(1909) 07 CAL CK 0023

In the Calcutta High Court

In Re: Official Assignee''s Commission

Date of Decision : 23-07-1909

Acts Referred:

Insolvency Act, 1848 — Section 19

Citation : (1909) ILR (Cal) 990 : 4 Ind. Cas. 697

Hon'ble Judges : Fletcher, J

Bench : Single Bench

Judgement

Fletcher, J.—This case has been mentioned on the application of the Official Assignee to speak to the minutes of an order made in Insolvency Proceedings directing the Official Assignee to sell certain Immovable properties which are subject to a mortgage. The order was made on the application of the mortgagee with the consent of the Official Assignee. The reason that the Official Assignee has required that the minutes should be spoken to is on account of the Chief Clerk having drawn the minutes of the order as allowing the Official Assignee''s commission only on the amount coming to the insolvent''s estate, whereas the Official Assignee claims that he is entitled to commission out of the insolvent''s estate on the full value of the property.

2. The matter is one of considerable importance. In some cases the commission that has been paid to the Official Assignee in respect of the sale of the Immovable property of an insolvent out of the insolvent''s estates when the same has been subject to mortgages, has worked out at a very high percentage. The Official Assignee says, however, that he has been allowed by the Court for so many years to charge these commissions that the settled practice to allow him the commission must be taken to be valid.

3. Now, the office of the Official Assignee is constituted under the Indian Insolvency Act, 1848. In that Act there are three sections that are most important with reference to this application. The first is Section 19 and is as follows:

4. "And be it enacted, that no remuneration whatever," (and to my mind the word remuneration is very important) "whether in the shape of commission or

otherwise, shall be received by any Assignee, except in the manner nor beyond the extent hereinafter allowed; (that is to say) the Court may allow a fair remuneration to the Assignee or Assignees out of the sum to be distributed as dividends, and make an order accordingly."

5. The other two sections are Sections 21 and 31. Section 21 defines the duties of the Official Assignee upon the adjudication and directs that "he shall, with all convenient speed, take possession by himself or by means of messengers of the Court, or by other fit and proper persons, of all the real and personal estate and effects of the insolvent of which immediate possession may be obtained, and shall use his best endeavours to seize, obtain, recover, and reduce into possession, as speedily as possible, the rest of such estate and effects, and all debts, claims, and choses in action, which by virtue of his appointment under this Act, and of the vesting order or adjudication, he shall have been empowered to obtain, recover, and get in."

6. Section 31 sets out the duties of the Assignee as to realisation of the insolvent''s estate and runs as follows:

7. "The Assignee or Assignees shall, with all convenient speed, make sale of the property and effects of the insolvent: provided nevertheless, that the Court shall have full power and authority., upon the application of any insolvent, or only creditor or mortgagee of such insolvent, to delay or postpone the sale of any property, and to make such other order respecting the same as to such Court shall seem meet."

8. The statute, therefore, provides that it is the duty of the Official Assignee to sell the property of the insolvent with all convenient speed, and as to his remuneration for doing so, the Act says the only reward that he is to get for so doing is a commission on the amount to be distributed as dividends. If, for the purpose of realising the estate more favourably, it is necessary for the Official Assignee to join with the mortgagee in selling the property, there can be little doubt that it is his duty to do so. There can be little, if any, more trouble in selling the equity of redemption in a property than in selling the property free from incumbrance. I can see no warrant for saying that the Official Assignee is entitled to calculate his commission on the full value of the mortgaged properties. In fact Mr. Zorab, for the Official Assignee, had to admit that the Official Assignee could not claim his commission as Official Assignee, but he claimed it qua auctioneer. But on that view of the case, the Official Assignee is met with the provisions of the Supreme Courts'' Officers Act from which provisions the Court cannot dispense him. Besides which it can hardly be suggested that a trustee having power to sell by auction can employ himself as the auctioneer and charge the trust estate with his commission as auctioneer. The only difficulty in the case is that the Official Assignee has been permitted for many years to take these commissions. Up to the year 1875, the orders produced before me appear to vary. From that date apparently the orders have allowed the Official Assignee to take the commission now claimed. The only

reported case, however, appears to be In re Howard Brothers, Insolvents (1874) 13 B.L.R. App. 9, and the attention of the Court in that case was not called to the Supreme Courts'' Officers Act. Having regard to the very express words used both in the Indian Insolvency Act, 1848, and the Supreme Courts'' Officers Act, I think that the order as drawn up by the Chief Clerk is correct.

9. This application, therefore, fails and must be dismissed.