Committee to exercise their own judgment as to whether those interests were impaired by the plaintiff's continuance in office. And having regard to the case of *Hayman* v. *Governors of Rugby School* (1) we think the onus was, as the Court of first instance placed it, on the plaintiff to show that the defendant-Committee had not, in dismissing him, acted on a *bonâ fide* belief that the dismissal was necessary in the interests of the Devasthan, but had been actuated by some other and improper motive. But the finding of the lower appellate Court is, we think, in effect, that the Committee did act without any real regard to the interests of the Devasthan and were actuated by the bad feeling and caste enmity which, the lower appellate Court holds, the majority of the Committee entertain as Saraswats towards the Havig community, of which the plaintiff is a member.

This we think, is a finding of fact which is binding in second appeal.

The decree of the lower Court must, therefore, be confirmed. The appellants must bear all costs of this appeal.

G. B. R. *Decree confirmed.*

(1) (1874) L. R. 18 Eq. 28.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

R. S. WOONWALLA AND COMPANY (APPELLANTS) *v.* N. C. MACLEOD AND ANOTHER (RESPONDENTS).*

1906. *March* 26.

Indian Insolvency Act (11 and 12 Vict., c. 21), section 31—Sale by Official Assignee—Sanction of the Court—Power of Court to set aside a completed sale.

Under the Indian Insolvent Act the Official Assignee has full power to sell the property and effects of an insolvent, and it is his duty to make sale of the same with all convenient speed. The sanction of the Court to the sale is not necessary.

Section 31 of the Indian Insolvent Act does not vest the Court with power to set aside completed sale.

* Appeal No. 1417.

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WOONWALLA AND CO. v. N. C. MACLEOD.

APPEAL from the judgment of Chandavarkar, J., on a rule *Nisi* dated 9th September 1905.

The facts on which the rule was argued were as follows:—Two persons Bhukandas Lallubhai and Hargovandas Ichharam, representing the firm of Lallubhai Mulchand, were, at the instance of one Vassonji Trikamji, adjudicated insolvents on or about the 19th June 1901.

The appellants R. S. Woonwalla and Company were one of the creditors of the firm of Lallubhai Mulchand to the extent of Rs. 3,652-1-5.

The recoverable assets of the firm of Lallubhai Mulchand consisted of a mortgage in their favour of two lakhs of rupees on the property of the Hope Mills, Limited.

On the 10th April 1905, the right, title and interest of the insolvents in the mortgage-debt was agreed to be sold to one Ebrahim Rahimtulla for Rs. 8,000 subject to the sanction of the Court. On the same day, Mr. Premchand Roychand submitted to the Official Assignee an offer for Rs. 10,500. At this Mr. Ebrahim expressed his readiness to increase his offer to Rs. 10,500.

On the 14th April 1905, the matter was by the Official Assignee brought to the notice of the Commissioner in Insolvency, who ordered that the Official Assignee should be at liberty to sell the property to the highest bidder after it was put to auction between Ebrahim Rahimtoolla and Premchand Roychand.

The same day the property was put to auction and it was knocked down to Ebrahim Rahimtoolla for Rs. 13,100.

On the 27th June 1905, the Official Assignee executed a deed of assignment in Mr. Ebrahim's favour.

On the 6th September 1905, R. S. Woonwalla and Company applied to the Commissioner in Insolvency to set aside the sale and obtained a rule "to show cause why the order made in this matter upon the 14th April 1905 and the sale made in pursuance of the said order should not be revoked, set aside and cancelled."

Chandavarkar, J., held that the Court had no jurisdiction to cancel the sale as it had none to sanction it.

The applicants appealed against this order.

Setalvad with *Jinnah* and *Weldon* for the appellants:—The Insolvency Court has jurisdiction to set aside the sale in question. It was a sale sanctioned by the Court and a sale for which the sanction was necessary. The Official Assignee has no power to conduct this sale without the sanction of the Commissioner. Section 31 of the Insolvency Act does not apply to this case. It does not apply to debts, but applies only to corporeal property. The word 'debts' does not occur in the section. A comparison of section 31 with sections 7, 21, 24, 26, 33, 36 and 50 shows the validity of our contention. In these sections the words 'property,' 'effects' and 'debts' are separately mentioned, but in section 31 only the words 'property' and 'effects' are used. Under section 28 the Official Assignee could not have accepted a pie less than the amount of the debt from the debtor without the sanction of the Court. Can it then be maintained that he could throw it out to a stranger for any amount? Here the ultimate equity of redemption belonged to the Company and therefore it was a debt due by the Company to the insolvent mortgagee. Moreover the Commissioner has power to set aside the sale under the latter part of that section.

It is the practice not to sell debts without the sanction of the Court. In fact the Official Assignee had obtained the sanction in the present case. The original agreement between the Official Assignee and Mr. Ebrahim was not to take effect until the sanction of the Commissioner was taken. That agreement was cancelled by the Commissioner who ordered the property to be sold to the highest bidder of the two intending purchasers, Ebrahim and Premchand. The conveyance declares the sale as having been sanctioned by the Court.

We submit that the Court has general jurisdiction to set aside the sale and rely on *In re Motion*[1] which appears to support our contention.

If the sanction was necessary for this sale, then it was obtained improperly. The sum advanced by the insolvent was two lakhs of rupees, which together with interest amounts to about

(1) (1873) L. R. 9 Ch. App. 192.

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three lakhs, and that debt was sold for Rs. 13,100. It was due to concealment and misrepresentation of facts by Mr. Ebrahim.

The Official Assignee also did not make proper inquiries; if he had, he would have realised full three lakhs of rupees instead of Rs. 13,100.

We do not bring a suit to set aside the sale because it would lead us to an enormous expense, and moreover the suit can only be brought by the Official Assignee, who, as he supports Mr. Ebrahim, will not undertake to bring it.

Raikes, acting Advocate-General, with *Strangman* for the first respondent:—The sanction was not necessary, and the Commissioner has no power to set aside the sale in the summary way asked for. In cases like the present, it is the practice of the Official Assignee to go to the Commissioner to obtain his advice—not his sanction—whether an intended sale is beneficial or not, and he did so in the present case. The right to sell belongs to the Official Assignee and the Commissioner has no power to interfere unless he is asked to do so by Mr. Macleod. Whether Mr. Macleod takes the advice of the Commissioner or not, the sale is his, and therefore the Commissioner was right in holding that he has no power to sanction the sale and consequently no power to set it aside. The Official Assignee is not charged with fraud; all that is alleged against him is that he was deceived by Mr. Ebrahim. He still believes that the sale under the circumstances was proper. It was stated before the Commissioner that the Official Assignee was willing to allow the present appellant to use his name to a regular suit, provided he was given an indemnity for costs; but naturally the Official Assignee is unwilling to bring charges against Mr. Ebrahim which he does not believe.

Lowndes with *Inverarity* for the second respondent Ebrahim Rahimtoolla:—It is admitted by Mr. Setalvad that his case does not come under section 28 of the Act. It is argued that the Official Assignee has no power to sell this debt under section 31; but what is sold in the present case is a mortgage-debt, which is something more than a debt: it is an interest under section 58 of the Transfer of Property Act. The Commissioner cannot

interfere under that section because the sale is completed. In obtaining the sanction of the Commissioner, Mr. Macleod only obtained the advice of his superior officer for his own protection, so that he may not be charged with conducting this sale in an hole-and-corner manner. It is a sale by the Official Assignee, he is the legal owner, and the conveyance is in his name. The attitude of Mr. Ebrahim was fair; he desired a public auction, but Mr. Macleod said that a sale by public auction would not be beneficial. Even if Mr. Macleod was guilty of neglect of duty, the sale to us cannot be set aside on that ground. Mr. Ebrahim is not charged with fraud; all that is alleged against him is that he concealed certain facts from Mr. Macleod. But Mr. Ebrahim was not bound to disclose the alleged facts. The Official Assignee says that he did not act on any representation made by Mr. Ebrahim, nor did Mr. Ebrahim make the representation alleged by the appellant. When Mr. Macleod told Ebrahim that he would obtain the sanction of the Court, he only put a condition on the contract like any other condition. Rule 31 of the Rules of the Court for the Relief of Insolvent Debtors in Bombay, not cited by my learned friend, has no application to the present case. *In re Motion*(1) has not a word to suggest about the general jurisdiction of the Court. It was entirely decided under section 72 of the Bankruptcy Act of 1869, corresponding to section 102 of the Bankruptcy Act of 1883. These sections give wide powers to the Bankruptcy Court, but there is no such section in the Indian Act. Prior to the Bankruptcy Act of 1869, questions similar to the present arose also in England; and earlier cases like *Ex parte Gould*,(2) *Ex parte Holder*,(3) *Ex parte Sidebotham*(4) and *Ex parte Brettell*(5) seem to support Mr. Setalvad's contention. But the last of these cases went in appeal as *Ex parte Cutts*(6) before Lord Cottenham, L. C., who held that the Court never had such a general jurisdiction, and ever since that decision the point was not raised till the passing of the Act of 1869. (Counsel also cited *Ellis* v.

(1) (1873) L. R. 9 Ch. App. 192.
(2) (1822) 1 G. & J. 231.
(3) (1834) 1 Mont. & Ay. 518.
(4) (1835) 4 Deac. & Ch. 693.
(5) (1838) 3 Deac. 111.
(6) (1838) 3 Deac. 242.

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Silber[1] and *Ex parte Lyons*[2]). Even assuming the Court has jurisdiction to set aside this sale, the jurisdiction is discretionary and the Court would not exercise it in this case: *Ex parte Lucas*[3]; *In re Arnold*.[4] It would not exercise it also on the ground that, as no appeal lies from the Insolvency Court to the Privy Council, we should be deprived of the benefit of their consideration.

[JENKINS, C. J.:—Is that so? *Kustoor Chand Rai Bahadur* v. *Rai Dhunput Singh Bahadur*,[5] is an instance in which appeal was allowed to the Privy Council from the Insolvency Court. But perhaps the point was not raised.]

Section 73 of the Insolvent Debtors' Act only gives a right of appeal to the Court of Appeal. It is doubtful that at a time when no appeal could lie to the House of Lords from the decisions of the Bankruptcy Court of England, the Legislature meant to give that right in India.

Setalvad in reply:—In *Ex parte Cutts*,[6] the point was whether the purchaser had by his own act submitted to the jurisdiction and the Court decided he had not. As regards suppression of facts, *Boswell* v. *Coaks*[7] is an authority.

[JENKINS, C. J.:—Is that case not overruled by the House of Lords?]

Yes, it is reported in 11 App. Cas. 235. The House of Lords only say that the proposition is too broadly stated. As regards appeal to the Privy Council, *In re Bhagwandas Hurjivan*[8] may throw some light. If the Official Assignee is unwilling to put allegations against Ebrahim, our plaint will be dismissed for disclosing no cause of action. (Counsel also cited section 55 of the Transfer of Property Act and section 32 of the Insolvent Debtors' Act.)

JENKINS, C. J.:—This appeal arises out of an application by certain creditors in the insolvency of Bhucandas Lallubhai and Hurgovandas Ichharam to set aside a sale of property of the insolvent.

(1) (1872) L. R. 8 Ch. App. 83.
(2) (1872) L. R. 7 Ch. App. 494.
(3) (1833) 1 Mont. & Ay. 93.
(4) (1891) 9 Morr. 1.
(5) (1895) L. R. 22 I. A. 162.
(6) (1838) 3 Deac. 242.
(7) (1884) 27 Ch. D. 424.
(8) (1884) 8 Bom. 511.

The property sold consisted of the insolvents' interest as puisne mortgagees in a mill in Bombay and the debt secured by the mortgage.

On the 10th of April 1905 the Official Assignee agreed with Mr. Ebrahim Rahimtoola to sell the property to him for Rs. 8,000 subject to the sanction of the Court. On the same day Mr. Premchand Roychand made an offer of Rs. 10,500. Mr. Ebrahim at once expressed his willingness to increase his offer to the same amount.

Thereupon the Official Assignee brought the matter before the learned Commissioner in Insolvency, who directed that the property should be put up to sale between the two contending parties, Mr. Ebrahim and Mr. Premchand.

This was done and the property was knocked down to Mr. Ebrahim for Rs. 13,100.

On the 27th June 1905 a deed of assignment was executed by the Official Assignee in Mr. Ebrahim's favour.

On the 6th of September the present application to set aside the sale was made. It was heard by the learned Commissioner, who held he had no jurisdiction and discharged the rule.

From that order the present appeal is preferred.

In my opinion the rule was rightly discharged.

Under the Indian Insolvent Act the Official Assignee has full power to sell the property and effects of an Insolvent, and it is his duty to make sale of the same with all convenient speed (section 31).

True it is that the first agreement for sale to Mr. Ebrahim was expressed to be subject to the sanction of the Commissioner, but this was not because the law so required, but because the Official Assignee desired the Commissioner's guidance.

In the end, however, it was not under this conditional agreement that the property was sold, but in a mode indicated by the Commissioner which required no subsequent sanction by him.

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It cannot, therefore, in my opinion, be contended that the sale was by the Court and as such liable to be set aside on a proceeding like the present.

How then can it be said that Mr. Ebrahim came within the jurisdiction of the Court in Insolvency?

There clearly was no submission on his part, so the jurisdiction must rest, if anywhere, on the words of the Act.

But the only section to which the appellants can point is the 31st; they rely on the concluding words of that section.

But in my opinion that section does not vest the Court with power to set aside a sale completed, as the one in question has been.

But even if those concluding words were capable of the meaning for which the appellants contend, still the Court is not bound to interfere thereunder: it has a discretion.

And when regard is had to the circumstances of the case, and the nature of the contest, I hold that even if there be the jurisdiction, it ought not to be exercised in this case.

If the appellants think they are entitled to relief, then it should be sought in a regular suit. We therefore dismiss the appeal with costs. There will be separate costs for each respondent.

Appeal dismissed.

Attorneys for the appellants:—*Messrs. Daphtary, Fareira and Diwan.*

Attorneys for the respondents:—*Messrs. Payne and Co.*

W. L. W.