

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, and Mr. Justice Birdwood.

1885
February 26.

GANGA'DHAR BHIVRA'V, PLAINTIFF, v. DATTO KRISHNA'JI,
DEFENDANT.*

*Civil Procedure Code Act XIV of 1882, Secs. 344, 351 and 356—Insolvency—
Jurisdiction—Execution of a decree—Sale—Completion of sale.*

The plaintiff Gangádhār obtained a decree against the defendant. In execution of that decree, certain property was attached on 5th March, 1881. Although the judgment-debtor was not arrested in execution of that decree, nevertheless he, on the 18th October, 1882, applied to the Court of the Subordinate Judge to be declared an insolvent under section 344 of the Code of Civil Procedure (Act XIV of 1882). He was declared an insolvent under that section, and the Názir of the Court was appointed a receiver on 22nd December, 1883. The receiver proceeded, under the direction of the Court, to convert the property of the insolvent into money under section 356 (a) of the Code. Certain immoveable property was purchased by the petitioner Tukárám for Rs. 1,032 on 4th December, 1884. Tukárám, after some time, presented an application, in which he stated that inasmuch as the insolvent had not been arrested in execution of the decree obtained by Gangádhār, the Court had no jurisdiction; and he prayed that, if such was the case, the sale should be set aside, and the money returned to him. No appeal was preferred by the judgment-creditor, or other creditors of the insolvent, against the order of insolvency made under section 351 of the Code. The Subordinate Judge referred the following question to the High Court, *viz.*, "whether a Court which has declared the insolvency of a judgment-debtor, can direct the receiver to proceed under section 356 of the Code and complete any sale, though the purchaser objects to the direction on the ground of want of jurisdiction in the Court, which objection seems to the Court to be valid, but too late."

Held, that as the declaration of insolvency was *ultra vires*, the Subordinate Judge should take no further steps to give effect to it, but leave the parties concerned to take such measures as they may be advised.

THIS was a reference, under section 617 of the Code of Civil Procedure Act XIV of 1882, by Ráv Sáheb Raghunáth Shivrám Tipnis, Subordinate Judge of Karád, who stated the case thus:—

"The plaintiff Gangádhār obtained a decree against the defendant Krishnáji, deceased, by his heir and son Datto. In execution of that decree certain property was attached on 5th March, 1881. The judgment-debtor applied to this Court to be declared an insolvent under section 344 of the Code. He was not arrested in execution of the decree. The application was made on 18th

* Civil Reference, No. 5 of 1885.

October, 1882. Defendant is not an agriculturist. This Court (Rāv Sāheb R. Bānāji) declared the petitioner an insolvent, and appointed the Nāzīr of this Court as receiver on 22nd December, 1883.

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“The receiver has proceeded, under the direction of the Court, to convert the property of the insolvent into money, under section 356 of the Code.

“Certain immoveable property has been sold to the petitioner Tukārām for Rs. 1,032 on 4th December, 1884.

“The purchaser Tukārām has preferred the petition No. 128 of 1884, alleging that the insolvent was not arrested in execution of the decree, and, therefore, this Court had no jurisdiction; that, if it be so, the sale should be set aside, and his money returned to him.

“From the report of the Nāzīr and receiver, and the record of the proceedings, I find the facts as stated in paragraphs 2-4.

“No appeal was preferred by the judgment-creditor, or other creditors of the insolvent, against the order of insolvency made under section 351 of the Code.

“There can be no doubt that this Court had no jurisdiction to entertain the application of insolvency. *A fortiori*, the declaration of insolvency is *ultra vires*—*Purbhudds v. Chugan*⁽¹⁾.

“The question now arises, whether this Court is by its own order, which stands unreversed by a superior Court, precluded from preventing the procedure under section 356. I am of opinion that this Court has no power to set aside the sale, or quash the insolvency proceedings.

“The purchaser is, however, in a very sad predicament. The deed of sale or conveyance, which will be executed to him, may hereafter be impeached by any one for defect of title. I don't think that the rulings in *Kondājī v. Anāu*⁽²⁾ and *Lakshman v. Bābājī*⁽³⁾ will help the purchaser. They have no application to his case.

“The Honourable the High Court can set aside the proceedings under section 622 if the nature of the present case be brought

⁽¹⁾ I. L. R., 8 Bom., 196.

⁽²⁾ I. L. R., 7 Bom., 448.

⁽³⁾ I. L. R., 8 Bom., 31.

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to their notice. It is true that this Court has no power to direct the attention of the Honourable Court to the proceedings. I only mention it as a matter of reference.

“The direction, which this Court may give to the receiver under section 356 of the Code, is not appealable, but it may affect the parties concerned very materially. The orders of insolvency are only appealable to the High Court: see section 589 of the Code.

“If the proceedings are not quashed by any superior Court, my own opinion is, that this Court must direct the receiver to complete the sale and execute a conveyance to the purchaser. But I entertain doubts, as I think that the receiver and the intended purchaser have rights to bring the informality to the notice of the Court to protect themselves from the liability; and the question of jurisdiction ought to be re-opened at their instance.

“The point which I respectfully beg to submit for the opinion of the Honourable the Court, is, whether this Court, which declared the insolvency of a judgment-debtor, can direct the receiver to proceed under section 356 of the Code and complete any sale, though the purchaser objects to the direction, on the ground of want of jurisdiction in the Court, and which objection seems to the Court to be valid, but too late.”

There was no appearance in the High Court on behalf of any party.

SARGENT, C. J.—As the declaration of insolvency was *ultra vires*, the Subordinate Judge should take no further steps to give effect to it, and leave the parties concerned to take such measures as they may be advised.

Order accordingly.