APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

SANYASI CHARAN MANDAL 1914

v. March 17.

ASUTOSH GHOSE;

AND

KISHENCHAND KESHARICHAND

v.

SANYASI CHARAN MANDAL.*

Minor—Insolvency—Provincial Insolvency Act (III of 1907), ss. 4, cls. (b) (g), 16—Contract Act (IX of 1872), ss. 11, 247, 253, 254—Infant, adjudication of, as an insolvent—Receiver in Insolvency, powers of—Hindu joint-family—Bankruptcy Act 1883 (46 & 47 Vict., c. 52) ss. 33, 102—Insolvency of partner—Dissolution of partnership.

In India, as in England, an infant partner of a firm cannot as such be adjudicated an insolvent.

Lovell & Christmas v. *Gilbert Walter Beauchamp* (1) followed.

The creditors of the firm are not entitled to proceed against him personally, being restricted only to his interest in the property of the firm (*vide* s. 247 of the Indian Contract Act).

There is no difference in principle between the nature of the liability of an infant admitted by *agreement* in a partnership business and that of another (*e.g.*, a Hindu) on whose behalf an *ancestral* trade is carried on by his guardian.

Joykisto v. *Nityanand* (2), *Ram Partab* v. *Foolibai* (3) referred to.

It is not open to the Court to direct the receiver in insolvency to deal with assets other than those belonging to the persons who have been adjudicated insolvents.

Lovell & Christmas v. *Gilbert Walter Beauchamp*(1) explained.

* Appeals from Orders, No. 264 and 298 of 1912, against the orders of H. P. Duval, District Judge of 24-Parganas, dated March 15 ; May 10, 15, and 27, 1912.

(1) [1894] A. C. 607. (2) (1878) I. L. R. 3 Calc. 738.

(3) (1896) I. L. R. 20 Bom. 767, 777.

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Whereas in England the bankruptcy of a partner works dissolution of the partnership without an order of the Court, it is not so in India. *Vide* ss. 253, 254 of the Indian Contract Act.

A receiver appointed under s. 16 of the Provincial Insolvency Act merely replaces the insolvent partner in respect of the business of the firm.

The position of a receiver is the same both with regard to a Hindu joint-family partnership assets and acquisitions therefrom.

APPEAL from original order, No. 298 of 1912, by Kishen Chand Keshari Chand (creditors), petitioners.

APPEAL from original order, No. 264 of 1912, by Sanyasi Charan Mandal (minor), objector.

The facts regarding the proceedings out of which these two appeals arose are briefly as follows. The firm of Bhuban Mohan Mandal and Nil Ratan Mandal carried on a joint family ancestral business in rice and firewood at No. 4-1 Munshigunj Road, Kidderpur, in the District of 24-Parganas, the partners thereof being the five sons of Bhuban Mohan, deceased, *viz.*, Nil Ratan, Amulya Ratan, Satya Charan, Fatick Charan and Sanyasi Charan, the last two being minors. This firm was indebted to Messrs. Kishenchand Kesharichand of No. 199, Harrison Road, Calcutta, in the liquidated sum of Rs. 2,500 payable on a hundi, dated 28th December, 1911. On the 19th February 1912, the creditor firm made an application in the Court of the District Judge, 24-Parganas, to have all the partners of the debtor firm adjudicated insolvents under the provisions of the Provincial Insolvency Act on the allegation that they had committed various acts of insolvency during the preceding three months, and also prayed for the appointment of a receiver, under Act III of 1907, of all the properties of the said owners and partners of the debtor firm. At the time this application was made one of the two infants had attained majority, but the other, Sanyasi Charan, continued so till the disposal of the appeals

in the High Courts. On the objection of the infant, the learned District Judge dismissed the application for adjudication of the infant as an insolvent, but granted it with regard to the four other partners and appointed a receiver of all the four businesses and of all the properties purchased since the death of Bhuban and four-fifths only of the other properties alleged to have been inherited by all the brothers from their father. Thereupon exception was taken to this order by way of two separate appeals to the High Court at the instance of the infant as well as the creditor firm.

Mr. B. Chakravarti (with him *Babu Umakali Mookerjee*, *Babu Satish Chandra Mookerjee* and *Babu Khetra Gopal Banerjee*), for Kishen Chand Keshari Chand, appellants in A. O. O. No. 298 of 1912 and also for the respondent in A. O. O. No. 264 of 1912. My submission is that the receiving order should include all the property including that of the infant.

[*Dr. Ghose.* But s. 16, cl. (*2*) of the Provincial Insolvency Act is conclusive.]

Refers to Williams on Bankruptcy p. 160 *re* separate and joint creditors, Lindley on Partnerships, 7th Ed. p. 716, and *Lovell* v. *Beauchamp* (1).

The Official Trustee becomes a tenant in common. An adjudication order against one partner only, puts a person in possession of the whole of the assets of the firm.

[*Dr. Ghose.* The security did not comprise the infant's share.]

If the brothers could sell for *bona fide* debts of the family, then the Trustee in Bankruptcy, who takes their place, can do so too.

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The whole of the property ought to be in the hand of the receiver.

Dr. Rash Behary Ghose (with him *Babu Panchanan Ghose* for *Babu Khetra Mohun Sen*), for the minor, Sanayasi Charan, respondent in A. O. O., No. 298 of 1912 and appellant in A. O. O., No. 264 of 1912. I submit that the question before your Lordships is a very narrow one now, as my client cannot be adjudicated an insolvent under the Provincial Insolvency Act he being a minor.

The partnership is dissolved as soon as the adjudication order is made and the receiver becomes a tenant in common with the other partners who are solvent. I object to that portion of the District Judge's order regarding any property (other than the business of the family) which was not ancestral: see section 247 of the Indian Contract Act. The creditor can only follow the share of the minor in the business. This can only be done by applying to the Court in the ordinary way under the Provincial Insolvency Act to wind up the partnership business. I submit, therefore, that my learned friend's appeal must fail and my appeal must succeed.

Mr. Chakravarti, in reply. As four brothers are adults and insolvents and the fifth brother an infant, the most convenient course to take is to give the receiver charge of all the property, otherwise it would be impossible to wind up the business. This is a liability incurred by the four brothers without the consent of the minor; and, if they alone are liable, then the property is theirs. If the minor wants to get a share in this property, he must also incur a liability for the debts incurred for the purpose of the acquisition of this property. If your Lordships will not decide that question in these proceedings, then keep this property safe, and let it be decided in the

proper *forum*. There is no difference between the Dayabhaga and the Mitakshara on the subject of after-acquired property in a joint family ancestral trading business. Here an active representation was made by the infant that Nilratan had authority to sign for the firm.

[MOOKERJEE J. Have you got the account books here showing the funds?]

The receiver is in attendance here and says that these account books are in the lower Court.

[MOOKERJEE J. How do you propose to get over the provisions of section 16 of the Provincial Insolvency Act?]

All the property vests in the Receiver: see *Lovell and Christmas* v. *Beauchamp* (1).

[MOOKERJEE J. Only the interest of the person declared insolvent vests in the receiver.]

The Trustee in Bankruptcy takes four-fifths share, *i.e.*, of the insolvents, and as receiver takes charge of one-fifth share of the minor till his status is decided in a title suit.

MOOKERJEE AND BEACHCROFT JJ. These appeals are directed against an order under section 16 of the Provincial Insolvency Act of 1907. The circumstances under which the order in question has been made may be briefly narrated. One Bhuban Mohan Mandal left five sons: Nil Ratan, Amulya Charan, Satya Charan, Fatick Charan and Sanyasi Charan. During his lifetime, Bhuban Mohan Mandal carried on business in cloth, rice and fuel. After his death, his sons, two of whom were infants, inherited the firms mentioned. On the 19th February 1912,

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Kishenchand Kesharichand, the appellant in one of these appeals, made an application under the Provincial Insolvency Act to have the partners of these firms adjudicated insolvents. At the time the application was made, one of the two infants had already attained majority, but the other Sanyasi Charan was and is even now, an infant. The District Judge found upon the evidence that the acts of insolvency imputed to four of these persons had been established, namely, that they had acted in the manner described in clauses (*b*) and (*g*) of section 4 of the Provincial Insolvency Act. The District Judge thereupon declared the four adult brothers, insolvents. But he dismissed the application for adjudication of the infant as insolvent, because, in his opinion, the infant could not be declared an insolvent. He further appointed a receiver and directed him to proceed to realise the assets of all the four businesses and of all the properties purchased since the death of Bhuban and four-fifths only of the other properties which, it was alleged, had been inherited by all the five brothers from their father. Exception has been taken to this order by the infant as also by the creditor at whose instance these proceedings have been commenced.

The infant objects to the validity of the order on the ground that the receiver was not competent to realise in its entirety the assets of the business and of the properties acquired since the death of his father. His contention is that the property of his four insolvent brothers alone had, under section 16 of the Provincial Insolvency Act, vested in the receiver who was consequently competent to realise a four-fifths share only of the assets of the partnership business as also of all after-acquired properties. The objection urged by the creditor is twofold, namely, *first*, that the infant should have been adjudged an insolvent;

and, *secondly*, that, in any view, the receiver was entitled to realise the whole of the properties inherited by the five brothers from their father.

The question for determination, is, whether the infant should have been adjudicated an insolvent. On behalf of the creditor it has been argued that although, under the law of England, an infant is not liable to be adjudicated an insolvent, the principle on which that doctrine is based is not recognised in this country, and consequently the doctrine itself should not be applied here. There is no room for controversy, as is clear from the decision of the House of Lords in *Lovell & Christmas* v. *G. W. Beauchamp* (1), that the District Judge correctly held that under the English Law, an infant partner cannot be adjudicated an insolvent. The question for determination is, whether a different view should be taken under the Indian law. Section 247 of the Indian Contract Act provides that a person who is under the age of majority according to the law to which he is subject may be admitted to the benefits of a partnership but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm. It is not necessary for our present purpose to determine whether the principle which underlies section 247 is in harmony with the principle which underlies section 11 as interpreted by their Lordships of the Judicial Committee in *Mohori Bibi* v. *Dharmo Das Ghose* (2). But the position is incontrovertible that an infant may be admitted to the benefits of a partnership although he cannot be made personally liable for any obligation of the firm; yet the share of the infant in the property of the firm is liable for the

(1) [1894] A. C. 607.

(2) (1903) I. L. R. 30 Calc. 539; L. R. 30 I. A. 114.

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obligation of the firm. It has been urged on behalf of the creditor-appellant that as the infant is liable to satisfy the debts of the firm, though it may be to the extent of his interest in the property of the firm, he is liable to be adjudicated an insolvent, if it transpires that the debts of the firm cannot be satisfied out of the property of the firm. In our opinion, the contention is obviously fallacious. As regards the infant partner, the creditors of the firm are not entitled to proceed against him personally. They are restricted to a special fund, namely, his interest in the property of the firm. If the value of such interest is not sufficient for the satisfaction of the dues of the creditors, it cannot be maintained that the infant is unable to pay his debts which must be the true foundation of all proceedings in insolvency against him. The remedy of the creditors is restricted in its scope, and if that remedy is partial, it cannot be maintained that the person against whom the limited remedy is available is liable to be declared an insolvent. Indeed, he may have ample funds other than the partnership assets, though such funds cannot be reached by the creditors of the firm, simply because under the law they cannot hold him personally liable to satisfy the obligations of the firm. We are of opinion that the law under the Indian Contract Act does not in this respect differ from the English law on the subject and that here, as in England, an infant partner of a firm cannot, as such, be adjudicated an insolvent.

Our attention has been also invited to the circumstance that a joint Hindu family firm is not in all respects on the same footing as an ordinary partnership arising out of a contract. It has been argued that the rights and obligations of the coparceners cannot be determined by exclusive reference to the

provisions of the Indian Contract Act, but must be considered also with regard to the rules of the Hindu Law which regulate the transactions of Hindu families; and as an illustration of this fundamental difference, reference has been made to the rule that the death of one of the coparceners does not dissolve a Hindu family partnership. This position may be accepted as sound. But it is equally clear that there is no difference in principle between the nature of the liability of an infant admitted by agreement into a partnership business and that of another on whose behalf an ancestral trade is carried on by his guardian. It is on this basis that it has been ruled in the cases of *Joykisto* v. *Nittyanand* (1) and *Ram Partab* v. *Foolibai* (2), that a Hindu infant, on whose behalf a family trade is carried on, is not personally liable for the debts incurred in such a trade, but his share therein is alone liable. In so far as the propriety of the order of the District Judge with regard to the infant is concerned, we must consequently overrule the contention of the creditor.

The question next arises, what is the precise position of the receiver appointed under section 16 of the Provincial Insolvency Act. On behalf of the creditor, it has been argued that he is entitled to take possession of, and to realise the entire assets of, the trading firms, all the after-acquired properties and also all ancestral properties inherited by the five brothers. In support of this proposition, reliance has been placed upon the decision of the House of Lords in *Lovell and Christmas* v. *G. W. Beauchamp* (3). That case, at first sight, seems to lend some support to the contention of the creditor, but upon closer examination, turns out to be of no real assistance to him. In

(1) (1878) I. L. R. 3 Calc. 738. (2) (1896) I. L. R. 20 Bom. 767, 777.
(3) [1894] A. C. 607.

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that case, Gilbert Walter Beauchamp was a partner in the firm of Beauchamp and Brothers. He was an infant and the other partner was Ralph Beauchamp. Goods which had been supplied upon the order of the firm were not paid for. An action was consequently brought in the Queen's Bench Division against the firm in the firm's name. An appearance was entered for Ralph and also for Gilbert, the infant, by his guardian *ad litem*. Objection was taken on behalf of the latter that the infant could not be made liable. This objection was overruled, and, on the 2nd August 1893, an order was made adjudging the plaintiff to recover against the defendants the sum claimed. A similar judgment was obtained by another creditor who had supplied goods to the firm. On appeal to the Divisional Court to set aside the latter judgment, the application was dismissed, but it was also ordered that execution was not to issue against the separate property of the infant or against his share, if any, in the partnership profits. The Court of Appeal refused to disturb the order thus made by the Divisional Court: *Harris* v. *Beauchamp* (1). On the 2nd August 1893, that is, on the date when the first judgment had been obtained, Lovell and Christmas (the persons who had obtained the judgments) served a bankruptcy notice on Beauchamp Brothers, founded on their judgments intimating that if the requisitions of the notices were not complied with, an act of bankruptcy would be committed. The money was not paid and the creditors presented a petition for a receiving order in respect of the estate of Beauchamp Brothers, whereupon a receiving order was made. This order was rescinded by the Court of Appeal, on the ground that as one of the partners was an infant, the receiving order could not properly be made against

(1) [1893] 2 Q. B. 534.

the firm: *In re Beauchamp Brothers* (1). The Court of Appeal granted leave to appeal to the House of Lords, but on the terms that the judgment of the Queen's Bench Division of the 2nd August 1893, should be treated as affirmed in the Court of Appeal, with leave to the respondent Gilbert to lodge a cross-appeal. The position consequently was that when the matter was taken to the House of Lords, the question of the validity of the judgment in the suit against the firm as also of the order made in the partnership proceeding were both open for consideration. It was, under these circumstances, that Lord Herschell stated that the judgment was erroneous and required to be amended; and he directed it to be amended by the insertion of the words "other than Gilbert Walter Beauchamp" after the word "defendant." Lord Herschell after giving this direction, proceeded to observe as follows: "I think the proper course will be to amend it in the manner which I have suggested. It will thus constitute, as from its date, a valid receiving order against Ralph Beauchamp, and, I think, the receiver appointed under that order should also be appointed receiver of the partnership assets for the purpose of protecting them for the benefit of the creditors." It is plain that the order authorising the receiver to deal with the partnership assets for the purpose of protecting them for the benefit of the creditors was made, not merely in the partnership proceeding, but also in the proceeding on the judgment against the firm, as there was, in fact, a judgment against the firm represented by the adult partner. The decision of the House of Lords cannot, consequently, be rightly regarded as an authority for the proposition that in a bankruptcy proceeding, it is open to the Court to direct the receiver to deal with

(1) [1894] 1 Q.B. 1.

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assets other than those belonging to the persons who had been adjudged insolvents. It would, indeed, be surprising if the Court could, in a proceeding under the Insolvency Act, deal with the property of a person who had not been adjudged an insolvent. This is plain from familiar statements in books of authority: "on the bankruptcy of one only of several persons, the joint assets do not vest in the trustee. Consequently, an action in the Chancery Division to ascertain the share of the bankrupt was formerly necessary, but now under section 102 of the Bankruptcy Act, 1883, the Court in Bankruptcy can ascertain such share. It is, however, not so in the case of an infant" [Lindley on Partnership, 8th Edition, p. 762.] Section 102 of the Bankruptcy Act, 1883, to which reference is made, is in these terms: "Every Court having jurisdiction in bankruptcy under the Act shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or of fact, which may arise in any case of bankruptcy, coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case". To the rule thus laid down a proviso is added that "the jurisdiction hereby given shall not be exercised by any County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto or the money, money's worth or right in dispute does not, in the opinion of the Judge, exceed in value £ 200". The following is an accurate statement of the principles which govern the matter now before us: "Upon the bankruptcy of a partner his power over the partnership property ceases

from the commencement of the bankruptcy, and his share of the property, that is, of the surplus after payment of the partnership debts and the claims of all his co-partners, will vest together with his all other separate estate, in his trustee, who, in respect of the bankrupt's share of the partnership assets, will become tenant-in-common with the solvent partner and entitled to have the partnership affairs wound up according to the rule in bankruptcy" [Robson on Bankruptcy, 7th Edition, p. 682]. This position is amply supported by judicial decisions of the highest authority, amongst which may be mentioned specially *Fox* v. *Hanbury* (1), *Ex parte Ruffin* (2) and *Fraser* v. *Kershaw* (3).

We may observe that the principle formulated in the cases just mentioned rests on the theory familiar to English lawyers, that the bankruptcy of one partner operates as a dissolution of the partnership among all other partners: *Fox* v. *Hanbury* (1), *Ex parte Smith* (4), and *Crawshay* v. *Collins* (5). It is essential to note, however, that the effect of the bankruptcy of a partner on the partnership, is not in this country, identical with that under the law of England, as becomes clear from a comparison of section 33 of the Bankruptcy Act, 1890, with the provisions of sections 253 and 254 of the Indian Contract Act. Under the Bankruptcy Act, 1890, bankruptcy is placed on the same footing as death, and there is a dissolution of partnership by reason of the death or bankruptcy of one of the partners. In section 253 of the Indian Contract Act, on the other hand, in the absence of any contract to the contrary, the relation of partners to each other is determined by the death of any partner,

(1) (1776) Cowper 445.
(2) (1801) 6 Ves. 119.
(3) (1856) 2 K. & J 496, 499.
(4) (1800) 5 Ves. 295.
(5) (1808) 15 Ves. 218, 278.

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whereas under section 254, at the suit of a partner, the Court may dissolve the partnership when a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors. Thus, whereas in England the bankruptcy of a partner works a dissolution without an order of the Court, in this country the bankruptcy of a partner may have the same effect, only if a suit is instituted for dissolution of partnership on that ground by a partner other than the one who has been adjudged insolvent. Consequently, in this country, when a person has been adjudicated an insolvent, the partnership is not necessarily dissolved, and the receiver who is appointed under section 16 of the Provincial Insolvency Act, merely replaces the insolvent partner in respect of the business of the firm, that is, the receiver and the partners who have not been adjudicated insolvents continue to constitute the firm. It may possibly be open to the receiver to take steps for the dissolution of the partnership, but he cannot claim, as Receiver in insolvency, to take exclusive possession of the assets of the firm, including, in this case, the interest of the infant who has not been adjudicated an insolvent. We are clearly not concerned, in the present proceedings, with the question, whether the particular debt which the creditor seeks to realise may be realisable from the interest of the infant in the firms; that is a question which can be adjudicated in a suit properly framed for the purpose. What concerns the Court in these proceedings is the true position of the Receiver in relation to the partnership property. As regards such property, we feel no doubt whatever that he is not entitled to deal with the entire assets inclusive of the interest of the infant who has not been adjudicated an insolvent.

A question has been raised before us not only as to the partnership assets, but also as to what has been described as the after-acquired properties. On behalf of the creditor, it has been contended that the after-acquired properties have not only been acquired out of the funds of the partnership but that they have not been treated as part of the partnership property. In the view we take, the distinction suggested is immaterial, because whether what is described as after-acquired property be treated as included in the partnership assets or be deemed independent thereof, the receiver is not entitled to take possession of and to deal with more than the four-fifths share held by the persons adjudicated insolvents. In respect of these properties, the receiver is precisely in the same position as the persons who have been adjudicated insolvents and have been replaced by him by operation of law. The essence of the matter is that the share of the infant has not vested in him, and he is consequently not entitled to deal with it. The receiver may, if so advised, institute a suit for dissolution of the partnership, in which appropriate proceedings may be taken for realisation of the assets. The creditor also may, if so advised, pursue his remedy, if any, against the infant in a suit properly framed for enforcement of his claim. But whatever remedies may be available hereafter to the receiver or to the creditor, it is clear that the properties of the infant cannot be dealt with by either of them in these proceedings.

The result is that the appeal of the creditor (No. 298 of 1912) is dismissed and the appeal of the infant (No. 264 of 1912) is allowed. The order of the District Judge is varied in the manner following. The receiver will take possession of four-fifths share of the business and four-fifths share of all the proper-

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ties purchased since the death of Bhuban Mohan Mandal as also four-fifths share of other properties jointly held by the infant and his brothers.

The creditor will pay the costs of the infant in both the appeals.

G. S. *Infant's appeal allowed; Creditor's appeal dismissed.*

CRIMINAL REFERENCE.

Before Sharfuddin and Teunon JJ.

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May 22.

EMPEROR

v.

JOGENDRA NATH GHOSE.*

Perjury—Witness—Deposition not read over to witness in the hearing of accused or his pleader but read by witness himself—Inadmissibility of deposition in subsequent trial for giving false evidence—Proceeding against witness—Preliminary inquiry—Omission to record statements of witnesses examined thereat—Order for prosecution not containing assignment of the false statements—Criminal Procedure Code (Act V of 1898) ss. 360(1), 476—Practice.

Section 360(*1*) of the Criminal Procedure Code requires the evidence of a witness to be read over to him in the hearing of the accused or his pleader, so as to enable the latter to correct any mistakes in it. The reading of the deposition by the witness himself is not a compliance with the section, and renders the record of it inadmissible in a subsequent trial against him under s. 193 of the Penal Code.

Mohendra Nath Misser v. *Emperor* (1) and *Jyotish Chandra Mukerjee* v. *Emperor* (2) followed.

Although s. 476 of the Criminal Procedure Code does not expressly provide for the manner in which the preliminary inquiry thereunder is

* Criminal Reference, No. 95 of 1914, by R. L. Ross, Sessions Judge of Darbhanga, dated April 22, 1914.

(1) (1908) 12 C. W. N. 845. (2) (1909) I. L. R. 36 Calc. 955.