(1920) 08 CAL CK 0012

Calcutta High Court

Case No: None

Rash Behari Ghose		APPELLANT
	Vs	
The Official Assignee		RESPONDENT

Date of Decision: Aug. 31, 1920

Acts Referred:

- Presidency Towns Insolvency Act, 1909 - Section 36

Citation: AIR 1921 Cal 95 : 68 Ind. Cas. 341

Hon'ble Judges: Asutosh Mookerjee, Acting C.J.; Earnest Fletcher, J

Bench: Division Bench

Judgement

Mookerjee, Actg. C.J.

1. This appeal is directed against an order made by Mr. Justice Rankin u/s 36 843M D & VI. 45 : 5Q B. 401 : 13 L, J, Q B. 95;8 Jur 35 : H.E. 0 of the Presidency Towns Insolvency Act, 1909. The subject-matter of the order is War Bands to the value of Rs, 20,000 deposited by Jacob and Co., with the Registrar of this Court on its original side as security for the due performance of a decree obt(sic)oul against them by the appellant, Raid Behari Gloss, or of such decree as may ultimately be made in the litigation between them. The events, which have lad up to the order, may be briefly narrated.

2. On the 3rd July 1913 Nitai Charan Ghose, father of the appellant, was adjudicated an insolvent on his own petition. On the 11th January 1916, the insolvent same up for his discharge and the order of the Court was that his discharge be suspended for 18 months, that is, till the 11th July 1917. The order was completed and filed on the I8th July 1917. Now it transpires that Nitai Charan Gross was employed as Manager in the firm of W. A. Lie and Co., who were the first Managing Agents of the Nalbona Coal Co. Ltd, Nitai Charan Ghose had assisted in the formation of the Company, and it was arranged amongst the promoters the as remuneration he would receive three fourths of the snares witan might be allotted to one Meinal Dasi also two-third of

shan shares as might be alloted to Kaladamoyi Dasi, who ware vendor of lands to be transferred to the Company when formed. The shares, however, were issued neither in the names in these two ladies nor in the name of Nitai Charan Ghose. They were in fact issued in the name of Rash Bahari Ghose and have always stood in his name in the books of the Company. On or about the 15th May 1917 Rash Bahari Ghose dealt with these shares as his own property and self them to Jacob and Co., for Rs. 15,920. On the 20th November 1917 Rash Bahari Ghose instituted a suit against Jacob and Co., for recovery of the value of the shares, which he alleged, had been delivered to them pursuant to the agreement for sale. Jacob and Co., admitted possession of the shares, bat denied that they had obtained them from Rash Behari Ghose, they set up in fast an entirely different story as to how they had acquired title to the disputed shares. The suit was heard by Mr. Justice Ghose and on the 27th August 1919 a decree was made in favour of Rash Behari Ghose against Jacob and Co. This decree was confirmed on appeal on or about the 20th April 1920 We have been informed that Jacob and Co., have carried the matter further and have preferred an appeal to His Majesty in Council. Daring the pendency of this litigation Jacob and Co., deposited with the Registrar War Bonds of the face value of Rs. 20,000 for the performance of such decree as might ultimately become binding on them. On the 8th June 1920 the Official Assignee commenced the present proceedings with an application (which had been drawn up apparently on the 3rd May) in which he alleged that the War Bond, in so far as they covered the price of the sharer, appertained to the estate of the insolvent. He accordingly prayed that the Registrar might be directed to sell the War Bonds and to pay him the sum of Rs 15,920, The application was opposed by Rash Behari Ghose who asserted that the shares were in no cense the after acquired property of the insolvent and that their, price never formed part of his estate. Mr. Justice Rankin examined Rash Behari Ghose, overruled his objection, and declared that he was the trustee for the Official Assigns in resaved of the decree obtained by him on the 27 h August 1919 against Jacob and Co., and also in respect of the security deposited by the latter. On this basis, Mr., Justice Rankin has restrained Rash Behari Ghose (and the Official Assignee also) from taking out of Court or dealing with the security until further orders. Rash Behari Ghose has appealed against this order and Mr. Pugh has contended on his behalf that an order of this description should not have been made after summary enquiry in a proceeding u/s 36 of the Presidency Towns Insolvency Act, 1909. Mr., Avatoom has controverted this argument, and has further urged that if the contention of the appellant should prevail, the Court should direct the revival of the regular suit which had been instituted by the Official Assignee for determination of the title to the shares but was withdrawn or abandoned in view of the turn taken by the present proceedings. We are of opinion that the order under appeal should not have been made, in the circumstances of the present case, u/s 36 (5) of the Presidency Towns Insolvency Act.

3. Section 36 authorises the Court to summon before it any person, known or suspected to have in his possession any property belonging to the insolvent, and to examine the person so brought before it concerning the insolvent, his dealings or property Sub Section s 5 and 6 then provide as follows : -

(a) If, on the examination of any such person, the Court is satisfied that he has in his possession any property belonging to the insolvent, the Court may, on the application of the Official Assignee, order him to deliver to the Official Assignee that property or any part thereof, at such time, in such manner and on such terms as to the Court may seam just.

(6) Orders made under sub-Section s I A 209 : 3 P C. 783 9 Sar. P. C. T. 727 8 Moo. P.C. (N. s.) 127 20 E.R 76 : 17 E.R 2 ,0. and (5) small be executed in the same manner as decrees for the payment of money or for the delivery of procedure under the Code of Civil Procedure, 1908, respectively.

4. These sub-Section s read together make it plain that the property in respect of which the order is made must be in the " possession " of the person examined, and the order may be executed against him in the same manner as if it were a decree for the payment money or decline of asperity. Sub Section (5) is apparently, modeled on sub Section (5) on see (sic) English Banknote Act, 1883 and it is worthy of notice that the tern "possession" as used in that Section has been so no what narrowly. Interpreted. To take one illustration: in Davit, Inre, Goodman, Exporter (1)828 : 5 Manson 329). Wright and Darling, JJ., ruled that the Court has no jurisdiction o make an order on an agent to give up goods in his possession as agent for his principal; and they declined to express an opinion on the question, whither such order could be made even if the principal ware made a respondent to the application. In the case before us, it might have been a matter for argument whether the War Bonds deposited with the Registrar by Jacob and Co, as security for the due performance of such decree as might ultimately become binding on them, could be said to be property in the possession" of Rash Behari Ghose at the time of the order.

5. Apart from this question, it is plain that no order u/s 36 (5) should have been made in this case. That Section like Section 26 of the Indian Insolvent Act, 1848, which it replaced, is discretionary. This was w 11 settled under the Statute of 1848, and was elaborately disused by Sir Barnes Peacock, C. J. : Barlow v. Cochrane 2 B L, Rule Order C. J. 56 : 1 Ind Doc. (N,S,) 933. In that case, a summary order had been made by Mr. Justice Phear in favour of the Official Assignee u/s s 24 and 26 of the Indian Insolvent Act, Robinson, In the matter of 2 Ind. Jur. (N. S.) 273. A suit was thereupon inclined for declaration of title to the disputed fund. Mr., Justice Norman dismissed the suit. On appeal, the question was raised whether the suit was maintainable. Peacock, C. J., and Monk by, J., who heard the appeal concurred in holding that the order u/s 26 of the Indian Insolvent Act could not deprive the plaintiff of his right to sue in the High Court to establish his right to the goods, if he could prove that he had such an interest in the goods or the proceeds thereof as

prevented them from passing to the assignee of the insolvent; the Official Assignee was no more protected than any other Assignee would have been the Court acted upon his application and the order was obtained and anted upon by the Official Assignee at his own peril. The Judge. however, were not agreed as to the merits of the matters involved in the suit. Peacock, C. J., hold that the suit should be decreed, wailed Markby, J., held that the view taken by Norman, J., in concurrence wish the order made by Phear. J., should be uphill. The result was that under Clause 36 of the Liters Patent, the judgment of the Chief: Justice prevailed against the concurrent opinions expressed by Phear. J., Norman, J., and Markby, J. The matter was then taken on appeal to the Judicial Committee; Miller V. Thomas Bellino(4). The objection that the order of the Insolvent Court was conclusive and that the suit was not maintainable was reiterated by Sir Roundell Palmer, who appeared on behalf of the appellant and relied upon Garbett v. Vedt (5). The Judicial Conmisiee, ho never, were not impressed with the objection heard the appeal on the merits and affirmed the judgment of Peacock, C. J. The view that the exercise of the power vested in the Insolvent Court u/s 26 of the Insolvent Act is discretionary and that a regular suit Has for detarm nation, of the question of title was uniformly maintained so long as the Statute of l846 w*8 in force. Reference may be made to the decision in D(sic)''ji''irkanat''i Hitter v. A. B. Miller 4B. L, B, (0,C. J.) 63 : 15 W, Rule (0, C. J.) 18n., where Peacock, C J., pointed out that it was not consistory of the court in all cases to whether the disputed property belonged to the insolvent or no'', but it was discretionary wish the court to enter upon the trills of sash a question and to make an order. Paear, J , added that the order, if male, could only be passed after a process of judicial enquiry and upon the hearing of evidence and the procedure of she insolvent Court and the mode prescribed for an application u/s 25 were not very appropriate to an enquiry which mainly had regard to connecting rights of property. Phear, J., added at the same time that though it had been the constant practice of the Insolvent Court to make such order, it had always been the practice of the Court to abstain from making an order u/s 26 to deliver over goods or to pay debt''s when it appeared that there was really a acriflict of right or equity between the insolvent and the person in whose possession the goods were or from whom payment of the debt was sought to be obtained. There is really a conflict of two considerations when the Gonrt is sailed upon to make a summary order of this description on the one hand, unless the Insolvency Court exercises the power, the property may be made away with before an action can be brought and determined on the other hand, in a case where there is a substantial conflict of right, the time taken up in enquiry by the insolvent Court may be thrown away, if a regular suit is instituted for investigation of the rights of the parties. To the same effect is the decision in Ajodhia Perihad v. A. B. Miller 7 B L. B. 74 : 75 WC. J.) 16. The point was, emphasized by Sir Richard Garth, C. J., in Umbica Nundun Biswas, In the matter of 3 C. 434 : 1 C. L.R 561 : 1 Ind. Dec n. s.) 862. when *he expressed his entire approval of the practice of the Court lo abstain from deciding difficult questions of title u/s 26 and to leave the parties to settle such questions by a regular suit. He added that the procedure u/s

26 was not calculated to effect satisfactorily the trial of difficult questions of title, and as the judgment would not be conclusive, even if the Court thought it right to decide the matter, either party being free if they Chose to raise the same question again in a regular suit, the Chief Justice proceeded to allow the appeal and to discharge the order made by Kennedy, J., in favour of the Official Assignee. A similar view was taken in Kursondas Ramjee, In re4 Bom. L. Rule 154 : 26 B. 785. We are not unmindful that there are instances in which cases of some complexity have been dealt with u/s 26 see for instance Kalagurla Suryanarayana v. Yarla-gadda Naidoo 6 C. W.N. 513, where there was a marked conflict of testimony upon a simlpe issue, namely, whether certain payments had been in fact made. See also Rowlandion v. Champion17 M 21 : 6 Ind. Dec. (n. s.) 14. Official Assignee of Madras v. Mehta & Son49 Ind Cas 918 : 42 M. 510 : 36 M. I. T. 190 : 25 M. L. T 265 : (1919 M. W. N. 298), Hirth, In re, Trustee, Ex paiti (1899) i Q. B. 61 : 68 C,. J Q B 287 : 80 L. T. 63 : 47 W. R243 : 6 Manson 10 : in T. L. Rule 153. Slobodinsky, In re, Mocre, Ex parte(1903) 2 K. B. 517 : 72 L. J. K B. 888 : 89 L. T 190 : 52 W. R 156 : 10 Manson 84 : 9 T. L. Rule 66. Amongst cases decided under the Presidency Towns Insolvency Act, 1909, our attention has been drawn to the judgment of Greaves, J., in Seehass, In re 46 Ind. Cas 196 : 22 C. W. N. 335. where the opinion was expressed that a question as to whether a sale of property by an insolvent was fraudulent or void could, in the discretion of the Court, be enquired into u/s 36, subject to the right of the party affected to being a suit, if so advised. The point whether the Presidency Towns Insolvency Act, 1909, has or has not altered the law in this respect, does not appear to have been argued and we express no opinion as to the maintainability of a suit for the determination of the question of title after the matter has been decided u/s 36 : Haiee Abdul Lateef Cahib v. Official Assignee of Madras 44 Ind Cas. 847 : 40M 1 76. This much is plain that the Court should not deal with the matter u/s 36, if it really involves difficult questions of title, but should leave the parties to litigate such matter in a regular suit See Official Assignee of Madras v. Vadamlli Ammal 36 Ind. cas. 524, 20 M. L. T. 311 : 4 L. W. 425 : 40 M. 810. We are of opinion that, in the case before us, the matters in issue should have been left to be decided in a regular suit. To enable the Official Assignee to succeed, an enquiry must be made as to the terms of the contract between Nitai Charan Ghose and the two ladies and it must be proved that the shares represented the fruits of that contract; that the ownership in the shares was vested in the father of the appellant, that he held them in trust for his father''s benefit; that when he sold the shares to Jacob and Co., he acted as trustee for his father; that he obtained a decree against them in the same capacity; and that the security deposited by Jacob at d Co., vartcok of the same character. These are questions which require full investigation and should be determined in a regular suit. Such a suit, it appears, was actually instituted by the Official Assignee, but has been either abandoned or withdrawn in favour of the more expeditions for a of enquiry contemplated by Section 36. There can be little doubt that the suit was the more appropriate remedy.

6. The result u that the appeal is allowed, the order made by Mr. Justice Rankin discharged, and the application of the Official Assignee dismissed. The suit already mentioned will stand revived. The costs of the appellant with here and before Mr. Justice Rankin will be costs in the trait. The Official Assignee will be at liberty to take the costs incurred by him out of the unclaimed dividend revenue account, in so far as the costs cannot be met from the assets in his hands. We make thing order, because there is reason to believe that the provisions of the insolvency rules as amended in 1918 have been overlooked and amounts have been drawn from the unclaimed dividend account without the leave of the Court.

Fletcher, J.

7. I agree.