

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Brett.*

*In re MAUD ANDERSON.\**

1909  
Feb. 15.

*Insolvency—Indian Insolvent Act (11 and 12 Vict. c. 21)—Jurisdiction—Summary proceeding—Order for Ejectment of insolvent Tenant, on application of Landlord, whether valid.*

On an application by the insolvent's landlord, who was an admitted creditor in respect of arrears of rent, for an order that the insolvent should make over possession of the premises to the Official Assignee:—

*Held*, that there was nothing in the Insolvent Act, which enabled the Court, sitting in Insolvency, on a summary proceeding, to make at the instance of the landlord, what was virtually an order for ejectment against the tenant.

APPEAL by the insolvent, Maud Anderson.

THIS was an appeal by the insolvent, Maud Anderson, from an order of Sharfuddin J., dated the 21st September 1908, and a subsequent order of Fletcher J., dated the 18th November 1908.

It appears that Miss Maud Anderson, a boarding house-keeper, was for some time prior to and at the time of her insolvency a monthly tenant of the premises No. 77, Dhurrumtollah Street belonging to one Baloram Das at a rent of Rs. 300. On the 4th August 1908, she filed her petition in Insolvency, and on the same day, a vesting order was made, vesting all her property in the Official Assignee. Her schedule showed her total liability at Rs. 2,952, out of which the sum of Rs. 2,479 was set out as due to the landlord for arrears of rent.

On the 1st September 1908, Baloram Das called upon the insolvent to make over possession of the premises immediately. On her failure to do so, on the 7th September 1908, he made an application, before the Commissioner in Insolvency, alleging that more than Rs. 3,000 was due for arrears of rent, out of which he had obtained decrees for rent amounting to Rs. 2,843, and praying for "an order that the

\* Appeal from Original Civil, No. 63 of 1908.

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insolvent may be ordered to show cause why she should not forthwith deliver up possession of the premises No. 77, Dhurrumtollah Street to the Official Assignee or to the petitioner, and in default why she should not be committed for contempt.”

The matter came on for hearing before Sharfuddin J. on the 21st September 1908. The insolvent submitted that no order of ejection could be passed against her on an application in Insolvency; the Court, however, ordered the insolvent to make over possession within a week to the Official Assignee. His Lordship observed as follows :—

SHARFUDDIN J. This is a rule calling upon the insolvent, Maud Anderson, to shew cause why she should not deliver possession of No. 77, Dhurrumtollah Street in Calcutta to the Official Assignee or to the applicant, and in default why she should not be committed for contempt. It appears that the insolvent filed her insolvency petition on the 4th August 1908, and with that also she filed a schedule of property in possession, and in that schedule I find under the heading interest in land, houses, rents and other real estate no mention of any interest in the house in question and it is described in the schedule as *nil* and the only two properties described as in the possession of the insolvent are two dog carts and one office-jaun. The contention on behalf of the proprietor of the house No. 77, Dhurrumtollah Street, is to the effect that the insolvent after being declared insolvent should have delivered possession of the said premises to the Official Assignee or to him. So far as the delivery to himself is concerned, that part of the case has been given up and the applicant confines his case to the first part, namely, that the insolvent make over possession to the Official Assignee which has not yet been done. Under section 7 of the Indian Insolvency Act, it is clear that all the interest of the insolvent on the making of the vesting order vested in the Official Assignee, and under section 21 of the said Act the Official Assignee has to take possession of all such interest of the insolvent and then to exercise his discretion as to whether he would keep the property in his possession or not. Learned Counsel appearing on behalf of the insolvent to shew cause concedes that under section 21 all property should be taken possession of by the Official Assignee who is to elect whether he will keep possession of the property or not. Under these circumstances, I am of opinion that the insolvent should at once deliver possession of the premises to the Official Assignee. As to her being committed for contempt, that I do not think I should do for although the insolvent has not disclosed any interest in the premises No. 77, Dhurrumtollah Street, she has described herself as a boarding house-keeper carrying on business at No. 77, Dhurrumtollah Street. I do not think she has wilfully concealed her interest in the property in question. In the above circumstances, I make the rule absolute so far as it concerns the delivery of possession of the premises to the

Official Assignee. After the Official Assignee has taken possession it will be for him to decide what he will do with the property. He may allow the insolvent to carry on business in the premises if he chooses, or he may ask the insolvent to vacate. I direct the insolvent to make over possession within a week.

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Thereupon, the insolvent requested the Official Assignee to allow her to reside in the premises, but the Official Assignee refused to do so, and appointed the 28th September 1908 for the insolvent to make over vacant possession of the premises to him, when he proposed to make over possession to the landlord. The insolvent failed to do so. On the 13th November 1908, Baloram Das obtained a rule from the Insolvency Court calling upon the insolvent, "to shew cause why she should not carry out the order of the 21st September 1908, and why in default she should not be attached for contempt." On the 18th November 1908, the rule *nisi* of the 13th November 1908 was made absolute by Fletcher J. and it was ordered that a writ of attachment do issue against the person of the insolvent on the 28th November, 1908, for disobedience of the order of the 21st September 1908.

The insolvent appealed under section 73 of the Insolvent Act from the order of Sharfuddin J., dated the 21st September 1908, and the contempt order of Fletcher J., dated the 18th November 1908.

*Mr. Avetoom*, for the appellant. The Commissioner in Insolvency had no jurisdiction to make the order of the 21st September, 1908. It amounted to an order for ejection at the instance of the landlord against the tenant. There is no provision in the Insolvent Act allowing of such an order being made. An order of this nature could only be made on the application of the Official Assignee.

*The Advocate-General (Mr. Sinha) (Mr. C. C. Ghose with him)*, referred to *In re Finley, Ex parte Clothworkers' Company* (1) with reference to the practice prevailing in England. The landlord's position was one of hardship: the insolvent tenant neither could pay the rent, nor would she quit the premises. By

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section 22 of the Insolvent Act, I was debarred from distraining. The landlord's only remedy was to ask the Court to order his premises to be made over to the Official Assignee, who would then elect to retain the property and be open to an action brought by the landlord, or make over the property to the landlord. Under section 26 of the Insolvent Act, the Court had power to make a similar order against a stranger : surely, the Court had jurisdiction to make the order against the insolvent himself. To relegate the landlord to a suit for ejection, would subject him to loss of rent for a considerable interval.

MACLEAN C.J. One Maud Anderson became insolvent on the 4th of August 1908. It appears that she was a monthly tenant of certain premises known as 77, Dhurumtollah Street, at a rent of Rs. 300. On the 7th of September 1908, an application was made by her landlord the practical object of which was that the insolvent should be ordered to shew cause why she should not forthwith deliver up possession of those premises either to the landlord or to the Official Assignee. That matter came on for hearing, and notwithstanding the objection of Maud Anderson, the insolvent, the Court ordered the insolvent to make over possession within a week to the Official Assignee. She did not do that, and the result was that a contempt order was passed on the 18th of November 1908. She now appeals : and she says that the Court sitting in Insolvency had no jurisdiction to make the first order. I think her contention must prevail. I can see nothing in the Insolvency Act which enables the Court to make at the instance of a landlord, what is virtually an order for ejection against his tenant. It is said that her interest in this house vested in the Official Assignee. That would be true if she had any interest, but the landlord proceeds on the footing that the lease had determined, that Maud Anderson was a trespasser and that he was entitled to immediate possession. In this view, there was nothing to vest in the Official Assignee. If the Official Assignee thought he was entitled to and wanted possession, it was for him to have applied to the Court. But there are no provisions in the Insolvency

Act which enable the Court sitting in Insolvency on a summary proceeding like the present to make virtually an ejectionment decree, at the instance of a landlord, against his tenant. The appeal therefore succeeds and must be allowed with costs both here and in the Court of first instance. The order for committal must also be discharged. I regret the result, because I think the appellant has been too smart for the other side.

BRETT J. I agree.

*Appeal allowed.*

Attorney for the appellant : *N. B. Sarkar*

Attorney for the respondent : *P. L. De.*

J. C.

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## APPELLATE CIVIL

*Before Mr. Justice Coxe and Mr. Justice Doss.*

SHAMALDHONE DUTT

v.

LAKSHIMANI DEBI.\*

1908  
Aug. 7.

*Attorney and Client—Settled Account, re-opening of—Accounts settled on basis of Untaxed Bills—Fiduciary Relationship—Onus of Proof in Transactions between Attorney and Client—Independent Advice—Assignment of Promissory Notes, validity of—“Final decree,” meaning of—Contract Act (IX of 1872), s. 16—Evidence Act (I of 1872), s. 111.*

Where the plaintiff, a solicitor, had acted for the predecessor in title of defendants in various matters and had also from time to time advanced money to him and also received various sums on behalf of the plaintiff, and subsequently an account was settled on untaxed bills between the plaintiff and the said predecessor of the defendants, in which an independent solicitor acted for the same, and, as a result, at first a mortgage and then three further charges were executed in favour of the plaintiff, in a suit to recover the money due on these securities :—

*Held, first*, that the mere existence of fiduciary relationship between attorney and client will not entitle the client to have a settled account, concluded by

\* Appeal from Original Decree, No. 229 of 1907, against the decree of Ambikacharan Mukerjee, Offg. Additional Subordinate Judge of Hooghly, dated March 29, 1907.