1877

DELHI AND LONDON BANK, LIMITED v. ORCHARD.

now under appeal relates, such last-mentioned application was not barred by the 21st section of Act XIV of 1859, and ought to have been granted.

It was contended that the rule *res judicata* applied, and that the application made on the 4th of May, 1871, was barred by the order of the Deputy Commissioner of the 10th day of December, 1869, from which no appeal was preferred. But their Lordships are of opinion that the order of the 10th day of December, 1869, was not an adjudication within the rule of *res judicata*, or within s. 2 of Act VIII of 1859.

For the above reasons their Lordships will humbly advise Her Majesty that the judgment and order of the Chief Court of the Punjab of the 31st of July, 1874, be reversed, and that the judgment and order of the 17th of March, 1873, be affirmed and stand in force; and that the defendant do pay to the plaintiffs their costs incurred in the Chief Court of the Punjab subsequently to that decree. The respondent must pay the costs of this appeal.

Appeal allowed.

Agents for the Appellants: Messrs. *Johnston, Farquhar,* and *Leech.*

Agent for the Respondents: Mr. *T. L. Wilson.*

IN THE INSOLVENT COURT.

Before Mr. Justice Kennedy.

1877
Aug. 21 & 24.

IN RE MURRAY, AN INSOLVENT.

EX PARTE DWARKANATH MITTER.

Insolvency—Order and Disposition—Insolvent Act—11 *and* 12 *Vict., c.* 21, *s.* 24—*Goods pledged by Insolvent and re-delivered to him on Commission Sale.*

M., who carried on the business of a watch and clock-maker in Calcutta, borrowed from *D. M.* Rs. 6,000, for which he gave a promissory note, and, as collateral security for the payment of which sum, he pledged certain articles consisting of watches, clocks, &c., with *D. M.* The articles remained

for some months in the custody of *D. M.*, who then re-delivered them to *M.* for sale on commission, the proceeds to be applied in liquidation of the debt. *M.* gave a receipt for the articles, and some of them were sold by *M.* on those terms. On the 2nd of May, 1877, *M.* filed his petition in the Insolvent Court, and such of the articles as remained unsold came into the possession of the Official Assignee. On an application by *D. M.* claiming the articles and praying for an order directing the Official Assignee to return them, it was alleged that it was customary for European jewellers in Calcutta to receive articles on commission sale, and it was contended that such receipt did not divest the true owners of possession. *Held*, the articles were rightly vested in the Official Assignee. On the facts, the insolvent was the true owner of the goods. *D. M.'s* interest ceased when he ceased to have possession of the goods; the receipt in this view only amounted to an agreement to sell and apply the proceeds in liquidation of the debt, and it could have been proved and a dividend recovered on it under the insolvency. Even if the interest of *D. M.* did not cease, the goods were in the order and disposition of the insolvent, there being nothing to show any publicity or notoriety in the change of possession of the goods. No amount of evidence would convince the Court that there was a custom of purchasing goods from a retail-dealer and leaving them with him for commission sale. *Semble.*—No such arrangement would be upheld as against the Official Assignee.

THIS was an application for an order that the Official Assignee should make over to the claimant, Dwarkanath Mitter, certain articles which had come into his possession as assignee of the estate of the insolvent.

The affidavit of Dwarkanath Mitter in support of the application stated that, on the 7th of December, 1874, the insolvent, who carried on the business of a watch-maker and jeweller in Calcutta, borrowed from him Rs. 6,000, for which he gave a promissory note payable three months after date; and, as collateral security for the payment of which sum, he pledged certain articles consisting of clocks, chronometers, &c., with Dwarkanath Mitter; and those articles remained in his custody for three or four months; that Dwarkanath Mitter, subsequently, at the insolvent's request, sent the said articles to the insolvent on commission sale, and obtained a receipt for them; that the insolvent was, according to the custom of the European jewellers in Calcutta, in the habit of receiving articles on commission sale, and some of them were so sold by the insolvent; that, on the 2nd of May, 1877, the insolvent filed

1877

IN RE MURRAY, AN INSOLVENT.

EX PARTE DWARKANATH MITTER.

his petition in the Insolvent Court, and the Official Assignee, among other things, took possession of the articles remaining unsold, and as he declined to make them over to the claimant without an order of Court, this application was made for an order directing their return.

Mr. *J. G. Apcar* for the claimant, as to the jurisdiction of the Court to entertain such an application as this, and that it was not necessary to bring a regular suit, referred to *Llewellyn* v. *O'Dowda* (1). He then contended that the result of the transaction between the claimant and the insolvent was not to effect such a transfer to the latter as would subject the goods to his order and disposition on his becoming insolvent. It was customary to leave articles with tradesmen, as for instance watch and clock-makers, and carriage-makers; but the fact of their being so left did not have the effect of inducing persons to give greater credit to such tradesmen, and such articles were not liable, on the insolvency of the trader, to pass to the Official Assignee as being in the order and disposition of the insolvent. It is a well-known custom in Calcutta for jewellers to take goods as agents and sell them on commission sale. In such a case the goods would not be in the order and disposition of the insolvent; see *Priestley* v. *Pratt* (2). The insolvent was only an agent for sale, and there was no consent that he was to be the reputed owner; see *Smith* v. *Hudson* (3); *Load* v. *Green* (4); Griffiths on Bankruptcy, ed. of 1867, p. 463; Lindley on Partnership, 3rd ed., 1193; *Ex parte Brown* (5); *Ex parte Gledstanes* (6). See also the class of cases referred to in Lindley on Partnership, 1158, where goods are entrusted for a particular purpose to a person who subsequently becomes insolvent: *Ex parte Waring* (7); *Ex parte Frere* (8).

Mr. *Piffard* for the Official Assignee submitted, that there was nothing to show that the goods passed actually into the possession of the claimant. [Mr. *Apcar*.—That was I thought

(1) Taylor's Rep., 169.
(2) L. R., 2 Exch., 101.
(3) 34 L. J., Q. B., 145; *per* Blackburn, J., p. 151.
(4) 15 M. & W., 216.
(5) 3 Mon. and Ayr., 471, at p. 476.
(6) 3 Mon. Dea. and De Gex, 109.
(7) 19 Ves., 345.
(8) Mon. & McAr., 263.

1877

IN RE MURRAY, AN INSOLVENT.

EX PARTE DWARKANATH MITTER.

admitted.] The desire and intention of the parties was that the goods should be sold as those of the insolvent. They were in the order and disposition of the insolvent, and are rightly in the hand of the Official Assignee.

Cur. adv. vult.

KENNEDY, J.—In this case I have no difficulty in determining that the Official Assignee ought not to make over the goods to the applicant, and to direct that he should defend any suit that may be brought against him. I am not so sure that the strongest ground of the assignee's claim is the reputed ownership clause, because so far as I can judge, on the facts, the insolvent was not only the reputed but the real owner. The allegation is, that the goods were pledged to the applicant, who re-delivered them upon certain terms,—that is to say, that the insolvent should sell them; and, as I understood Mr. Apcar to say, should apply the proceeds in liquidation of his debt. Now, as I take it, at common law, the interest of the pledgee of goods ceased by his ceasing to have possession of them at least by his own consent, and the Contract Act does not seem to me to change this. It describes pledge as a bailment, and the natural inference is, that when the bailment comes to an end, the pledge does so likewise. We have then the goods in the hands of the insolvent discharged of the applicant's lien and subject only to the terms of the receipt, which, at the outside, only amounts to an agreement to sell the goods and apply the proceeds in liquidation of his debt; for breach of this the applicant could prove and recover a dividend.

Even if, however, the applicant were in a position to put his claim higher, and to rely on his having an interest in the goods, I do not think he can escape the operation of the order and disposition clause. As Mr. Piffard pointed out, there is not anything to show in what way the applicant took possession of the goods; nothing to point out that publicity and notoriety of change of possession or of ownership which in *Lingard* v. *Messiter* (1) was held so important. It is true that a well estab-

(1) 1 B. & C., 408.

1877

IN RE MURRAY, AN INSOLVENT.

EX PARTE DWARKANATH MITTER.

lished course of trade as in *Ex parte Watkins* (1) will prevent the mere possession of goods inferring such reputation of ownership as to bring the goods within the statute, otherwise some most useful branches of commerce would become impossible, as for instance commission agency, leasing chattels, and possibly even pawnbroking. But the usage must be well established, *Ex parte Lovering* (2), and above all the transaction must be clearly *bonâ fide*.

Now, without going into the question suggested in *Ex parte Watkins* (3), which points out the difference of position of goods in a retail shop, I may say, that no amount of evidence would convince me that there was a practice or custom of purchasing goods from a retail dealer and leaving them with him for commission sale; and I may further say, that I do not think that any arrangement by which in substance and effect one creditor secures a preference as to the proceeds of certain goods over the others by an arrangement which leaves the goods in the manual power of the bankrupt, can ever be upheld. The most formally drawn conveyance, by which the goods were assigned to the creditor with a provision that they were to be returned to the debtor's shop, and then sold by him and the proceeds applied in liquidation of his debt, would fail. Why should this transaction be supported which only differs from that by the real meaning and intention not being clearly and explicitly stated—a difference which does not tend in its favor.

Any other doctrine would, in truth, sweep away the whole principle of the order and disposition clause. I have not been referred to any one single case in which the property in dispute was a personal chattel in the manual possession of the bankrupt, and the claimant claimed it as a mortgagee, where such claim was allowed. The cases of *Spackman* v. *Miller* (4) and *Hornsby* v. *Miller* (5) are intended as complementary to each other. The one shows the result of an arrangement operating as a re-demise of mortgaged goods, and thus preventing the pos-

(1) L. R., 8 Ch., 520.

(2) L. R., 9 Ch., 624.

(3) L. R., 8 Ch., 520, at p. 531.

(4) 12 C. B., N. S., 659; S. C., 9 Jur., N. S., 50.

(5) 1 E. & E., 192; S. C., 5 Jur., N. S., 938.

session during the time being with the consent of the true owner, and the other, when the possession is consistent with the mortgage deed. I believe it to be impossible and against the spirit of the Act by any conveyancing device to give a lien for money advanced upon goods previously the property of the bankrupt, and returned to or permitted to remain with him. The power of so borrowing money would be much more dangerous than that of raising money by sales at an undervalue equivalent to the amount which would be advanced on pledge. Such sales would, in many cases, be strong evidence of criminal intention in the original purchaser of the goods, or at any rate would lead to speedy discovery.

1877

IN RE MURRAY, AN INSOLVENT.

EX PARTE DWARKANATH MITTER.

Application refused.

Attorney for Dwarkanath Mitter : Baboo *P. C. Mookerjee.*
Attorney for the Official Assignee: Messrs. *Orr* and *Harris.*

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Jackson, Mr. Justice Macpherson, Mr. Justice Markby, Mr. Justice Pontifex, and Mr. Justice Ainslie.

THE EMPRESS *v.* BURAH AND BOOK SINGH.*

1877
March 26.

IN THE MATTER OF THE PETITION OF BURAH AND BOOK SINGH.

Jurisdiction of High Court—Act VI of 1835*—Act XXII of* 1869, *s.* 9*—*24 *&* 25 *Vict., c.* 67, *s.* 22; *c.* 104, *ss.* 9, 11, *and* 13*—*3 *&* 4 *Will. IV, c.* 85*—*16 *&* 17 *Vict., c.* 95*—*17 *&* 18 *Vict., c.* 77*—Delegation, Power of.*

By Act XXII of 1869, certain districts were removed from the jurisdiction of the High Court, and by s. 5 the administration of Civil and Criminal Justice was vested in such officers as the Lieutenant-Governor of Bengal should appoint. By s. 9 the Lieutenant-Governor was empowered to extend all or any of the provisions of the Act to the Cossyah and Jynteeah Hills. By a notification in the *Calcutta Gazette* of 4th October, 1871, the Lieutenant-Governor extended the provisions of the Act to the Cossyah and Jynteeah

* Criminal Appeal, No. 482 of 1876, against an order of Col. Bivar, Deputy Commissioner of Shillong, dated the 24th of April, 1876.