

ABDUL
HAMED
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MAHIT-
ULLAH.

(2) Does any custom of pre-emption prevail which applies to the property the subject matter of the suit, and if so, is the plaintiff entitled under that custom to a decree in respect of the property which formed the subject matter of the two sale deeds?

(3) Did the plaintiff perform the conditions required by the Muhammadan law?

(4) What was the real price?

If the court finds it convenient without dislocating its business it will dispose of these issues as soon as possible. The parties may adduce further evidence relevant to the second issue but to no other issue. On return of the findings the usual ten days will be allowed for filing objections. The case will be put up early on return of the findings.

Issues remitted.

FULL BENCH.

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August, 7

Before Sir Henry Richards, Knight, Chief Justice, Justice Sir George Knox and Justice Sir Pramada Charan Banerji.

EMPEROR v. OHIRANJI LAL.*

Act No. III of 1907 (Provincial Insolvency Act), sections 43 and 46—Additional District Judge—Order punishing debtor for fraudulent dealings with account books—Appeal, whether appeal civil or criminal and to what court.

*Held by RICHARDS, C.J., and BANERJI, J., (KNOX, J., dissenting) that an appeal from an order of an Additional District Judge under section 43 (2) of the Provincial Insolvency Act, 1907, lies directly to the High Court and not to the Court of the District Judge. *Makhan Lal v. Sri Lal* (1) followed.*

Held also, by RICHARDS, C.J., and KNOX and BANERJI, JJ., that such an appeal is an appeal on the civil side of the Court and not a criminal appeal.

THIS case first came up for hearing before a single Judge, who referred it to a Bench of two Judges, but was eventually on a recommendation by the Division Bench laid before a Full Bench.

The facts were as follows :—

On the application made by the applicant to be declared an insolvent he was asked by the Court to deposit his account books. He filed an affidavit showing that the books had been taken to another district to be used as evidence in a case pending there

* Criminal Appeal No. 600 of 1914 from an order of Pitambhar Dat Joshi, Second Additional Judge of Aligarh, dated the 1st of July, 1914.

and had been stolen on their way back from that district. The court disbelieved the statements contained in the affidavit and took evidence and passed an order convicting the petitioner for concealing or destroying the books under section 43 of the Provincial Insolvency Act and sentenced him to two months' imprisonment. This was an appeal against that order.

Mr. G. W. Dillon (with him Mr. Jawahar Lal Nehru), for the appellant:—

[On the question arising as to whether a civil or a criminal appeal should have been filed in the case, counsel submitted that he was prepared to amend the grounds of appeal and make it a civil appeal if the Court was of opinion that a civil appeal should have been filed. As both the appeals lay in the High Court it made no material difference to him.]

The Government Pleader (Babu Lalit Mohan Banerji), for the Crown, raised a preliminary objection to [the effect that an appeal in the case did not lie to the High Court but to the District Judge.

Mr. G. W. Dillon submitted that there were two questions for decision in the appeal:—

(1) The proceedings in insolvency having been had in the court of the 2nd Additional Judge of Aligarh and the order of conviction having been passed by that court the matter for decision was if an appeal lay to the High Court or to the District Judge of Aligarh.

(2) The second point was if the order of conviction was good.

Section 46 of the Provincial Insolvency Act provided for appeals. It laid down that any person aggrieved by an order made by a District Court in certain matters mentioned therein otherwise than in appeal might appeal to the High Court. An Additional Judge, though departmentally under the control of the District Judge, had the same jurisdiction in insolvency matters as the District Judge. Section 8 of the Bengal, North-Western Provinces and Assam Civil Courts Act laid down that Additional Judges "shall discharge any of the functions of a District Judge which the District Judge may assign to them and, in the discharge of those functions they shall exercise the same powers

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as the District Judge." With a view to a division of work in the Aligarh district the District Judge and the two Additional Judges have divided certain local areas between themselves and the present application was accordingly filed "in the court of the 2nd Additional Judge of Aligarh." Section 20 of the Bengal, North-Western Provinces and Assam Civil Courts Act provided that "save as otherwise provided by any enactment for the time being in force an appeal from a decree or order of a District Judge or Additional Judge shall lie to the High Court." There was nothing in the Insolvency Act which limited the above provision unless it was section 46 of the Insolvency Act.

By clause 2, section (2), of the Insolvency Act "all words and expressions defined in the Code of Civil Procedure shall have the same meaning as those respectively assigned to them in the said Code." The word "subordinate" used in section 46 of the Insolvency Act has not been defined by the Code of Civil Procedure. For the purposes of insolvency proceedings the court of an Additional Judge was not subordinate to that of the District Judge and an appeal against the order of the Additional Judge had been rightly preferred to the High Court. Section 39 of the Bengal, North-Western Provinces and Assam Civil Courts Act did not apply to the present case; *Makhan Lal v. Sri Lal* (1).

The Government Pleader (Babu *Lalit Mohan Banerji*), for the Crown, submitted that section 3 of Bengal, North-Western Provinces and Assam Civil Courts Act showed that the court of an Additional Judge was a different class of court from that of the District Judge. Section 9 of the above Act made all the Civil Courts (including the court of the Additional Judge) subject to the administrative control of the District Judge. By section 39 of the Act the court which was subject to the administrative control of the District Judge was a court of an inferior grade to that of the District Judge. The Court of an Additional Judge was therefore a court of an inferior grade to the court of the District Judge. The word "subordinate" was not defined anywhere, but section 3 of the Code of Civil Procedure made every Civil Court of a grade inferior to that of a District Court subordinate to the District Court. An appeal from an order of the

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Additional Judge under section 46 of the Insolvency Act therefore lies to the District Judge. In section 20 of the Bengal, North-Western Provinces and Assam Civil Courts Act the words "save as otherwise provided" showed that it was not impossible for an appeal from an Additional Judge's order to go to the District Judge and section 46 of the Insolvency Act provided for such an appeal.

RICHARDS, C. J.—Chiranji Lal applied to be declared an insolvent. The case came before the Second Additional Judge of Aligarh, and he, in exercise of the jurisdiction conferred upon the court by section 43 of the Provincial Insolvency Act of 1907, ordered the debtor to be imprisoned for a term of two months for having fraudulently or vexatiously concealed books of account. The debtor Chiranji Lal appealed to this Court against the order of the Second Additional Judge.

A preliminary objection was taken against the hearing of the appeal to the effect that an appeal did not lie to the High Court, but lay to the District Court. Section 8 of the Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887) provides for the appointment by Government of Additional Judges. Clause (2) of the same section provides that the Additional Judges so appointed shall discharge *any of the functions of the District Judge* which the District Judge may assign to them, and in discharge of those functions shall exercise the *same powers as a District Judge*. There is no doubt that the Second Additional Judge was duly appointed under section 8 and there can be no doubt that the District Judge assigned to the Second Additional Judge the disposal of this particular insolvency application.

It seems to me that there can be also no doubt that under clause (2) of section 8 the District Judge had authority to assign the petition in question to the Second Additional Judge. Section 20 provides that "save as otherwise provided by any enactment for the time being in force, an appeal from a decree or order of a District Judge or Additional Judge shall lie to the High Court."

In my opinion these provisions make it quite clear that the appeal in the present case lay to the High Court. The Additional Judge who dealt with the matter is a District Judge.

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It was contended by the objectors that under the provisions of section 46 of the Provincial Insolvency Act of 1907 an appeal from an order of a court subordinate to the District Judge lies to the District Judge, and it is argued that the Second Additional Judge was a court subordinate to the District Court within the meaning of section 46, clause (1). In support of this contention section 39 of the Bengal, North-Western Provinces and Assam Civil Courts Act is cited. This section provides as follows:—"For the purposes of the last foregoing section the presiding officer of a court subordinate to the administrative control of the District Judge shall be deemed to be immediately subordinate to the court of the District Judge, and for the purposes of the Code of Civil Procedure the court of such an officer shall be deemed to be of a grade inferior to that of the court of the District Judge." It seems to me that this is a clause providing that for the specified purposes mentioned in section 39 and for this purpose only a court is to be deemed subordinate or of a lower grade to the court of the District Judge. It cannot override the other clear provisions to which I have referred. A Bench of this Court has already considered this question in the case of *Makhan Lal v. Sri Lal* (1). The view taken by the learned Judges in that case was that the appeal from an order of the Additional Judge lay to the High Court and not to the District Judge. I entirely agree with the view taken by the learned Judges in that case and I would overrule the preliminary objection.

KNOX, J.—I regret finding myself unable to follow the view taken by my brother Judges in this matter. So far as I am aware, when the Legislature intends that an appeal from an Additional Judge shall lie to the High Court it makes special provision for the purpose. As for instance in section 20 of Act No. XII of 1887. It seems to me that the Provincial Insolvency Act, No. III of 1907, intended that the court having jurisdiction under the Act should be the District Court, and courts which were authorized by the Local Government with the previous sanction of the Governor General Council to exercise such jurisdiction. If it had been intended that an appeal from an Additional Judge

(1) (1912) I. L. B., 34 ALL, 332.

should lie direct to this Court it would have been very simple for the Legislature to have said in section 46 (2) : —“ Any person aggrieved by an order made by the District Court or the Additional Judge under section . . . ” In the absence of special words conferring a right of appeal from an Additional Judge to the High Court, I am not prepared to hold that an appeal would so lie. I can quite understand that the Legislature may have intended that matters of this kind, which called for speedy decision, should, if there was an Additional Judge in the first instance, be referred to and at once decided by the District Court on the spot.

BANERJI, J.—The question to be determined in this case is whether an appeal from the order of the Second Additional Judge lay to this Court or to the court of the District Judge. In support of the contention that the appeal lay to the District Judge reference is made to section 46 of the Provincial Insolvency Act, which is to the effect that a person aggrieved by an order made in the exercise of insolvency jurisdiction by a court subordinate to the District Court, may appeal to the District Court. It is urged that the court of the Additional Judge is subordinate to the District Court within the meaning of the section and that therefore no appeal lies to this Court. I am unable to agree with this contention. I am clearly of opinion that the court subordinate to the District Court, referred to in section 46, sub section (1), is the subordinate court mentioned in section 3 of the Act, that is to say, a court subordinate to the District Court which has been invested by the Local Government with the previous sanction of the Governor General in Council by notification in the Local Official Gazette with jurisdiction in Insolvency matters. Had it been intended that the court of an Additional Judge should be deemed to be a subordinate court within the meaning of the section, it would have been distinctly provided in the section in the case of Additional Judges that they shall be deemed to be subordinate to the District Court in the same way as Courts of Small Causes have been declared to be subordinate to the District Court.

It is next urged that an Additional Judge is under the Civil Courts Act No. XII of 1887 subordinate to the District Court.

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This contention also is, in my opinion, untenable. Section 3 of the Civil Courts Act defines the different classes of civil courts, but, except for the purposes of administrative control and for the purposes mentioned in section 39 of the Act, the court of an Additional Judge is not declared in the Act to be subordinate to the court of the District Judge. Section 8 of the Act provides that an Additional Judge appointed by the Government is competent to discharge any of the functions of a District Judge which the District Judge may assign to him and in discharge of those functions he shall exercise the same powers as the District Judge. One of the functions of the District Judge is to try insolvency matters, and under the provisions of this section the District Judge is competent to assign that function to the Additional Judge in any particular case or in any class of cases. In the discharge of those functions the Additional Judge exercises the powers of the District Judge as such, and it cannot be said that an appeal from an order made by him in the exercise of those functions lies to the District Judge, who himself can exercise no higher functions in regard to those matters. By section 20 of the Civil Courts Act an appeal from an order of an Additional Judge lies to the High Court. Therefore in the present case the appeal in my opinion lay to this Court and the preliminary objection has no force. I may add that there can be no more inconvenience in allowing an appeal to this Court from the order of an Additional Judge than from the order of the District Judge.

Mr. G. W. Dillon, for the appellant, dealing with the merits of the case submitted that when criminal proceedings are started against any person he should be informed of the nature of those proceedings. No notice was given to the appellant that he was being dealt with under the penal clause of section 43 of the Insolvency Act. There must be something in the nature of a charge before any person is convicted of any offence; *Amiruddi Karikar v. Jadav Karikar* (1). There could be no conviction under section 43 of the above Act on evidence recorded on objections to the applicant's insolvency petition. Evidence in the criminal proceedings should have been recorded *de novo*. *Nathu Mal v. The District Judge of Benares* (2). If the petitioner

(1) (1913) 19 G. L. J., 430.

(2) (1910) L. L. R., 32 All., 547.

know he was being proceeded against criminally he would not have made any statement at all and the burden of proof being on the prosecution there would have been no evidence on the record against the appellant.

The Government Pleader (Babu *Lalit Mohan Banerji*), for the Crown, was not heard in reply on this point.

RICHARDS, C. J., and KNOX and BANERJI, JJ.—We are all unanimously of opinion (assuming that an appeal did lie to the Court in the case) that it comes before this Court as a first appeal from order on the Civil Side. We, therefore, treat the case as such. Mr. *Dillon* has addressed us on the merits of the case and has argued that there was no proper charge of having committed any offence under section 43 of the Provincial Insolvency Act, and has called our attention to the case of *Amiruddi Karikar v. Jadav Karikar* (1) and also to the case of *Nathu Mal v. The District Judge of Benares* (2). In our opinion having regard to the facts of the present case the debtor had every opportunity of knowing that an inquiry was being made as to whether he did not conceal and was not concealing his books of account. He got every opportunity of showing to the court that he had not done this. Under these circumstances we see no reason to interfere with the order of the court below and we accordingly dismiss the appeal. The appellant must now surrender to his bail and serve out the remainder of the sentence.

Appeal dismissed.

(1) (1913) 19 C. L. J., 430.

(2) (1910) I. L. R., 32 All., 547.

