APPELLATE CIVIL.

Before Costello A. C. J. and Edgley J.

1937

May 19.

INDU BALA DASEE

v.

BAKKESHWAR BANERJI*.

Insolvency—Receiver—Dâyabhâga—*Hindu joint family firm*—Kartâ—*Managing member's powers—Firm's property—Liability—Attachment, Effect of—Appeal—Leave of Court—Presidency-towns Insolvency Act (III of 1909), s. 52—Provincial Insolvency Act (III of 1907), s. 28.*

The receiver in insolvency of the *kartâ* of a Hindu joint family firm does not obtain an unfettered *kartâ's* right to have recourse to the property of the other members of such a firm for the purpose of satisfying the claims of the creditors of that firm.

Where insolvency proceedings are instituted against the manager or *kartâ* of a *Dáyabhâga* Hindu joint family firm consisting of several members, the whole of the properties of those persons who constitute that firm are not available for distribution amongst the creditors of that firm after adjudication: the utmost that can vest in the receiver in such a case is the *kartâ's* own share in the family business together with such right as he may have to dispose of property belonging to the other members of the firm for the purpose of discharging business obligations.

As there is a very definite difference in the provisions of s. 52 of the Presidency-towns Insolvency Act as compared with s. 28 of the Provincial Insolvency Act, it can scarcely be accurate to describe the *kartâ* or managing member's rights—as regards incurring and discharging liabilities on behalf of a Hindu joint family business—as an item of property at all. But it seems quite clear on the authorities that some such right is recognised and that it is to be deemed to be a species of property available for creditors.

The existence of an attachment in favour of a creditor does not constitute that creditor a secured creditor, but the property in respect of which an attachment is made is not free, at any rate, to this extent that it cannot be made the subject of a private sale. The property is not free but frozen.

The right of the *kartâ* or manager of a Hindu joint family firm is normally a right to incur debts by having recourse to the assets of the family. Where this right, at the time of the insolvency, has been put an end to or at any rate suspended owing to the existence of an attachment, even assuming that such right passes to the receiver, it must pass with the clog upon it which the attachment has created.

*Appeals from Original Orders, Nos. 456, 407, 410 and 589 of 1935 and 129 of 1936, against the order of A. M. Ahmad, District Judge of Nadia, dated Aug. 19, 1935.

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The power of the receiver is subject to the same qualification as if it was in the hands of the father, *i.e.*, the head of the Hindu joint family.

Adusumelli Gopalakrishnayya v. *Peyyath Gopalan* (1) followed.

In an insolvency matter an order that is of such a nature that it would fall for the decision of the Court under s. 4 is, in effect, an order either deciding rights or at any rate deciding priority, and is, therefore, appealable without leave.

Where the receiver in insolvency is made a party to such an appeal he represents the creditors and certainly the petitioning creditor, who is not, therefore, a necessary party to the appeal.

APPEAL FROM ORIGINAL ORDER by the creditors of an insolvent firm.

The facts of the case and the arguments in the appeal appear sufficiently from the judgment.

Panchanan Ghosh for the appellants in Nos. 407, 410, 456 and 129.

Soureendra Narayan Ghosh and *Shyama Charan Mitra* for the appellants in all.

Paresh Nath Mukherji for the appellants in Nos. 407, 410 and 456.

Beereshwar Bagchi and *Surajit Chandra Lahiri* for the receiver, respondent, in Nos. 407, 410, 456 and 589.

Chandra Shekhar Sen and *Sateesh Chandra Sen* for the respondents in No. 589.

Hemendra Kumar Das and *Purushottam Chatterji* for the respondents in Nos. 407, 410 and 129.

Panna Lal Chatterji for the Deputy Registrar in No. 129.

COSTELLO A. C. J. The only one of these connected appeals which has been argued before us at any length is that which is numbered 456 of 1935 and is entitled Sm. *Indu Bala Dasee and others* v. *Bakkeshwar Banerji* (receiver). It is quite clear that the

(1) (1926) I. L. R. 51 Mad. 342.

view taken by us in this appeal will have the effect of determining the rights of the parties in the other appeals also, particularly having regard to the fact that Mr. Ghosh appearing on behalf of certain decree-holders does not desire to contest the correctness of the adjudication in insolvency of Lakshmi Narayan Ganguli. Lakshmi Narayan is described in the insolvency proceedings as the managing member of a joint Hindu family firm which was known by the name and style of and carried on business as Messrs. Ganguli Brothers. It appears that there are in all fifteen members in that family firm, of which fourteen are of full age, and one is a minor whose interests are in the hands of the learned advocate who represents the Deputy Registrar of the Court. Mr. Ghosh's clients are three ladies, each one of whom had lent money to Messrs. Ganguli Brothers and who in regard to their respective loans had obtained three separate decrees against this family firm. They, therefore, are in the position of being decree-holders, but that does not in any sense constitute them secured creditors in the insolvency. They have, however, this advantage, that they managed to secure an attachment of certain properties belonging to Messrs. Ganguli Brothers before their three suits came to trial and, therefore, of course before they obtained decrees in those suits. Thus, directly decrees had been made in their favour, they were in a position to endeavour to obtain their rights under those decrees by appropriate proceedings in execution against the properties which had already been attached. Unfortunately for them, however, they were not the only creditors of Messrs. Ganguli Brothers. There were others, and we gather a considerable number of other creditors, most of whom at any rate were desirous of enforcing their rights against the family firm. One of these creditors is one Kali Das Bakshi—and he acting solely or at any rate primarily in his own interest—instituted proceedings in insolvency in the Court of the District Judge of Nadia as an outcome of which an adjudication order

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was made, and a receiver was appointed in whom the property of the insolvent became vested by virtue of the provisions of the Provincial Insolvency Act.

The question we have to decide comes to this: what is it that can rightly be described as the property of the insolvent for the purposes of this particular insolvency. It appears to have been suggested that because the insolvency proceedings were instituted against Lakshmi Narayan as the manager or *kartâ* of the joint Hindu family firm, therefore, the whole of the assets, at any rate the business assets of that firm, became vested in the receiver, who had been appointed in the insolvency proceedings and so the whole of the properties of the fifteen persons who constituted the firm ought to be available for distribution amongst the creditors. That is a proposition we cannot accept. We are quite clearly of opinion, and indeed I think it is now conceded at the bar, that the utmost that could have vested in the receiver was Lakshmi Narayan's own share in the family business together with such right as he might have had to dispose of property belonging to the other members of the firm for the purpose of discharging business obligations. That is what has been put forward by Mr. Bagchi and Mr. Lahiri on behalf of the joint creditors of this family firm.

Mr. Ghosh on the other hand—supported by the learned advocates who appeared for the members of the Ganguli family—other than the insolvent and the minor—says that the attachment to which I have already referred must be taken into account and that although as regards the ordinary property and assets of the insolvent the attachment is inoperative and ineffective as against the receiver, it is of consequence as regards the alleged right which Lakshmi Narayan is said to have had as the manager of the joint family to deal with the assets belonging to himself and the other members of the family for the purpose of liquidating the family debts.

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The actual judgment with which we are concerned appears in the order sheet of the insolvency proceedings (Insolvency Case No. 20 of 1935) under the serial No. 30, and the date August 19, 1935. The learned District Judge points out first of all, that on the application of one of the creditors of the family firm of Kali Das Bakshi, Lakshmi Narayan was adjudicated insolvent on July 16, 1935. Then he refers to the three decrees which had been obtained by Mr. Ghosh's clients, all of them in Court of the Additional Subordinate Judge of Nadia. Then he says "an "objection to the receiver taking possession of all the "joint properties of the firm on the ground that the "properties of the other judgment-debtors, one of "whom is a minor, did not vest in the receiver "appointed by this Court" was put forward by some of the other creditors (he was of course referring to the decree-holders). Then he refers to the attachment. The learned Judge no doubt took the view that it was only the share of Lakshmi Narayan that vested in the receiver, but he adds this "as to the second contention, "whether the previous attachment of the joint family "property by some of the creditors, the powers of the "receiver to bring the property to sale has ceased to "exist, there appears to be not much force in the above "contention as the attachment does not create any title "in favour of the attaching creditor. It merely "prevents private alienation. The mere fact of attach-"ment cannot place him in the category of a secured "creditor". The learned Judge, therefore, was of opinion that there did pass to the receiver some right which was supposed to have been vested in the insolvent as the *kartâ* of the joint family firm, a right to bring to sale their property for the benefit of the firm's creditors, that despite the attachment that right became vested in the receiver.

Were it not for existence of a large number of authorities many of which have been cited before us, I should have been disposed to take the view that, as there is a very definite difference in the provisions of

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s. 52 of the Presidency-towns Insolvency Act as compared with s. 28 of the Provincial Insolvency Act, it can scarcely be accurate to describe the *kartâ* or managing member's rights as regards incurring or discharging liabilities on behalf of a joint Hindu family business, as an item of property at all. But it seems quite clear on the authorities that some such right is recognised and that it is to be deemed to be a species of property available for the benefit of creditors.

It has been pointed out to us by the learned advocate for the Gangulis, that there does not seem to be any reported decision regarding a *Dâyabhâga* family in this connection. We will, however, for the purpose of deciding this appeal assume that a *kartâ's* right to dispose of or, at any rate, to affect with liability joint property in the case of a joint Hindu family firm is to be regarded as a piece of property which ordinarily would pass to and become vested in a receiver upon the insolvency of the *kartâ* or managing member, in such a way as to afford some advantage to the creditors of the joint family firm. We will assume that that is the position in normal circumstances. But here as Mr. Ghosh has emphasized there was an attachment and an attachment before judgment in the three suits brought by Mr. Ghosh's clients —an attachment which subsisted after judgment— and after this had respectively obtained decrees in the Court of Additional Subordinate Judge of Nadia. I have already said that the existence of an attachment in favour of a creditor does not constitute that creditor a secured creditor; but an attachment does mean this: that the property in respect of which it is made is not free, at any rate, to this extent that it cannot be made the subject of a private sale. Mr. Justice Edgley in the course of the argument used an expression which seemed to me to be very apt in the circumstances—the property is not free but frozen, *i.e.*, for the time being it is not available for selling. I suggested to Mr. Lahiri at the early stage of the

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argument that it is very difficult to see how the receiver could have acquired any higher right than the insolvent himself possessed and, therefore, we are of opinion that the position must be taken to be this: that the right of Lakshmi Narayan as the *kartâ* or manager of the family firm of Messrs. Ganguli Brothers was normally a right to incur debts for business purposes and equally to discharge those debts by having recourse to the assets of the family. This right, at the time of the insolvency, had been put an end to or at any rate suspended owing to the existence of the attachment. Therefore, even assuming that such right passed to the receiver, it must have passed to the receiver with the clog upon it which the attachment had created.

We think, therefore, that the learned Judge was not right in coming to the conclusion that the receiver obtained—what I may perhaps describe as an unfettered *kartâ's* right to have recourse to the property of the other coparceners—the other members of the joint Hindu family firm—for the purpose of satisfying the claims of the creditors of that firm. We are led to that view of the matter upon a consideration of a case to which our attention was drawn by Mr. Ghosh, namely, *Adusumelli Gopalakrishnayya* v. *Peyyath Gopalan* (1). The judgment is that of Ramesam and Devadoss JJ. It is very short and it appears at p. 343. The learned Judges said:—

> Only the power of the father to sell the shares of the sons passes to the Official Receiver.

They were referring to the well-known case of *Sat Narain* v. *Behari Lal* (2). The learned Judges continue:—

> But the power is subject to the same qualification as it is in the father's hands.

In support of that proposition they referred to the case of *Allahabad Bank, Ltd., Bareilly* v. *Bhagwan*

(1) (1926) I. L. R. 51 Mad. 342, 343. (2) (1924) I. L. R. 6 Lah. 1; L. R. 52 I. A. 22.

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Das Johari (1) and to the case of *Seetharama Chettiar* v. *Official Receiver, Tanjore* (2). They proceed thus:—

> In this case the son's shares have been attached and after such attachment the Official Receiver cannot exercise the power of sale. It is true that in respect of such properties which were sold by the Official Receiver prior to the attachment of the son's share by the decree-holder, the above observations do not apply.

The important part of that judgment is the statement that the power of the Official Receiver is subject to the same qualification as if it was in the hands of the father, that is to say, the head of the joint family.

We are of opinion that this appeal No. 456 of 1935 must be allowed with the consequential results to the other appeals Nos. 407, 410 and 129. The orders appealed against are set aside and the execution will proceed. As regards Appeal No. 589 against the order of adjudication which is not now challenged, it is dismissed.

I ought perhaps to add that two preliminary objections of a formal kind were raised by Mr. Lahiri and afterwards elaborated by Mr. Bagchi. The first of them was that no appeal lay against the order or decision of the District Judge of Nadia dated August 19, 1935, because it was not one of the matters in respect of which an appeal was permitted without the leave either of the District Judge or of the High Court. We have, however, come to the conclusion that as this was an insolvency matter and the order of August 19, 1935, was an order of such a nature that it would fall for the decision of the Court under s. 4. It was, in effect, an order either deciding rights or at any rate deciding priority. The order was, therefore, appealable without leave.

(1) (1925) I. L. R. 48 All. 343. (2) (1926) I. L. R. 49 Mad. 849.

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The other point, an equally technical one, was that the proceedings were not properly constituted, because the petitioning creditor Kali Das Bakshi had not been made a party to the appeal. We are, however, of opinion that the presence of Kali Das is not necessary because the receiver is a party to the appeal and he represents the creditors and certainly the petitioning creditor. The preliminary objections taken by Mr. Lahiri, therefore, have no substance.

The appellants in Appeal No. 456 of 1935 are entitled to get their costs here and below from the receiver respondent out of the insolvent's estate. There will be no order as to costs in the other appeals.

EDGLEY J. I agree.

Appeal No. 456 of 1935 allowed.

G.S.