APPEAL FROM ORIGINAL CIVIL.

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

GULAM MUSTAPHA MALLIK

v.

MADANLAL.*

1930

July 10, 16.

Insolvency—Acts of insolvency—Charging order under O. XXI, r. 49 of the Code of Civil Procedure (Act V of 1908)—Appeal from adjudication order—Official Assignee, if a necessary party—Presidency Towns Insolvency Act (III of 1909), s. 9.

A charging order under Order XXI, rule 49 (2) of the Civil Procedure Code is not an attachment within the meaning of the sections in the Presidency Towns Insolvency Act (III of 1909).

In an appeal from an adjudication order, the Official Assignee is a necessary party.

APPEAL from an order of Lort-Williams J.

The appellant, Gulam Mustapha Mallik, was, on 14th January, 1930, adjudicated an insolvent, on a petition by the respondent, Madanlal, a creditor. The acts of insolvency, as alleged in the petition, were—

(*i*) That, on 13th September, 1929, the debtor gave notice to the creditor's *gomâstâ* that he suspended payment.

(*ii*) On 28th August, 1929, the debtor's interest in his co-partnership business was attached by the petitioning creditor in execution of a decree against him.

Against that order this appeal was filed.

S. N. Banerjee and *S. N. Banerjee* (*Jr.*) for the appellant.

S. M. Bose for the respondent.

Cur. adv. vult.

RANKIN C. J. This is an appeal from an adjudication order made by the learned Judge in Insolvency Jurisdiction under the Presidency Towns Insolvency Act. It appears that the petitioning creditor on the 28th August, 1929, obtained a charging order under Order XXI, rule 49, Code of Civil Procedure, against

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the interest of the debtor in a certain partnership. In his petition for adjudication, the petitioning creditor alleged two acts of insolvency. One was that, by reason of this charging order, the interests of the debtor in the co-partnership business were attached and that the attachment was still subsisting. The learned Judge has, by his order, found this act of insolvency proved. The other act of insolvency alleged was a notice of suspension of payment of debts, as to which the learned Judge has not found one way or the other.

Upon this appeal, the debtor contends, first, that the petition was not in order, seeing that the petitioner had certain security which he had neither given up nor valued; and, he contends further that the charging order under Order XXI, rule 49 is not an attachment within the meaning of the section defining acts of bankruptcy in the Presidency Towns Insolvency Act of 1909.

So far as the first objection is concerned, as the petitioning creditor by his learned counsel has in this Court agreed to give up his security for the benefit of the creditors in the event of his getting an adjudication order, no formidable difficulty arises. That matter is capable of being put right and nothing more need be said about it.

Upon the question whether the charging order on the interest of the debtor made under rule 49 of Order XXI, Code of Civil Procedure, is an attachment, it appears to me that there is a good deal to be considered. But there can be no doubt that, if there is one thing more than another upon which the Court is obliged and entitled to treat the words of the statute with great strictness, it is the definition of the acts of insolvency in an Insolvency Act. It is notorious that there have been in England many cases of great technicality upon this very point and there can be no doubt that the right point of view from which to approach the question is that, even although the Court should think that there is no great reason or no reason at all why a charging order of this sort should not, for purposes of insolvency, be treated upon the

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same footing as a levy by the Sheriff on goods and other form of attachment, the Court will not on that ground alone bring the case within the words of the definition of acts of insolvency. The words of rule 49 begin "save as otherwise provided by this "rule" and then they go on to say that "property "belonging to a partnership shall not be attached or "sold in execution of a decree other than a decree "passed against the firm or against the partners in "the firm as such." The rule was new in 1908 and, prior to that time, the practice seems to have been somewhat confused; but in one way or another the partnership assets were attached at the time and sold. Under this rule, this process of applying the ordinary law of attachment to partnership property in execution of a judgment against a single partner has been stopped and that is the real meaning of the first clause of the rule. It is to put an end to a bad practice that had been fairly common, if not indeed actually authorised by law—the practice, namely, of attaching in the ordinary way the partnership assets under a judgment against a single partner. So that the main object of the first clause is merely to stop that. But the second clause contains a provision borrowed from an English statute as to charging orders and it provides that, under a charging order, sale may be directed in course of execution. Some stress has been laid upon the opening words of the rule "save as otherwise provided by this rule" and it has been suggested that those words show that from the legislator's point of view the charging order under clause (*2*) is to be regarded as a form of attachment. In my opinion, this inference is precarious and, even assuming that it were clear that for certain purposes of Order XXI a charging order was in the same position as an attachment or was to be deemed to be an attachment, I do not think that it would be right to hold that a charging order is an attachment within the meaning of section 9 of the Presidency Towns Insolvency Act. For these reasons, I am of opinion that the act of bankruptcy relied on by the petitioning creditor was not made out.

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In this case, when an appeal was brought by the debtor from the adjudication order, the debtor omitted to make the Official Assignee a party to the appeal. It has been represented to us that there is some confusion as to the necessity of making the Official Assignee a party to an appeal from an adjudication order. There can be no doubt that the Official Assignee ought in all cases to be made a party to the appeal in the full sense of the word. The adjudication order when it is once made vests all the property of the insolvent in the Official Assignee and all creditors have an interest in the order. The effect of an appeal from an adjudication order, if the appeal is successful, is to take the property out of the Official Assignee's hands and to deprive the creditors of the benefit of the trusts of the property which was in the hands of the Official Assignee. The confusion, if any, seems to arise from the fact that, in a previous case [*Khem Karandas Khemka* v. *Huribux Fatehpunia* (1)], the learned Judge, quoting English authorities, said that notice of the appeal must go to the Official Assignee and it seems to be thought that the notice of appeal is some peculiar and exceptional sort of notice which goes to a person who is not in the ordinary sense a party. I would only point out that, while in this country appeals are brought by filing a document called a memorandum of appeal, the English cases speak of a "notice of appeal" because all appeals are brought by notice and by no other formality. The notice of appeal in an English case is exactly the same thing as the memorandum of appeal in an Indian case.

In these circumstances, the appeal must be allowed with costs both before us and before the learned Judge on the Original Side. The adjudication order will be discharged.

GHOSE J. I agree.

Attorneys for appellant: *P. L. Mullick & Co.*

Attorney for respondent: *P. D. Himatsingka.*

N. G.

(1) (1925) 29 C. W. N. 884.