

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

B. N. LANG, APPELLANT AND DEFENDANT, *v.* HEPTULLABHAI
ISMAILJI, RESPONDENT AND PLAINTIFF.*

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August 19.

*Presidency Towns Insolvency Act (III of 1909), section 17—Leave of Court—
Power of secured creditor of adjudicated insolvent to realise his security
by means of a regular suit without obtaining leave.*

A, having obtained a decree in a suit brought by him against B for the payment of a sum of money, assigned the decree to C by way of mortgage to secure the repayment of monies advanced by C to A. Subsequently A became insolvent and his property being vested in the Official Assignee the latter executed the decree against B and obtained payment of the amount due from B in full. Subsequently C, without the leave of the Court first obtained, brought a suit against the Official Assignee to recover the amount due to him as mortgagee of the decree against B out of the monies so recovered by the Official Assignee.

Held, that the Official Assignee, having executed a decree which had been assigned by way of security, was in the position of a mortgagor who had sold the mortgaged property and was in possession of the sale proceeds, that until the claim of the mortgagee had been satisfied the insolvent or his Official Assignee had no right to the proceeds of the decree and that the secured creditor in such a case might file a suit to obtain payment of his claim out of the amount so recovered by the Official Assignee without obtaining the leave of the Court under section 17 of the Presidency Towns Insolvency Act as the proviso to section 17 covered a suit by a mortgagee to realise his security.

ONE Tyabhai Moosaji filed a suit, namely Suit No. 1053 of 1909, and obtained a decree for the payment of Rs. 2,440-1-5 with interest at 6 per cent. per annum against one Abdoolabhai Farzoolabhai. On the 1st of June 1910, the plaintiff in this suit, at the request of Tyabhai Moosaji, advanced to the latter the sum of Rs. 2,000 at the interest of 9 per cent. per annum on the security of the decree in the abovementioned suit (exclusive of the right to costs under the decree) and

* Appeal No. 1 of 1913.: Suit No. 603 of 1912.

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subject as aforesaid the decree was, by a deed of assignment dated the 9th of June 1910, assigned to the plaintiff who thereon served the judgment debtor with notice of the assignment, which notice however the latter declined to receive.

Subsequently Tyabhai Moosaji became insolvent and his estate accordingly became vested in the Official Assignee, who executed the decree in Suit No. 1053 of 1909 against Abdoolabhai Farzoolabhai and recovered the full amount due on the decree from the latter. The Official Assignee refused to recognise the plaintiff's claims under the deed of assignment of the 9th of June 1910.

The plaintiff filed a suit against the defendant as Acting Official Assignee and assignee of the estate and effects of Tyabhai Moosaji claiming a declaration that he was entitled to be paid out of the estate of Tyabhai Moosaji by the defendant the sum of Rs. 2,000 and the interest due thereon and that he was a secured creditor for that amount and was entitled to be paid out of the judgment debt recovered by the Official Assignee the abovementioned sums, the costs of the present suit and other costs incurred by the plaintiff.

The suit was tried before Mr. Justice Beaman. At the trial the following issue amongst others was raised :—

(1) Whether this suit is maintainable under section 17 of the Insolvent Act?

The learned Judge gave judgment on the 3rd of December 1912 in favour of the plaintiff holding on the abovementioned issue as follows :—

BEAMAN, J. :—This is a suit by the plaintiff against the Official Assignee to recover a sum of Rs. 2,000 secured by the mortgage of a decretal debt by an instrument dated the 9th of June 1910. The defendant replies that

the suit is barred by section 17 of the present Presidency Towns Insolvency Act, as no leave has been obtained. In support of that contention I am referred to a recent judgment delivered by my brother Davar, J., in which he takes that view. It appears that shortly afterwards upon a motion before Heaton, J., this judgment was cited and that learned Judge, without expressing any opinion of his own, thought it right to follow it. It can only be with the greatest reluctance and the utmost deference to the opinion of my brother Davar, J., that I do not adopt the same view, but I feel unable to accept the conclusion reached by Davar, J. After giving his judgment my best attention, I am sensible that there is much to be said for the view he takes and that he has said it as well and as forcibly as possible, yet it appears to me that before that conclusion can be established the language of section 17 with its proviso needs so much interpretation even going the length of inserting words, which are not to be found in the section or the proviso itself, that I should hesitate long before departing from the plain and only meaning of the language used by the Legislature. The concluding words of the proviso seem to me to be conclusive ; for if there were no such section as section 17 how could it be said that a secured creditor might not realise his security in the ordinary way by means of a suit? In some cases it is not easy to say how he could do so by any other means. Take for example the case of an equitable mortgage. Having read the proviso with the section very carefully and duly considered all the reasoning contained in the judgment of my learned brother Davar, J., it still seems to me that section 17, which is taken verbatim from section 9 of the English Bankruptcy Act of 1883, does and is intended to save all the rights of secured creditors as they existed and were enforceable before the passing of that Act.

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The defendant appealed against the judgment and decree of the learned Judge.

Kanga, with *Taraporevala*, for the defendant-appellant.

The principal questions are—

(1) Was Rs. 2,000 paid on the 1st of June 1910 ?

(2) No leave having been obtained is the suit not maintainable in view of section 17 of the Presidency Towns Insolvency Act ?

The proviso to section 17 only refers to realisation outside the Court. If a suit has to be filed the mortgagee must obtain the leave of the Court. Power of a secured creditor does not mean a right to sue.

The Transfer of Property Act (IV of 1882), sections 67 and 68, speak of a mortgagee's right to sue, not power to sue. (Refers to proviso as to powers in sections 6 to 9 of the Trustees and Mortgagees Powers Act, XXVIII of 1866.) The Civil Procedure Code speaks of right to sue, not power to sue. Even the Official Assignee must have leave to sue before filing a suit.

Under section 18 of the Act the Court could order a stay even in a foreclosure suit.

Courses open to a secured creditor, Rule 3, 2nd Schedule and section 86 of the Act.

Refers to sections 12 and 72 of the Bankruptcy Act (32 and 33 Vict. c. 71): *White v. Simmons*⁽¹⁾; *Lloyd v. David Lloyd & Co.*⁽²⁾; *Waddell v. Toleman*⁽³⁾.

Strangman (Advocate General), with *Desai*, for the plaintiff-respondent.

Kanga replies.

SCOTT, C. J.:—Two questions have been argued in this appeal, first, whether the plaintiff was the assignee

⁽¹⁾ (1871) L. R. 6 Ch. 555.

⁽²⁾ (1877) 6 Ch. D. 339.

⁽³⁾ (1878) 9 Ch. D. 212.

by way of mortgage of the insolvent's decree, and, secondly, whether this suit, instituted without the leave of the Court, is barred as falling under the general prohibition of suits without such leave contained in section 17 of the Presidency Towns Insolvency Act or whether it is saved by the proviso that the section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

On the first question there can be no doubt that the decision must be in the affirmative for the evidence is all one way and establishes the claim.

The Official Assignee, having executed a decree which had been assigned to the plaintiff by way of security, is in the position of a mortgagor who has sold the mortgaged property and is in possession of the sale proceeds. Until the claim of the mortgagee is satisfied, the insolvent or his Official Assignee has no right to the proceeds of the decree. It is argued that the saving proviso to section 17 does not cover the present suit because the power of a secured creditor to realise his security does not include a suit for enforcement of his rights. We are unable to accept this view. A suit is one of the recognised methods of realisation of mortgage securities. The expression 'realise his security' is quite an appropriate and well-recognised term to include all the remedies of the mortgagee. The following are examples of its use in practice in relation to mortgagees suits.

In *Lloyd v. David Lloyd & Co.*⁽¹⁾, Jessel M. R. says : "Now, as a rule, a mortgagee has a right to realise his security, and of course, as incidental to that, a right to bring an action for foreclosure."

⁽¹⁾ (1877) 6 Ch. D. 339 at p. 343.

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In Yate Lee on Bankruptcy Act of 1883 (3rd Edn.), under G. R. 73 (page 627) the following note occurs :—
“ In 1852 by 15 and 16 Vict. c. 86, section 48, the court of chancery was; for the first time, authorised to direct the sale of a mortgaged property, instead of a foreclosure of the equity of redemption ; and, from that time, applications by a mortgagee for realisation of a security given by a mortgagor who became bankrupt, were usually made in chancery, the reason being that in chancery the mortgagee, as plaintiff, usually had the conduct of the sale, whereas under the rules the trustee of the mortgagor had the conduct unless otherwise ordered, and that under the rules the trustee's costs were made a charge on the property, and might have priority over the mortgage, contrary to the practice in chancery which postponed them to the mortgagee's claim. This is still the case under the present rules ; and a mortgagee can, therefore, generally realise his security to greater advantage, by applying to the chancery division, than by applying in bankruptcy.”

Lastly, we may refer to a rule in *pari materia*, viz., Rule 14 (3) of the Companies Winding-up Rules, 1892, “ Provided always that nothing in this Rule or in Order XLIX, rule 5, of the Rules of the Supreme Court, 1883, shall authorise the transfer of any action by a mortgagee or debenture holder for the purpose of realising his security.”

The necessity for these illustrations arises from the fact that in Suit No. 47 of 1912, *Lalchand v. Balkrishna*,*

* NOTE.—In *Lalchand v. Balkrishna*, the following judgment was delivered by Davar, J., on the 15th of October 1912 :—

DAVAR, J. :—The plaintiffs in this suit claim to recover from the first defendant a sum of Rs. 4,500 and interest thereon, alleging that this sum is due to them under an indenture of mortgage, dated the 14th of February 1910, and executed by the first defendant whereby he mortgaged to them his one-third, share in certain properties belonging to himself jointly with the other members

Davar, J., held that the words "power to realise" in the proviso to section 17 only had reference to the powers

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of his family. The first defendant had, on the 3rd of October 1910, presented his petition in insolvency and that petition was pending on the 9th of January 1912, when this suit was filed. In consequence of the first defendant's pending insolvency, the plaintiffs made the Official Assignee a co-defendant in the suit and they have also joined the father, brother and sister of the first defendant, alleging that they are interested in the property mortgaged to the plaintiffs, as members of a joint and undivided Hindu family. They pray for a money-decree against his (sic) mortgagee or the Official Assignee and further pray that in default of payment the mortgaged premises may be ordered to be sold and that, in so far as it may be necessary, the property comprised in the deed of mortgage be ordered to be partitioned and the first defendant's share therein ascertained and ordered to be made available for the satisfaction of their claim.

The first defendant disputes the mortgage but for our present purposes it is necessary to refer to his contentions. He pleads, however, at the outset that the suit is not maintainable having regard to the provisions of the Presidency Towns Insolvency Act. The third defendant raises the same objection to the suit and further pleads that the plaint discloses no cause of action against him and that he is not a necessary party.

Amongst the issues raised at the hearing were: (1) Whether this suit is maintainable having regard to the provisions of section 17 of the Presidency Towns Insolvency Act of 1909; and (4) Whether the suit as framed is maintainable against defendants 3, 4, 5 and 6.

By an order made on the 3rd of July 1912, it was ordered that the petition in insolvency filed by the first defendant and dated the 3rd of October 1910, be dismissed and it was further ordered that the order of adjudication made thereon, on the 4th of October 1910, be annulled. Under these circumstances the plaintiffs asked that the second defendant's name be struck off and an order to that effect was made accordingly.

Having regard to the contentions raised in the first and fourth issues, I directed that they should be first argued before me, and that the trial of the other issues should stand over, till I had dealt with these issues which, if decided against the plaintiffs, would terminate the suit either wholly or in part.

The contentions of the defendants raised in the first issue are based on section 17 of the Presidency Towns Insolvency Act being Act III of 1909. That section provides that "on the making of an order of adjudication, the property of the insolvent . . . shall vest in the Official Assignee and

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of mortgagees or pledgees to sell the property mortgaged or hypothecated to them without recourse to a suit. In

. . . no creditor . . . shall during the pendency of the insolvency proceedings . . . commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose." To this section is attached a proviso which enacts that the "section shall not affect the *power* of any secured creditor to *realise* or otherwise *deal with* his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed." It is conceded that if the section had stood by itself without the proviso, this suit, not having been filed with the leave of the Court, would fail. But it is contended that the proviso permits a secured creditor to file a suit of the nature of the suit now before me.

I am unable to accept this contention. It is quite clear from the language of the proviso and the words employed therein, that it is not intended to be an exception to the rule laid down in the section and to apply to *suits* by secured creditors. The proviso does not in any way qualify the bar against a creditor filing a suit without the leave of the Court. What the proviso enacts is that the power of a secured creditor to realise or otherwise deal with his security by means other than a suit shall remain unaffected by the insolvency of the debtor. If it was intended by the Legislature to make an exception in the case of suits by secured creditors, they would in the section itself have added the words "except a secured creditor" after the words "no creditor". Instead of making any such exception, the Act merely provides that the *power* of a secured creditor to realise or deal with his security shall not be affected by the provisions of this section. If a suit for realising a creditor's security was intended to be covered by this proviso, the word "power" would never have been used, but the language would have been "the right to sue to realise a security". Again the words "otherwise deal with" in conjunction with the words "realise" make it abundantly clear that the proviso has reference to certain well-recognised powers which a secured creditor possesses. In my opinion the proviso refers to such powers as mortgagees and pledgees may have of selling the property mortgaged to or hypothecated with them without recourse to a suit and the words "deal with his security" refer to the rights they may have of transferring or assigning the debt due to and the security in the possession or at the disposal of the said creditors. The Act having come into operation not very long, there is no Indian authority on the subject; but the section corresponds with section 9 of the English Bankruptcy Act of 1883, and in spite of Mr. Rangnekar's most industrious efforts on behalf of his clients, he has not been able to cite a single authority, showing that after that Act came into force, secured creditors in England were permitted to sue an insolvent debtor or the Official

White v. Simmons⁽¹⁾, in dealing with a proviso in the same words as that now under discussion, Lord

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Receiver to realise their security without the leave of the Court. Certain cases were cited before me, but they were cases all decided before the Bankruptcy Act of 1883 came into operation, and were under an Act which did not contain any corresponding provisions as are to be found in section 9 of the Bankruptcy Act of 1883. And one or two others after 1883 had no application to the question now before me.

Under these circumstances, I must hold that this suit, having been filed without the leave of the Court previously obtained, is not maintainable. Mr. Rangnekar asks me to remedy the defect by giving him leave now. But it seems to me that I have no power to do so, as the leave contemplated under section 17 of the Insolvency Act is leave that must be obtained previous to the institution of the suit.

Having come to these conclusions, it is unnecessary to discuss the question raised in the fourth issue. But I feel that in view of the fact that the plaintiffs will have to file another suit, unless my present finding is found to be erroneous I ought to say that I feel disposed to regard the frame of the present suit as bad. As the suit fails on the first issue, I have not considered the authorities that have been cited before me, and what I now state ought in no sense to be taken as my judgment. I merely say, for the guidance of those who may have to frame another suit, that it seems to me that in a suit by a creditor to establish his mortgage against the share of his mortgagor in the property of a joint Hindu family, the other members of the family are not necessary parties and before he has established his mortgage and executed his decree and purchased his mortgagor's share he cannot ask for partition in the same suit in which he wishes to establish his claim under his mortgage. Not only in a suit, such as I have before me, have the plaintiffs no cause of action against the other members of the family, but the plaintiffs appear to me to misjoin both parties and causes of action in the suit, and in any event even if I had come to the conclusion that the frame of the suit was not bad, I would have still been inclined to exercise the powers that are vested in the Court under Order II, Rule 6, of the Civil Procedure Code.

I find the first issue in the negative and for the defendants. I dismiss the suit. Plaintiffs will pay the defendants' costs of this suit.

After I had written out the judgment and just as I was going to deliver it Mr. Rangnekar asked my permission to draw attention to a case he had come across after the matter was argued before me. I read the case and found that

(1) (1871) L. R. 6 Ch. 555.

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Hatherley declined to hold that where there was "an express reservation of all rights, a mortgagee should be precluded from proceeding in equity to enforce his security".

In our opinion the learned Judge in the present case was right in holding that the proviso to section 17 covers this suit as a suit by a mortgagee to realise his security.

The appeal must be dismissed with costs.

Attorneys for the appellant: *Messrs. Bicknell, Merwanji, Romer & Co.*

Attorneys for the respondent: *Messrs. Surajmal & Co.*

Appeal dismissed.

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it had no application to the question I had before me and would make no difference in my decision. The case is that of *Sharp v. McHenry*⁽¹⁾. The Court there was not considering whether a secured creditor can institute legal proceedings and maintain an action without the leave of the Court. The question before the Court was whether two pending actions should be stayed under section 10, sub-section (2) of the Bankruptcy Act of 1883. The substantial action by the creditor was filed before the debtors' bankruptcy and another action was filed by the creditor against the Official Receiver which seems to have been subsidiary to the first suit. The first action required no leave, having been filed before bankruptcy. It does not appear if the second action was with or without the leave of the Court.

The question in the case was not whether the actions were maintainable in the absence of leave contemplated by section 9 of the Bankruptcy Act of 1883 but it was merely whether under the discretion vested in the Court under section 10, sub-section (2), and having regard to the rival jurisdiction of the Chancery and Bankruptcy Sides of the High Court in matters relating to the estate of a bankrupt, the Court should not stay proceedings in the Chancery Division of the High Court. Under the peculiar or rather complicated circumstances of that case the Court refused to stay proceedings.

I do not think this case has any applicability to the present suit before me.

⁽¹⁾ (1886) 55 L. T. 747.