APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Woodroffe J.

1919

June 2.

BHURAMULL BANKA

v.

THE OFFICIAL ASSIGNEE OF BENGAL.*

Insolvency—Procedure and practice—Contempt—Verbal order by the Official Assignee to attend—Disobedience of order—Motion to commit—Notice of application—Service of affidavits—Irregularity—Waiver—Presidency Towns Insolvency Act (III of 1909), s. 33 (2) (c) (e) and (4)—Insolvency Rules Nos. 36 and 37.

Having regard to the terms of section 33 (2) (c) of the Presidency Towns Insolvency Act, there is no need for the Official Assignee to apply to the Court for an order for the insolvent's attendance, nor any need for the Court's order to be in writing, to be served personally on the insolvent and to contain a notice that unless the insolvent complied with it he would be committed for contempt.

An order given by the Official Assignee to attend his office in pursuance of section 33 (2) (c) of the Presidency Towns Insolvency Act, need not necessarily be in writing. If an order is given by him verbally, it is valid and there is a duty upon the insolvent to comply therewith. Non-compliance with such order will render the insolvent liable to be punished for contempt of Court.

There is no express provision that affidavits in support of the application for contempt should be served at the same time as the notice of application.

Per CURIAM. In future if the Official Assignee intends to apply for a committal order for contempt of Court, he will be well advised to put his order into writing and have it served on the persons intended to be proceeded against, with a notice that if the order is not complied with proceedings for contempt will be taken. Further, it is eminently desirable from all points of view that the procedure laid down by the Rules should be strictly complied with.

* Appeal from Original Civil, No. 40 of 1919, in Insolvency Case No. 39 of 1919.

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APPEAL by Bhuramull Banka, the insolvent, against an order made by Mr. Justice Rankin sitting as Commissioner in insolvency.

Bhuramull Banka, the abovenamed insolvent, carried on business as merchants in Calcutta under the name and style and firm of Ramchandra Banka. On the 26th February, 1919, one Mussamat Radha Bibi instituted a suit against the said Bhuramull Banka, praying for a declaration that she was entitled to a first charge on the book-debts and assets of the defendant's firm, for a decree for Rs. 1,69,799-13 and for other reliefs, and by consent of parties the Official Receiver was appointed receiver on the 10th March, 1919, of the book-debts, outstandings, cash money, properties and assets of the defendant's firm until the final determination of the said suit. On the 21st March, 1919, Bhuramull Banka was adjudicated insolvent at the instance of one of his creditors and on the 5th April, 1919, the adjudication order was served on the insolvent and he was directed to attend the Official Assignee's office immediately. On the 7th April, 1919, he called at the Official Assignee's office, where he was told to attend at his *guddee* the following day to give possession of the remaining books. On the 9th April, 1919, the insolvent accompanied by his attorney again attended the office of the Official Assignee and was examined by the Official Assignee with regard to his property, estate, books and papers. At the conclusion of the examination the Official Assignee verbally ordered the insolvent to attend personally the former's office daily and to make a list of the books belonging to his estate, which had been removed to the Official Assignee's office. He was further ordered to make enquiries and report to the Official Assignee as to the whereabouts of his current books and also as to the books and papers belonging to his estate

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taken possession of by the Official Receiver as receiver appointed in the said suit of Mussamat Radha Bibi. The insolvent having failed to file his schedule within the statutory period of 30 days from the date of service of the order of adjudication and having failed to attend personally at the office of the Official Assignee daily in pursuance of the order given the insolvent to that effect on the 9th April, 1919, the Official Assignee on the 6th May, 1919, served on the insolvent a notice of an application for contempt. On the 9th May, 1919, copies of the affidavit intended to be used was sent by the Official Assignee to the insolvent. On the 10th May, 1919, the Official Assignee filed the notice of application and the affidavits in support thereof. On the 13th May, 1919, the matter came on for hearing and was adjourned on the application of the insolvent. On the 15th May, 1919, the insolvent affirmed his affidavit in reply and on the 16th May, 1919, Mr. Justice Rankin heard the matter and directed that the insolvent be committed to jail for contempt. The insolvent, thereupon, appealed.

Mr. N. Sircar (with him *Mr. S. R. Das*), for the insolvent. The service of the notice of the application dated the 5th May, 1919, and the service and filing of the affidavit in support thereof, sworn on the 10th May, 1919, were irregular, not being in compliance with the Rules of this Court. No order of committal should, therefore, have been made:—see Hechle's Rules of the High Court, p. 586, rules 36 and 37; Halsbury's Laws of England, Vol. 7, p. 311; Oswald on Contempt, 3rd Edn., p. 199; *In re Tuck* (1) and *In re Holt* (2). The committal was made on the grounds stated in paragraphs 2, 3 and 4 of the notice of application (which will be found

(1) [1906] 1 Ch. 692. (2) (1879) 11 Ch. D. 168.

set out in the judgment). The insolvent should not have been committed to prison on those grounds for the following reasons:—*First*, there was no order of Court in connection with any of these matters. *Secondly*, the order was not served personally on the insolvent. *Lastly*, no time was mentioned within which the order complained of was to be carried out. Where it was intended to make an order for contempt the order of which there was a breach should have been made in writing and served on the insolvent personally. [Section 33 (*2*) (*c*) and (*e*) and (*4*) of the Presidency Towns Insolvency Act was referred to.]

Mr. Langford James, for the respondent. The section of the Presidency Towns Insolvency Act did not require the order to be in writing, nor did it require that at the first instance the Official Assignee should come to Court for an order and then notice should be given. As to personal service of the order, the order was given verbally to the insolvent and no question of personal service would arise. (*In re Pickard* (1) was referred to.) Section 24 of the English Bankruptcy Act, 1883, was the same as section 33 of the Presidency Towns Insolvency Act. (Rule 200 of the English Bankruptcy Rules was relied on). In a motion to commit, unlike a motion to attach, it was not necessary to serve a copy of the affidavit with the motion: see *Taylor, Plinston Brothers & Co., Ld.* v. *Plinston* (2). The insolvent waived the irregularity by appearing on the 13th May, 1919, and asking for an adjournment; see *Hampden* v. *Wallis* (3), *Ex-parte Alcock* (4) and the Rules of the Supreme Court, p. 772, "waiver."

Mr. Sircar, in reply. In criminal contempt no question of waiver arose. This was a criminal

(1) [1912] 1 K. B. 397.
(2) [1911] 2 Ch. 605.
(3) (1884) 26 Ch. D. 746.
(4) (1875) 1 Ch. P. D. 68.

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contempt. It was of such a nature as to interfere with the administration of justice, or to bring the Court into disfavour or contempt—Oswald on Contempt, 3rd Edn., p. 37, *et seq.* The cases relied on by the respondent did not help him. The insolvent could not be sent to jail until all the rules had been complied with: *Taylor* v. *Roe* (1), *In re Seal* (2), *Evans* v. *Noton* (3) and *Callow* v. *Young* (4).

Mr. Langford James, with leave of Court. *Taylor* v. *Roe* (1) was definitely overruled by *Petty* v. *Daniel* (5). [*Rendell* v. *Grundy* (6) was relied on.]

Cur. adv. vult.

SANDERSON C. J. This is an appeal by the insolvent against an order of committal made by Rankin J.

On the hearing of the appeal, the merits of the matter were not discussed by the learned counsel for the insolvent and no attempt was made to justify his conduct.

It appears that the appellant was adjudicated insolvent on the 21st March, 1919, at the instance of a creditor, and shortly before that, *viz.*, on the 26th February, 1919, a suit in which the insolvent's grandmother was the plaintiff and the insolvent was defendant was filed, and in that suit by consent of the parties the Official Receiver was appointed on the 10th March, 1919, receiver of the book-debts, outstandings, cash, money, properties and assets of the insolvent's firm.

Notice of an application for an order of committal dated the 5th May, 1919, was served on the insolvent on the 6th May. The notice was as follows:—

"Take notice that on Tuesday the 13th day of "May, 1919, at 11 o'clock in the forenoon or so soon

(1) (1893) 68 L. T. 213.
(2) [1903] 1 Ch. 87.
(3) (1892) 9 T. L. R. 1 8.
(4) (1887) 56 L. T. 147.
(5) (1886) 34 Ch. D. 172.
(6) [1895] 1 Q. B. 16.

"thereafter as the matter may be heard an appli-
"cation will be made before the learned Commis-
"sioner in Insolvency for an order that you be
"committed for contempt under section 24 (*3*) and
"section 33 (*2*) (*c*) and (*e*) and (*4*) on the following
"grounds:—

"1. That the order of adjudication passed against
"you on the 21st March, 1919, was served on you on
"the 5th April, 1919, and that you have failed to file
"your schedule.

"2. That you were ordered by the Official Assignee
"personally on the 9th day of April, 1919, to attend his
"office from day to day in order to make a list of the
"books belonging to your estate which had been re-
"moved to the Official Assignee's office. You have
"neither attended his office nor have you made a list
"of the books.

"3. That you were directed by the Official Assignee
"on the same date to make enquiries and report to
"him as to the whereabouts of your current books.
"You have taken no notice whatsoever of such direc-
"tions.

"4. That you were directed by the Official Assignee
"to enquire and report as to the books, papers, belong-
"ing to your estate taken possession of by the Official
"Receiver appointed in the suit of Radha Bibee. You
"have failed to do so."

On the 13th May the insolvent applied for an adjournment, which was granted by the learned Judge, and the application was heard on the 16th.

The learned Judge came to the conclusion that the insolvent was deliberately trying to play off the Official Receiver against the Official Assignee and that in the insolvency he had done nothing, or as near as possible to nothing, for a period of a month, that he had deliberately done this with the idea that the

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Court would take no notice of it, if he gave sufficient trouble.

As I have already stated, there has been no attempt made to question the learned Judge's finding which, on the materials before us, was, in my judgment, amply justified.

It was therefore a case in which, as far as the merits are concerned, an order for committal was properly made.

The appellant's learned counsel, however, raised several technical points, none of which were taken in the Court of first instance or referred to in the grounds of appeal. But having regard to the nature of the case, we allowed these points to be argued.

It was argued that the learned Judge had not committed the insolvent on the first ground and that the insolvent should not have been committed on grounds 2, 3 and 4 of the application.

The first reason alleged was that the orders of the Official Assignee were verbal and as such were not sufficient basis for committal. It was argued that if the insolvent did not attend, in pursuance of the order made by the Official Assignee on the 9th April referred to in ground 2 of the notice, the Official Assignee should have applied to the Court for an order for the insolvent's attendance, that the Court's order should have been in writing, that it should have been served personally on the insolvent, that it should have contained a notice that unless he complied with it he would be committed for contempt, and that the insolvent could not be committed unless the above procedure had been carried out.

In my judgment, this question must depend upon the terms of section 33 of the Presidency Towns Insolvency Act, 1909. Sub-section (2) of that section provides that "the insolvent shall . . . (*c*) wait

"at such times and places on the Official Assignee "or special manager . . . (*e*) generally do all such "acts and things in relation to his property and the "distribution of the proceeds amongst his creditors, "as may be required by the Official Assignee or "special manager or may be prescribed or be directed "by the Court by any special order or orders made in "reference to any particular case, or made on the "occasion of any special application by the Official "Assignee or special manager, or any creditor or "person interested."

Sub-section (*4*) is as follows:—

"If the insolvent wilfully fails to perform the "duties imposed upon him by this section, or to "deliver up possession to the Official Assignee of any "part of his property, which is divisible amongst his "creditors under this Act and which is for the time "being in his possession or under his control he shall, "in addition to any other punishment to which he "may be subject, be guilty of a contempt of Court, and "may be punished accordingly."

There is nothing in the section to show that an order of the Official Assignee to attend his office in pursuance of section 33(*2*) (*c*) must be in writing. Consequently, the order given verbally on the 9th April was a valid order and there was then a duty upon the insolvent to comply with the order. This section further provides in sub-section (*4*) that if the insolvent wilfully fails to perform the duties imposed upon him by the section, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of Court and may be punished accordingly. So that in this case when the insolvent failed to attend at the Official Assignee's office in accordance with the order of the Official Assignee, he failed to perform a duty imposed upon him by the

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section and he was guilty of a contempt of Court. The contempt was complete and he was liable to be punished accordingly.

Consequently, in my judgment, having regard to the terms of the section, there was no need for the Official Assignee to pursue the procedure indicated above, which the learned counsel for the appellant urged, was necessary, before proceedings for contempt could be properly taken.

The next point urged was that there was no time specified in grounds 3 and 4. I do not think it necessary to consider this at any length, the learned Judge has found that the insolvent did practically nothing for a month: further, this point does not touch ground 2 of the application and that ground alone, having regard to the facts of this case and the finding that the insolvent was deliberately trying to play off the Official Receiver against the Official Assignee with the idea that if he gave sufficient trouble, the Court would take no notice of it, would be sufficient to justify the order for committal.

It was next argued that the affidavit filed on behalf of the Official Assignee should have been filed together with or before the notice of application, and should have been served on the insolvent at the same time as the notice of application: and reference was made to the Insolvency Rules Nos. 36, 37 and the preceding rules 17 to 20. The notice of application was served on the insolvent on the 6th May; on the 9th May the Official Assignee sent copies of the affidavits which he intended to use in support of his application for contempt. On the 10th May, the notice of application and the affidavits were filed by the Official Assignee. On the 13th May the matter was before the learned Judge; at the insolvent's request the application was adjourned until the

16th. At the hearing of the application on the 16th the insolvent relied upon an affidavit put in by him, which he had affirmed on the 15th, and in which he replied to the allegations contained in the affidavit filed on behalf of the Official Assignee.

There is no express provision that the affidavit in support of the application should be served at the same time as the notice of application, but assuming that there was any irregularity in the procedure, the learned counsel for the Official Assignee relied upon rule 200 of the Insolvency Rules and the decision in *Rendell* v. *Grundy* (1).

In this case the insolvent was served with the notice on the 6th May, one week before the day originally fixed for the hearing: the notice set out the grounds of the application. On the 9th, copies of the affidavits intended to be used were sent by the Official Assignee.

The insolvent affirmed his affidavit on the 15th and the case was heard on the 16th.

The insolvent had everything, to which he was entitled, and he has not been prejudiced in any way and in my judgment on the facts of this case the non-compliance with the rules, if any, does not invalidate the proceedings.

The learned counsel for the insolvent argued that the application was in the nature of a criminal proceeding and therefore that there could be no question of waiver: in my judgment, on the facts of this case, it was not necessary for the Official Assignee to rely on the doctrine of waiver.

For these reasons, in my judgment, this appeal must be dismissed.

In this case there was no doubt as to the verbal orders, which were made by the Official Assignee. We

(1) [1895] 1 Q. B. 16.

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think, however, that in future, if the Official Assignee intends to apply for a committal order for contempt of Court, he will be well advised to put his order into writing and have it served on the person intended to be proceeded against, with a notice that if the order is not complied with, proceedings for contempt will be taken. Further, it is eminently desirable, from all points of view, that the procedure laid down by the Rules should be strictly complied with.

The Official Assignee will get his costs out of the assets—the costs will be as between attorney and client.

WOODROFFE J. The contention that a written order of the Court was necessary which order had to be served on the appellant in practice, amounts to this that if the orders of the Official Assignee are repeatedly disobeyed and then an order is made by the Court which is obeyed, no punishment by way of contempt can follow under the Act upon the repeated disobedience, though according to the Act the offence is complete immediately the Official Assignee's directions are disobeyed. It would be possible in this way to delay, and to some extent to defeat, the insolvency proceedings. In my opinion, no order in writing was requisite either from the Official Assignee or from the Court, though as regards the former it may be, as the learned Chief Justice has pointed out, desirable for the Official Assignee to put his directions into writing. The other alleged irregularities of procedure are, in my opinion, not made out: but if they were, they have not in fact occasioned any failure of justice. The merits are not the subject of discussion before us, the question before us merely being whether the technical grounds have been established which would justify this Court in holding that the appellant should not be

committed for acts which call for the proceedings which have been taken against him.

I agree, therefore, that the appeal fails and should be dismissed.

O. M. *Appeal dismissed.*

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Attorney for the appellant: *J. K. Sarkar.*

Attorney for the respondent: *Charu Chandra Bose.*

APPELLATE CIVIL.

Before Fletcher and Cuming JJ.

UMESH CHANDRA DUTT

v.

BIBHUTI BHUSHAN PAL CHOWDHURY.*

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June 19.

Appeal—Judgment raising question of costs only, if appealable.

An appeal, raising a question of costs only, where no question of principle is involved, is incompetent.

SECOND APPEAL by Umesh Chandra Dutt and others, judgment-debtors (defendants).

This appeal arose out of a decree as to mesne profits with costs based on a petition of compromise. The parties could not come to a settlement about costs of the case and referred the matter to the decision of the Court. The Subordinate Judge granted proportionate costs, this order embracing also the costs incurred in delivery of possession. On appeal by the decree-holders, the District Judge held that the order of the

* Appeal from Appellate Decree, No. 925 of 1917, against the decree of R. E. Jack, District Judge of Nadia, dated Dec. 8, 1916, modifying the decree of Kali Kumar Sarkar, Subordinate Judge, Nadia, dated Dec. 22, 1915.