

APPELLATE CIVIL.

Before Mr. Justice Mosely and Mr. Justice Dunkley.

1935

Mar. 27.

P.M. CHETTIAR FIRM

v.

A.K.A.C.T.A.L. CHETTIAR FIRM.*

Insolvency—Execution of decree against debtor during pendency of insolvency petition—Notice to executing Court—Power of executing Court to sell attached property—Application for delivery of debtor's property to Receiver essential to prevent sale—Attaching creditor's rights as against Receiver—Receiver's powers exercisable by Insolvency Court where no Receiver is appointed—Direction of sale by Insolvency Court to Executing Court—Provincial Insolvency Act (V of 1920), ss. 51, 52, 58.

There is no provision in the Provincial Insolvency Act which prohibits a Court executing a decree from selling the judgment-debtor's property merely because notice has been given that an insolvency petition by him or against him has been admitted. It is only when an application is made to the executing Court for the delivery of the property that the Court is required by s. 52 of the Act to direct the property, if in its possession, to be delivered to the Receiver. In the absence of such an application the Court is at liberty to sell the property.

Rolla Ram v. Mal, 80 I.C. 509; *Tirpit Thakur v. M. R. Das*, A.I.R. (1930) Pat. 406—*referred to*.

S. 51 merely enacts that the attaching creditor shall not be entitled to the benefit of the execution as against the Receiver. It is immaterial whether a Receiver has been appointed or not, as, under s. 58 of the Act, where no Receiver is appointed, the Court has all the rights of and may exercise all the powers conferred on a Receiver under the Act.

The Insolvency Court has no power to direct a sale by the executing Court.

Chari for the appellants. The Insolvency Court (the District Court) had no jurisdiction to pass an order permitting the respondent to execute his money decree against the appellant. The order complained of is in effect a direction by the Insolvency Court (the District Court) to the executing Court (the Assistant District Court).

* Civil Misc. Appeal No. 168 of 1934 from the order of the District Court of Pyapôn in Insolvency Case No. 30 of 1932.

As no adjudication of the debtors had taken place s. 52 of the Provincial Insolvency Act applied, and the executing Court was bound to direct the delivery of the property to the Receiver. *Mahasukh Jhaverdas v. Valibhai Fatubhai* (1).

1935
P.M.
CHETTIAR
FIRM
v.
A.K.A.C.T.A.
L. CHETTIAR
FIRM.

Basu for the respondent. S. 28 of the Act applies only after adjudication, and there is no specific provision dealing with a creditor's application for execution before adjudication. But s. 4 of the Act is couched in very wide terms, and as soon as a petition in insolvency is filed by a debtor the Insolvency Court assumes full jurisdiction over his affairs. The Insolvency Court was perfectly competent to pass the order it did in this case, which was, in fact, obtained in answer to the objection raised by the appellant that leave of the Insolvency Court had not been obtained. The appellant cannot blow hot and cold at the same time. S. 52 of the Act has no application to the facts of this case because there was no Receiver to take charge of the properties. If the respondent is refused permission to execute his decree the property will go back to the debtor; moreover, the appellant is purposely delaying his adjudication as long as possible.

Durga Saran v. Beni Prasad (2); *Tirpit Thakur v. Mahanath Ramperkash* (3); *Ralla Ram v. Ram Labhaya* (4).

MOSELY, J.—The respondents, the A.K.A.C.T.A.L. Firm, applied on the 20th August, 1932, in Insolvency Case No. 30 of 1932 of the District Court of Pyapôn, for the adjudication of the appellants, the P.M. Chettiar Firm, as insolvents. The case was

(1) 30 Bom. L.R. 455.

(3) A.I.R. (1930) Pat. 436.

(2) 31 All. L.J. 1342.

(4) 6 Lah. L.J. 232.

1935
 P.M.
 CHETTIAR
 FIRM
 v.
 A.K.A.C.T.A.
 L. CHETTIAR
 FIRM.
 MOSELY, J.

much delayed by the P.M. Firm delaying to produce their accounts and by contests over a receivership. The present position is that there is only an *interim* receiver of the rents of certain paddy lands. Besides the petitioning firm, there are other creditors for a large amount. On the 22nd May, 1933, the petitioning firm filed Suit No. 26 of 1933 in the Assistant District Court of Pyapôn for their debt, which was one of over Rs. 12,700 due on a promissory note, and they obtained a decree on the 29th August 1933. There are two cases now pending in the Assistant District Court in execution of that decree, Nos. 4 and 32 of 1934. An intermediate application for execution, No. 18 of 1934, was dismissed by the Assistant District Court on the ground (pleaded by the judgment-debtors) that no leave of the Insolvency Court, that is of the District Court, had been obtained. It is clear, therefore, that notice of the insolvency petition had been given to the executing Court. After the dismissal of Execution Case No. 18 the petitioning creditor applied for permission to the District Court to execute his decree in the Assistant District Court, and permission was granted on two conditions (1) that the sale proceeds must be kept in deposit in Court for rateable distribution among creditors in case of adjudication, and (2) that no set-offs were to be allowed, but the purchase price must be deposited in Court in full. The present appeal by the P.M. Firm is against this order on the ground that it is contrary to section 52 of the Provincial Insolvency Act.

The relevant sections of the Act are sections 51 and 52. Section 51 (1) reads :

"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of

the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of the petition."

1935

P. M.
CHETTIAR
FIRM

In the old Act of 1907 the corresponding section No. 34 read

A.K.A.C.T.A.
L. CHETTIAR
FIRM.

" * * * except in respect of the assets realized in the course of the execution by sale or otherwise before the date of the order of adjudication."

MOSELY, J.

Section 52 reads :

" Where execution of a decree has issued against any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that an insolvency petition by or against the debtor has been admitted, the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the receiver, but the costs of the suit in which the decree was made and of the execution shall be a first charge on the property so delivered, and the receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge."

In the two execution cases in question the property has been attached, and it is therefore property in the possession of the Court, as was pointed out in an unauthorized ruling cited—*Tirpit Thakur v. Mahanath Ramperkash Das* (1). In these execution cases the debtor firm objected to the execution on the ground that leave of the Insolvency Court had not been obtained, a ground which is entirely inconsistent with the present grounds of appeal. It was assumed in cases under the Act of 1907 that there was nothing in law to prevent a decree-holder from continuing to execute his decree up to the date when

(1) A.I.R. (1930) Pat. 406.

1935

P.M.

CHETTIAR
FIRM

v.

A.K.A.C.T.A.
L. CHETTIAR
FIRM.

MOSELY, J.

an order for adjudication was passed [*Ishri Prasad v. Gopi Nath* (1); *Din Dayal v. Gur Saran Lal* (2); *Madhu Sardar v. Khitish Chandra Banerji* (3)].

There are only unauthorized reports of cases dealing with the question whether an executing Court under the Act of 1920 can proceed in execution to sell property of a judgment-debtor after the date of a petition by or against that debtor in insolvency has been admitted, but before he has been adjudicated. In *Ralla Ram v. Ram Labhaya Mal* (4) it was said that there was no provision in the Provincial Insolvency Act which prohibits a Court executing a decree from selling the judgment-debtor's property merely by reason of its having been given notice that an insolvency petition by him (or against him) has been admitted. It is only when an application is made to the executing Court for the delivery of the property that the Court is required by section 52 of the Act to direct the property, if in its possession, to be delivered to the receiver. In the absence of such an application the Court is at liberty to sell the property.

This would appear to be correct on the face of it. Section 51 merely enacts that the attaching creditor shall not be entitled to the benefit of the execution as against the receiver. I would remark here that it does not appear to me to make any material difference whether a receiver has been appointed or not as, under section 58 of the Act, where no receiver is appointed, the Court shall have all the rights of and may exercise all the powers conferred on a receiver under the Act. The decision in *Ralla Ram's* case (4) was assumed to

(1) (1912) I L.R. 34 All. 628.

(2) (1920) I.L.R. 42 All. 336.

(3) (1914) I.L.R. 42 Cal. 289.

(4) 80 I.C. 509.

be correct in *Tirpit Thakur's* case (1). There is one case which appears to be to the contrary effect,—*Mahasukh Jhaverdas v. Valibhai Fatubhai* (2), but that decision went on the point that property attached is property in the possession of the Court, and it is not clear there whether application had been made to the attaching Court to deliver the property to the receiver under section 52 or not. Two other cases quoted—*Durga Saran v. Beni Prasad* (3) and *Rangopal Ram Parshad v. Gulua Mal Ghasi Ram* (4) are to the effect that section 52 contemplates the existence of a receiver with full powers. As I have said, section 58 would appear to be against this.

The executing Court had power, I consider, to direct the property to be sold if no application under section 52 was made to it. Admittedly no such application was made. There is no provision in the Act for the Insolvency Court to allow or direct a sale by the executing Court with or without any conditions, and for this reason, therefore, we are bound to hold that the order of the Insolvency Court was without jurisdiction. It was in itself a harmless order inasmuch as it merely directed,—what is laid down by law,—that the sale must be for the benefit of the general body of creditors, and it imposed, therefore, a condition which the executing Court will have to impose if the property is sold, that only cash bids be allowed. These matters, however, must be left to the executing Court, where sale will proceed if no application is made under section 52. I would remark here that if such an application is to be made under section 52 it would be advisable for the Insolvency Court to appoint an

1935
P.M.
CHETTIAR
FIRM
A.K.A.C.T.A.
L. CHETTIAR
FIRM.
MOSELY, J.

(1) A.I.R. (1930) Pat. 406.

(3) 31 All. L.J. 1342.

(2) 30 Bom. L.R. 455.

(4) A.I.R. (1930) Lah. 851.

1935
 P. M.
 CHETTIAR
 FIRM.
 v.
 A.K.A.C.T.A.
 L. CHETTIAR
 FIRM.
 MOSELY, J.

interim receiver with powers to act under section 52, or grant to the present *interim* receiver under section 20 of the Act such powers. I would also remark that the adjudication should now be proceeded with with proper despatch. I understand that a duplicate file has been opened, and in case of further appeal to this Court there should be no more of the delays that have happened in the past. The order in question will be formally set aside. Under the circumstances there will be no order as to costs of this appeal.

DUNKLEY, J.—I agree.

FULL BENCH (CRIMINAL).

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mya Bu, and Mr. Justice Dunkley.

KING-EMPEROR

v.

MAUNG BO MAUNG.*

1935
 May 29.

Public servant—Sanction to prosecute—Criminal Procedure Code (Act V of 1898), s. 197 (1)—Delegation Rules, 1926, rule 4—"L" Circular No. 48 of 1926—Appointment of assistant accountants in the Treasury—Appointment and removal by Deputy Commissioner—Deputy Commissioner not the agent of Local Government for the purpose of appointment and removal—Charge of criminal breach of trust—Offence not an offence in discharge of duty.

Rule 4 of the Delegation Rules, 1926, made by the Secretary of State for India empowers the Local Government in respect of the subordinate services, not merely to delegate the power of appointment and removal to a subordinate authority, but to authorize such subordinate authority independently so to appoint or remove. In virtue of this power the Local Government by "L" Circular No. 48 of 1926 has authorized the Deputy Commissioner to appoint assistant accountants in the Treasury in his district. In making such appointments the Deputy Commissioner does not act for or on behalf of the Local Government; the power of appointment and by implication the power of removal and dismissal from office of such subor-

* Criminal Revision No. 240 of 1935 arising out of the order of the First Additional Magistrate of Prome in Criminal Trial No. 17 of 1935.