[APPEAL FROM INSOLVENT COURT.]

1872.
Sept. 20.

KALLIA'NDA'S KIRPA'RA'M ....*Appellant.*
TRIKAMLA'L GULA'BRA'I..................*Respondent.*

Insolvent Court—Practice—Appeal—High Court—Notes of evidence not taken—Jurisdiction to hear appeal.

In order to enable the High Court to hear the appeal of an opposing creditor from an order made upon the hearing of an insolvent's petition which such creditor opposes (and upon which evidence is taken), it is necessary that notes of all the evidence at the hearings should be recorded by an officer of the Insolvent Court.

In re Lakhmidás Hansráj (a) in substance followed.

THIS was an appeal from an order (dated 5th June 1872) of Gibbs, J., sitting as Commissioner in the Insolvent Court, by which, after hearing counsel on behalf of Kalliándás Kirpárám, a creditor who opposed the discharge of the insolvent; and after the cross examination of the insolvent, and after the examination and cross examination of several witness called on behalf of the opposing creditor, and on reading several exhibits, the learned Judge ordered that the hearing of the matters of the insolvent's petition should be adjourned without protection until the 4th of December then next.

The grounds of opposition filed by the opposing creditor charged the insolvent with offences coming within the 50th Section of the Insolvent Debtor's Act, but the learned Judge did not consider that the circumstances of the case warranted him in punishing the insolvent under the penal section, and he, therefore, made the above order under Section 47 of the Act.

From the above order, the opposing creditor presented a petition of appeal to the High Court. The petition was accepted by GREEN, J., in Chambers in June 1872.

On the first day of the hearing before the Commissioner, no notes of the evidence given were taken or required to be taken, under the provisions of Section 72 of the Insolvent Act; but on the second and subsequent days of the hearing,

(a) 5 Bom. H. C. Rep. O. C. J. 63.

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such notes were taken by the Clerk of the Court at the request of the opposing creditor.

The appeal came on for hearing before SARGENT, Acting C.J., and BAYLEY, J., on the 24th of August 1872.

Anstey and Leith, for the appellants, were requested in the first instance to apply themselves to the question whether, under the circumstances, an appeal lay to the High Court. The Court referred to *in re Lákhmidás Hansraj* (*b*).

Anstey—It does not appear who was the appellant in the case referred to. If the insolvent was the appellant (as he would seem to have been), the decision can be supported, for I have always contended that no appeal is by the Act given to an insolvent, see *Gill v. Barron* (*c*) and *in re Abrahams* (*d*). How can an insolvent be expected to be in possession of money to make the deposit which is required before notes of the evidence can be taken? The report of the case of *in re Lakhmidás Hansráj* is very unsatisfactory and no reasons for the decision are given.

I. We contend that the taking of notes under Sec. 72 is not a condition precedent to the right of a creditor to appeal under Section 73. The words of the latter section are imperative, the Court "*shall* hear" the appeal, while under Section 72 it is discretionary with the opposing creditor to require notes to be taken. He *may* require them to be taken for his own protection. It would be obviously unjust to require a creditor to have notes taken by an officer of the Court from the beginning of the case, when it may not be until near the end of it that he becomes dissatisfied with the manner in which the Court is conducting the inquiry. Besides, any person aggrieved by the order of the Insolvent Court may appeal (*i.e.*) all the creditors of the insolvent. Must they all have notes taken of the evidence? The provisions of Sec. 72 were introduced in order that the opposing creditormight be enabled to have proper materials upon which to appeal. Here we have the full notes

(*b*) 5. Bom. H. C. Rep. O. C. J. 63.
(*c*) 5 Moo. P. C. C. (N. S.) 213. (*d*) 2 *Ibid* 241.

taken by the Commissioner himself which he has allowed us to use. If the Court does not allow an appeal, it in fact overrules the express provisions of the Statute. (BAYLEY, J., referred to *in re Gholam Rasul Khan* (e) ; *In the matter of Ramsebak Misser* (f).

II. If we cannot appeal on the evidence, we can at least show that upon the facts as they are set forth in the judgment of the Commissioner his decision in point of law is erroneous.

III. The appeal in the case has already been admitted by Mr. Justice Green. The present objection, if a good one, ought then to have been taken. It is now too late : *Gopee Bullub Roy* v. *Goluck Proshad Bose* (g) followed by Peacock, C.J., in *Bharutt Chunder Roy and others* v. *Issur Chunder Sircar and others* (h). The case of *In re Ameer Khan* (i) was also referred to.

The insolvent appeared in person.

SARGENT, C.J. :—On the last point made by Mr. Anstey, we are clearly of opinion that the objection that has been raised cannot be got rid of by reason of the petition having been admitted by Mr. Justice Green. There are no provisions in the Insolvent Act as to the presentation of petitions of appeal similar to those contained in Section 336 of the Civil Procedure Code, and the cases referred to by Mr. Anstey, which were decided upon the latter section, are, therefore, inapplicable. On the other point, we will take time to consider our judgment.

Cur. adv. vult.

On the *20th* of September the Court delivered judgment and said that, though the taking down of evidence by an officer of the Insolvent Court was not a condition precedent to the right to appeal, yet that, in cases where it was necessary to consider the evidence, the Appellate Court could only look at the notes of evidence taken down by an officer of

(e) 1 Beng. L. Rep. O. C. J. 130. (f) 5 Beng. L. Rep. 179.

(g) Calc. W. Rep. for 1864 Civ. R. 135.

(h) 8 Calc. W. Rep. Civ. R. 141. (i) 6 Beng. L. Rep. 459.

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the Insolvent Court in the manner provided by section 72 of the Insolvent Act, and when it appeared that no such notes had been taken, had no option but to dismiss the appeal. The appeal was accordingly dismissed.

Attorneys for the opposing creditor : *Craige, Lynch, and Owen.*

[APPELLATE CIVIL JURISDICTION.]

Sept. 23.

Referred Case.

VIJKOR, mother of PA'NA'CHAND and TA'RA'CHAND minors, sons of HIRA'-CHAND deceased ....*Plaintiffs.*
JIJIBHA'I VA'JI ....*Defendant.*

Minor—Act XX. of 1864—Next friend, suit by—Procedure.

There is nothing in the Minors Act (XX. of 1864) to prevent the institution of a suit by the next friend of a minor who has not obtained a certificate of administration to the minor's estate, but who claims no right to have charge of the minor's property, asking for a declaration of the minor's rights, and for an order directing the defendant to pay money he owes to the minor into the Principal Civil Court of the District.

As the right, however, of a friend to institute a suit on behalf of a minor is under the control of the Court, and as the Minor's Act, by Sec. 3—7, enables a friend of the minor to protect his interests by applying for the appointment of a fit person to have charge of the property of the minor and to protect his estate, the proper course for a Court, to which a plaint on behalf of a minor is presented by his friend, is either to refuse to accept the plaint, when there is no pressing necessity for its acceptance, or in case such pressing necessity exists, to accept the plaint and stay proceedings until the plaintiff has duly obtained a certificate under the Act.

THIS was a reference made by W. H. Newnham, Acting Judge of the District of Súrat, under Section 28 of Act XXIII. of 1861, for the orders of the High Court.

The reference was considered by SARGENT, Acting C.J., and MELVILL, J.

None of the parties appeared either in person or by counsel.