APPEAL FROM ORIGINAL CIVIL.

Before Costello and Panckridge JJ.

1937
Mar. 16, 17.

TARAK DAS DHAR
v.
SANTOSH KUMAR MALLIK.*

Insolvency—Official Assignee—Abandonment of insolvent's property—Sale by insolvent after discharge—Validity—Transfer of Property Act (IV of 1882), s. 54—Presidency-towns Insolvency Act (III of 1909), s. 17.

Once a particular item of property has vested in the Official Assignee by virtue of the operation of s. 17 of the Presidency-towns Insolvency Act, that property cannot become revested in the insolvent without any other action on the part of the Official Assignee save an expression of opinion that the property is of no value and that he does not propose to do anything in the way of attempting to make the property available for the creditors of the insolvent and that accordingly he is abandoning it.

The sale by the insolvent after his discharge of such property abandoned by the Official Assignee will not pass a good title to the purchaser.

Sheonandan v. *Kashi* (1) dissented from.

APPEAL from a decree of Ameer Ali J. by the plaintiff.

The facts of the case are briefly as follows :—

The plaintiff sued for recovery of possession of premises No. 52, Wellington Street, Calcutta, on establishment of his title thereto as heir and legal representative of one Nitai Chand Dhar, who had died in 1896. Nitai's father, Dina Nath, was entitled to a half-share in the premises in suit ; his brother, Krishna Lal, or the heirs of Krishna Lal as entitled to the other half-share would have inherited in the absence of any disposition by their father, Panchanan Dhar. The issue in the suit was whether Panchanan Dhar did or did not make such a disposition in favour of Jadu Nath, son of his daughter, Bidhu Mukhi. Nitai died in 1896, leaving the plaintiff,

*Appeal from Original Decree, No. 61 of 1936, in Original Suit No. 61 of 1936.

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Tarak Das, and a younger son Habla born in 1890. The question arose, whether owing to the mental condition of Habla Tarak had inherited the whole of Nitai's half-share, or only half and subsequently on the death of Habla in 1921 the other half. A preliminary question of law as to the maintainability of this suit by plaintiff, whose property had vested in the Official Assignee on his insolvency, was tried as a preliminary point. Evidence was also taken as to the date of Habla's insanity, and it was contended on behalf of plaintiff that, even if Tarak's insolvency were a bar, it would not affect the share, which Tarak acquired through Habla, who died in 1921. Habla had been adjudged a lunatic on January 25, 1909. The fact that he has been insane from infancy was stated both in the report, dated April 26, 1909, and in Chitty J.'s judgment, dated January 25, 1909. On June 5, 1936, Ameer Ali J. held that the mere fact that the Official Assignee had abandoned or refused to touch this item of the insolvent's estate, *viz.*, the property in suit, did not automatically revest that property in the insolvent and dismissed the suit on the preliminary point of law. Thereupon the plaintiff preferred this appeal.

Page, J. Maitra and *P. C. Sen* for the appellant. The plaintiff, Tarak, should be afforded an opportunity of producing further evidence consisting of fresh documents having a direct bearing on the question of the date when Habla Dhar had become insane. There was uncontradicted evidence on the record that when his father died in 1896 Habla Dhar was of sound mind, though he became insane later, and so Habla was not debarred from inheriting under Hindu law. There was no substance in the preliminary point of law raised by the defendants that the suit by the plaintiff was not maintainable, because his interest in the premises No. 52, Wellington Street, Calcutta, had vested in the Official Assignee under the provisions of s. 17 of the Presidency-towns Insolvency Act of 1909 on Tarak being adjudicated

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an insolvent on May 15, 1912. The plaintiff had obtained his discharge on May 18, 1916, and, as the Official Assignee did not propose doing anything with the said property because it had no value, it thereupon automatically revested in the plaintiff, who could sue without obtaining a registered conveyance from the Official Assignee or joining him as plaintiff. *Sheonandan* v. *Kashi* (1). I also rely on the opinion of the Right Honourable Sir Dinshaw Mulla at p. 346 of his Law of Insolvency.

P. C. Ghose, J. N. Mazumdar and *A. K. Ghose* for the Mallik respondent.

S. K. Dutta for the Dhar respondents.

Counsel for respondents were not called upon to reply.

COSTELLO J. The judgment in this case was, in effect, a decision on a point of law which has been decided in a contrary sense by the High Court of Allahabad in a case reported under the title of *Sheonandan* v. *Kashi* (1). The learned Judges who decided that case began their judgment in these words :—

> The facts of the litigation out of which this appeal arises are complicated ; but the appeal before us raises a single and a simple point.

The same position obtains in the matter before us. We suggest that the facts out of which this appeal arises are complicated, because that seems to have been the view taken by the learned Judge himself in the Court below. In his judgment he says :—

> The events of this suit are not clear in my mind, but I remember that some evidence was taken and the matter was then adjourned for the plaintiff to obtain evidence on commission.

It is, however, possible, I think, to state the relevant facts quite shortly. The suit was brought by one Tarak Das Dhar to establish his title to and

(1) (1916) I. L. R. 39 All. 223.

to obtain possession of certain premises known as 52, Wellington Street in this city. Tarak was a son of a man named Nitai, who had two other sons named, respectively, Narayan and Habla. Narayan was the eldest of the family: Tarak came in the middle and Habla was the youngest. Nitai died in the year 1896 and the eldest son Narayan had predeceased him by about one year. Habla died in the year 1921. Nitai was the grandson of a man named Panchanan Dhar—being the son of Panchanan's eldest son Dina Nath. Panchanan had a second son named Krishna and a daughter Bidhu Mukhi Dasee. The latter married a man named Mallik. They had a son called Jadu Nath. The four defendants in the suit were the grandsons of Jadu Nath through his daughter Radha Rani. The property which is the subject matter of the present proceedings, originally belonged to Panchanan and he by a deed of gift had given a life interest in that property to Jadu Nath who, it will be seen from what I have already said, was his daughter's son. After the death of Jadu Nath the property in question would in the ordinary course have reverted to the two sons of Panchanan or their descendants. By a family arrangement, however, the property was allowed to remain in the possession of that side of the family during the life-time of Jadu Nath's wife, his mother Bidhu Mukhi and his son Gopi Nath. Meanwhile the present plaintiff was adjudicated an insolvent by an order made on May 15, 1912, and he remained in the state of insolvency, if I may so put it, till he obtained his discharge in the year 1916.

The fundamental factor in this case is the operation of s. 17 of the Presidency-towns Insolvency Act of 1909 which, as is well known, provides that on the making of an order the property of the insolvent shall vest in the Official Assignee and shall become divisible among his creditors. It follows, therefore, that whatever rights Tarak had as regards the property, *i.e.*, the premises No. 52, Wellington Street, on his insolvency became vested in the then Official

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Assignee. I have already stated that the reversionary interest in that property would vest in the two sons of Panchanan or their representatives—put shortly, in the two branches of the family originally represented by Dina Nath and Krishna—that is to say, Dina Nath and his descendants would take one half and Krishna and his descendants the other half, and upon the death of Nitai representing Dina Nath that half share would in the ordinary course be divided between Tarak and Habla—Narayan having died before Nitai. There was a dispute, however, as to whether Habla had, in fact, acquired any rights at all, because it was contended that he was from the time of his birth onwards not of sound mind. In other words, he was a congenital idiot. It was sought to give support to this contention by a reference to a judgment given by Chitty J. on January 25, 1909, in connection with an application for an enquiry into the incapacity of Habla. By that judgment, Chitty J. expressed the opinion that Habla was of unsound mind and was incapable of managing his affairs and he stated :—

> He has been in this state since infancy and has never displayed any signs of intelligence or acquired the power of speech.

Accordingly, Chitty J. appointed the mother of Habla Dhar as his committee. I doubt very much whether, strictly speaking, the judgment of Chitty J. was admissible in evidence for the purpose for which it was used. But quite independently of that the learned Judge at the trial seems to have thought that the oral evidence given before him was sufficient to establish the fact that Habla Dhar was a lunatic from his birth and that, therefore, under Hindu law he never did acquire any rights at all as regards the property 52, Wellington Street. The result of that finding of fact was that the present plaintiff—respondent in this appeal—at the time of his insolvency in the year 1912 was entitled to that half share of the interest in the premises No. 52, Wellington Street, which finally passed to Dina Nath and his branch of the family. The finding of fact arrived at by Ameer

Ali J. has not been seriously challenged in this Court. The utmost that Mr. Page, appearing on behalf of the appellant, urges is that his client ought to be afforded the opportunity which was asked for in the proceedings in the Court below, of producing further evidence, which the learned counsel then appearing described as consisting of fresh documents and which he said had a direct bearing on the question of the date when Habla Dhar became insane. I see no reason at all for interfering with the decision of the learned Judge, by which he declined to grant the adjournment asked for in order that additional evidence might be adduced touching the question of the insanity and the date thereof.

We are, therefore, faced with this position that there is before us an appeal which, in the words of the Judges of the Allahabad High Court, "raises a single and simple question of law"—the point being this, that the interest of Tarak on his insolvency vested in the Official Assignee by operation of law, and the Official Assignee, having taken up the attitude that the property represented by the insolvent's interest in premises No. 52, Wellington Street, having ostensibly, at any rate, no value, he did not propose to do anything with it. Did the property in question, therefore, in some way or other either remain that of the insolvent or became revested in him in such manner that at the time when this suit was instituted he was in a position to say that the title to that property was in him as the plaintiff in the suit and so he was entitled to obtain possession of it as against the defendants who, as I have said, are the present representatives of the third branch of Panchanan's descendants, namely, that branch who are the descendants of Panchanan's daughter Bidhu Mukhi. It is obvious that whatever interest Tarak had in the premises No. 52, Wellington Street, did vest on his insolvency in the Official Assignee.

It was argued on behalf of Tarak as the plaintiff in the Court below and on his behalf as the appellant

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before us that the point was covered by the decision in the Allahabad case (1), to which I have referred and the decision in that case was either expressly or tacitly approved of by that distinguished and learned author, Sir Dinshaw Mulla, in his Lecture No. 8 of the Lectures, which he delivered as Tagore Professor of Law at Calcutta University and which were afterwards published in a book under the title of 'Law of Insolvency'. Mr. Page refers us to the relevant paragraph, which appears at p. 346 of the book with the heading "Property abandoned by Official Assignee as worthless". It runs as follows :—

> Where a particular item of property belonging to the insolvent, *e.g.*, a mortgage security, is abandoned by the Official Assignee or receiver as being of no value at all, and the insolvent obtains his discharge, the property belongs to the insolvent, and the sale thereof by the insolvent after his discharge will pass a good title to the purchaser.

That statement is actually based on the judgment of Piggot and Walsh JJ. in the Allahabad case. As we are of opinion that we are unable to agree with the judgment in that case, perhaps it is right that I should set out the facts on which it was based. They were as follows :—A certain house was mortgaged to one Bipat in 1907. He executed a simple mortgage of his mortgagee rights in favour of one Seeta Ram in 1909. Seeta Ram's rights were purchased by the plaintiff Kashi in 1913. Prior to that, namely, on October 1, 1910, Bipat was adjudicated an insolvent. His rights in the house in question were entered in the schedule of assets. On February 15, 1913, the receiver appointed by the insolvency Court made a report to the effect that no realisable assets were left ; that there was the house but it was so heavily encumbered that nothing was realisable from it. Bipat had obtained his discharge on June 24, 1913 and a little more than a year afterwards, that is to say, on October 28, 1914, Bipat sold to the plaintiff for a sum of Rs. 500 his mortgage rights together with his right to receive arrears of rent, which was then outstanding and due to Bipat. In January,

(1) (1916) I. L. R. 39 All. 223.

1915, the plaintiff brought a suit for a declaration that he was the mortgagee of the house, for possession thereof as mortgagee and for recovery of arrears of rent. The representative in interest of the original mortgagors pleaded *inter alia* that the plaintiff purchased nothing by the sale-deed of October 28, 1914, because on that date Bipat's interest in the property had come to an end by virtue of his insolvency and discharge. The Court of first instance gave effect to this plea and dismissed the suit without trying the other issues in the case. The first appellate Court reversed that decision and remanded the suit for trial on the merits and against the order of remand an appeal was taken to the High Court of Allahabad and in that way the matter came to be decided by Piggot and Walsh JJ. The learned Judges referring to the transaction of October 20, 1914, stated :—

> The present suit was by Kashi to enforce the rights, if any, acquired by him under this transfer. The Court of first instance, although it framed a number of issues, dismissed the suit on the single finding that Bipat after his order of discharge had no rights left under the mortgage in question. The point taken was that Bipat's rights had vested in the Court, or the receiver, under s. 16 of the Provincial Insolvency Act, III of 1907, and that the order of discharge does not operate so as to revest those rights in Bipat.

Section 16 of the Provincial Insolvency Act corresponds to s. 17 of the Presidency-towns Insolvency Act. The learned Judges continued thus :—

> The learned District Judge in appeal has reversed this finding and has remanded this case to the first Court for trial on the merits. We do not know at present whether the plaintiff Kashi has got value for his money or not ; that question depends upon the determination of the issues not hitherto tried. We think the District Judge was right.

Then follows this proposition :—

> The receiver having abandoned this particular item of property as worthless, Bipat became entitled to deal with it after the order of discharge.

Ameer Ali J. in deciding the present case did not act on any such principle and that apparently underlying that proposition and we think the course he took was the correct one. It is very difficult to see how it can rightly be contended that once a particular item of property has vested in the Official Assignee by virtue of the operation of s. 17 of the Presidency-towns Insolvency Act that property can become revested in the insolvent without any other action

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on the part of the Official Assignee save an expression of opinion that the property is of no value and that he does not propose to do anything in the way of attempting to make the property available for the creditors of the insolvent and that accordingly he is abandoning the property. Mr. Page, I think, realised the difficulty which confronted him in endeavouring to persuade us to accept the view that in law there can be such an abandonment of incorporeal or immovable property by the Official Assignee as to bring it about that it becomes automatically or by some sort of metaphysical process, as it were, revested in the insolvent either during the currency of his insolvency or after his discharge. The bare idea that immovable properties can vest or revest in any one in that kind of way is obviously directly contrary to the express provisions of the Transfer of Property Act, which make it quite clear that property of the kind with which we are now concerned, can only be transferred from one person to another by means of an appropriate instrument in writing, which is subsequently registered. We differ from the view of the learned Judges of the Allahabad High Court with less hesitation perhaps than we might otherwise have done, because no reasons are given for the expression of opinion involved in the proposition, which I cited from that judgment, and it is not at all clear what was the real *ratio decidendi* and the basis of the decision on a matter which they themselves described "as a single and simple point of law". With due respect to Piggot and Walsh JJ. we feel bound to come to the conclusion that we should not follow that decision—clearly we are not obliged to do so—and we take the view that the decision of Ameer Ali J. on the point of law involved in the matter which we have to decide, was right.

The result is that we must hold that Tarak at the time when the suit was brought had no enforcible title in the premises situated at 52, Wellington

Street, and that the suit was rightly dismissed. This appeal is also dismissed and with costs.

PANCKRIDGE J. I agree. I have nothing to add with regard to the question of insolvency law raised by this appeal. I do, however, desire to make one or two observations on the question of fact in issue, namely, the mental condition of Habla at the date of his father's death.

Mr. Page has pointed out that the oral evidence— to the effect that at the time of his father's death in 1896 Habla was of sound mind although he became of unsound mind later—has not been contradicted. That is true. Mr. Page admits that it would be unreasonable to expect strangers like the Mallik defendants to be able to find witness to speak to the mental condition of a person 40 years ago, who is now deceased. The evidence on behalf of the plaintiff on this point cannot be called independent. The plaintiff himself is personally interested in the decision and the only witness who has been called to corroborate him is his cousin, the defendant Bhujanga Bhooshan Dhar. So far from this witness being independent it is significant that he was one of those who, when the plaintiff appeared to be likely to encounter difficulties owing to the fact that he had been adjudicated an insolvent in 1906, applied to be transferred to the category of plaintiff under O. I., r. 10, and thereafter to continue the suit.

The evidence of the plaintiff is to my mind rendered entirely valueless by certain admissions. The admissions are three in number. There is the statement in the plaint that he is the heir and legal representative of Nitai, which must mean that that he is the sole heir and legal representative. There is also a recital in the mortgage of July 8, 1911, to which he was a party, which states that Habla was, and had always been an idiot from his birth devoid of the slightest quantum of reason and intellect, faculty of understanding, and power of speech and wholly incapable of taking care of himself or of managing his affairs.

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It may be that a suggestion can be made to explain why in 1911 the plaintiff should wish to exaggerate the mental disability of Habla and antedate that disability, but I can see nothing, which would explain the plaintiff's statement in a petition verified by him on July 27, 1922. This petition was filed shortly after the death of Habla and its object was to recover certain Government Promissory Notes, which had been deposited to form a fund, out of which Habla's maintenance could be paid. In paragraph 2 the plaintiff states that Habla was and had always been an idiot from his birth devoid of the slightest quantum of reason and intellect or faculty of understanding and power of speech and wholly incapable of taking care of himself and of managing his affairs.

I cannot imagine why the statement should have been made if in fact Habla had at his birth been a person of normal mentality but had subsequently in 1909 developed insanity. In my opinion the evidence called by the plaintiff, even though uncontradicted, is quite worthless. It is said that no opportunity was given to the plaintiff to supplement this oral evidence by documentary evidence. As I read the judgment of the learned Judge he had really disposed of the matter in his judgment of May 29 and the only thing, which was left open was the proposed application of the Dhar defendants to be made plaintiffs. On June 5, 1936, when the case came up again, counsel for the plaintiff applied to supplement the oral evidence which had been previously given. The learned Judge in his discretion thought that he was not justified in acceding to that application and in my opinion that discretion was rightly exercised.

Appeal dismissed.

Attorney for appellant : *S. M. Chowdhuri.*

Attorneys for respondent : *S. C. Ghose* ; *Mitra & Boral.*

G. S.