

Chandrakant Devji Vs. Narottamdas Amarchand

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Court : Mumbai

Decided On : Mar-12-1941

Reported in : (1941)43BOMLR644

Judge : John Beaummt, Kt., C.J. and ;Macklin, J.

Appeal No. : O.C.J. Appeal No. 35 of 1940 and Suit No. 285 of 1940

Appellant : Chandrakant Devji

Respondent : Narottamdas Amarchand

Judgement :

John Beaumont, Kt., C.J.

1. This is a motion in appeal No. 35 of 1940 asking, in the first instance, that the appeal may be dismissed under Order XXII, Rule8, Civil Procedure Code, 1908, and, in the alternative, that the appellant may be ordered to give further security for the coats of the appeal. The appeal is against a money decree passed against the appellant. After the passing of the decree, the decree-holders got the debtor adjudicated insolvent. There is, we are told, an appeal against the order of adjudication, but at the moment the order of adjudication stands.

2. The contention of the respondents on this motion is that the right to appeal against the money decree is vested in the Official Assignee, and that the appeal has abated under Order XXII, Rule8, and ought to be dismissed under Sub-rule

(2). Mr. Engineer for the respondents has relied on a decision of this Court in *Rustomji v. Byramji* (1933) 36 Bom. L.R. 79, but in my opinion, that decision is not in point. The Court there was considering whether a right to sue to set aside a money decree on the ground of fraud vested in the Official Assignee, and the Court held that it did so vest. But the question here is whether a right to appeal against a money decree is affected by the insolvency of the appellant debtor, and that question must be determined by a reference to the Civil Procedure Code. At the moment when this appeal was filed, it was a well constituted appeal. That is not in dispute. The question is whether it ceased to be a well constituted appeal by reason of the insolvency of the appellant. That question turns on Order XXII, Rule 8, Civil Procedure Code, which provides in Sub-rule (1) that the insolvency of a plaintiff in any suit, which the Assignee or the Receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such Assignee or Receiver declines to continue the suit or to give security for the costs thereof as therein mentioned. I agree with the view expressed by the Lahore High Court in *Mul Chand-Ganga Bishen v. R.M. Downie and Co., Ltd.* (1928) I.L.R. 10 Lah 208 that the plain implication of that section is that the suit does abate, if the Assignee declines to continue the suit or to give the security, although that is not expressed in terms. Sub-rule (2) enables the Court to dismiss the suit where it has abated under Sub-rule (1). Rule 8 is made applicable to appeals by Rule 11.

3. Now, the only question to my mind on this motion is whether it can be said that the Official Assignee might maintain this appeal for the benefit of the insolvent's creditors. The case in Lahore, to which I have referred, was also a case of a money decree, but the question whether the appeal might be maintained by the Official Assignee was not discussed, so far as the report shows. In my judgment, the words 'might maintain' mean has the power, or is 'entitled, to maintain, and one has to look at the Presidency-towns Insolvency Act in order to see what powers the Official Assignee has in the matter. By Section 68(2)(d) of the Act the Official Assignee has power to institute, defend or continue any suit or legal proceeding relating to the property of the insolvent. A suit relating to the property of the insolvent, in my opinion, means a suit which, if successful, will increase the assets distributable amongst the creditors, or the defence of which may prevent the assets being diminished. A right to institute an appeal, which merely relates to a

money claim against an insolvent, is not, in my view, a legal proceeding relating to the property of the insolvent and does not fall within the powers given by Section 68 to the Official Assignee, I think, therefore, that the Official Assignee could not maintain the appeal for the benefit of the insolvent's creditors, and consequently the appeal has not abated under Order XXII, Rule 8. The Official Assignee is not bound by the judgment appealed from, and can in insolvency decline to admit the debt.

4. The question then arises whether we ought to direct the appellant to give further security for costs. He has made the ordinary deposit of Rs. 500 under the High Court Rules. It is said that he has got no money, that this suit was fought at considerable length in the Court below, and that he can produce money if he wants to do so, but has not produced anything towards paying the amount of this decree. However, the general principle on which the Courts act is not to order further security to be given merely on the ground that the appellant is poor. So far as I can judge from the statement made by counsel, the appeal raises a question of law, which is arguable, and in the circumstances I do not think that we ought to order the appellant to give any further security for costs. The motion, therefore, fails and must be dismissed with costs.

Macklin, J.

5. I agree.

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