

properly tried. We, accordingly, discharge the decrees of the courts below and remand the case to the court of first instance with directions to re-admit the suit under its original number and try it *de novo* after framing proper issues. Costs here and hitherto will be costs in the cause.

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*Appeal decreed—Cause remanded.*

## REVISIONAL CIVIL.

*Before Mr. Justice Piggott.*

NAND KISHORE (PETITIONER) v. SURAJ MAL AND OTHERS (OPPOSITE PARTIES).\*

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April 28.

*Act No. III of 1907 (Provincial Insolvency Act) section 43.—Receiver's report—Insufficient to base a conviction on.*

On report by a receiver of an insolvent's property to the effect, that the insolvent had fraudulently transferred certain property of his just before he was declared an insolvent, and that he had concealed the fact that he was the owner of a certain shop, the court convicted him under section 43 of the Provincial Insolvency Act. *Held*, that a receiver's reports do not constitute legal evidence upon which an order under section 43 of the said Act can be based, and therefore a conviction under section 43 based only on a receiver's report is bad in law. *Emperor v. Chiranjil Lal* (1), *Nathu Mal v. The District Judge of Benares* (2), *ex parte Campbell*, *In re Wallace* (3) referred to.

THE facts of this case were as follows:—

One Nand Kishore was declared insolvent on the 12th of August 1911. On the 12th of March, 1913, he applied for an order of discharge. The receiver made two written reports to the court on the 25th of February, 1913, and the 15th of March, 1913, respectively, in which he stated that the insolvent had made a fraudulent and fictitious gift of certain property and had fraudulently omitted certain other property from the schedule of assets filed by him. In May, 1913, an application was made asking the court to take action under section 43, clause (2) of the Provincial Insolvency Act. The grounds upon which the application was based were the fraudulent gift and the fraudulent concealment aforesaid, as well as concealment of some account books, &c. Nand Kishore was examined in connection with both the matters, namely, his

\* Civil Revision No. 13 of 1915.

(1) (1914) I. L. R., 36 All., 576. (2) (1910) I. L. R., 32 All., 547.

(3) (1885) 15 Q. B. D., 213.

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application for discharge and the application against him for action under section 43, clause (2), on the 6th of June, 1913. The Court of Small Causes, which was the court exercising insolvency jurisdiction, found that there were no sufficient materials to establish the grounds of concealment of account books, &c. The court found that the receiver's reports proved the first two charges and on the 5th of July, 1913, it refused the application for discharge and sentenced Nand Kishore to one year's simple imprisonment. On appeal the District Judge maintained the conviction on the same grounds, but reduced the sentence to six months. Nand Kishore applied in revision to the High Court.

Mr. *W. Wallach* (with him Mr. *A. P. Dube*), for the applicant :—

The conviction had been based entirely on the receiver's reports. In proceedings under section 43, clause (2), the receiver's written reports were not legal evidence upon which the court could act. It was only under certain specified circumstances that a receiver's report was deemed to be evidence. Section 44, clause (4), of the Provincial Insolvency Act, provided that the receiver's report shall be deemed to be evidence, and the court may presume its correctness, only for the purposes of that section, namely, the granting or refusal of an order of discharge. For other purposes, for example, those of section 43, clause (2), the ordinary law of evidence applied and the receiver had to be called as a witness to prove the statements contained in his report and be subjected to cross-examination. In proceedings under section 43, clause (2), a formal criminal charge need not be drawn up; but the court must proceed on legally admissible evidence and not import into them materials which were deemed to be evidence only by a special rule and for a special purpose. The cases of *Emperor v. Chiranjilal* (1), and *Nathu Mal v. The District Judge of Benares* (2), relied on by the lower court were not in point. In both of those cases there was the deposition of witnesses and other legal evidence upon which the court had proceeded. In the present case the point was not that the insolvent was not aware of the charges brought against him, but that those charges had not been established by legal evidence.

(1) (1914) I. L. R., 36 All., 576.

(2) (1910) J. L. R., 32 All., 547.

Mr. B. E. O'Connor, for the opposite party:—

The lower court had not proceeded exclusively on the reports of the receiver. The insolvent himself was examined on oath; and there was other evidence also, namely, certain entries in the account books. The insolvent called witnesses, who were examined by the court.

[PIGGOTT, J.—As to the account books the insolvent was not confronted with the entries therein nor asked to explain them.]

It could not be said that the insolvent was in any doubt about the nature of the charges against him or that he was taken at a disadvantage. Due notice was given to his pleader of the receiver's reports and the pleader took certain objections to them. A reference to section 27, clause (4) of the Provincial Insolvency Act, would show that the receiver's report could be taken into evidence for purposes other than those mentioned in section 44; and that the report became part of the proceedings of the court. The Provincial Insolvency Act was closely modelled upon the English Bankruptcy Act and the case of *ex parte Campbell*, In re. *Wallace* (1), which was under the latter Act, was in point. The objection raised by the applicant was a very technical one and was not sufficient to call for interference in revision.

Mr. W. Wallach, in reply.—

In the case cited by the other side, the question was one of approving a proposed composition, for which purpose section 18 of the English Act, which corresponds to section 27 of the Indian Act, laid down that the receiver's report might be looked at. That case did not carry the admissibility in evidence of the receiver's report any further than what it was under the Indian Law. Because a certain matter was deemed to be evidence for one purpose, it did not follow that it was to be deemed evidence for another. The account books by themselves did not prove anything against the insolvent; nor was there anything in his statement upon which the conviction could be supported.

PIGGOTT, J.—In this case an appellate order by the District Judge of Cawnpore has been called up by this Court in the

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exercise of the general powers of superintendence and revision conferred upon it by section 46, clause (1) of the Provincial Insolvency Act, No. III of 1907. The order is one sentencing an insolvent named Nand Kishore to undergo simple imprisonment for a period of six months under section 43 of the said Act. The allegations held to be proved against him are :—

(1) That in the year 1908, at a time when the business which he was conducting was beginning to fail he fraudulently transferred certain property by way of gift to his wife and other members of his family, (2) that in the schedule of assets submitted by him along with his application to be declared an insolvent he fraudulently concealed the existence of the property nominally transferred by him, and also the fact that he was the owner of a shop in what is known as the Kuli Bazar at Cawnpore. Nand Kishore's case was that the transfer by way of gift was made in good faith, and that the shop in the Kuli Bazar has never been his property. The finding against Nand Kishore, both in the court of first instance and in the District Court, has been mainly based upon certain reports submitted by the receiver. I hold that those reports do not constitute legal evidence for the purpose for which they have been used and I should not have taken them into account against Nand Kishore. The learned District Judge has referred to the decision of a Full Bench of this Court, in a case reported under the heading *Emperor v. Chiranji Lal* (1). Somewhat more in point was the earlier decision of a Bench of this Court in *Nathu Mal v. The District Judge of Benares* (2). Neither of these precisely touch the question which has been argued before me ; but there can be no doubt that an order sentencing an insolvent to undergo imprisonment must be based upon legal evidence and the depositions of witnesses whom he had an opportunity of cross-examining. The report of a receiver may be evidence for the special purpose of determining whether an insolvent is or is not entitled to an order of discharge, vide section 44 of the Act. It may also be taken into consideration by a court for certain other purposes, as for instance when considering the admissibility of a proposal for composition under section 27 of the same Act. It is not evidence for the purpose of all

(1) (1914) I. L. R., 36 All., 576.

(2) (1910) I. L. R., 32 All., 547.

possible proceedings under the Act. I have examined the facts of the present case, and I am quite satisfied that there are a number of points on which the receiver might well have been cross-examined and on which Nand Kishore was fully entitled to an opportunity of cross-examining before the statements of fact embodied in his report could be accepted and acted upon as they have been done in the courts below. I do not gather from the record that either the property purporting to be transferred under the deed of gift of 1908, or the shop in the Kuli Bazar has been taken possession of by the receiver, as part of the assets of the insolvent, or made available for the satisfaction of the creditors. The learned Judge of the Small Cause Court who heard this case in the first instance would not, I am confident, have dispossessed any person whom he found in possession of this shop on the strength of the evidence which, in his opinion, justified the infliction upon Nand Kishore of a sentence of imprisonment. Yet it is a more serious matter to sentence a man to undergo imprisonment than to deprive another of his possession over a building. In the argument addressed to me, in support of the order of the District Judge, reference was made to an English case, *ex parte Campbell, In re. Wallace* (1). That case really bears out the view which I take of the present case. Certain reports submitted by a receiver were allowed to be taken into consideration in that case precisely as they could have been under section 27 of the Provincial Insolvency Act, No. III of 1907. But the case is no authority for the proposition that such reports could have been treated as evidence in a proceeding, the object of which was to subject an insolvent to the penal provisions of the Insolvency Act. I am unable to sustain the order of the District Court in this matter, and the only question that I have to consider is what order I should substitute for it. On a review of the entire facts of the case, I am not prepared to direct that further proceedings should be taken in this matter. I have already affirmed an order of the court below refusing Nand Kishore his discharge, and it is possible that proceedings involving further inquiry into the matters litigated in connection with the order now before me may yet have to be taken. If it be found hereafter that evidence

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is forthcoming, such as to justify the insolvency court in taking possession, either of the shop in the Kuli Bazar or of the property purporting to be dealt with by the deed of gift of 1908, as assets belonging to Nand Kishore at the time when he was declared insolvent, and therefore available for the satisfaction of his creditors, it may be that the question of subjecting Nand Kishore to punishment for his dealings in this connection may require further consideration. Unless and until something of the sort occurs, I am not of opinion that the facts which were before the courts below were such as to justify the application of section 43 of the Provincial Insolvency Act in this case. My order is that the order of the court below is set aside and that the security which I understand Nand Kishore has furnished for his attendance, if required, is hereby discharged. I make no order as to costs.

*Conviction set aside.*

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## APPELLATE CIVIL.

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*Before Mr. Justice Chamier and Mr. Justice Piggott.*

ABDUL GHAFAR (DEPENDANT) v. NUR JAHAN BEGAM (PLAINTIFF) AND MUMTAZ-UD-DIN AND OTHERS (DEPENDANTS).\*

*Act No. IX of 1908 (Indian Limitation Act), schedule I, article 62—Limitation—Succession certificate obtained by one of the heirs of a deceased person—Suit by remaining heir for recovery of her share.*

A certain Mohammedan in the year 1903 obtained a succession certificate to realise debts due to his deceased uncle and realised some of those debts. In the year 1913, the widow of his brother, who had died subsequent to the death of his uncle, brought the present suit for her husband's share of the money realised. *Held*, that article 62 of the first schedule to the Indian Limitation Act, 1908, governed the suit, and as no money had been realised by the holder of the succession certificate within three years of the suit it was barred by limitation. *Amina Bibi v. Najm-un-nissa Bibi* (1), *Parsotam Rao Tantia v. Radha Bai* (2), *Masik-uddin v. Imtiaz-un-nissa Bibi* (3), *Mahomed Wahib v. Mahomed Ameer* (4), followed. *Umardaraz Ali Khan v. Wilayat Ali Khan* (5) distinguished.

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\* First Appeal No. 2 of 1915, from an order of Srish Chandra Basu, District Judge of Budaun, dated the 18th of November, 1914.

- (1) (1915) I. L. R., 37 All., 233.      (3) (1915) I. L. R., 37 All., 40.  
 (2) (1915) I. L. R., 37 All., 318.      (4) (1905) I. L. R., 32 Calo., 527.  
 (5) (1896) I. L. R. 19 All., 169.