APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and Mr. Justice Gentle.

THE BUCKINGHAM AND CARNATIC CO., LTD., APPELLANTS,

1936, May 6.

v.

THE OFFICIAL ASSIGNEE OF MADRAS, RESPONDENT.*

Presidency-towns Insolvency Act (III of 1909), sec. 60 (2)—"Salary or income"—Meaning of—Piece-work labourer paid daily wages calculated on quantity of his work, wages, however, being paid once a month—Earnings of, "salary or income", if—Attachable under sec. 60 (2), if—Attachment of labourer's earnings—Order of, made with his consent—Binding nature on employer of—Locus standi *of latter to object to attachability of earnings.*

An insolvent was a daily piece-work labourer in the Carnatic Mills belonging to the appellants and his daily wages were calculated on the quantity of work turned out by him. His average daily earnings as a piece-worker amounted to Rs. 1-11-1, though for purposes of convenience he was paid once a month. His wages accordingly varied from month to month according to the number of days he worked and the amount of work he turned out. His services were liable to be terminated on a month's notice. He earned no wages on the days he was absent with leave and he could not be compelled to work against his will.

Held that the earnings of the insolvent were not "salary or income" within the meaning of, and were not attachable under, section 60 (2) of the Presidency-towns Insolvency Act.

A salary means something in the shape of an yearly or other periodical method of calculation for payment for services, and it must be some definite annual amount which is coming to the insolvent. The earnings in the present case do not satisfy either of these tests.

* Original Side Appeal No. 7 of 1936.

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In re Jones. Ex parte Lloyd, [1891] 2 Q.B. 231, followed. *In re Rogers. Ex parte Collins*, [1894] 1 Q.B. 425, 431, and *Ex parte Benwell. In re Hutton*, (1884) 14 Q.B.D. 301, referred to.

As a condition for his getting the protection of the Court from arrest, the insolvent consented to a part of his earnings being paid to the Official Assignee, and an order was accordingly made by the Insolvency Court upon the appellants requiring them to withhold monthly a sum of Rs. 6 from the earnings of the insolvent and to remit the same to the Official Assignee. The appellants were not given any notice of the proceedings in the Insolvency Court in which the insolvent consented to the arrangement in question and were never heard in opposition to it.

Held that the appellants were not bound by the said proceedings and that, on being served with the garnishee notice, they had a *locus standi* to object to the legality of the order made upon them.

APPEAL against the judgment and order of WADSWORTH J. dated 23rd January 1936 and made in the exercise of the insolvency jurisdiction of the High Court in Applications Nos. 440 of 1935, 2545 of 1935 and 1892 of 1935 in Insolvency Petition No. 382 of 1933.

O. T. G. Nambiyar for appellants.

T. S. Venkatesa Ayyar for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by

BEASLEY C.J. BEASLEY C.J.—One E. Balasundara Mudaliar, an insolvent, was employed by the appellants, Messrs. Binny & Co., in their mills and the insolvent having agreed to pay an allocation to the Official Assignee in order to get protection, on 15th August 1935, an order was made by the Insolvency Court upon the appellants requiring them to withhold monthly a sum of Rs. 6 from the salary of the insolvent and immediately to remit it to

the Official Assignee until further or other order of the Court. On 24th September 1935, the appellants took out an application before the Master in chambers praying that the garnishee order before mentioned should be vacated. The Master dismissed the application and from his order of dismissal the appellants appealed to the Insolvency Judge who dismissed the appeal.

The Master, on the objection of the Official Assignee, held that the appellants had no *locus standi* to object to the order of attachment of the insolvent's earnings in their hands and also that these earnings were "income" *ejusdem generis* with "salary" in section 60 (2) of the Presidency-towns Insolvency Act and therefore liable to attachment. WADSWORTH J. ruled in favour of the appellants on the first point but against them on the second. Hence this appeal.

These two questions have now to be considered. Although there is no appeal on the first point by the Official Assignee, he is entitled to uphold the trial Judge's decision upon any ground that is open to him. This point was not argued by the appellants since it had been decided in their favour by the trial Judge. For the Official Assignee, Mr. Venkatesa Ayyar contends that the proceedings were entirely between the Official Assignee and the insolvent, that what was in question was the pay of the insolvent, that, since he was willing that a part of it should be paid to the Official Assignee as a condition for his getting the protection of the Court from arrest, the appellants have no right to be heard to the contrary and that the insolvent having consented to this arrangement, such arrangement is binding

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upon the appellants. It is very difficult to understand this contention. The appellants were not given any notice of the proceedings in the Insolvency Court in which the insolvent consented to the arrangement in question and were never at that stage heard in opposition to it; nor do we think that at that stage it was necessary for them to be heard. They, however, were not bound by those proceedings at all. As a result of such proceedings this attachment was made and they were served with the garnishee notice. It is argued on behalf of the Official Assignee that it is not open to them to raise any objection whatever to this direction upon them but they have merely to obey it, but no authority is cited in support of this contention. A refusal to obey the Court's direction would subject the appellants to unpleasant consequences. Are they not to be heard to say that the order made upon them was an illegal order in that the earnings, the subject of the order, were not attachable under section 60 of the Act? Is a person upon whom an order, which appears to him to be illegal, has been made not to be allowed to state his objection thereto? If the insolvent's earnings are not attachable under section 60 (2), then clearly the order upon the appellants is an illegal one and ought never to have been made and the appellants have the right to show that it ought never to have been made upon them. We agree with WADSWORTH J. on this point.

The next question is whether these earnings come within the words "salary or income" which appear in section 60 (2) of the Presidency-towns Insolvency Act; and here some facts are necessary.

The insolvent is a daily piece-work labourer in the Carnatic Mills belonging to the appellants and his daily wages are calculated on the quantity of work turned out by him. His average daily earnings as a piece-worker amount to Rs. 1-11-1, though for purposes of convenience he is paid once a month. His wages accordingly vary from month to month according to the number of days he works and the amount of work he turns out. The insolvent joined the service of Binny & Co. in 1926; and his services are liable to be terminated on a month's notice. He earns no wages on the days he is absent with leave and, from the third paragraph of the second affidavit of Mr. Barlow, it appears that he cannot be compelled to work against his will. Those being the facts, the decisions under the corresponding section of the English Bankruptcy Act are of assistance to us. The first of these is *Ex parte Benwell. In re Hutton*(1). There, it was held that the word "income" in section 90 of the Bankruptcy Act of 1869 applies only to an "income" *ejusdem generis* with a "salary" and does not enable the Court to set aside for the benefit of the creditors of a professional man who is an undischarged bankrupt any part of his prospective and contingent earnings in the exercise of his personal skill and knowledge. BRETT M.R. on page 306 says:

"Section 89 deals with cases in which the bankrupt is entitled, either by the bounty of the Crown or under some Act of Parliament, to some 'pay, half-pay, salary, emolument or pension'. He is entitled to one of these things, though he has not got it actually in possession, but he is certain to have it if things go on as they are. And the Court is empowered to deal with matters of this kind, though they are not comprised

(1) (1884) 14 Q.B.D. 301.

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in any of the previous sections of the Act, for the bankrupt is certain to have them though they have not yet come into his possession. Section 90 goes further still and enables the Court to deal with 'a salary or income other than as aforesaid' of which the bankrupt is in the receipt. What is the meaning of the word 'salary' in the section? It must be a salary of the same kind as those things which have been already mentioned though it is not paid in respect of similar services. Then there is the general word 'income'. The rule is that general words added to particular words do not include everything which would come within them according to the literal meaning of the English language but are to be limited to things *ejusdem generis* with those things which have been previously mentioned. 'Income' therefore must mean 'income' in the nature of a salary.''

In a recent case, *In re Landau. Ex parte Trustee*(1), ROMER L.J. refers to *Ex parte Benwell. In re Hutton*(2) and says:

"It is true that Lord ESHER in *Ex parte Benwell* (2) said that income in the old section, corresponding to section 51, sub-section (2), was income *ejusdem generis* with salary; but with all respect to that learned Judge, I do not think such a statement assists us very much unless the statement goes on to tell us to what genus the salary payment belongs. He did not do so."

With all respect to ROMER L.J., BRETT M.R. in *Ex parte Benwell. In re Hutton*(2) did state to what genus salary belonged because he says salary must be of the same kind as "pay, half-pay, salary, emolument or pension" set out in section 89 of the Act.

COTTON L.J. in *Ex parte Benwell. In re Hutton*(2) says:

"In my opinion section 90 points to some definite annual amount which is coming to the bankrupt and in such a case a part of it can be set aside for the benefit of his creditors."

Next is *In re Shine. Ex parte Shine*(3). There, the bankrupt had entered into an agreement with

(1) [1934] 1 Ch. 549. (2) (1884) 14 Q.B.D. 301, 308.
(3) [1892] 1 Q.B. 522.

the management of a theatre to act for a term of two years at a salary of thirty pounds a week payable weekly. The salary was to be subject to a proportionate reduction in respect of any night upon which the theatre should not be open. It was held that the payment to the bankrupt for his service under the agreement was "salary or income" within the meaning of section 53, sub-section (2), of the Bankruptcy Act of 1883. Lord ESHER M.R. in his judgment referred to *Ex parte Benwell. In re Hutton*(1) and said that, the payments being made under a contract, the rules laid down there did not apply. In *In re Shine. Ex parte Shine*(2) there was a definite contract for a stated period and the amount to be paid was a definite amount; and BOWEN L.J. in the same case says:

"I am of opinion, having regard to the contract, that it is a salary. 'Salary', I think, must mean a definite payment for personal services arising under some contract and (to borrow an expression of my brother FRY) computed by time."

In the case before us, no doubt the money is paid to the insolvent under a contract of service but it is not a definite payment; it is indefinite in amount, the amount being dependent upon the quantity of work done and the number of days worked by the insolvent. It is no doubt for personal services. In *In re Rogers. Ex parte Collins*(3) VAUGHAN WILLIAMS J. on page 431 says:

"It seemed to be rather assumed in argument that because money was personal earnings it could not be within the 53rd section. I do not agree. If you happen to receive your personal earnings under a contract, so that your personal earnings are not daily earnings, but take the shape of yearly or other periodical salary, I conceive that, subject to the rule of

(1) (1884) 14 Q.B.D. 301, 308. (2) [1892] 1 Q.B. 522.
(3) [1894] 1 Q.B. 425.

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not depriving the bankrupt of the means of livelihood, if it be shewn that after providing fairly and liberally for the support of the bankrupt there will be a balance of salary, that balance of salary, even though the salary is a salary for personal exertions, might be made the subject of an order under the 53rd section."

Therefore, in the view of VAUGHAN WILLIAMS J. a salary means something in the shape of a yearly or other periodical method of calculation for payment for services and, as before stated by COTTON L.J. in *Ex parte Benwell. In re Hutton*(1), "salary" must be some definite annual amount which is coming to the bankrupt. The earnings in this case do not satisfy either of these tests.

We now come to a case which seems to us to be directly in point, namely, *In re Jones. Ex parte Lloyd*(2). In that case, *Ex parte Benwell. In re Hutton*(1) was followed and it was held that wages earned by a workman employed in a colliery are not "salary or income" within the meaning of section 53, sub-section (2), of the Bankruptcy Act of 1883. The workman there was earning wages which averaged twenty-five to thirty shillings a week. We know that colliers are paid on a piece-work basis and their earnings therefore vary from day to day; and CAVE J. could not distinguish between the case of the collier before him and the case of the debtor in *Ex parte Benwell. In re Hutton*(1), stating that in the latter case, although the debtor was making large sums of money amounting to more than £1,000 a year, yet, inasmuch as he was not entitled to receive that money with respect to any particular period such as a year or some part of a year irrespective of the amount of work he did, the money so received

(1) (1884) 14 Q.B.D. 301. (2) [1891] 2 Q.B. 231.

was not "income" *ejusdem generis* with "salary". With regard to the case before him, he said that, as in *Ex parte Benwell. In re Hutton*(1) it was impossible to compel the debtor to go on working and earning money, in the same way in the case before him if the debtor did not choose to go to work, he would earn nothing. WADSWORTH J. at first was inclined to think that the ruling in *In re Jones. Ex parte Lloyd*(2) would govern the present case but on further consideration was of the contrary opinion, saying :

"The case of the collier was, so far as the information available goes, regarded as the case of a more or less casual employee paid for the job, though the wages were paid weekly for convenience. The insolvent in the present case is not a casual employee but a permanent employee whose conditions of service are governed by rules and who is entitled to a month's notice before his services are terminated, and, though perhaps in theory he may have the option of staying away from work without any action for damages lying against him, in fact the rules of the company appear to hold out such inducements as to make his employment as regular as that of any salaried worker."

With all respect to WADSWORTH J., we are unable to see any difference between the insolvent in this case and the collier in *In re Jones. Ex parte Lloyd*(2). WADSWORTH J., in our view, was in error in regarding the collier as a more or less casual employee paid for the job. That is not so. There is no reason for supposing that the collier in question was differently employed to other colliers. There is a contract of service ; they are paid for convenience weekly and are paid on a piece-work basis, as it is obvious that collier was in that case, and are entitled to notice ; and their

(1) (1884) 14 Q.B.D. 301.

(2) [1891] 2 Q.B. 231.

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wages vary according to the number of days they work and the amount of work they do. A collier so employed has never been regarded as a casual labourer in our experience. We are quite unable to distinguish this case from that case which in our view, having regard to the other cases referred to and the tests laid down, was correctly decided.

Applying that case to this, we allow the appeal and give the appellants their costs throughout.

Solicitors for appellants: *King and Partridge.*

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

1936, April 1.

R. T. KESAVULOO (SECOND RESPONDENT—SECOND JUDGMENT-DEBTOR), APPELLANT,

v.

THE OFFICIAL RECEIVER, WEST TANJORE AT TANJORE, AND ANOTHER (PETITIONER AND FIRST RESPONDENT —FIRST JUDGMENT-DEBTOR), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 182 (5) as amended by Act IX of 1927—"Final order"—Meaning of—Order returning execution petition for amendment—"Final order", if.

The expression "final order" in clause 5 of article 182 of the Indian Limitation Act of 1908 as amended by Act IX of 1927 does not mean "the last order in point of time". The words "final order" imply that the proceeding has terminated so far as the Court passing it is concerned.

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* Appeal Against Order No. 488 of 1934.