

APPENDIX

Before Mr. Justice Markby and Mr. Justice Birch.

SHEIKH IRSHAD ALI (JUDGMENT-DEBTOR) v. RADHU SHAH *alias* GHOLAM
KABIR (DECREE-HOLDER).*

1874
Jan'y. 6 & 13

*Special Appeal—Question of Fact—Proceeding to set aside Transfer of Cross
decree—Proceeding to enforce Decree—Act XIV of 1859, s. 20.*

THE facts of this case are fully stated in the judgment of Markby, J.

Mr. *Sandel* for the judgment-debtor.

Baboo *Aushootsh Dhar* for the decree-holder.

The following judgments were delivered :—

MARKBY, J.—In this case it appears that the decree was obtained in 1862, and that the first proceedings in execution were taken in August 1864. Certain objections were then taken, which were disposed of finally on the 16th of May 1865. On the 11th September 1865 the decree-holder was directed to proceed with his execution within two days, but he took no further step, and on the 28th of August 1866 the case was struck off.

At the same time there was pending against the judgment-creditor a decree obtained by the judgment-debtor for a smaller amount, which, under s. 209 of the Code of Civil Procedure, the judgment-creditor was bound to set off : but he had not done so.

At some time in 1866, the judgment-debtor attempted to transfer his decree into the name of some other person (*benami* as it is called), so as to prevent its being made available to the judgment-creditor for a satisfaction *pro tanto* of his own decree. The judgment-creditor, therefore, objected, and on the 17th August 1866,—that is to say, before the execution proceedings in this suit were struck off the *Dec.*,—the judgment-creditor succeeded in setting aside this transfer.

The Munsif held,—and the District Judge apparently agrees with him (though the grounds of his decision are not quite clear),—that the action of the judgment-creditor, by which he prevented the attempt of the judgment-debtor to transfer his decree into another name, was a proceeding taken to enforce the decree which the judgment-creditor now seeks to execute. The present

*Miscellaneous Special Appeal, No. 284 of 1873, against the order of the Judge of East Burdwan, dated the 12th July 1873, affirming a decree of the Munsif of Chowki Jahanabad, dated the 20th May 1873.

1874 case turns entirely upon this question. If it was so, the present application is in time, otherwise not.

SHEIKH
IRSHAD ALI
v.
RABHU SHAH.

It appears to me, however, that this is a question not of law for the Court of Special Appeal, but of fact for the Courts below. I think it impossible to say, as a matter of law, that action taken to prevent the judgment-debtor from making away with his property may not be in some cases a proceeding to enforce the decree within the meaning of the section. If an application for execution be made, and the judgment-creditor then discovers that all the available property of the judgment-debtor has been made away with, his only course would be to suspend the execution proceedings, and set about the task of bringing back the property—a task which it would very likely take more than three years to complete; and if, having got back the property, the judgment-creditor proceeded to execute his decree upon it, I should think it reasonable to say that he had been all along taking proceedings to enforce his decree. On the other hand, if, after having succeeded in bringing back the property, he took no steps to realize his debt, I think I should hold, in the absence of explanation, that the judgment-creditor had all along no real intention to execute his decree; and that the proceedings to which I have alluded were taken, not in furtherance of execution, but only in order to keep the property of the judgment-debtor available to the judgment-creditor when he should think fit to execute the decree.

From these observations it will be seen that it is not improbable that I should have come myself to a different conclusion upon the facts of this case, but inasmuch as the question was one of fact, the decision of the Court below is conclusive, and cannot be disturbed in special appeal.

I think, therefore, that the appeal should be dismissed with costs.

BIRCH, J.—I concur in thinking that we ought not to interfere in this case. It seems to me to be a question of fact whether the action taken by the decree-holder evinces an intention to keep his decree in force. Both the lower Courts have come to the conclusion that, in acting as he did, the decree-holder was doing his best to keep his decree alive, and I would not interfere with their finding in special appeal.

Before Mr. Justice Poulifec

1874
March 4.

IN THE MATTER OF OMERFOLOLL DAW (AN INSOLVENT).

Insolvent Act—(11 & 12 Vict., c. 21), s. 40—32 & 33 Vict., c. 71 (*The Bankruptcy Act, 1869*), s. 31—*Proof of Claim*—*Breach of Contract*—*Unliquidated Damages*.

THE insolvent in this case was a dealer in oilman's stores in China Bazar, and filed his petition on 20th May 1873; he came up for his discharge on 2nd September 1873, when after some cross-examination the hearing was adjourned, and the insolvent was directed to file a further estate paper. The

matter again came up for hearing on 9th February 1874, and on that occasion Messrs. C. & W. Scott, merchants in Calcutta, and creditors of the insolvent, applied for leave to prove a claim against the insolvent amounting to Rs. 11,702-11-6, which sum they alleged was due to them as damages for breach of contract under the following circumstances:—On 30th July 1872 the insolvent entered into a contract with Messrs. Scott & Co., for the purchase from them of 12,000 boxes of candles in good order and condition, to arrive within twelve months from October 1872, at, 4 annas 5 pie per packet, each box containing 25 packets; delivery to be taken within forty-five days, and payment to be made on the forty-fifth day from the date of actual arrival in the godowns of Messrs. Scott & Co.

1874
 IN THE
 MATTER OF
 OMENTOOLL
 DAW.

Prior to the filing of the petition of the insolvent, 6,000 boxes of candles had arrived, and the insolvent was required to take delivery of 4,000 boxes, 2,000 boxes being damaged and excluded by mutual agreement from the contract. The insolvent failed to take delivery of the candles, although Messrs. Scott & Co. were at all times ready and willing to deliver the same to him. Messrs. Scott & Co. accordingly sold the candles for 3 annas and 9 pie per packet, being the best price obtainable.

After the filing of the insolvent's petition, 2,000 more boxes of candles arrived, which Messrs. Scott & Co. also resold for 3 annas and 8 pie per packet. It was further alleged that the remaining 4,000 boxes of candles deliverable under the contract were then in transit to Calcutta, where they would shortly arrive, and that upon their arrival they would not, so far as could be then estimated from the appearance of the market, realize more than 3 annas and 8 pie per packet. The damages alleged to have been sustained by Messrs. Scott & Co., owing to the breach of contract by the insolvent, were estimated at Rs. 11,702-11-6, the sum now claimed, but this claim was subsequently increased by the arrival of the remaining boxes of candles, and their sale at less than the estimated price, to Rs. 11,762-14-1.

Mr. *Phillips* for Messrs. Scott & Co. contended that the provisions of the English Bankruptcy Act of 1869 relating to proof of claims in respect of unliquidated damages applied to India, and that therefore Messrs. Scott & Co. ought to be allowed to prove their claim. The learned Commissioner thereupon directed the Official Assignee to instruct Counsel, and to have the point argued.

The matter now came on for argument,

Mr. *Phillips* for Messrs. Scott & Co. contended that, by the operation of s. 40 of the Indian Insolvent Act taken with s. 31 of the English Bankruptcy Act of 1869, unliquidated damages could be proved in the Insolvent Court, and cited *Ex parte Waters* (1) and *Ex parte Lilyvi Coal and Iron Co.* (2).

(1) L. R., 8 Ch., 562.

(2) L. R., 7 Ch., 28.

1872

IN THE
MATTER OF
OMERTOLOLL
DAW.

Mr. *Ingram*, on behalf of the Official Assignee, supported Mr. *Phillips'* contention, and referred to the cases of *In the Matter of Shibchandra Mullick* (1), and *In the Matter of Parke Pittar* (2). He further contended that the provisions of the English Bankruptcy Act are incorporated with the Indian Insolvent Act, and cited *Gray v. Chick* (3).

PONTIFEX, J., allowed the claim, and directed the measure of damages to be again mentioned to the Court if there was any dispute about the amount.

Attorneys for Messrs. Scott & Co.: Messrs. *Berners & Co.*

Attorney for the Official Assignee: Mr. *Dignam*.

Before Mr. Justice Phear and Mr. Justice Morris.

THE QUEEN v. PIRAN, *alias* GUNZAI, *alias* KURREEMUN.*

1874

April 2.

Criminal Procedure Code (Act X of 1872), s. 67, Illustration (a)—Indian Penal Code (Act XLV of 1860), ss. 499 & 503.

See also
14 B.L.R. 55.

Where an offence was alleged to have been committed during a journey from Bombay to Calcutta, and was in fact committed between Bombay and Allahabad, at which latter place the complainant and the person by whom the offence was alleged to have been committed separated and proceeded to Calcutta by different trains,—*Held* that the Magistrate of Howrah had no jurisdiction to try the charge. To bring the matter within his jurisdiction, the journey should have been continuous from one terminus to the other without any interruption by either party.

The prisoner Piran was charged in the Court of the Magistrate of Howrah on the two following charges, *viz.* :—

"1st, That she on or about the 25th day of February 1874, near Allahabad, and when travelling from Bombay to Calcutta by rail, criminally intimidated Mrs. Florence Field, and thereby caused her alarm, and that she has thereby committed an offence punishable under s. 503 of the Indian Penal Code and within the cognizance of the said Magistrate of Howrah. And 2nd, that she, between the 27th February and 11th March 1874, published imputations against Mrs. Field's character of such a nature as to harm her reputation."

From the evidence for the prosecution it appeared that the accused had been engaged by Mrs. Field to serve her as ayah on a journey from London to Calcutta, that while travelling on the railway between Bombay and Calcutta, and before reaching Allahabad, the accused had used threatening language to Mrs. Field, who in consequence dismissed her on their arrival at

* Criminal motion against the order of the Officiating Magistrate of Howrah, dated the 16th March 1874.

(1) 8 B. L. R., 30.

(3) *Cor.*, 136.

(2) 8 B. L. R., 118.