

A LULU BUKSH a.k.a. MIRZA NAMRUD BUKSH

v.

OFFICIAL RECEIVER

B [SUPREME COURT—F.X. Rooney J.—16 January 1987]

Civil Jurisdiction

*Bankruptcy—alleged misconduct of official receiver—application for removal—Court will not interfere unless it can be showed there will or might be a surplus*

C

K. R. Bulewa for the Applicant

J. K. L. Maharaj for the Respondent

Application by Bankrupt that the Official Receiver (O.R.) and his deputy be removed as the trustee in bankruptcy of the applicant's estate, by reason, since the making of the receiving order, of alleged gross mismanagement of the bankrupt's affairs.

D

It was alleged inter alia, that property of the bankrupt was sold at 'gross undervaluation', that an exorbitant commission was allowed to an auctioneer who disposed of the balance of bankrupt's property on 18 December 1983; that the O.R. and his deputy were "..... presently under police investigation" for alleged mismanagement of (the applicant's) stock in trade; that no proper inventory of (the applicant's) property was compiled; debts had not been collected; excessive charges had been raised; and that officers concerned have displayed "animosity and antagonism towards applicant.

E

Receiving Order was made on 26 April 1983. On 21 June 1984 a resolution was passed to the effect that if the applicant failed to deposit sufficient funds before 29 June, the O.R. should apply for adjudication and in that event the O.R. should be appointed trustee. On 20 July 1984 an adjudication order was made. On 24 September 1984 the bankrupt applied for discharge. On 16 October 1984 this was refused as no public examination had by then taken place as required by Bankruptcy Act Cap. 48 S.28.

F

*Held:* There must be circumstances in which the Court could interfere at the instance of a bankrupt to control the actions of the trustee.

G

'The point' can only arise where the bankrupt can show that there is or will or might, but for the trustee's action or inactions be a surplus in the trustee's hands after satisfying in full all the claims of the creditors. Where the estate is insolvent it matters not to him how it is administered.

A

There was nothing before the Court to suggest that if the alleged transgressions of the O.R. or deputy were corrected there would be a surplus which applicant might hope to receive.

B

The Creditors here appointed the O.R. as Trustee. The Creditors also have the right (S.93(1)) to remove the trustee; it is not for the court to usurp the rights of the creditors.

To make the order sought would serve no useful purpose. The O.R. and his deputy are appointed by the Minister (S.71) and may be removed by him.

C

The Bankrupt if he has cause, may make his complaints to the Minister.

Application dismissed.

Cases referred to:

D

*The Debtor v. Dodwell* (1949) 1 Ch 236

ROONEY, Mr Justice.

### Judgment

This is an application by the bankrupt that the Official Receiver and his deputy be removed as the trustee in bankruptcy of the applicant's estate. In his affidavit in support, the applicant alleges that since the making of the receiving order and his adjudication the management of the bankrupt's affairs have been badly and grossly mismanaged.

E

In particular, it is alleged that property belonging to the bankrupt was sold "at gross undervaluation". There are allegations that the Official Receiver allowed an exorbitant commission to an auctioneer who disposed of the balance of the applicant's property on the 18th December 1983, that the Official Receiver, Mr Davendra Pathik, and his deputy, Mr Sukhdeo Sahai, "are presently under police investigation for alleged mismanagement of (the applicant's) stock in trade", that no proper inventory of the applicant's property was compiled, that debts have not been collected, that excessive charges have been raised, that the officers concerned have displayed "animosity and antagonism" towards the applicant etc. etc.

F

G

A perusal of the Court file reveals that a receiving order was made on the 26th April, 1983. At a meeting of creditors held on the 21st June, 1984, a resolution was passed to the effect that if the applicant failed to deposit sufficient funds to settle the claims of all proven creditors together with the Official Receiver's fees and expenses before the 29th June that the Official Receiver should apply for an order of adjudication and that in such event that the Official Receiver be appointed trustee. An adjudication order was made by the Court on the 20th July, 1984.

H

A On the 24th September, 1984 the applicant applied for his discharge. The Official Receiver and several creditors opposed. On the 16th October, 1984, I dismissed the application for discharge on the ground that no public examination of the debtor had taken place. Section 28(1) of the Bankruptcy Act, Cap. 48, states that no application for a discharge may be heard until the public examination of the bankrupt has been concluded.

B Sections 79 and 97 of Cap. 48 correspond with sections 80 and 105 of the English Bankruptcy Act, 1915. It was conceded in *The Debtor v. Dodwell (the Trustee)* (1949) 1 Ch. 236 that there must be circumstances in which the Court could interfere at the instance of a bankrupt to control the actions of the trustee. But, as Harman J. explained at 240, the point can only arise where the bankrupt can show that there is, or will, or might (but, for the trustee's action or inaction) be a surplus in the trustee's hands after satisfying in full all the claims of the creditors. Where the estate is insolvent the bankrupt has no interest in it, and it matters not to him how it is administered. I have nothing before me in this case to suggest that if the alleged transgressions of the Official Receiver and his deputy were corrected, this would result in a surplus of assets over liabilities which the applicant might hope to receive under section 70 of the Act.

D Mr Bulewa submits that this Court has the power to remove a trustee by virtue of section 93(2) of the Act on the grounds of misconduct. He submits that this provision extends to the Official Receiver when he is the trustee in bankruptcy.

E Section 21(4) of the Act entitles the creditors to appoint the Official Receiver as trustee. This they have done in the present case. If the Court were to make the order demanded in this application, this would create an immediate vacancy in the office of trustee. Section 77(4) would then come into operation and the Official Receiver would be required to act as trustee. The power to remove a trustee under section 93(2) does not include a power to appoint another person as trustee. It is the creditors who have the sole right to appoint trustees under section 76 and they also have a right to remove an appointed trustee under section 93(1). It is not for the Court to usurp the rights of the creditors who are the persons most interested in the debtor's estate. Even if this Court were to remove the Official Receiver as trustee in bankruptcy this would not prevent the creditors re-appointing him to that office if they so wished.

F Thus, to make an order in the terms prayed for in this motion would not serve any useful purpose even if it were shown that such an order would prove beneficial to the applicant.

G The Official Receiver and his staff are appointed by the Minister under section 71 of the Bankruptcy Act. These officers are removable by the Minister. If the present applicant has any cause of complaint about the conduct of Messrs Pathik and Sahai in the course of their official duties, he may make appropriate representations to the Minister.

This application is misconceived and must be dismissed with costs.

H *Application dismissed.*