APPELLATE CIVIL.

Before Mr. Justice White and Mr. Justice Field.

1880
Aug. 11.

NUBBI BUKSH (JUDGMENT-DEBTOR) *v.* CHASNI (DECREE-HOLDER).*

Appeal—Insolvency—Refusal to grant Application to be declared Insolvent—Code of Civil Procedure (Act X of 1877), ss. 351, 588, cl. 17.

An order refusing to grant an application to be made an insolvent, is appealable under cl. 17, s. 588 of the Code of Civil Procedure.

Such an order must be considered to be one made under s. 351.

Juggutjeebun Gooptoo v. *Haro Coomar Pal* (1) dissented from.

THE facts relevant to this report sufficiently appear in the judgments of the Court.

Baboo *Aushootosh Dhur* and Munshee *Serajul Islam* for the appellant.

Mr. *H. Bell* and Mr. *Trevelyan* (with them Baboo *Bama Churn Banerjee*, Baboo *Aukhil Chunder Sen*, and Baboo *Juggut Chunder Banerjee*) for the respondent.

The judgments of the Court (WHITE and FIELD, JJ.) were as follows:—

WHITE, J.—This is an appeal against an order of the Officiating Judge of Dacca, refusing an application, on behalf of Nubbi Buksh Bepari, to be declared an insolvent under s. 351 of the Code of Civil Procedure.

A preliminary objection is taken, that the appeal does not lie: *first*, on the ground that the order being one of refusal is not made under s. 351; and *secondly*, because, if made under that section, no appeal lies against an order of refusal, but only against an order granting the application.

Section 588, cl. 17, of the Code gives an appeal against an order under s. 351 in these words—"orders in insolvency matters

* Appeal from Order No. 98 of 1880, against the order of R. F. Rampini, Esq., Officiating Judge of Dacca, dated the 29th March 1880.

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under s. 351." Now, as regards the first objection, I think that the order under appeal, although one of refusal, was made under s. 351. This is the only section under which the District Court can deal with an application by an insolvent judgment-debtor to be made an insolvent. Neither that section, nor any other section in the chapter, expressly authorises the Court to refuse the application; but from the language of the 351st section, as well as from the nature of the case, it is obvious that the Court has such power, for s. 351 directs that the Court may, if satisfied as to certain particulars, declare the applicant to be an insolvent, which implies that, if not so satisfied, the Court may refuse the application. It appears to me to follow from these data that an order refusing an application is as much made under s. 351 as an order granting an application, unless the former order can be supposed to be made under no section of the Code, which could not, I apprehend, be seriously contended.

Taking the order to be made under s. 351, the second objection cannot, in my opinion, prevail against the natural meaning of the words used in cl. 17 of s. 588. The words "orders in insolvency matters under s. 351" are wide enough to embrace any order made under that section, whatever its nature may be; and an order made by a Court in the course of disposing of an application is not the less the order of the Court because it refuses the application. Where the Legislature intended to confine the right of appeal to one species of order, it has used clear and appropriate words, as for instance, in cl. 27 of s. 588, where an appeal is only given in respect of orders of refusal under s. 558. This question has been the subject of decision by more than one Bench of this Court. In the earlier decision—*Mumtaz Hossein* v. *Brij Mohun Thakoor* (1) — the objection was disallowed. Mr. Justice Jackson, who pronounced the judgment of the Court, says:—"It appears to us that the term 'insolvency matter' is purposely wide so as to include any question arising out of the exercise of the functions entrusted to the Courts under the section specified." That decision, and the reasons upon which it is founded, commend themselves to our judgment. The second decision was passed about a year and

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a quarter afterwards—*Juggutjeebun Gooptoo* v. *Haro Coomar Pal* (1). In this decision the objection prevailed, but I am unable to gather from the report the precise ground upon which it was allowed to do so. It is to be observed that the earlier decision of Mr. Justice Jackson and Mr. Justice McDonell was not cited. Under these circumstances I think that we are at liberty to act upon that authority, which appears to us to be most in conformity with the true construction of cl. 17, s. 588.

For these reasons, we are of opinion that an appeal lies to this Court against the order refusing to declare Nubbi Buksh an insolvent.

(The learned Judge then went into the evidence in the case, and dismissed the appeal on the merits.)

FIELD, J.—In this case a preliminary objection has been made that no appeal will lie. In other words, it is contended, that an order refusing to declare a person an insolvent does not come within the meaning of the words "orders in insolvency matters under s. 351" in cl 17, s. 588 of the Code of Civil Procedure. Section 351 is as follows:—"If the Court is satisfied that, &c..... the Court may declare him" (*i. e.*, the applicant) "to be an insolvent." This section contains no express provision empowering the Court to refuse an application made by a judgment-debtor asking to be declared an insolvent, and I may add that no such express provision is to be found in any other section of the Code. The question then arises, under what section does the Court make an order refusing to declare a person to be an insolvent. That it has power to make this order there can be no doubt.

It appears to me that, although the provisions of s. 351, in their express language, empower the Court to make an affirmative order only, yet, by necessary implication, they must be understood to give the Court the further power to make a negative order,—*i. e.*, an order refusing to declare the applicant to be an insolvent; and that an order refusing to declare an applicant to be an insolvent is, therefore, made under s. 351. If cl. 8 of s. 588, read with s. 103 of the Code,—cl. 9 of s. 588, with s. 108,—cl. 7 of s. 588, with s. 111,—cl. 19 of s. 588, with s. 370,—

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cl. 20 of s. 588, with s. 371,—cl. 21 of s. 588, with s. 372,—and cl. 27 of s. 588, with ss. 558 and 560,—it will be abundantly manifest (more especially as regards ss. 371, 558, and 560) that orders refusing to grant applications under certain sections of the Code are understood to be made under those particular sections which expressly confer the power only of granting applications, and do not contain express words authorising the Court to make orders refusing such applications. I think further that this interpretation is supported by the construction put by their Lordships of the Privy Council upon the 76th section of the Registration Act in the case of *Reasut Hossein* v. *Hadjee Abdoollah* (1).

I concur in the judgment which has just been delivered on the merits.

Appeal dismissed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Morris, and Mr. Justice Mitter.

GUJJU LALL (DEFENDANT) *v.* FATTEH LALL (PLAINTIFF).* 1880 *June* 1.

Evidence Act (*I of* 1872), *ss.* 13, 40, 41, 43—*Admissibility in Evidence of Judgments not "inter partes."*

Per GARTH, C. J., JACKSON, PONTIFEX, and MORRIS, JJ. (MITTER, J., dissenting).—A former judgment, which is not a judgment *in rem*, nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit, either as a *res judicata*, or as proof of the particular point which it decides, unless between the same parties or those claiming under them.

In a suit between *A* and *B*, the question was, whether *C* or *D* was the heir of *H*. If *C* was the heir of *H*, then *A* was entitled to succeed; otherwise not. The same question had been raised in a former suit brought by *X* against *A*, and decided against *A*; and this former judgment was admitted in evidence in the suit between *A* and *B*, and dealt with by the Courts below as conclusive evidence against *A* upon the point so decided.

Held (MITTER, J., dissenting) that the former judgment was not admissible as evidence in the suit between *A* and *B*, either as "a transaction" under s. 13, or as "a fact" under s. 11, or under any other section of the Evidence Act.

* Full Bench on Special Appeal, No. 2307 of 1878.

(1) L. R., 3 I. A., 221, at pp. 225, 226; S. C., I. L. R., 2 Calc., 131, at p. 137.