by the Act to be evidence of the facts stated in the notice and also to be conclusive evidence of the order having been made, and of its date. The effect of the two sections is that the Notification proves first the insolvency and secondly the date on which the adjudication order speaks. The Judicial Committee in (26) Md. Siddique Yousuf v. Official Assignee, reported in 70 I.A. 93 held that the order of adjudication was conclusive. The order of adjudication refers to (he petition and the acts of insolvency are mentioned there and the view in Mulla''s Insolvency Act 2nd Edition at pages 747. 748 is that the Notification in the Gazette need not state the acts of insolvency.

31. Counsel for the respondents relied on the Bench decision in (27) T. S. Gupta v. Kanahialal, reported in 68 CW N 358 and the decision in (28) Thorn v. Smith, reported in (1947) 1 KB 307 in support of the proposition that if a fact of jurisdiction were admitted it need not be proved. In the Bench decision in T. S. Gupta v. Kanahialal, (supra), a question arose as to where a decree was made for bona fide requirement of the premises and the defendant raised an issue as to that but at the trial did not dispute the bona fide requirement and the court did not go into the question of any further proof whether such admission was sufficient to attract the jurisdiction of the Court to pass a decree for ejectment. The English decision in Thorn v. Smith, (supra), refers to the earlier decision in (29) Barton v. Fin-cham. reported in (1921) 2 K.B. 291 where Atkin, L.J., observed that if the parties before the court admitted that one of the events had happened which gave the court jurisdiction and there was reason to doubt the bona fides of the admission, the Court was under no obligation to make any further inquiry as to the question of fact. These decisions were rightly relied on by Counsel for the respondents in support of the proposition that no further proof of insolvency was required in the present case in view of the facts and circumstances already referred to. that the debtors did not dispute the insolvency and the Court had sufficient evidence to pass an adjudication order on the evidence before it. Counsel for the respondents also relied on the decision in (30) Raja Killikoto, v. Chaitana Sahu & others, reported in 47 I.A. 200 in support of the proposition that the consent aspect in the present case would raise the estoppel u/s 96 of the C.P.C which precluded the Court from entertaining the appeals where the order had been passed by consent. I have already said that the order is not solely by consent but there is the element of consent It is in aid of that feature of consent that Counsel for the respondents relied on the observation of Lord Buckmaster in the Raja of Killikota''s case, supra, that if it were regarded as a consent judgment there could be no appeal; and if it were not regarded as a consent judgment then it became necessary to examine into the conditions as to whether the appeal should be decreed or not. If the consent were entirely controverted it is rightly said by counsel for the respondents that it is not the subject

matter of appeal. If, on the other hand, there was the consent as in my opinion there is unmistakable evidence of it in the records that feature of consent running through the records in the present case raises the bar against the appellants reopening the question of consent in this indirect manner.

32. Counsel for the respondents relied on the Bench decision in (31) Basangouda Giriyeppagouda Patil Vs. Basalingappa Mallangouda Patil, in support of the proposition that the plea of estoppel by res judicata may prevail even when the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute. It should be stated in the present case that here is no question of illegality because the order is not entirely and solely by consent. The plea of estoppel by res judicata in the words of Lord Hobhouse, in the decision in (32) Great North West Central Railway Company & ors. v. Charlebois & ors. reported in 1899 A.C. 114 is that if the legality of the act is one of the points substantially in dispute, that may be a fair subject of compromise in court like any other disputed matter. In the present case it was rightly said on behalf of the respondents that the debtors having participated in the proceedings by the oral representation and their affidavit evidence and the court having proceeded on that basis to pass the order of adjudication it is no longer open to the appellants to contend that the court did not find as a fact proved that insolvency was committed. It is rightly said that it was within the province of the Court to regulate its procedure as to proof and in the facts and circumstances of the case insolvency was found to have been proved and the order shews that there was insolvency. The last contention that was advanced on behalf of the appellants was that the order appointing the Official Assignee as Receiver was in violation of the Punj. Relief Indebtedness Act, 1934 and that the properties in the Punjab were not attached and therefore the Court could not appoint the Official Assignee as Receiver for an indefinite period which might extend beyond the date of adjudication order. It is also said that if the property vested in the Official Assignee by reason of adjudication order he could not be a Receiver and charge interest on the same property. The order does not show that the Official Assignee is appointed Receiver after the vesting order. The order is that upon default there will be the vesting order. u/s 16 of the Presidency Towns Insolvency Act the Court has power for the protection of the estate to appoint an interim Receiver. In the present case the Court has exercised that power. If after vesting any dispute arises with regard to the vesting or attachment of the residential house that is not the subject matter of the appeal. For all these reasons I am of the opinion that the contentions on behalf of the appellants fail.

The appeal is dismissed with costs. The costs of the appeal are to be added to the claim of the respondent No. 1. The costs of the Official Assignee are assessed at 15 gold mohurs and to come out of the estate. All interim orders are vacated. Parties to act on a signed copy of the minutes.

S.K. Mukherjee, J.

I agree.