

petitioners were the aggressors and it must be known that the use of deadly weapons by aggressors cannot be justified on any ground of legal right. The convictions will be upheld and the sentences will stand.

1928.

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EMPEROR.

ADAMI, J.—I agree.

## APPELLATE CIVIL.

*Before Kulwant Sahay and Macpherson, JJ.*

NARAYAN MISTRI

v.

RAM DAS.\*

1928.

April, 26.

*Provincial Insolvency Act, 1920 (Act V of 1920), sections 10, 24 and 25—debtor's inability to pay, enquiry into—court to be satisfied on the evidence adduced by applicant—creditor whether entitled to adduce substantive evidence—concealment of property, enquiry as to, when should be made—section 20 (1) proviso, scope of.*

Section 24, Provincial Insolvency Act, 1920, provides :

" (1) On the day fixed for the hearing of the petition..... the court shall require proof of the following matters, namely, (a) that the creditor or the debtor as the case may be, is entitled to present the petition :

Provided that where the debtor is the petitioner, he shall for the purpose of proving his inability to pay his debts be required to furnish only such proof as to satisfy the court that there are prima facie grounds for believing the same and the court if and when so satisfied, shall not be bound to hear further evidence thereon; .....

(2) The court shall also examine the debtor if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon."

*Held, (per Kulwant Sahay, J.) that the court, before making an order of adjudication, has to be satisfied only upon the evidence adduced by the debtor that the debtor who applies*

\*Appeal from Original Order no. 117 of 1927, from an order of W. H. Boyce, Esq., I.C.S., District Judge of Patna, dated the 16th May, 1927.

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for insolvency is unable to pay the debts and the creditor is not competent at that stage to produce substantive evidence as to concealment of property by the debtor.

The consideration of the question as to whether there has been a concealment of property and as to the benami nature of any transaction by the debtor should be deferred till the stage when the final discharge is applied for. *Bhagirath Chaudhury v. Jamni Musammat*(1) and *Gobind Prasad Gir v. Kishun Lal Dhokri* (2), followed.

*Per* MACPHERSON, J. :—" The proviso to section 24(1) ought not to be interpreted in such a way as to reduce the requirements of a most salutary provision, that the debtor must prove his inability to pay his debts, to a mere assertion or nominal proof. The least that is required of him is such proof as to *satisfy* the court that there are *prima facie* grounds for believing his plea of inability to pay his debts; as soon as the court is so satisfied, the court *may* stop taking evidence on this point, but unless and until the court is so satisfied, it is bound to hear further evidence on the point and if it is not forthcoming, to dismiss the petition."

*Bhagirath Chaudhury v. Jamni Musammat*(1) and *Gobind Prasad Gir v. Kishun Lal Dhokri* (2), doubted.

Appeal by the petitioner.

*Sant Prasad*, for the appellant.

*Chowdhry Mathura Prasad*, for the respondents.

KULWANT SAHAY, J.—This is an appeal against the order of the District Judge of Patna dismissing the appellant's application for being adjudged an insolvent on the ground that he is not unable to pay his debts.

In his application for insolvency the appellant stated that his debts amounted to Rs. 825 and odd and in schedule 2 he gave the amount and particulars of his properties valued at Rs. 37 odd. Two of the creditors opposed the application. Their objection was that the appellant was not unable to pay his debts, that he had concealed many of his properties, that he had created a fictitious sale deed dated the

(1) (1927) 8 Pat. L. T. 184.

(2) (1924) A. I. R. (Pat.) 166.

6th of September 1926 in favour of his sister's husband Jaikishun Bhagat in respect of three houses belonging to him and that, as a matter of fact, he was still the owner of those houses and in possession thereof and that the value of the houses was sufficient to pay off his debts.

The learned District Judge took evidence as regards the benami nature of the sale, and he came to the conclusion that the houses were still the property of the appellant and in his possession and on the valuation thereof he was of opinion that he was in a position to pay his debts.

Two points have been taken on behalf of the appellant in this appeal: first, that it was not open to the District Judge at the present stage to investigate the question whether the alleged sale of the houses was a benami sale; and second, that upon the evidence it was not established that the sale was benami, and that the appellant was not unable to pay his debts.

As regards the first question, it is necessary to consider the provisions contained in the Provincial Insolvency Act of 1920. Section 10 lays down conditions on which a debtor can present an insolvency petition, and the first condition is that he is unable to pay his debts. We are not concerned with the other conditions as those conditions have been admittedly fulfilled. Section 24 lays down the procedure to be followed at the hearing of the petition, and the Court is required to take proof of the fact that the creditor or debtor, as the case may be, is entitled to present the petition. The proviso to sub-section (1), which is a new provision introduced into the Act for the first time in the year 1920, is to the following effect:—

" Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are prima facie grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon."

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Then follow other matters about which the Court is to require proof. Sub-section (2) provides—

“The Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon.”

Sub-section (2) of section 25 then provides :

“In case of a petition presented by a debtor, the Court shall dismiss the petition if it is not satisfied of his right to present the petition.”

It is thus clear that under the provisions of the Act of 1920 the Court before making an order of adjudication has to be satisfied that the debtor who applies for insolvency is unable to pay his debts, and the creditors who appear at the hearing have the right to question the debtor as to his conduct dealings and property.

The question is whether at this stage, namely, at the hearing of the petition before the making of the order of adjudication, the Court can go into the question as regards the benami nature of a transfer made by the debtor. The proviso to sub-rule (1) to section 24 requires the debtor to furnish only such proof as to satisfy the Court that there are prima facie grounds for believing that he is unable to pay his debts. If a deed of transfer is produced before a Court such a deed is prima facie evidence of the transfer, and if the party opposing the application wants to establish that the transfer is not a real transfer but a fictitious or benami transfer it is for him to prove it, and in the absence of such proof the Court is to presume that the transfer is a real transfer. There is no provision in section 24 to enable the creditors to produce evidence in support of their allegation that the transfer is a benami transfer. Under sub-section (2) the creditors have the right to question the debtor as regards his conduct dealings and property; but there is nothing in the section which would empower the creditor to produce substantive evidence as regards the concealment of property by the debtor. It is only at the stage of

making the order of discharge that the question as regards the concealment of property or the question of the debtor being guilty of any fraud or fraudulent breach of trust can be raised, and it is only at that stage that the creditors are entitled to adduce evidence on these points. I am of opinion that the learned District Judge was not competent at this stage to go into the question of the transfer being a real or benami transaction. It is true that the Court has to be satisfied that the debtor is unable to pay his debt; but that has to be done upon the evidence adduced by the debtor, and, if the evidence satisfies the Court that there are prima facie grounds for believing that the debtor is unable to pay his debts the Court is to make an order of adjudication.

In *Bhagirath Chaudhury v. Jamni Musammat*(<sup>1</sup>) it was held that the consideration of the question as to whether there has been a concealment of property and as to title to property, e.g., benami nature of transactions and joint or separate character of properties, should be deferred till the stage when the final discharge is applied for.

In *Gobind Prasad Gir v. Kishun Lall Dhokri*(<sup>2</sup>), reliance upon which is placed on behalf of the respondent, it was held that under the old Act it was unnecessary for a person presenting an application to show that he is unable to pay his debts as the old Act did not require him to show that he was unable to pay his debts but this is a matter which the Court under the new Act has to investigate. But the learned Judges went on to observe that the Court can only investigate such matters on such materials as are placed before the Court by the party making the application for adjudication of insolvency, in other words, on prima facie evidence of the debtor's inability to pay.

I am, therefore, of opinion that evidence as regards the benami nature of the transaction ought

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(1) (1927) 8 Pat. L. T. 184.

(2) (1924) A. I. R. (Pat.) 166.

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not to have been allowed to be given at the present stage.

Assuming, however, that such evidence was rightly taken, I am of opinion that upon the evidence, as it stands, it is not possible to hold that the transfer was a benami transfer.

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However, as I have already said, the question as regards the benami nature of the transfer will properly come up for consideration when the debtor applies for his discharge and it will be considered upon the evidence that may then be produced before the Court.

I would set aside the order of the District Judge and direct that an order of adjudication be made under section 27 of the Act and the debtor should apply for his discharge within six months from this date. The appellant is entitled to his costs of this appeal and in the Court below.

MACPHERSON, J.—I agree to the order proposed. I do so on the ground that the appellant has satisfied me on the record as it stands that there are prima facie grounds for believing that even if he is still the owner of the house he is unable to pay his debts. I am doubtful, as at present advised, whether the decision in *Bhagirath Chaudhuri v. Jamni Musammat* (1) and an observation in *Gobind Prasad Gir v. Kishun Lal Dhokri* (2) do not go beyond the provisions of the proviso to section 24(1). The view which found favour certainly involves serious practical difficulties. To my mind that proviso ought not to be interpreted in such a way as to reduce the requirements of the most salutary new provision that the debtor must prove his inability to pay his debts to a mere assertion or nominal proof. The least that is required of him is such proof as to *satisfy* the Court that there are prima facie grounds for believing his plea of inability to pay his debts; as soon as the Court is so satisfied

(1) (1927) 8 Pat. L. T. 184.

(2) (1924) A. I. R. (Pat.) 166.

(e.g., by his own deposition, after he has been subjected to examination by the Court and questioned by creditors as to his conduct dealings and property), the Court *may* stop taking evidence on this point (an enabling provision) but unless and until the Court is so satisfied (and experience shows that little reliance is to be placed on the uncorroborated testimony or documents of many debtor-applicants) the Court is bound to hear further evidence on the point and if it is not forthcoming, to dismiss the petition. For instance it is for the Court to say whether a deed of sale produced by the petitioner and purporting to transfer his property is such proof as to satisfy it in the particular case that *prima facie* he has no property left and therefore is unable to pay his debts. Then it is easy to lay undue stress on the fact that enquiry into the bonafides of a transfer may be made at the time of discharge of the insolvent but one must not forget that a large proportion of insolvents never apply for discharge and the effect of adjudication is to give them protection for (as a rule) six months and facilities for putting further obstacles in the way of their creditors, a fact which it may be supposed was not unknown to the legislature.

*Order set aside.*

## APPELLATE CIVIL.

*Before Kulwant Sahay and Ross, JJ.*

GILLU MAL

*v.*

FIRM MANOHAR DAS JAI NARAIN.\*

1928.

April. 26.

*Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rules 58, 63—claim petition, dismissal of for default—subsequent suit by claimant—onus probandi.*

The burden of proof in a suit under Order XXI, rule 63, is on the party seeking to establish his right to attach the

\*Appeal from Original Decree no. 8 of 1925, from a decision of Rai Bahadur Surendra Nath Mukharji, Subordinate Judge, First Court, Patna, dated the 21st of November, 1924.

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SON, J.