

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice,
Mr. Justice Sundaram Chetti and Mr. Justice Pakenham Walsh.

MOONRUMUGAMKONDAN ASARI (DEFENDANT),
APPELLANT,

1930,
July 30.

v.

CHOCKALINGAM ASARI (PLAINTIFF), RESPONDENT. *

Provincial Insolvency Act (V of 1920), sec. 28—After-acquired property of insolvent—Emeralds entrusted to insolvent for sale in the ordinary course of his business—Agreement with defendant to sell for profit—Suit by undischarged insolvent for recovery of price and share of profits—Claim for profits negatived—Suit for emeralds or their value, if maintainable by undischarged insolvent—Property, reputed ownership of.

Where the plaintiff, an undischarged insolvent, who had obtained some emeralds for sale from their owner in the ordinary course of his business and had given them to the defendant for sale, sued the latter for the price of the emeralds and a half share of the profits said to be realized by an alleged sale of the same by the defendant, or, if there was no sale, for the recovery of the emeralds or their value, the defendant pleaded, *inter alia*, that the suit was not maintainable by the plaintiff, as he was an undischarged insolvent, and the lower Courts had negatived the claim for profits as no sale had been made.

Held, that, in respect of the emeralds, the plaintiff was a bailee for sale, and the property in them did not vest in the Official Receiver in insolvency under section 28 of the Provincial Insolvency Act (V of 1920); nor were they the reputed property of the insolvent under the section;

and that, consequently, the plaintiff, though he was an undischarged insolvent, was competent to sue for the recovery of the emeralds or their value from the defendant.

The question as to the competency of an undischarged insolvent to sue to recover his after-acquired property, raised in

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the Reference to the Full Bench, was not answered by their Lordships, as it did not arise for decision in this case.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Tinnevely in Appeal Suit No. 171 of 1926 preferred against the decree of the Court of the District Munsif of Tinnevely in Original Suit No. 390 of 1924.

The material facts appear from the judgment. The second appeal first came on for hearing before ANANTA-KRISHNA AYYAR J. who directed the case to be placed before the Chief Justice for orders under rule 6 of the Appellate Side Rules. An order was thereupon made directing that the case be heard by a Full Bench.

G. T. Ramanujachari for appellant.—The plaintiff being an undischarged insolvent, the present suit is not maintainable by him: see *Kala Chand Banerjee v. Jagannath Marwari*(1). Section 28 (4) of the Provincial Insolvency Act, 1920, vests the property (including after-acquired property) in the Official Receiver. The receiver alone can sue to realize the assets. The decision in *Ramanatha Iyer v. Nagendra Iyer*(2) is erroneous, as it is opposed to the decision of the Privy Council in the above case. Under the Indian Act after-acquired property vests in the Official Receiver without his intervention; hence, the insolvent cannot sue in respect of such property: see *Ma Phaw and others v. Mawng Ba Thaw*(3). The rule of intervention by the trustee in insolvency has been taken away under the Indian Act, unlike the rule under the English Bankruptcy Law, see the English Bankruptcy Act (1914), section 53. In this case, the plaintiff asks for the price of the emeralds as well as a half share of the profits of the sale thereof. The amount recovered is liable to be distributed among the insolvent's creditors. Hence only the Official Receiver can sue to realize the assets.

R. Krishnaswami Ayyangar (with *K. Venkateswaran*) for respondent.—The question of vesting of property is different from the question of the right of suit. The plaintiff in this case is to recover certain emeralds (or their value) which were entrusted

(1) (1927) I.L.R. 54 Calc. 595.

(2) (1923) 45 M.L.J. 827.

(3) (1926) I.L.R. 4 Rang. 125.

to the insolvent for sale. The jewels belonged to one Sita Lakshmi Ammal who entrusted it to the insolvent who was only a bailee for sale; the property was not vested in the insolvent. The plaintiff prayed for the recovery of the jewels or their value and a half share of the profits of the sale, if there was a sale by the defendant. Both the lower Courts negatived the claim for profits. The defendant appealed in the lower Appellate Court and in the High Court against the decree for the value of the jewels. This claim for the recovery of the jewels or its value is not a claim for after-acquired property. There was no sale and no profits to be realized. Hence there were no assets to be realized on behalf of the insolvent's creditors by the Official Receiver. The question under reference does not arise. Reference was made to Williams on Bankruptcy (13th edition), pages 229 and 230.

G. T. Ramanujachari in reply.—The suit includes a half share of profits, which is certainly after-acquired property. The insolvent had a special property in the emeralds, even as a bailee, which vested in the Official Receiver under section 28 of the Provincial Insolvency Act, 1920. Even if it is a bailment to the insolvent, the Official Receiver is a competent party to sue, as there must be consideration for the bailment and so the insolvent had an interest in the property which vested in the Official Receiver. Further, this property was the reputed property of the insolvent under section 28 of the Act, and vests in the Official Receiver under that section.

The OPINION of the Court was delivered by

BEASLEY C.J.—The question referred to us for decision is, “Is it open to an undischarged insolvent to maintain a suit regarding his after-acquired properties subject to the right of the Official Receiver to intervene in such proceedings?” In our view, upon the facts of this case this question does not arise and we are not disposed to enter into any further discussion of this question which is purely one of academic interest.

The facts of the case may be quite shortly stated. The insolvent was the plaintiff in the District Munsif's Court. He was also an undischarged insolvent. His

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case as set out in the plaint was that he got emeralds from one Sita Lakshmi Ammal for sale and that he gave them to the defendant in the suit for sale. The value of the emeralds was fixed, so he alleges, at Rs. 1,000 and it was agreed that the excess realized by the defendant by the sale should be shared equally between the plaintiff and the defendant. He sued to recover the emeralds or Rs. 1,000, the price of the emeralds, and for Rs. 250 being his share, as he alleged, of the profits made by the defendant on the allegation that the defendant sold the emeralds for Rs. 1,500, and he asked for the return of the emeralds in case they were not sold by the defendant. Amongst other contentions the defendant raised the plea that the plaintiff was an undischarged insolvent and was consequently not entitled to sue. An issue was taken upon that contention and the District Munsif found that the plaintiff was an undischarged insolvent but that he could maintain the suit for recovery of the articles bailed. I wish to draw particular attention to the fact that the articles were described by the District Munsif as articles bailed. Then there was an appeal and the first Appellate Court fixed the value of the emeralds at Rs. 800 and gave the plaintiff a decree for that amount only. The case came up on second appeal to this Court and the question of the maintainability of a suit by an insolvent with reference to after-acquired property was raised and in view of the fact that a Letters Patent Appeal raising this very point was then pending decision by a Full Bench, our learned brother ANANTAKRISHNA AYYAR J. adjourned the case until the Opinion of the Full Bench was delivered. The Letters Patent Appeal, however, abated and the matter again came before our learned brother who, in view of what appears to be a

difference of view in a case decided by KRISHNAN and ODGERS JJ. in *Ramanatha Iyer v. Nagendra Iyer*(1) and a later decision of the Privy Council in *Kala Chand Banerjee v. Jagannath Marwari*(2), referred the case to us.

Upon the facts of this case, the plaintiff's suit was divided into two parts, (1) relating to his commission of Rs. 250—that claim has been held against—and (2) for the return of, or the value of, the emeralds which he handed over to the defendant for sale. In our view, the first essential in the appellant's case is that the emeralds themselves or their cash value should vest in the receiver as the after-acquired property of the insolvent under section 28 of the Provincial Insolvency Act. That section deals both with the actual property of an insolvent at the time of his adjudication and property which may pass into his possession after the adjudication. In the case of property coming into his possession after adjudication—it is after-acquired property—that shall forthwith vest in the receiver. There is another class of property dealt with in that section and that is the reputed property of the insolvent. Upon the facts of this case the value of the emeralds can, in no sense of the word, be described as the property of the insolvent. His own case was that this property was given to him by Sita Lakshmi Ammal for sale. He was a jeweller and goldsmith and so was the defendant. So that, in the ordinary course of business, according to his own case, these emeralds were entrusted to him for sale. That statement in his case completely negatives any position occupied by him other than as a bailee of goods for sale and it is important to remember that this statement that there had been an entrustment to the

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insolvent, of these emeralds as a bailee is not controverted anywhere in the written statement of the defendant. Clearly the emeralds were not the property of the insolvent, but it has been urged before us that, although they are not the property of the insolvent, they may yet be his reputed property. Where goods, precious stones and such like things are given into the hands of a goldsmith or a jeweller either for the purpose of being converted into ornaments or for sale, they are given to him in the ordinary way of his business; and assuming that at the time of his adjudication he is in possession of those jewels, clearly they are not his jewels at all but they are the jewels of the bailor and as such, being easily identifiable, do not pass to the receiver in the insolvency. The further question arises as to what is to happen if he had recovered the proceeds of the sale. Here again, if those proceeds have not been inter-mixed with the money belonging to the creditors and can easily be identified, the money does not vest in the receiver; but this case is a stronger one from the respondent's point of view, because the jewels had been parted with and the insolvent had no money in his possession which he had received in respect of the sale. He claims in his suit to get that money from the defendant. If he succeeds, no one, I think, would contest that that money is clearly ear-marked as money belonging to the real owner of the jewels, namely, Sita Lakshmi Ammal, up to the extent of the agreed value Rs. 1,000 and is not available at all for distribution by the receiver amongst the creditors in the insolvency. This matter, I think, is made perfectly clear by the notes to section 38, which is the vesting section, in the English Bankruptcy Act. See Williams on "Bankruptcy," XIII Edition, page 229. The marginal note is

"Trusts arising from employment of bankrupt."

and the note says

“ Lastly, then, there is the third class of trusts, where the bankrupt has not the general, but only a special property, e.g., where property is vested in the bankrupt as an agent, such as a factor, etc., such property, so long as it or its proceeds remain distinguishable from the mass of the bankrupt’s property, will not pass to the trustee of the creditors.”

Then again at page 230, it is stated :

“ It is always to be remembered that, although goods in the hands of an agent may be easily distinguishable, they may yet, on the bankruptcy of the agent, pass to his trustee if the principal has permitted the agent to have a possession not consistent with the ordinary usages of trade, and raising a reputation of ownership in the bankrupt.”

Here the case for the plaintiff, uncontradicted by the defendant in his written statement, is that there was no entrustment at all which was not consistent with the ordinary usages of trade. As before stated, the insolvent was a jeweller and goldsmith and he himself says that the emeralds were entrusted to him for sale—that is what a jeweller and goldsmith does—and it cannot be said that the emeralds or their value were the reputed property of the insolvent. Under these circumstances and upon the facts of this case the question before us really does not arise. It would arise if the property were property which vested in the Official Assignee or the receiver, as the case may be. Therefore, we decline to decide the question. We need express no opinion upon what would happen had the property been the after-acquired property of the insolvent. With regard to the claim for Rs. 250 no question arises with regard to that because that claim has been disallowed in all the Courts.

The case must therefore be dealt with by the referring Judge in the light of these observations.

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