APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and Mukerji J.

OFFICIAL ASSIGNEE OF CALCUTTA

v.

RAMRATAN DAS BAGREE AND OTHERS.*

1926

Nov. 19.

Insolvency—Secured creditor—Sale by Official Assignee of charged property—Commission—Calcutta Insolvency Rules (1910), r. 178—Costs.

D, an insolvent, prior to his insolvency, hypothecated certain assets for sums greatly in excess of their value. The creditors thus secured filed suits on the hyphothecation deeds. Subsequently the Official Assignee sold the charged assets, with the consent of one of such creditors, and charged commission on the sale-proceeds. In an application by the other secured creditor for refund of the commission.

Held, that the Official Assignee was not entitled to charge such commission.

APPEAL from an order of C. C. Ghose J.

One Dwijendra Nath Sen executed two deeds of hypothecation, dated the 15th February 1924 and the 14th January 1925, in favour of the firm of Nandaram Das Mathura Das charging his stock-in-trade, book debts and certain other assets. On the 25th March 1925 he also executed another deed of hypothecation of the same goods in favour of Ramratan Das Bagree the respondents. Then on 9th June 1925 the said Dwijendra Nath Sen was adjudicated insolvent. Prior to that, on the 6th of June 1925 Ramratan Das instituted a suit for the purpose of enforcing his charge. At that date Ramratan Das had no knowledge of the defendant's insolvency and on the 22nd June 1925 obtained an order that the Official Assignee

* Appeal from Original Order No. 97 of 1926.

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be brought on record. Subsequently on the 1st of December 1925 a decree was made in favour of Ramratan Das Bagree for two sums of Rs. 2,500 and Rs. 1,200. Thereafter a question was raised as to priority between Ramratan Das Bagree and Nandaram Das Mathura Das and ultimately it was settled between them that whatever monies would be raised by sale of the stock-in-trade would be divided between them in proportion of 1 to 2, Ramratan Das getting the one-third share. The stock-in-trade was thereafter sold by the Official Assignee, with the consent of Nandaram Das Mathura Das only, for a sum of Rs. 3,702-7-3, and the Official Assignee deducted a sum of Rs. 185-1-11 as his commission on the same which was disputed by Ramratan Das Bagree. Thereafter Ramratan Das Bagree took out summons against the Official Assignee for refund of the said commission. The application was allowed by Mr. Justice C C. Ghose and the following judgment was passed.

C. C. GHOSE J. The question raised on this summons is whether the Official Assignee of Calcutta as assignee of the estate and effects of one Dwijendra Nath Sen is entitled to retain a sum of Rs. 185-1-11 as and by way of commission in the circumstances stated below.

It appears that the said Dwijendra Nath Sen executed three deeds of hypothecation, one dated the 21st March 1925 in favour of Ramratan Das Bagree and two others dated the 15th February 1924 and '4th January 1925 in favour of Nandaram Mathura Das. The property mentioned in the deeds of hypothecation consisted of goods which were the stock-in-trade in the business carried on by Dwijendra Nath Sen. It appears that Ramratan Das Bagree instituted a suit in this Court on the 6th June 1925 being suit No. 1660 of 1925, against the said Dwijendra Nath Sen for the purpose of enforcing the deed of hypothecation executed by him in favour of the plaintiff.

It is said that at the time of the institution of the suit, it was not known that Dwijendra Nath Sen had been adjudicated an insolvent and an application was therefore made to this Court on the 22nd June 1925 for an order that the Official Assignee be brought on the record. By an order made by this Court dated the 22nd June 1925 the application was granted

and the Official Assignee was brought on the record. Thereafter it appears that the Official Assignee wrote on the 12th November 1925 to Messrs. Dutt & Sen the solicitors for the plaintiff Ramratan Das Bagri stating that inasmuch as the insolvent had admitted in his Schedule that the plaintiff Ramratan Das Bagri was a secured creditor for two sums, namely, Rs. 2,500 and Rs. 1,200 being the amounts claimed in the said suit and that in the events which had happened he would not contest the suit. The suit ultimately came on before my learned brother Mr. Justice Buckland on the 1st December 1925 when his attention being drawn to the letter of the 12th November 1925, he made a decree in favour of the plaintiff Ramratan Das Bagree. It appears that thereafter a question of priority was raised between Ramratan Das Bagree and Nandaram Mathura Das and ultimately it was agreed between them that whatever moneys were realised by sale of the stock-in-trade of the said Dwijendra Nath Sen would be divided between the plaintiff Ramratan Das Bagree and the said Nandaram Mathura Das in the proportion of 1 to 2, *i.e.*, the plaintiff Ramratan Das Bagree would get a one-third share of the sale-proceeds of stock-in-trade and the said Nandaram Mathura Das would get a two-thirds share of the sale-proceeds. It appears that thereafter an arrangement was arrived at by which the Official Assignee was to sell the stock-in-trade through Messrs. Mackenzie Lyall & Co. The goods were accordingly sold and a sum of Rs. 3,702-7-3 was realised by the sale of the goods. The Official Assignee has furnished an account in which he says that the net balance available for distribution among the plaintiff Ramratan Das Bagree and the said Nandaram Mathura Das is a sum of Rs. 3,226 13-10. This sum has been arrived at by deducting a sum of Rs. 185-1-11 on account of the Official Assignee's commission and this last mentioned sum is the subject of exception on this summons.

The Official Assignee has appeared by counsel and he has argued that under section 81 of the Presidency Towns Insolvency Act and Rule 178 of the Rules made thereunder the Official Assignee is entitled to charge the commission referred to above. On the other hand it has been argued on behalf of the plaintiff Ramratan Das Bagree that under the Presidency Towns Insolvency Act and the Rules made thereunder the Official Assignee is not entitled to deduct any commission whatsoever on the facts of this case.

It appears to me that in this case the parties concerned, namely, the two hypothecatees did not avail themselves of the provisions of the Second Schedule of the Insolvency Act for the purpose of realising their security and that therefore they not having availed themselves of the machinery provided by the Insolvency Act cannot be charged with commission in the manner proposed by the Official Assignee. The present plaintiff proceeded

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to institute a suit and has recovered a decree on his deed of hypothecation. The sale by Messrs. Mackenzie Lyall & Co. was a sale by arrangement between the parties and at the time when the sale was so held the only property which had vested and which remained vested in the Official Assignee under the terms of section 17 of the Insolvency Act was the equity of redemption which the insolvent had after the deed of hypothecation had been executed by him. In these circumstances I do not see how the Official Assignee can contend that under rule 178 (*b*) he is entitled to charge a commission. It is said that the explanation to that rule is merely a guide for the purpose of construing rule 178 (*b*). I agree; and on the construction of rule 178 (*b*) there cannot be the slightest doubt in my opinion that the Official Assignee is not entitled to claim the commission referred to above.

The result therefore is that there will be an order in terms of the summons and the Official Assignee must pay the costs of this application personally.

On that the Official Assignee appealed.

Mr. N. N. Sircar and *Mr. B. K. Ghosh*, for the appellant.

Mr. A. K. Ray, for the respondent.

RANKIN C. J. The question in this case is whether the Official Assignee is entitled as against the firm of Ramratan Bagree to retain by way of commission to him under the Insolvency Rules of this Court a sum which appears to amount to some 62 Rupees.

The insolvent, one Dwijendra Nath Sen, was adjudicated on the 9th of June 1925. Prior to the insolvency, namely, on the 15th of February 1924 and the 14th of January 1925 he had executed certain deeds of hypothecation over his stock-in-trade, book-debts and certain other assets in favour of a firm which I shall refer to as Mathura Das. He had also on the 25th of March 1925 executed a deed of hypothecation over the same assets in favour of the present respondents—the firm of Ramratan Das Bagree. It appears that the Official Assignee took

possession of the assets at a time when he had no notice of the respondent's claim to a security there over but that immediately thereafter the respondent firm objected to the Official Assignee proceeding to sell the stock-in-trade and other assets comprised in the alleged security. The Official Assignee had become responsible for rent of the premises in which these goods were and he was not at the moment in a position to deal finally with the claim of either of the two firms whom I have named to be secured creditors. He obtained consent of the firm of Mathura Das to his proceeding with the sale but the respondent firm stoutly objected and maintained that they would take steps to prevent the Official Assignee from selling these assets at his own hand. In fact, the respondent firm on the 16th of June, very shortly after the adjudication, commenced a suit on the Original Side for enforcement of their security. They originally brought the suit against the insolvent, but on the 22nd of June the Official Assignee was added as a party; and apparently at or about that time the Official Assignee made an arrangement with the respondent firm. The arrangement was in substance this that it was in the interest of all the parties that the goods should be sold at once and that the respondent firm would waive their objection to the Official Assignee proceeding with his sale provided that the sale proceeds would be retained by the Official Assignee pending the decision of the questions of lien and priority which were arising from the claims of these two firms to be secured creditors. The sale was held on the 23rd of June and it appears that the result of it was that the gross proceeds were Rs. 3,702 and that a sum of Rs. 256 and another of Rs. 34 were costs and charges of the actual sale, and the question with reference to the Official Assignee's

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commission is a question in all of Rs. 185-1-11 pies. So far as the firm of Mathura Das is concerned, no objection is raised to the Official Assignee retaining two-thirds of that sum which otherwise would come to that firm. The real question in dispute is as regards one-third of that sum, *i.e.*, a sum of some 62 Rupees.

What happened was that the respondent firm proceeded with their suit, and in November 1925 the Official Assignee admitted the claim of the respondent firm in respect of two sums amounting altogether to Rs. 3,700 and on the 1st of December 1925 a decree was obtained by the respondent firm in the presence of the Official Assignee declaring that that sum formed a charge upon the goods—the stock-in-trade and the outstandings of the insolvent. I would pause here to observe that that decree is in one respect extremely erroneous and absurd. Whether it is a slip on the part of the learned Judge or on the part of some one in the drawing up of the decree I do not know, but the decree actually says that " the Official Assignee " do out of the estate and effects of the insolvent " defendant pay to the plaintiffs the sum of Rupees " three thousand and seven hundred with interest " thereon ". Anything more improper than that a person with a security which he is proposing to realize should get a judgment of that sort against the Official Assignee it would be difficult to imagine. His right of course was to have his charge declared and enforced and to have it declared that he was at liberty to prove for a dividend out of the general assets on the ordinary terms, namely, to prove for the balance after realising his security or to value his security and take a dividend on the balance. The judgment in this respect is one which I should have thought the Official Assignee or some one on his behalf would

never have allowed to pass without objection. That, however, does not affect the present case.

There was another suit commenced by the firm of Mathura Das to which apparently the respondent firm were parties and in that suit which appears to have been for enforcement of the plaintiff's security the parties in the end arrived at a settlement. The Official Assignee, to put the matter shortly, was satisfied that both these firms were secured creditors and that there was nothing left out of the sale proceeds to come to the general estate of the insolvent and it was arranged that the proceeds should be divided between these two rival claimants who were secured creditors in the ratio of 2 to 1. I do not know that the amount of the debt of the firm of Mathura Das appears from the paper book but I do not understand it to be disputed that their claim was larger than the claim of the respondent firm. This no doubt explains why the ratio should be 2 to 1. Be that as it may, the sale proceeds after deducting the costs of the sale were insufficient to pay in full even the claim of the respondent firm and it is now abundantly clear that in the subject matter of the various deeds of hypothecation the Official Assignee on behalf of the general creditors had no beneficial interest.

The question which now arises is not whether by virtue of Insolvency Rule No. 178 the Official Assignee is entitled to say that he must out of the general assets and at the expense of unsecured creditors receive a commission of 5 per cent. upon the total amount fetched by the goods on their sale but whether he is entitled as against these secured creditors—the respondent firm—to claim to deduct a portion of that 5 per cent. out of their actual security itself. Some difficulty has arisen in considering this matter from the fact that the actual deeds of hypothecation are

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not before the Court. I will dispose of this case on the basis that it may well be that the nature of the security given to the firms of Mathura Das and Ramratan Das Bagree was a mere charge, *i.e.* to say, that it was not in substance equivalent to an absolute assignment or complete transfer of what in English law would be called the legal estate. The principle which governs the question whether a property goes to the Official Assignee at all in cases of this class is as follows: I am quoting from a statement of the law which appears in a note to section 38 of the English Bankruptcy Act in the well-known book Williams' "Bankruptcy Practice". "Secondly, there is a class "of trusts where, although the bankrupt did not "acquire the absolute legal ownership for the purpose "of an express trust yet, he, though retaining the "legal property, has divested himself of the whole "or part of his beneficial interest. In this class of "trusts, if the bankrupt has parted with the whole "of his beneficial interest (as where a bankrupt has "sold a debt or mortgaged it to secure a debt of an "amount greater at the time of the bankruptcy than "the debt mortgaged) and become a bare trustee, the "legal interest of the bankrupt will not pass to the "trustee in bankruptcy, but remain in the bankrupt; "but if any beneficial interest remains in the bank-"rupt, whether the extent of such beneficial interest "be ascertained or not, the legal interest will pass to "the trustee in bankruptcy, subject, of course, to the "performance of the trust".

In my judgment it matters nothing in this case whether the nature of the security was a mere charge or was something more. So long as it is established that the insolvent has no beneficial interest in the property I do not think that the property itself is in any way to be regarded as a part of the general estate.

There is no difficulty in equity in regarding a person who is in possession of property which is subject to charge which he himself has created as being in the position of a trustee. Now in these circumstances it has to be remembered that it is a fundamental principle of Insolvency Law that as regards his security a secured creditor cannot be forced into the Insolvency Court at all. He can stand outside the Insolvency Court and proceed, as these creditors were proceeding. to enforce his rights outside the Insolvency Court altogether. That being the position, it is a matter for very careful consideration whether a rule made by this Court under its jurisdiction to make Insolvency rules could validly be made so as to appropriate a part of the property of a mere third party and it is necessary to scrutinize very carefully the terms of any rule which is said to have that effect. It is quite clear in this case that the firm of Ramratan Das Bagree were doing their best to keep intact and unprejudiced all their rights under their deed of hypothecation. Rule 178 says that "the Official "Assignee shall be entitled to retain as a remuneration "for the duties to be performed by him, *inter alia*, "a commission of 5 per cent. on the principal amount "or value of the assets collected by him in each estate". So far as the present question is concerned, it is reasonably clear that these are the words which must govern this case. There is in that rule an explanation which has no direct bearing on this case but which may, perhaps, require to be considered in so far as it may be thought to throw some light upon the expression in the rule itself "the principal amount or value 'of the assets collected by him in each estate". That explanation, as it now stands, is in these terms: "For "the purpose of this rule the amount to be paid in "pursuance of a composition or scheme of arrangement

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"and also any amount realized under the Second "Schedule to the Act shall be deemed to be assets "collected by the Official Assignee". In interpreting that explanation I will assume that an amount realized under the Second Schedule to the Act is to be deemed to be an asset collected by the Official Assignee not only for the purpose that the Official Assignee's commission is to be computed at the expense of the general creditors upon the total sum but that it is to be deducted from that part of the amount realized which has to go to the secured creditors. I will assume that but I am very far from deciding it. Even so, however, it has to be remembered that under Rule 18 of the Second Schedule to the Presidency Towns Insolvency Act no mortgagee can be compelled to have his security realized under that schedule in any case. Steps can only be taken either by the mortgagee or with his consent and it may not, therefore, be totally unreasonable in these circumstances to impose a condition that the commission has to be paid even at the expense of the security that is realized. It is another matter altogether to say because of those words in the amended explanation that in a case where certain assets are charged for a sum that greatly exceeds their value the total amount realized by those assets on sale is to be regarded as assets collected by the Official Assignee in the estate for the purpose of levying upon a secured creditor a part of the commission. The word "assets" in the Calcutta Insolvency Rules may be found also in Rule 60 where the rule says that "the assets in every matter "remaining after payment of the actual expenses "incurred in realizing any of the assets of the insol-"vent shall, subject to any order of the Court, be liable "to the following payments which shall be made in "the following order of priority"; and second in the

list of the payments is this: "Any fees payable to or "costs, charges or expenses incurred or authorized by "the Official Assignee". Looking at the rule as a whole it seems to me that the purpose of Bankruptcy Rule No. 178 is to say that the remuneration of the Official Assignee is to be computed on the amount that he collects for the estate. This is very different from the rule that obtained under the previous Insolvency Act—the Imperial Statute—where it had to be computed on the amount available as dividend which of course is a very different thing because the expense of administration has to come out of the general estate before there is any dividend.

In the present case I feel reasonably clear that the intention of the arrangement between the firm of Ramratan Das Bagree and the Official Assignee was that that firm would raise no objection to the Official Assignee selling as he wanted to sell but that they were not by that arrangement to be understood as in any way bringing themselves into the Insolvency administration but on the contrary would proceed with their suit for enforcement of their security as indeed their right was. The learned Judge takes in this matter substantially the same view which I venture to think is correct.

Some comment has been made on the fact that the learned Judge ordered the Official Assignee to pay the costs personally. If he was to order the Official Assignee to pay costs at all he must order him to pay the costs personally as it is quite clear that this consequence cannot be visited upon the unsecured creditors. The correspondence immediately preceding the launching of this motion does not induce me to think that the learned Judge would have been right in leaving each party to bear its own costs, and I for one am not disposed to interfere with his discretion in

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that matter. With regard to this appeal there can be no question that the Official Assignee having lost, must pay the costs of the respondents.

MUKERJI J. I agree.

Attorneys for the appellant: *N. C. Mandal & Co.*

Attorneys for the respondent: *Dutt & Sen.*

N. G.

APPELLATE CIVIL.

Before Suhrawardy and Duval JJ.

GOPAL CHANDRA SAHA

v.

ABDAR RAHIM BISWAS.*

1926

Nov. 11.

Appeal—Preliminary decree—Final decree—Appeal against the preliminary decree after the passing of the final decree—Maintainability.

Where in a mortgage suit a preliminary decree passed by the Munsif was appealed against before the District Judge, and then taken on second appeal before the High Court without preferring any appeal against the final decree which in the meanwhile was passed by the Munsif in terms of the judgment of the District Judge;

Held, that the appeal to the High Court from the preliminary decree was incompetent.

Nanibala Dasi v. *Ichamoyee Dasi* (1), *Jogendra Narayan Das* v. *Satyendra Chandra Ghose* (2), referred to.

SECOND APPEAL by Gopal Chandra Saha, the plaintiff.

* Appeal from Appellate Decree, No. 931 of 1924, against the decree of M. C. Ghose, District Judge of Jessore, dated March 11, 1924, modifying the decree of Ramesh Chandra Sen Gupta, Munsif of Jhenidah, dated June 14, 1923.

(1) (1923) 40 C. L. J. 291.   (2) (1925) 29 C. W. N. 640.