

As to the question of delicacy, which was much relied on by the learned Judge in the Division Court, we apprehend that the Civil Courts having assumed the jurisdiction cannot draw fine distinctions between a woman who has never lived with her husband and is averse to joining him and one who has lived with him and perhaps acquired a physical or moral loathing for him, and objects to returning. It may be advisable that the law should not adopt stringent measures to compel the performance of conjugal duties; but as long as the law remains as it is, Civil Courts, in our opinion, cannot with due regard to consistency and uniformity of practice (except, perhaps, under the most special circumstances) recognise any plea of justification other than a marital offence by the complaining party, as was held to be the only grounds upon which the Divorce Courts in England would refuse relief in *Scott v. Scott*⁽¹⁾.

We must, therefore, reverse the decree of the Division Court, and remand the case for a decision on the merits after hearing the defendant's case. Costs of this appeal to abide the result.

Attorneys for appellant.—Messrs. *Chalk and Walker*.

Attorneys for respondent.—Messrs. *Payne, Gilbert and Sayani*.

(1) 34 L. J., 23.

1886.

DADAJI
BHIKAJI
v.
RUKMABAI.

INSOLVENCY JURISDICTION.

Before Mr. Justice Bayley.

IN THE MATTER OF THE PETITION OF EDWARD JAMES
SYDNEY SHREWSBURY, AN INSOLVENT.

KESHAVLA'L GOVARDHANDA'S, OPPOSING CREDITOR.

1886.

March 17.

Insolvency—Indian Insolvent Act, Stat. 11 and 12 Vic., Cap. 21—Personal estate of the insolvent—Expectant or contingent interest—Deduction from salary for a provident fund and mutual assurance fund—Right of Official Assignee.

S., a clerk in the employment of the G. I. P. Railway Company, agreed with the Company that 5 per cent. of his salary should be deducted every month as his contribution or subscription to a fund called the Provident Fund, and a further rate of 1 per cent. as his subscription to another fund called the Mutual Assurance Fund. By the rules of these funds he was entitled to receive back his

1886.

IN RE THE
PETITION OF
E. J. S.
SHREWSBURY.

subscriptions in the event of his dismissal for misconduct. S. became insolvent and omitted to mention in his schedule the sums standing to his credit in respect of the above two funds.

Held, that these sums were personal estate of the insolvent held by the Company in trust for him, which passed to the Official Assignee under section 7 of Stat. 11 and 12 Vic., cap. 21, and that they should be entered in his schedule as part of his estate.

On the 8th August, 1885, the insolvent filed his petition in insolvency under the Indian Insolvent Act, Stat. 11 and 12 Vic., cap. 21.

By section 6 of the Act, insolvents are required to file a schedule in the form prescribed in Schedule C. to the Act. That form requires insolvents to state the "real and personal estate and effects in which they have any interest in reversion, remainder or expectancy."

The only property mentioned under this heading by the insolvent Shrewsbury was a sum of Rs. 275, which was stated to be his monthly salary as a clerk in the G. I. P. Railway Company.

On the 17th March, 1886, counsel on behalf of an opposing creditor applied that the schedule should be amended, and that the insolvent should be ordered to insert in his schedule certain sums of money standing to his credit in the books of the Company as a subscriber to two funds, *viz.*, the "Provident Fund," and the "Mutual Assurance Fund," maintained for the benefit of the servants of the Company and their families.

It appeared that the insolvent had been a clerk in the Company since June, 1872, his employment being determinable on a month's notice. From the commencement of his employment he had subscribed to the above funds, which the Company had started for the benefit of all persons in its service who were in receipt of a monthly pay of Rs. 30 and upwards. The rules and regulations of the Provident Fund, so far as they are material for the purposes of this report, are as follows:—

(1) "The fund shall be managed, as part of the Company's business, by the Board of Directors of the Company, whose decision shall be final and binding upon all the members of the fund; but for its more convenient administration a committee in the character of agents of the Board shall be appointed, consisting of the following five officers of the Company in India, for the time being, *viz.*, the Company's Agent, the General Traffic Manager, the Chief Resident Engineer, the

Locomotive Superintendent, and the Storekeeper, three of whom shall be a quorum. The committee shall act under the instructions, and their proceedings be subject to confirmation by the Board in all matters not previously distinctly delegated to them, and all such acts of the committee shall be binding on the members, unless the Board shall otherwise determine.

1886.

IN RE THE
PETITION OF
E. J. S.
SHREWSBURY.

(2) "The benefit of the fund shall be open to all persons in the service of the Company in India on the 30th June, 1868, who shall be in receipt of a monthly pay of Rs. 30 or upwards, but it shall be *compulsory* on persons entering the service after that date to join the fund on entering, or as soon as their pay shall qualify them to become members."

(4) "From the 1st of July, 1868, a deduction of 5 per cent. shall be made from the monthly pay of each member of class "A.", and $2\frac{1}{2}$ per cent. from the monthly pay of each member of class "B.," the total amount deducted from time to time being paid over to the committee for investment in the names of the trustees mentioned in Rule 7."

(7) "All amounts received by the committee, from whatever sources, after deducting payments and the expenses of managing the fund, shall be from time to time invested in Indian Government securities, or in the stock of the Company, in the names of the Company's Agent and of the General Traffic Manager in India, as trustees of the fund.

(8) "As soon after the 31st December of each year as possible, the total investments made from the subscriptions of that year shall be divided (by book entry) between the members of the fund, according to the ratio of subscription of each. In like manner, investments made from other amounts received and from interest on the total stock held by the fund shall be divided rateably, according to the amount of stock standing at the credit of each member.

(9) "On the total subscriptions and share of investments of a member reaching a sum of £ 40, or upwards, and such member being desirous either to bring his wife or family out from England, or to provide for their return passage home an equivalent advance may be made to him on the security thereof to enable him to do so.

(10) "On the total subscriptions and share of investments of a member reaching in amount the guarantee security required for his fidelity, the same may be assigned to the Company, by way of security in satisfaction thereof.

(11) "Except under Rules 9 and 10, no charge shall be made on a member's subscriptions and share of investments. If a member retires from the service, the amount of his share of investment standing at his credit on the 31st day of December preceding his retirement, or, at the option of the Board, the market value thereof calculated at the public price of the same day shall, at the discretion of the Board, either (1) be paid to him in Bombay, or (2) be paid to him in London, or (3) be invested in the purchase of a like annuity for him, or, if he wishes it, for his wife, or a member of his family approved by the Board, and his subscriptions for the period subsequent to such preceding 31st day of December will be returned to him in full. If he dies in the service of the Company, the Board may, at their discretion, either (1) pay the amount *standing to his credit as above*

1886.

IN RE THE
PETITION OF
E. J. S.
SHREWEBURY.

and his subsequent subscription to his widow, or (2) invest the same in the purchase of a life annuity for his widow, or a member of his family approved by the Board, or (3) they may pay the same to his executors or administrators. Any payment or investment authorised by this rule shall be a discharge to the fund from the member's share and interest in the fund.

(12) "A member dismissed the service for misconduct will receive back the amount of his subscriptions alone (without interest), less any amount claimable by the Company on account of guarantee security, or loan, or on account of money due to the Company by the person dismissed, or lost to them by his misconduct, the balance at his credit, after payment of the above, becoming the property of the fund."

(15) "The Board, upon the proposition of the committee, may make any new rules as occasion shall require."

The rules and regulations of the Mutual Assurance Fund contained the following clauses :—

(1) "That the fund be called 'The Great Indian Peninsula Railway Mutual Assurance Fund.'"

(3) "The Directors to deduct from the salary of each servant required to give security a sum equal to 1 per cent. per annum upon the amount of such security, to be placed to the credit of the fund, and an account for this purpose to be opened in the books of the Company."

(7) "Any person who is guaranteed under the provisions of this fund and who may retire from the Company's service, or the widow, child, or representative of any such guaranteed person who may die while in the Company's service, shall, subject however to the provisions contained in clauses 4 and 8, be entitled to receive back the rateable proportion out of the fund, including interest, which shall be due to such guaranteed member, or to such member of the fund so dying."

(8) "The rateable proportion of each member will be the gross amount paid by him to the fund, after deduction of his share of losses and allowance of his proportion of interest."

(9) "The rateable proportion due to any subscriber to the fund will be forfeited if the fund has at any time to make good loss or defalcation by such subscriber, whether such loss or defalcation amounts to the rateable proportion or not. The committee will, however, endeavour, before charging any losses to the fund, to make up such loss, as far as possible, from any property belonging to the individual over which the Company may have control."

(17) "In order to place all contributors to the fund on an equal footing, the rate of percentage now fixed shall not afterwards be altered."

(7) "The amount of insurance is, as a general rule, to be the amount of 6 months' pay, or, if that is an odd figure, the nearest even hundred. Special cases to be dealt with by the head of the department."

(8) "Premia will be deducted in one annual payment, but any special case where the annual amount may be too heavy to be levied in one instalment will be dealt with specially on the application of the head of the department."

(9) "By the establishment of this fund it will be seen (by Rule 7) that all the Company's employes of good character who may be guaranteed will be entitled to receive back with interest their rateable proportion of the fund on leaving the service."

1886.

IN RE THE
PETITION OF
E. J. S.
SHREWSBURY.

On the 31st December, 1885, a sum of Rs. 2,027-2 was standing to the credit of the insolvent's account in the books of the Company in respect of the Provident Fund, and a sum of Rs. 189-5-0 in respect of the Mutual Assurance Fund.

Vicáji for the opposing creditor:—I apply that the schedule be amended inserting the sums standing to the insolvent's credit in respect of these two funds. This is property in which he has a beneficial interest. It is now vested in him, and will come into his possession on his dismissal or retirement. Counsel referred to *Stat. 12 and 13 Vic., cap. 106, secs. 141 and 142; Green v. Spicer*⁽¹⁾; *Graves v. Dolphin*⁽²⁾; *Pym v. Lockyer*⁽³⁾; *Ex parte Huggins*⁽⁴⁾.

Farran for the G. I. P. R. Company:—I merely appear to point out that no order can be made against the Company. The insolvent is still in the service of the Company, and by the rules relating to their funds it is clear that so long as a subscriber continues in the employment of the Company he has no right whatever in the fund. He cannot withdraw any money, nor can any assignee. In certain events the insolvent may have a right, but these events have not happened. In case of his death the Company under Rule 11 may hand over the money standing to his credit to his widow or child. The Official Assignee can take nothing. The insolvent's right is merely a contingency. Under the rules, until he dies or retires or is discharged, the amount of his interest cannot be ascertained. There is nothing at present to which the insolvent or the Official Assignee, as representing him, can make any claim.

31st March. BAYLEY, J.:—The insolvent in this case is a clerk or servant employed in the Locomotive Department of the G. I. P. Railway Company, and receives a salary of Rs. 275 a month. By the terms of his employment, a deduction has been

(1) Russell and Mylne, 395.

(3) 12 Sim.

(2) 1 Sim, 67.

(4) L. R., 21 Ch. Div., 85.

1886.

IN RE THE
PETITION OF
E. J. S.
SHEWSEBURY.

made by the Company of 5 per cent. from his monthly salary as his subscription to a fund called the Provident Fund, and of a further 1 per cent. as his subscription to another fund called the Mutual Assurance Fund, and it appears that on the 31st December last there was a sum of Rs. 2,027-2-0 to the insolvent's credit in the books of the Company in respect of the Provident Fund and of Rs. 189-5-0 in respect of the Mutual Assurance Fund. The insolvent is required to state in his schedule any property which he may have in reversion or expectancy, but he has made no mention whatever of either of these two sums.

The scheme, according to which the funds are managed, is contained in a set of rules and regulations, of which the most important are Rules 9, 10, 11, 12 and 15. (His Lordship read the above rules.) It is contended on behalf of the opposing creditor that the sum to the credit of the insolvent in both these funds is a personal estate vested in trust for the benefit of the insolvent, which passes to the Official Assignee under section 7 of the Insolvency Act, and that it ought to be inserted in his schedule. On behalf of the Railway Company it has been argued that the insolvent's interest in the funds is a bare contingency analogous to the interest of covenanted servants of the Government in the Civil Service Pension Fund; that the insolvent cannot withdraw any portion of the funds during the period of his service; and, in the event of his death, the amount is payable to his widow or relation at the discretion of the Company. On a careful consideration of the rules I have no doubt that the insolvent has a contingent or expectant interest in the funds, which should have been inserted in his schedule. It is not the property of the Company, but is vested in trust in the Company for the benefit of the insolvent during the period of his service. If his conduct be so bad that the Company dismiss him, he is entitled to get back his subscription. It is a part of his personal estate to which he has some sort of right, and which passes to the Official Assignee by force of section 7 of the Act. There is no analogy between this fund and the Civil Service Fund, and the authorities with respect to the latter have no bearing on this case. There are three principal decisions with reference to the Civil Service Fund, namely,

Boldero v. The East India Company⁽¹⁾, *The East India Company v. Robertson*⁽²⁾, and *The Secretary of State for India v. Underwood*⁽³⁾. On the general question of assignability in the event of insolvency or bankruptcy they throw no light whatever. The case of *Ex parte Huggins*⁽⁴⁾, cited by Mr. Vicáji, is not a direct authority on the point, but it comes the nearest to it. It was held there that pensions allowed by Government for past service are assignable, and are "property" within the meaning of the English Bankruptcy Act. In the present case I hold that the sums standing to the credit of the insolvent in respect of the two funds in question are part of his personal estate, and are vested in the Official Assignee under section 7 of the Indian Insolvency Act, and I order that they be inserted accordingly in the schedule, to enable the Official Assignee to take such steps for the recovery of them for the benefit of his creditors as he may deem proper.

Insolvent in person.

Mr. *Charles E. Milvain* for the opposing creditor.

Messrs. *Little, Smith, Frere and Nicholson* for the G. I. P. R. Company.

(1) 11 H. L., 85.

(2) 12 M. P. C., 400.

(3) L. R., 4 Eng. & Ir. App., 580.

(4) L. R., 21 Ch. Div., 85.

APPELLATE CRIMINAL.

Before Mr. Justice Nánábhái Hariddás and Sir W. Wedderburn, Bart., Justice.

QUEEN-EMPRESS *v.* KRISHNA'BHAT.*

1885.

December 1.

Criminal Procedure Code (Act X of 1882), Secs. 193, 436 and 537—Power of the Court of Session to commit a discharged person for trial without the intervention of a Magistrate—Evidence Act (I of 1872), Secs. 30 and 114—Evidence of an accomplice—Corroboration—Confession.

In cases exclusively triable by the Court of Session, section 436 of the Code of Criminal Procedure (Act X of 1882) empowers the Court of Session or District Magistrate to order a discharged person to be committed for trial by such Court. There is nothing in that section to show that, when such order is made, the commitment thereupon must necessarily be made by the Magistrate who has discharged him, whilst the first proviso to it shows that it may be made by the

* Criminal Appeal, No. 117 of 1885.