APPELLATE CIVIL.

Before B. B. Ghose and Panton JJ.

HARANCHANDRA CHAKRAVARTI

v.

JAY CHAND.*

1929

Mar. 5.

Insolvency —Release of attached property under claims by sons of judgment debtor—Creditor's suit under O. XXI, r. 63 decreed by trial court—Substantial confirmation by High Court on appeal—Judgment-debtor adjudicated insolvent, but attached property not included in schedule—Subsequent inclusion on his application—Whether attaching creditor has charge thereon for full amount of his decree—Whether attaching creditor's costs of suit in which decree was made, of execution and of suit under O. XXI, r. 63, are first charge on the property—Provincial Insolvency Act (V of 1920), ss. 51, 52—Whether s. 52 refers to moveable property only.

As a result of a suit, under Order XXI, rule 63 of the Code of Civil Procedure, between A, the attaching decreeholder, and the sons of B, the judgment-debtor, whose property, on being attached in execution of A's decree was released on the claims of the sons, the said property was declared to belong to the judgment debtor and so liable to attachment in A's decree. This judgment was maintained in appeal by the High Court with some variations.

Held, the result of the suit was to revive the attachment which was removed when the claim cases were allowed.

Bonomali Rai v. *Prosunno Narain Chowdhry* (1), *Ramchandra Marwari* v. *Mudeshwar Singh* (2), *Protap Chandra Gope* v. *Sarat Chandra Gangopadhyaya* (3) and *Anthaya Hegade* v. *Manjaiya Shetty* (4) referred to.

The attachment, however, does not create any title in favour of the attaching creditor. It merely prevents private alienation.

Motilal v. *Karrabuldin* (5) and *Raghunath Das* v. *Sundar Das Khetri* (6) referred to.

B was adjudicated an insolvent before the High Court decision, but in the schedule of his properties he did not include the property, the subject-matter of the suit under Order XXI, rule 63. After the judgment of the High Court, he applied to include this property, and the receiver taking possession thereof proceeded to sell it. A made an application that the whole of his dues should be paid out of the amount realised by the sale of the said property.

Held that, having in view section 51 of the Provincial Insolvency Act, 1920, A was only entitled to be classed with other unsecured creditors on the basis of a rateable distribution of assets.

*Appeal from Order, No. 23 of 1928, against the order of Mr. K. C. Nag, District Judge of Rajshahi, dated Sept. 20, 1927.

(1) (1896) I. L. R. 23 Calc. 829.
(2) (1906) I. L. R. 33 Calc. 1158.
(3) (1920) 25 C. W. N. 544.
(4) (1921) I. L. R. 45 Mad. 84.
(5) (1897) I. L. R. 25 Calc. 179; L. R. 24 I. A. 170.
(6) (1914) I. L. R. 42 Calc. 72; L. R. 41 I. A. 251.

Held, however, that A was entitled to a first charge on the sale proceeds for his costs of the suit in which the decree was made and the costs of execution, in which must be included the costs of the suit under Order XXI, rule 63, up to the decision of the appeal to the High Court which all must be considered as one proceeding in attachment.

Phul Kumari v. *Ghanshyam Misra* (1) referred to.

Held, further, that the words in section 52 of the Act, "the court shall, on application, direct the property if in the possession of the court to be delivered to the receiver" do not imply that section 52 applies only to moveable property. It refers to the case of the attachment of all kinds of property whether moveable or immoveable.

APPEAL BY THE CREDITOR.

This was an appeal by creditor, Haranchandra Chakravarti against the order of the District Judge, Rajshahi, in insolvency proceedings regarding the estate of one Mahendrachandra Nag, dated the 20th September, 1927, ordering that the appellant must rank equally with other unsecured creditors in the distribution of the assets and dismissing his petition, dated the 13th May, 1925, that he is entitled to get the whole sale proceeds. The facts and the material dates are set out in the judgment of Mr. Justice B. B. Ghose.

Mr. Sharatchandra Ray Chaudhuri (with him *Mr. Bireshwar Bagchi* and *Mr. Jatindramohan Chaudhuri*), for the appellant. The appellant, having, by instituting a suit for the purpose, secured this property, the original attachment made by him in execution of his own money decree, which was released by the orders in the four claim cases, has revived; and, as such, the position of the appellant with regard to this property, which was not originally included within the list of properties given by the insolvent, is that of a secured creditor and the property should not have been made available to the general body of creditors.

[B. B. Ghose J. How can he be a secured creditor under the Insolvency Act?]

At any rate the costs of the title suit incurred by the appellant, as also the costs of the original decree and of its execution, should be first paid out of the

(1) (1907) I. L. R. 35 Calc. 202; L. R. 35 I. A 2.

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property to the appellant and then the balance may be rateably distributed among the general body of creditors.

[B. B. Ghose J. That is very equitable no doubt, but how do you bring it within the Insolvency Act?]

I contend that I come within section 52 of the Provincial Insolvency Act, 1920.

[B. B. Ghose J. Under this section, you are clearly entitled to a first charge with regard to the costs decreed in your original money suit as also your costs in the execution of the decree. But how do you bring your costs in the subsequent title suit within the section?]

I contend that the costs in the title suit come within the costs of execution; for, the title suit is only an aid to and practically in the course of execution. (Refers to Order XXI, rule 63 of the Civil Procedure Code.)

[B. B. Ghose J. But did not the execution stop with the orders in the claim cases releasing the attachment?]

No. Your Lordship knows the attachment would revive when the title suit is decided in favour of the execution-creditor. I refer to *Krishnappa Chetty* v. *Abdul Khader Sahib* (1). This case is based on the Privy Council decision in *Phul Kumari* v. *Ghanshyam Misra* (2). As such, the execution proceedings are pending throughout.

[B. B. Ghose J. But there must be a direct authority on the point. See *Sankaralinga Reddi* v. *Kandasami Tevan* (3).]

Mr. Jogeshchandra Ray (with him *Babu Dineshchandra Ray*), for the respondents. Section 52 only refers to moveable property and does not apply to immoveable property. The words "if in the possession of the court" and "delivered" are significant and contemplate only moveable property.

(1) (1913) I. L. R. 36 Mad. 535.
(2) (1907) I. L. R. 35 Calc. 202, L. R. 35 I. A. 22.
(3) (1907) I. L. R. 30 Mad. 413.

[B. B. Ghose J. But reading section 52, it does not seem to refer only to moveable property.]

Mere attachment does not bring the property in the possession of the court unless it is moveable property. It has been decided in some cases to be so. These decisions are, however, published in the unauthorised reports. But in any case the appellant cannot be a secured creditor within the meaning of the Insolvency Act. Besides, a receiver is bound to follow section 61 of the Act in distributing the property.

Mr. Ray Chaudhuri, in reply. The language of section 52 coupled with the decision in *Sankaralinga Reddi* v. *Kandasami Tevan* (1) pointed out by your Lordship is an effective reply to Mr. Ray's contentions. Section 52 cannot, by its terms, be restricted to moveable property only. There is the word "if" before the words "in the possession of the court." That indicates that the property may or may not be in the possession of the court.

B. B. GHOSE J. This is an appeal by a creditor, who is described as creditor No. 4, against the order of the District Judge of Rajshahi dated the 20th September, 1927, made in an insolvency proceeding. The appellant had obtained a decree for over Rs. 5,000 on the 16th July, 1914. In 1915, he attached a house as belonging to his judgment-debtor, since adjudicated insolvent. Four claim cases were started by the sons of the judgment-debtor, who alleged that the property attached did not belong to the judgment-debtor, but to themselves. Those claims were allowed on the 23rd August, 1915, and the property released from attachment. On the 18th May, 1916, the appellant brought a suit, as provided under Order XXI, rule 63 of the Code of Civil Procedure, for a declaration that the property belonged to his judgment-debtor and not to the claimants. In this suit, the claimants and the judgment-debtor were made defendants. The suit was decreed in the trial court

(1) (1907) I. L. R. 30 Mad. 413.

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on the 30th September, 1921. The claimants appealed against the decree to this court and the final decree of this court was made on the 22nd March, 1924. In the meantime, on the 5th November, 1921, the judgment-debtor was adjudicated insolvent and a receiver was appointed of his properties. The property, which was the subject-matter of the suit brought by the appellant, was not included in the schedule of the properties of the insolvent. The receiver did not take possession of the property, nor did he take any interest in the litigation relating to that property. After the decree of the High Court, setting aside the order releasing the property from attachment and declaring that the appellant could proceed in execution against the property in suit as belonging to his judgment-debtor, the insolvent judgment-debtor applied in the insolvency proceeding on 30th July, 1924, for including the property in question in his schedule. After that date, the receiver took possession of the property and proceeded to sell it. The present appeal arises out of an application made by the appellant that the whole of his decretal amount should be paid first out of the assets realised by sale of the disputed property, on the ground that, as the property was made available for the creditors of the judgment-debtor at his instance, he was entitled to a first charge on the property. The argument was based upon the fact that the result of the decree in the suit brought by him was that the attachment that was effected in 1915 in execution of the appellant's decree was revived and it should be considered as having continued throughout and this attachment constituted a charge on the property. He is, therefore, entitled to preference to other creditors. The learned Judge rejected that contention holding it to be wholly untenable and that the appellant must rank equally with other unsecured creditors in the distribution of the assets. The appeal is against that order and the appellant claims that the whole of his dues should be paid first out of the assets realised by the sale of the property in question.

It is true that when, on account of a claim being allowed under Order XXI, rule 60, Civil Procedure Code, a property is released from attachment if the decree-holder brings a suit as provided under Order XXI, rule 63, and that suit is decided in his favour, the result is, according to the authorities, that the attachment is revived, although the property was released from attachment under rule 60. The authority for this proposition is to be found in the cases of *Bonomali Rai* v. *Prosunno Narain Chowdhury* (1), *Ramchandra Marwari* v. *Mudeshwar Singh* (2), *Protapchandra Gope* v. *Saratchandra Gangopadhyaya* (3) and *Anthaya Hegade* v. *Manjaiya Shetty* (4). It may, therefore, be held that the property was subject to attachment at the time when it was included in his schedule by the insolvent and the receiver took possession on the 31st July, 1924. But the effect of this attachment is surely not what the appellant claims it to be. Attachment does not create any title in favour of the attaching creditor. It merely prevents private alienation: See the cases of *Moti Lal* v. *Karrabuldin* (5) and *Raghunath Das* v. *Sundar Das Khetri* (6). The position of the appellant as an attaching creditor did not, therefore, confer any title upon him in the property in question, and he is only entitled to be classed with other creditors all of whom are entitled to rateable distribution of the assets in the hands of the receiver. The rights of an executing creditor are defined in section 51 of the Provincial Insolvency Act, which provides that 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 realised in the course of the execution by sale or otherwise before the date of the admission of the petition. The appellant, therefore, has no higher right than that of any other unsecured creditor, and

(1) [1896] I. L. R. 23 Calc. 829.
(2) [1906] I. L. R. 33 Calc. 1158.
(3) [1920] 25 C. W. N. 544.
(4) [1921] I. L. R. 45 Mad. 84.
(5) [1897] I. L. R. 25 Calc. 179; L. R. 24 I. A. 170.
(6) [1914] I. L. R. 42 Calc. 723; L. R. 41 I. A. 251.

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he is not entitled to have his decree satisfied in full out of the sale proceeds of the property attached by him.

It is, however, contended on behalf of the appellant that, under section 52 of the Provincial Insolvency Act, he is, at any rate, entitled to the costs awarded to him in the suit in which the decree was made and to the costs of the execution. His contention is that the release of the property from attachment under Order XXI, rule 60, Civil Procedure Code, and the period during the continuance of his suit and the appeal in the High Court should be considered as one proceeding in attachment and as, under the authorities referred to above, the attachment that was made in 1915 should be considered to have revived, he is entitled to all the costs under section 52 of the Act. It is contended, on the other hand, on behalf of the respondents, who are the other creditors of the insolvent, that section 52 of the Provincial Insolvency Act applies only to cases where the attachment is of moveable properties and the contention is based upon the words "the court shall, on application, direct "the property, if in the possession of the court, to be "delivered to the receiver." As immoveable property attached by the court cannot be said to be in the possession of the court which could be delivered to the receiver, this section must be confined to cases of moveable properties which are taken possession of by the court in attachment. I do not agree with this contention. The opening words of section 52 refers to attachment of any kind of property which is saleable and the words on which the respondents rely need not be confined to moveable property alone. Where immoveable property is attached in execution of a decree, it is commonly stated that the property is in the custody of the court and there is no reason to suppose that the legislature meant that the attaching decree-holder would have a charge for his costs where moveable property is attached but he would be entitled to no such relief if immoveable property is attached

by him although, as in the present case, the proceedings relating to the attachment of the property are taken at considerable cost of money and trouble. The true construction, therefore, in my opinion, is that section 52 refers to the case of attachment of all kinds of property and is not confined to moveable property alone.

The next contention, on behalf of the respondents, is that if the appellant is held to be entitled to any costs as first charge, then it must be confined to the costs in the decree for money and those of the execution proceedings which led to the release of the property from attachment: or, in other words, the costs incurred by him up to the 23rd August, 1915, and not the costs of the subsequent proceedings in the suit which he brought in order to substantiate his right to attach the property as belonging to his judgment-debtor. That argument does not seem to me to be acceptable. The object of the suit under Order XXI, rule 63, is to maintain the attachment and get rid of the order of release (*Bonomali's case*). If it is held that the result of the subsequent suit was that the attachment was revived, as it must be held in accordance with the cases cited above, it seems to me difficult to avoid the conclusion that the proceedings in the suit which led to the revival of the attachment should be considered as proceedings in furtherance of execution, and I think that the expression "costs of the execution" should have a liberal interpretation, so as to include the costs of the suit brought under Order XXI, rule 63 of the Code, in which the appellant succeeded in having the order under rule 60 releasing the property from attachment set aside. In *Phul Kumari* v. *Ghanshyam Misra* (1) their Lordships expressed an opinion that such a suit is the only mode of obtaining a review of the order in such cases and also as if it were "simply a form of appeal." Having regard to the fact that it was only after the appellant succeeded in his suit finally, the insolvent included the property

(1) (1907) I. L. R. 35 Calc. 202 ; L. R. 35 I. A. 22.

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in his schedule and the receiver took possession, it is only just and proper that the appellant should get all the costs as a first charge on the property. It is by reason of the effort of the appellant that this property has been made available to the entire body of creditors. The receiver never stirred to take possession of the property as belonging to the insolvent. Having saved the property for the benefit of the creditors as against the claims of third persons, it seems to be wrong that he should not be allowed to claim a charge for the expenses incurred by him in his endeavour.

The order of the learned Judge, therefore, should be varied to this extent, that the appellant shall have a first charge on the property for the costs of the suit in which the decree was made and of the execution proceedings including the costs of the suit brought under Order XXI, rule 63 of the Civil Procedure Code in the trial court and in the appellate court; and after the charge is satisfied, the balance of the assets realised will be distributed rateably amongst the several creditors including the appellant for the rest of his claim. Having regard to the fact that the success has been divided, there will be no order as to costs of this appeal.

PANTON J. I agree.

R.K.C. *Order varied.*