

any right of the public, either in the bed of the river or in the *jalkar*, and it would appear upon the pleadings that the Government have recently been dealing with this river as their own property. The question then being between the plaintiff as the owner of the permanently settled property Dhoba, and the Government claiming this property as their own, we need not in this case determine what may be the rights of the public in the river.

The only question that ought to be determined in the case is whether the property in dispute is a part of *towji* No. 1 Dhoba or not.

The plaintiff is evidently not in a position to prove any express grant by Government, but the Munsif asked the Collector to send him the papers in connection with the permanent settlement of the estate. These papers, if produced, might have thrown some light on the question.

We consider it, therefore, right and proper to send the case back to the Subordinate Judge, with a direction that he will send for the papers in connection with the permanent settlement of Dhoba, and reconsider the case with reference to the remarks we have already made. Costs to abide the final result.

J. v. W.

Case remanded.

ORIGINAL CIVIL.

Before Mr. Justice Sule.

CHANDMULL AND OTHERS v. RANEE SOONDERY DOSSEE
AND OTHERS.*

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August 28.

Representative of deceased person—Representative of insolvent debtor—Civil Procedure Code, 1882, section 252—Suit against widow of insolvent as his legal representative parties—Official Assignee—Form of decree.

The husband of the defendant was adjudicated an insolvent in 1891, and the usual order was made vesting his estate in the Official Assignee. He subsequently died without having filed his schedule and no schedule had ever been filed. After his death a suit was brought by a creditor

* Application in the Original Civil Jurisdiction under section 622 of the Civil Procedure Code, in the matter of Act XV of 1882 and of suit No. 11457 in the Calcutta Court of Small Causes,

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against the defendant as the "widow, heiress, and legal representative" of the deceased insolvent, in which suit a decree was made against her, "the amount to be levied out of the assets of the deceased in her hands." In an application by the defendant to have the decree set aside on the grounds that the Official Assignee was a necessary party to the suit, and that the decree should have been against him as her husband's representative, as his estate was in his lifetime, and since had continued to be, vested in the Official Assignee, *Held* that on the death of the insolvent his widow, the defendant, became his legal representative within the meaning of section 252 of the Civil Procedure Code, and that the existence of the vesting order in no way affected her position as such representative. *Greender Chunder Ghose v. Mackintosh* (1); *Girdharlal v. Bai Shiv* (2), and *Kashi Prasad v. Miller* (3) referred to.

Held, also, that the Official Assignee was not a necessary party to the suit. The Official Assignee is not a necessary party to any suit to recover a money debt from a person who is either an insolvent at the time the suit is instituted or becomes insolvent pending the suit. But a decree made against an insolvent under such circumstances should be restricted in form so as not to allow the judgment-creditor by means of execution to obtain an advantage over the general body of creditors. *In re Hunt Monnet & Co., Ex parte Gamble v. Bhola Gir* (4), and *Miller v. Budh Singh Dudkuria* (5) referred to.

In this case the decree was varied by the omission of the words "to be levied out of the assets of the deceased in her hands," and liberty was reserved to the judgment-creditor to prove for the amount of his decree in the Insolvent Court, with a note that execution of the decree is stayed pending the insolvency.

THIS was an application by the defendant Ranee Soondery Dossee to have set aside a decree, dated 2nd July 1894, made against her by the Chief Judge of the Calcutta Court of Small Causes.

It appeared that Hurro Nath Shaha, the husband of the applicant, had become insolvent, and a vesting order was made on 21st August 1891, by which all his estate and effects became vested in the Official Assignee. Hurro Nath Shaha subsequently died without having filed his schedule. On 23rd May 1894 a suit in the Calcutta Small Cause Court was brought against Ranee Soondery Dossee, and other defendants, who were alleged to be her husband's co-sharers or partners, for the price of goods sold. In the

(1) I. L. R., 4 Calc., 897.

(2) I. L. R., 8 Bom., 309.

(3) I. L. R., 7 All., 752.

(4) 1 Bom. H. C., 251.

(5) I. L. R., 18 Calc., 43.

plaint in that suit Raneë Soondery Dossee was described as “the widow, heiress, and legal representative of Hurro Nath Shaha deceased.”

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Her grounds of defence to the suit were—(a) that the plaintiff disclosed no cause of action against her ; and (b), that the Official Assignee was a necessary party to the suit. The other defendants pleaded “never indebted.”

The record showed that the “suit was withdrawn against second and third defendants. First plaintiff solemnly affirmed and examined. No evidence offered for the defence. Decreed with costs, and pleaders’ fee Rs. 45 as against first defendant, to be levied out of the assets of the deceased in her hands.”

Raneë Soondery Dossee then applied to the High Court in its Original Civil Jurisdiction under section 622 of the Code of Civil Procedure to have this decree set aside on the grounds that the Chief Judge had failed to exercise a jurisdiction vested in him, and had acted illegally and with material irregularity, and a rule was issued calling on the plaintiffs to show cause why the decree should not be set aside.

Mr. Jackson and Mr. O’Kinealy in support of the rule.

Mr. Dunne showed cause.

The arguments and cases cited are sufficiently stated in the judgment of the Court.

SALE, J.—In this case the husband of the defendant was adjudicated an insolvent, and the usual order was made vesting the estate in the Official Assignee. Subsequently the insolvent died. No schedule of debts was filed previous to his death, nor has any been filed since. After the death of the insolvent a creditor brought a suit in the Calcutta Court of Small Causes against the defendant “as his widow, heiress, and legal representative,” and obtained a decree “to be levied out of the assets of the deceased in her hands.”

An application to set aside this decree is now made on behalf of the defendant, under section 622 of the Civil Procedure Code, on the following grounds as stated in the petition : (1) That there is no cause of action against the defendant, her husband’s estate being

1894 vested in the Official Assignee ; (2) that the Official Assignee, in
 CHANDMULL whom the estate is vested, was a necessary party to the suit.

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The questions argued before me were somewhat different in form.

First, it was said that the defendant, though admittedly the widow and heiress of the deceased insolvent according to Hindu law, could not, for the purposes of the suit, be treated as his legal representative, seeing that his estate was in his lifetime, and still continues to be, vested in the Official Assignee.

The second contention on behalf of the petitioner was that the Official Assignee was a necessary party to the suit, and that no decree as against the estate could be made in his absence ; and that in any case the form of the decree was wrong.

The person who has the right to represent the estate of a deceased person is in the Civil Procedure Code called his representative, or legal representative : see sections 244 and 252. There is no doubt that, under ordinary circumstances, the widow and heiress of a deceased person would be his legal representative within the meaning of section 252. In the case of *Greender Chunder Ghose v. Mackintosh* (1), Pontifox, J., at p. 908 of the report, expresses the opinion that the term "legal representative" would include the widow and heiress.

Does the fact of the insolvency of the husband and the existence of the vesting order affect the widow's position as legal representative ?

Can it be said that the vesting order makes the Official Assignee the legal representative of the deceased insolvent ?

Section 252 does not seem to contemplate such a result. That section provides that a decree obtained against the legal representative of a deceased person may be executed as if it had been obtained against such deceased person personally to the extent of the property of the deceased person come to his hands if not duly applied by him. This provision is obviously inapplicable to the Official Assignee who is not accountable for any assets vested in him as such, except to the Insolvent Court, subject to whose orders such assets are held by him, and against whom,

(1) I. L. R., 4 Cal., 897.

therefore, in his official capacity, no personal execution can issue. The section does not contemplate the insolvency of the deceased party, and excludes the idea of the Official Assignee being regarded as the legal representative within the meaning of the section. Moreover the fact that the estate of the husband is not in the widow's hands, but in the hands of third parties, is no bar to the making of a decree against her in her representative character—*Girdharlal v. Bai Shiv* (1).

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It has also been held that the Official Assignee is not a *representative* of a deceased insolvent within the meaning of section 244 of the Code. Clause (c) of section 244 enables the Court executing a decree to determine "questions arising between the parties to the suit in which the decree was passed or their representatives." Where a judgment-debtor, after attachment of his property, was declared an insolvent, and the Official Assignee, in whom the estate had vested, applied to have the attachment removed, the lower Court treated the matter as one to be dealt with under section 244. On appeal it was held that the Official Assignee cannot be considered to be a representative of a judgment-debtor within the meaning of section 244, and that he should be treated as a third party—*Kashi Prasad v. Miller* (2). From these considerations it appears to me quite clear, that, on the death of the insolvent, his widow, the defendant, became his legal representative within the meaning of section 252, and that the existence of the vesting order in no way affects her position as such representative.

It was open to the plaintiff as a creditor of the deceased insolvent, either to proceed to prove his claim in the insolvency proceedings, or to institute a suit against the widow as the legal representative of his debtor. Having adopted the latter course, no proceeding could be taken under section 49 of the Insolvent Act to stay the suit, inasmuch as no schedule of the insolvent's debts and credits has been filed. The suit therefore having proceeded and a decree obtained, the second question arises, *viz.*, whether the decree is open to objection on the ground that it was obtained in a suit not properly constituted, the Official Assignee not being a party to such suit.

(1) I. L. R., 8 Bom., 309.

(2) I. L. R., 7 All., 752.

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The case of *In re Hunt Monnet and Co., Ex parte Gamble (Official Assignee) v. Bhola Gir* (1) seems to show that, as regards suits pending against a person at the time of his insolvency, the Official Assignee is not a necessary party, and that such suits may properly be continued against the insolvent in the absence of the Official Assignee, notwithstanding the insolvency. In that case it appeared that several creditors had instituted suits against a certain firm. After decrees had been obtained in most of the suits, but while some suits were still pending, the firm was declared insolvent. The usual vesting orders were made, by which the estate and credits of the insolvent firm and the separate estate of an insolvent partner were vested in the Official Assignee. On the same day, and also subsequently, the property of the firm was attached at the instance of various judgment-creditors. The Official Assignee then applied not to lay on any more attachments, and to have himself added as a party under section 73 of Act VIII of 1859, not only in the suits which were then pending, but also in the suits in which decrees had already been made. After an elaborate exposition of the law, the result as to how insolvency affects the relative rights of the Official Assignee and the creditors of an insolvent as to suits pending at the date of insolvency is thus stated (p. 257 of the report): "The result then is that as to suits pending at the date of the vesting order, in which the insolvent is *plaintiff*, the law in England and India is the same, *viz.*, that the Official Assignee may, on certain specified conditions, carry on such suits for the benefit of the general body of creditors, in substitution of, but not as co-plaintiff on the record with, the insolvent. As to pending suits in which the insolvent is a *defendant*, the law in India is the same as the law in England, except that, under section 49 of the Indian Insolvent Act, the Courts in India are specially directed, after the filing of the insolvent's schedule and before his discharge, to stay suits and all proceedings therein founded on any debt or demand inserted in the schedule, on proof to the Court's satisfaction that the debt or demand so inserted in the schedule is identical with that which forms the subject of the suits, &c., which they are asked to stay. As to any power of continuing such actions in substitution of

(1) 1 Bom. H. C., 251.

the insolvent, or of being made a party to the suit in addition to the insolvent defendant, the Official Assignee in India has not such power, any more than the corresponding functionary in England." Then as regards suits in which a decree has been made against a defendant prior to his insolvency the judgment proceeds thus : "Neither in England nor in India have the assignees of an insolvent ever been held to have the power, after judgment and decree, to get themselves made parties to the suit, with a view of moving for a new trial, setting aside the judgment, or for any other purpose whatsoever."

As regards the question of the position of the Official Assignee as to suits instituted against the insolvent or his representative after insolvency, no schedule having been filed, there is a recent decision of this Court which is in point. In *Miller v. Budh Singh Dudhuria* (1) the facts were as follows : A person was adjudicated an insolvent, and an order was made vesting his estate in the Official Assignee, but no schedule of debts and credits was filed. A suit for money was then brought against the insolvent in a mofussil Court, and subsequently, on the application of the plaintiff, the Official Assignee was added as a party defendant. The Court found that the amount claimed was due by the insolvent, and directed payment by the Official Assignee. On appeal to this Court, it was held that the Official Assignee had been wrongly made a party, and that the judgment against him was in a form which would entitle the judgment-creditor to be paid out of the estate preferentially, which was also wrong. The Chief Justice says : "The first order putting Mr. Miller's name on the record was in our opinion wrong. There is nothing in the Insolvency Act which enables a suit of this kind to be continued against the Official Assignee when the defendant has become insolvent, and this is not the case of the assignment of any interest within the meaning of section 372 of the Code of Civil Procedure, such as would enable the plaintiff to proceed against the assignee. We think, therefore, that the Subordinate Judge was wrong in placing Mr. Miller's name on the record ; but his name having been wrongly placed there, we think that

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the judgment against him in this form must be wrong, and the reason is that such a judgment would work manifest injustice and prevent the beneficial operation of the Insolvency sections of the Act, because a judgment of this kind as against Mr. Miller comes to this, that he is to pay the money out of the estate in his hands, and that this man, the plaintiff, is entitled to get the whole of his claim, and that it is to be paid in full if the whole estate of the insolvent is sufficient to pay him. This is clearly wrong, and consequently this appeal must be allowed and the judgment of the Subordinate Judge and the order substituting Mr. Miller's name on the record must be set aside, and the case remitted to the Subordinate Judge for trial as against the original defendant."

That was the case of a suit instituted against the insolvent after the estate had vested in the Official Assignee. The present suit was brought after the death of an insolvent against his representative. I see no essential difference between the two cases, and the principle which underlies the decision in the one case applies equally to the other. It is true that there have been instances in this Court where suits have been brought for money claims against both the insolvent and the Official Assignee as co-defendants. There are also cases where on the defendant becoming an insolvent pending the suit, the Official Assignee has been added as a party defendant, on the application of the plaintiff. But in all these cases the decree has been as against the debtor only, and as regards the decretal amount liberty has been reserved to the plaintiff to rank as a creditor in the insolvency.

This practice has been adopted, not on the ground that the Official Assignee is a necessary party to these suits, but rather with the object of giving the Official Assignee notice of the claim and to prevent any question arising as to the *bona fides* of the proceedings. There are also cases in this Court where such suits have been allowed to proceed to a decree against the judgment-debtor, notwithstanding his insolvency in the absence of the Official Assignee, liberty being reserved in the decree to the judgment-creditor to prove in insolvency for the amount of his judgment debt.

The cases which I have cited in the Bombay Court and in

this Court are sufficient I think to establish the proposition, that the Official Assignee is not a necessary party in any suit to recover a money debt from a person who is either an insolvent at the time the suit is instituted or becomes insolvent pending the suit. But it is also clear that the decree made as against an insolvent under these circumstances, should be restricted in form so as not to allow the judgment-creditor, by means of execution, to obtain an advantage over the general body of creditors. The decree in the present case is free from objection, except as to the words "to be levied out of the assets of the deceased in her hands."

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The defendant has denied assets, but even should there be assets in her hands they are still vested in the Official Assignee, and are beyond the reach of any creditor, except through the machinery of the Insolvent Court. If there are outstanding assets, the Insolvent Court, if moved, would immediately proceed to get in such assets.

Under this decree in its present form, the plaintiff would be entitled to obtain execution against the defendant, and, if there should be assets in her hands, to obtain payment thereout in preference to the other creditors. This would be a proceeding entirely contrary to the policy of the Insolvent Act, and contrary also to the policy of the Civil Procedure Code which favours *pro-rata* distribution of a debtor's assets among all his creditors. The decree should be in the form adopted in this Court under similar circumstances. The words "to be levied," &c., should be omitted and liberty reserved to the judgment-creditor to prove for the amount of his decree in the Insolvent Court, with a note that execution of the decree is stayed pending the insolvency.

There must be an order therefore varying the decree in the manner indicated.

Each party must bear his own costs of the application.

Attorney for Ranee Soondery Dossee : Babu N. C. Roy.

Attorney for the plaintiffs : Mr. N. C. Bose.

J. V. W.