

1915

SARJU
PRASAD
v.
MAHADEO
PANDE.

Mr. JUSTICE KNOX held that the unsuccessful party had been prejudiced by the procedure adopted inasmuch as he had been deprived of the right of appeal, and he set aside the decree. The view taken in the case of *Shiam Behari Lal v. Kali* (1) is in agreement with the view taken by the Calcutta, Bombay and Oudh Courts and is, we think, correct. It seems to us that under section 35 of Act IX of 1887 the Munsif who tried the suit, not having been invested with the jurisdiction of a Court of Small Causes, was bound to try out the suit as a regular suit, and that there was a right of appeal against his decision. We allow this application, set aside the order of the Subordinate Judge, return the record to his court and direct that the appeal be restored to the pending file and disposed of according to law. Costs of this application will be costs in the cause.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

KASHI NATH AND ANOTHER (DECREE-HOLDERS) v. KANHAIYA LAL SHARMA
(RECIPIENT).*

1915,
May 10.

Act No. III of 1907 (Provincial Insolvency Act), section 34—Decree for sale of certain property was obtained by one of the creditors—Prior to sale judgment-debtor was adjudged insolvent—Position of other creditors.

Section 34 of the Provincial Insolvency Act was intended to put the creditors of the insolvent who have not actually attached the property before the date of the order of adjudication in as good a position as creditors of the insolvent who but for his insolvency would have been entitled to a rateable distribution of the assets realised on an execution sale. Certain property was attached before judgement and a decree was subsequently obtained for its sale; but prior to a sale actually taking place the judgement-debtor was adjudged an insolvent. *Held*, that as the order of adjudication was passed prior to the sale of the property it must be regarded as the property of the judgement-debtor and as such was available to the general body of creditors.

THE facts of this case were as follows:—

One Kashi Nath and another brought a simple money suit in the court of the Subordinate Judge of Aligarh, against one Keshab Deo and obtained attachment before judgement of certain immoveable property of the defendant in 1909. In

* First Appeal No. 34 of 1915, from an order of W. F. Kirton, Second Additional Judge of Aligarh, dated the 27th of January, 1915.

(1) (1898) I. L. R., 23 Bom., 382.

1911, Keshab Deo was adjudicated, by the District Judge, an insolvent. Subsequent to the attachment, but before the order of adjudication he alienated portions of the attached property by means of four sale-deeds, and another portion was sold in execution of a simple money decree of the Bombay High Court. Kashinath's suit was decreed in 1913, and in 1914 the decree-holders applied for execution by sale of the property which had been attached before judgement. The property was proclaimed for sale. Thereupon the receiver of the property of the insolvent Keshab Deo applied to the District Judge claiming the property sought to be sold as having vested in him. The District Judge granted the application and ordered the Subordinate Judge to release the property from attachment and make it over to the receiver. The decree-holders appealed to the High Court.

The Hon'ble Mr. *Abdul Ruoof*, for the appellants.—

A portion of the property had been alienated by Keshab Deo before his adjudication as an insolvent. It was no longer his property at the date of the adjudication, and consequently it could not vest in the receiver. Section 64 of the Code of Civil Procedure gives certain rights to the attaching creditor alone; it cannot help the receiver. What the section provides is that private alienations are void as against the claims of the attaching creditors, namely, the appellants in this case. The alienations are not void absolutely; no person other than the attaching creditor can claim to treat the alienations as being void.

Babu *Pearey Lal Banerji*, for the respondent (receiver).—

The decree-holders are proceeding against the property treating it as the property of Keshab Deo. Unless they treat it as being his property they can have no right to proceed against it. So, their own case being that the property continues to be the property of the insolvent Keshab Deo, the receiver is entitled to claim it on behalf of the general body of the creditors. Under section 34 of the Provincial Insolvency Act the receiver is entitled to claim the benefit of the execution which the decree-holders are claiming for themselves under section 64 of the Civil Procedure Code.

The Hon'ble Mr. *Abdul Raoof*, in reply.—

The decree-holders' claiming the benefit of section 64 of the Civil Procedure Code is not tantamount to their admitting that the

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property belongs to Keshab Deo. The position is this that by virtue of the right acquired by them by the attachment they can bring the property to sale, notwithstanding the private sales.

CHAMIER and PIGGOTT, JJ.—This is an appeal against an order of the Second Additional Judge of Aligarh, passed under the Provincial Insolvency Act. In June, 1909, the appellants filed a suit against Keshab Deo and others and they caused certain immoveable property of Keshab Deo to be attached under order 38 of the Code of Civil Procedure before judgement. The appellants obtained a decree in that suit on June 12th, 1913. In the meantime Keshab Deo had transferred portions of the property by four sale-deeds, dated November 15th and 16th, and December 6th and 9th, 1909, and part of the property which had been attached had been sold in 1909 in execution of a decree passed by the Bombay High Court. Keshab Deo had, in 1911 been declared insolvent and the respondent, Pandit Kanhaiya Lal Sharma, had been appointed receiver of his property. The receiver has claimed the property in question as property which is available for the creditors of the insolvent, and the learned Judge has decided that it is property available for the creditors, and has directed the Subordinate Judge who placed the property under attachment to release it from the attachment and make it over to the receiver. It appears that execution of the decree obtained by the appellants was taken out by them in 1914, the property was proclaimed for sale and the sale was to have taken place on January 22nd last. It was at this point that the receiver claimed the property on behalf of the general body of creditors. Under section 64 of the Code of Civil Procedure neither the private alienations made by Keshab Deo nor the execution sale of the property could affect the rights of the appellants to bring the property to sale in execution of their decree. The appellant's case is that the property has under the private alienations and the execution sale ceased to be the property of Keshab Deo, and that all that the appellants have is the special right conferred upon them by section 64 of the Code of Civil Procedure to execute their decree against the property, notwithstanding the private alienations and the execution sale. They contend that the property is no longer the property of Keshab Deo, and therefore

section 34 of the Provincial Insolvency Act does not apply so as to entitle the receiver to claim it. It may be that the private alienations and also the execution sale of the property are void as against the receiver, and if so, there can of course, be no doubt that the property is the property of Keshab Deo and section 34 must be held to be applicable. Assuming, however, that the private alienations and the execution sale are not voidable or void as against the receiver, we think that the property must still be regarded as the property of the debtor, Keshab Deo. The decree-holders are entitled to bring the property to sale as the property of Keshab Deo because the private alienations and execution sale are void as against them. Section 34 of the Provincial Insolvency Act provides that where execution of a decree is issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of execution by sale or otherwise before the date of the order of adjudication. The sale has not yet taken place, but execution of the appellant's decree has issued against the property. In our opinion the property must still be regarded as the property of the debtor, and it is as property of the debtor that it is liable to answer the decree held by the appellants. It seems to us quite clear that section 34 of the Provincial Insolvency Act was intended to put creditors of an insolvent who have not actually attached the property before the date of the order of adjudication in at least as good a position as creditors of the insolvent who, but for his insolvency, would have been entitled to claim a rateable distribution of the assets received on an execution sale. In our opinion the learned Judge was right in holding that the property was available for the general body of creditors. But we express no opinion as to the rights of the alienees or of the purchasers at the execution sale as they are not before us. The appeal is dismissed with costs.

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Appeal dismissed.