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Court : Allahabad

Decided On : Apr-04-1935

Reported in : AIR1935All675; 157Ind.Cas.41

Appellant : Abdul Rahman

Respondent : Nihal Chand

Judgement :

Sulaiman, C.J.

1. This is a defendant's appeal arising out of a suit brought by the plaintiff for recovery of Rs. 2,000 lent by him to the defendant on 19th February 1927, together with interest at Rs. 1-4-0 per cent per mensem. The defence inter alia was that the plaintiff was an undischarged insolvent, and was not entitled to sue. The Courts below have overruled the objection and decreed the claim. In second appeal the Division Bench before which the case came up for disposal referred the following question to a Full Bench:

Whether the plaintiff, in view of the fact that he is an undischarged insolvent, is entitled to maintain the present suit.

2. As in several rulings, the rule of law prevailing in England has been frequently invoked, it may be convenient to point out at the outset that in England some distinction has undoubtedly been drawn between property which was owned by the insolvent at the time of his adjudication and property which is acquired by him

afterwards. Following certain previous rulings it was laid down in the case of *Mitchel v. Kohen* (1890) 25 Q.B.D. 262, which was a suit for wrongful conversion of certain machinery that as regards after acquired property, a transaction by a bankrupt if entered into before the trustee had intervened, would not, be Invalid if the person dealing with him acted bona fide and for value. At the same time it was pointed out on p. 266 that if a trustee had interfered before the money was paid over, he would have been entitled to demand, that it should be paid to him. In England this view of the law has been accepted and we now find in Section 47, Bankruptcy Act of 1914, 4 and 5 Geo 5), that a special provision is made in respect of property acquired by an undischarged bankrupt subsequently in which case he is allowed to deal with it before any intervention by the trustee. Section 45 of the Act also gives protection to certain bona fide transactions without notice.

3. But in India neither the Provincial Insolvency Act, 1907, nor the Act of 1920 draws any such distinction. Section 28(2) makes the whole of the property of the insolvent vest in the Court or the receiver on the making of the order of adjudication, and Sub-section (4) provides that all property which is acquired by or devolves on the insolvent after the date of the order of adjudication and before his discharge shall forthwith vest in the Court or the receiver and the provisions of Sub-section (2) shall apply in respect thereof. It is therefore perfectly clear that property existing at the time of the adjudication as well as property acquired by or devolved on the insolvent after adjudication stands on the same footing, and both vest forthwith in the Court or the receiver as the case may be. No distinction appears to have been drawn by the legislature in respect of these two classes of property. It would amount to legislating if any such distinction were to be imported into the section on account of certain rules of law which prevail in England. The Insolvency Act in India is not in every, respect identical with the Bankruptcy Act in England, and there is accordingly no justification for deciding cases under the Indian Act, in the light of cases decided in England.

4. No doubt in the case of *K. Ramanatha Iyer v. T.S. Nagendra Aiyar* 1924 Mad. 223, such a distinction was laid down. I am, with great respect, unable to accept such a view. The cases of *Ali mahmad Abdul Hussein v. Vadi lal Devchand* 1919 Bom. 115, and *Chhote Lal v. Kedar Nath* 1924 All. 703, are not in point, because

they were not cases arising under the Insolvency Act at all, but were governed by the Insolvent-Debtors Act of 1848. They are therefore not applicable. On the other hand, the Rangoon High Court in the case of *Ma Phaw v. Maung Ba Thaw* 1926 Rang. 179, held that where the insolvent before the discharge became entitled by inheritance to certain property, the transfer of the property made by him, even before any action was taken by the receiver in regard to such property and even if the transferee took the property for value, bona fide and without notice, was void as against, the receiver.

5. The view taken by the Full Bench in the case of *Gobind Ram v. Kunj Behari Lal* 1924 All. 341, undoubtedly was that an insolvent has no transferable interest left in his property after the vesting order. The position has now been made clear by their Lordships of the Privy Council in the case of *Kala Chand Banerjee v. Jagannath Marwari* 1927 P.C. 108. After quoting Section 16, Insolvency Act of 1907, their Lordships on p. 597 observed:

This provision is perfectly clear. 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.

6. Again on p. 599 it, was said:

That does not in the least imply that an action against him (insolvent) 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.

7. Their Lordships pointed out that the contrary view would encourage collusive arrangements and. might involve the sacrifice of properties which ought to be made available for the benefit of creditors. I am of opinion that whether the property in question be property which existed at the time of the adjudicating or was acquired by or devolved on the insolvent, afterwards, it vests in the receiver, and he alone is entitled to deal with it. The case of *Rup Narain Singh v. Har Gopal Tewari* 1933 All. 449, is distinguishable, because in that case the mortgagor was subsequently discharged and he could be held to be estopped from denying the

validity of his own mortgage. The question whether an insolvent can maintain a suit for recovery of a loan advanced by him stands on a slightly different footing.

8. It has been held in the case of *Khelafat Hussain v. Azmat Husain* 1920 Pat 277, that an insolvent cannot maintain a suit in his own name for the deferred dower of his daughter, even though the receiver has refused to bring such a suit. In the case of *A. Rozario v. Mahomed Ebrahim Sarang* 1924 Bom. 460, it was held that where an insolvent without the knowledge of the Official Assignee and, without bringing the fact of his adjudication to the notice of the Court obtained a decree in respect of a debt due to him prior to his insolvency, the decree could be set aside on the ground of fraud, even by the judgment-debtor. In the case of *Daud Sayad Mahomed v. Mahomed Sayad* 1926 Bom. 366, it was held that as the whole of the insolvent's property vests in the Official Assignee, nothing is left vesting in the insolvent which can give him a cause of action, and that a suit by him in his own name after his adjudication cannot be maintained. It was even held that the addition of the Official Assignee later would amount to adding a new plaintiff. In the case of *Bhagwan Das v. Official Liquidator, Amritsar National Bank* 1928 Lah. 675, the right of appeal to a judgment debtor was denied after he had been declared an insolvent and it was held that the receiver alone should appeal.

9. There is however one aspect of, the matter which does not appear to have been pressed by counsel in these cases. Section 28, Sub-section (2), prohibits suits being, brought by creditors against the property of the insolvent and also prohibits the commencement of any suit or other legal proceeding by a creditor. But there is no specific provision in the Act, under which a suit by an insolvent after his adjudication is, in express terms, prohibited. Section 59(d) however empowers a receiver, by leave of the Court, to institute, defend or continue any suit or other legal proceedings relating to the property of the insolvent. This provision implies that the receiver is the proper person to institute, defend or continue suits and proceedings relating to the insolvent's property. Where the property in dispute in a suit is admitted to be or is of such a nature that it must vest in the receiver, a receiver alone is the proper person to institute suits and proceedings. The suit brought by an, insolvent behind the back of the receiver would be defective.

10. But where a loan was advanced by the insolvent after his adjudication to the defendant it does not necessarily follow that the sum of money given by the insolvent was property which had vested in the receiver. The insolvent might be a mere benamidar on behalf of an undisclosed principal, in which cases he would be entitled to sue even though an insolvent and the suit would, of course, be for the benefit of the real owner. Again, under Section 28(5), properties exempted by the Civil Procedure Code, or other enactments from liability to attachment and sale in execution of a decree do not vest in the receiver. Such moneys as are exempted remain the property of the insolvent, and if he has lent the, money out of such accumulated saving, there would be no bar either to his lending the money to the defendant or to his bringing a suit to recover the amount.

11. At the same time as a receiver is an officer of the Court acting under the control and direction of the Court and in the interest of the insolvent's creditors, it is the duty of the Court to see that no fraud is perpetrated before its eyes and that the insolvent does not walk away with moneys which ought to go to the officer of the Court. An appropriate course would, seem to be to implead the official receiver in the suit or at least give him notice of the action so that when a decree is passed in favour of the plaintiff, the receiver may be at liberty to take the benefit of the decree and recover the amount due under it, if it can be shown that the property was such as had vested in the receiver. Such inquiry can easily be made either in the execution department or by a separate suit between the receiver and the insolvent.

12. But it seems to me inappropriate that the present defendant who took the money from the plaintiff should be allowed to deny that the money belonged to the plaintiff. Prima facie there is no presumption that the money did not belong to the plaintiff. As a matter of fact as the receiver had not intervened and seized this amount, there is a presumption in favour of the plaintiff that the money was his own. The suit therefore cannot be thrown out on the mere ground that the plaintiff is an insolvent. Had the defendant established definitely that the money had in fact, vested in the receiver and was not the property of the plaintiff, the matter might possibly have been different. Notice should accordingly be given of this appeal to the receiver and then the decree of the Courts below upheld.

Thom, J.

13. I concur.

Iqbal Ahmad, J.

14. I agree.

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