INSOLVENCY JURISDICTION.

Before Mr. Justice Dunkley.

IN THE MATTER OF T.S.N. CHETTYAR FIRM.*

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Apl. 24.

Insolvency—Rangoon Insolvency Act, s. 7—Cases in which Official Assignee claims higher title than insolvent had—Cases falling within ss. 55, 56—Scope of s. 7 not confined to these—Discretion of Insolvency Court to exercise jurisdiction—Far distant third parties—Inadvisability of deciding all disputes on motion—Proviso to s. 7, application of—Rangoon Insolvency Act, s. 36 (4) (5).

Section 7 of the Rangoon 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 that which the insolvent himself would have had; nor is it confined to cases falling within ss. 55 or 56 of the Act. But the Insolvency Court may, in its discretion, refuse to exercise its jurisdiction in fairness to far distant third parties whose rights may be difficult to ascertain apart from a regular suit, or when it is not advisable to decide on motion the questions in dispute.

Jnanendra Bala v. *The Official Assignee, Calcutta*, I.L.R. 54 Cal. 251, followed.

There is nothing in the provisions of the proviso to s. 7 to show that it applies only when the respondent third party has been summoned and examined under s. 36 of the Act. But the application of the proviso is restricted to the two matters arising under sub-sections (*4*) and (*5*) of the Act, that is, under sub-section (*4*) the question whether the third party is indebted to the insolvent, or under sub-section (*5*) the question whether the third party is in possession of property belonging to the insolvent. Unless all parties agree, if such indebtedness or possession is denied by the third party the jurisdiction of the Court to try the matter is wholly excluded and it does not matter whether the denial has been made in the course of examination under s. 36 or at any other time.

S. 36 (*5*) has in view only the case of property admittedly belonging to the insolvent the whereabouts of which the Official Assignee desires to discover; it relates to possession and not to title. Where the ownership of or title to the property is in dispute, s. 36 (*5*) has no application and the jurisdiction of the Insolvency Court is not barred in such cases by the proviso to s. 7.

Chinnappa Mudali v. *The Official Assignee, Madras*, I.L.R. 55 Mad. 385; *Evelyn Popaly* v. *The Official Assignee, Madras*, [1938] Mad. 72, referred to.

The Official Assignee, Madras v. *E. Narasimha Mudaliar*, I.L.R. 52 Mad. 717, dissented from.

Clark for the Official Assignee.

P. K. Basu for the respondent Palaniappa.

Foucar for respondents 1 and 2 in Petition No. 11.

* Insolvency Case No. 14 of 1930 of this Court.

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DUNKLEY, J.—In connection with the insolvency of the T.S.N. Firm twenty petitions have been filed by the Official Assignee for setting aside certain transfers on various grounds, and declarations that certain immovable properties vest in the Official Assignee as being properties of the insolvent firm, divisible among the creditors. These petitions have been numbered serially. In petitions Nos. 1, 8, 9, 11, 12, 15, 19, 4, 5, 14 and 16, Mr. P. K. Basu for A.P.L. Palaniappa Chettyar, and Mr. Foucar for the 1st and 2nd respondents in petition No. 11, have taken the objection that either the Insolvency Court has no jurisdiction to hear and decide these petitions, or, if it has jurisdiction, then the exercise of that jurisdiction is discretionary, and on the facts alleged in the petitions the Insolvency Court ought to decline to exercise jurisdiction and to direct the Official Assignee to prosecute his claims by instituting regular suits in the ordinary civil courts having jurisdiction in respect of the questions in dispute in the several petitions, in regard to which objection has been taken to jurisdiction.

The jurisdiction of the Insolvency Court in matters of this kind is conferred by the provisions of section 7 of the Rangoon Insolvency Act (formerly the Presidency-Towns Insolvency Act), and the extent of the jurisdiction conferred by that section and the manner of its exercise have been considered in a number of decisions of the High Courts of Calcutta and Madras, and there are numerous decisions of the English Courts under the similar provisions of the Bankruptcy Acts. I am well aware that, according to the English decisions, where the Trustee in Bankruptcy claims to the property in dispute as against a stranger to the bankruptcy no higher right by reason of the special provisions of the bankruptcy law than the insolvent himself had, the question at issue between the Trustee and such third party cannot

be tried within the jurisdiction of the Bankruptcy Court, and I consider it unnecessary to refer to the decisions on this point. But it has been pointed out in many decisions that under the provisions of the Rangoon Insolvency Act the jurisdiction of the Insolvency Court in regard to claims by the Official Assignee against third persons is a discretionary jurisdiction; that conditions existing in India and Burma are entirely different to the conditions existing in England, and for this reason in India and Burma the discretion of the Insolvency Judge cannot be fettered by such rigid rules as those imposed by the English Bankruptcy Law. The leading cases of the Calcutta and Madras High Courts on this subject are *Jnanendra Bala Debi* v. *The Official Assignee of Calcutta and others* (1) and *The Official Assignee of Madras* v. *E. Narasimha Mudaliar* (2). Mr. Basu has argued that these decisions are opposed to one another and that in Calcutta the rigid rule of English Law has been adopted, but, in my opinion, that is not so. In my view, the principle of law laid down in both these cases is exactly the same and is correctly enunciated in the last paragraph of the head-note of the Madras case, which reads as follows :

"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 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."

No doubt the application of this principle is divergent in the two Courts, and the Madras High Court in its insolvency jurisdiction is prepared to entertain and decide many disputes between the Official Assignee and

(1) (1925) I.L.R. 54 Cal. 251. (2) (1929) I.L.R. 52 Mad. 717.

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strangers to the insolvency which would in the Calcutta High Court be referred to the ordinary Courts for decision, but this is nothing more than a divergence of practice. It is, as a matter of law, clear that section 7 of the Rangoon 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 that which the insolvent himself would have had. So far as this Court is concerned I am, with the greatest respect, content to adopt and follow the practice of the Calcutta High Court. In *Jnanendra Bala Debi* v. *The Official Assignee of Calcutta* (1) Rankin J. said (at pages 258 & 259):

"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 *benamidar* 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 *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 sections 55 and 56 of the Presidency-Towns Insolvency Act. There are many other cases. There may be cases, for

(1) (1925) I.L.R. 54 Cal. 251.

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 righ tasserted by the Official 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."

With the greatest respect, I am prepared to exercise my discretion in accordance with the rules laid down by Rankin J.

Since that judgment was delivered a proviso has been added to section 7 of the Rangoon Insolvency Act in the following terms :

" 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 a manner and to the extent provided in that section."

This proviso was considered by a Full Bench of the Madras High Court in *The Official Assignee of Madras* v. *E. Narasimha Mudaliar* (1), and it was held that the proviso applied only when the respondent third party had been summoned and examined under the

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provisions of section 36 of the Act. With the greatest respect, I find myself unable to accept such a narrow interpretation of the proviso. The provisions of the proviso have again been considered by the Madras High Court in *N. Chinnappa Mudali and three others* v. *The Official Assignee of Madras* (1) and very recently in *Evelyn Popaly* v. *The Official Assignee of Madras* (2), and the original decision in *The Official Assignee of Madras* v. *E. Narasimha Mudaliar* (3) appears to have been considerably modified. With the greatest respect, I am unable to agree that the proviso applies only when the third party has been actually examined under section 36, for I can find nothing in the proviso limiting its application in this manner, But I agree with the decision in *Chinnappa Mudali* v. *The Official Assignee of Madras* (1) that the application of the proviso is restricted to the two matters arising under sub-sections (4) and (5) of section 36, that is, under sub-section (4) the question whether the third party is indebted to the insolvent, or under sub-section (5) the question whether the third party is in possession of property belonging to the insolvent. Unless all parties agree, if such indebtedness or such possession is denied by the third party, the jurisdiction of the Insolvency Court to try the matter is, in my opinion, wholly excluded, and it does not matter whether the denial has been made in the course of examination under section 36 or at any other time. But sub-section (5) of section 36 has in view only the case of property admittedly belonging to the insolvent, and the object of the sub-section is to enable the Official Assignee to discover its whereabouts ; it relates to possession only and not to title. Where the ownership of, or title to the property is in dispute this sub-section has no

(1) (1931) I.L.R. 55 Mad. 385. (2) I.L.R. [1938] Mad. 72.
(3) (1929) I.L.R. 52 Mad. 717.

application, and consequently the jurisdiction of the Insolvency Court under section 7 is not barred in such cases by the proviso to the section.

[On the facts his Lordship said that the partners of the T.S M.R.K.R.M. Firm of Pyapôn were also partners of the insolvent firm of T.S.N. and consequently the assets of the former firm had vested in the Official Assignee. Palaniappa was at all material times its agent and had transferred the assets of the firm which the Official Assignee was claiming. Palaniappa was a respondent in all the petitions and his near relations were the other respondents. Palaniappa was in possession of the properties and the relatives were his nominees only. His Lordship held that in no case was the jurisdiction of the Court barred by the proviso to s. 7. Palaniappa was bound to account to the firm for all his dealings and therefore was accountable to the Official Assignee ; and therefore the petitions could be heard and decided by the Insolvency Court.]

On one general ground I have no doubt as to what the answer to this question ought to be. Palaniappa as agent of the T.S.M.R.K.R.M. Firm was acting in a fiduciary capacity towards the firm and was bound to account to the firm with the utmost strictness for all his dealings with the firm's property. He is bound to account to the Official Assignee with equal strictness, as the Official Assignee has become vested with all the assets of the firm, and he must account in these Insolvency proceedings and nowhere else. It would be monstrous if the Official Assignee, in order to obtain a proper accounting from the agent of an insolvent and to investigate his dealings with his principal's property, were obliged to undergo the extreme inconvenience and incur the great expense of filing a series of suits against the agent in various civil

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Courts. Clearly such an account can be taken and such an investigation can be made most conveniently and expeditiously in the Insolvency Court and ought to be done here. In my opinion, these petitions afford striking examples of the kind of exceptions to the ordinary rule which Rankin J. must have had in mind when in *Jnanendra Bala Debi* v. *The Official Assignee of Calcutta* (1) he said (at page 259) :

"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."

In four of the petitions now under consideration there are, of course, other respondents, but they are so intimately connected with A.P.L. Palaniappa as to raise the inference that they are his nominees, and, as it appears that even in these four cases Palaniappa is in possession of the properties concerned, the insertion of their names in certain transfers cannot be a sufficient ground for the exercise of my discretion in a different way.

A further point has been raised on behalf of A.P.L. Palaniappa in connection with petitions Nos. 4, 5, 14 and 16 ; and that is that the properties concerned in these petitions originally belonged to the T.S. Firm, and that the original transfers by the T.S. Firm have been set aside by this Court, in previous judgments in this insolvency, only to the extent of the interest of the partners of T.S.M.R.K.R.M. in the T.S. Firm, and on this foundation an elaborate argument based on the law of partnership has been constructed. This point has, in my opinion, already been dealt with and answered in the judgment of my brother Braund, dated 15th

(1) (1925) I.L.R. 54 Cal. 251.

December 1937, and in the judgment of the Court of appeal on appeal therefrom (Miscellaneous Appeal 5 of 1938). In the course of his judgment Braund J. said :

" The T.S.N. Firm took over from the T.S. Firm all those assets relating to that part of its business which was conducted in Rangoon, India, and Malay States, while the new Pyapôn firm took over all the other assets of the T.S. Firm with one exception. It was in short a splitting up of the T.S. Firm into two parts and an apportionment of the assets between the two groups which emerged out of the T.S. Firm."

In his evidence in connection with the matter then before the Court Palaniappa said

" I was connected with T.S. Firm of Pyapôn for 5 or 6 years. After I was in T.S. Firm for 3 years it became T.S.M.R.K.R.M. T.S. business continued until it became T.S.M.R.K.R.M. T.S. was carrying on and T.S.M.R.K.R.M. was also carrying on ; one did not replace the other. T.S. only existed for the purpose of winding up."

It is common ground that Palaniappa was the duly constituted agent of both firms. Later in his evidence he said " I renewed the mortages in favour of T.S. Firm in the name of T.S.M.R.K.R.M. and put them in T.S.M.R.K.R.M. Firm." I myself was a member of the appellate Bench, which heard the appeal from the judgment of my brother Braund, and in the course of my judgment I said :

" The T.S.M.R.K.R.M. Firm took over as a going concern the T.S. business at Pyapôn, and all the assets of the latter business were shown as assets in the books of T.S.M.R.K.R.M. Firm. The agent who, as I have said, had a full power of attorney from the T.S. Firm, was obliged to deal with the properties remaining in the name of the T.S. Firm in accordance with the orders of the partners of the T.S.M.R.K.R.M. firm. The T.S. Firm ceased to have any beneficial interest in these properties, the beneficial interest in which was vested in the T.S.M.R.K.R.M. firm ; they, in fact, constituted the assets of the latter firm."

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It is therefore clear that when the T.S.M.R.K.R.M. came into existence the T.S. Firm ceased to exist except in name. In regard to the properties of which the T.S. Firm still continued to hold the legal title, that firm held such title as bare trustees for the T.S.M.R.K.R.M. Firm. The beneficial interest in all such properties belonged to the latter firm and has vested in the Official Assignee. Hence the whole of the interest originally held by the T.S. Firm in these properties has vested in the Official Assignee, and therefore, in my opinion, on this ground there is no substance in the point which has been raised.

The plea in bar of jurisdiction of this Insolvency Court therefore fails in respect of all the petitions and the petitions will now be heard and decided on the merits by this Court in due course. The costs of the trial of this issue in regard to jurisdiction, which has been raised by A.P.L. Palaniappa, must in any event be paid by him to the Official Assignee, advocate's fee twenty gold mohurs.