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We are therefore of opinion that in the present case we have jurisdiction and should interfere.

We accordingly make this Rule absolute, set aside the order of the Deputy Commissioner dated the 7th June, 1912, and direct him to proceed with and determine the appeal before him on the merits.

We make no order as to costs.

S. C. G. *Rule absolute.*

ORIGINAL CIVIL.

Before Fletcher J.

GREY

v.

LAMOND WALKER.*

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Jan. 29

Sale of goods—insolvency of purchaser before delivery—Vendor's right to refuse delivery—Official Assignee, duties and rights of—Election within reasonable time—Tender of cash before delivery—Presidency Towns Insolvency Act (III of 1909) ss. 52, 62, 64—Joint Hindu family, insolvency of member of—Infant partner—Contract Act (IX of 1872) s. 247.

On the insolvency of the *kurta* of a *mitakshara* Hindu family, a suit is not maintainable by the Official Assignee for damages for breach of a contract entered into by the firm, which was the joint business of the family.

Under section 52 of the Presidency Towns Insolvency Act, the rights that passed to the Official Assignee were the rights the insolvent had under the contract *as an insolvent* : hence, it was the duty of the Official Assignee to declare his election to take up the contract within a reasonable time, and to tender cash before calling for delivery.

Ex parte Chalmers (1) and *Morgan* v. *Bain* (2) followed.

* Original Civil Suit No. 689 of 1912.

(1) (1873) L. R. 8 Ch. App. 289. (2) (1874) L. R. 10 C. P. 15.

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ORIGINAL SUIT.

This suit was instituted by Mr. C. E. Grey as Official Assignee of the property of Gurmukh Roy Kadia, an insolvent, for the recovery of Rs. 3,199-2-9 as damages for failure to deliver under two contracts for the sale of sugar. The contracts, both dated the 15th August 1910, were entered into between the firm of Messrs. Walker, Goward & Co., of which the defendant Mr. Lamond Walker was a member, and the firm of Messrs. Gurmukh Roy Ramessur, and were each for the sale by the former firm to the latter, of 50 tons of Java sugar for shipment from July to October 1911, in equal instalments of $12\frac{1}{2}$ tons each, each shipment to be treated as a separate contract, and the terms being "cash before delivery as customary."

On the 15th June, 1911, Gurmukh Roy Kadia was adjudicated an insolvent on his own petition, and a vesting order was made, vesting his property in the plaintiff. In the adjudication order Gurmukh Roy Kadia was described as carrying on business under the style of Gurmukh Roy Ramessur. The goods arrived in Calcutta in the months of July, August, November and October, respectively, in respect of the one contract, and in the months of July, August, September and October, respectively, in respect of the other.

No notice of arrival of any of the goods was given by the defendants to the plaintiff, and the plaintiff took no steps for the purpose of completing the contracts till the 13th September, 1911, on which date he wrote to the defendants in respect of the July and August shipments, in these terms:—"I have to give you notice that you have not yet sent me an arrival notice in terms of the above contracts. I am at present prepared to pay for and take delivery of the goods, on

your tendering the same for the above shipments." At no time did the plaintiff tender to the defendants the price of any portion of the goods.

The defendants replied, on the 21st September, 1911, that they had "already disposed of the sugar under the contract." This was confirmed by a further letter of the 9th November, 1911. On the 26th April, 1912, the plaintiff obtained leave from the Court, in its Insolvency Jurisdiction, to institute proceedings, and on the 13th June claimed from the defendants, on behalf of the insolvent's estate, the sum of Rs. 3199-2-9, being the difference between the contract rates and the rates prevailing on due dates, for their failure to deliver the sugar sold under the contracts. On the defendants repudiating all liability, this suit was instituted.

The averment of breach in the plaint was in these terms:—"The plaintiff was at all times ready and willing to take delivery and pay for the said sugar in terms of the said agreements, but the defendants, in breach of the said agreements, failed and neglected to deliver any of the sugar."

In their written statement, the defendants put in issue the proprietorship of the firm of Gurmukh Roy Ramessur by the insolvent; and contended that they were justified, in the circumstances, in not delivering any of the goods under the contract.

The following issues were settled between the parties:—

(i) Was the insolvent the sole proprietor of the firm of Gurmukh Roy Ramessur?

(ii) Did the plaintiff or the insolvent ever tender cash before calling upon the defendants to deliver the goods: if not, is the plaintiff entitled to call upon the defendants to deliver?

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(iii) Was the plaintiff bound to express his readiness and willingness to perform the contract in suit within a reasonable time of the insolvency?

(iv) Was the plaintiff in fact ready and willing to perform the contract?

(v) Did the defendants, by stating in their letter of the 21st September, 1911 that they had already sold the sugar, refuse to give delivery and commit a breach of the contract?

In respect of the first issue, it appeared from the evidence that the insolvent was the *kurta* of a *mitakshara* Hindu family, and was joint with his grandson Ramessur, who was an adult, and that the business of the firm of Gurmukh Roy Ramessur formed part of the joint family estate.

It was not disputed that the market was a rising one, and that the rates prevailing on the dates of delivery were higher than the contract rates.

Mr. B. C. Mitter (with him *Mr. N. N. Sircar*), for the defendants. It is clear from the evidence that the insolvent was not the sole proprietor of the firm of Gurmukh Roy Ramessur: the insolvent was joint with his grandson Ramessur, and the business formed part of the joint family estate. It follows that the Official Assignee, in whom vested the property only of the insolvent, cannot maintain this suit. In the circumstances the defendants were justified in not making delivery under the contracts. On the insolvency of Gurmukh Roy, the Official Assignee was not entitled to delivery, unless and until he first made tender of the price: *Ex parte Chalmers* (1), *Morgan* v. *Bain* (2), *Ex parte Stapleton* (3). No tender of cash was made by the Official Assignee. These authorities also show

(1) (1873) L. R. 8 Ch. App. 289. (2) (1874) L. R. 10 C. P. 15.
(3) (1879) L. R. 10 Ch. D. 586.

that an election to fulfil the contract must be made within a reasonable time. There had been unreasonable delay by the Official Assignee: his letter of the 13th September was too late.

Mr. Pugh (with him *Mr. Langford James*), for the plaintiff. The evidence shows that Ramessur was an infant. Assuming that the business was part of the joint estate, this suit could have been brought by Gurmukh Roy alone previous to his insolvency: and hence is now maintainable by the Official Assignee. An infant cannot enter into or sue on a contract: as regards third parties, he has not the status of a partner: it may be, after decree, the infant may have his rights against the Official Assignee for a share in the profits: see section 247 of the Contract Act. It is submitted Ramessur is not a necessary party: if it be held otherwise, let him be added as a party to this suit. It is a well established principle that the insolvency of one of the contracting parties does not put an end to the contract. There has been no disclaimer by the Official Assignee: see sections 62 and 64 of the Insolvency Act of 1909—nor was any application made under section 65 to the Court to rescind the contract. Hence the contract was a subsisting one. The authorities cited on behalf of the defendants have no application to this case, where provision was made in the contracts for cash before delivery. The defendants failed to give arrival notices, as they were bound to do. When called upon to make delivery, they admitted they had disposed of the goods: this was a clear breach. It was unnecessary thereafter for the Official Assignee to tender cash: *Tolhurst* v. *Associated Portland Cement Manufacturers* (1), *In re Phœnix Bessemer Steel Co.* (2).

(1) [1902] 2 K. B. 660, 671. (2) (1876) L. R. 4 Ch. D. 108.

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The Official Assignee was at all times ready and willing to fulfil his part of the contract, namely, to pay cash before delivery. The market was a rising one and the defendants have pocketed the profits.

FLETCHER J. In this suit Mr. Charles Edward Grey, the Official Assignee of Bengal, and as such assignee of the property of Gurmukh Roy Kadia, an insolvent, sues three gentlemen who carry on business in copartnership together under the style of Messrs. Walker, Goward & Co. to recover Rs. 3,199-2-9 as damages in respect of a breach of two contracts for the sale of sugar. The contracts were both dated the 15th of August 1910, and were both for the sale of 50 tons of Java sugar delivered over July, August September and October, 1911, by instalments of 12½ tons each month.

On the 15th of June, 1911, Gurmukh Roy Kadia was adjudicated an insolvent, he being in the adjudication order described as carrying on business under the style of Gurmukh Roy Ramessur, and no steps were taken by the Official Assignee until the 13th of September, 1911, for the purpose of completing these contracts. On the 13th of September, 1911, Mr. Grey wrote to the defendants in these terms: "I have to give you notice that you have not yet sent me the arrival notice in terms of the above contracts. I am at present prepared to pay for and take delivery of the goods, etc., etc." No notice had been given of the arrival of any goods by the defendant to Mr. Grey. It appears from the evidence that the first lot of the July goods did not arrive here until August. That appears from the evidence given on behalf of the defendants.

The following issues were settled between the parties:—(i) Was the insolvent the sole proprietor

of the firm of Gurmukh Roy Ramessur? (ii) Did the plaintiff or the insolvent ever tender cash before calling upon the defendants to deliver the goods; if not, is the plaintiff entitled to call upon the defendants to deliver? (iii) Was the plaintiff bound to express his readiness and willingness to perform the contract in suit within a reasonable time of the insolvency? (iv) Was the plaintiff, in fact, ready and willing to perform the contract? (v) Did the defendants, by stating in their letter of 21st September, 1911, that they had already sold the sugar, refuse to give delivery and commit a breach of the contract?

On the first issue the evidence stands in this way. The insolvent, Gurmukh Roy, is a member of a *mitakshara* Hindu family; he is in fact the *kurta* of the family. He had two sons, both of whom are deceased, and the eldest grandson (it matters not for this purpose whether he is an adopted son of the deceased's son or a natural born son) is Ramessur; and, in accordance with the usual practice adopted amongst Hindus who belong to this school of Hindu law, the firm is carried on in the name of the *kurta* of the family, Gurmukh Roy, and in the name of the eldest grandson, Ramessur.

There cannot be any doubt in cases of families of this nature that there is a presumption of jointness, not only of their property, but even as regards business which they carry on, and if any member sets up that a particular portion of the property forms his *peculium*, or separate property, the *onus* of proving that lies on the particular member who sets up that case. If seems to me in this case that the Official Assignee has got the rights of Gurmukh Roy, and no one else, and the *onus* is upon him to show that this business was in fact a separate business of Gurmukh Roy.

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Now, how does the evidence stand as regards that? It is obvious on the evidence given on behalf of the Official Assignee that out of the profits of this business, and without any separate account being kept of those profits, there was paid on account of Ramessur, not only his food and raiment, but also the expenses of his performing acts of worship suitable and proper to the religion which he professes. That cannot be doubted. There is a charge for a supper for Ramessur on arriving in Calcutta, and on several other occasions a charge for his raiment and a charge for performing the religious ceremony of worshipping the "Mother Ganges." It seems to me, on that, quite clear that the business does form a portion of the joint family estate.

Then, it is said that Ramessur is an infant and, therefore, the only right he can have is a right to have such portion of the assets which remained after paying the creditors in full handed over to him. That is not this case at all. What you have to consider in this case is, what is the title of the Official Assignee? The title of the Official Assignee is not open to doubt, because, under section 52 of the Presidency Towns Insolvency Act, the title of the Official Assignee is to all such property which may belong to, or be vested in, the insolvent at the commencement of the insolvency, but excluding all property which was held by the insolvent on trust or for any other person. It is quite obvious on that section that the Official Assignee stands exactly in the same position as the insolvent, except that where the insolvent held the property, not only for himself, but on trust for other members of the family, the portion thereof which was held by the insolvent as a trustee does not pass to the Official Assignee. It seems to me on the construction of the Act that is quite clear.

It is then said that under section 247 of the Indian Contract Act the suit can be maintained by Gurmukh Roy, as the *kurta* of the family, for any obligations entered into on behalf of the business. That may be so as regards Gurmukh Roy; but the Official Assignee is not Gurmukh Roy, and he is not a member of the joint Hindu family. The Official Assignee's rights are to such portions of the joint family estate as Gurmukh Roy was entitled to in his own right. It has nothing to do with the other members of this joint Hindu family.

I am satisfied that Ramessur was not in fact an infant. The evidence is that he is about 24 or 25 years of age; at least, that is the evidence which I accept. That Ramessur is anything like 13 or 14 years of age I do not believe, and the proceedings in the Small Cause Court, both of the plaint filed by the firm and of the written statement filed against the firm, make no mention that Ramessur was an infant.

I therefore find the first issue in favour of the defendants, namely, that Gurmukh Roy was not in fact the sole proprietor of the firm of Gurmukh Roy Ramessur.

The second issue is, what are the rights of the Official Assignee, with regard to contracts of this nature, upon the happening of an insolvency? A good deal has been said on the disclaimer sections, sections 62 to 64. This is not a case of a disclaimer at all. The question is, what, under section 52, were the rights which passed to the Official Assignee upon the insolvency of Gurmukh Roy. It seems to me quite clear that the rights that passed to the Official Assignee were not the rights of Gurmukh Roy as a solvent, but the rights that he had under the contract as an insolvent, that is, as a person declaring his inability to comply with the terms of the contract, and therefore

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it was the duty of the Official Assignee, upon requiring the completion of the contract, that he should offer to complete the contracts in the way that the insolvent was bound to complete them, namely, that he should make a tender of cash before calling upon the vendor to deliver under the terms of the contract. In my opinion, the decision of Lord Selborne, when Lord Chancellor, and Lord Justices James and Mellish in *Ex parte Chalmers* (1) is conclusive on that matter. That is also in accordance with the decision of the Court of Common Pleas, in *Morgan* v. *Bain* (2). In my opinion, the Official Assignee was only entitled under the terms of the contract, and, having regard to the insolvency of Gurmukh Roy, to take up the same position that Gurmukh Roy could have done.

Then, passing to the third issue, I think that the decisions in *Ex parte Chalmers* (1) and in *Morgan* v. *Bain* (2) show that the Official Assignee must declare his election to take up the contracts on the terms that I have mentioned, namely, that he should stand in the shoes of the insolvent, *qua* insolvent, within a reasonable time. In my opinion, the defendants were not bound to take any steps in regard to these contracts, unless and until they heard from the Official Assignee that he elected to take up the contracts on those terms, and, until he did so elect, they were entitled to remain quiet with regard to any of the matters required to be done under the contract. On the 13th of September, 1911, when the Official Assignee first gave notice to the defendant that he intended to take up the contracts, I think he was much too late in declaring his election. In a case like this, where the adjudication happened as long ago as the 15th of June, 1911, it would be intolerable that a mercantile firm should have to wait from the 15th of June to the 13th September to

(1) (1873) L. R. 8 Ch. App. 289. (2) (1874) L. R. 10 C. P. 15.

find out whether the Official Assignee intended to elect to take up the contracts or not. It may be that in that time Messrs. Walker, Goward & Co. might have considered it necessary, though there is no evidence that they did in this case, to cancel on the best terms that they could the contracts that they had made in Java with respect to the sugar. In my opinion, the election declared in the letter of the 13th September, 1911, was far too late, and was not made within a reasonable time. That being so, the other two issues suggested by the counsel for the Official Assignee do not in fact arise, because in my opinion the Official Assignee did not declare within a reasonable time that he intended to take up the contract, and the defendants were entitled to assume that the Official Assignee intended to abandon it. The decisions I have cited above show that if the Official Assignee had elected to take up the contracts it was his duty to tender cash to the defendants before requiring the defendants to deliver the goods to him It is admitted he did not do this. The present suit, therefore, fails, and must be dismissed with costs on scale No. 2.

J. C. *Suit dismissed.*

Attorneys for the plaintiff: *Leslie & Hinds.*
Attorneys for the defendants: *B. N. Bose & Co.*