APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and C. C. Ghose J.

PRATAPMALL RAMESHWAR

v.

CHUNILAL JAHURI.*

1932

July 13, 14.

Insolvency—Creditor's petition for adjudication—Ability of debtor to pay debts—Liquidation of assets—Legal tender—Attachment—Immoveable property in the possession of receiver—Leave of court—Notice to receiver, if necessary—Prohibitory order on judgment-debtor—Presidency-towns Insolvency Act (III of 1909), s. 13 (4) (b)—Code of Civil Procedure (Act V of 1908), O. XXI, rr. 52, 54—High Court (Original Side) Rules, Chap. XVII, r. 27A.

Although a debtor may have assets, which, if liquidated, would provide sufficient money to discharge his debts, yet if he has no liquid assets wherewith to pay his debts at present, he is not "able to pay his debts" within the meaning of section 13(*4*) (*b*) of the Presidency-towns Insolvency Act so as to resist a creditor's petition for adjudication.

Where immoveable properties, belonging to the judgment-debtor, are in the custody of a receiver appointed in another suit, the decree-holder may properly attach them by first obtaining leave of the court to attach under Chapter XVII, rule 27A of the Rules of the High Court and then by means of a prohibitory order under Order XXI, rule 54 of the Civil Procedure Code.

Order XXI, rule 52 does not apply in the circumstances and no notice to the receiver is necessary.

Kewney v. *Attrill* (1) referred to.

APPEAL by the creditor from an order of Ameer Ali J.

The facts of the case are sufficiently set out in the judgment.

S. N. Banerjee for the appellants.

N. N. Sircar, Advocate-General, and *N. C. Chatterjee* for the respondents.

*Appeal from Original Order, No. 45 of 1932, in Insolvency Case No. 47 of 1932.

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RANKIN C. J. This is an appeal from an order made by my learned brother Mr. Justice Ameer Ali whereby he dismissed a creditor's petition for the adjudication of the two respondents as insolvents under the Presidency-towns Insolvency Act. The petition was brought on the 4th of March of the present year and the learned Judge proceeded upon the ground that, in his opinion, it was not made out by the creditor that the debtors were not in a position to pay their debts. It is quite true that one of the reasons for which the court is enabled to dismiss a creditor's petition is the reason given in section 13 of the Presidency-towns Insolvency Act, which says that "the court shall dismiss the petition "if the debtor appears and satisfies the court that he "is able to pay his debts". It will be seen that the burden of proof is entirely on the debtor. In the present case the question appears to be what is meant by saying that the debtor has to prove that he is able to pay his debts. The case made by the respondents was not a case that they were able to pay their debts, if it be carefully examined; though they do say in so many words "we are still in a position to pay all just "and reasonable debts". But the case they make is that they are entirely unable at the present to pay the petitioning creditor's debt, to speak of that alone, apart altogether from any other debts. They say they have got a number of immoveable properties; that the mortgages will be less than the value of these properties. They wind up by saying that they are not insolvents, but, in the circumstances, they have no ready cash to pay. What the statute means by ability to pay debts is not merely that the man has assets which, if liquidation proceeds, may, in the result, provide sufficient money to discharge his debts. It means that he is not so embarrassed that he cannot meet his debts in the ordinary way by making legal tender and discharging his debts. The circumstance that a man has assets and the assets are not liquid assets and, therefore, he cannot pay his debts is a circumstance which stands in favour of having a

liquidation and not against having a liquidation. The judgment to be exercised on this ground in connection with a petition for adjudication is exercised on very much the same lines as the discretion to annul an adjudication on the ground that the debts have been paid or that the debtor ought never to have been adjudicated. It was never the intention of the statute that a man, having a petitioning creditor's debt and proving an act of bankruptcy, should be told that no provision whatever will be made for the payment even of his debt, and that the petition is to be dismissed on the ground that the debtors are able to pay all their debts. If, to a petitioning creditor who has knowledge of an act of bankruptcy, tender of money is made for his own debt, he is not, in a usual case, at all obliged to receive the money and have the petition dismissed, because it may very well be that other creditors may proceed in insolvency and that the payment will be held bad against the Official Assignee. But, if coupled with such an offer, it can be shown that there are no other debts or that the debtors are prepared and able to pay off all the other debts, then no doubt a strong case arises for dismissal of the petition. In my judgment, the learned Judge has misapplied the terms of the section, on which he has relied, and the judgment cannot be supported upon the ground on which it has been based.

Before us, the appeal has been supported by a contention to the effect that the only act of insolvency shown is that premises No. 38, Barhtolâ Street belonging to the debtors were attached on the 19th of January, 1932, and continued under attachment for more than 21 days. It is said that that attachment was an irregular or illegal attachment altogether. It appears that the Court appointed a receiver over the properties of the debtors including this property. It appears that the petitioning creditors, who held a decree for their debts, applied to the Court, which had appointed a receiver, and asked for leave, notwithstanding the

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appointment of a receiver, to attach two definite specified immoveable properties in which the debtors had an interest. The Court gave the leave asked for and the attachment was formally and regularly made by an attachment under Order XXI, rule 54. The way in which it is said that that attachment is illegal or improper is this: It is said that under rule 52 of Order XXI of the Code of Civil Procedure this proceeding was not rightly taken. It is quite true that the proceeding has no connection whatever with rule 52, Order XXI. Rule 52 refers to property in the custody of a court or public officer. It provides that an attachment can be made in a way which leaves no room for an application for the leave of the court or of the public officer. It is to be noticed that it treats the court and the public officer exactly in the same way. Under that rule, in any case to which it applies, the executing court simply issues attachment without consulting the other court. Apart altogether from any question whether rule 52 applies to immoveable property, while it is true in a sense that the court, when it appoints a receiver, takes possession of the property, I am reasonably clear that the rule was never intended to apply to a case where the court appoints a receiver of the rents and profits of the immoveable property. What has been done in this case has been done following the practice on the Original Side, which, of late years, became settled in view of principles well-settled in England and is now in Chapter XVII of our Rules. It is very common for persons who apprehend execution to start a partnership suit and have a receiver appointed of the assets of the partnership, or a partition suit, and have a receiver appointed of the assets of the family; or a mortgage suit and have a receiver appointed of the assets under mortgage. In these cases, the endeavour to use Order XXI, rule 52, is of very small use to the executing creditor. It may be that the suit for partition or for dissolution of partnership is entirely collusive, and under rule 52 of Order XXI very little relief is to be obtained by the executing

creditor. According to the particular practice in this Court and in the Courts in England, the creditor, in such circumstances, is to go to the court, who appoints the receiver, and he asks the court to give him leave, so far as a certain property is concerned, to ignore the receivership altogether. In that case, he proceeds exactly as if no receiver has ever been appointed and that is the course adopted by the creditor in this case. Sometimes, when a creditor goes and asks leave in such fashion, the court will not allow him to attach the assets direct. In many cases, that might result in interfering with the administration of the court as regards the partnership assets. In a partnership case, the court calls for the creditors and endeavours to pay the creditors of the firm out of the assets and to hand back the balance, if any, to the partners according to their shares. In many cases, therefore, to allow an executing creditor to come in and levy upon the assets directly and independently of the court's proceedings would lead to confusion and cause injustice or give preference to the attaching creditor. In such cases, the court will refuse the relief in that form and will make an order in the well-known form now known by the case of *Kewney* v. *Attrill* (1). It will give the creditor no leave to attach direct, but it will give him a charging order upon the assets that are being administered upon the term that the creditor will use that charging order in a way which will be under the control of the court. The present is a case where the court granted leave to attach the assets direct by the ordinary process and the Master, in this case, upon a tabular statement, is quite right in ordering attachment under rule 54 of Order XXI. That attachment is a perfectly good attachment and that the act of bankruptcy, therefore, cannot be challenged.

We have been asked, in this case, to give the debtors further time. I am well aware of the difficulties of giving debtors very much time when a

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bankruptcy petition has been filed and is being contested. But had there been any attempt when this petition was first filed on the part of the debtors to provide for the petitioning creditor's debt on term of being given a little time, I should have been the last person to have objected to any reasonable order of adjournment. One may take notice of the fact that, at the present time, people may very legitimately have special difficulty in finding the necessary liquid money to pay debts; but this petition was presented in March and nothing whatever has been done to pay off even the petitioning creditor, let alone any of the other creditors. Mr. Banerjee, who has to look after the interests of his client, is not disposed to consent to further time being given to the debtors, and his client might very well be, for all we know, in difficulty at this stage in receiving his money, unless indeed all the other creditors can be ascertained and, at the same time, paid. It is quite impossible for us, therefore, to thrust upon Mr. Banerjee's client, against his will, a further adjournment for any such purpose.

In the result, the order of adjudication must be made. We find the act of insolvency being the act mentioned in clause 1 of paragraph 6 of the petition* and we find the petitioning creditor's decretal debt to be good petitioning creditor's debt and we make the adjudication now.

The appeal will be allowed. The petitioning creditor's ordinary costs of this Court and of the Court below certified for counsel will come out of the assets.

GHOSE J. I agree.

Appeal allowed.

G. K. D.

*The paragraph in question was as follows :—

6. That the said debtors, within three months before the date of the presentation of this petition, have committed the following acts of insolvency :

(1) That the right, title and interest of *inter alia* the said Chunilal Jahuri and Matilal Jahuri in the said premises, No. 38, Barhtolâ Street, Calcutta, was attached on the 19th January, 1932, and such attachment continued for a period of more than 21 days and is still continuing in execution of the said decree in our favour in the said suit No. 1133 of 1931, which is a decree of this Court for payment of money.