APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and Pearson J.

THE OFFICIAL ASSIGNEE OF CALCUTTA

v.

FREDERICK LIONEL HARCOURT.*

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Aug. 3, 4.

Insolvency—Discharge—Delay in drawing up of the order for discharge—Calcutta Rules under the Presidency Towns Insolvency Act (III of 1909), rr. 28, 137.

When an order for discharge of an insolvent had been made, but, contrary to Insolvency Rule 28, had not been drawn up or filed,

held, in the circumstances, that the Official Assignee was not entitled to intervene and get the after-acquired properties of the insolvent for the benefit of the creditors.

In such a case, rule 137 of the Calcutta Insolvency Rules is to be read with rule 28.

APPEAL from an order of Lort-Williams J.

Frederick Lionel Harcourt, the respondent, was adjudicated an insolvent in the year 1921. On the 8th March, 1922, on his own application, an order for discharge was made upon condition that he consented to a judgment for Rs. 28,365-5-8. On the same day, Harcourt did sign his consent to a judgment for that amount. No further steps were taken for drawing up of that order, nor was it drawn up, signed or filed. Thereafter, in May, 1930, Harcourt settled a suit which he had brought against the Eastern Tavoy Minerals Corporation Limited, and, in consequence thereof, a sum of Rs. 35,000 was deposited by the defendant corporation to the credit of that suit. Thereafter, on the 12th August, 1930, the Official Assignee made an application to Court for an order that the Registrar do pay to the Official Assignee the sum of Rs. 35,000 out of the monies lying to the credit of the said suit

*Appeal from Original Order, No. 112 of 1930, in Insolvency Case No. 34 of 1921.

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and that the order of 8th March, 1922, be rescinded or in the alternative a decree be passed against the insolvent for Rs. 28,365-5-8 and the Official Assignee may have leave to execute the decree by attaching the said sum of Rs. 35,000. The application was dismissed. On that this appeal was filed.

S. M. Bose and *N. C. Chatterjee* for the Official Assignee.

Harcourt appeared in person.

None appeared for the other respondents.

RANKIN C. J. In the year 1921, Mr. Frederick Lionel Harcourt was adjudicated an insolvent and, by an order made on the 8th of March, 1922, upon his application for discharge, it was ordered that the insolvent be given an immediate discharge upon the condition that he consented to a judgment being entered up against him for the sum of Rs. 28,365-5-8p. It has been found as a fact by the learned Judge and not disputed before us that the insolvent signed on a proper form his consent to a judgment for that amount being entered up against him. He swears that he did so on the day the order was made. No further steps, however, were taken for the drawing up of the order made upon the application for discharge and it appears to be clear that that order has not yet been drawn up, signed or filed. Eight years afterwards, in May, 1930, the insolvent, who had been conducting himself, as he tells us, on the footing that he had obtained an immediate—if a conditional—discharge, settled a suit which he had brought for the recovery of a large sum on account of salary and a further sum on account of damages for wrongful dismissal against a company called the Eastern Tavoy Minerals Corporation Limited, and, by reason of various proceedings to which I need not now refer, a sum of Rs. 35,000 was paid by those defendants into Court to the credit of that suit. The Official Assignee coming to hear of this, took steps apparently to obtain this money for the benefit of the creditors in the insolvency and, by his letter of the 2nd June, 1930,

written to the Registrar, he claimed that the sum should be held and not paid over to Mr. Harcourt by reason of the fact that he was about to apply for leave to execute the judgment pursuant to the order made on the application for discharge. No judgment had ever been filed and, at a later stage, an application was made before Mr. Justice Lort-Williams, which application was apparently based not upon the footing that the Official Assignee was entitled to execute the judgment, but on the footing that, as the order made upon the application for discharge had never been completed, Mr. Harcourt was still an undischarged insolvent. The same ground was taken on the application to the learned Judge sitting in Insolvency from whose order this appeal has been preferred. The Official Assignee maintains that all these years by reason of the insolvent's failure to get the order drawn up and completed, Mr. Harcourt has not been discharged and is an undischarged insolvent and he claims on the ground that, as he has intervened, this after-acquired property of the insolvent is claimable by him for the benefit of the insolvent's estate. In addition to that ground, he further makes a claim on the footing that he ought to have the judgment drawn up and leave to execute the judgment. In his affidavit, the Official Assignee enlarges at considerable length upon these various points. Not only does he contend that the insolvent is still an undischarged insolvent, but he apparently makes a grievance of the fact that the insolvent has not rendered an annual statement of his earnings—a statement which would not be required on the footing that he was not discharged as the order made on the application for discharge had not been completed.

Before us the contention of the Official Assignee has been supported by learned counsel on his behalf by reference to rule 137 of the Insolvency Rules of this Court. That rule runs thus :—

" The order of the Court made on an application for discharge shall be dated of the day on which it is made, and shall take effect from the day on

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which the order is drawn up and signed; but no office or certified copy of such order (save an office copy for the purposes of an appeal) shall be delivered out nor shall such order be gazetted until after the expiration of the time allowed for appeal, or, if an appeal be entered, until after the decision of the Appellate Court thereon ".

There is a rule now numbered 138A, which was not made part of our rules until just recently, namely, in May last year, which says:

"If the insolvent neglects to have the order for discharge drawn up, signed and filed within three months from the passing of the order, the same shall be liable to be rescinded on the application of the Official Assignee or of a creditor who has proved or by the Court of its own motion ".

That rule was not in force at all at the time of Mr. Harcourt's application for discharge. I shall say something later as to this. It appeared to me, at the hearing, that this matter would perhaps take on another form if it were further investigated. I find that the English Bankruptcy rule No. 234 is exactly in the same terms as rule No. 137 which I have already read. I further find that the English Bankruptcy rule 37 is the same as our Insolvency rule No. 28—a rule which does not appear to have come to the notice of the Official Assignee or of his advisers in this case. That rule is as follows:

Preparation of Orders: "If within one week from the making of an order of adjudication "—certain other orders are mentioned—" or order on application for discharge, such order has not been completed, it shall be the duty of the Registrar to prepare and complete such order; provided that if in any case the Judge shall be of opinion that the provisions of this Rule ought not to apply, he may so order; and provided also that where an order of discharge is granted subject to the condition that judgment shall be entered against the insolvent, nothing in this Rule shall require the Registrar to prepare and complete the order until the insolvent has given consent, in a prescribed form, to judgment being entered against him ".

So that, at the time of Mr. Harcourt's discharge, he was governed by rule 137 and by rule 28 and it was the duty of the Registrar, if that order was not completed by the insolvent within one week, to have that order drawn up, in order that it might be gazetted and in order that the public and the creditors and everybody concerned might know of the order of the Court. In these circumstances, I am of opinion that

it will be little short of monstrous for us to lay down that, because the Registrar did not perform this duty in the matter of the order made on this application for discharge and because the Official Assignee for all these years has taken no steps to get this matter completed in the interest of the public and of the creditors, Mr. Harcourt has been an undischarged insolvent for the past eight years. I am aware that rule 28 is difficult to carry out by reason of the requirements as to court-fees. But even so it is manifest that, when Mr. Harcourt left the Court after the order had been made upon his application for discharge and heard no more about the matter, he was entitled to assume that the Court would do what its rules say and he was further entitled to assume that the Official Assignee whose duty it was to see that these matters were done properly would see to this. So far as that ground is concerned either against Mr. Harcourt or against anybody else—the Eastern Tavoy Minerals Company Limited—I am of opinion that the Official Assignee's application is entirely misconceived and that there is no ground for any such claim as has been made by him in this case.

It remains then to consider the other branch of the application, namely, whether the Official Assignee, who never took steps to see that the order had been drawn up, still less took steps to see that any judgment came into existence, can be given leave now to execute the judgment. It is sufficient to say that the answer to that is in the negative.

I should mention that the recent rule No. 138A appears to me, now that my attention has been drawn to this matter, to be misleading. The only circumstances under which it ought to be possible for an order to remain without being drawn up for so much as three months are the circumstances mentioned in rule 28, namely, where a judge has made an order that the Registrar need not prepare and complete the order or where the insolvent has not given his consent

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to the judgment being entered against him. If it is thought that it can be applied to any other class of cases then I think the rule is apt to mislead. The appeal is dismissed.

PEARSON J. I agree.

Attorney for appellant: *S. K. Mukherjee.*

Attorney for respondent: *C. C. Ghose.*

Insolvent in person.

N.G.