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Before Mr. Justice Pratt and Mr. Justice Geidt.

SHOSHI BHUSAN GHOSE *v.* GONESH CHUNDER GHOSE.*
[24, 25 and 30th April, 1902.]

Injunction—Specific Relief Act—(I of 1877) s. 54—Judicial discretion of Court—Where the act of the defendant amounts to an ouster of the plaintiff from the possession of the joint-property.

In a case where the act of the defendant amounts to an ouster of the plaintiff from his possession of joint-property, pecuniary compensation not being an adequate relief, an injunction would be the proper remedy.

Anant Ramrav v. *Gopal Balvant* (1) followed.

THE defendants, Soshi Bhusan Ghose and another, appealed to the High Court.

[501] This appeal arose out of an action brought by the plaintiff for a perpetual injunction to restrain the defendants from closing the door of a staircase leading to the roof of a two-storeyed house on a declaration that the said staircase was the joint-property of the parties. The allegation of the plaintiff was that the house was an ancestral property, and that he and the defendants were in possession of separate rooms of the house according to their convenience; that the parties were using jointly the staircase leading to the roof; that when the partition took place, although it was agreed that the plaintiff would use the staircase jointly with the defendants, yet the latter, owing to a family dispute, had closed the doors of the staircase against the wishes of the plaintiff. Hence the present suit was brought. The defence of defendant No. 1, who alone contested the suit, *inter alia*, was that the plaintiff had no cause of action; that the claim was barred by limitation; that he had been using the small room at the top of the staircase for the last eight or nine years adversely to the plaintiff, and had repaired it at his own expense to use it as his bedroom, in which he had placed valuable properties. The Court of first instance refused the plaintiff's claim for perpetual injunction, but issued a temporary injunction on all the defendants, restraining them from placing any obstruction to the plaintiffs using the staircase from the groundfloor to the first floor. On appeal the learned Subordinate Judge of Hoogly, Babu Hemanga Chunder Bose, having found that the staircase was the joint-property of the parties, issued a perpetual injunction restraining the defendants from closing the staircase or any portion of it.

Dr. Ashutosh Mookerjee and Babu *Biarj Mohun Mazoomdar* for the appellants.

Babu *Jogesh Chunder De* for the respondent.

PRATT AND GEIDT, JJ. The plaintiff and defendants, who are nearly related, live in a two-storeyed house of ten rooms, five on each floor. The plaintiff occupies two rooms on the groundfloor and two rooms on the first floor, while each of the three defendants occupies one room on the groundfloor and one room on the first floor. There is a staircase inside the house leading to the roof past the first **[502]** floor. The plaintiff's

* Appeal from Appellate Decree No. 1664 of 1900, against the decree of Babu Hemanga Chunder Bose, Subordinate Judge of Hoogly, dated the 13th of August 1900, reversing the decree of Babu Khetter Nath Dutt, Munsiff of Howrah, dated the 18th of April 1900.

(1) (1894) I. L. R. 19 Bom. 269.

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case was that this staircase was the joint-property of himself and the defendants, and that the defendants had obstructed it, so that he was unable to obtain access either to his rooms on the first floor or to the roof, and he, therefore, prayed for a perpetual injunction restraining the defendants from continuing the obstruction. The case of the defendant No. 1, who alone contested the suit, was that there had been a partition among the members of the family, and that at this partition the staircase had been allotted not to the plaintiff, but to the three defendants, and that he himself, with the consent of the other defendants had converted the *chillaghar* (or pen-house built on the roof to protect the staircase) into a room for his own use, where he kept valuables.

The learned Subordinate Judge, on appeal, has found that the staircase is the joint-property of both plaintiff and defendants, and has granted the injunction sought for. The defendant No. 1, on appeal to this Court, does not object to the injunction so far as it relates to the obstruction between the groundfloor and the first floor, but he objects to it so far as it compels him to refrain from obstructing the plaintiff's access to the roof from the first floor. It is contended on his behalf that, even if the staircase is joint-property, as it is found to be, the Subordinate Judge should not have granted an injunction against the latter obstruction, but should have held that this was a case not for an injunction, but for damages. In support of this contention reference is made to the *Shamnugger Jute Factory Company* v. *Ram Narain Chatterjee* (1), in which it was laid down that in granting or withholding an injunction, the Courts exercise a judicial discretion and weigh the amount of substantial mischief done or threatened to the plaintiff, and compare it with that which the injunction, if granted, would inflict upon the defendant. With that principle we are in entire agreement. But in the present case it is no mere case of damage to the plaintiff; the defendant's act amounts to an ouster of the plaintiff from his possession of the staircase which affords him access to the roof. In such a case an injunction is a proper remedy, as was held in *Anant Ramrav* v. *Gopal Balvant* (2). It is not a case where, to use **[503]** the language of s. 54 of the Specific Relief Act, pecuniary compensation would be an adequate relief. The mere fact that the defendant, in invasion of the plaintiff's right, has found a great convenience in converting the *chillaghar* into a room for keeping valuables is no ground for refusing an injunction. We find that the learned Subordinate Judge has rightly used his discretion in issuing the injunction, and we accordingly dismiss this appeal with costs.

Appeal dismissed.

29 C 503.

INSOLVENCY JURISDICTION.

Before Mr. Justice Stephen.

IN THE MATTER OF CHUNI LAL OSWAL.

[24th April, 1902.]

Insolvent Debtors Act (11 *and* 12 *Vic. Cap. XXI*) *ss.* 26 *and* 36—*Construction of.*

The words " and it shall be also lawful for the Court on those are any other occasions " in s. 36 of the Insolvent Debtors Act (11 and 12 Vic. Cap. XXI) are intended to receive a very wide application, and the Court has power to proceed under this section as soon as there is an insolvent.

(1) (1886) I. L. R. 14 Cal. 189 (198). (2) (1894) I. L. R. 19 Bom. 269.

Under s. 26 of the same Act, no rule should be granted except on the application of the assignee or an admitted creditor.

In the matter of Bucktwar Chand (1) followed.

No one can be regarded as a creditor until his name is admitted to the schedule, or until he establishes it there.

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THIS was a rule obtained by the adjudicating creditor, Soobolchand Chunder, calling upon Amuluk Chand Parruk, am-muktar of Hookum Chand, the sole proprietor of the firm of Binraj Hookum Chand, and Tuloke Chand, Monib gomastha of the same firm, to show cause why they should not deliver over to the Official Assignee all books, books of account, account and securities for money, and also all other stook-in-trade goods and effects belonging to the insolvents in their possession, power or control.

And for an order that the insolvents Chooni Lall Oswal, Prem Chand Oswal, Jetmull Oswal, Moolchand Oswal, Deep Chand **[504]** Oswal, and Bhimraj Oswal, and also Amuluk Chand Parruk and Tuloke Chand, should personally attend Court for the purpose of being examined touching the estate and effects of the insolvents.

Mr. *Garth* for Amuluk Chand Parruk and Tuloke Chand. I appear to show cause against the rule, and take a preliminary objection.

The application for the rule was made under s. 26 of the Insolvency Act. My point is that the applicant is not a creditor whose debt has been admitted or established within the meaning of s. 26. See *In the matter of Bucktwar Chand* (1).

No schedule has yet been filed by the insolvent, and the adjudicating creditor's debt has neither been admitted nor proved.

What the Act intended was this, that unless the insolvent admitted the creditor's claim in the schedule, the Official Assignee should make the application.

No order can be made under s. 36 of the Insolvency Act, except at the hearing of the insolvency. This section does not give any power to the creditor to apply to the Court to examine the insolvent.

A creditor cannot have a higher right under s. 36 than he has under s. 26.

S. 36 deals with the course to be adopted at the hearing.

The contention here is that the creditor has a right to make the application under s. 36. I submit that it is not upon the application of a creditor that such an order would be made, but only upon the Courts own motion if it thought fit.

Mr. *Dunne* for the insolvent. I support Mr. Garth's contention.

Mr. *Sinha* for the adjudicating creditor. The contention of the other side is that the examination can take place only after there has been a hearing. They cannot point to any words in s. 36 warranting that assertion.

If their contention be correct, it would lead to this, that between the date of filing the petition or adjudication and the date of the hearing, no order could be made under s. 36.

The insolvent could do what he likes with the property without any inquiry.

The Court would not make an order without being put in motion by some one.

[505] I submit that as regards s. 36, the Court has ample power to

(1) (1896) 1 C. W. N. 328.

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examine the creditor, the insolvent, and any one else, and upon the adjudicating creditors claim.

Under s. 26 different considerations arise.

This is an order which we ask for as corollary to the first part of the order under s. 26 : that part of the order as to handing over the goods comes after the examination.

If after the examination the Court found that this creditor had these goods, can it be argued that the Court has no power to order the goods to be made over?

If the examination of the insolvent can now be heard, then the rule under s. 26 follows as of course.

I submit that the case before Jenkins, J., *In the matter of Bucktwar Chand* (1), was a different case to the present. In that case there was only a rule under s. 26 : there was no order made under s. 36.

Another distinction is, that in that case the insolvent had petitioned and had not admitted the claim. Here it is an adjudication, and the creditors have sworn that the debt is due, which is not denied.

The basis of the insolvency is my sworn statement that I am a creditor. See *In re Alla Dinbhoy Hubibhoy* (2).

The word "established" as used in s. 26 of the Insolvency Act means "established by evidence."

In this case the claim that I am a creditor has been established as early as the 5th April last.

Mr. *Garth* in reply.

STEPHEN, J. In this case there is an order under s. 36 and a rule under s. 26. It is argued that both of these are bad. In the first place, it is said that proceedings cannot take place under any part of s. 36, until after the day appointed for the hearing. I cannot agree with this contention, and it seems to me that the limitation relating to the appointed day is confined to the first part of s. 36, and that the words "and it shall also be lawful for the Court on those or any other occasions" are intended to receive a very wide application. **[506]** I think the Court has power to proceed under this section as soon as there is an insolvent.

It has been further argued before me that the Court cannot proceed under s. 36 without an application on the part of an Assignee or by an admitted or established creditor. This contention also, I think, is unsound whether we take the words of the section itself or whether we take the purpose for which it was framed.

As regards the words of the section, I think the Court is to act on its own responsibility on information it may happen to receive from any quarter, and, if I am right in supposing that the Court may act as soon as there is an insolvent, it may plainly be advisable that the Court should act, before the parties concerned in the insolvency have ascertained their rights or formulated their claims.

As much therefore of the present proceedings as are framed under s. 36 are, I think, in order.

As regards the rule under s. 26, I think it was improperly granted. It was not granted on the application of the assignee, and no creditor has yet been admitted within the meaning attached to that phrase in the case *In the matter of Bucktwar Chand* (1). It has been contended that

(1) (1896) 1 C. W. N. 328. (2) (1887) I L. R. 11 Bom. 61.

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there is an established creditor because the insolvency in this case is on a creditor's petition.

I do not think that this contention has any substance in it. The legal view of the petition is that the creditor has proved the debtor an insolvent and no man can for present purposes be regarded as a creditor until his name is admitted to the schedule or until he establishes it there.

Attorney for opposing creditor : *A. N. Ghose.*

Attorneys for insolvent : *Rutter & Co.*

Attorneys for Tuloke Chand : *Orr, Roberston and Burton.*

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29 C 507.

[507] *Before Mr. Justice Stephen.*

IN THE MATTER OF CHUNI LAL OSWAL. [7th May, 1902.]

Practice—The Insolvent Debtors Act (11 *and* 12 *Vic. Ch. XXI*) *s.* 36—*Right of witness to be represented by Counsel.*

Where witnesses have been ordered to attend Court for purpose of examination under s. 36 of the Insolvency Act :

Held, that on special circumstances being shown, Counsel may properly be allowed to attend on behalf of such witnesses. *In re Nursey Kessowji* (1) followed.

Held, further, that the attending of Counsel includes acting as Counsel in the oridinary way.

DURING the examination of certain witnesses summoned under s. 36 of the Insolvency Act, the question arose as to whether they were entitled to be represented by Counsel.

Mr. *Garth* (with him Mr. *Knight*) for Amluk Chand Parruck and Guloke Chand.

I submit a witness is entitled to be protected by Counsel. If a witness is cross-examined, it is only fair that he should be entitled to be represented.

A rule was issued against me to show cause, why I should not bring my books of account before the Court, and why I should not attend Court for the purpose of being examined. It was admitted on that occasion that I should be entitled to appear. See *In re Nursey Kessowji* (1). I appear here because the question of costs with regard to the rule was to stand over.

Mr. *Jackson* (with him Mr. *A. Chowdhuri*) for the opposing creditor.

Counsel comes here and claims a right to protect a witness. He has no better right than an ordinary individual.

In the matter of the petition of Nolitmohan Doss, an insolvent (2), PONTIFEX, J., decided that a person from whom property sought to be taken under s. 36 of the Insolvency Act is entitled to be represented by Counsel. That is not the case here. The opposing party is the insolvent.

As to the question of costs, the Court can determine that at the end of the examination.

[508] I have never seen Counsel watching a case take any proceedings in it. Before Mr. Justice Harington last year, in the suit of *Ghosal*

(1) (1879) I. L. R. 3 Bom. 270. (2) (1873) 11 B. L. R. App. 33.

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v. *Ghosal* (1), we wanted to appear, but the Court held that, though we could do so, we could not take part in any proceedings.

STEPHEN, J. The question now raised is whether witnesses appearing in accordance with an order made under s. 36 of the Insolvent Debtors, Act, 1848, are entitled to be represented by Counsel. In an ordinary case a witness has, of course, no right to be represented. The differences however, between the position of witnesses appearing in an ordinary cause, and the position of those appearing in the present proceedings, seem to me too weak for any sound argument to be based on the analogy between them. Here witnesses have, with perfect propriety, been cross-examined by Counsel to show that they have been guilty of serious fraud and conspiracy. I cannot think that the law intends that they should not have any chance of professional assistance to make an answer to such charges: the more so as it is much harder for the Court to protect their interests than it would be in an ordinary case. I am therefore glad to find that the matter has been already dealt with in the case of *In re Nursey Kessowji* (2), where it is laid down that in proceedings such as these under special circumstances Counsel may properly be allowed to attend on behalf of witnesses.

The charges mentioned above, to my mind, constitute special circumstances within the meaing of this rule and I take the attending of Counsel to include acting as Counsel in the oridinary way. I therefore hold that the witnesses in the present case may be represented by Counsel with all the powers of Counsel ordinarily appearing in an ordinary case.

Attorney for opposing creditor: *A. N. Ghose.*

Attorneys for insolvents: *Rutter & Co.*

Attorneys for Amluk Chand Parruck and Guloke Chand: *Orr, Robertson and Burton.*

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29 C 509.

[509] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Prinsep and Mr. Justice Hill.

KASSIM MAMOOJEE *v.* ISUF MAHOMED SULLIMAN.* [14th May, 1902.]

Foreign judgment, action on—Domicile—Defendant not resident or domiciled in foreign country—No appearance by defendant or submission to jurisdiction—Jurisdiction—"Foreigner"—Subject of the Sovereign both of British India and of a British colony.

Courts generally exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction, and, apart from some statutory power, cannot exercise jurisdiction over any one beyond its limits.

Whaley v. *Busfield* (3) referred to.

A judgment of a foreign Court obtained in default of appearance against a defendant cannot be enforced in a Court in British India, where the defendant at the time the suit commenced was not a subject of, nor resident in, the country in which the judgment was obtained.

Gurdyal Singh v. *Raja of Faridkote* (4), *Schibsby* v. *Westenholz* (5), *Rousillon* v. *Rousillon* (6) referred to.

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* Appeal from Original Civil No. 16 of 1901 in suit No. 504 of 1899.

(1) (1901) Unreported case, dated 21st May 1901.
(2) (1879) I. L. R. 3 Bom. 270.
(3) (1886) L. R. 32 Ch. D. 131.
(4) (1894) I. L. R. 22 Cal. 222.
(5) (1870) L. R. 6 Q. B. 155.
(6) (1880) L. R. 14 Ch. D. 351.