

In Re: a Debtor

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Court : Kolkata

Decided On : Aug-08-1961

Reported in : AIR1963Cal25

Judge : A.N. Ray, J.

Acts : [Presidency Towns Insolvency Act, 1909](#) - Section 9

Appeal No. : Suit No. 20 of 1960

Appellant : In Re: a Debtor

Advocate for Def. : Provas Sen, Adv.

Advocate for Pet/Ap. : S. Sinha, Adv.

Disposition : Application dismissed

Judgement :

ORDER

A.N. Ray, J.

1. This is an application for an adjudication. The main act of insolvency relied on is that there was an attachment. There are two grounds of opposition: first, that the respondent has ability to pay, secondly, that the attachment is invalid inasmuch as there was a Receiver in respect of the properties and no leave was taken prior to

effecting attachment.

2. Counsel on behalf of the applicant relied on a Bench decision reported in *Pratapmal Ramesh-war v. Chunilal Johuri* : AIR1933 Cal417 on the observation appearing at p. 418 of the report that the words 'ability to pay debts' in the statute mean not merely that the man has assets which, if liquidation proceeds, may in the result, provide-sufficient money to discharge his debts but that he is not so embarrassed that he cannot meet his debts in the ordinary way by making legal tender and discharging debts. The circumstance that a man has assets and not liquid assets and, therefore he cannot pay his debts is a circumstance which stands in favour of having a liquidation and not against having a liquidation.

3. On behalf of the respondent, reliance is placed on the decree in the partition suit which provides that the Receiver is to sell the properties in suit. It is true that there is perhaps not sufficient or adequate cash with the respondent just at the present moment but taking a broad view of the facts in this case I am of opinion that the respondent has ability to pay the debts. The respondent has stated in his affidavit that the Receiver is about to sell the properties which will yield to the respondent large sums of money.

4. The second contention on behalf of the respondent is that the attachment was levied on June 16, 1960 and the Receiver has been in possession of the properties since 1956. Counsel on behalf of the petitioner relied on the decisions reported in *Banku Behari Dey v. Harendra Nath*, 15 Cal WN 54; *Maharajah of Burdwan v. Apurba Krishna RoV*, 15 Cal WN 872 and *Sarat Chandra Banerjee v. Apurba Krishna Roy*, 15 Cal WN 925 in support of the proposition that where leave is required to be obtained and proceedings are started without obtaining such leave, the Court usually stays proceedings and enables the party to take leave and when such leave is obtained the proceedings become valid. In other words, the absence of leave is an irregularity which can be cured by the subsequent grant of leave. Counsel for the applicant in particular relied on the decision of *Venkatakrishtnayya v. Malakondayya*, AIR 1942 Mad 306. A sale was held in that case. The act of insolvency was that the person proceeded against, allowed his property to be sold in execution of the decree. It was contended that though the

sale was held, eventually it was set aside and therefore there was no act of insolvency. It was held that the setting aside of a sale would not alter the fact that the property was sold in execution of the decree. On that ratio the Court held that under Section 6(e) of the Provincial Insolvency Act, there was in fact a sale in execution of the decree, the subsequent setting aside of the sale would not alter the fact and the insolvency petition would be competent in that case. It was thus contended that since leave was taken in the present case in the month of January 1961, the attachment in the year 1960 was valid. In the Madras case the factum of sale constituted the act of insolvency. It was complete on the happening of the sale. In the case of attachment it has to remain for 21 days. The continuance of the attachment is not an act of insolvency. The act of insolvency is that the attachment remained for 21 days. The contention of the respondent was that there was no lawful attachment for 21 days, because there was no leave obtained, and therefore there was no act of insolvency.

5. In the present case Section 12(1)(c) of the Presidency Towns Insolvency Act enacts that a creditor shall not be entitled to present an insolvency petition against the debtor unless the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition. The conditions under which the creditor may petition are that there is a lawful act of insolvency within the meaning of the Statute. An attachment without leave when the properties are in the possession of the Receiver is not a valid attachment. It is not an attachment on which the statutory jurisdiction can be attracted as the foundation of the act of insolvency. It is true that leave has been subsequently obtained with regard to the attachment. Such leave does not in my opinion render the attachment as an act of insolvency within the meaning of the Act. I am therefore of opinion that this application should fail and I dismiss the same with costs. Certified for counsel.