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are being offered for sale, and therefore is the very thing which ought to be stuck up in a conspicuous part of the kutcheri.

In the result I think that this notice was not stuck up at all within the meaning of this clause of section 8 of Regulation VIII of 1819, and, in accordance with the decision of the Privy Council, I think that the sticking up or publication of it was essential to the validity of the sale, and consequently, agreeing with the decision at which Mr. Justice Ghose has arrived, the sale, to the extent mentioned in the judgment of the learned Judges who heard the case in the first instance, must be set aside, and a decree made in accordance with the said judgment.

Appeal No. 126 *of* 1890 *dismissed.*

Appeal No. 133 *of* 1890 *decreed in part.*

C. D. P.

Before Mr. Justice Pigot and Mr. Justice Gordon.

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June 12.

POONA LALL (OPPOSITE PARTY) *v.* KANHAYA LALL BHAIA, GYAWAL (PETITIONER).*

Insolvency—Civil Procedure Code (Act XIV of 1882), *Chap. XX.—Discharge of insolvent—Future earnings of insolvent, power of Court to compel payments out of, towards liquidation of debts.*

The function of the Court, acting under chapter XX of the Code of Civil Procedure, is to compel insolvent-debtors to pay their debts if it can, either by its compulsory process, or, where that cannot be used, by withholding from them, when it has the power of doing so, the relief to which they might otherwise be considered entitled.

The granting of an order of discharge under that chapter is to a certain extent discretionary with the Court, and if the Court be of opinion that an insolvent may reasonably be expected to possess an income accruing during the time of his insolvency and likely to continue, even if such income be from sources such that it could not be attached, it ought very seriously to consider whether under such circumstances it ought to exercise its power to discharge the insolvent, and not rather stay its hands and require him as a condition of such discharge to satisfy it by payments on account of his debts, that he really desires, so far as he can, honestly to discharge the debts that he owes.

A Gyawal who was in receipt of a very considerable income, derived from offerings made by pilgrims, applied to be declared an insolvent under

* Appeal from Order No. 26 of 1890 against the order of J. Crawfurd, Esq., District Judge of Gaya, dated the 31st of October 1889.

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the provisions of chapter XX of the Code of Civil Procedure. He was opposed by a judgment-creditor who, *inter alia*, contended that the insolvent should be compelled to contribute out of his income towards the payment of his debts. The Court finding that there were no assets, and holding that such income was not property capable of being attached, and that it had no power to order an insolvent to pay anything out of future earnings towards the discharge of his debts, declared the applicant an insolvent and granted him his discharge.

Held, that the Court had power to withhold the discharge until the insolvent had satisfied it, by payments on account of his debts, that he really desired to discharge his debts; and that, under the circumstances of the case, both having regard to the fact that the inquiry into the estate of the insolvent had been insufficient, and to the fact that he was in a position to contribute out of his income towards the payment of his debts, the order was wrong and should be set aside.

THIS was an appeal against an order passed by the District Judge of Gaya, under the provisions of chapter XX of the Code of Civil Procedure, declaring the petitioner Kanhaya Lall Bhaia an insolvent and granting him his discharge.

The petition by the insolvent was filed on the 3rd April 1889, and it was opposed by Poona Lall, the appellant, who was the only creditor, and who held a decree for Rs. 5,000 against the insolvent and his brothers, as representatives of their deceased father, which he had purchased from one Lakshmi Narain Dass, in whose favour it had been passed by the High Court.

It appeared that the insolvent was one of a family of Gyawals, and that in August 1885 he had previously been declared an insolvent, jointly with his father, who was then alive, and his mother and brothers. The debts existing at the date of that insolvency had never been paid off, nor had the insolvent been discharged from further liability in respect thereof. With the exception of the debt covered by the opposing creditor's decree, however, it did not appear that any other debts had been incurred by the insolvent since the date of the previous insolvency.

The grounds of opposition included concealment of property, and it was urged that the insolvent was in receipt of a very considerable income derived from offerings made by pilgrims, and that he was perfectly able thereout to defray his debts. With reference to the allegation that the insolvent had concealed property,

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the opposing creditor was unable to substantiate the charge, but it was one of his grounds of appeal to the High Court that the lower Court had not compelled the production of the books of the family or examined witnesses, the production and examination of which would, he contended, have enabled him to prove his case.

The lower Court, after adjourning the hearing twice to enable the opposing creditor to produce his evidence, refused to adjourn it again, and found the allegation as to concealment of property in favour of the insolvent. Upon the question as to the insolvent being compelled to contribute from his income for the purpose of liquidating his debts, the District Judge observed as follows:—

"There remains the question as to the income which the petitioner admits that he receives from the offerings of pilgrims. He states that he has now separated from the rest of the family, and that the income from this source has fallen off and is precarious. The Civil Procedure Code gives this Court no power such as the Insolvency Act gives to the Commissioner in Insolvency to require the petitioner to pay part of his future earnings to the payment of his debts. The mere chances that pilgrims will come to the petitioner and employ his services and give him gratuities is not, in my opinion, saleable property, either under section 266 of the Civil Procedure Code or section 6 of the Transfer of Property Act. Supposing the Court were to sell it, there would be no power to compel the pilgrims to employ the purchaser, who would have no right to force the petitioner after the sale to work for him as lessee or otherwise. That the rights or chances of the petitioner were not saleable seems to have been the view taken by my predecessor, or else they would have been sold in the previous insolvency. Under the circumstances I see no objection to the grant of a declaration of insolvency. The fact of the previous insolvency would not prevent this; for that did not affect debts subsequently contracted. Under these circumstances I declare the petitioner an insolvent, and as there are no assets I grant his discharge. The insolvent will within three days pay in Rs. 5 for the issue of the usual Gazette notification, when a date will be fixed for framing the schedule."

The opposing creditor appealed to the High Court on various grounds, in addition to those indicated above. The only grounds

material, however, to notice are those relating to the lower Court not compelling the production of the books and giving the opposing creditor a sufficient opportunity for proving his allegation as to concealment of property, and the fact that the Court had not compelled insolvent to contribute out of his income towards the liquidation of his debts. It was contended that such income was attachable, and, as regards the amount of it, it was pointed out that there was evidence to show that at the date of the previous insolvency it amounted to at least Rs. 1,800 a year.

Baboo *Jogesh Chunder Dey* appeared for the judgment-creditor, appellant.

Baboo *Kali Kishen Sen* for the insolvent, respondent.

The judgment of the High Court (PIGOT and GORDON, JJ.) was as follows :—

We think the appeal must be allowed and the order set aside. The jurisdiction under the insolvency sections of the Civil Procedure Code is no doubt one most difficult to administer satisfactorily, but it still is competent for the Court so to exercise its powers as to secure to the creditors a better chance of recovering something from the insolvent-debtor than we think has been, under the circumstances of this case, allowed. We are dissatisfied with the course taken by the lower Court in two respects. We do not think that sufficiently active means of searching into the insolvent's affairs was afforded by the Court to the appellant, who for some mysterious reason is called the objector, and we think that both in respect of the rules, an order for the production of which he asked for, and as to the issue of summons to examine witnesses, and summons to examine the books relating to the religious business carried on by the insolvent and his family, the Court ought to have, in the interest of the creditor, furthered, in place of refusing the application made by the appellant, although it may be, perhaps, that the evidence and the documents which the appellant sought to lay before the Court might not, when laid before it, add much to the Court's knowledge of the insolvent's position and means, still this source of information ought, we think, to have been searched out and used to its full extent. Further, it does appear that the religious business, a term which for want of a

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better name we apply to the insolvent's occupation and that of his family, undoubtedly does bring in a very considerable income, although it may well be that that income is not of a nature such that it can be the subject-matter of attachment, or seizure, or the like under the Code. That, we are told, is the view which has been taken by another Bench of this Court, and we need not say any more as to that. But the District Judge has discharged the insolvent, and has discharged him after his having filed a schedule in which the debt of the present creditor was set out; that is to say, he has absolutely obliterated the debt due under the decree. Now we have asked the respondent's Vakeel for any ground, if he had any, for contending that it was the imperative duty of the Court under the circumstances to grant that discharge. He was unable to point out to us anything statutory or generally for so contending. We think that the issue of an order of discharge must, in its nature, having regard to the character of the insolvency jurisdiction, be to a certain extent discretionary, and if the Court be of opinion that the insolvent may reasonably be expected to possess an income accruing during the time of his insolvency and likely to continue, even be it an income from sources such that it could not be attached, still the Court ought very seriously to consider whether under such circumstances it ought to exercise its power to discharge the insolvent, and not rather stay its hands and require the insolvent, as a condition of such discharge, to satisfy it, by payments on account of the debt, that he really desires, so far as he can, honestly to discharge the debts that he owes. It may be shocking to the idea of some insolvents that they should be under obligation to pay debts which they have any chance of getting out of; that is very true, but the function of the Court is to compel them to do so, if it can, either by its compulsory process, or, where that cannot be used, by withholding from them, where it has the power of doing so, the relief to which they might otherwise be considered entitled. We think the Court ought to have taken these views into consideration in the present case, even supposing that the inquiry into the insolvent's estate, which we think ought to have been made and which we now direct should be made, were to have resulted in the discovery of nothing, strictly speaking, attachable or seizable on behalf

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of his creditors. We set aside the order of discharge and direct that, upon the appellant supplying the necessary funds, notice be issued in the Gazette notifying the setting aside of the order of the District Judge and the cancelment of the order of discharge. We direct that an inquiry into the insolvent's means do proceed, the appellant having such opportunity as we have shown by this judgment that we think he ought to have had, and after such inquiry the District Judge will make such order in the matter of the insolvency as, having regard to the views expressed in our judgment, would be proper for him to make.

The appellant will be entitled to recover the amount of the costs of this appeal against any estate, if any, as shall be discovered, can be realized in the insolvency.

Appeal allowed and further inquiry directed.

H. T. H.

Before Mr. Justice Pigot and Mr. Justice Gordon.

PERGASH LAL (DEFENDANT) *v.* AKHOWRI BALGOBIND SAHOY AND OTHERS (PLAINTIFFS).*

1890 *August* 5.

Rent suit—Landlord and tenant—Co-sharers, suit by one of several, for separate share of rent, or, in alternative, for whole rent due if more than share claimed should be found due.

The plaintiffs, some of the co-sharers in certain land, instituted a suit against a tenant and the remaining co-sharer P, alleging that the tenant held under a pottah granted by all the co-sharers; that rent was due from him for the period in suit; and that they had ascertained from P that he alleged that he had received his share of the rent for that period from the tenant, and that he refused to join as plaintiff in the suit. They accordingly prayed (*a*) for a decree for the amount of their share of the rent against the tenant; (*b*) if it should appear that any part of P's share of the rent remained unpaid, the requisite extra Court-fee might be received and a decree made for the whole of the arrears in favour of themselves and P, and that the latter might, if he consented, be made a co-plaintiff; (*c*) that if it appeared that P had realized more than his share of the rent, a decree might be made against him for the excess and against the tenant for the balance. The plaint also asked for costs and further relief. The tenant contested the suit and submitted that it was in effect a suit for plaintiffs' share of the rent only and could not therefore be main-

* Appeal from order No. 335 of 1889 against the order of J. Crawfurd, Esq., District Judge of Gaya, dated the 7th of August 1889, reversing the decree of Gopee Nath Maytay, Munsiff of Gaya, dated 15th December 1888.