ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Starling.

N. C. MACLEOD, OFFICIAL ASSIGNEE (ORIGINAL DEFENDANT 1), APPELLANT, *v.* KIKABHOY KHUSHAL (ORIGINAL PLAINTIFF), RESPONDENT.*

1901. *June* 14, 21.

Insolvency—Property subject to mortgage in possession of insolvent at date of insolvency—Indian Insolvency Act (Statute 11 and 12 Vict. c. 21), section 23—Reputed ownership—Fixtures—Goods and chattels—Registration of mortgage—Registration Act (III of 1877), section 17.

On the 23rd June, 1893, one Vishram Meghji, the owner of a flour mill, mortgaged all the machinery, engines, plant, stock, implements, utensils, trade fixtures, chattels and effects specified in schedule annexed to the deed of mortgage to the plaintiff for Rs. 8,000 then advanced, and power was given to the plaintiff to sell the same in default of payment. In March, 1899, Vishram Meghji became insolvent, and his estate thereupon vested in the Official Assignee. The plaintiff claimed the mortgaged property, but the Official Assignee contended that under section 23 of the Indian Insolvency Act (Stat. 11 and 12 Vict. c. 21) he was entitled to it as property which with the consent of the true owner was in the possession, order or disposition of the insolvent at the date of insolvency. The property was sold by consent and the plaintiff brought this suit to recover the proceeds. From the evidence it appeared that the greater portion of the mortgaged property consisted of articles fixed to various parts of the flour mill or of the machinery therein.

Held, as to the articles not so fixed that the plaintiff was not the true owner of these and that they were not therefore within the section and passed to the Official Assignee.

2. As to the fixed articles that they were not goods and chattels in the possession, order or disposition of the insolvent as the reputed owner and that they were not in his reputed ownership within the section. The plaintiff was therefore entitled to them or to such portion of the proceeds of sale as represented their value.

It was contended that the fixed articles must either be goods and chattels or immoveable property, and if the latter, they could not be affected by the mortgage deed as it was not registered and the charge in favour of the plaintiff was therefore invalid.

Held, that the question of registration depended on the Registration Act (III of 1877), which requires the registration of all assurances of immoveable property. The fixed articles in question did not fall within the definition of immoveable property contained in section 3 of that Act, not being "attached to the earth or

* Suit 395 of 1899; Appeal 1114.

1901.

MACLEOD v. KIKABHOY.

permanently fastened to any thing which is attached to the earth." Section 17 of the Registration Act therefore did not apply.

Fixtures are not goods and chattels within the rules of reputed ownership laid down in section 23 of the Indian Insolvency Act (Stat. 11 and 12 Vict. c. 21). The fact of such fixtures being removeable by a tenant makes no difference. They are still fixtures to which the doctrine does not apply.

THE plaintiff Kikabhoy Khushal sued the Official Assignee (defendant 1) as the assignee of the estate of Vishram Meghji, an insolvent (defendant 2), to recover the sum of Rs. 8,000 and interest out of the proceeds of certain property which had been mortgaged to the plaintiff on the 23rd June, 1893, but which upon the insolvency of Vishram Meghji (defendant 2) in March, 1899, had been taken possession of by the Official Assignee (defendant 1) and sold.

Vishram Meghji was the owner of a flour mill, and by an indenture dated the 23rd June, 1893, for an advance of Rs. 8,000 made to him by the plaintiff, he charged "all the machinery, engines, plant, stock, implements, utensils, trade fixtures, chattels and effects now standing or being in or upon or belonging to or used in connection with the said flour mill more particularly specified in the schedule A hereto" as security to the plaintiff for the repayment of the said sum of Rs. 8,000. He further covenanted that he would not remove any of the said chattels or premises without the plaintiff's consent, and by the said deed the plaintiff was given power to sell the mortgaged property.

The schedule referred to in the deed was as follows:

List of machinery and other goods in the flour mill.

One boiler twenty feet by six in diameter by Daniel Adamson.
One double cylinder engine twenty-four horse-power.
One donkey engine, three cast-iron mill frames, each four feet complete with wheel and other accessories.
Three pairs mill-stones, four feet, by Mabel and Company.
One chimney forty feet long two feet in diameter.
Shaftings forty feet long and three inches thick with pulleys complete.
One shafting of the mill fifteen by four.
One large pulley six feet long.
Three tubs for the mill.
Six tanks for water.
One tank for oil eureka.
One wheat-cleaning machine.

One screw-cutting lathe sixteen feet long complete.
One hoist with chain complete.
Three centrifugal or shifting machines.
Three cranes for raising stones.
Two blowers.
One box new drilling tools.

In January, 1899, there was a sum of Rs. 7,158 due to the plaintiff on the security of the said mortgage, and the plaintiff called upon Vishram Meghji to pay it within twenty-four hours. The money was not paid.

In March, 1899, Vishram Meghji became insolvent and his estate vested in the Official Assignee (defendant 1). The plaintiff claimed the mortgaged property, but the Official Assignee repudiated his claim, alleging that he (the Official Assignee) was entitled to the property under section 23 of the Indian Insolvency Act (Stat. 11 and 12 Vict. c. 21)[1] as property which, with the consent of the true owner, was in the possession, order and disposition of the insolvent at the time of his insolvency.

The property was subsequently sold as above stated by the Official Assignee for Rs. 8,000 with the plaintiff's consent and without prejudice to his claim, and the plaintiff now claimed the proceeds.

With respect to the articles mentioned in the above list the following evidence was given at the hearing:

The following were fixed to a foundation :—the boilers, the cylinder, the donkey engine, three mill-stones, the chimney.

Six shaftings were fixed to a beam, one shafting was fixed to the engine of the grinding mill.

The large pulley was fixed to the engine.

The other tools were part of the grinding machinery.

They were not fixed—they could be removed whenever required. Six tanks for water were merely standing on a frame-work fixed to the ground.

The tank for oil was standing on the ground.

(1) Sec. 23 of Stat. 11 and 12 Vict. c. 21 :—And be it enacted, that if any such insolvent shall at the time of filing his petition, or at the time of filing the petition on which an adjudication of insolvency shall be made by the consent and permission of the true owner thereof, have in his possession, order or disposition any goods or chattels whereof such insolvent is reputed owner, or whereof he has taken upon him the sale, alteration or disposition as owner, the same shall be deemed to be the property of such insolvent, so as to become vested in the Official Assignee of the Court by the order made in pursuance of this Act.

1901.

MACLEOD v. KIKABHOY.

The wheat-cleaning machine was fixed to the beam.

One saw-cutting lathe was fixed to the ground with saws on wooden beams.

One hoist with chain was fixed on the second floor to a wooden stool or a horse.

The horse was fixed to the floor to shaftings on the floor.

The hoist was a crane and was fixed; three centrifugal machines were fixed on the first floor—one end to the floor, the other end to the roof.

Three cranes for raising grinding stones—they were not fixed to the ground but to the grinding machine which was fixed to the ground. Two blowers were fixed to the beam on the ground floor.

Box with drilling tools was not fixed.

The drilling tools were for drilling. They were specially sent for from Europe to drill holes.

They belonged to this mill's machinery.

They were used with the screw-cutting lathe and belonged to that machine.

Manji and Visram put in the engine boiler and mill stones—some of the articles since I was employed. The others were there when I was first employed.

Everything is removeable. The masonry could have to be taken.

The machinery has been sold but not removed.

All the articles I mentioned belonged to Visram Meghji.

If Visram had got notice to quit he could have removed them all at great expense.

Some injury would be caused to the machinery by the removal.

It was an iron chimney, and very easily they could have been removed.

The boiler is in a 4-feet hole, there cement is put in and gullies and masonry work put on all sides.

The boiler is built with masonry work all round. It is not rivetted to masonry.

The machinery is fixed so that it may work properly: you could not work it without its being fixed.

Russell, J., held that such of the above articles as were "fixed" were immoveable property and were exempt from the operation of section 23 of the Insolvency Act and were not goods and chattels within the said section, and as to those articles which were not "fixed" he held that they were moveable property of which the plaintiff was *not* the true owner within the meaning of the section and that they therefore did not pass on his insolvency to the Official Assignee. He therefore passed a decree for the plaintiff.

The first defendant (Official Assignee) appealed.

Scott (Acting Advocate General) and *Jardine* for the appellant (Official Assignee).

They cited section 23 of the Indian Insolvency Act (Stat. 11 and 12 Vict. c. 21); Yate Lee on Bankruptcy (3rd Ed.) pages 294 and 370; *Hawtry* v. *Butlin*(1); Transfer of Property Act (IV of 1882), section 3; *Shuttleworth* v. *Hernaman*(2); *Ex-parte Sykes*(3); *Bryson* v. *Wylie*(4); *Mather* v. *Fraser*(5); *Longbottom* v. *Berry*(6); *Harold* v. *Eastwood*(7); *Ex-parte Loyd.*(8) If the articles attached to the earth became immoveable property, they did not pass under the Indenture as it was not registered—*Najibulla* v. *Nusir Mistri.*(9)

Robertson and *Rivett-Carnac* for respondent (plaintiff):—

They cited *Whitmore* v. *Empson*(10); *Ex-parte* v. *Astbury*(11); *Green* v. *Cole*(12); *Hallen* v. *Runder*(13); *Lee* v. *Gaskell*(14); *Exparte Spicer.*(15)

As to registration, they cited *Sheo Sunkur* v. *Hirdey Narain*(16); *Har Sahai* v. *Chunni Kuar*(17); *Narasamma* v. *Subbarayudu.*(18)

JENKINS, C.J.:—By an instrument of the 23rd of June, 1893, the defendant Vishram Meghji covenanted with the plaintiff that the machinery, engines, plant, stock, implements, utensils, trade fixtures, chattels and effects specified in a schedule thereto should stand charged with, and continue to be a security to the plaintiff for a sum of Rs. 8,000, then advanced, and power was thereby vested in the plaintiff to sell the same on default in payment.

In March, 1899, while there was still a large sum due to the plaintiff, Vishram filed his petition under the Act for the Relief of Insolvent Debtors, and thereby his assets became vested in the Official Assignee, who is now represented by Mr. Macleod, the present incumbent of that office.

The Official Assignee contended that the articles specified in

(1) (1873) L. R. 8 Q. B. 293.
(2) (1857) 1 DeG. & J. 322.
(3) (1850) 13 Jur. 486.
(4) (1797) 1 B. & P. 83 (note).
(5) (1856) 2 K. & J. 536.
(6) (1870) L. R. 5 Q. B. p. 137.
(7) (1850) 20 L. J. (Ex.) 154.
(8) (1834) 3 Dea. & Chitty, 765 at p. 790.
(9) (1881) 7 Cal. 196.
(10) (1856) 23 Beav. 313.
(11) (1869) L. R. 4 Ch. 630.
(12) 2 W. Saund. 656.
(13) (1834) 1 Cr. M. & R. 266.
(14) (1876) 1 Q. B. D. 700.
(15) (1837) 2 Dea. 335.
(16) (1879) 6 Cal. 25.
(17) (1881) 4 All. 14.
(18) (1895) 18 Mad. 364.

1901.

MACLEOD v. KIKABHOY.

the schedule to the instrument were in the possession, order or disposition of the insolvent with the consent of the true owner, and so vested in him. The plaintiff combated this contention, and the articles having by consent been sold, he has brought this suit to establish his right to be paid out of the proceeds.

The case was heard by Mr. Justice Russell, who decided in plaintiff's favour as to such of the articles as were "fixed" on the ground that they were not goods and chattels, and as to such as were not "fixed" on the ground that the plaintiff was not the true owner. From this decision the Official Assignee has appealed.

Shuttleworth v. *Hernaman*[1] clearly shows (and it has been conceded by Mr. Robertson that the decision of Russell, J., in this case cannot be supported so far as it proceeds on that ground) that the plaintiff was not the true owner of the articles not "fixed." To that extent therefore the decree must in any case be varied, for these articles were clearly in the insolvent's possession.

It remains then to consider what are the rights of the parties in relation to the "fixed" articles, but before going into this there is a matter which requires explanation. The evidence on the record as to the extent and purpose of annexation is meagre, and Mr. Robertson has told us how this came about. On the evidence-in-chief of Jamsetji Sorabji, the learned Judge was satisfied that with the exception of three or four articles the plaintiff had made out a *prima facie* case of the scheduled assets being fixtures, and he intimated this opinion, and that he should so hold unless the defendants by examination or their own evidence established the contrary. Mr. Raikes, it is said, did not quarrel with this, and it was practically taken as proved that with the above exceptions the scheduled assets were fixtures. Mr. Raikes unfortunately is not here, but Mr. Justice Russell's own recollection and his note of Mr. Raikes' argument bear out Mr. Robertson's statement, which I shall therefore take to be correct.

Were the annexed articles, goods and chattels in the possession, order or disposition of the insolvent with the consent of the true owner and was the insolvent the reputed owner thereof within section 23 of the Indian Insolvent Act? That Act was passed

(1) (1857) 1 DeG. & J. 322.

by the English Legislature, and is practically, so far as the doctrine of reputed ownership goes, identical in its terms with the earlier English Bankruptcy Acts. Therefore reference to the pertinent English decisions is legitimate and proper.

It has been conclusively established in England that fixtures are not goods and chattels within the rule of reputed ownership. This was decided in the leading case of *Horn* v. *Baker*,(1) which has been consistently followed. In illustration of this I may refer to *Clark* v. *Crownshaw* (2); *Coombs* v. *Beaumont*(3); *Ex-parte Barclay*.(4) The principle is fully discussed by Lord Cranworth in *Ex-parte Barclay*. (His Lordship referred to the judgment in this case and continued.)

This case makes it clear that the fact of the articles being removeable by a tenant makes no difference; they still are fixtures to which the doctrine does not apply. In my opinion the same rule should apply in the town of Bombay.

But then it is said that it is a circumstance in favour of the Official Assignee, that the articles were charged by the deed of 1893, apart from the immoveable property to which they were annexed. I fail to see how in the reputation of ownership arising out of possession this makes any difference, and that it does not is shown by *Whitmore* v. *Empson*.(5)

The case of *Ex-parte Sykes*(6) was much pressed on us by the Official Assignee in this connection. From the report of the case it would not seem that anything was decided, which the Official Assignee can call in aid, and this view is borne out by a footnote at page 407 of 5 D. M. & G., where it is stated, "According to the note which one of the present Reporters took of the case, nothing was decided except that the claim of the plaintiffs was too doubtful to entitle him to the common mortgagee's order in Bankruptcy."

The conclusion then to which I come is that the annexed articles, located as they were, were not goods and chattels in the possession, order or disposition of the insolvent as their reputed owner, and that they therefore were not in his reputed ownership.

(1) (1808) 9 East. 215.
(2) (1832) 3 B. & Ad. 804.
(3) (1833) 5 B. & Ad. 72.
(4) (1855) 5 D. M. & G. 403.
(5) (1856) 23 Beav. 313.
(6) (1850) 13 Jur. 486.

1901.

MACLEOD v. KIKABHOY.

But then it is said, if this be so, the charge was invalid for want of registration, and it is propounded as a necessary dilemma that the articles must either be goods and chattels, or they must be immoveable property, and, if immoveable property, then they would be unaffected by any document, unless duly registered. But do the alternatives proposed exhaust all possible cases? Must a subject-matter be immoveable property within the meaning of the Registration Act, or be subject to the doctrine of reputed ownership? It is clear on the English cases that fixtures, though not goods and chattels within the reputed ownership section, need not be land (*Hallen* v. *Runder*(1); *Lee* v. *Gaskell*(2)). Therefore the dilemma does not *ex vi termini* arise. So here the question whether these fixtures are immoveable property must be decided on the wording of the Registration Act and independently of any conclusion as to their not being goods and chattels under section 23 of the Insolvent Act. The Registration Act makes compulsory the registration of all assurances of immoveable property, and so I have to see whether the instrument in suit is such an assurance. Immoveable property is by section 3 said to include "Land, buildings, hereditary allowances, rights to way, lights, ferries, fisheries or any other benefit to arise out of land and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops, or grass." Of the annexed articles none were attached to the earth; they were at most fastened to that which was attached to the earth. That, however, is not enough; they must have been "permanently fastened." The evidence, as I have already said, is meagre as to the extent and intention of annexation, but looking to the fact that the insolvent who erected them was only a monthly tenant, I am unable to hold that they were permanently fastened; on the contrary, I think they were not. Therefore section 17 of the Registration Act does not apply.

I therefore think that to the articles which were not "fixed" the Official Assignee has a good title. They would be those numbered 9, 10, 11 and 18 in the schedule: to the rest he has no title.

The chattels for the purpose of this decree being by consent taken to be of the value of Rs. 750, we declare that the Official

(1) (1834) 1 C. M. & R. 266. (2) (1865) L. R. 1 Q. B. 700.

Assignee is entitled to that sum with such interest as may have been raised in respect thereof and that the plaintiff is entitled to the balance of the fund in the Official Assignee's hands, and decree accordingly.

We do not disturb the Judge's order as to costs, but the respondent will only get half his costs of the appeal.

Attorneys for plaintiff—*Messrs. Payne, Gilbert and Sayani and Moos.*

Attorneys for the Official Assignee (defendant 1)—*Messrs. Mansukhlal, Damodar and Jamsetji.*

CRIMINAL REFERENCE.

Before Mr. Justice Ranade and Mr. Justice Fulton.

IMPERATRIX *v.* RATNYA.* 1897. *November* 3.

Jurisdiction—Scheduled Districts—Reference and appeal in a criminal case from the Scheduled Districts—Act No. XI of 1846—Scheduled Districts Act XIV of 1874.

The Collector of Khándesh, in his capacity of Political Agent for the Mehwási Estates, convicted the accused of murder committed at a village in the Scheduled Districts, and sentenced him to transportation for life. He then forwarded the proceedings to Government for confirmation. The accused also appealed to Government against the conviction and sentence. The Government thereupon directed the Political Agent to submit the proceedings to the High Court under Rule 35 of the Rules promulgated in 1855 under section 3 of Act XI of 1846. The appeal presented by the accused was also forwarded to the High Court. The question arose as to whether the High Court had jurisdiction to dispose of the reference.

Held, that the High Court had jurisdiction.

REFERENCE by A. Cumine, Collector of Khándesh and Political Agent of the Mehwási Estates of Kathi in the Khándesh District, under section 7 of the Scheduled Districts Act No. XIV of 1874 in a murder case.

The accused was charged under section 302 of the Indian Penal Code (Act XLV of 1860) with having committed murder at Piprapani, a village belonging to the Mehwási Estate of Kathi,

* Criminal Reference No. 104 of 1897.