INSOLVENCY JURISDICTION.

Before McNair J.

In re BINJRAJ SAGARMAL.*

1934
Dec. 17;
1935
Jan. 10.

Insolvency—Power of court—Injunction—Creditor proceeding in a foreign court—Relation back of assignee's title—Attachment prior to adjudication—Presidency-towns Insolvency Act (III of 1909), ss. 90(1), 51.

Section 90(*1*) of the Presidency-towns Insolvency Act is wide enough to enable the court to grant an injunction restraining a creditor, who carries on business and has assets within the jurisdiction, from proceeding in the court of a foreign country against the insolvent's property in such country.

Re : *Sumermull Surana* (1) followed.

The doctrine of relation back of the Official Assignee's title to the insolvent's property to the time of commission of the act of insolvency, as embodied in section 51 of the Presidency-towns Insolvency Act, does not apply where the property is situated in a foreign country and which has been attached under an order of the foreign court prior to adjudication.

Galbraith v. *Grimshaw* (2) and *Gummidelli Anantapadmanabhaswami* v. *Official Receiver of Secunderabad* (3) applied.

APPLICATION by the trustees of a deed of composition executed after adjudication.

The facts of the case and arguments of counsel are sufficiently set out in the judgment.

A. K. Roy, Advocate-General, *S. C. Ray* and *S. K. Basu* for the applicants.

S. N. Banerjee (Sr.), *B. C. Ghose* and *Rudra* for the creditors Messrs. Chunilal Hazarimal.

Cur adv. vult.

MCNAIR J. This is an application for an injunction to restrain certain creditors of an insolvent firm known as Binjraj Sagarmal from proceeding with execution proceedings in the court of the District

*Application in Insolvency Case No. 82 of 1933.

(1) (1931) 35 C. W. N. 506; on appeal (1931) 35 C. W. N. 997.
(2) [1910] A. C. 508.
(3) (1933) I. L. R. 56 Mad. 405; L. R. 60 I. A. 167.

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Judge, Ratangarh, Bikanir, and from taking any proceedings other than those contemplated by a scheme of composition entered into by the insolvent firm with their creditors.

The applicants are the trustees under the composition.

On the 16th of May, 1933, an application was made to this Court by a creditor for an adjudication order against the firm of Binjraj Sagarmal.

The usual notices were issued and the firm was adjudicated insolvent on the 30th of May, 1933. The proprietors of the insolvent firm were stated to be Chunilal, Sagarmal and Dhanraj and they were said to carry on business at Calcutta, Patna, and Tezpur in Assam.

The insolvent firm filed their schedule on the 15th of August, 1933, and included in their list of creditors the firm of Chunilal Hazarimal who carried on business in Calcutta, and amongst their assets, immovable property in Bikanir.

On the 23rd of August, 1933, the same three persons, namely, Sagarmal, Chunilal and Dhanraj purporting to be the proprietors of the plaintiff firm put forward a proposal for composition.

Messrs. Chunilal Hazarimal on the 7th of September, 1933, submitted a proof of their debts. They claimed to be unsecured creditors for Rs. 10,000 being money lent on two *purjâs* now filed in the suit instituted at Ratangarh. There is an endorsement on the proof that they were admitted to vote, and that the debt was admitted to rank for dividend.

A meeting of creditors was held on the 16th of November, 1933, and the proposal was accepted by a majority of creditors exceeding three-fourths of the value of the aggregate claim against the insolvents' estate.

The public examination of the insolvents was duly held and on the 12th of December, 1933, this Court approved the proposal for composition and the appointment of the present applicants as the trustees,

and empowered the Official Assignee to make over the assets of the insolvent firm to the trustees. There is some dispute whether Messrs. Chunilal Hazarimal did or did not vote for the composition, but it is clear that they received a voting paper, and that they took part in the insolvency proceedings. They must, therefore, be governed by the decision of the meeting which approved the composition. In the meantime Messrs. Chunilal Hazarimal instituted proceedings in the Bikanir Court to recover their debt.

On the 16th of May, 1933, the very day on which the application was made to this Court for adjudication of the insolvent firm, Messrs. Chunilal Hazarimal filed a suit in Bikanir and obtained an order for attachment before judgment. The suit was to recover the same debt which was mentioned in the insolvency proceedings and the plaint states that the cause of action arose in Calcutta. They impleaded not only the three members of the firm who were adjudicated insolvents but also the four sons of Chunilal Binjraj, three of whom are minors and all of whom were said to carry on business as a joint family concern.

There is no doubt, however, that the debt which they sought to recover was the debt due from the firm of Binjraj Sagarmal for which they had proved in the insolvency and there is no suggestion that the business was the business of a joint Hindu family other than the statement in the first paragraph of the plaint.

The District Judge of Ratangarh in Bikanir decreed the suit on the 29th of November, 1933. During the trial, he raised the issue—

> Are the plaintiffs not entitled to institute this suit on account of the pendency of insolvency proceedings at Calcutta against the defendants ?

This issue he decided in favour of the plaintiff firm as "the burden of proof was on the defendants "(*i.e.*, the insolvents) and they have produced no "proof at all." An application for setting aside the order for attachment before judgment was dismissed for the same reason.

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Following up their decree Messrs. Chunilal Hazarimal on the 23rd of December, 1933, obtained an order for sale of the insolvent firm's Bikanir properties.

The present petitioners applied in Bikanir for stay of execution of the decree and for an *interim* stay of the sale, but as they produced no evidence of their status as trustees under the composition, nor any list of creditors, or of debts, or of assets, it is not surprising that their application was unsuccessful.

The Bikanir properties were sold by auction on the 31st of March, 1934, but confirmation of the sale has been stayed pending the result of these proceedings.

The first question that arises is one of jurisdiction. In delivering judgment in a somewhat similar application in *Re Sumermull Surana* (1), Panckridge J. said :—

> There is nothing in principle which prevents the court from restraining proceedings in a foreign court where as here the parties sought to be restrained carry on business within the jurisdiction, even if they do not reside here, and have assets within the jurisdiction which can be attached in the case of any breach of injunction. Moreover I am disposed to think that the language of section 90(*1*) of the Insolvency Act is wide enough to confer on the court the power of granting an injunction of the character here asked for.

With that statement of the law I respectfully agree and I have no doubt that in the present case the court has power to grant the desired relief. The question that remains is whether, in the circumstances, that relief should be granted. In the case, to which I have referred, the learned Judge held in his discretion that no injunction should issue and his decision was upheld by the Court of Appeal (2). There are certain outstanding points of difference in the facts of this case from those outlined in the reported case.

Here, it is the trustees who seek to enforce the composition; and the creditors in the present case have submitted a proof of their debt and taken part in the insolvency proceedings. Moreover, the insolvent firm disclosed the properties now under attachment in Bikanir in their schedule of assets and they are

(1) (1931) 35 C. W. N. 506, 509. (2) (1931) 35 C. W. N. 997.

willing to convey them to the trustees for the benefit of the general body of creditors if the attachment in Bikanir is removed. In this connection, the opposing creditors contend that the Bikanir properties were excluded from the composition deed which provided in paragraph 6 that on the adjudication being annulled the "assets appertaining to the insolvents' business at "Calcutta, Patna and Tezpur" should vest in the trustees absolutely. These are assets in British India. The same paragraph, however, empowers the trustees to "realise *all* the secured and unsecured assets by "suit or otherwise." These words are wide enough to include the Bikanir properties.

In *Sumermull's* case (1) it was suggested that as between the insolvent and his creditors an adjudication order made in British India would *prima facie* operate so as to make property in a foreign state available to the creditors unless the law of the foreign state interferes with the operation of our own law, but that, before granting an injunction such as that which was sought, a judge might reasonably insist on definite evidence as to the law of the foreign state.

The petitioners here produce evidence that the law of insolvency and of transfer in Bikanir, so far as is relevant to the present matters, is identical with the law of British India and they urge that the property in Bikanir would vest in the Official Assignee and then in the trustee under the composition.

In ordinary circumstances this would be correct; but the difficulty which the petitioners have to overcome is the fact that the Bikanir properties were already attached when the adjudication order was made. To meet this difficulty reliance is placed on section 51 of the Presidency-towns Insolvency Act and it is contended that the insolvency must be deemed to relate back and commence at the time of the commission of the act of insolvency, that is, prior to the 16th of May, 1933. This argument was put forward and

(1) (1931) 35 C. W. N. 506.

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was rejected by the House of Lords in *Galbraith* v. *Grimshaw* (1). Lord Loreburn there said—

> The attachment in England will not prevail against a claim of a foreign trustee in bankruptcy which is prior in date, provided that the effect of the bankruptcy is to vest in the trustee the assets in question. If the attachment is prior in date, then I do not think it will be affected by the title of the trustee in a foreign bankruptcy; and the reason is that a foreign law making the title of the trustee relate back to transactions which the debtor himself could not have disturbed has no operation in England, while the English law as to relation back applies only to cases of English bankruptcy.

Lord Dunedin dealing with the same matter says at page 513:—

> Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution; and that I take to be the doctrine at the bottom of the cases of which *Goetze* v. *Aders* (2) is only one example. But if you wish to extend that not only to the question of recognising a process of universal distribution but also of introducing the law of relation back, then it seems to me you at once get into rather great difficulties, because the question at once arises, according to which law will you apply the doctrine of relation back? If you take the law of the country of the bankruptcy, then the execution or security in question may be and often is of a kind which is quite foreign to the system of law which you are administering in the Bankruptcy Court. If on the other hand you take the law of the country of the attachment, then you have to administer a law which is quite ignorant of the precise execution or security with which it has to deal. Accordingly, to say the least of it, there has been quoted to us no instance where as a question of international law a Court has applied the rule of relation back, and certainly there are *dicta* of Lord President Inglis which seem to point completely the other way.

The case of *Galbraith* v. *Grimshaw* (3) was recently applied by the Judicial Committee to an appeal from India in *Gummidelli Anantapadmanabhaswami* v. *Official Receiver of Secunderabad* (4). There the district court of Secunderabad, which was held to be a foreign court, on a creditor's petition adjudicated in 1928 certain persons insolvent, and the question arose whether under such adjudication there vested in the Official Receiver of Secunderabad, who was trustee in the bankruptcy, the benefit of a decree obtained by the insolvents in the Madras High Court freed from an attachment made by that court in

(1) [1910] A. C. 508, 510.
(2) (1874) 2 R. 150.
(3) [1910] A. C. 508.
(4) (1933) I. L. R. 56 Mad. 405; L. R. 60 I. A. 167.

1926. The Madras High Court, on appeal, held that the attachment was purely prohibitory and did not create any title, lien or security in favour of the attaching creditor which could prevail over the receiver in insolvency.

That view was overruled by the Privy Council, who held on the principles laid down in *Galbraith* v. *Grimshaw* (1), that the foreign adjudication order would not be allowed to interfere with any process already pending which fettered the insolvent's power of transferring the subject matter of the process to the receiver in bankruptcy; and they quoted with approval the test supplied by Lord Loreburn which is as follows:—

> In each case the question will be whether the bankrupt could have assigned to the turstee, at the date when the trustee's title accrued, the debt or assets in question situated in England. If any part of that which the bankrupt could have then assigned is situated in England, then the trustee may have it; but he could not have it unless the bankrupt could himself have assigned it.

In the present case, at the date of the adjudication, the insolvents could not themselves have assigned the Bikanir properties, because of the attachment which had already been granted by a foreign court and it is immaterial to consider whether the property would, in fact, have vested in the Official Assignee if it had been merely attached in British India.

The result is that the creditors, having duly obtained an attachment in Bikanir before the date of the adjudication, cannot now be "deprived of the fruits of their diligence."

The application must be dismissed with costs.

Application dismissed.

Attorney for applicants: *D. N. Ganguly.*

Attorneys for respondents: *Dutt & Sen.*

P.K.D.

(1) [1910] A. C. 508.