

INDIAN LAW REPORTS. [VOL. LVI.]
INSOLVENCY JURISDICTION.

Before Lord-Williams J.

1929.
April 9.

NRIPENDRA KUMAR BOSE, *In re.* *

*Insolvency—Order and disposition—Presidency-towns Insolvency Act
(III of 1909), s. 52.*

Where, prior to insolvency, the insolvent took delivery of goods from sellers upon giving them a promissory note and a document as follows:—

“ I engage myself to hold these goods in trust for and on their behalf and keep the goods insured against fire and confirm that these goods until sold by me and the proceeds thereof when sold, shall remain their property and that the said proceeds shall be kept by me separate, the intention being that they may take possession of the goods and/or the said proceeds whenever they wish to do so and that production of this note shall make null and void any claims that may be made on the goods and/or the said proceeds by my creditors whether or not they had notice of this trust. The trust created shall cease to exist after I have paid in the amount.”

Held that the transaction was an attempt to defeat the provisions of the Insolvency Act and also to secure a preference over all other creditors and so illegal; and that, upon the insolvency, the goods vested in the Official Assignee.

APPLICATION.

The facts of this case will appear from the judgment.

Mr. B. C. Ghose, for the petitioner. There is difference between the wordings of section 52 of the Presidency-towns Insolvency Act with those of the corresponding section of the English Bankruptcy Act. The trust is absolute and complete in this case and the property in the goods cannot pass to the Official Assignee.

Mr. W. Gregory (with him *Mr. P. N. Chatterjee*), for the Official Assignee. The property in the goods passed to the insolvent. Therefore, upon insolvency, the goods vested in the Official Assignee. The alleged trust was only a fraudulent arrangement between the sellers and the insolvent, by which the goods were left in the manual power of the insolvent only for the purpose of postponing other creditors. And so it cannot be upheld: *In re Murray* (1).

*Insolvency Suit, No. 16 of 1929.

(1) (1877) I. L. R. 3 Calc. 58, 62.

LORT-WILLIAMS J. This insolvent was adjudicated on the 25th January, 1929.

Prior to his insolvency, he carried on business in Calcutta under the name and style of Gobinda Chunder Bose & Company.

In the course of such business, he used to obtain goods through the petitioners, Messrs. Bettmann & Kupfer, who also carry on business in Calcutta.

The method by which such goods were obtained was as follows :—

Bose sent an indent to the petitioners, addressed to ~~them~~, and on a form supplied by them—requesting them to order on his account certain goods therein mentioned, packed as directed at the price stated, C. I. F. C. I. Calcutta—60 days D/A in sterling and otherwise on terms and conditions stated on the reverse of the form. These terms *inter alia* provided, that all risks of voyage, &c., were to be borne by Bose. That ~~he~~ would accept their invoice as correct and accept on presentation and pay at maturity the draft (or on demand the pro-note) drawn for the invoice value—That in the event of the goods arriving before the bill fell due, he would retire the same or, if no draft were drawn, he would pay the invoice amount on arrival of the steamer. That he would raise no objection to quality, &c., unless the draft (or pro-note) had been first accepted (or signed) and paid by him. In case the indent mentioned D/A terms, that is to say, delivery against acceptance, the petitioners had the option to allow these terms or not, and Bose agreed to pay the draft on arrival of the steamer. In default of Bose accepting or paying the draft at maturity or pro-note on demand, he agreed to pay the value of the goods according to the invoice as for goods bargained and sold, and authorised the petitioners to resell the goods on his account, and agreed to pay any deficit and waive all claims to any surplus which might arise on re-sale. In answer to the indent order, the petitioner used to send what they called a report stating that the order had been placed. In practice, the goods ordered were made over to Bose, either against cash or

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upon his executing a pro-note for their value. This note contained particulars of the invoice, the goods and the ship and a promise to pay the sum stated therein to the petitioners on demand against the goods and in addition, at the foot thereof, a statement which, so far as it is material is as follows :—

“ I engage myself to hold these goods in trust for
“ and on their behalf and keep the goods insured
“ against fire and confirm that these goods until sold
“ by me and the proceeds thereof when sold, shall
“ remain their property and that the said proceeds
“ shall be kept by me separate, the intention being
“ that they may take possession of the goods and/or
“ the said proceeds whenever they wish to do so and
“ that production of this note shall make null and
“ void any claims that may be made on the goods
“ and/or the said proceeds by my creditors whether or
“ not they had notice of this trust. The trust created
“ shall cease to exist after I have paid in the above
“ amount.”

This document is called by the petitioners a trust receipt, and is a variant of the trust receipts sometimes taken by bankers in exchange for goods delivered to the buyers in advance of payment.

In accordance with the above arrangement, the petitioners delivered goods to Bose and at the time of his insolvency, the goods had not been paid for and the notes had not been met. Thereupon the petitioners made a claim upon the Official Assignee for the return of the goods and for the amount due on the promissory notes. This claim the Official Assignee has rejected—and the petitioners now ask that his decision be reversed.

Their contention is that the goods are trust property, and held by Bose as such, and therefore form no part of his assets divisible among his creditors. Section 52 (1) (a), Presidency-towns Insolvency Act, 1909. The Official Assignee contends either that the property in the goods had passed from the petitioners to the insolvent prior to his adjudication, or that they are goods which were at the commencement of the

insolvency in the possession, order and/or disposition of the insolvent in his trade and/or business by the consent and permission of the petitioners, as the true owners thereof under such circumstances that the insolvent was the reputed owner thereof, within the meaning of section 52 (2) (c) of the Presidency-towns Insolvency Act, 1909, and that the trust if it ever existed, had been discharged prior to the insolvency.

It has been contended on behalf of the petitioners that the law on this point, in the Presidency-towns in India, differs from the English law, because the phrasing of the analogous sections in the Indian and the English Act is slightly different. Thus, in the English Bankruptcy Act, 1883, section 44, the property of the bankrupt divisible amongst his creditors shall not comprise: (1) property held by the bankrupt on trust, but it shall comprise (iii) all goods being at the commencement of the bankruptcy in the possession order or disposition of the bankrupt in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof. Whereas, in the Presidency-towns Insolvency Act, trust property is not divisible, but "subject as aforesaid," property of which the insolvent is the reputed owner as aforesaid is divisible. In my opinion, there is no difference in effect between the two sections, and I think the English arrangement of the section is preferable, because more lucid. Section 44 (1) of the English Act and section 52 (1) (a) of the Indian Act can never be in conflict with section 44 (iii) and section 52 (2) (c) respectively, because where any one holds property in trust, he is the real owner, and, therefore, the real and the reputed ownership are in the same person—and section 44 (iii) and section 52 (2) (c) do not apply: *Joy v. Campbell* (1). If, in this case, Bose held the goods in trust, the question of reputed ownership cannot arise.

But if Bose was a trustee, then he was the real owner, and the property in the goods, was in him. Whereas the trust receipt printed upon the pro-note

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(1) (1804) 1 Sch. & Lef. 328.

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states explicitly that the property in the goods— and/or the proceeds thereof is to remain in the petitioners until payment.

If, therefore, the property in the goods never passed to Bose, in my opinion, it is clear upon the facts that the goods were in his reputed ownership within the meaning of section 52 (2) (c).

On sale of goods, the property in the goods passes, when the parties intend that it shall pass, as shown by the terms of the contract, and the circumstances of the case.

Where the delivery of the goods or of a document giving control of the goods is to be in exchange for payment of, or security for the price of the goods, the seller, unless a contrary intention appears, reserves the right of disposal and the property in the goods, until payment, or security, be made or given accordingly. In the absence, therefore, of the trust receipt, the property in these goods would have passed to Bose on signing the pro-note and not before. But the effect of the trust receipt was to postpone the transfer of property until payment. Apart, however, from these considerations, the arrangement made by the petitioners, was only an ingenious attempt to defeat the provisions of the Insolvency Act. While putting it in the power of Bose to obtain credit on the strength of the goods with which they supplied him, they tried nevertheless to secure a preference for themselves over all other creditors. Even if they had succeeded in drafting a document, which would have been sufficient to create a trust, in my opinion, such a trust would not have been legal or valid. A trust must be created in good faith. This application, therefore, is dismissed with costs.

Application dismissed.

Attorneys for Messrs. Bettmann & Kupfer: *Leslie & Hinds.*

Attorneys for the Official Assignee: *Arnowitz & Co.*

A. K. D.