C.E. Grey Vs. Walker, Goward and Co.

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Court : Kolkata

Decided On : Jan-29-1913

Reported in : 18Ind.Cas.753

Judge : Fletcher, J.

Appellant : C.E. Grey

Respondent : Walker, Goward and Co.

Judgement :

Fletcher, J.

1. 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 co-partnership together under the style of Messrs. Walker, Goward and Company, 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 12 1/2 tons each month.

2. On the 15th 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-Ramesha 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 so from the evidence given on behalf of the defendants. The following issues were settled between the parties:

(1) Was the insolvent the sole proprietor of the firm of Gurmukh Roy-Ramesha?

(2) 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?

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

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

(5) 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 karta, 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 son or a natural born son, is Ramesha: 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 karta of the family Gurmukh Roy, and in the name of the eldest grandson, Ramesha.

3. 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. It 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.

4. 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 Ramesha 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 Ramesha 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.

5. Then, it is said that Ramesha 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 in exactly 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.

6. It is then said that under Section 247 of the Indian Contract Act, the suit can be maintained by Gurmukh Roy as the karta 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 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.

7. I am satisfied that Ramseha 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.

8. That Ramesha 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 Ramesha 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-Ramesha.

9. Then the second issue is, what are the rights of the Official Assignee with regard to contracts of this nature upon 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 Assigned 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, 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 the case of Ex parte Chalmers L.R. 8 Ch. App. 289; 42 L.J. Ch. 37; 28 L.T. 325; 21 W.R. 349, is conclusive on that matter. That is also in accordance with the decision of the Court of Common Pleas in Morgan v. Bain L.R. 10 C.P. 15; 44 L.J.C.P. 47; 31 L.T. 616; 23 W.R. 239. 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.

10. Then passing to the third issue, I think that the decisions in Ex parte Chalmers L.R. 8 Ch. App. 289; 42 L.J. Ch. 37; 28 L.T. 325; 21 W.R. 349 and in Morgan v. Bain L.R. 10 C.P. 15; 44 L.J.C.P. 47; 31 L.T. 616; 23 W.R. 239 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 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 and Company 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 ware 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.