1938 *Present :* **Poyser and Koch JJ.**

MOOSAJEE *et al. v.* PEIRIS.

215—D.C. Colombo, 5,118.

Insolvency—Insolvent about to leave the Island—Arrest under certificate in form R—Payment of debt to secure release—Right of other creditors to share in payment—Ordinance No. 7 of 1853, s. 152.

Where a person, adjudged insolvent, was about to leave the Island and was arrested under a certificate in the form R obtained by a proved creditor, and where the insolvent paid the debt in order to secure his release,—

Held, that the money paid should be brought to the insolvency case for the benefit of all the creditors.

The costs incurred in procuring the arrest and in recovering the money will be a first charge on the said sum.

APPEAL from an order of the District Judge of Colombo.

E. F. N. Gratiaen, for creditors, appellants.

C. X. Martyn, for assignee, respondent.

Cur. adv. vult.

March 31, 1938. KOCH J.—

The first respondent, John Yorke, was adjudicated an insolvent on July 19, 1937, and on August 24, the second respondent was appointed provisional assignee. The appellants who are doing business as forage merchants had on September 28, *inter alios,* proved a claim of Rs. 628.50 against the insolvent. Learning that the insolvent was making arrangements to leave for India, the appellants, through their proctor, Mr. Wilson, applied for and obtained on October 25, 1937, an order withdrawing further protection to the insolvent. He also obtained on the same day an order allowing a certificate in the form " R " to issue to the appellants. On this certificate, a writ of execution against the body of the insolvent was obtained and on the same day the insolvent was arrested by the Fiscal at the Jetty. The Fiscal immediately removed the insolvent in a car. The insolvent's wife accompanied him. On the way the Fiscal was told that the claim would be paid if the party was taken back to the wharf premises. The Fiscal took the party back to the wharf and the sum of Rs. 628.50 was there paid by the insolvent's wife who took the money out of a box and handed the same to the Fiscal. A receipt was immediately made out for this payment by the Fiscal and handed to the insolvent's wife and the insolvent discharged from arrest. The receipt, however, purported to state that the money was received from the insolvent.

The appellants contend that they are entitled to the entirety of this payment. The respondent objects and claims the sum for the benefit of all the creditors. The learned District Judge, on the meagre evidence led, seemed to think that the money paid was the money of the insolvent, but nevertheless, made order allowing the appellants a further opportunity of renewing their application on or before February 1, 1938, if they were in a position to prove more specifically that the amount paid was not the

money of the insolvent. He further directed that if no such application was made, the assignee would be entitled to deal with this money as belonging to all the creditors. It has transpired that no such application has been made, and therefore, the effect of the learned District Judge's order now is in favour of all the creditors. The reason for this reservation in the order is apparently due to the fact that Counsel for the assignee admitted that the appellants would be entitled to be paid the amount if it could be proved that the amount was paid not by the insolvent but by anybody else on his behalf.

In the first place, I do not think that an assignee, who is always under the control of the Court while insolvency proceedings last, can do what he pleases and be permitted to take up a position detrimental to the interests of the creditors he represents—section 78 of Ordinance No. 7 of 1853. His admission cannot therefore be viewed seriously. The learned Judge himself seems to think that the assignee has gone too far in making this admission and I am inclined to agree with him.

In the second place, I do not think that it matters materially whether the money paid was that of the insolvent or of anyone else. It was money paid to discharge a proved debt of the insolvent who was under arrest in the insolvency proceedings and, in my opinion, that money should be brought to the credit of the insolvency case for the benefit of all the creditors.

Learned Counsel for the appellants has candidly admitted that it is impossible to prove that the money was actually that of the insolvent's wife, although there is the fact that she opened a box and drew the money out of that box. He argues that his client's vigilance in obtaining the arrest should be rewarded as it was solely owing to that vigilance that the money was recovered. He cited a case reported in *Ramanathan's Reports (1863—1868)*, at page 124, namely, *Findlay v. Miller*, where, under the old practice obtaining before the Civil Procedure Code came into operation, it was held that concurrence cannot be claimed by other creditors to proceds of execution against the person of the debtor. This decision cannot, in my opinion, be extended to apply to the arrest of an insolvent effected under a prescribed procedure in insolvency proceedings which are regulated entirely and exhaustively by a special Ordinance of lengthy proportions, namely, Ordinance No. 7 of 1853.

In the case cited, the other creditors were not parties to the case under the decree of which the debtor was arrested ; while in these proceedings, the assignee and proved creditors are obviously parties and have a direct interest in the developments which occur in the course of the insolvency proceedings and which are in addition of an *in rem* character.

Mr. Gratiaen also cited the case of *Mutturamen Chetty v. Suppramaniam Pulle*[1]. Here again the same differentiation applies. The plaintiff in this case obtained a warrant of arrest against the judgment-debtor. The debtor duly tendered the amount of the judgment-debt into Court and obtained a release. The plaintiff, thereupon, moved under section 350 of the Civil Procedure Code that this money should be carried to his separate account. This was allowed, but thereafter, a judgment-creditor in a different case seized this money and contested the application of the

[1] *12 N. L. R. 193.*

arresting creditor to draw the money which was, as I have just said, carried to the separate account of the applicant. It was held, and, I would respectfully remark, rightly so, that the money having been vested in the applicant at the time of the appropriation order was not liable to seizure at the hands of the claimant, a judgment-creditor in a different case.

I fail to see how decisions, adverse to parties to cases other than the case in which proceeds are recovered, who make their claim to concurrence by reason of a special section, namely, section 352, of the Civil Procedure Code, can be said to apply to parties in the case itself, and particularly so when the case itself is of a special nature controlled by a procedure of its own.

Mr. Gratiaen also argued that although under section 109 of the Insolvency Ordinance a creditor by proving his debt under the insolvency is deemed to have elected to take the benefit of the petition with respect to the debt so proved and to have relinquished his other remedies, the effect of a later section, namely, section 152, is to whittle down this disability by placing the proved creditor in the position of an active judgment-creditor. He referred us to a passage on page 202 of *Archbold on the Law and Practice in Bankruptcy (11th ed.)* which says that the effect of *12 & 13 Vict. c. 106, s. 257*—this section corresponds precisely to our section 152—" is an exception to the general proposition that a creditor by proving his debt abandons all other remedies for its recovery ". There can be no doubt that the provisions of section 152 do grant a right to any proved creditor to act independently of the assignee and other proved creditors and to obtain the arrest of an adjudicated insolvent in certain circumstances, but, in the absence of any special advantage conveyed by the terms of this section or of any other section of the Ordinance with respect to any benefit which he might thereby derive, such benefit must, in my opinion, be considered to be to the advantage of all the proved creditors, who, under the section, are further regarded as judgment-creditors.

The provisions of this section are somewhat elaborate and, if it was the intention of the law to conserve to a judgment-creditor a benefit derived through action on his part under the section to the exclusion of the other judgment-creditors referred to in this section, the section would have proceeded to say so.

It is pointed out that under the section the right to proceed to execution is given not only to the assignee but to any proved creditor, and that this concession would not have been granted unless the intention was to reward the active creditor. I hardly think so, I feel that the extension of the right to proved creditors has been made in order to safeguard them generally against any apathy displayed by the assignee.

Mr. Martyn, on behalf of the assignee, referred us to *Archbold p. 565.* It is here set out that a proved creditor is entitled only to his proportion of the nett produce of a bankrupt's estate, and that the only instances of priority of debts known to the law of bankruptcy are cases of a landlord for rent, secured creditors, servants, clerks, &c. It will be noted that this learned authority does not make the case of a vigilant creditor who by

his sole efforts has recovered monies an exception to this rule. In our Ordinance, the sections dealing with the priority of debts are sections 95 *et seq.* and here again, the case of a vigilant creditor is not introduced.

I am not prepared to regard the payment of the money by the insolvent's wife—if it were her own—as a gift to the insolvent which, under section 70, would vest in the assignee. I feel however that the underlying principle of that section is to catch up any asset which may come into existence whereby the insolvent has been benefited and that such asset must be regarded as obtained for the advantage of all the creditors.

I would therefore dismiss the appeal. In the circumstances, there will be no costs of appeal. The learned District Judge has made no order as to the costs of the inquiry in the Court below. This will stand. I, further direct that all costs incurred by the appellants in procuring the arrest of the insolvent and in recovering the sum of Rs. 628.50 be a first charge on the said sum.

POYSER J.—I agree.

Appeal dismissed.