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cl. 1, makes another sort of provision by allowing the Governor in Council, after ascertaining that the Municipality "have neglected any work or duty falling within the scope of this Act which is in the opinion of the Governor in Council emergently necessary for public health or safety, to issue an order to the Municipality to execute such work or perform such duty." In case of disobedience the Governor in Council may direct the District Magistrate to do this. I think the figure of speech used by the draftsman "take measures" was probably meant for the beginning of some sort of action such as is expressed by the words "execute" and "perform"; and that the real intent of the Legislature is not satisfied by mere prohibitions contained in a proclamation. Section 73 acts remedially in so far as it makes it the duty of the Municipality, after the Governor in Council has intimated his sanction, to set to work itself, in case of epidemic, to do the same work or duty which for exactly the same reasons of public safety the Governor in Council may order the Municipality to do, and in case of disobedience may order to be done by the District Magistrate at the expense of the Municipality. The Legislature has in the Act of 1884 amended s. 24, as already pointed out, and made new sanitary action compulsory and given the executive establishment and the Collector of the district powers of compulsion by supersession of the Municipality. We must even in dealing with a law conferring benefits construe it strictly as penal and not liberally as remedial, [189] where the consequences become penal—Dwarris on Statutes, s. 640; *Hubbard v. Johnstone* (1). We may say with the learned Judge in that case, "though this statute be remedial, yet it is very penal if all its requisitions be not complied with," and, again, "the same rule ought to obtain here as in the construction of clauses inflicting pains and penalties in the revenue laws, if they be ambiguously and obscurely worded, the interpretation is ever in favour of the subject; for this plain reason, that the Legislature is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed." I would, therefore, quash the conviction and the order confirming it.

Conviction and sentence reversed.

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INSOLVENCY.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.

IN THE MATTER OF HAROON MAHOMED, INSOLVENT.

[27th and 28th February, 1890.]

Insolvency—Practices—Appeal from order of adjudication—Respondent on record withdrawing from appeal—Other creditors allowed to appear in appeal as respondents although not named on the record—Hindu law—Cutchi Memons—Family firm—Question of partnership in family firm—Burden of proof.

An order was made by the Insolvent Court adjudging H. an insolvent on the petition of certain of his creditors. H. appealed against the order, the petitioning creditors being the respondents named on the record. When the appeal came on for hearing, the said respondents did not appear, and it was alleged that the appellant had settled with them, in order to induce them to withdraw from the appeal. Another creditor, whose name was in the insolvent's schedule,

(1) 3 Taunt. per Heath, J. 220, (321).

thereupon applied to be heard in the appeal in support of the order of adjudication, and if necessary that his name should be entered on the record as respondent. The Court granted the application.

The Official Assignee is entitled to his costs of appearing in an appeal against an order of adjudication.

By an order of adjudication one H., together with eight other persons alleged to be his partners in the firm of Haji Mitha Cassum, was adjudged an insolvent. H. appealed, denying that he was a partner. All of the insolvents were Cutchi Memons, and were members of the same family. The firm had existed for forty years, having been established by the great grandfather of the appellant and had ever since been carried on under the same name by the family of the founder. The petitioning creditors alleged that the members of the insolvent's [190] family lived together and were joint in food and estate, and that the firm was a family firm; that the appellant's father had been principal manager of the firm in his lifetime, and that on his death, two years previously, the appellant had taken his place. The appellant denied that he was joint with the other members of the family, or that he had ever been a partner, or had represented himself to be a partner in the firm.

Held, confirming the order of the Court below,

(1) that being a Cutchi Memon, the rules of Hindu law and custom applied to the appellant, and that his position with regard to the family property was to be determined by the same conditions as would apply in the case of a member of a joint and undivided Hindu family;

(2) that the firm in question was a family firm, and was the property of a family subject to the Hindu law; that whatever might have been the appellant's position previously, it was clear that on his father's death his father's share in the firm by law descended to the appellant and his brothers, if he had any. He then became a partner in the firm, if he had not been so already. It was open to him to show that he did not become a partner; but the facts above mentioned being established, the burden rested on him of displacing them, and of showing that he did not become a member of the family firm.

[R., 37 B. 71=14 Bom. L.R. 336=15 Ind. Cas. 520; 9 Bom. L.R. 274; 8 Ind. Cas. 214=4 S.L.R. 77; D., 29 A. 176=4 A.L.J. 94=27 A.W.N. 13; 31 M. 166=9 M.L.J. 3.]

APPEAL from two orders of the Commissioner of the Insolvent Court (Bayley, J.) dated, respectively, the 21st June, 1889, and 21st August, 1889.

On the 21st June, 1889, on the application of the petitioning creditors who appeared on the record as respondents in the appeal, the appellant, with eight other persons alleged to be partners trading in Bombay under the name of Haji Mitha Cassum, was adjudicated an insolvent under s. 9 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21).

On the 2nd July, 1889, the appellant filed a petition denying that he was ever a partner in the said firm of Haji Mitha Cassum; and on the 3rd July, 1889, he obtained a *rule nisi* calling upon "the petitioning creditors and all other creditors of the said insolvent" to show cause why the order of adjudication should not be revoked, or set aside, so far as he was concerned. On the 21st August, 1889, after argument this rule was discharged by the Commissioner of the Insolvent Court, and the order of adjudication was confirmed. The appellant now appealed against both these orders.

Lang, for the insolvent.

[191] *Macpherson* and *Kirkpatrick*, for opposing creditors.

ardine, for the Official Assignee.

The appeal being called on for hearing.

Lang objected to counsel appearing or being heard for the opposing creditors, as they were not the creditors whose names appeared as respondents on the record.

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Kirkpatrick (with *Macpherson*) applied that his clients, who were scheduled creditors, although not the respondents on the record, should be allowed to appear in the appeal in support of the orders of the Insolvent Court, and, if necessary, should now be entered on the record as respondents. He stated that the actual respondents on the record were the creditors on whose petition the original adjudication order had been made, and who had got the rule *nisi* of the 3rd July, 1889, discharged. These creditors, however, had shortly afterwards been bought off by the insolvent, and had consequently withdrawn their instructions from their attorneys (Messrs. Roughton and Byrne). Another of the scheduled creditors had then instructed Messrs. Roughton and Byrne to appear on his behalf, and, at the hearing of the appeal, to support the orders of the Court below. Acting for this creditor, Messrs. Roughton and Byrne had applied for and obtained the paper book from the insolvent's attorneys. The insolvent, however, had settled with this creditor also on the very evening before the appeal came on, and he also had thereupon withdrawn his instructions. The three creditors for whom counsel now appeared then came forward and instructed Messrs. Roughton and Byrne to retain counsel and to resist the appeal. Counsel submitted that these creditors should be heard on the appeal, contending that in insolvency cases the proceedings taken by one creditor were taken on behalf of all. The Court would not permit each creditor to obtain for himself a separate order of adjudication against the insolvent. One order was sufficient, but all the creditors were equally interested, and might support it or take the place of the petitioning creditor if he withdrew. If that were not allowed, an insolvent might at the last moment pay off the single creditor who had petitioned against him, and then all the proceedings would have to be begun *de novo* by some other creditor.

[192] *Jardine*, for the Official Assignee, supported the application, and referred to the form of the rule *nisi* of the 3rd July, 1889, which called upon the petitioning creditors "and all other creditors of the insolvent" to appear and show cause why the order of adjudication should not be set aside.

The Court granted the application, and proceeded to hear the appeal.

The appellant and the other insolvents were Cutchi Memons, and were all members of the same family. The firm of Haji Mitha Cassum had existed for forty years. It had been established by the great-grandfather of the appellant, and had ever since been carried on under the same name by the family of the founder.

The following were the material allegations made on affidavit by the creditors and by their witnesses:—

(1) That the family to which the insolvent belonged, was a Cutchi Memon family, the members of which lived together, and were joint in food and estate.

(2) That the firm of Haji Mitha Cassum was a family firm.

(3) That the insolvent always represented himself as a partner.

(4) That the business of the said firm in Bombay was principally attended to by the father of Haroon in his lifetime, and that on his death, Haroon took his place in the firm.

(5) That certain properties belonging to the firm stood in Haroon's name, and that Haroon had handed over the title-deeds to the Bank of Bombay to raise money for the firm.

(6) That he had raised money for the firm on promissory notes, and that the money so raised by him was credited in the firm's books to the Bank, and not to him,—a circumstance which showed that he had acted for the firm.

(7) That he received and paid money into the Bank of Bombay on behalf of the firm, representing himself as a partner.

The affidavits filed on behalf of appellant

(1) Denied that he ever represented himself as a partner.

[193] (2) Denied that he was joint in estate with the other members of the family.

(3) Alleged that the immoveable properties referred to, belonged to himself personally and stood in his own name and that he kept separate books.

(4) Alleged that he stood surety for the said firm as being unconnected with it.

(5) That no profit or loss was credited to him in the firm's books.

(6) That as to the sums of money paid by him into the Bank of Bombay for the firm, that was done merely as a matter of convenience, and because the firm had no current account with the Bank.

JUDGMENT.

SARGENT, C. J.—In this case we see no reason to interfere with the order that has been made by the Commissioner of the Insolvent Court. The order appealed from is one adjudicating Haroon Mahomed an insolvent, under s. 9 of the Indian Insolvent Act (11 and 12 Vic., c. 21), as one of the partners in the firm of Haji Mitha Cassum. By the same order other persons alleged to be partners of that firm were also adjudicated insolvents. They admit their partnership, and do not appeal. Haroon Mahomed, however, appeals from that order, denying his partnership, and the question for decision is, whether, upon the affidavits that have been filed in the matter, the Commissioner was justified in holding that he was a member of the firm.

The appellant is a Cutchi Memon, and belongs to the same family as the other persons who have been made insolvents. As Cutchi Memons the rules of Hindu law and custom apply to them, and the position of the appellant with regard to the family property must be determined by the same considerations as would apply in the case of a member of a joint and undivided Hindu family.

Now it appears that the firm in question was founded, about forty years ago, by the great-grandfather of the appellant, and has been carried on ever since by the family. The three sons of the original founder (Ahmed, Cassum, and Abdul Satar) are [194] still living, and are named in the order appealed from. Ahmed, the eldest, has had four sons, the eldest of whom (Mahomed) was the father of the appellant, and died about two years ago. The other three sons of Ahmed, as well as the two sons of Cassum, are admittedly partners in the firm, and are also mentioned in the order.

The firm, then, was a family firm, and was the property of a family subject to Hindu law. In the case of *Samalbai Nathubhai v. Someshvar*(1) it was stated that an ancestral trade may descend, like other inheritable property, upon the member of an undivided family, and a member of such a

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family was held liable, as a partner, for an obligation incurred by his family firm, although it was not shown that he had ever actively taken part in the business of the firm, and although he had been absent for six years from the place where the firm was carried on. Melvill, J., was of opinion that, "during his father's lifetime he was joint owner of the firm. After his father's death he acquiesced in the continuance of the firm under the same name and ostensibly, therefore, with the same constitution. He has never done any act to divest himself of his share in the business."

In the present case the firm that was founded forty years ago was, up to the date of its insolvency, carried on under the same name and by the same family. In the case of such a family firm existing under the Hindu law the death of a partner does not dissolve the partnership, as it would in cases to which English law applies. Haroon's father died two years ago, but the firm went on as before. Whatever may have been Haroon's position previously, it is clear that, on his father's death, his father's share by law descended to him and his brothers, if he had any. He then became a partner in the firm, if he had not been so already.

Of course, it is open to him to show that he did not become a partner; but, we think, that, once the facts referred to are established, the burden rests upon Haroon of displacing them, and of showing that he never became a member of the family firm. The [195] affidavits before us do not show this. The petitioning creditors allege that his father took a principal part in managing the firm up to the time of his death, and that since that time Haroon has taken his place. It appears that since then, at all events, Haroon has kept up an intimate connexion with the firm. He has raised money for it. He has paid money into the Bank for it, and drawn money out for it. He has lived with the other members of his family, who are admittedly members of the firm. He does not disclose how he is supported, if he draws no profits out of the firm, as a partner, for his maintenance. He alleges that he has properties of his own which he purchased for himself, and which he says do not belong to the firm. He says these properties "were not purchased out of the monies of the firm of Haji Mitha Cassum, or on account of the said firm." But he does not tell us from what source he obtained the purchase money. He does not tell us what occupation he follows, or how he has acquired his wealth. All these matters might have been explained, but no explanation is given. We think, therefore, that it is impossible to resist the conclusion that Haroon Mahomed was a partner in the insolvent firm, and we confirm the order of adjudication. The opposing creditors will get their costs of the appeal out of the estate.

Jardine asked for the costs of the Official Assignee, on the ground that the Official Assignee was interested in the appeal, and was bound to appear. He cited *Ex parte Ward* (1) and *In re Hurruck Chund Golicha* (2). The Court granted the application.

Order confirmed.

Attorneys for appellant :—Messrs. *Payne, Gilbert and Sayani*.

Attorneys for respondents (creditors) :—Messrs. *Boughton and Byrne*.

Attorneys for the Official Assignee :—Messrs. *Jefferson, Bhaishanker and Dinsha*.

(1) L.R. 15 Ch. D. 292.

(2) 5 C. 605.

NOTE.—As to the position of the Official Assignee in cases similar to the above, see also *Ex parte Keys*, 1 Mont. & Ayrton, 226; *In re Bryant*, 2 Rose, pp. 1 & 4; *Ex parte Billiard*, Buck, 220; *Ex parte Parker*, 3 Daa. & Ch., 112; *Ex parte Jackson*, M. & Bligh, 394, at p. 411.