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50. The appeal, therefore, of the plaintiffs should in my judgment be dismissed with costs. It will not however be necessary to proceed with the account directed by the decree, as the parties have since agreed on the figures. But this need not, I think, be mentioned in the order we make.

HEATON, J.:—I agree that the Liquidator entered into valid agreements with the defendants regarding the sale of the blankets and of the cotton bales and for the disposal of the proceeds. And I think so for the reasons stated by my learned brother. That being so, the plaintiffs' claim must fail, for neither section 72, nor section 65 of the Indian Contract Act can possibly apply to what in this case happened, in fulfilment of those valid agreements.

I, therefore, agree that the appeal must be dismissed with costs.

Solicitors for the appellants: Messrs. *Little & Co.*

Solicitors for the respondents: Messrs. *Craigie, Blunt & Caroe.*

Appeal dismissed.

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

NAGINDAS BHUKHANDAS (ORIGINAL OPPONENT), APPELLANT *v.* GHELABHAI GULABDAS (ORIGINAL APPLICANT), RESPONDENT.*

1919 December

Provincial Insolvency Act (III of 1907), section 43—Provident Funds Act (IX of 1897), section 4—Provident Fund—Railway employe drawing his Provident Fund after his adjudication as insolvent—Payment of the money to his wife—Fraudulent transfer.

*First Appeal No. 234 of 1918.

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The appellant who was in the employ of a Railway Company was adjudicated an insolvent under section 16 of the Provincial Insolvency Act 1907 and a Receiver was appointed. Subsequently, the insolvent resigned his appointment and drew his Provident Fund from the Railway Company. A large portion of the amount so drawn was paid by the insolvent to his wife. The District Judge held that the transaction amounted to a fraudulent act within the meaning of section 43 (2) of the Act and sentenced the insolvent to three months' simple imprisonment. The insolvent having appealed :—

Held, setting aside the conviction and sentence, that there was no fraudulent dealing by the insolvent within the meaning of section 43 of the Act inasmuch as neither the Receiver nor the creditors had any claim to the money drawn by the insolvent as his Provident Fund from the Railway Company.

Cohen v. *Mitchell*(1) and *Official Assignee of Madras* v. *Mary Dalyairns*(2), referred to.

THIS was an appeal from conviction and sentence passed by W. T. W. Baker, District Judge of Surat, under section 43 of the Provincial Insolvency Act (III of 1907).

The appellant was an employe in the Loco Department of the B. B. & C. I. Railway. In November 1909, he was adjudicated an insolvent under section 16 of the Provincial Insolvency Act. In January 1918, the insolvent resigned his appointment with the Railway Company, and drew the amount of Rs. 2,062-14-0 which stood to his credit as Provident Fund.

The amount so drawn was not paid over by the insolvent to the Receiver; but out of it, the insolvent paid Rs. 1,600 to his wife.

The District Judge held that the payment was a fraudulent transfer by the insolvent within the meaning of section 43 of the Act, and sentenced him to three months' simple imprisonment.

The insolvent appealed to the High Court.

(1) (1890) 25 Q. B. D. 262. (2) (1902) 26 Mad. 449.

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Pending the disposal of the appeal, the insolvent applied for stay of his sentence. The application was heard by Heaton and Pratt JJ., who granted the stay.

HEATON, J.:—We are dealing with an interlocutory matter that arises out of an appeal filed under clause 2 of section 46 of the Provincial Insolvency Act, III of 1907. The appellant was sentenced to three months' simple imprisonment. He has appealed.

There is no doubt that the appeal lies and not unnaturally he wants the sentence of imprisonment suspended until the appeal is disposed of. Otherwise he stands a very good chance of serving out the entire term of imprisonment before the appeal is heard. It has, however, been objected—and this is the only point that seems to me really to need attention—that we have no power to suspend the imprisonment or release a person on bail. That argument, however, I think, is mistaken. Clause 2 of section 47 of the Provincial Insolvency Act tells us that in dealing with this appeal we are to follow the provisions of the Civil Procedure Code. At least that is the effect of what that clause says. Now under the Civil Procedure Code we have power to stay proceedings under an order appealed from. That, I think, is quite plain from Rule 5 of Order XLI of the Civil Procedure Code, and all we are asked to do is to stay proceedings under the order appealed from. We do this by making an order which will secure the release of the appellant from jail on such terms as may be provided. We leave the terms to be settled by the District Judge who will direct what security should be taken from sureties to secure the surrender of the appellant should he hereafter be called upon to surrender.

The District Judge will make out an order to the jailor directing the release of the appellant when security to his satisfaction has been furnished.

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Costs of this matter will be costs in the appeal.

PRATT, J.:—I concur. In regard to the argument that, Order XLI, Rule 5 does not apply because there is no decree to be executed, it seems to me that the provisions in that rule which provide for stay of proceedings under an order are applicable. For instance an order of arrest before judgment under Order XXXVIII, Rule 4 would be appealable under section 104 (*h*) of the Civil Procedure Code and it could not be contended that the Court of appeal in such a case would not have the power to stay further proceedings either by suspension of the sentence or directing the release of the appellant on his giving the bail. That this provision of the Civil Procedure Code would be applicable was apparently the view expressed by Bayley, Acting C. J., in *In the matter of Hormarji Ardesir Hormarji*[1].

The appeal was heard by Shah and Crump JJ.

N. K. Mehta, for the appellant:—I submit that the Provident Fund money which the appellant has received from the Railway Company being a compulsory deposit is not liable to attachment by a Civil Court nor claimable by a Receiver in Insolvency under section 4 of the Provident Funds Act: *Veerchand* v. *B. B. & C. I. Railway*[2].

This amount was, thus, absolutely at his disposal and did not vest in the Receiver for the benefit of his creditors: *Official Assignee of Madras* v. *Mary Dalgairns*[3].

The appellant has, therefore, committed no offence under section 43 of the Provincial Insolvency Act in transferring the money to his wife.

(1) (1892) 17 Bom. 334 at p. 340. (2) (1904) 6 Bom. L. R. 921.
(3) (1902) 26 Mad. 440.

H. V. Divatia, for the respondent:—The appellant has committed an offence under section 43 of the Provincial Insolvency Act. His case is covered by sub-section (2) (*b*) or (2) (*c*) of that section. Thus if a debtor fraudulently transfers *any property* or commits any other act of bad faith, he commits an offence under that section.

Under section 16 (4) of the Provincial Insolvency Act, all the property of the insolvent acquired after the adjudication order vests in the Receiver. This amount was acquired by the appellant after the order of adjudication and, therefore, it vested in the Receiver immediately on its receipt by the appellant.

Even if this amount cannot be called after-acquired property, the case comes under section 43 (2) (*b*) because it deals with the fraudulent transfer of *any* property of the insolvent.

Besides, the present case is covered by sub-section (2) (*c*) of section 43 because the insolvent has committed an act of bad faith by getting up a false story of the transfer of the amount to his wife.

As regards section 4 of the Provident Funds Act, I submit that the deposit is not attachable only so long as it remains in the hands of the company. After it is paid to the insolvent, it becomes his property and therefore vests in the Receiver under section 16 (4). The case of *Veerchand* v. *B. B. & C. I. Railway*[1] does not apply because there the amount was attached while it was with the Company which is not the case here.

C. A. V.

CRUMP, J.:—The appellant in this case appeals against an order of the District Judge of Surat

[1] (1904) 6 Bom. L. R. 921.

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sentencing him to three months' simple imprisonment under section 43 of the Provincial Insolvency Act (III of 1907).

The facts are shortly as follows: The appellant Nagindas was in the employ of the B. B. & C. I. Railway Company. On November 3, 1909, he was adjudged an insolvent under section 16 of the Act, and a Receiver was appointed. In January 1918, he resigned his appointment with the Railway Company and drew from them a sum of Rs. 2,000 odd which stood to his credit in the books of the Railway Provident Fund. This money was not paid over to the Receiver and in the lower Court it was alleged that Rs. 1,600 out of this sum had been paid by the insolvent to his wife. It is with reference to this transaction that the learned District Judge has held him guilty of a fraudulent act within the meaning of section 43 (2) of the Act.

The reasoning of the learned District Judge may be summarized as follows: The protection afforded to the monies in the Provident Fund by section 16 (2) (*a*) of this Act ceased as soon as these monies came into the hands of the insolvent, and they forthwith vested in the Receiver and became divisible among the creditors as provided by section 16 (4). But in accordance with the doctrine in *Cohen* v. *Mitchell*[1] the insolvent was entitled to retain the money received from the Provident Fund unless and until the Receiver intervened, and had he merely retained them he would not have been guilty of any fraud. But he had advanced a false story to prove that the money had been paid to his wife in satisfaction of a legal claim. This allegation amounted to a fraudulent transfer punishable under section 43.

The case of *Cohen* v. *Mitchell*[1] is not a decision on the Provincial Insolvency Act but on the English

[1] (1890) 25 Q. B. D. 262.

Bankruptcy Act (46 & 47 Vict. c. 52), and the decisions on which the learned District Judge has relied for extending the applicability of the doctrine therein laid down to the case before him are decisions in cases arising in the Presidency Towns prior to the Presidency Towns Insolvency Act 1909. These cases are governed by the provisions of the Indian Insolvency Act of 1848. It is, therefore, necessary in the first instance to examine the terms of the relevant Statute.

It is not disputed that the deposit with which we are now concerned was a compulsory deposit as defined in section 2 of the Provident Funds Act 1897, and it is clear that at the date of the adjudication order it was not at the disposal of the insolvent for his own benefit. Therefore it was not at that date "property" within the definition contained in section 2 (1) (*e*) of the Provincial Insolvency Act and did not therefore vest in the Receiver under section 16 (2). But, apart from the provisions of section 4 of the Provident Funds Act, 1897, it became "property" as soon as the money was paid to the insolvent, and was thus property acquired by him after the date of the order of adjudication. Under section 16 (4) such property "shall forthwith vest in the Court or Receiver and become divisible among the creditors in accordance with provisions of sub-section (2), clause (*a*)". At first sight it would appear that these words in their literal construction are free from any doubt.

But there are grounds for holding that these words should not be literally construed. In *Cohen* v. *Mitchell*[a] the Court declined to follow the literal construction of sections 44 and 54 of the English Bankruptcy Act on the ground of inconvenience and the Courts in India in dealing with the analogous provisions of section 7 of

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the Indian Insolvency Act (11 & 12 Vict. c. 21) have allowed themselves the same measure of freedom (see *Alimahmad* v. *Vadilal*[1]). These Acts are *in pari materia*, and the considerations which have led the Courts to reject a literal construction are equally present in the case of the Provincial Insolvency Act. Nor is there so great a difference between the words employed by the Legislature as to permit of any distinction. It must therefore follow that in the present case also the doctrine in *Cohen* v. *Mitchell* [2] is applicable.

But it remains to consider the effect of section 4 of the Provident Funds Act, 1897. So far as the section bears upon the facts of this case it runs as follows: "Neither the Official Assignee nor a Receiver appointed under Chapter XX of the Code of Civil Procedure shall be entitled to, or have any claim on any such compulsory deposit (i.e., any compulsory deposit in any Railway Provident Fund.)" By virtue of section 59 of the Provincial Insolvency Act the reference to Chapter XX of the Code of Civil Procedure must, for the purposes of this case, be construed as applying to section 16 of the former Act. What then is the force of the words "shall be entitled to or have any claim on any such compulsory deposit"? We are not here concerned with cases of attachment under a decree or order of a Court, and it is unnecessary to refer to the provisions of the Code of Civil Procedure to which reference is made in section 16 of the Provincial Insolvency Act. We have a specific provision applying directly to the case of a Receiver appointed under that Act. The question is whether the learned District Judge is right in holding that the protection afforded by the section ceases when the money comes into the hands of the depositor. In my opinion that is too restricted a

[1] (1919) 21 Bom. L. R. 849. [2] (1890) 25 Q. B. D. 262.

construction. The words used are very wide. No Receiver has any claim on such compulsory deposits. If that is so how can he claim to receive the money when it is paid into the hands of the depositor? The case of *Official Assignee of Madras* v. *Mary Dalgairns*[1] is here in point. That decision was prior to the Amendment of the Provident Funds Act in 1903 whereby clause 2 was added to section 4, and is therefore a decision as to the effect of clause (1) of the section. It was held that the effect of clause (1) was to deprive the Official Assignee of the right which had otherwise vested in him to receive the sum standing to the credit of the insolvent on the insolvent's retirement from the service. That decision is with reference to section 7 of the Indian Insolvency Act, but it is equally applicable to the present case. In my opinion that decision is correct and should be followed. The result is that neither the Receiver nor the creditors have any claim to the money drawn by the insolvent, and therefore there could be no fraudulent dealing such as is made punishable by section 43 of the Provincial Insolvency Act.

In this view of the case it is unnecessary to determine whether on the basis of the findings of the District Judge any fraudulent dealing is established. It may however be remarked that it is difficult to reject the defence specifically pleaded by the insolvent that he was under a *bona fide* belief that the amount was not attachable and consequently did not vest in the Receiver. Even if it be assumed that the learned District Judge has correctly apprehended the law, the point is surrounded with so much doubt that the insolvent may well have entertained a *bona fide* belief that the amount in question was entirely at his disposal.

(1) (1902) 26 Mad. 440.

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For these reasons I would set aside the order of imprisonment. The respondent to bear the costs throughout. The bail bond to be discharged.

SHAH, J. :—I concur.

Order set aside.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Shah, and Mr. Justice Crump.

1919. December 3.

MINNA WINSOR (ORIGINAL OPPONENT), APPELLANT *v.* E. WINSOR (ORIGINAL APPLICANT), RESPONDENT.*

Indian Succession Act (X of 1865), sections 264 B, 239—Administrator—Directions—District Court cannot, but High Court can, give directions.

A District Court has no power to give directions to an administrator in regard to the estate, when Letters of Administration have already been granted. The power vests in the High Court by virtue of section 264 B of the Indian Succession Act (X of 1865).

APPEAL from orders passed by P. E. Percival, District Judge of Poona.

The facts were that one Miss E. Winsor took out Letters of Administration to the estate of her deceased father. She next applied to the Court on the 1st October 1918 for an order to sell all the houses belonging to the deceased by public auction. The Court passed the order with the consent of other daughters of the deceased. Then on the 14th of the same month, a further application was made for modifying the above order, and the Court after hearing all parties, ordered on the 3rd December 1918, that the family house should be valued by the Nazir of the Court and Minnie Winsor (one of the daughters) be paid her one-eighth share in the valuation, and that the remaining houses should be sold by private arrangement and not by auction.

*First Appeal No. 57 of 1919.