APPELLATE CIVIL.

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

1932

Mar. 9, 10.

MRINALINI DASEE

v.

HARIHAR DE.*

Insolvency—Summary attachment of immovable in the possession of the insolvent's wife, if valid—Provincial Insolvency Act (V of 1920), s. 21 (2), (3), provs. (i), (ii).

Immovable property claimed by the insolvent's wife as her own and to be in her possession was summarily attached under section 21 (2) of the Provincial Insolvency Act at the instance of a creditor without his bringing the matter for adjudication either by motion before the insolvency court or by a regular suit for that purpose before a proper tribunal.

Held that this was not authorised by the section and was improper.

The summary powers under the clauses (2) and (3) of section 21 of the Provincial Insolvency Act are not to be exercised until the contingencies mentioned in the provisos (*i*) and (*ii*) of the said section have arisen.

FIRST APPEAL by the claimant.

The material facts appear from the judgment.

Gopendranath Das and *Byomkesh Basu* for the appellant.

Bijankumar Mukherji and *Apoorbadhan Mukherji* for the respondent.

RANKIN C. J. In this case, it appears that one Saratkumar Ray presented his own petition for adjudication in insolvency on the 25th of September, 1929, and that, on that date, the usual order was made to admit the petition. On the 4th of December, a certain creditor who appears to have been No. 1 in the list of creditors filed by the debtor asked the court to appoint an *interim* receiver. The court did, on that day, appoint an *interim* receiver and notice of the application was given to the debtor. On the

*Appeal from Original Order, No. 415 of 1930, against the orders of K. C Nag, District Judge of Hooghly, dated June 27 and Aug. 2, 1930.

3rd of January, 1930, the same creditor applied to the court for an order upon the receiver directing him to serve notice on the tenant at Calcutta "for "paying rent of the house to him" and for certain other matters. It may here be explained that there was a certain house at Chandernagore, which the insolvent's wife claimed as her own, she having purchased it with her own money. There was also a house in Calcutta, which was in the occupation of a tenant, with reference to which as I understand, there was a claim by the wife under a deed of gift from insolvent. But from the beginning, the position was that these two houses were claimed by the wife. Now, the creditor's application that the receiver should be directed to serve notice on the tenant was entirely a harmless application. I should have thought that the receiver under his ordinary powers would give notice of any claim—if he thought there was any claim—to the tenant and after that if the tenant paid any rent to the wife he would be under a liability when the receiver established that the properties belonged to the insolvent to pay the rent over again. The court made an order directing notice to be served upon the tenant not to pay rent to any other person excepting the receiver. The tenant was not obliged to obey that order at all, merely he was under the risk that if he paid to a wrong person he would have to pay twice. That being so, there was nothing wrong with that order, even considering the fact that the wife had not been a party. The order was merely for giving a notice to the tenant, such as the receiver might perfectly well issue without any order from the court. Then the matter proceeded and the creditor asked the court for attachment of the house of the petitioner for insolvency purchased in the *benâmi* of his wife. What this proceeding was supposed to be, I confess I did not at first understand, but it has been explained to us that it was supposed to have been made under section 21 of the Provincial

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Insolvency Act. If so, I can only say that it was an abuse of the section. That is a section which gives powers to the court, which it may exercise at the time of admitting the petition and at any other time. It may, for instance, order the debtor to give security for his appearance if he is expected to abscond; that might be a reasonable thing to do. In the same way, it may order the attachment by actual seizure of the whole or any part of the property in the possession, or under the control of the debtor, excepting such things as are exempted from execution by the Civil Procedure Code; and the proviso is to the effect that an order under clause (*2*) is not to be made unless the court is satisfied that the debtor, with intent to defeat or delay his creditors or to avoid any process of the court, has absconded or has failed to disclose or has concealed, destroyed or removed any documents likely to be of use to his creditors or any part of his property. To apply that provision to the case of an immovable property—where the court knows that the property is claimed by the wife and that the petitioner and his wife are both saying that the property does not belong to the insolvent—on the mere ground that the insolvent has not declared it as an asset is of course a thoroughly unjust and absurd procedure. These summary powers are intended to prevent the debtor from making away with what is his property—documents and books of account which might be used against him, — property that he might run away with and take away out of the reach of the creditors. Merely because there is a dispute between the creditor and the insolvent as to whether certain property belongs to the insolvent or his wife to pass an order to attach a house under section 21 is an unreasonable proceeding. Property in the possession of the wife and claimed by the wife, having been attached, the wife had only to appear before the learned Judge and she was entitled to an order cancelling that attachment as a matter of right. The phrase "property in the possession or

"under the control of the debtor" was never intended to apply to a house claimed by the wife, because the debtor and his wife are living together. Now, this order having been made, the wife, on the 29th of January, 1930, did apply in substance to have these proceedings cancelled. As regards the Calcutta house, apparently by some confusion it was thought that the order of the 3rd of January, 1930 amounted in some way to an attachment of the rent. In any case, the lady applied and she was treated as a person making a claim. It appears, that she prayed for an enquiry of her claim petition by the receiver and though her property had been attached in her absence and she wanted the receiver to enquire and find out whether after all it was her property, she was ordered to deposit certain costs before the receiver would begin the enquiry. Then the claimant filed her sale deed and the receiver appears to have made a report on or about the 10th of June. On the 24th of June, the lady applied for an order directing the receiver not to take delivery of possession or realise rent of the premises mentioned in the petition. The receiver was directed by the learned judge on the 27th to proceed to Calcutta and realize the outstanding arrears of rent and apply a portion towards necessary repairs. All this was done before there was any adjudication as to whether this property belonged to the insolvent or not. The tenant was ordered to pay the whole of the arrears by a certain time. What obligation the tenant was under to obey that order I do not know. However, it appears now that the tenant has paid a certain amount of rent to the receiver and that that amount is now in court and the tenant is apparently continuing to pay his rent into court. Lastly, the claimant asked that the investigation of the claim matter by the receiver be stayed and the matter be dealt with by the court on evidence. By an order of the 2nd of August, the learned judge declared that the receiver was already in possession of the property

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and the receiver was directed to continue his enquiry into the question of ownership. From that order, the wife appeals to us. In my judgment, the proper order is to put the matter back into the position from which it never ought to have been changed in the absence of a proper adjudication as to whether the property belongs to the insolvent's estate or not. I propose to set aside the order of attachment of the 13th of January, 1930; I propose to declare that the lady was in possession of the Chandernagore house and, by her tenant, of the Calcutta house, at the time of the insolvency; and I propose to declare further that, unless and until a creditor or the receiver at his own risk as to costs brings a proper motion before the learned judge or a proper suit for a declaration that these two houses do not belong to the lady, but belong to the insolvent, the possession which she originally had is not to be disturbed. As the tenant of the Calcutta property is paying his rent into court, that arrangement for the present need not be interfered with: but unless, within six weeks from to-day, a proper motion against the lady is filed before the learned judge or other proper proceedings to make a claim on behalf of the estate against the lady are instituted, then, at the end of six weeks, the lady is to be entitled to receive the rent out of court, subject to any right that the receiver may have to bring a motion to recover the money from her upon establishment of the title of the insolvent. This appeal must succeed with costs against the creditor No. 1, hearing fee—three gold mohurs.

GHOSE J. I agree.

Appeal allowed.

A. K. D.