

with full knowledge of its character as a public trust for religious purposes and that he has for some years paid part of the income to and for the trust. And in his written statement he asks the Court to direct him to make an annual payment out of the income of the property to the trusts, if the Court find that it is a public trust for a religious purpose. These pleadings may fairly raise the question whether defendant No. 1 has become a constructive trustee in virtue of the alienation on which he relies and by reason of his conduct. In that view of the case he would be a necessary party : *Jugalkishore v. Lakshmandas Raghunathdas*⁽¹⁾. It is impossible to say at this stage whether such a case will be established. That depends upon the evidence. But judging from the pleadings, we must hold that defendant No. 1 is a proper and necessary party, and that the suit as against him has been wrongly dismissed without trial.

The decree is reversed and the case remanded for disposal according to law. Costs including those of this appeal to be costs in the cause.

Decree reversed.

R. R.

(1) (1899) 23 Bom. 659.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

NAGINLAL CHUNILAL (ORIGINAL PLAINTIFF), APPELLANT, v.
THE OFFICIAL ASSIGNEE (ORIGINAL DEFENDANT), RESPONDENT.*

Presidency Towns Insolvency Act (III of 1909), sections 7, 86—Official Assignee—Third person's property taken in custody by Official Assignee—Suit by stranger—Civil Court—Right of suit.

Where the Official Assignee takes into his possession property as belonging to the insolvent which a third party claims as his own, the latter can bring a suit against the Official Assignee in a Civil Court to establish his right.

APPEAL from the decision of M. B. Tyabji, District Judge of Broach.

* Appeal No. 40 of 1910 from Order.

1911.

COLLECTOR
OF POONA
v.
BAI
CHANCHAL-
BAI.

1911.

July 27.

1911.

NAGINLAL
CHUNILAL
v.
THE
OFFICIAL
ASSIGNEE.

One Dahyabhai Chhotalal was adjudged an insolvent by the Insolvency Court at Bombay: and his property was vested in the Official Assignee of the Bombay High Court. The Official Assignee took into his custody certain furniture which was in the insolvent's possession. The plaintiff claimed that the furniture belonged to him and was let by him to the insolvent. He submitted his claim to the Official Assignee: but it was disallowed. The furniture was advertised for sale. The plaintiff, thereupon, filed a suit against the Official Assignee in the District Court at Broach, for a permanent injunction prohibiting the sale.

The learned District Judge held that he had no jurisdiction to entertain the suit and that the plaintiff's only remedy was to move the Insolvency Court at Bombay.

The plaintiff appealed to the High Court.

L. A. Shah, for the plaintiff.

Ratanlal Ranchhoddas, for the defendant.

The following cases were referred to in arguments:—

In re Rassul Haji Cassum⁽¹⁾; *Ex parte Cochrane*⁽²⁾; *In re Champagne, Ex parte Kemp*⁽³⁾; *Re Crook, Ex parte Collins*⁽⁴⁾; *Ex parte Brown*⁽⁵⁾; *White v. Simmons*⁽⁶⁾; *Ellis v. Silber*⁽⁷⁾; *Waddell v. Toleman*⁽⁸⁾; *Ex parte Davies*⁽⁹⁾.

CHANDAVARKAR, J.:—This was a suit brought by the appellant against the Official Assignee of the estate of Dahyabhai Chhotalal Vakil, an insolvent, to obtain a permanent injunction restraining the Official Assignee and another person from selling certain articles as belonging to the estate of the insolvent. In his plaint the appellant alleged that the articles in question belonged to him as owner, but that the defendants had taken possession of them as belonging to the insolvent. The plaintiff, therefore, claimed a permanent injunction and a declaration that the articles were of his ownership.

(1) (1910) 13 Bom. L. R. 13.

(2) (1875) L. R. 20 Eq. 282.

(3) (1893) 10 Mowell 285.

(4) (1892) 66 L. T. 29.

(5) (1879) 11 Ch. D. 148.

(6) (1871) L. R. 6 Ch. 555.

(7) (1872) L. R. 8 Ch. 83.

(8) (1878) 9 Ch. D. 212.

(9) (1881) 19 Ch. D. 86.

The District Judge, in whose Court the plaint was filed, has held, upon a consideration of sections 7 and 86 of the Presidency Towns Insolvency Act (III of 1909), that the Court has no jurisdiction to try the suit, because the only Court which could take cognizance of such a suit is the Insolvency Court in the Presidency Town. We think that view is not warranted by the provisions of the Act in question.

Section 7 provides :—

“Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case”.

Now, the first observation that has to be made as to this section is that it is an enabling section. It gives power to the Insolvency Court to decide all questions of priorities, and all other questions, which may arise in any case of insolvency coming within the cognizance of the Court. It can hardly be disputed, in fact it is admitted, that before the Act came into force, the ordinary Courts had jurisdiction to entertain such claims against the Official Assignee. The Official Assignee merely steps into the shoes of the insolvent for the purposes of his rights and his liabilities. As has been pointed out in *In re Mapleback, Ex parte Caldecott*⁽¹⁾, “except where there is an offence against the Bankrupt law, or against some law in favour of creditors, the trustee is merely the legal representative of the debtor, with such rights as he would have had if not bankrupt.” Therefore, if the Official Assignee goes into possession of, or claims certain property as belonging to, the insolvent, whereas it is claimed by a stranger as his, then the stranger has by common law the right given to him of suing the Official Assignee, just in the same manner that he could have sued the insolvent, if he had not become bankrupt. Now, such a right as this existing under the common law could be extinguished no doubt by an Act, but the extinction must be in express language or by some necessary

(1) (1876) 4 Ch. D. 150 at p. 156.

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implication arising from any of the provisions of the Act. The language of section 7 is hardly adequate for the purpose of extinguishing the common law right. Further, the section in question says that "the Court shall have power to decide all questions of priorities and all other questions whatsoever." It is very doubtful whether it was intended by the Legislature that the Court should have the power to decide questions of title, as between the Official Assignee and a stranger, with reference to property, which is claimed by the Official Assignee as the insolvent's, and which on the other hand is claimed by a stranger as his. Had that been the intention of the Legislature, the wording of the section would have been that "the Court shall have power to decide all questions". But, instead of wording it in that manner, the Legislature first of all brings in questions of a particular character, and then gives the general words "all other questions whatsoever". On the principle of *ejusdem generis* it is reasonable to argue that the Legislature did not intend questions of title to be brought for adjudication within the jurisdiction of the Insolvency Court. We need not, however, express any definite opinion upon that point. It is sufficient to hold that section 7 does not take away the jurisdiction of the ordinary Courts that already existed at the time this Act came into force.

Then we turn to section 86. That section provides :—

"If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the Official Assignee, he may appeal to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just".

Here, again, the language is insufficient to take away the right of suit which every person had against the insolvent before he became bankrupt, and which right the stranger continued to have as against the Official Assignee, as the legal representative of the insolvent. All that this section provides is that any person aggrieved by any act or decision of the Official Assignee may appeal to the Court, which means that if a person does feel that injustice has been done to him by any act of the Official Assignee, it is open to him to ask for redress at the hands of the Insolvency Court. But that does not shut out the jurisdiction of the ordinary Court.

The language of section 7 of the Act is a reproduction of section 102 of the English Bankruptcy Act of 1883, which again is a reproduction of section 72 of the Bankruptcy Act of 1869. No doubt there is a clause in section 102 of the former, which is not to be found in our Presidency Towns Insolvency Act (III of 1903). That clause gave power to the Court of Bankruptcy in England to refer any difficult questions of law and of fact triable by a jury, to the ordinary Court for determination. And it is argued by Mr. Ratanlal that from the omission of this clause from section 7 of the Indian Act, it is a legitimate inference that the Legislature here intended that the Insolvency Court alone ought to have jurisdiction to try all questions including those of title arising between an insolvent represented by the Official Assignee and any person claiming adversely to him. But where a stranger claims certain property as his, as against an insolvent represented by the Official Assignee, it is open to doubt whether the question is one which in the strict sense of the expression may be said to arise in the course of insolvency. But assuming it does so arise, the power given by the English Law to the Insolvency Court to refer a question of law or fact to an ordinary Court does not necessarily exclude the ordinary jurisdiction of the latter Court to determine questions relating to the title of the insolvent to property as against a stranger. We must, therefore, hold that the lower Court had jurisdiction to try this suit.

The order of the lower Court is reversed and the case sent back to that Court for trial on the merits. The costs of this appeal must be paid by the respondents.

Order reversed.

R. R.

1911.

NAGINLAL
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