

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J., and Walmsley J.

CHOWTHMULL MAGANMULL

v.

THE CALCUTTA WHEAT AND SEEDS
ASSOCIATION.*

1924

May 27

*Appeal—Security for stay of execution—Insolvency of judgment-debtor—
Right of decree-holder to the money deposited in Court.*

In an appeal the defendant appellant obtained an order for stay of execution on depositing, to the credit of the suit, the decretal amount. Subsequently the appellant was adjudicated insolvent and the Official Assignee did not proceed with the appeal.

On an application for dismissal of the appeal and payment to the decree-holder of the money so deposited in Court :—

Held, that the amount was payable to the decree-holder and not to the Official Assignee.

Bird v. Barstow (1) and *Ex parte Binner, in re Keyworth* (2) referred to.

ON 30th July 1923 the Calcutta Wheat and Seeds Association obtained a decree against the defendants Chowthmull Maganmull for Rs. 21,850 with interest and costs. The defendants appealed from that and on 29th August 1923, on the plaintiff company taking steps to execute the decree, the defendants appellants obtained an order for stay of execution on depositing Rs. 21,850 in Court as security, to the credit of the suit. By an order made on the 16th April 1924,

* Application in Appeal from Original Civil No 136 of 1923, in suit No. 158 of 1922.

(1) [1892] 1. Q. B. 94.

(2) (1874) L. R. 9 Cl. 379.

the appellants were adjudicated insolvents. Thereafter the Official Assignee not proceeding with the appeal the plaintiff company made this application for the appeal to be dismissed and the said sum of Rs. 21,850 to be paid to them. The Official Assignee claimed the money as belonging to the insolvents' estate and for the benefit of the general body of creditors.

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Mr. S. N. Banerjee (with him *Mr. K. P. Khaitan*) for the applicants. This amount did not belong to the insolvents' estate at the date of their adjudication and therefore could not vest in the Official Assignee. It was paid out to meet the decretal amount, provided the plaintiff company were successful in the appeal. *Bird v. Barstow*(1), *Ramiah Aiyar v. Gophtier*(2).

The Official Assignee. The amount belonged to the estate of the insolvents within the meaning of section 52(2)(a) of the Presidency Towns Insolvency Act and as such should be available for distribution amongst the general body of creditors.

SANDERSON C.J. This is an application by the plaintiff respondents that the appeal should be dismissed and that an order should be made directing the Registrar to pay to the attorneys for the plaintiff respondents the sum of Rs. 21,850, and any interest that may have accumulated.

It appears that the plaintiffs obtained a decree for that sum on the Original Side of this Court.

An appeal was preferred by the defendants Chowthmull Maganmull to this Court: and, an application was made for stay of execution. A consent order was made on the 29th of August 1923 in these terms: "By consent the execution will be stayed pending the

(1) [1892] 1 Q. B. 94.

(2) (1918) 1, L. R. 41 Ma L. 1053.

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“hearing of the appeal upon the defendant appellant
 “paying into Court, the decretal amount with interest,
 “the total being twenty one thousand eight hundred
 “and fifty, on or before the 14th of September 1923. If
 “the money is not so paid, the stay will be removed.
 “The plaintiff respondent will be at liberty to take
 “out the money, if so deposited, on giving security to
 “the satisfaction of the Registrar.”

The appellants deposited the money in Court in accordance with the order.

It appears that the plaintiffs then taxed their bill of costs and were taking steps to realise the taxed bill by means of execution: and, an order was made that the amount of the taxed bill should be paid on or before the 17th April 1924. On the 16th of April, the appellants were adjudicated insolvents. On the 28th of April the attorneys for the plaintiffs wrote to the Official Assignee informing him that the appellants had been adjudicated insolvents and requesting him to let them know whether he intended to prosecute the appeal or not. The letter concluded in these words: “If you decide to go on
 “with the appeal please furnish security for costs in
 “terms of the order of this Court dated the 24th March 1924”. That letter was not answered by the Official Assignee and this application was made yesterday week. It was adjourned in order that the Official Assignee might appear and state what was the position as far as he was concerned, and what course he intended to pursue.

The learned Official Assignee has appeared and stated that he is not in a position to give any security for the costs of the appeal and, as I understand, he is not in a position to prosecute the appeal. The result is that the appeal is dismissed with costs as prayed.

The further question arises with reference to the second part of the application, namely the application that the Registrar should be directed to pay to the plaintiffs' attorneys the sum of Rs. 21,850 and any interest which may have accumulated in part satisfaction of the decree.

The learned Official Assignee argued that although the sum was paid into Court as a condition for obtaining a stay of execution, still the sum of Rs. 21,850 was property belonging to the insolvents within the meaning of section 52(2) (a) of the Presidency Towns Insolvency Act, 1909, at the commencement of the insolvency and, accordingly he argued that the sum should be available for distribution amongst the creditors of the insolvents.

On the other hand, the learned counsel for the plaintiffs argued that the sum in question did not belong to the insolvents at the date of the commencement of the insolvency and did not become vested in the Official Assignee for the benefit of the creditors.

In my judgment the argument of the learned counsel for the plaintiffs is correct.

In my judgment the effect of the order was that the money was paid into Court to give security to the plaintiffs that in the event of their succeeding in the appeal they should obtain the fruits of their success. See *Bird v. Barstow* (1). It may be put in other words, viz., that the amount paid into Court was the money of the plaintiff respondents subject to their succeeding in the appeal and thereby showing that the decree in their favour by the learned Judge on the Original Side was correct. The words which were used by Lord Justice James in the case of *Ex parte Banner, in re Keyworth* (2) are applicable to this case. The learned Lord Justice said that the effect of

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the order was that 'the money which was paid into Court belonged to the party who might be eventually found entitled to the sum.'

The result therefore is that the appeal must be dismissed with costs which will include the costs of this application—(all such costs to be provable in the insolvency)—with a direction to the Registrar to pay the sum of Rs. 21,850 with the interest which has accrued in respect thereof to the attorneys for the plaintiff respondents.

WALMSLEY J. I agree.

Attorneys for the applicants: *Khaitan & Co.*

N. G.

APPELLATE CIVIL.

Before Pearson and Graham JJ.

HARIPADA HALDAR

v.

BARADA PRASAD ROY CHOWDHURY AND
 OTHERS.*

1924
 May 8.

Execution Sale. Application to set aside—Limitation, period of—Limitation Act (IX of 1908), Sch. I, Arts. 160, 181—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90.—Bengal Tenancy Act (VIII of 1885), s. 173 (3).

All applications whether under section 47, or Order XXI, rule 90, Code of Civil Procedure, are governed by the 30 days' period of limitation provided by article 166 of the 1st Schedule of the Limitation Act of 1908.

* Appeal from Order No. 343 of 1922, against the order of G. B. Mumford, 2nd Additional District Judge, 24-Parganas, dated June 8, 1922, affirming the order of Tarak Nath Bose, Munsif of Diamond Harbour, dated May 26, 1921.