FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Thom and Mr. Justice Iqbal Ahmad

1935
April, 4

ABDUL RAHMAN (DEFENDANT) *v.* NIHAL CHAND (PLAINTIFF)*

Provincial Insolvency Act (V of 1920), sections 28(4) and (5); 59(d)—Undischarged insolvent's suit to recover loan—Maintainability—Question whether the money lent was property which had vested in the receiver—Presumption—Receiver should be made party to the suit.

Under the provisions of section 28, clauses (2) and (4), of the Provincial Insolvency Act, property acquired by or devolving on the insolvent after the adjudication as well as property existing at the time of adjudication stand on the same footing and both vest forthwith in the court or the receiver, as the case may be; although under the English law some distinction has been drawn between the two, in respect of transactions made by the insolvent.

There is no specific provision in the Provincial Insolvency Act under which a suit by an undischarged insolvent is, in express terms, prohibited. Where, however, the property in dispute in a suit brought by an undischarged insolvent is admitted to be vested, or is of such a nature that it must vest, in the receiver, the receiver alone is the proper person to institute suits and proceedings in respect of it, according to section 59(*d*) of the Act; and the suit brought by the insolvent behind the back of the receiver would be defective.

But where a loan was advanced by the insolvent after his adjudication, and he brings a suit for its recovery, it does not necessarily follow that the money given by the insolvent was property which had vested in the receiver. The insolvent might be a mere benamidar on behalf of an undisclosed principal and the suit would be for the benefit of the real owner; or the loan might have been given out of accumulated savings from such items of property as do not vest in the receiver according to section 28(5) and remain the property of the insolvent himself. It is not appropriate that the defendant who took the money should be allowed to deny that the money belonged to the plaintiff. As a matter of fact there is a presumption in

*Second Appeal No. 913 of 1932, from a decree of N. L. Singh, Additional Subordinate Judge of Meerut, dated the 22nd of April, 1932, modifying a decree of Usuf-uz-zaman, Second Additional Munsif of Ghaziabad, dated the 8th of January, 1931.

favour of the plaintiff that the money was his own, inasmuch as the receiver had not intervened and seized this amount. Unless, therefore, the defendant definitely established that the money had, in fact, vested in the receiver, the suit can not be thrown out on the mere ground that the plaintiff is an undischarged insolvent. The appropriate course would be to implead the receiver in the suit or at least give him notice of the action so that he may show, if he can, that the property was such as had vested in him, in which case he can take the benefit of the decree and recover the amount thereof.

Mr. *Shiva Prasad Sinha,* for the appellant.

Dr. *K. N. Katju* and *N. C. Vaish,* for the respondent.

SULAIMAN, C.J.:—This is a defendant's appeal arising out of a suit brought by the plaintiff for recovery of Rs.2,000 lent by him to the defendant on the 19th of February, 1927, together with interest at Re.1-4 per cent. per mensem. The defence *inter alia* was that the plaintiff was an undischarged insolvent, and was not entitled to sue. The courts below have overruled the objection and decreed the claim. In second appeal the Division Bench before which the case came up for disposal referred the following question to a Full Bench: "Whether the plaintiff, in view of the fact that he is an undischarged insolvent, is entitled to maintain the present suit."

As in several rulings the rule of law prevailing in England has been frequently invoked, it may be convenient to point out at the outset that in England some distinction has undoubtedly been drawn between property which was owned by the insolvent at the time of his adjudication and property which is acquired by him afterwards. Following certain previous rulings it was laid down in the case of *Cohen* v. *Mitchell* (1), which was a suit for wrongful conversion of certain machinery, that as regards after-acquired property, a transaction by a bankrupt, if entered into before the trustee had intervened, would not be invalid if the person dealing with him acted *bona fide* and for value. At the same time it was pointed out on page 266 that if a trustee had

(1) (1890) 25 Q.B.D., 262.

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interfered before the money was paid over, he would have been entitled to demand that it should be paid to him. In England this view of the law has been accepted and we now find in section 47 of the Bankruptcy Act of 1914 (4 and 5 Geo. 5. ch. 59) that a special provision is made in respect of property acquired by an undischarged bankrupt subsequently, in which case he is allowed to deal with it before any intervention by the trustee. Section 45 of the Act also gives protection to certain *bona fide* transactions without notice.

But in India neither the Provincial Insolvency Act, 1907, nor the Act of 1920 draws any such distinction. Section 28(2) makes the whole of the property of the insolvent vest in the court or the receiver on the making of the order of adjudication, and sub-section (4) provides that all property which is acquired by or devolves on the insolvent after the date of the order of adjudication and before his discharge shall forthwith vest in the court or the receiver and the provisions of sub-section (2) shall apply in respect thereof.

It is, therefore, perfectly clear that property existing at the time of the adjudication as well as the property acquired by or devolved on the insolvent after adjudication stand on the same footing, and both vest forthwith in the court or the receiver as the case may be. No distinction appears to have been drawn by the legislature in respect of these two classes of property. It would amount to legislating if any such distinction were to be imported into the section on account of certain rules of law which prevail in England. The Insolvency Act in India is not in every respect identical with the Bankruptcy Act in England, and there is accordingly no justification for deciding cases under the Indian Act in the light of cases decided in England.

No doubt in the case of *Ramanadha Iyer* v. *Nagendra Aiyar* (1) such a distinction was laid down. I am, with great respect, unable to accept such a view.

(1) A.I.R., 1924 Mad., 223.

The cases of *Alimahmad Abdul Hussein* v. *Vadilal Devchand* (1) and *Chhote Lal* v. *Kedar Nath* (2) are not in point, because they were not cases arising under the Insolvency Act at all, but were governed by the Insolvent Debtors Act of 1848. They are, therefore, not applicable.

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On the other hand, the Rangoon High Court in the case of *Ma Phaw* v. *Maung Ba Thaw* (3) held that where the insolvent before the discharge became entitled by inheritance to certain property, the transfer of the property made by him, even before any action was taken by the receiver in regard to such property and even if the transferee took the property for value, *bona fide* and without notice, was void as against the receiver.

The view taken by the Full Bench in the case of *Gobind Ram* v. *Kunj Behari Lal* (4) undoubtedly was that an insolvent has no transferable interest left in his property after the vesting order. The position has now been made clear by their Lordships of the Privy Council in the case of *Kala Chand Banerjee* v. *Jagannath Marwari* (5). After quoting section 16 of the Insolvency Act of 1907, their Lordships on page 597 observed: "This provision is perfectly clear. The moment the inheritance devolved on the insolvent Amulya, who was still undischarged, it vested in the receiver already appointed, and he alone was entitled to deal with the equity of redemption." Again on page 599 it was said: "that does not in the least imply that an action against him (insolvent) may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it and he, and not the insolvent, has the sole interest in the subject-matter of the suit." Their Lordships pointed out that the contrary view would encourage collusive arrangements

(1) (1919) I.L.R., 43 Bom., 890. (2) (1924) I.L.R., 46 All., 565.
(3) (1926) I.L.R., 4 Rang., 125. (4) (1923) I.L.R., 46 All., 398.
(5) (1927) I.L.R., 54 Cal., 595.

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and might involve the sacrifice of properties which ought to be made available for the benefit of creditors.

I am, therefore, of opinion that whether the property in question be property which existed at the time of the adjudication or was acquired by or devolved on the insolvent afterwards, it vests in the receiver, and he alone is entitled to deal with it.

The case of *Rup Narain Singh* v. *Har Gopal Tewari* (1) is distinguishable, because in that case the mortgagor was subsequently discharged and he could be held to be estopped from denying the validity of his own mortgage.

The question whether an insolvent can maintain a suit for recovery of a loan advanced by him stands on a slightly different footing.

It has been held in the case of *Khelafat Hussain* v. *Azmat Hussain* (2) that an insolvent cannot maintain a suit in his own name for the deferred dower of his daughter, even though the receiver has refused to bring such a suit. In the case of *Rozario* v. *Mahomed Ebrahim Sarang* (3) it was held that where an insolvent without the knowledge of the official assignee and without bringing the fact of his adjudication to the notice of the court obtained a decree in respect of a debt due to him prior to his insolvency, the decree could be set aside on the ground of fraud, even by the judgment-debtor. In the case of *Sayad Daud* v. *Mulna Mahomed* (4) it was held that as the whole of the insolvent's property vests in the official assignee, nothing is left vesting in the insolvent which can give him a cause of action, and that a suit by him in his own name after his adjudication cannot be maintained. It was even held that the addition of the official assignee later would amount to adding a new plaintiff. In the case of *Bhagwan Das* v. *Amritsar National Bank* (5) the right of appeal to a judgment-debtor was denied after he had

(1) (1933) I.L.R., 55 All., 503. (2) (1919) 54 Indian Cases, 699.
(3) (1924) I.L.R., 48 Bom., 583. (4) A.I.R., 1926 Bom., 366.
(5) (1928) 111 Indian Cases, 432.

been declared an insolvent and it was held that the receiver alone should appeal.

There is, however, one aspect of the matter which does not appear to have been pressed by counsel in these cases. Section 28, sub-section (2) prohibits suits being brought by creditors against the property of the insolvent and also prohibits the commencement of any suit or other legal proceeding by a creditor. But there is no specific provision in the Act under which a suit by an insolvent after his adjudication is, in express terms, prohibited. Section 59(*d*), however, empowers a receiver, by leave of the court, to institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent. This provision implies that the receiver is the proper person to institute, defend or continue suits and proceedings relating to the insolvent's property.

Where the property in dispute in a suit is admitted to be vested, or is of such a nature that it must vest, in the receiver, a receiver alone is the proper person to institute suits and proceedings. The suit brought by an insolvent behind the back of the receiver would be defective.

But where a loan was advanced by the insolvent after his adjudication to the defendant, it does not necessarily follow that the sum of money given by the insolvent was property which had vested in the receiver. The insolvent might be a mere benamidar on behalf of an undisclosed principal, in which case he would be entitled to sue even though an insolvent and the suit would, of course, be for the benefit of the real owner. Again, under section 28(5), properties exempted by the Code of Civil Procedure or other enactments from liability to attachment and sale in execution of a decree do not vest in the receiver. Such moneys as are exempted remain the property of the insolvent and if he has lent the money out of such accumulated savings, there would be no bar either to his lending the money

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to the defendant or to his bringing a suit to recover the amount.

At the same time, as a receiver is an officer of the court acting under the control and directions of the court and in the interest of the insolvent's creditors, it is the duty of the court to see that no fraud is perpetrated before its eyes and that the insolvent does not walk away with moneys which ought to go to the officer of the court. An appropriate course would, therefore, seem to be to implead the official receiver in the suit or at least give him notice of the action so that when a decree is passed in favour of the plaintiff, the receiver may be at liberty to take the benefit of the decree and recover the amount due under it, if it can be shown that the property was such as had vested in the receiver. Such inquiry can easily be made either in the execution department or by a separate suit between the receiver and the insolvent.

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But it seems to me inappropriate that the present defendant who took the money from the plaintiff should be allowed to deny that the money belonged to the plaintiff. *Prima facie* there is no presumption that the money did not belong to the plaintiff. As a matter of fact as the receiver had not intervened and seized this amount, there is a presumption in favour of the plaintiff that the money was his own. The suit, therefore, cannot be thrown out on the mere ground that the plaintiff is an insolvent. Had the defendant established definitely that the money had, in fact, vested in the receiver and was not the property of the plaintiff, the matter might possibly have been different. Notice should accordingly be given of this appeal to the receiver and then the decree of the courts below upheld.

THOM, J.:—I concur.

IQBAL AHMAD, J.:—I agree.