

## APPELLATE CIVIL.

Before Mr. Justice Muhammad Raza and Mr. Justice B. S. Kisch

1932  
April, 4.

BUDDHOO LAL AND ANOTHER (PLAINTIFFS-APPELLANTS)  
v. RAM SAHAI AND OTHERS (DEFENDANTS-RESPONDENTS).\*

*Provincial Insolvency Act (V of 1920), section 28, clauses (2) and (4)—Insolvent transferring property after order of adjudication—Transfer, validity of—Inherent power of court to take cognizance of questions which cut at the root of subject-matter of controversy—Questions of law not raised in pleadings, if can be raised subsequently—Second appeal—Plea of possessory title not raised in lower court, if can be raised in second appeal.*

The words of section 28, clauses (2) and (4) of Act V of 1920 are imperative. The Act makes no difference between property belonging to the insolvent when the order of adjudication is made and the after-acquired property mentioned in clause (4). All the property of the insolvent vests in the court or the Receiver as soon as the order of adjudication is made. After such vesting the insolvent ceases to be the owner of the property in law and dealings by him with respect thereto become void. Therefore a transfer made by him is a nullity and has no existence in the eye of law, and the persons who base their title on a transfer executed by an insolvent have no *locus standi* to maintain a suit as they acquire no title to the property by such a transfer. *Sundarappa Ajar v. Arunachella Chettiar* (1), *Gobind Ram v. Kunj Behari Lal* (2), *Ma Phaw v. Maung Ba Thaw* (3), and *Kalachand Banerji v. Jagannath Marwari* (4), referred to.

The court has an inherent power to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties. Where a question of law is not specially raised in the pleadings but a party is not in any way taken by surprise and the materials on record are quite sufficient to enable the appellate court to give a decision on the question in dispute which has throughout been understood to

\*Second Civil Appeal No. 171 of 1931, against the decree of Pandit Tika Ram Misra, Subordinate Judge, Malihabad at Lucknow, dated the 10th of March, 1931, reversing the decree of Babu Hiran Kumar Ghoshal, Munsif in addition to strength, Lucknow, dated the 15th of December, 1930.

(1) (1908) I.L.R., 31 Mad., 493. (2) (1923) I.L.R., 46 All., 398;

(F.B.) (401).

(3) (1926) I.L.R., 4 Rang., 125. (4) (1927) L.R., 54 I.A., 190; 31 C.W.N., 741; 25 A.L.J., 621.

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be a question of law it can be allowed to be argued by an appellate court and disposed of by it.

If a plea of possessory title is not taken in the lower court it cannot be allowed to be raised for the first time in second appeal.

Messrs. *Radha Krishna* and *R. K. Bose*, for the appellants.

Messrs. *Hyder Husain*, *L. S. Misra* and *B. P. Misra*, for the respondents.

RAZA and KISCH, JJ. :—These three second appeals (Nos. 171 to 173 of 1931) arise out of two suits which were instituted in the court of the Munsif (South), Lucknow, on the 31st of May, 1930.

The facts relevant to these appeals may be very shortly stated.

The dispute in these cases relates to a building in Husainganj, Lucknow. It appears that there is a *shiwala* (Hindu temple) between the northern and southern portions of the building. The plaintiffs base their title on two sale deeds executed by one Kamal Lal, son of Ram Lal of Gaya, on the 12th of September, 1929. They brought two suits for possession of the property on the basis of the sale deeds against three persons, namely Ghasitey, Durga Prasad, and Ram Sahai. The plaintiffs' claim was resisted by the defendants on various grounds. The learned Munsif decreed the plaintiffs' claim in both the suits on the 15th of December, 1930, and awarded Rs.25 as damages also to the plaintiffs against Durga Prasad, defendant No. 2, in suit No.134/124 of 1930. The defendants appealed and their appeals were allowed by the learned Subordinate Judge of Malihabad at Lucknow on the 10th of March, 1931. The plaintiffs have come to this Court in second appeal.

The crucial question in these cases is the competency of Kamal Lal to transfer the property in suit to the plaintiffs after he had been adjudged an insolvent and the property had vested in the Insolvency Court. The learned Munsif held that though Ram Lal and Kamal

Lal were adjudged insolvents in 1919 and their property, including the property in suit, had vested in the Insolvency Court, Kamal Lal was competent to sell to the plaintiffs the property of which he had become divested by order of adjudication. The learned Subordinate Judge took a different view. He held that by the order of adjudication the whole right, title and interest of the insolvent became vested in the Insolvency Court and the insolvent, who had no saleable interest or title left in him, could not pass any title to the plaintiffs. The sale deeds were, therefore, void and the plaintiffs did not acquire by their purchase any title to the property and had no *locus standi* to maintain the suits for possession of the property.

In our opinion the judgment of the learned Subordinate Judge is quite correct. The view taken by the learned Subordinate Judge is supported by the following authorities: *Sundarappa Ayar and others v. Arunachella Chettiar* (1), *Gobind Ram v. Kunj Behari Lal and others* (2), and *Ma Phaw and others v. Maung Ba Thaw* (3). The view of the Rangoon High Court finds ample support in the decision of the Privy Council in *Kalachand Banerji v. Jagannath Marwari* (4) in the following words: "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. The alternative in the section applicable to vesting in the court was, no doubt, inserted to provide for the case of a Receiver not being appointed at the same time as the adjudication of insolvency was made and to foreclose an argument that vesting was suspended until the actual appointment of a Receiver . . . The court only acts through a Receiver and any estate acquired by, or devolving, on an insolvent is vested in him as from the date of the acquisition or devolution, whatever the date of the Receiver's actual

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appointment . . . That the rights of a secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent, is, of course, plain, but that does not in the least imply that an action against him 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. To him, therefore, must be given the opportunity of redeeming the property."

The law appears to be clear on this point. Under section 16(2) of Act III of 1907 "on the making of an order of adjudication the whole of the property of the insolvent, save in so far as it includes such particulars (not being his books of account) as are exempted by the Code of Civil Procedure or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree shall vest in the court or in a Receiver as hereinafter provided . . ." Under clause (4) of the same section "All such property as may be acquired by, or devolve on, the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the court of Receiver . . ." Section 28, clauses (2) and (4) of Act V of 1920 corresponds to section 16, clauses (2) and (4) of Act III of 1907. The words of the section are imperative. The Act makes no difference between property belonging to the insolvent when the order of adjudication is made and the after-acquired property mentioned in clause (4). All the property of the insolvent vests in the court or the Receiver as soon as the order of adjudication is made. It follows, therefore, that from the date of the order Kamal Lal and Ram Lal ceased to have any interest in the property. The property was taken away from them and became vested in the court, so that after such vesting Kamal Lal ceased to be the owner of the property in law and dealings by him with respect thereto became void. The transfer in

question made by him must be held to be a nullity and has no existence in the eye of law. The sale deeds in question have, therefore, been rightly held by the learned Subordinate Judge to be void. The plaintiffs, who base their title on the deeds in question, have no *locus standi* to maintain the suit when they acquired no title to the property by purchase.

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The appellants contend that the plea relating to Kamal Lal's insolvency was not taken in the first court and should not, therefore, be accepted in dismissing the plaintiffs' suits. It is true that though the defendants had in their defence questioned the title of Kamal Lal and his competency to transfer the property in suit they had not specifically pleaded that the transfer was void as it was made by an undischarged insolvent; but the fact remains that they had taken the plea in the first court in the course of arguments and that court had allowed the question to be argued and had given its decision on that point. The question was fully discussed at the hearing of the suits in the first court and also at the hearing of the appeals in the lower appellate court. There is nothing to show that any objection was taken to the plea in question being argued and decided in the lower appellate court. In fact the lower appellate court had heard arguments on that ground of appeal only and had not heard arguments on any other point involved in the appeals. The plaintiffs were not in any way taken by surprise and the materials on record were quite sufficient to enable the court to give a decision on the question under consideration. The question under consideration has throughout been understood to be a question of law. It should also be borne in mind that the court has an inherent power to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties. Under these circumstances we think it is now too late for the plaintiffs to contend that the plea in question should not have been accepted by the lower appellate court in disposing of the appeals.

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The appellants' learned counsel has drawn our attention to the fact that the learned Subordinate Judge has not considered the question of damages which were awarded to the plaintiffs by the first court against Durga Prasad, defendant No. 2. We have examined the record for the purpose of deciding that question. The plaintiffs' witnesses, Husaini (P. W. 9) and Budhu Lal (P. W. 10), have given evidence on that point. We are not satisfied with their evidence which appears to be vague and inconsistent and does not establish that any bricks or iron sheets were removed or taken away by the defendant No. 2. We are not prepared to hold on their evidence that the defendant No. 2 is liable for the damages claimed.

The appellants' learned counsel attempted to raise the question of possessory title in arguing the appeals before us, but no such plea was taken in the lower courts. The memorandum of appeal also does not raise any such question. It appears that the whole object of these suits was to have the question of title decided and the defendants' possession was not denied. The plaintiffs cannot, therefore, be allowed to raise the question of possessory title in second appeal. The result is that the appeals fail and must be dismissed. No case has been made out to disturb the judgment of the learned Subordinate Judge. We dismiss all the three appeals with costs throughout.

*Appeal dismissed.*