PRIVY COUNCIL.

KALA CHAND BANERJEE

v.

JAGANNATH MARWARI AND ANOTHER.

*P. C.** 1927

March 3.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Insolvency—Provincial Insolvency Act (III of 1907) s. 16, sub.-ss. 4. 5—Mortgaged property vested in Receiver—Foreclosure suit—Receiver necessary party—Res Judicata—Code of Civil Procedure (Act V of 1908), s. 11.

When mortgaged property has vested in a receiver under the Provincial Insolvency Act, 1907, s. 16, sub-s. (4), the proviso in sub-s. (5) does not entitle the mortgagee to bring or continue a suit for foreclosure without making the receiver a defendant. A decree obtained in his absence is not *res judicata* against him, so as to affect his right to redeem, even if the Court in rejecting an application by him to be made a party, has heard and rejected his objections to the decree being made.

Decree of the High Court reversed.

APPEAL (No. 92 of 1925) from a decree of the High Court (November 25, 1924) reversing a decree of the Subordinate Judge of Asansol, Burdwan.

The appellant as receiver of the estate of one Amulya Krishna Bose, who had been declared an insolvent under the Provincial Insolvency Act, 1907, brought a suit to set aside a decreee for foreclosure of a mortgage upon property which had devolved upon the insolvent, and to redeem the property.

The facts and the terms of the relevant provisions of the above Act appear from the judgment of the Judicial Committee.

The Subordinate Judge made a decree for redemption.

**Present* : VISCOUNT DUNEDIN, LORD SALVESEN AND SIR JOHN WALLIS.

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On appeal to the High Court the decree was set aside and the suit dismissed.

The learned Judges (Walmsley and Ghose JJ.) were of opinion that the receiver could not maintain the suit having regard to s. 16, sub-s. (5) of the above Act. Ghose J. held further that the final decree of the Subordinate Judge for foreclosure operated as *res judicata* against the plaintiff. In his view, the receiver, if he wished to challenge the decree, could and should have appealed from it.

Dunne, *K. C.*, and *F. B. Raikes*, for the appellant.

DeGruyther, *K. C.*, and *Dube*, for the respondents.

March 3.

The judgment of their Lordships was delivered by

LORD SALVESEN This is an appeal from the decision of the High Court of Judicature at Fort William in Bengal, dated the 25th November 1924, by which the judgment of the Subordinate Judge of Asansol in Zillah Burdwan, dated the 5th February 1923, was reversed and the suit dismissed with costs. The appellant prays that the decision of the High Court should be reversed and that of the Subordinate Judge restored.

The material facts are as follow:—The appellant is the Receiver of the estate of Amulya Krishna Bose, who was adjudicated an insolvent on the 21st February 1914, by the District Judge of Bankura who, by the same order, appointed a Receiver of Amulya's estate. Amulya was the son of Tara Prasanna Bose, who in February 1913, had executed a mortgage for the sum of Rs. 40,000 in favour of the defendants over certain properties that belonged to him. He failed to pay the mortgage interest, and on the 11th January 1915, the mortgagees instituted a suit for foreclosure of mortgage. After some procedure to which it is unnecessary to refer, a Solenamah

was executed by the mortgagor and mortgagees under which it was agreed that the time for payment of the mortgage debt should be extended on the undertaking of the mortgagor to pay the interest regularly every year within the month of Chaitra. Failing such payment the mortgagees were to be entitled to foreclose. This Solenamah (or deed of compromise) was filed by the mortgagees on the 6th March 1915, but before any order was made the mortgagor, Tara Prasanna Bose, died on the 7th September. On his death it is matter of admission that the properties subject to the mortgage or the equity of redemption therein devolved by inheritance on the insolvent Amulya.

By Act III of 1907, which contains the law applicable to the facts of the case, it is provided, section 16, clause (*4*), as follows :—"All such property as may be "acquired by or devolve on the insolvent after the date "of an order of adjudication and before his discharge "shall forthwith vest in the Court or Receiver and "become divisible among the creditors in accordance "with the provisions of sub-section (*2*), clause (*a*)." This provision is perfectly clear. The moment the inheritance devolved on the insolvent Amulya, who was still undischarged, it vested in the Receiver already appointed, and he alone was entitled to deal with the equity of redemption. The alternative in the section applicable to vesting in the Court was no doubt inserted to provide for the case of a Receiver not being appointed at the same time as the adjudication of insolvency was made and to foreclose an argument that vesting was suspended until the actual appointment of a Receiver. The difficulty suggested by Ghose J., is thus entirely unsubstantial. The Court only acts through a Receiver, and any estate acquired by or devolving on an insolvent is vested in

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him as from the date of acquisition or devolution whatever the date of the Receiver's actual appointment.

The mortgagor was of course a necessary party to the suit for foreclosure, Civil Procedure Code, Order XXXIV, rule 1, and, as on his death his interest devolved on the Receiver in the insolvency of Amulya Krishna Bose, the plaintiffs became entitled to continue the suit by leave of the Court against the Receiver, Order XXII, rule 10. Instead of adopting this procedure, they chose to transact with the insolvent exactly on the same footing as if he were still undivested, and obtained from him a ratification of the deed of compromise. Proceeding on this, as the interest stipulated had not been paid, they obtained a preliminary decree against him on the 15th March 1916, and notwithstanding the subsequent intervention of the Receiver, to which reference is subsequently made in detail, a final decree was pronounced on the 31st August by which Amulya was debarred from all right to redeem the mortgaged property.

This procedure is said to be justified by the terms of section 16 (clause 5) of the Act already referred to, which runs as follows:—"Nothing in this section "shall affect the power of any secured creditor to deal "with the security in the same manner as he would "have been entitled to realise or deal with it if this "section had not been passed". The learned Judges of the High Court interpret this clause as inferring that the secured creditor is entitled to deal with the security as though there had been no vesting in the Court or the Receiver. Their Lordships are clearly of opinion that this construction of the clause cannot be supported. That the rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an

insolvent is, of course, plain, but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it, and he and not the insolvent, has the sole interest in the subject matter of the suit. To him, therefore, must be given the opportunity of redeeming the property. The contrary view would encourage collusive arrangements between the secured creditor and the insolvent and might involve the sacrifice of valuable equities of redemption which ought to be made available for the benefit of the unsecured creditors of the insolvent with whose interests the Receiver is charged. On this point their Lordships are in entire accord with the opinion of the Subordinate Judge.

The ratification by Amulya of the deed of compromise on which the decree against him proceeded was therefore a nullity, and the whole proceedings by which he was made a party to the suit were equally ineffective to bind the equity of redemption vested in the receiver.

Counsel for the respondents was unable to adduce any argument in support of the above ground of decision of the High Court. He, however, strenuously maintained that the second ground, which is only expounded in the judgment of Ghose J., was well founded. This is in effect a plea of *res judicata*, and is based on the intervention of the Receiver in the former suit. Having learned that the preliminary decree of the 15th March 1916, had been passed against Amulya, he filed two petitions on the 11th and the 16th April 1916. In these he contended that he and not Amulya should have been substituted for the deceased Tara Prasanna. He accordingly prayed that the Court should set aside the preliminary decree and

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make him a party in the suit as Receiver, and to try the suit in his presence. It is admitted that he was never made a party—obviously on the ground that the Subordinate Judge took the same erroneous view of his rights as the Judges of the High Court in the present case. He was, however, heard on his petitions, and his objections to a final decree were repelled. In effect, therefore, it was urged that a decision had been given against him on the same argument which he has submitted here, and not merely so, but that he had appealed to the High Court, who had found the appeal incompetent—not specifically on the ground that he was not a party to the suit, but on a special ground, of the soundness of which their Lordships have no means of forming an opinion. All this, however, will not avail the respondents. The decree, which is pleaded as constituting *res judicata*, on the face of it bears that it was pronounced in a suit to which the appellant was not a party, and therefore does not come within the rule as to *res judicata* in section 11 of the Civil Procedure Code, which only applies to matters which were in issue in a former suit between the same parties. The refusal to make the appellant a party to the suit cannot be treated as having the same effect as an order to the opposite effect, although it is plain enough from the judgments that if he had been made a party the result would have been the same in both the Courts in which he was heard on his petitions. It was suggested that the Receiver ought to have appealed from the decision of the High Court to this Board, but whether such an appeal at the instance of a person who was not a party to the suit would have been entertained may well admit of doubt. In any case the appellant who had done his best to be made a party to the suit and had failed, was quite entitled to

proceed on the view that the decree against Amulya was not binding on him, and to take action in his own name to vindicate the equity of redemption as he has now done.

Their Lordships accordingly will humbly advise His Majesty that the appeal be allowed, that the decision of the High Court be reversed, and that of the Subordinate Judge restored—the appellant to have his costs in the Courts in India and of this appeal.

Solicitors for appellant: *W. W. Box & Co.*

Solicitors for respondents: *Ranken Ford & Chester.*

A. M. T.

CRIMINAL REVISION.

1927

Jan. 27.

Before Suhrawardy and Mitter JJ.

HARBHANJAN SAO

v.

EMPEROR.*

Search by Excise Officer—Legality of the search—Confession to an excise officer—Admissibility of the confession—Bengal Excise Act (V of 1909), Chapter IX—Criminal Procedure Code (Act V of 1898), ss. 1, 5, 102 and 103—Evidence Act (I of 1872), s. 25.

Sections 102 and 103 of the Criminal Procedure Code do not apply to searches under the Bengal Excise Act, which are governed by Chapter IX of the Act.

An excise officer is not a "*police officer*" within s. 25 of the Evidence Act, and a confession made to him is not within its purview.

Ah Foong v. *Emperor* (1), followed.

* Criminal Revision No. 1220 of 1926, against the order of A. Z. Khan, Additional Chief Presidency Magistrate, Calcutta, dated Dec. 8, 1926.

(1) (1918) I. L. R. 46 Calc. 411.