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Oct. 12.

## Appellate Civil Jurisdiction.

*In re* HUNT, MONNET, and Company,  
*ex parte* GAMBLE, Official Assignee... *Appellant*.

BIHOLA'GI'R MANGI'R and others, ..... *Respondents*.

*Official Assignee — Vesting Order — Indian Insolvent Act — Pending Suits—Right of Official Assignee to be made Party—Stay of Execution or Process—Attachment—Civ. Proc. Code, Secs. 246 and 247.*

The rights of the Official Assignee of insolvents, for the benefit of the general body of creditors, over the property of an insolvent lawfully vested in him, wherever that property may be, are rights that must be respected and recognised by all Courts wheresoever situated.

The Official Assignee has no legal right under the Insolvent Act to apply to be made a party to suits against the insolvent pending at the time of a vesting order being made, nor has he the power, after judgment and decree have been pronounced in a suit against the insolvent prior to his vesting order, to get himself made a party to such suit, with a view of setting aside the judgment or appealing therefrom.

By Sec. 17 of the Letters Patent constituting the High Court, the practice of the Insolvent Court (where any such practice is specifically pointed out by the Insolvent Act or the rules framed under it) is not affected by the amalgamation of the Courts; and, under Sec. 49 of the Insolvent Act, the Official Assignee, *after* schedule filed and before the discharge of the insolvent, may apply to any Court in which a suit is brought against the insolvent for any debt or demand admitted in the schedule, or disputed as to amount only, for a stay of process or execution, but where no schedule has been filed the Official Assignee cannot adopt this course.

Where property of an insolvent vested in the Official Assignee by order of the Insolvent Court is attached in execution at the suit of a creditor of the insolvent, the proper course for the Official Assignee to adopt is to apply to the Court, under Secs. 246 and 247 of the Civil Procedure Code, to have the attachment removed, or, if too late to make such application, he may institute a suit to establish his right.

SEVERAL rules were obtained by the Official Assignee of the Court for relief of insolvent debtors in Bombay, calling upon certain Puñá creditors of the insolvent firm of Hunt, Monnet, & Co., and of James Hunt (one of the partners in that firm), to show cause why certain orders made by the District Judge of Puñá rejecting the claim of the Official Assignee to be made a party to certain suits instituted in the Court of the Principal Şadr Amín at Puñá against the said insolvents by the said creditors, and also why a certain order by the same Judge rejecting the claim of the Official Assignee to appeal against a decree passed by the said Principal Şadr Amín against the said insolvents at the suit of one of their said creditors, should not be reversed or varied.

*Coram* ARNOULD, Acting C. J., FORBES and TUCKER, JJ., 5th October 1864.

*Bayley, White, Shāntārām, and Pāndurang* appeared to show cause.

*Anstey, Dunbar, Kelly, and McCombie* in support of the rule.

The material facts and authorities in the case will be found stated in the following judgment, delivered on the 12th of October 1864 by ARNOULD, Acting C. J. :—

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In this case cause was shown on Wednesday (5th October) against several rules granted by this Court on the 21st of last September, at the instance of the Official Assignee of insolvents, against Bholágir Mangir and other Puṇá creditors of the insolvent firm of Hunt, Monnet, & Co. Of these creditors all except two were creditors holding decrees. The rules served on all these creditors with the exception of Bholágir called upon each of them to show cause why an order of the Judge of Puṇá of the 29th of August last (confirming a previous order of the Principal Ṣadr Amín of Puṇá of the 16th of June last) should not be reversed or varied; and the order served on Bholágir called on him to show cause why an order of the same Judge, made on the 1st of September last, refusing to entertain an appeal against the decree of the 28th of June last of the same Principal Ṣadr Amín, made in Bholágir's favour against the insolvent estate, should not be reversed or varied.

The following are the material facts in the case. It being known that the firm of Hunt, Monnet, & Co. was in difficulties, the Puṇá creditors of that firm, in the earlier part of the present year, filed several suits against the firm in the court of the Principal Ṣadr Amín of that city. It is not necessary to go minutely into the facts and dates of the different suits in order to decide on the merits of the present application. It would be necessary, no doubt, to ascertain and state them with minute accuracy in a case where the question of priority as between the Official Assignee and the creditors had to be determined.\* But that is not the question which we have to determine here and now. For the present purpose it is sufficient to state that Bholágir and several of the other creditors obtained decrees on, before, or shortly after the 28th of June, and under all these decrees attachments were placed on the property of the insolvent firm at Puṇá in the course of the 30th of June. In the case of one of the creditors the attachment was not, it appears, placed till the

\* See on this point *Gamble v. Bholágir*, 2 Bom. H. C. Rep. 146, 2nd ed.

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4th of July, in the case of two of the creditors, their suits were still pending (*i.e.*, no decree had been passed in their favour) on the 20th of July, the day on which the Official Assignee made his first application to this Court, and since which date all the suits and proceedings therein have remained *in statu quo*.

After the creditors in Puná had been thus exerting themselves, steps were taken in Bombay to declare the firm insolvent. On the 30th of June, Monnet filed a petition in the Insolvent Court, on which, on the same day, an order was made, under the 21st section of the Insolvent Act, vesting all the real and personal estate of the firm of Hunt, Monnet, & Co. in the Official Assignee. On the 1st of July, Hunt was adjudicated an insolvent on the petition of a creditor, and, under Sec. 11 of the Act, his estate, the usual order having been subsequently made, vested as from the date of the petition and adjudication in the Official Assignee. On the 30th of June, therefore, the Official Assignee had vested in him, for the benefit of the general body of the creditors, all the estate and interest of the *insolvent firm*, and on the 1st of July all the separate estate of the insolvent partner, James Hunt.

It may be as well to state clearly the effect of this vesting order under the Indian Insolvent Act (11 & 12 Vict., c. 21). By Secs. 7 and 11 of that Act, from the moment of the vesting order being made, all the property, real and personal, of the insolvents, and all their future rights to any such property, "whether within the territories within the limits of the Charter of the (late) East India Company, or without," and all debts due or growing due to them, become absolutely vested in the Official Assignee as trustee for the general body of creditors from the date of the insolvents' petition (under Sec. 7), and from the date of the creditors' petition and adjudication (under Sec. 11). The rights of the Official Assignee for the benefit of the general body of creditors over the property of the insolvent lawfully vested in him, wherever that property may be situated, are rights that must be respected and recognised not within the limits of the Presidency Town jurisdiction only, but by all courts, wheresoever situated, in which the Official Assignee has reason to appear on behalf of the general body of creditors.

The Official Assignee having thus obtained his two vesting orders, one on the 30th of June, the other on the 1st of

July, presented himself on the 4th of July in the court of the Principal Şadr Amín of Puñá, where and when he made what we must consider an ill-advised application: Instead of applying, as he might and ought, under Sec. 246 of the Civil Procedure Code, to have the attachments already laid on removed, he made an application alike unsupported, as will presently appear, either by principle or precedent. He applied to the Principal Şadr Amín not to lay on any more attachments, to recognise him in his capacity of Official Assignee, and as such to add him as a party, under Sec. 73 of the Procedure Code, not only in the suits which were then pending, but also in the suits in which a decree had been already passed.

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The Principal Şadr Amín took time to consider this application, and on the 16th of July refused it, on the ground that if treated as an application to be added as a party to the suits he could not entertain it, under Sec. 73 of the Civil Procedure Code, and if treated as an application to stay proceedings, under Sec. 49 of the Insolvent Act, the Official Assignee had no *locus standi*, since that section only gives him power to stay proceedings, as to debts or demands, actually entered in the schedule, and which are proved, to the satisfaction of the court applied to, to be the identical debts or demands which form the subject of claim in the suits or proceedings which it is sought to stay. Immediately after this order was given, the Official Assignee sought to appeal against it before the gentleman occupying the temporary position of Assistant Judge in charge of the office of the Judge of Puñá; this gentleman having very properly declined to interfere, the Official Assignee, on the 20th of July, came before this Court, and obtained two rules—(1) A rule absolute for the stay of proceedings in the case of that class of suits in which decrees had been then already given, until the Official Assignee should have time to make further application, if so advised, either to the Insolvent Court in Bombay, or to the Court in Puñá, or until further order; (2)—With regard to the two suits then pending, the Court was induced, at the strong solicitation of the counsel for the Official Assignee, to grant a *rule nisi* calling on the defendants in those two suits to show cause why the Official Assignee should not be entered on the record as a co-defendant, the Court intimating at the time that they granted even a *rule nisi* with considerable reluctance, and that the applicant must take it entirely at his own

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risk. Having thus obtained a further stay of the proceedings, the Official Assignee appealed to Mr. Walter, the District Judge of Poona, against the order of the Principal Sadr Amin of the 16th of July. On the 29th of August Mr. Walter made the first of the two orders which it is now sought to set aside, viz., an order confirming that of the Principal Sadr Amin of the 16th of July, both as to the suits in which decrees had been actually passed, and also as to the two suits which were then pending. As regards the first class of suits, the grounds of Mr. Walter's decision may be shortly thus stated: regarding the application of the Official Assignee as an application to be made a party to suits in which decrees had been actually passed against the insolvent estate, the Official Assignee had shown no ground of law, either in the Insolvent Act or under the Civil Procedure Code, on which such application should be based; regarding his application, on the other hand, as an application under Sec. 49 of the Insolvent Act to stay proceedings, the short and complete answer was that such section could by its terms only apply to cases in which a schedule had actually been filed, and in which it was proved, to the satisfaction of the Court to whom the application was made, that the proceedings sought to be stayed were proceedings arising out of suits founded on the identical debts or demands entered in such schedule against the names of the several creditors by whom such suits had been respectively filed. As no schedule had been filed in this insolvency at the time of the application in question (in fact, as we were informed in the course of the case, no schedule had been filed until a week or so before the last argument before us was brought on), the application, regarded as an application to stay proceedings, must of course fail. With regard to the application of the Official Assignee to be admitted as a party in the two pending suits, Mr. Walter held that though, under Sec. 73 of the Civil Procedure Code, the same objections did not exist as in the case of the suits in which decrees had been passed, yet that he found nothing in the Procedure Code to favour such an application by the Official Assignee, Sec. 106 of the Code applying only to suits brought by insolvent plaintiffs, and leaving suits against insolvent defendants to the operation of the previously existing law: as to staying proceedings in these suits, he thought the objection arising out of the want of a schedule was as applicable to this class of suits as to those in which decrees had been passed, and, therefore, as to those two

suits also he confirmed the order of the Principal Šadr Amín. An attempt was then made to induce Mr. Walter to admit an appeal against the decree passed on the 28th of June by the Principal Šadr Amín in favour of Bholágír. On the 1st of September last Mr. Walter made an order rejecting this appeal, on the ground that as he had already decided that the Official Assignee had no right, as such, to be heard as party in that suit or in proceedings taken thereon, so he had no right to present an appeal against the decree passed therein.

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In order to ascertain whether Mr. Walter was right or wrong in the three classes of orders he thus made, it will be requisite to state briefly the effect of insolvency on the relative rights of the Official Assignee and the creditors of an insolvent:—1st, in regard to suits pending at the date of the vesting order; 2nd, in regard to suits in which a decree has passed at the date of the vesting order, but in which attachment has not then been laid on, or in which an auction sale under the decree has not taken place.

We will consider first the rule as to pending suits founded on contracts, as the suits now in question all are. In suits founded on contract (with very few exceptions) in which the insolvent was a *plaintiff*, the old rule was that the suit abated, that is, came to an end, by the insolvency of the plaintiff; this remained the rule in England till the year 1852, when the Common Law Procedure Act of that year (15 & 16 Vict., c. 76, s. 142) provided "that the bankruptcy or insolvency of the plaintiff in any action which the assignees might maintain for the benefit of the creditors, shall not be pleaded in bar to such action, unless the assignees shall decline to continue and give security for the costs thereof, &c., and in case the assignees neglect or refuse to continue the action and give such security &c. the defendant may, within eight days after such neglect or refusal, plead the bankruptcy:" (the words "or insolvency" do not occur in the ill-drawn clauses of the Imperial Act).

This only affects suits pending at the time of the vesting order in which the insolvent is plaintiff; and as to these suits, and these only, it gives the assignees a power they did not before possess (and which they can of course only exercise within the strict limits of the statute), not indeed of being added as parties to the suit with the bankrupt (such a thing

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was never thought of), but of carrying on the suit on behalf of the general body of the creditors in substitution and in lieu of the insolvent.

As to suits pending at the date of the vesting order in which the insolvent is *defendant*, they are not touched by the statute; they remain as they were at Common Law; as to them the assignees have no power whatsoever of continuing to defend them in substitution of the insolvent, far less any power of getting themselves added as co-defendants in such suits together with the insolvent. The law as to pending suits is the same in India as in England, except indeed in so far as Sec. 49 of the Indian Insolvent Act has supplied a procedure for the stay of suits pending against the insolvent as defendant, which does not exist, so far as we can discover, in any of the English Insolvency Acts, and to which reference has already been made; but this clause only applies after a schedule has been filed. With regard to pending suits in which the insolvent is plaintiff, Sec. 106 of the Code of Civil Procedure is (except a slight improvement in language in the concluding words of the clause) the same as Sec. 142 of the English Common Law Procedure Act of 1852.

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 Sec. 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 the insolvent, or of being made parties 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. Sec. 29 of the Indian Insolvent Act, on which some stress was laid in the course of the argument, gives the Official Assignee no such power: that relates

not at all to suits pending at the time of the insolvency, but to suits which but for the insolvency the insolvent himself might have commenced, prosecuted, or defended, and which, therefore, the Official Assignee, after the insolvency, shall not be precluded, provided *he first obtains the leave of the Court*, from commencing, prosecuting, or defending in his own name, as Official Assignee of the insolvent, for the benefit of the general body of the creditors. This section has no application whatever to suits commenced, prosecuted, or in course of being defended by the insolvent at or before the date of the insolvency, *i.e.*, of the vesting order.

Having now seen how insolvency affects the relative rights of the Official Assignee and the creditors of the insolvent as to suits pending at the date of the petition, we next proceed to consider their relative rights as to suits in which judgment has been given, or, in the language of the Civil Procedure Code, in which a decree has been passed prior to that date. As to this 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.* They have invariably been left in such cases to try their right to the property at the time of execution, as against the creditor, by action brought either against the Sheriff for an improper execution of the decree, or against the purchaser under the decree, the former mode of procedure being that generally adopted. Most of the English cases have been decided on the rights of assignees of *bankrupts*, bankruptcy and insolvency, as is well known, having been long distinguished from one another in the English system, and insolvency being of comparatively recent introduction. The principal distinction as affecting the present point between the two systems is this that in bankruptcy the right of property vests in the assignees as from the date of the act of bankruptcy, which was often a secret act; whereas in insolvency it vests from the date of the petition of the insolvent, or from the date of the petition of a creditor followed by adjudication of insolvency, both of which are acts sufficiently public and notorious. As far back as the year 1756 the law was fixed by the well-known decision of Lord Mansfield in *Cooper v. Chitty (a)*, that a Sheriff who has seized the goods of a bankrupt after an act of bankruptcy, but before the commission (or fiat), and

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(a) 1 Burr. 20; S. C. 1 Smith's L. C. 417 (5th ed.)

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sold them after the commission (or fiat) and assignment, is liable to an action, brought at the suit of the assignees of a bankrupt, for the recovery of the goods or their value. The rule, as established by this case, proceeds on the plain principle that when the Sheriff so sold, that which he sold was not the property of the bankrupt (which alone he was authorised to sell), but the property of the assignees. It was also decided, as is well-known to the English lawyer, that the assignees might, as the English law-phrase is, "waive the tort," and proceed against the Sheriff as for the breach of an implied contract for the proceeds of the goods (*Kitchen v. Campbell* (b), *Young v. Marshall* (c), *Clark v. Gilbert* (d); and the principle of the above decisions was extended to insolvency in the case of *Groves v. Cowham* (e) (a case decided on the 34th section of the Insolvent Act, 7 Geo. IV., c. 57). The operation of this rule of law was altered as to Sheriffs in 1831 by the Interpleader Act (1 & 2 Wm. IV., c. 58) which enabled the Sheriff, immediately on claim being made against him by the assignees, to refer to the courts the determination of the question of property in the goods as between the execution creditors (or decree-holders) and the assignees. Further, with a view to the protection of execution creditors from the operation of secret acts of bankruptcy, changes were introduced into the law, first by the 2nd & 3rd Vict., c. 29, subsequently and more completely by the 12th & 13th Vict., c. 106, s. 133, the result of which is as follows: all attachments against the lands of a bankrupt *bonâ fide* executed by seizure, and all attachments against the goods of a bankrupt *bonâ fide* executed by seizure and sale, shall be deemed valid, notwithstanding any prior act of bankruptcy, provided the creditors at the time of levying the attachment had no notice of any prior act of bankruptcy. The Interpleader Act and the legislative provisions last referred to have never been introduced into India; in point of fact, they were not so much wanted here, the insolvency system established by the Indian Insolvent Act, 11 & 12 Vict., c. 21, vesting the property of the insolvent in the Official Assignee, not from the date of a prior act of bankruptcy, which might be, and often was, of a secret nature, but from the date of the petition of the insolvent, or of a creditor, followed by adjudication of insolvency, both of which were acts public in their nature and

(b) 3 Wilson 304.

(d) 2 Bingh N. C. 313.

(c) 8 Bingh. 43.

(e) 10 Bingh. 5.

duly chronicled in the official *Gazettes* of the several Presidencies.

With regard then to seizures and sales in execution by the Sheriff, after the date of the petition, on judgments obtained against the bankrupt (or insolvent) before that date, the Official Assignee in India was left to pursue his remedy against the Sheriff as prescribed by the Common Law of England.

Since the Code of Civil Procedure has become the law regulating the practice of the High Court with regard to all civil suits of every description between party and party, the proper course of the Official Assignee to pursue is that prescribed by Secs. 246 and 247 of the Code, viz., by claim, in the first instance, to remove the attachment, and if that be refused, by order of the Court (against which order there is no appeal), then by suit to establish his right, which suit must be brought within a year. As, however, by Sec. 17 of the Letters Patent the practice of the Insolvent Court (where any such practice is specially pointed out by the Insolvent Act, or the rules framed under it) is not to be affected by the amalgamation of the courts, it would appear clear that under Sec. 49 of the Insolvent Act, the Official Assignee, *after* schedule filed, and before the discharge of the insolvent, might still apply to any court in which a suit has been brought against the insolvent for any debt or demand admitted in the schedule, or disputed as to amount only, for a stay of process or execution.

In the present case, as no schedule was filed till long after the date of Mr. Gamble's application to the Principal Sadr Amín at Puná of the 4th of July, the Official Assignee cannot of course avail himself of this section to justify the application he so made. Things being as they were on the 4th of July, his proper course would have been to have applied to the Principal Sadr Amín under Sec. 246 of the Procedure Code. Mr. Gamble, in para. 8 of the second of the petitions which he filed in this Court on the 20th of July last, says that "after the Principal Sadr Amín had refused his application to be admitted as a party, he deemed it inadvisable and futile to apply to that officer to have the attachments removed." He ought so to have applied in the first instance; having failed to do so he has lost his right so to

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apply, Sec. 247 requiring that all claims under Sec. 246 shall be made *at the earliest opportunity* to the court which shall have ordered the attachment.

The above exposition of the law enables us at once to dispose of all these rules. It being quite clear that the Official Assignee had no legal right to apply to the Principal Şadr Amín to be made a party either to the suits pending at the date of his application of the 4th of July, or to the other suits in which a decree had been previously passed, or to have proceedings stayed therein, it follows that the order of the Principal Şadr Amín of the 16th of July, refusing that application, and the order of the Judge of the 29th of August, confirming that order, were perfectly right; and consequently that each one of the rules, calling upon the several parties respectively named therein to show cause why Mr. Walter's order of the 29th of July should not be reversed, must be discharged with costs on the Official Assignee. It being equally clear, from what we have already said, that the Official Assignee had no *locus standi* or legal right to appeal against the decree passed in Bholágír's favour on the 28th of June, it follows that the rule calling on Bholágír to show cause why Mr. Walter's order of the 1st of September, refusing to entertain such appeal, should not be reversed or varied, should also be discharged with costs.

The order of the Court, therefore, in regard to all these rules, is that they be one and all discharged with costs.

Costs throughout to be borne by the Official Assignee.