

Before Mr. Justice Byves and Mr. Justice Piggott.

HASHMAT BIBI (OBJECTOR) v. BHAGWAN DAS AND OTHERS (OPPOSITE PARTIES)*
(and two other appeals consolidated.)

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December, 17.

Act No. III of 1907, (Provincial Insolvency Act), sections 13(3), 47—Attachment of property as that of insolvent before adjudication of insolvency—Civil Procedure Code (1908), order XXI, rule 58; order XXXVIII, rules 5 to 12—Procedure—Appeal.

Where certain property was attached under section 13 (3) of the Provincial Insolvency Act, 1907, by a court exercising jurisdiction under that Act, before the petitioner was declared an insolvent and a receiver appointed, it was held that the court was bound to hear and adjudicate upon any claims which might be preferred by persons alleging themselves to be in fact the owners of such property. Procedure under section 13 (3) of the above mentioned Act was analogous to attachment before judgement under the Code of Civil Procedure. It might have been open to the objectors to wait until the receiver had taken some action in respect of the property attached and then to apply under section 22 of the Act but this they were not bound to do.

THE facts of this case were as follows:—

One Karim Bakhsh applied to be declared insolvent. Bhagwan Das and others filed objections opposing the insolvency on the grounds that the applicant had transferred his property in bad faith to his wife on the 11th of July, 1906, and that he had not set forth all his property in the schedule, having omitted to mention property purchased in the name of his son, Abdul Ghani, on the 16th of July, 1900. The Judge called for certain reports from the amin, but ordered the said property to be immediately attached, holding it to be the applicant's property, and appointed the amin to be the receiver. The wife and the son were no parties to the application. Thereupon the wife and the son put in applications praying the court to re-consider its order, and give them an opportunity of establishing their claim. The Judge dismissed the applications, holding that he had no jurisdiction to hear the applications. The objectors appealed both against the order directing the property to be attached and the orders dismissing their applications. The former was numbered F.A.F.O., No. 169 of 1913 and the latter Nos. 170 and 171 of 1913.

Pandit Vishnu Ram Mehta, for the respondents, took a preliminary objection to the effect that no appeal lay from an order making an attachment before judgement under the Provincial Insolvency Act.

* First Appeal No. 170 of 1913 from an order of L. Marshall, District Judge of Jaunpur, dated the 22nd of February, 1913.

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Dr. *S. M. Sulaiman*, for the appellants, having pointed out that under section 46 (3) of the Provincial Insolvency Act an appeal was allowed against every order provided leave was obtained, the Court proceeded to hear the appeal.

The Judge had jurisdiction to hear the application. He could not order a person to be dispossessed without giving him an opportunity to be heard. The court has inherent power to entertain such objections. Section 47 of the Provincial Insolvency Act gives the court powers which it has under the Code of Civil Procedure. Attachment under section 13 (3) of the Provincial Insolvency Act is an order similar to attachment before judgement under the Code of Civil Procedure. The procedure applicable to such attachments is the same as laid down in order XXI. (See order XXXVIII, rules 7 & 8.) Rule 58 of that order gives the court power to entertain and investigate objections, and I submit the Court is bound to do so. The Judge must be satisfied that the property was under the control and management of the debtor and he having failed to do so in this case his order is wrong. The effect of this order would be that the applicants would have no remedy.

Pandit *Vishnu Ram Mehta* :

The order of the Judge in attaching the property and ordering theamin to make a report amounted to an order appointing a receiver. The moment a receiver was appointed the property vested in him and the applicant ought to have waited till the receiver did something against his interest: *Mul Chand v. Murari Lal* (1). Even then he could only proceed under section 22 of the Insolvency Act. This was not an order in execution. Order XXI, rule 58, did not apply, and even if it was applicable the aggrieved party would have no right of appeal. His only remedy is by a separate suit. He cannot even come in revision.

Dr. *S. M. Sulaiman*, for the appellants, was not called upon to reply.

RYVES and PIGGOTT JJ:—These are three connected appeals arising out of insolvency proceedings. Karim Bakhsh applied to the District Judge of Jaunpur on the 28th of August, 1912, for an order adjudicating him an insolvent. While the application was under inquiry the District Judge received

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information on the strength of which he came to the conclusion that Karim Bakhsh had failed to disclose, or was attempting to conceal, certain immovable property belonging to him. He accordingly passed an order under section 13 (3) of the Provincial Insolvency Act for the attachment of the said property, *viz.* shares in a tiled house and courtyard and in certain trees, a zamindari share and a portion of a fixed rate holding, as being property in the possession or under the control of Karim Bakhsh. This was on the 4th of February, 1913. On the 8th of February, 1913, an order adjudicating Karim Bakhsh to be an insolvent was passed and a receiver was appointed. On the 12th of February, 1913, two persons, *viz.*, Hashmat Bibi, wife of Karim Bakhsh, and Abdul Ghani, minor son of Karim Bakhsh, presented separate applications to the District Judge, claiming the property attached in pursuance of the order of the 4th of February, 1913, as their own property. These petitions of objection referred to order XXI, rule 58, of the Code of Civil Procedure and purported to be made under that rule read with section 47 of the Provincial Insolvency Act (Act III of 1907). Each of these applications was rejected by the District Judge on the ground that the provisions of order XXI, rule 58, aforesaid had no application and that the only remedy open to the petitioners was either by separate suit, or by appeal against the order of attachment. Three appeals have accordingly been presented to this Court. One is by Hashmat Bibi and Abdul Ghani jointly against the order of the 4th of February, 1913, directing the attachment of the property in question. The other two appeals are by Hashmat Bibi and Abdul Ghani separately against the orders of the 22nd of February, 1913, dismissing the objections filed by them on the 12th of February, 1913. These appeals have been admitted by special leave of this Court under section 46 of Act III of 1907. The Provincial Insolvency Act lays down no procedure to be followed by the court when effecting an attachment. According to section 47, therefore, the court must follow the same procedure as it would do in the exercise of its original civil jurisdiction, and must also exercise the same powers. Now an attachment under section 13(3) of the Provincial Insolvency Act is strictly analogous to an attachment before judgement effected under order XXXVIII, rules 5 to 12, of

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the Code of Civil Procedure. According to order XXXVIII, rule 8, of the Civil Procedure Code a claim may be preferred to property attached before judgement, and the court is, thereupon, bound to investigate such claim in the manner provided for the investigation of claims to property attached in execution of a decree for payment of money. This refers us back to order XXI, rule 58, of the Civil Procedure Code. In our opinion, therefore, the District Judge was bound to entertain the objections put forward by Hashmat Bibi and Abdul Ghani and to hold an investigation as to the validity of the claims put forward by them to the ownership of the property attached. The necessity for doing this at some stage or other of the proceedings is apparent when we consider that, by reason of section 16 (2) of the Provincial Insolvency Act, the property in question vested in the receiver from the date of his appointment, if in fact it was the property of the insolvent, but did not so vest if it was the property of Hashmat Bibi and Abdul Ghani. It has been suggested before us that, for this very reason, the present appellants might have waited until the receiver proceeded to take some action by way of realizing this property for the benefit of Karim Bakhsh's creditors, and then might have appealed against the receiver under section 22 of Act No. III of 1907. We take note of this argument only to point out that this is a course which was apparently open to these appellants, but it does not follow that they had no right to question the order of attachment itself. We think, for the reasons already given, that they have this right and that their petitions of the 12th of February, 1913, should not have been rejected without inquiry. We accordingly accept the appeals Nos. 170 and 171 now before us, set aside the orders complained against in those appeals, and direct the District Judge to re-admit the petitions of Hashmat Bibi and Abdul Ghani on to his file of pending applications and to dispose of them. The costs of these appeals will abide the event.

As regards Appeal No. 169 of 1913, we think it must be formally dismissed, on the ground that the District Judge had before him sufficient *prima facie* reason for directing the attachment by his order of the 4th of February, 1913. The parties will bear their own costs of this appeal.

Appeal Nos. 170, 171 allowed.

Appeal No. 169 dismissed.