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as such a step effectually bars any enquiry into any charge under section 103.

It has been urged that great confusion will result as the surety has already paid five annas in the rupee to the Official Assignee in this case, as there was no stay of execution pending the appeal. We cannot help that. We are of opinion that it is not in the public interest or in that of commercial morality to approve of this scheme.

The appeal is allowed and the order appealed from set aside with costs five gold mohurs.

APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

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Feb. 14.

R.M.M.S.T.M. CHETTYAR

v.

THE OFFICIAL ASSIGNEE.*

Presidency-Towns Insolvency Act (III of 1909), section 58 (5)—Penal provisions of section 58 (5) not applicable unless after adjudication—Power of Court to commit for contempt—Conduct of the appellant showing wilful intention to obstruct—Discretionary powers, exercise of in committal for contempt when interfered with on appeal.

On the application of a creditor to adjudicate the appellant insolvent, the Official Assignee was appointed *interim* Receiver to take immediate charge of the account books and assets of the appellant. Before notice of appointment was served on the appellant, he sent the account books and other valuable securities to his principals in Pudukottah. There was no legal proof, however, that he sent the books after he had notice of the petition to adjudicate him insolvent, though there were grounds to suspect that he did so with intention to obstruct the Official Assignee in discharge of his duties.

Held, that the failure to hand over the books and the securities to the Official Assignee before the order of adjudication was passed, however culpable such failure might be, would not amount to contempt of Court punishable under the provisions of section 58 (5) of the Presidency-Towns Insolvency Act.

Held, further, that if there is definite legal evidence that the appellant had notice of the petition to adjudicate him and of the appointment of the *interim*

* Civil Miscellaneous Appeal No. 51 of 1926.

Receiver, the Court may be justified in acting under the wide powers it enjoys of committing for contempt.

Held, further, that where the Court has committed the appellant for contempt under section 58 (5) of the Presidency-Towns Insolvency Act and where it was found that the committal was not justified under that section, the Appellate Court may interfere with such committal, even though it is possible that the appellant could have been committed for contempt under the wider powers of the High Court so to commit.

Cowasjee—for Appellant.

P. S. Chari—for Respondent.

RUTLEDGE, C.J., AND BROWN, J.—Appellant R.M. M.S.T.M. Venkatachellam Chettyar was the agent of the K.A.S. Chettyar Firm in Rangoon. In July 1925 he found himself in difficulties and his creditors began to press for payment. On the 18th of July an urgent demand for payment of a debt within 24 hours was made and he was unable to satisfy the demand. On the 20th he paid some of his creditors and either on the 21st, as he says, or on the 18th as the petitioning creditor says, he left his ordinary place of business in Mogul Street and took up his residence in 41st Street. From that date payments were entirely suspended.

On the 23rd of July 1925 the V.E.R.M. Chettyar Firm filed a petition on the Original Side of this Court to adjudicate the K.A.S. Firm as insolvents. On the day on which the application was filed the Official Assignee was appointed *interim* Receiver to take immediate charge of the account books and assets, if any, of the K.A.S. Firm from its agent. The Assistant Official Assignee then proceeded to the appellant's ordinary place of business, where he found a safe which he sealed up. He then proceeded with the petitioning creditor to 41st Street to find the insolvent. He found there some one, who said that he was the cook of the insolvent, but the insolvent himself was not there. He left word that

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the appellant should be informed of his visit and be told to come to his office. Notice was then issued on the appellant but this notice was not served until the 30th of July. On the 31st of July the appellant appeared before the Official Assignee and, on being asked to produce his books, he told the Official Assignee that he was unable to do so as he had sent the books to his principal in the Native State of Pudukottah. On the 4th of August the firm was adjudicated insolvent and on the 8th of August the appellant left Rangoon for India.

Application was then made for action to be taken against him for contempt of Court under the provisions of section 58 (5) of the Presidency-Towns Insolvency Act. He was finally arrested and brought back to Burma and he has now been found guilty of contempt of Court and committed to prison for six months.

The present appeal is filed against this order of commitment to prison. The appellant says that he was short of money, that he wired to his principal on the 18th for funds, that on the 22nd he received a telegram in reply telling him to send the books to the principal and that in compliance with this telegram he despatched the books on the 28th of July.

It is contended on behalf of the appellant that the provisions of section 58 (5) have no application to the present case. Clause (1) of section 58 lays down that the Official Assignee shall, as soon as may be, take possession of the deeds, books and documents of the insolvent and under clause (5) any agent of an insolvent is bound to make over to the Official Assignee all money and securities in his possession or power which he is not by law entitled to retain as against the insolvent or the Official Assignee. The clause further lays down that if the agent fails

so to do, he shall be guilty of a contempt of Court. With the books of account on the 28th of July the appellant also forwarded various securities and admittedly these books and securities have never been handed over to the Official Assignee.

It is, however, contended that, at the time the appellant despatched the books and securities, his firm had not yet been adjudicated insolvent, that the provisions of section 58 apply only to what takes place after the adjudication and that, as at the time of adjudication the appellant was not in possession of the books and securities, he was not guilty of contempt of Court within the meaning of section 58.

The Official Assignee was on the 24th of July appointed *interim* Receiver under the provisions of section 16 of the Presidency-Towns Insolvency Act. That section lays down that when so appointed the Official Assignee shall have such of the powers conferable on a receiver appointed under the Code of Civil Procedure, 1908, as may be prescribed.

Section 17 of the Act provides that on the making of an order of adjudication, the property of the insolvent shall vest in the Official Assignee.

Section 58 clause (1) provides that the Official Assignee shall, as soon as may be, take possession of the deeds, books and documents of the insolvent and all other parts of his property capable of manual delivery.

Section 58, clause (2) then lays down that the Official Assignee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent, be in the same position as if he were a receiver of the property appointed under the Code of Civil Procedure, 1908, and the Court may on his application enforce such acquisition or retention accordingly.

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The Official Assignee, when appointed receiver under section 16, has the power as receiver to take possession of the property of the debtor. But it is not until the adjudication has been made that the debtor is called in the Act the insolvent; and the provisions of section 58 apply automatically immediately an adjudication has been made whether there has been any specific appointment of a receiver or not.

It seems to us therefore that there is considerable force in the contention that the provisions of section 58 cannot be held to apply to the powers of the Official Assignee prior to the adjudication when he is acting, not under the powers devolving on him by the operation of the Act itself, but under the powers specially conferred on him by his appointment as receiver under section 16.

The provisions of clause (5) of section 58 are penal in their nature and cannot be construed as applying to any particular case, unless it is quite clear that no other construction of the section is possible.

Section 16 provides only for an *interim* procedure pending the adjudication and we cannot construe that section as empowering the Court to invest the Official Assignee with any powers not expressly mentioned in that section.

It is quite clear that, had the Official Assignee in the present case not been appointed Receiver under section 16, he would have had no power whatsoever until the order of adjudication was passed. In such a case it could not possibly be argued that section 58 would have given him any power to take possession of the books of account before the 4th of August; and it seems to us clear therefore that the powers given by section 58 commence only when, under section 17, the property of the insolvent automatically vests in the Official Assignee.

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In this view of the case, the failure to hand over the securities to the Official Assignee before the order of adjudication was passed, however, culpable such failure might be, would not amount to contempt of Court punishable under the provisions of clause (5) of section 58. If this view of the law be correct, then it is clear that the appellant has not been guilty of contempt of Court under that section as at the date of the adjudication the books of account and the securities were not in his possession or power. It has, however been suggested that apart from the special provisions of section 58, the appellant has been guilty of contempt of Court and was punishable summarily by the Insolvency Court. It has been urged on behalf of the insolvent that at the time he sent the books of account and the securities to his principal he had no knowledge of the pendency of the insolvency proceedings, and that he had no intention whatever of interfering with the due performance of his duties by the Official Assignee, but was actuated solely by a desire to surrender to his principal all his rights and duties as agent of the firm. We find it impossible in the circumstances of the case to accept this contention. The appellant admittedly has been acting as agent of money lending firms for fifteen years. Admittedly he was unable to pay up the debts of the firm on the 20th July. A chettiar with so much experience must in the circumstances have been well aware of the likelihood that insolvency proceedings would be instituted against him, and it is impossible to believe that he did not well know what the result of his action in sending the securities and the books of account out of the jurisdiction of the Court would be. It is clear that his action has obstructed the course of justice, as it has prevented all investigation

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of the firm's transactions as well as deprived the *interim* Receiver and the Official Assignee of taking possession of the property namely the valuable securities of the firm, and no attempt has been made by the firm or the appellant to restore what has thus been smuggled away. In our opinion the trial Judge was justified in finding that the appellant's "whole conduct shows that it was his wilful intention to obstruct the Official Assignee and the creditors of the firm."

We have very carefully considered whether in these circumstances we should be justified in upholding the order committing the appellant to jail for contempt of Court. The Court's power to deal with such matters in a summary way are very wide and must for that reason be used with great caution. We are not prepared to say that the learned trial Judge would have been exceeding his powers had he considered the circumstances of the present case with reference to the general power of the Court to deal with cases of contempt, and after such consideration had passed the order appealed against. But it is clear that it was not after a consideration of such general powers that the learned Judge acted, and that he committed the appellant to jail because he was of opinion that the appellant was guilty of a contempt within the meaning of section 58 (5) of the Insolvency Act. Where we now to uphold the order appealed against we should therefore in effect be passing a penal order and committing the appellant to jail for a different offence from that of which he was found guilty by the trial Judge. Even so if there were anywhere clear and definite proof that the appellant had received notice of the insolvency application and the appointment of the Official Receiver before taking the action he did, we think we

should be justified in dismissing this appeal. But although it seems to us certain that the appellant when he sent the books of account and securities to India was well aware of the extreme probability that insolvency proceedings had been or would shortly be instituted against his firm, and it is unlikely that he had no knowledge that that they had actually been instituted, there is no direct legal proof of any kind that he had received notice of the insolvency proceedings or had been informed of the visit of the Official Assignee to his house. In these circumstances and after the lapse of so long an interval of time we do not feel justified in employing the summary powers of the Court to deal with the appellant.

We therefore allow the appeal and set aside the order of the trial Judge committing the appellant to jail. But in the circumstances we refuse to allow the appellant his costs either in this Court or in the Court below.

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