1920

MOSHIUDDIN AHMED v. K. AHMED.

the District Judge, who takes the place of the *kazi* in Mahomedan law, did not appoint the mother and the fact that the Court subsequently found her fit to act for the minors would not validate an arrangement, which in its inception was invalid.

S. M. *Appeal allowed.*

INSOLVENCY JURISDICTION.

Before Greaves J.

1920

Feb. 10.

LALBIHARI SHAH, *In re.**

Insolvency—Jurisdiction—Order by Registrar in Insolvency, appeal from—Limitation—Reference under Sch. II, s. 18 of Act III of 1909—Validity of mortgage, question of—Consent of parties—Presidency Towns Insolvency Act (III of 1909), ss. 6, 101; Sch. II, s. 18—The Calcutta Insolvency Rules, 1910, Rule 5.

The period of limitation prescribed by section 101 of the Presidency Towns Insolvency Act (III of 1909) for an appeal from an order made by the Registrar in Insolvency, shall be computed not as from the date when the findings of the Registrar are signed or filed but as from the date when the report is signed by the Registrar and the matter is thereby completed.

Upon application by certain persons claiming to be mortgagees of an Insolvent's estate, an order was made by the Court directing them to prove their mortgage before the Registrar in Insolvency under section 18 of the second schedule of the Presidency Towns Insolvency Act (III of 1909):

Held, that under such reference to him, the Registrar had no jurisdiction to deal with the question of the validity or otherwise of the mortgage, even with the consent of the parties before him, so as to affect the interest of infants adversely by his decision.

APPEAL by Mirzamull Boid, Jaharmull Boid, Punam Chand Boid, Bhowar Lal Boid, Inder Chand Boid and Chandmull Boid from the Report of the

*Insolvency Suit No. 190 of 1914.

1920

LALBIHARI SHAH, *In re.*

Registrar in Insolvency, dated the 12th July, 1919, and signed on the 14th August, 1919, on the taking of accounts in respect of an alleged mortgage in favour of Kedarnath Saha and others under order of this Hon'ble Court dated the 23rd August, 1916.

The facts of the case for the purpose of this report are sufficiently stated in the judgment.

On the hearing of the appeal, the following applications were made to the Court:

(i) Application by Mirzamull Boid and others, infants by their next friend Dhonraj Boid, for an order (*a*) that leave may be granted to amend the memorandum of appeal filed on the 3rd September, 1919, by inserting the words, after the names of the appellants, "infants by their paternal uncle and next friend Dhonraj Boid;" (*b*) that the appeal be treated as having been filed on the 3rd September, 1919; (*c*) that, if necessary, the time for filing the appeal be extended up to such date as this Hon'ble Court may think necessary and that liberty be given to the applicants to refile the said memorandum of appeal with such amendments; (*d*) that the hearing of the appeal be continued before the drawing up of any formal order of amendment, on the attorneys' undertaking in that behalf.

(ii) Application by Mirzamull Boid and others, infants by their next friend Dhonraj Boid, for leave to file a memorandum of appeal (a copy of which was served with the notice of application) and that the time for filing such memorandum be extended up to such date as the Court may think fit and that such appeal be heard on the 19th January 1920 (the date fixed for the original appeal).

(iii) Application by Jnanendra Nath Saha, Atindra Nath Saha and Kedarnath Saha that the appeal and exceptions filed on the 4th September, 1919, by Mr. S. M.

Dutt on behalf of Mirzamull Boid and others may be dismissed with costs to be paid by the said Mr. S. M. Dutt on the ground that no next friend was named on behalf of Mirzamull Boid and others who were infants and that the said Mr. S. M. Dutt did not file any retainer.

Mr. H. D. Bose (with him *Mr. B. K. Ghose*), for Kedarnath Saha, Atindra Nath Saha and Jnanendra Nath Saha, contended that the appeal was not maintainable on the grounds (i) that the appeal was by infants of whom there was no next friend on the record and (ii) that it was filed out of time. The application for the examination of witnesses under section 36 of the Presidency Towns Insolvency Act was made, by Dhonraj Boid an uncle of the infants as the next friend of the infants. In the proceedings under section 36 of the Act, another person, namely, the infant's mother Panni Bibi acted as the next friend without there being an order for the discharge of the previous next friend. In the present proceedings, however, the lady did not appear as the next friend of the infants but in her personal capacity and the infants were throughout before the Registrar without a next friend and this appeal has been filed without there being a next friend appointed on their behalf. Refers to O. XXXII, r. 2. The appeal is therefore incompetent.

Mr. A. N. Chaudhuri (with him *Sir B. C. Mitter*, *Mr. S. N. Banerjee* and *Mr. N. N. Bhose*), for the appellants. This is merely an informal objection. Dhonraj Boid was properly appointed the next friend of the infant and he cannot withdraw from the proceedings without the leave of the Court. We have put in an application by Dhonraj Boid to have the cause title amended by inserting his name as the next friend of the infant.

1920

LALBIHARI SHAH, *In re.*

[GREAVES J. Supposing that the appeal has been filed in time I think I should maintain the infant's appeal on terms.]

Mr. H. D. Bose, on the second point, contended that the period allowed for appeal under section 101 read with section 6 of the Presidency Towns Insolvency Act is 20 days and time runs from the date of the order, decision or report. In this case the Registrar in Insolvency published his findings on the 12th July, 1919, and signed it on that day. The findings were filed on the 15th July and the report settled and passed on the 25th July, but it was not until the 14th August, 1919, that the Report was signed and filed. It is submitted that time ran from the 12th July when the Registrar recorded his findings. The Registrar is not bound to give reasons for his findings which are often incorporated in the Report. The decision or report of the Registrar in the matter is the finding. This is not an appeal as from a decree of this Court under Letters Patent or an appeal from the Mofussil under the Civil Procedure Code and it was not necessary that a copy of the report should accompany the grounds of appeal. Refers to O. XLI, r. 1, Civil Procedure Code, 1908. It was also not necessary to have the Report drawn up or to file the Report or to apply for a copy of the Report. Refers to *Promothonath Roy* v. *Lee* (1). The matter is not governed by the Limitation Act but by a special statute, namely section 101 of the Insolvency Act.

Mr. A. N. Chaudhuri. There is authority for saying that the Limitation Act governs the matter: *Draupadi* v. *Hira Lal* (2).

Mr. H. D. Bose. The case referred to by Mr. Chaudhuri is distinguished in *Thakur Prasad* v. *Panno*

(1) (1919) 23 C. W. N. 553, 556. (2) (1912) I. L. R. 34 All. 496.

Lal(1) and the Madras High Court has refused to follow the Allahabad decision: *M. Duraisami Aiyangar* v. *Mankashi* (2), *Trasi Deva Rao* v. *Parameshrya* (3). Refers to s. 29, Limitation Act; Halsbury's Laws of England, Vol. II, 306.

Mr. A. N. Chaudhuri. There is a vital difference between the judgment of a Judge and the reasons given by a Referee. The Referee is not bound to give reasons for his findings. There is no appeal from the findings by the Registrar but only from the order. The findings are no creature of the statute—the act or order or decision which is appealable does not come into being until the Report is made. The Report is not a report which could affect any party until the Registrar has signed it. One test would be, could we appeal from these findings before the Report came into being, that is, was signed? Obviously, we could not. Secondly, we contend that there is no period of limitation where an infant is concerned. Thirdly, that the Court has power under section 90, sub-section (5) of the Insolvency Act, to extend the time and this is a fit case in which the Court will exercise that power. If there has been any irregularity in the proceedings, section 118 of the Insolvency Act would cure the defect.

Mr. H. D. Bose, in reply. The creditor knew or ought to have known that the Report was made on the 12th July, having been represented by the same solicitor. The findings by the Registrar are the Report in the matter, and the decision to which he came on the 12th July. Time, therefore, runs from that date.

(1) (1913) I. L. R. 35 All. 410. (2) (1914) 25 Ind. Cas. 610.
(3) (1914) 27 Ind. Cas. 144.

1920

LALBIHARI SHAH, *In re.*

[GREAVES J. Apparently, the practice in the office has been that an appeal is not filed until the decree or order is filed.]

Yes.

GREAVES J. This matter comes before me by way of an appeal from a decision of the Insolvency Registrar of this Court. The facts are shortly as follows :— On the 23rd July, 1914, Lalbehari Shah and others were adjudicated insolvents upon the petition of a creditor, one Motilal Boid. He was a creditor for Rs. 6,48,000 and he filed a retainer through an attorney Mr. S. M. Dutt to represent him in the insolvency proceedings. Motilal Boid is the father of the present appellants before me. He died on the 29th February, 1916, leaving him surviving his widow Panni Bibee and the appellants his infant sons. He also left a brother Dhonraj Boid. On the 7th August, 1916, an application was made by the brother as next friend of the infants for examination of certain witnesses under section 36 of the Insolvency Act. The retainer was signed by him and he made an affidavit that he had no interest adverse to the infants. He signed as next friend and the retainer that he gave to his attorney was in respect of all the proceedings. On the 23rd August, 1916, the mortgagees got an order to prove their mortgage before the Registrar in Insolvency under section 18 of the second schedule of the Insolvency Act and the Official Assignee was directed to sell the premises No. 3-2, Shovabazar. On the 1st September, 1916, Panni Bibee was appointed under the Guardian and Wards Act as guardian of her infant sons and on the 16th September, 1916, she gave to her brother-in-law Dhonraj Boid a power of attorney to act on her behalf. On the 18th September, 1916, the mortgaged properties were sold by the Official Assignee.

On the 2nd February, 1917, Panni Bibee applied for an order to examine the mortgagees under section 36 of the Insolvency Act and an order was made for their examination. It is said that Panni Bibee made the application really as next friend of the infants and in error of the fact that she was not their next friend. Be that as it may, it appears that all the proceedings before the Registrar in Insolvency were conducted on behalf of Panni Bibee not as next friend of the infants but as a creditor of the insolvents' estate and of course she was a creditor of her husband's estate by reason of her position as his widow. On the 6th July, 1918, the examination of the witnesses took place, that is to say of the mortgagees, for a period of two days and the Assistant Referee who was then acting as the Registrar in Insolvency stated that he would go into the question of the validity of the mortgages although I understand that he arrived at no final decision on that day. On the 3rd February, 1919, Mr. Remfry, the Registrar in Insolvency, stated that he thought that he would go into the question of the validity of these mortgages and, on the 17th February, 1919, the parties agreed to the question of the validity of the mortgages being gone into before him. From the 21st to the 27th February the witnesses on behalf of the mortgagees were examined before him and from the 19th March to the 10th April the witnesses called on behalf of the appellants were examined. On the 12th July, 1919, the Registrar in Insolvency signed his findings and just before the figures of the amount due on the mortgage occurs this, "I therefore find and report that there is now due on the mortgage the sum of Rs. 27,000 for principal and interest". Those findings were filed on the 15th July, 1919. On the 25th July, 1919, the Report of the Registrar in Insolvency was settled and passed and he there states that

1920

LALBIHARI SHAH, *In re.*

GREAVES J.

he had gone into the question of the validity of the mortgages and considered the facts placed before him and he holds that the mortgage is a valid one and that the consideration alleged therein was duly paid and then he goes to state what is due to the mortgagees On the 14th August, 1919, the Report was signed and filed on that day and on the 3rd September 1919 the present appeal was filed. Some dispute has arisen as to whether in fact it was presented on the 3rd September 1919 or on the 4th September. What happened, I understand, was that on the 3rd September it was tendered on the Original Side in the English Department and that the attorney who tendered the appeal was then told that it should have been presented in the Insolvency Jurisdiction of the Court and apparently it was presented in the Insolvency Jurisdiction of the Court on the 4th September 1919. It is not contested, certainly for the purpose of this application, that the time to file the appeal, if otherwise in time, would have extended until the reopening of the Courts after the long vacation. Accordingly, it does not seem to me to matter whether it was in fact filed on the 3rd or 4th September. On these facts being stated to me, two preliminary objections were taken on behalf of the mortgagees. First, it was said that the appeal is made or presented by infants without their having any next friend and I have an application made by the mortgagees asking that the appeal should be dismissed with costs to be paid by the attorney on the ground that no next friend had been named on behalf of the infants. On the other hand, I have another application before me for the amendment of the appeal by inserting the name of the next friend. It seems to me that having regard to the provisions of Order XXXII, rule 2, I have a discretion as to how I shall deal with the matter, when a plaint or other proceedings have been taken

without the infant being represented by a next friend, and it does not seem to me, therefore, that there is any substance in this preliminary objection because I shall accede to the application to amend the appeal upon the addition of the name of the next friend, upon the costs of the mortgagees of appearing on this application and the costs of their application, to which I have already referred, being paid. But there is a more substantial preliminary objection, and that is that the appeal was filed out of time. It is said that the Registrar's findings having been signed on the 12th July, 1919, and filed on the 15th, time runs as from one or other of these dates or in any case, at the very latest, from the 25th July, 1919, when the Report was settled and passed. On the other hand, it is said on behalf of the appellants that time did not commence to run until the report was signed by the Registrar on the 14th August, 1919. Now it appears that in accordance with the practice of the office, time is taken to run as from the time that the Report is signed because I find a note on the application for appeal "Report signed 14th August, 1918—appeal in time"—this being signed by the Registrar in Insolvency. It therefore remains to consider the provisions of section 101 of the Presidency Towns Insolvency Act in order to ascertain whether the preliminary objection on this point should prevail or not. Section 101 provides that the period of limitation for an appeal from any act or decision of the Official Assignee or from an order made by an officer of the Court empowered under section 6 shall be 20 days from the date of such act, decision or order as the case may be. Some discussion took place before me on this preliminary question as to whether the Registrar was a person empowered under section 6 of the Act. It is not necessary for me to deal with that now, for that is a question which will arise if I decide

1920

LALBIHARI SHAH, *In re.*

GREAVES J.

that the preliminary objection is not well-founded. So it only remains for me to decide whether the order of an officer of the Court referred to in section 101 is, under the circumstances, the findings that were filed on the 15th July or the Report that was actually signed on the 14th August. The conclusion that I have come to is that the 20 days provided by section 101 run not as from the findings being filed or signed but as from the matter being completed and the Report being signed. That is to say, when the matter is completed and the parties know their position. That, therefore, disposes of the preliminary objection and it now remains for me to deal with the appeal on its merits; but before I do so, I should add, as the matter has been ventilated, that it does not seem to me to matter whether Panni Bibee was alone before the Registrar or whether the infants, unrepresented by a next friend, were before the Registrar, because even if the infants were not before the Registrar, it is conceded that being affected by the order that the Registrar has made, they are entitled in any case to appeal. That disposes then of the preliminary objection and the two applications that are made, that is to say, with regard to the amendment of the application and with regard to the dismissal of the appeal. I now proceed to deal with the appeal on its merits.

[The appeal was then heard on the merits.]

Mr. H. D. Bose. The order of reference to the Registrar was in the nature of a preliminary decree which could only be reversed on appeal or by review or by a suit properly framed. In this case the order was by consent and their only remedy is under section 56 of the Insolvency Act.

[GREAVES J. What I have now to decide is whether on this reference the Registrar had power to decide the question of the validity or otherwise of the mortgage.]

On that point we have nothing to say. We do not contend that the Registrar could have gone into the question. Our point is that the question has already been decided by the Court.

[GREAVES J. All that I will now say is that the Registrar had no jurisdiction to deal with the matter.]

Sir B. C. Mitter. We gave notice that we would not go into any question on this appeal except the question of jurisdiction.

GREAVES J. I now come to deal with the appeal as presented. The first ground of appeal is that the Registrar had no jurisdiction to go into the question of the validity or otherwise of the said mortgage in the reference directed to him and that he erred in adjudicating on the same although the parties consented to that course being adopted.

The other grounds of appeal are, secondly, that the mortgage transaction was fictitious, thirdly, that he should have found on the evidence that the adjudication was collusive, and so on.

Counsel appearing on behalf of the appellants has stated before me that all he desires to do at the present time is to question the jurisdiction of the Registrar to deal with the validity of the mortgage under the reference to him under schedule 2, section 18 of the Presidency Towns Insolvency Act and he asks that there should be deleted from the report all the findings of the Registrar in Insolvency with regard to the validity of the mortgage and that is the only question that is now before me on this appeal. It seems to me that although the Registrar dealt with this question by the consent and agreement of the parties, he had no jurisdiction to deal with a question of this kind. Section 6 of the Insolvency Act states what are the matters that can

1920

LALBIHARI SHAH, *In re.*

GREAVES J.

be referred to the Registrar in Insolvency, *viz.*, to hear debtors' petitions; to hold public examinations of insolvents; to make any order or exercise any jurisdiction prescribed as proper to be made or exercised in Chambers; to hear and determine any unopposed or *ex parte* application; to examine any person under section 36. The only one of these headings which this could possibly come under would be heading 6 (*2*) (*c*), but that heading only deals with matters to be dealt with in Chambers, and rule 5 of the Insolvency Rules specifically lays down what are the matters that are to be heard and determined in open Court, which are among others 5 (*d*), applications to set aside or avoid any settlement, conveyance, transfer security or payment or to declare for or against the title of the Official Assignee to any property adversely claimed. It seems to me that you only have to read section 6 of the Presidency Towns Insolvency Act and Rule 5 to arrive at the conclusion that the Registrar in Insolvency, as indeed I think he thought himself, had no jurisdiction to deal with a matter of this kind, apart from consent of parties. He did so, having regard to the consent and on the footing that all the parties interested were *sui juris* which turns out not to be the case. In this view the appeal succeeds upon the only point which is now raised before me, that is to say, as to whether the Registrar in Insolvency had any jurisdiction to deal with this question and by his decision adversely affect the infants. I am expressing no opinion on this appeal with regard to the validity of the mortgage and whether it is now open to the appellants to attack the mortgage or not. I make no order as to costs.

A. P. B. *Appeal allowed.*

Attorney for the appellant: *S. M. Dutt.*

Attorneys for the respondents: *H. N. Dutt & Co.*