APPELLATE CIVIL.

Before Mookerjee and Buckland JJ.

LUCHIRAM MOTILAL BOID

v.

RADHA CHARAN PODDAR.*

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April 14

Evidence—Presidency Towns Insolvency Act (III of 1909)—Statements of insolvents under s. 27, sub. s. (1)—Admissibility of such statements in a subsequent suit—Cross-examination of witness by party Calling him—Evidence Act (I of 1872) s. 154—"Hostile witness".

Statements of insolvents under s. 27 sub-s. (*1*) of the Presidency Towns Insolvency Act cannot be received in evidence in a subsequent suit brought against them by their creditors, section 32 or 33 of the Evidence Act being of no avail. The erroneous omission to object to the reception of such evidence does not make it legally admissible.

In re Brunner (1), *Miller* v. *Madho Das* (2) referred to.

Where a witness stands in a situation which naturally makes him adverse to the party desiring his testimony, the party calling the witness is not as of right entitled to cross examine him, the matter being solely in the discretion of the Court under section 154 of the Evidence Act to permit the person calling the witness to put any questions to him which might be put in cross-examination by the adverse party.

Radhajiban v. *Taramonee* (3) distinguished.

Parkin v. *Moon* (4) *R.* v. *Ball* (5) *Price* v. *Manning* (6) referred to.

A witness who is unfavourable is not necessarily hostile, a hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth.

Surendra Krishna v. *Rani Dasi* (7) *Coles* v. *Coles* (8) *Greenough* v. *Eccles* (9) referred to.

*Appeal from Original Decree, No. 119 of 1919, against the decree, of Rajendra Lal Sadhu, Subordinate Judge of Pabna, dated Feb. 12, 1919.

(1) (1887) 19 Q. B. D 572.
(2) (1896) I. L. R. 19 All 73 ; L. R. 23 I. A. 106.
(3) (1869) 12 Moo. I. A. 380 ; 2 B. L. R. 79.
(4) (1836) 7 C. & P. 408.
(5) (1839) 8 C. & P. 745.
(6) (1889) 42 Ch. D. 373.
(7) (1920) I. L. R. 47 Calc. 1043, 1057.
(8) (1866) L. R. 1 P. & D. 70.
(9) (1859) 5 C. B. N. S. 786 ; 116 R. R. 865.

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APPEAL by Luchiram Motilal and another, the plaintiffs.

The above appeal arose out of a suit brought by the plaintiff-creditors for a declaration that two mortgage bonds dated the 30th January 1914 and 7th February 1914, executed by their debtors, the Sahas, were made without consideration with intent to defraud and were consequently voidable under section 53 of the Transfer of Property Act. These Sahas were adjudged insolvents by an order of adjudication made by the High Court and subsequently examined before the Registrar in insolvency under section 27, sub-s. (*1*) of the Presidency Towns Insolvency Act. Three of them stated in their examination that the mortgages referred to above were made in favour of relations, the plaintiffs thereupon intended to apply under sec. 55 of the Presidency Towns Insolvency Act for an avoidance of the mortgages, but the mortgagees had in the meanwhile obtained decrees against the mortgagors and the Official Assignee: to avoid future complications the plaintiffs instituted the present suit. The Court of first instance dismissed the suit, the plaintiffs appealed to the High Court.

Babu Manmathanath Mookerjee and *Babu Satish Chandra Munshi*, for the appellant.

Dr. Dwarka Nath Mitter, *Babu Narain Chandra Kar* and *Babu Satindra Nath Mookerjee*, for the respondents.

Cur. adv. vult.

MOOKERJEE J. This appeal arises out of a suit commenced by the appellants for declaration that two mortgages for Rs. 5,000 each, taken by the first two defendants, Radhacharan Poddar and Radhaballav Poddar, one from Lal Behary Saha (now deceased) on

the 30th January, 1914, and the other from Sukhlal Saha, Matilal Saha and Nritya Lal Saha on the 7th February, 1914, had been made gratuitously with intent to defeat their creditors and were consequently voidable under section 53 of the Transfer of Property Act. The plaintiffs are creditors of the Sahas and instituted this suit on the 9th March, 1918, on behalf of themselves and the other creditors whose names were set out in a schedule appended to the plaint. The mortgagors as also the mortgagees were made defendants; and as the Sahas had been adjudicated insolvents on the 23rd July 1914, by this Court in the exercise of its Insolvency Jurisdiction, the Official Assignee also was joined as a defendant. The suit was thus constituted as a representative suit of the type contemplated in the case of *Hakimlal* vs. *Musahar Sahu* (1) which was affirmed by the Judicial Committee in *Musahar Sahu* v. *Hakimlal* (2). The case for the plaintiffs is that after the Sahas had been adjudicated insolvents, they proved their claim before the Official Assignee in due course. On the 4th April, 1916, three of the insolvents, Krishna Lal Saha, Matilal Saha and Nritya Lal Saha were publicly examined before the Registrar in Insolvency. In the course of such public examination, it was elicited that they had executed the mortgages now in suit in favour of their relations. The plaintiffs intended to apply for an order under section 55 of the Presidency Towns Insolvency Act for avoidance of the mortgages as against the Official Assignee. But before the termination of the insolvency proceedings, they discovered that the mortgagees had obtained decrees on the mortgages on the 15th March, 1917, against the mortgagors and the Official Assignee. They have consequently been

(1) (1907) I. L. R. 34 Calc. 999; 6 C. L. J. 410.

(2) (1915) I. L. R. 43 Calc. 521; L. R. 43 I. A. 104; 23 C. L. J. 406.

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constrained to institute the present suit, as otherwise complications might result if the decrees should be executed and the hypothecated properties should on sale pass into the hands of strangers. The claim was resisted by the mortgagors and mortgagees defendants, in other words, by the Sahas and Poddars. The Official Assignee supported the plaintiffs and stated that he was not aware of the fraudulent character of the mortgages at the time when the mortgage decrees were made and he could not accordingly take steps to defend those suits. On these pleadings, the substantial question in controversy was formulated in the eighth issue in the following terms:—

"Were the mortgages in question executed by the insolvents without consideration and were they executed *mala fide* and fraudulently as shields against their creditors as stated in the sixth and eighth paragraphs of the plaint."

The Subordinate Judge held on the evidence that the plaintiffs had failed to discharge the burden which lay upon them to prove that the mortgages were fraudulent; he further found that the defendants had established that the mortgages were for consideration. On the present appeal, the arguments have centred round the question, whether the mortgages were gratuitous or for consideration.

At an early stage of the arguments, it transpired that certified copies of the record of the public examinations of Matilal Saha, Nritya Lal Saha and Krishnalal Saha were received in evidence by the Subordinate Judge. None of these persons had however been examined as witnesses in the lower Court, and consequently their previous statements could not be taken to have been utilised to contradict them. The question thus arose, whether the statements in the Insolvency proceedings could have been received

in evidence under either section 32 or section 33 of the Indian Evidence Act. Section 32 was of no avail, because even if it were assumed that the requirements of the introductory clause were satisfied, the case could not be deemed covered by any of the eight clauses. The clause which looked most helpful was the third, but this, it was conceded, was useless as the statements were not against the pecuniary or proprietary interest of the persons making them. Section 33 was equally of no assistance, because even if it were assumed that the requirements of the introductory clause were fulfilled, none of the three conditions mentioned in the proviso could be held to have been realised. The insolvency proceeding could not be treated as a proceeding between the same parties as the parties to the present suit. Nor could it be said that the adverse party in the first proceeding had the right and opportunity to cross-examine or that the questions in issue were substantially the same in the first as in the second proceeding. The scope of the public examination of the insolvent, as indicated in section 27 (*1*) of the Presidency Towns Insolvency Act, is to examine him as to his conduct, dealings and property. At that stage, the creditors who may have been notified are arrayed together; no question arises whether there is a conflict between secured and unsecured creditors or whether the alleged claim of one or other of them is or is not fraudulent. They cannot at the time be treated as adverse parties, nor can the question in issue in this suit be deemed by any stretch of language to be substantially the same as the question then in issue. There is the additional difficulty that the statement of one of the insolvents could not by any device be used as against another or the others. The admissions of an insolvent, if made after the act of insolvency, may be admissible against

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himself, but they cannot furnish evidence against another insolvent or as against the Official Assignee. Reference may in this connection be made to the decision in *In re Brunner* (1) where it was ruled that the answers of a bankrupt on his public examination are not admissible in evidence even in proceedings in the same bankruptcy by the trustee against parties other than the bankrupt. There was thus no escape from the position that the statements made by Krishna Lal Saha, Matilal Saha and Nritya Lal Saha in the course of their public examination under section 27(*l*) of the Presideney Towns Insolvency Act were not admissible in evidence in this suit. When we indicated our view on this point, Mr. Mookerjee on behalf of the plaintiffs requested that steps might be taken to examine these three persons in this Court. We decided to accede to this request, although we were not unmindful of the observations made by the Judicial Committee as to the reception of additional evidence in appeal in the case of *Kessowji Issur* v. *G. I. P. Ry.*, (2). We were, however, largely influenced in our decision by the circumstance that some endeavour had been made to examine the insolvents in the Court below, but the attempt proved infructuous as the witnesses could not be found and the warrants could not consequently be executed. No doubt, all the steps which might possibly have been taken to enforce attendance were not exhausted, but this might have been due to the fact that the previous statements were allowed to be received in evidence without objection. The erroneous omission to object to the reception of the evidence did not, as pointed out by the Judicial Commitee in *Miller* v. *Madho Das* (3) make it legally

(1) (1887) 19 Q. B. D. 572.
(2) (1907) I. L. R. 31 Bom. 381; L. R. 34 I. A. 115
(3) (1896) I. L. R. 19 All. 76; L. R. 23 I. A. 106.

admissible in evidence; but as such omission might possibly have induced the plaintiff not to take recourse to the extreme measures provided for the enforcement of attendance of witnesses, we thought it right to summon them for examination in this Court. Two of them, Matilal Saha and Nritya Lal Saha, did attend in obedience to the subpœna issued by this Court; Krishna Lal Saha did not attend and it was stated that his absence was due to illness. But when the witnesses appeared in Court, Mr. Mookerjee declined to examine them in chief, on the ground that as his clients were plaintiffs and the witnesses were mortgagors defendants, they were bound to be hostile. He accordingly asked that they might be treated as witnesses called by the Court and that he might be permitted to cross-examine them. In support of this position, he placed reliance upon the decision of the Judicial Committee in *Radhajiban* v. *Taramonee* (1). That decision is of no assistance to the appellant. There the witnesses summoned for the plaintiff (except one) did not appear. The plaintiff thereupon filed a petition praying that the case might be decided by his summoning the defendant in person and taking his deposition. The defendant was accordingly summoned and was asked by the Court whether the money claimed by the plaintiff was justly due from him or not. The defendant answered that he was not liable for the claim. The plaintiff then submitted that he had not intended to abide by the answer of the defendant and asked leave to cross-examine him. The trial Judge refused to put any further questions to the defendant or to allow any to be put on behalf of the plaintiff and dismissed the suit. On appeal to this Court, Morgan and Pandit, JJ. expressed their disapproval of the course adopted by the

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trial Judge, and when the case went up to the Judicial Committee, their Lordships fully concurred in the propriety of that censure. This is clearly no authority for the proposition that if the plaintiff calls the defendant as a witness, he is entitled to cross-examine him as a matter of right ; in the case before the Judicial Committee the defendant was treated as a witness called by the Court. If the contention of the appellants were to prevail, it would involve in substance an approval of the procedure condemned in emphatic terms by the Judicial Committee in two recent cases. *In Kisori Lal* v. *Chunni Lal*, (1) Lord Atkinson observed as follows :—

"It would appear from the judgment of the High Court that in India it is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness, with the design that each party shall be forced to produce the opponent so summoned as witness, and thus give the counsel for each litigant the opportunity of cross examining his own client. It is a practice which their Lordships cannot help thinking all Judicial tribunals ought to set themselves to render as abortive as it is objectionable. It ought never to be permitted in the result to embarass Judicial investigation as it has done in this instance".

Reference may also be made in this connection to the decision of the Judicial Committee in *Lal Kunwar* v. *Chiranji Lal* (2), see also *Venkata* v. *Pappaya* (3). *In re Rangaswami Iyenger* (4), the matter must plainly

(1) (1908) I. L. R. 31 All. 116 ; L. R. 36 I. A. 9 ; 13 C. W. N. 370 ; 9 C. L. J. 172.

(2) 1909) I. L. R. 32 All. 104 ; L. R. 37 I. A. 1 ; 14 C. W. N. 285 ; 11 C. L. J. 172.

(3) (1913) Mad. W. N. 828.

(4) (1913) Mad. W. N. 998.

be decided under section 154 of the Indian Evidence Act which gives the Court a discretion to permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. The rule recognised in *Clarke* v. *Saffery* (1) and *Bastin* v. *Carew* (2) namely, that, when the witness stands in a situation which naturally makes him adverse to the party who desires his testimony, as for example, when a defendant is called as the plaintiff's witness, the party calling the witness is entitled to cross-examine him, cannot be held applicable in this country in view of the provisions of section 154 of the Indian Evidence Act. Indeed, even in England, it has been ruled in later cases that the situation in which a witness stands towards either party does not give the party calling the witness a right to cross-examine him, unless the witness' evidence be of such a nature as to make it appear that the witness is unwilling to tell the truth [*Parkin* v. *Moon* (3), *R.* v. *Ball* (4)] and it now appears to be settled law in England that a party when called by his opponent cannot as of right be treated as hostile, the matter being solely in the discretion of the Court: *Price* v. *Manning* (5). We must further remember that a witness who is unfavourable is not necessarily hostile for a hostile witness has been defined as one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court: *Coles* v. *Coles* (6), *Greenough* v. *Eccles* (7), *Surendra Krishna* v. *Rani Dasi* (8). The position, consequently, is that although Matilal Saha and Nrityalal

(1) (1824) R. & M. 126.
(2) (1824) R. & M. 127.
(3) (1836) 7 C. & P. 408.
(4) (1839) 8 C. & P. 745.
(5) (1889) 42 Ch. D. 373.
(6) (1869) L. R. 1 P. & D. 70.
(7) (1859) 5 C. B. N. S. 786; 116 R. R. 865.
(8) (1920) I. L. R. 47 Calc. 1043; 1057.

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Saha were present in this Court, the plaintiffs did not examine them. We are thus left with the evidence adduced in the Court below, after the depositions of the insolvents before the Registrar in Insolvency have been excluded therefrom. Upon that evidence, there is no room for serious argument that the decision of the Subordinate Judge must be upheld. He has referred in detail to the oral evidence to show that the mortgages were for consideration and that oral testimony is largely supported by the account books. As regards the mortgage of the 30th January 1914, he has found that Lalbihari Saha had borrowed Rs. 4,000 from the first two defendants on the occasion of the marriage of his son in 1913, and executed a promissory note for the amount. The mortgage was granted to secure the sum due on the note and a subsequent advance of Rs. 440. As regards the mortgage of the 7th February 1914, the Subordinate Judge has found that it was granted to secure a prior loan of Rs. 3,000 taken in 1908. The oral evidence and the extracts from the account books have been placed before us and carefully commented upon. We see no reason to doubt the correctness of the conclusion of the Subordinate Judge that both the mortgages were for consideration and he, in our opinion, properly declined to decide in favour of the plaintiff on mere grounds of suspicion, for as Sir Lawrence Jenkins said in *Minakumari* v. *Bijay Singh* (1), the Court's decision must rest, not upon suspicion but upon legal grounds established by legal testimony.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

BUCKLAND J. I agree.

A. S. M. A.

Appeal dismissed.

(1) (1916) I. L. R. 44 Calc. 662 ; L. R. 44 I. A. 72.