APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Rankin J.

JNANENDRA BALA DEBI (APPELLANT)*

v.

THE OFFICIAL ASSIGNEE OF CALCUTTA AND OTHERS (RESPONDENTS).

1925

Dec. 18

Insolvency—Public Examination—Evidence—Presidency Towns Insolvency Act (III of 1909), ss 27, 36.

The statement of an insolvent made during his public examination is not admissible in evidence against a third party, from whom the Official Assignee claims to recover property as belonging to the insolvent's estate.

In re Brunner (1) followed. *Madhoram Raghumull* v. *Official Assignee* (2) explained.

PER RANKIN J. Section 36 of the Presidency Towns Insolvency Act does not contemplate cases in which there is real conflict as to title. The correct course in such cases would be to proceed by way of a motion before the Judge in Insolvency or by way of a suit.

APPEAL from a judgment of Pearson J.

On the 14th of February, 1922, one Nishi Kanto Chatterjee was adjudicated an insolvent on a creditor's petition. Thereafter a commission was issued at the instance of one of the creditors of the insolvent to examine the appellant, Srimati Jnanendra Bala Debi, the wife of the insolvent. She claimed that she was the owner of the premises No. 110, Beniatolla Street, which was bought in her name in 1914, the Assignee and the creditors claiming the said premises as belonging to the estate of the insolvent and standing in the *benami* of the said Srimati Jnanendra Bala Debi. Then the public examination of the insolvent was held. Thereafter in May 1925

* Appeal from Original Civil No. 90 of 1925.

(1) (1887) 19 Q. B. D. 572. (2) (1923) 27 C. W. N 611.

1925

JNANENDRA BALA DEBI v. THE OFFICIAL ASSIGNEE OF CALCUTTA.

the Official Assignee applied to Court for a declaration that the premises No. 110, Beniatolla Street, belonged to the estate of the insolvent Nishi Kanto Chatterjee and for an order on Jnanendra Bala Debi to deliver the said premises to the Official Assignee. As part of the grounds for that application the Official Assignee relied on the evidence given by the insolvent in his public examination and of the appellant in her examination under section 36 of the Act. The learned Judge taking insolvency matters made the order and on that this appeal was filed.

Sir Binod Mitter and *Mr. Sudhi R. Das*, for the appellant.

Mr. S. N. Banerjee and *Mr. B. C. Ghose*, for the respondent.

SANDERSON C. J. This is an appeal by Jnanendra Bala Debi against an order which was made by my learned brother Mr. Justice Pearson on the 17th of June 1925.

The order was made upon an application made by the Official Assignee of Calcutta in the insolvency of Nishi Kanto Chatterjee, who is the husband of the appellant; and, the notice was to the effect that an application would be made by the Official Assignee for a declaration that the premises No. 110, Beniatolla Street in the town of Calcutta, belong to the estate of the insolvent and that Srimati Jnanendra Bala Debi be ordered to deliver up possession of the said premises to the Official Assignee at such time, in such manner and on such terms as to the Court might seem fit and proper.

The learned Judge allowed the application, and the order was that the premises belonged to the estate of the insolvent and directed the appellant to deliver possession thereof to the Official Assignee.

The learned Judge appears to have assumed that the application was made under section 36 of the Presidency Towns Insolvency Act: and, the learned advocate, who appeared for the Official Assignee, informed the Court that both the parties treated the application at the hearing as having been made under section 36 of the Presidency Towns Insolvency Act.

In my judgment that was a mistake. It may be that the mistake arose by reason of the fact that the appellant was examined under section 36. The evidence of the appellant was taken on commission on the 4th April, 10th, 17th and 22nd May 1924 in pursuance of an order made on the 14th of March 1924, and the application, which is the subject of this appeal, was not made until May 1925.

It was, however, contended by the learned advocate on behalf of the Official Assignee that the Court had jurisdiction to entertain the application and make the order under the provisions of section 7 of the Act, and that therefore the learned Judge's order should not be set aside.

The learned Judge did not act on the appellant's evidence only: for he admitted as evidence against the appellant the statements which were made by the insolvent on his public examination, although the admission of such evidence was objected to by the learned advocate who appeared for the appellant.

The learned Judge in admitting the statements made by the insolvent on his public examination relied upon the case of *Madhoram Raghumull* v. *The Official Assignee* (1), and the passage upon which the learned Judge relied is at page 614.

With great respect to the learned Judge, I am of opinion that the decision in that case was misunderstood. The facts of that case, shortly stated, were

(1) (1923) 27 C. W. N. 611.

1925

JNANENDRA BALA DEBI v. THE OFFICIAL ASSIGNEE OF CALCUTTA.

SANDERSON C. J.

that the insolvents Surajmull and Mongalchand were adjudicated insolvents on the 15th of March 1921. Thirteen days before the adjudication, *viz.*, on the 2nd of March, the insolvents had assigned to certain creditors, who were called Raghunath Das Sewlal, some outstanding debts which were alleged to be owing to the insolvent firm. The proprietor of the firm of Raghunath Das Sewlal was a man called Ram Lal Pachisia. Ram Lal Pachisia on the 29th of June 1921 assigned his right title and interest under the assignment of the 2nd of March to the appellants Madhoram Raghumull. An application was made by the Official Assignee to the learned Judge taking insolvency matters on the Original Side, under the provisions of section 36 of the Presidency Towns Insolvency Act to have the two assignments of the 2nd of March 1921 and the 29th of June 1921 declared void as against the Official Assignee : and, the learned Judge made the order, declaring that the two assignments were void.

Madhoram Raghumull then appealed to the Court of Appeal. There was certain evidence before the learned Judge. It appeared that among others Raghumull, a member of the appellant firm, Ram Lal Pachisia, the proprietor of the firm of Raghunath Das Sewlal, and Mongalchand, one of the insolvents, were examined under section 36 of the Presidency Towns Insolvency Act : and, the question was raised whether the statements of the insolvent made on such examination could be admitted as evidence against the appellants Madhoram Raghumull and against Ram Lal Pachisia.

In giving the judgment in that case I am reported to have said, "As at present advised, however, I am "of opinion that the deposition of the insolvent was "not admissible as evidence against the appellants or

"Pachisia, but I do not decide this point and I leave "that question open if it ever becomes necessary to "decide it on another occasion."

I did not decide it on that occasion, because, as I stated in that judgment, I did not rely upon the statements of the insolvent in any way. The case was decided upon evidence other than the statements of the insolvent, both by Mr. Justice Richardson and by me.

I do not understand how the abovementioned case can be understood to be a decision that the deposition of the insolvent in the present case would be admissible as evidence against the appellant.

The learned advocate for the Official Assignee drew my attention to a passage which appears at the right-hand side of page 614, which begins as follow:—"The "learned counsel said that it was desirable that the "practice of this Court should be laid down clearly." This related to the question and the sufficiency of the notice, which in the cited case was in general term, and what followed was meant to be a statement of what notice should be given with regard to depositions, which were intended to be used upon an application under section 36, and it related only to depositions which would be admissible upon such an application.

It was a statement of the practice to be observed as regards notice, and in my judgment the passage cannot be read as a decision that the mere fact of giving notice would make admissible that which was otherwise inadmissible.

I adhere to the opinion expressed in the abovementioned case and, in my judgment, the deposition of the insolvent taken on his public examination was not admissible against the appellant upon the application which was before the learned Judge in the present case.

1925

JNANENDRA BALA DEBI v. THE OFFICIAL ASSIGNEE OF CALCUTTA.

SANDERSON C. J.

The reasons why the deposition of the insolvent is not admissible against the appellant in such a case are set out in the judgment of Mr. Justice Cave *In re Brünner* (1).

I am, therefore, of opinion that the learned advocate, who appeared for the appellant, was right in his contention that the learned Judge ought not to have admitted the deposition of the insolvent as evidence against the appellant.

That, however, does not dispose of this appeal.

The learned advocate who appeared for the Official Assignee read the evidence of the appellant herself and invited the Court to come to the conclusion upon that evidence that the premises in question really belonged to the insolvent.

I must say that I find it exceedingly difficult to accept the evidence of the appellant. It seems to me that it is unreliable. I need not state the reasons for that conclusion in detail. But that conclusion is not sufficient to justify the Court in acceding to the contention of the learned advocate for the Official Assignee. It does not seem to me that because the evidence of the appellant is rejected it must follow that the premises belonged to the insolvent. In my judgment, if we were so to hold, we should be speculating as to the real facts, when there is no sufficient evidence to justify the Court in arriving at that conclusion. Although the evidence of the appellant may be full of suspicion, I am of opinion that there is not sufficient evidence before the Court to justify it in holding that the Official Assignee has proved that the premises in question belonged to the insolvent.

The result, therefore, in my judgment, is that this appeal must be allowed and the order which the

(1) (1887) 19 Q. B. D. 572.

learned Judge made on the 17th of June 1925, must be set aside, and the application dismissed.

The Official Assignee must pay the appellant's costs of the appeal and of the proceedings before the learned Judge on the Original Side.

RANKIN J. I agree.

In this case it appears that the appellant was summoned as a witness under the private examination section,—section 36 of the Presidency Towns Insolvency Act,—and was questioned before a Commissioner as to her insolvent husband, his dealings and his property. She appeared before the Commissioner as a witness; and although she was allowed the assistance of a solicitor, the right of a witness to be re-examined under section 36 is a strictly limited right.

The answers given by her at this private examination are evidence against her. They are not merely evidence against her in any bankruptcy proceedings; they are evidence against her in any civil proceedings; whether in insolvency or whether in a civil suit on exactly the same principle. [*Cf. Ex parte Hall, In re Cooper* (1), *cf.* the decision of Jessel M. R. on p. 583, which is not the same as the head-note. *Cf.* also Evidence Act, section 18.]

Thereupon the Official Assignee was minded to claim a certain property No. 110, Beniatolla Street. That property stands and has since 1914 stood in the name of the appellant. It appears to have been purchased in July 1914 for Rs. 19,000. It appears to have been mortgaged in August 1914 for Rs. 11,000, in September 1915 for Rs. 13,000, and it seems that in comparatively recent years another mortgage of Rs. 35,000 was taken and the prior mortgagees were paid off.

(1) (1882) 19 Ch. D. 580.

1925

JNANENDRA BALA DEBI v. THE OFFICIAL ASSIGNEE OF CALCUTTA.

RANKIN J.

I collect that this property is in the possession of the lady: at all events, it is a property in or upon which the lady and the insolvent have been living; and we are told on the part of the Official Assignee that the property is worth some Rs. 60,000 and more, so that there is a very substantial value in the equity of redemption. When the Official Assignee made up his mind as a result of his investigation to move the Court to declare that the lady was a mere *benamdar* for the insolvent and had so been for something like ten years, he had to choose what course he would take. The ordinary course, having regard to the subject matter and the length of time over which the investigation might have to be carried, would have been to commence a suit against the lady for a declaration that she was a *benamdar* for the insolvent. But under section 7 of the Presidency Towns Insolvency Act this Court in its Insolvency Jurisdiction has jurisdiction to determine such a point as that; just in the same way as where a person who carries on a retail business, becomes an insolvent in this Court, the Court would have jurisdiction by motion in Insolvency to collect debts due to the business by third parties in Tipperah or somewhere else. As a rule, however, that class of proceeding against a mere third person as against whom the Official Assignee claims no higher title than the insolvent's is not brought in the Insolvency Jurisdiction, and in any ordinary case any such motion brought in that jurisdiction unfairly and unreasonably, would be refused as the learned Judge is in no way obliged in the Insolvency Jurisdiction to try such a question. I would guard myself from being supposed to lay down that the only proper subjects for such a motion are cases within section 55 or 56 of the Presidency Towns Insolvency Act. There are many other cases. There

may be cases, for example, where a property is claimed as having been taken by the opposite party from the insolvent after an available act of bankruptcy and it can be successfully claimed if the opposite party cannot bring himself within the protective sections. There may be cases where a transfer can be set aside if it is after an adjudication order. There are cases which come under section 53 of the Transfer of Property Act, where the right asserted by the Assignee is a right which belongs to creditors as such. It is important that it should be understood, first, that the rule that the Official Assignee should have recourse to this jurisdiction only when he has a higher title than the insolvent's, is not a rule of law in the sense that the Insolvency Court has not the jurisdiction to entertain such a case and, secondly, that it is not restricted only to sections 55 and 56. But the rule is well established if it is not rigid and it is necessary in fairness to third parties who cannot help their creditors, debtors or *cestuis qui trustent* going insolvent, who may live far from Calcutta, and whose right may be difficult to ascertain apart from a regular suit. It is necessary also in the interests of this Court which cannot undertake in its Insolvency Jurisdiction to collect debts all over India or to decide on motion all classes of disputes merely because an insolvent or his estate is a party. [*Cf. In re Pollard* (1) and *In re Yates* (2).] It may be noted that section 26 of the Indian Insolvent Act, 1848 (11 & 12 Vict., c. 21) is part of an entirely different scheme and corresponds neither to section 7 nor to any part of section 36 of the Act of 1909. [*Cf.* the observations of Peacock, C. J., in *Barlo v* v. *Cochrane* (3) and such a case as

(1) (1876) 8 Ch. D. 377. (2) (1879) 11 Ch. D. 148.
(3) (1868) 2 B. L. R. (O. C). 56.

1925

JNANENDRA BALA DEBI v. THE OFFICIAL ASSIGNEE OF CALCUTTA.

RANKIN J.

In re Khettsey Dis (1)]. The scheme of 1848 relates to a very different type of Court.

In the present case I do not collect that the appellant took such objection on these lines, to the proceedings being in the Insolvency Jurisdiction as to make it just to decide this case upon the mere question of propriety of *forum*. I rather gather that at the hearing both parties were under a mistaken notion that the proceedings were in some way or other under section 36. But whether in this case the Official Assignee would not have been more successful, had he proceeded by a regular suit, is a matter as to which one may have one's own opinion.

The matter of the ownership of this important property, apart from inadmissible evidence which has been allowed in the case, has to be decided upon an affidavit by the Official Assignee which sets out nothing except pieces from the appellant's deposition, an affidavit by the lady, one or two documents such as the mortgages, and that is all. When one comes to look at the deposition of the lady one finds that her story is not such that any Court would be justified in acting upon it, if she were a plaintiff suing anybody else. Her positive account of how she came to acquire this property is not only confused (as to which one may be allowed to say that it is perhaps small blame to her) but it is highly unconvincing and full of suspicion. Nevertheless one has to ask oneself whether there are any such admissions of fact as to entitle the Court to come to the conclusion that it is proved that the property was the insolvent's. We are dealing with a transaction of 1914 and so far as we know the insolvent did not get into the Insolvency Court till 1922—a very long time afterwards. There is no presumption that he was in difficulties and there

(1) (1869) 3 B. L. R App. 14.

is no presumption that he had money wherewith to buy the house. Cases of *benami* have been often dealt with by the Court. There is no presumption that what stands in the name of the wife belongs to the husband. In India if it is shown that the money to purchase the estate was the husband's money in origin, then in contradistinction from the law of England the fact of the wife's relationship does not raise any presumption of advancement; but until it is shown that the husband's money was the origin of the purchase, that line of argument does not commence at all. In the absence of direct evidence that the origin of the property, the purchase-money, was from the husband, indirect evidence, no doubt, can be entertained and it can be shown from the dealings of the parties with the property that as between them the property must have belonged to the husband. But in the case of husband and wife, the mere fact that money which is borrowed goes to the husband or is put into the husband's business is no convincing evidence that the property was not the wife's. There are other possible explanations, and it is not possible in such a case for a Court to proceed by an abstract deduction upon so ambiguous a circumstance as that.

For these reasons, it appears to me that when this matter is looked at upon the only admissible evidence the Official Assignee's claim must fail, and the judgment of the learned Judge in so far as it does not refer to evidence which is inadmissible, namely, the husband's answers on his public examination seems to me to lack cogency. He says: "The learned counsel has "argued on behalf of the wife that no evidence has "been given, that the husband himself was in a position "to buy this property, that there is no presumption of "*benami* and in the absence of evidence on the hus- "band's side it must be taken that the claim now made

1925

JNANE DRA BALA DEBI v. THE OFFICIAL ASSIGNEE OF CALCUTTA.

RANKIN J

"by the Official Assignee fails". That is the very contention which seems to me to be right. The learned Judge's answer to that is this: "I do that I "should be prepared to assent if there were anything "at all to support the statements or any of the state- "ments made by the wife as regards the source of the "money which she alleges came to her hands and "enabled her to pay the consideration for the purchase." With great respect to the learned Judge it is no evidence that the property was bought by the insolvent, to show that the wife's story that the property is hers is uncorroborated.

I come now to section 36 of Act III of 1909. This has not only been misunderstood by the parties before the learned Judge, but I have some reason to believe that the misunderstanding is widespread.

The section has, I think, been misinterpreted by false analogies drawn from the Act of 1848. Section 36 of the old Act corresponds to part of the present section 36 but nothing else corresponds.

Sub-sections (4) and (5) of section 36 of the Act of 1909 differ somewhat from their real proto-type, *i.e.*, from the corresponding part of what is now section 25 of the present Bankruptcy Act in England (which used to be section 27 of the Act of 1883). The English Act runs: (4) "If any person on examination before the "Court admits that he is indebted to the debtor, the "Court may . . . ." and so forth; (5) "If any person on "examination before the Court admits that he has in "his possession any property belonging to the debtor, "the Court may . . . ." and so forth. The change made in the Indian Act is this: "If on the examination "of such person the Court is satisfied that he is "indebted to the insolvent, the Court may . . . ." "If, on the examination of any such person, the Court "is satisfied that he has in his possession any property

"belonging to the insolvent, the Court may . . . ." It seems quite clear that that change of wording has only a limited effect. The provisions of section 36 mean that when the witness is before the Court, the Court may at that time (and even though for this purpose it is the Registrar and not the Judge), proceed even without an actual admission, if it is satisfied to the effect laid down in these two sub-sections. The power under the English Act has hardly been exercised but it is quite clear that it is exercisable in all cases coming within the section even by the Registrar of a County Court in the country. Whoever holds the examination has the power under the sub-sections, provided it is held by the Court [*Cf.* section 6 (*1*)]. It is quite true there is power to order the examination to be done by a Commissioner, but in that case I think it tolerably clear that sub-sections (*4*) and (*5*) are out of action altogether although the same result can be obtained by proceeding under section 7 and using the deposition as evidence against the respondent. What is contemplated under these sub-sections is the most summary of all proceedings, namely, an order made upon the witness there and then and without previous notice and it would be absolutely wrong ever to act under sub-section (*4*) or (*5*) unless there was a case so free from difficulty even on the story of the witness as to make it reasonable to act *brevi manu*. It is quite extravagant to suppose that in this case and under this section any order could have been made. A question of this sort whether a purchase ten years ago in the name of a lady was a purchase *benami*, is a long way from being within anything that section 36 contemplates. The correct course in these cases where there is any real conflict is either to proceed by way of a motion before the Judge in Insolvency or to proceed by way of suit,

1925

JNANENDRA BALA DEBI v. THE OFFICIAL ASSIGNEE OF CALCUTTA.

RANKIN J.

As an application under section 36, the present case would fall to be dismissed *in limine* and I have only dealt with the facts of the case at all because Mr. Banerjee sought to uphold the learned Judge's order as a good order under section 7.

With reference to the question whether the insolvent's evidence on his public examination is evidence in favour of his estate on a claim by the Official Assignee against a third party, that is a very easy and a very old question of law. It has been well-settled for years that the evidence of an insolvent in his public examination is not admissible against anybody except himself. It is not admissible in favour of his own estate as against a third party. It is possible for the Official Assignee to call the insolvent and it may be possible in certain circumstances in that way to get from him the fact that on his public examination he said so and so: when that is done then the insolvent can be cross-examined; and the respondent has the opportunity of showing that it does not matter what the insolvent says, he has contradicted himself and his words are of no account. Even although it may be shown that the respondent was a creditor and although it could be shown that the creditor had attended personally at the public examination and that he had heard the insolvent say what he had said, the insolvent's statements would not be evidence as such against the respondent for any purpose. What X says in the presence of A is sometimes evidence against A, in that A's conduct in relation to the statement throws light upon the facts; it is analogous to an admission by conduct; but in a judicial proceeding a party has no opportunity to interfere with statements being made which he does not admit; and though the circumstance might be put to the creditor in cross-examination, it is quite

wrong even in such a case to suppose that his presence at the public examination makes the insolvent's statements evidence against him. In my judgment the learned Judge has proceeded upon materials which were inadmissible and there are no sufficient materials on the record to support his finding.

As regards the case of *Madhoram Raghumull* v. *The Official Assignee* (1), I have read that case with some care and I do not find that there is anything in the judgment contary to the view I have expressed. As I regard the matter it was accepted that the deposition under section 36, was only evidence against the witness who gave it. The question as to the public examination, it was apparently not necessary then to decide.

Attorney for the appellant, *T. B. Roy.*

Attorney for the respondents, *P. L. Mallik.*

N. G.

(1) (1923) 27 C. W. N. 611.