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January, 29.

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

IRSHAD HUSAIN AND ANOTHER (PLAINTIFFS) *v.* GOPI NATH (DEFENDANT) *

Act No. III of 1907 (*Provincial Insolvency Act*), *section* 22—*Insolvency—Dismissal of objection to attachment of property by receiver—Subsequent suit by objector for declaration of title*—Res judicata.

Upon certain property, namely, a share in a house, having been attached by a receiver in insolvency as the property of the insolvent, a claim thereto was preferred by the son and nephew of the insolvent, who filed an application under section 22 of the Provincial Insolvency Act, 1907. Evidence of the title of the applicants was produced before the Insolvency Court; but the application was rejected, and an appeal from the order of rejection was dismissed on the merits. The applicants then filed a regular suit for a declaration of their title to the same property.

Held that the suit was barred by reason of the previous order of the Insolvency Court. *Pita Ram* v. *Jujhar Singh* (1) referred to.

THE facts of this case were as follows:—

One Wilayat Ali having been adjudicated an insolvent, a share in a certain house was attached by the receiver as being part of the property of the insolvent. The son and nephew of the insolvent thereupon raised an objection to the attachment, claiming the attached property as their own; and they filed in the Insolvency Court an application under section 22 of the Provincial Insolvency Act, 1907. The applicants produced in the Insolvency Court evidence as to their title to the property claimed; but the application was, after consideration, rejected. The applicants appealed against the order of the Insolvency Court, but their appeal was dismissed on the merits. Thereupon the present suit was filed, in which the applicants sought a declaration of their title to the attached property. The suit was dismissed upon the ground that the result of the proceedings under section 22 of the Act abovementioned and of the appeal in those proceedings operated as *res judicata* in respect of the present suit. The plaintiffs appealed to the High Court.

Dr. *S. M. Sulaiman*, for the appellants.

Dr. *Surendra Nath Sen*, The Hon'ble Munshi *Narain Prasad Ashthana*, and Pandit *Mohan Lal Sandal*, for the respondent.

*First Appeal No. 62 of 1917, from a decree of Kalika Singh, Subordinate Judge of Agra, dated the 29th of November, 1916.

(1) (1907) I. L. R., 29 All, 626.

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RICHARDS, C. J., and BANERJI, J.:—This appeal arises under the following circumstances. A man of the name of Wilayat Ali was adjudicated an insolvent. A share in certain house property was attached by the receiver as being the property of the insolvent. This property was claimed by the appellants, who were the son and nephew of the insolvent. These persons filed an application in the insolvency matter under section 22 of the Insolvency Act, which provides that "if the insolvent or any creditor or any other person is aggrieved by the act or decision of the receiver, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of." The act apparently complained of in the insolvency matter was the attachment of the property. No doubt the investigation as to whether or not the receiver was justified in attaching the property involved the investigation of the title to the share attached. The appellants in this Court produced their evidence with the result that the Insolvency Court refused to reverse or modify the act of the receiver in attaching the property, in other words, dismissed the application. An appeal was filed from the decision of the Insolvency Court which resulted in the dismissal of the appeal on the merits. Thereupon the plaintiffs instituted the present suit, which seeks a declaration of their title to the same property as was attached in the insolvency matter. The court below has dismissed the plaintiffs' suit on the ground that the decision of the Insolvency Court and the appellate court in the appeal from the insolvency decision operates as *res judicata*. If we had to consider the matter in the absence of authority, we doubt very much whether the order of the Insolvency Court and the court of appeal from that order can operate as *res judicata*. The provisions as to *res judicata* are contained in section 11 of the Code of Civil Procedure, which provides that "no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such

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court." We may point out that there was no previous *suit* between the parties to this suit. There was only the petition of objection to the attachment and the order passed on that petition. No doubt the question which is involved in the present suit, namely, the title to the property, was investigated in the insolvency matter, but there is strong ground for the argument that the question of *res judicata* is limited to the provisions of section 11 of the Code of Civil Procedure. In the case of *Gokul Mandar* v. *Padmanand Singh* (1), their Lordships of the Privy Council say as follows:—"They will further observe that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction." Where a decree-holder attaches property as being the property of his judgment-debtor and a third party objects to the property being attached, the third party can object to the attachment. If the objection is ruled against him he is entitled to bring a suit, provided that he brings it within the time expressly allowed by law, but the right to bring the suit is expressly given by the Code itself. It would certainly seem that in many cases it would be highly objectionable that an Insolvency Court should in a summary manner dispose of property or issues involving the title to the property. If an Insolvency Court has jurisdiction to finally try the right to property, it should as a general rule require the parties to file statements in the nature of pleadings, issues should be duly framed and the case tried in the manner in which an ordinary civil suit is tried. On the other hand, it certainly seems open to grave objection that a claimant to property alleged to belong to an insolvent, (not claiming as a creditor) should be entitled to have an investigation of his alleged title in the Insolvency Court with a right of appeal, and that he should then be again entitled to re-open the entire question in an independent suit. The consideration of this case indicates the necessity for amendment of the Insolvency Act. We have thought it right to say so much, because an important question of law seems to be involved in the consideration of this case. We find, however, that in the case of

(1) (1902) I. L. R., 29 Calc., 707.

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Pita Ram v. *Jujhar Singh* (1), a Bench of this Court decided, under circumstances which in principle cannot be distinguished from the present case, that a decision of the Insolvency Court operates as *res judicata*. We are bound to follow this decision or refer the present appeal to a larger Bench for re-consideration of the question involved. If we thought that any injustice had been done in the present case, we should not hesitate to adopt this course. We find, however, that there really was a complete trial of the plaintiffs' title in the insolvency case. The plaintiffs' title to the property was based upon an alleged oral will which the wife of the insolvent is alleged to have made a few days before her death and not very long before the application for the order of insolvency. The court absolutely disbelieved that the alleged oral will was ever made and came to the conclusion upon the materials it had before it that an arbitration award based upon this alleged oral will was a clumsy attempt to defeat the creditors of the insolvent. The title set up by the claimants was highly improbable and suspicious. Under these circumstances we do not think that this case is a fit one to refer to a larger Bench. We accordingly dismiss the appeal with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

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January, 29.

Before Justice Sir George Knox.

MADHO PRASAD AND OTHERS (DEFENDANTS) *v.* MOTI CHAND AND OTHERS (PLAINTIFFS)*

Civil Procedure Code (1908), *section* 24—*Transfer of suit—Grounds of transfer—Convenience of parties.*

Held that the mere convenience of the parties is not a good reason for the transfer of a suit to another court, when the plaintiff, who, within the limits assigned by the Code of Civil Procedure, has a right to select the *forum*, objects to the transfer. *Sachendra Nath Mitra* v. *Muhammad Habib-ullah* (2) referred to.

THIS was an application under section 24 of the Code of Civil Procedure for the transfer to Allahabad of a suit pending in the Court of the Subordinate Judge of Benares. The grounds

* Civil Miscellaneous No. 261 of 1918.

(1) (1907) I. L. R., 39 All., 626. (2) 24 Indian Cases, 707.