APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Odgers and Mr. Justice Beasley.*

THE OFFICIAL ASSIGNEE OF MADRAS (APPLICANT), APPELLANT,

1929, March 12.

v.

E. NARASIMHA MUDALIAR, PROPRIETOR OF JAMES & Co., PERIAMET, MADRAS (GARNISHEE), RESPONDENT.*

Presidency Towns Insolvency Act (III of 1909), sec. 7—Operation of—If limited to matters in which Official Assignee claims a higher title than insolvent—Money claim against stranger—If Official Assignee entitled to proceed under sec. 7—Limitation of right where witness summoned under sec. 36—Official Assignee in no higher position than insolvent—Seeking to recover debt not admitted—Matter of discretion for Court in each case, whether such claim be dealt with in Insolvency Court or not.

Section 7 of the Presidency Towns Insolvency Act is not limited in its scope to matters in which the Official Assignee by the operation of the Insolvency Law claims a higher title than what the insolvent himself would have had, and the Official Assignee is entitled to proceed by way of motion under section 7 in cases where he has a money claim against strangers to the insolvency, the only limitation placed on the jurisdiction of the Insolvency Court being, that when once the Official Assignee has summoned a witness under section 36 of the Act, and that witness disputes his indebtedness, the Official Assignee has no option but to proceed by way of suit.

Where the Official Assignee, standing in no higher position by reason of the special provisions of the Insolvency Law than the bankrupt himself, seeks to recover a debt which is not

* Original Side Appeal No. 26 of 1928.

OFFICIAL ASSIGNEE, MADRAS v. NARASIMHA MUDALIAR.

admitted, it is a matter of discretion for the Judge sitting in Insolvency whether in any given case he should deal with such a claim in the Insolvency Court, or refer it to the machinery of the ordinary Courts.

Ex parte Brown, In re Yates, (1879) 11 Ch.D., 148, *Ellis* v. *Silber*, (1872) 8 Ch. App. Cas., 83, *Gnanendra Bala Debi* v. *The Official Assignee of Calcutta*, (1925) I.L.R., 54 Calc., 251, followed.

ON APPEAL from the order of Mr. Justice WALLER, dated 13th February 1928, and passed in the exercise of the Ordinary Original Insolvency Jurisdiction of the High Court in Petition No. 193 of 1926 (In the matter of A. Swaminatha Mudaly, an insolvent), Application No. 498 of 1927.

The facts necessary for this report appear in the Judgment.

Nugent Grant (*V. Varadaraja Mudaliyar* with him) for appellant.—For a long number of years the Insolvency Court has entertained applications called garnishee proceedings to enable the Official Assignee to recover moneys due to the insolvent's estate. It may not be possible in every case for the Official Assignee to file a regular suit and pay the necessary Court-fee. In special cases, however, pleadings were directed as in a regular suit. Section 36 has been regarded only as a discovery section, i.e., as a convenient method of obtaining information. The information obtained under section 36 was either used or not used in applications under section 7. The intention of the Legislature was that one must not begin with section 36 and end in section 7. The amendment has not carried out the intention of the Legislature. The Court must be satisfied that the scope of section 7 has been whittled down by the amendment. Section 7 does not exclude matters other than those arising in Insolvency. English Bankruptcy Act of 1914, section 105 (1) corresponds to section 7 of our Act. The Court constituted under the Act must deal with matters arising under the Act—see *Official Assignee of Bombay* v. *Sundarachari*(1). *Abdul Khader* v. *Official Assignee of Madras*(2) is a case where BAKEWELL, J., refused to exercise jurisdiction on an application

(1) (1927) I.L.R., 50 Mad., 776. (2) (1916) I.L.R., 40 Mad., 810.

in the Insolvency Court for a declaration that certain property belonged to the insolvent, and the Appellate Court (RAHIM, Offg. C.J., and SESHAGIRI AYYAR, J.) set aside the order. They also refer to the advisability of trying difficult questions of title in the ordinary civil Courts. The Insolvency Court has to assume jurisdiction for the purpose of doing complete justice or making complete distribution of property—*Doraippa Aiyar* v. *Official Assignee, Madras*(1). The decision in Insolvency also operates as *res judicata*. *Jnanendra Bala Debi* v. *Official Assignee of Calcutta*(2), decides that the jurisdiction is not restricted to cases under sections 55 and 56. Only section 36 should not be made an instrument of torture. See also Halsbury's Laws of England, Vol. 2, page 137, Article 235, on Mode of Enforcement. It must be a matter of discretion for the Court, whether in any particular case the Court would or would not exercise jurisdiction in Insolvency. Vide also *Abdul Khader Sahib* v. *Official Assignee of Madras*(3), and *In re Kancherla Krishna Rao*(4).

R. N. Aingar (amicus curiae.)—The ordinary way of collecting a debt is by a suit. The Official Assignee stands in the shoes of the insolvent. Where the trustee has a higher title, the Insolvency Court is the appropriate forum, *Ex parte Brown, In re Yates*(5). A demand at law or in equity against a stranger cannot always be enforced in the Insolvency Court, *Ellis* v. *Silber*(6). The summary procedure under the Act is not intended for contentious proceedings. *Re Suresh Chander Gooyee*(7), held that it was discretionary with the Court to direct at the hearing of the motion that the matter be dealt with by an action.

Nugent Grant in reply.—The convenience of the Official Assignee as representing the general body of creditors is of great importance. The Official Assignee may, under certain conditions, have to be allowed the aid of the inquisitorial procedure. In every case a discretion must be left to the Court as to whether, with reference to the surrounding circumstances, the matter should or should not be dealt with in Insolvency—see *Ex parte Dickin, In re Pollard*(8).

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(1) (1921) 42 M.L.J., 141.
(2) (1925) I.L.R., 54 Calc, 251.
(3) (1913) 25 M.L.J., 308
(4) (1927) I.L.R., 51 Mad., 540.
(5) (1879) 11 Ch.D., 148.
(6) (1872) 8 Ch. App. Cas., 83.
(7) (1918) 23 C.W.N., 431.
(8) (1878) 8 Ch.D., 377.

OFFICIAL ASSIGNEE, MADRAS v. NARASIMHA MUDALIAR.

COUTTS TROTTER, C.J.

JUDGMENT.

COUTTS TROTTER, C.J.—I have had the advantage in this case of perusing the judgment about to be delivered by BEASLEY, J. It sums up the results arrived at after a long discussion between him, ODGERS, J., and myself and it may be taken to be the judgment of the Court. I only add a few words because I feel it is incumbent upon me to do so, as for 8 years I was in charge of the Insolvency jurisdiction of the Original Side of the High Court. The procedure which was prohibited by the judgment of the Calcutta High Court in *Jnanendra Bala Debi* v. *The Official Assignee of Calcutta*(1) was, that persons alleged to be indebted to the bankrupt estate known in our Court for some reason I never quite understood as "garnishees" should be examined, which of course in effect means cross-examined, by the Official Assignee under the powers of section 36, and that statements made by them not amounting to a definite admission of indebtedness to the estate should be used under section 7 to ask the Court there and then to pass a decree against the garnishee, on the ground that, though they are not tantamount to direct admissions, they were available as evidence to show that their answer to the claim put forward by the Official Assignee was untrue. That procedure in my opinion was not only rightly denounced by the Calcutta High Court but is definitely prohibited by the statute as amended. That is sufficient to uphold the judgment of WALLER, J., and dismiss this appeal.

But a much wider question was argued, and I think it would be wrong for us not to express our opinion upon it. It was said, on the authority of the English cases cited by my learned brother, that where a debt was

(1) (1925) I.L.R., 54 Calc., 251.

not admitted, being a debt as to which the Official Assignee stood in no higher position by reason of the special provisions of the Bankruptcy Law than the debtor himself, the matter could not be tried within the jurisdiction of the Insolvency Court. That that is the law in England, I do not question. I do not think it is, or was intended to be, the law in India under the Presidency Towns Insolvency Act. It is obvious that the Indian statute aims at relieving the Official Assignee in charge of a bankrupt estate, in suitable cases, from incurring the heavy burden of institution fees, which would necessarily be incurred if he were compelled in all cases to have recourse to ordinary suits (see section 115 of the Act). I am quite content to leave it as a matter of discretion to the learned Judge, as to whether in any given case he should deal with such a claim in the Insolvency Court here or refer it to the machinery of an ordinary suit. It must be remembered that the Court-fees of an ordinary suit in England are very small, and that no inconvenience is caused, and no obstruction is put in the way of the bankrupt estate, by confining the jurisdiction of the Bankruptcy Court to claims where the title of the trustee of the bankrupt estate stands on a higher footing than would have been the case if the debtor had been suing himself. In India, it is quite a different matter, and in many cases it would be quite impossible to obtain a sum out of such estate as is actually in the hands of the Official Assignee sufficient to institute proceedings for the recovery of outstanding debts, though the Official Assignee's claim may be a perfectly good one. I am quite content that it should be left to the Judge in Insolvency to decide, on the balance of convenience, whether it is best to try such cases himself or to relegate their disposal to the ordinary Courts; and that is a discretion which, when exercised by him, an appellate

OFFICIAL ASSIGNEE, MADRAS v. NARASIMHA MUDALIAR.

COUTTS TROTTER, C.J.

Court would interfere with only on grounds which are well-known and must necessarily be of rare occurrence. It is quite easy for the Judge who tries the summons to insist upon the Official Assignee giving to the other side what is in effect a pleading giving detailed particulars of the nature of his claim and to give full discovery of documents if that is sought for. On the other hand, there may be cases where the person sought to be made liable to the estate lives at a great distance, or where the estate has ample funds for payment of the necessary institution fees, in which it would be just and right for the learned Judge in Insolvency to decline to deal with the matter here in Madras. In this case WALLER, J., has exercised his discretion that this was a case which was properly triable by the ordinary Courts; and with that exercise of discretion I decline to interfere.

I may add, in conclusion, that, now that our attention has been drawn to it, I think the present form of what is called a garnishee summons is capable of being construed as throwing the burden of proof not on the Official Assignee but on to the so-called garnishee. In my experience, the Official Assignee never sought to take that attitude, and always proceeded to prove his case as if he were a plaintiff. Though it may not be a practical difficulty, I think it is proper that the form of summons should be amended so as to show that the burden of proof does rest on the Official Assignee. That is a matter for the Rules Committee and one of no real difficulty, the only point of importance being to omit the words which call upon the garnishee to show cause why he should not be adjudged to be a debtor to the estate, and substitute some other form of words which will make it clear that he is only called upon to meet a claim, the burden of proving which lies upon the Official Assignee.

ODGERS, J.—In this case, I had prepared a separate judgment, but I agree so entirely with the judgment about to be delivered by my brother BEASLEY, that I do not feel I should be justified in taking up time by trying to express what he has so clearly enunciated. I agree that the appeal should be dismissed.

OFFICIAL ASSIGNEE, MADRAS v. NARASIMHA MUDALIAR.

ODGERS, J.

BEASLEY, J.—This appeal raises a question of the greatest importance in Insolvency. It is an appeal from the order of WALLER, J., dated the 13th of February 1928. One E. Narasimha Mudaliar is alleged by the Official Assignee of Madras to owe the estate of an insolvent, A. Swaminatha Mudaliar, Rs. 1,445-2-0. A summons was taken out by the Official Assignee in order to obtain that money from Narasimha Mudaliar. This summons has come to be known on the Insolvency side of this High Court as a garnishee summons and the person summoned is known as the garnishee. When the matter came before WALLER, J., who was then sitting in Insolvency, the garnishee admitted that he owed the insolvent Rs. 173 and WALLER, J., made an order for payment of that amount, but as regards the disputed balance, as the garnishee did not agree to that matter being tried out on that summons, WALLER, J., ordered it to be tried elsewhere.

BEASLEY, J.

The question which arises in this appeal is, whether the Insolvency Court has jurisdiction to make an order for payment by a stranger to the insolvency of money in respect of which that person disputes his indebtedness to the insolvent. WALLER, J, in his judgment, stated that the claim before him was very clearly a case under section 36 of the Presidency Towns Insolvency Act, and I think that it is obvious that it was so from the wording of the summons. Before the Presidency Towns Insolvency (Amendment) Act of 1927, the Court could summon before it any person who was supposed to be indebted

OFFICIAL ASSIGNEE, MADRAS v. NARASIMHA MUDALIAR. — BEASLEY, J.

to the insolvent and examine that person, and if on examination the Court was satisfied that he was indebted to the insolvent, the Court could forthwith make an order upon him for the payment of the amount in which he was found to be indebted. But the Presidency Towns Insolvency (Amendment) Act of 1927 has brought about an alteration, and sub-sections (4) and (5) of section 36 of the Presidency Towns Insolvency Act of 1909 have been amended by the substitution of the following words "if on his examination any such person admits," for the words "if on the examination of any such person, the Court is satisfied." The result of this amendment is, that, where after an examination a person admits that he owes a sum of money to the insolvent, the Court can then and there order him to repay that amount to the Official Assignee, whereas, before the amendment, the Court could make that order even where there had been no such admission. In the case before us, the garnishee admitted that he owed a portion of the amount claimed by the Official Assignee but disputed that he owed the balance. WALLER, J., was therefore perfectly right in making an order upon him for the payment of the admitted amount and in declining to try the question of the disputed balance. The amendment to section 36 makes it quite clear that the Court has no jurisdiction whatever, on a summons under that section, to make orders for payment of debts disputed by garnishees. This disposes of the appeal, but we are asked to decide another important question arising out of this appeal, as it is argued on behalf of the Official Assignee that section 7 of the Presidency Towns Insolvency Act of 1909 gives the Insolvency Court jurisdiction to try money claims made by the Official Assignee, even where those claims are disputed by garnishees. Section 7 is as follows :—

"Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

The Official Assignee invites the Court to put the widest possible construction upon that section and to say that the Insolvency Court has jurisdiction to collect simple money debts owing to the insolvent's estate. It is argued by Mr. R. N. Aingar on the other side, that section 7 only entitles the Insolvency Court to deal with matters arising in insolvency, such as questions of fraudulent preferences and relation-back and so on, and that as regards simple money claims, the Official Assignee merely stands in the shoes of the insolvent, and has no greater rights conferred upon him by the Insolvency Law than the insolvent himself had before his insolvency. If that contention is well-founded, then it is not necessary to consider what effect section 2 of the Presidency Towns Insolvency (Amendment) Act of 1927 has upon that section, and it is therefore necessary to consider first of all whether the Insolvency Court before the amendment had jurisdiction to try simple money claims and, if it had, whether the section as amended, has taken away or limited that right. In this connexion there are two decisions of the English Courts, namely, *Ex parte Brown, In re Yates*(1) and *Ellis* v. *Silber*(2), which are of great importance. In the former case, it was held that the Court of Bankruptcy is the proper Court to try questions in which the trustee in bankruptcy has a higher and better title than the bankrupt, that is to say, in those cases where the

(1) (1879) 11 Ch.D., 148. (2) (1872) 8 Ch. App. Cas., 83.

OFFICIAL ASSIGNEE, MADRAS v. NARASIMHA MUDALIAR. — BEASLEY, J.

Bankruptcy Act itself gives him that better title, for example, questions of fraudulent preferences, but where a trustee in bankruptcy does not stand in any higher position than the bankrupt himself would have stood, the Bankruptcy Court ought not to assume jurisdiction, but should leave the matter to be dealt with by the ordinary Courts. In the latter case, Lord SELBORNE, L.C., said that the general proposition, that whenever a trustee in bankruptcy has a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, was a proposition entirely without warrant of anything in the Acts of Parliament and wholly unsupported by any trace or vestige whatever of authority. The position in England seems to be that the Bankruptcy Court does not entertain simple money claims by the trustee or Official Receiver in bankruptcy against strangers to the bankruptcy, but that such claims are tried in other Courts, unless there is an admission by the stranger to the bankruptcy, on an examination, that he is indebted to the insolvent, in which cases sub-section (4) of section 25 of the English Bankruptcy Act enables the Court to make an order upon him for payment, although RANKIN, J., in *Jnanendra Bala Debi* v. *The Official Assignee of Calcutta*(1) said: "The power under the English Act has hardly been exercised but it is quite clear that it is exercisable", and the English section is the prototype of section 36 of the Presidency Towns Insolvency Act, which before the recent amendment differed from it in that the Court could, on the examination of such a person, on being satisfied that he was indebted to the insolvent, make the order for payment. This distinction has, however, now been removed by the Presidency Towns

(1) (1925) I.L.R., 54 Calc., 251.

Insolvency (Amendment) Act of 1927, sub-section (4). It seems, therefore, that even under section 25 of the English Bankruptcy Act, the Bankruptcy Court rarely exercises the power it has given to it by that section, and *Ex parte Brown, In re Yates*, 1) and *Ellis* v. *Silber*(2), are authorities for the statement that in England the Bankruptcy Court ought not to entertain simple money claims against strangers to the bankruptcy. But it is a question whether the Bankruptcy Court in England has not a discretion nevertheless to entertain such claims but does not exercise it. Conditions in England are totally different from those in this country, and the collection of simple money debts where they are disputed by the debtors is a comparatively simple, speedy and inexpensive matter, whereas in India, if the Official Assignee is to be compelled to file suits in every case against a stranger who contests the claim, his position will be an impossible one. He will have to incur heavy expenses in order to file those suits and will be obstructed by those who are indebted to the insolvent at every turn, and there is no question that, if there is a discretion in the Insolvency Court to decide such claims in that Court, and it is properly exercised, the collection of the assets of the insolvent must be a much simpler and less expensive matter. The question is whether section 7 does give the Insolvency Court such a discretion, and the views expressed by RANKIN, J., in I.L.R., 54 Calc., 251 are of great assistance on this point. The facts in that case were that a lady was alleged by the Official Assignee to be a mere benamidar for the insolvent, and she was summoned under section 36 of the Presidency Towns Insolvency Act and as a result of the examination of the lady, the Official Assignee moved

(1) (1879) 11 Ch., D 148. (2) (1875) 8 Ch. App. Cas., 83.

OFFICIAL ASSIGNEE, MADRAS v. NARASIMHA MUDALIAR.

BEASLEY, J.

the Court for a declaration that she was merely a benamidar for the insolvent. On page 258 RANKIN, J., stated as follows:—

"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 benamidar 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."

It is, I think, clear from this, that RANKIN, J., considered that the Insolvency Court had discretion under section 7 to deal with simple money demands, and that right apparently has been exercised in the Calcutta High Court on its Insolvency side. But I also gather from his observations that the usual procedure is not to proceed by way of motion but by regular suit. On page 263, after dealing with the examination under section 36, RANKIN, J., says:

"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."

I see no reason for differing from the view expressed by RANKIN, J., but the question is, whether the amendment to section 7 and section 36 has altered the position as it then was in 1925, when that case was decided. The amendment to section 36, I have already referred to and I now propose to deal with section 2 of the Presidency

OFFICIAL ASSIGNEE, MADRAS v. NARASIMHA MUDALIAR.

BEASLEY, J.

Towns Insolvency (Amendment) Act of 1927, which amends section 7 of the Act of 1909. The amendment is contained in a proviso which is as follows :—

"Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under section 36, be exercised only in the manner and to the extent provided in that section."

In view of the fact that I agree with RANKIN, J., that section 7 before its amendment was not limited in its scope to matters in which the Official Assignee by the operation of the Insolvency Law claims a higher title than the insolvent would himself have had, I have to consider whether the amendment puts a limitation upon the jurisdiction of the Court, and in this connexion, I have to consider why this amendment and the amendment to section 36 were introduced. It is obvious that the amendment to section 36 was to prevent anything like a summary trial and orders being passed against strangers to the insolvency except upon the admission of those persons. It was to prevent a contested enquiry under the guise of an examination under that section, and I think it was intended by the amendment to section 7 to prevent the stranger to the insolvency from being first of all examined under section 36, and then, under section 7, having used against him his deposition taken under the former section. I am of the view that it is only when the garnishee has previously been examined under section 36 that any limitation is placed upon the jurisdiction of the Court. The proviso says "for the purpose of deciding any matter under section 36" and section 36 deals with the examination of persons suspected of being indebted to the insolvent. In all such matters, the Court has no jurisdiction under section 7 to deal with them, unless the garnishee admits his indebtedness. For the reasons I have already stated, in

my view, the Official Assignee is entitled to proceed by way of motion under section 7 of the Act in those cases where he has a money claim against a stranger to the insolvency. It is then for the Court to say whether the matter is one which it is reasonable, having regard to the convenience of all concerned, to deal with on a motion or whether it should be dealt with in a regular suit. But, in my opinion, no money claim in which any difficult questions arise should be dealt with by way of motion, nor should large claims ; only simple cases capable of easy and speedy proof should be so dealt with. But I am clearly of the opinion that, when once the Official Assignee has summoned a witness under section 36 of the Act, if that witness disputes his indebtedness, the Official Assignee has then no option but to proceed by way of suit.

In the result, I agree with the learned CHIEF JUSTICE and my brother ODGERS, J., that the judgment of our brother WALLER, J., should be confirmed and the appeal of the Official Assignee dismissed.

B.C S.