tiff, who was a minor, and together with the deed in favour of first defendant, they amount to more than half of the ancestral property. No authority in support of a Hindu father's power to make such an alienation of ancestral immovable property has been quoted at the bar, and we find that, in a similar case, the Allahabad High Court on the suit of a minor son held that such an alienation must be set aside, not only to the extent of the father's share, but altogether *Ganga Bisheshar* v. *Pirthi Pal*(1).

The second appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

1891. April 1, 2, 8. 1892. September 16.

SUBBARAYA (PLAINTIFF), APPELLANT,

v.

VYTHILINGA AND ANOTHER (DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Foreign Court—Bankruptcy in Mauritius—Right of suit by trustee under foreign composition-deed in British India—Stamp Act I of 1879, *s.* 31—*Registration Act III of* 1877, *s.* 17 (*e*).

A debtor and the firm of which he was a member were adjudicated bankrupts in Mauritius and a receiver was appointed by the Court. Subsequently the creditors met and resolved that if the adjudication was annulled, a composition, payable by instalments, be accepted in full satisfaction of their debts, and that the security of the plaintiff's firm be accepted for payment of such composition, and that the bankrupts' estate be assigned to that firm, and that the plaintiff be appointed trustee to carry out such arrangement.

An instrument was executed to give effect to these resolutions and was concurred in by the receiver and approved by the Court, which annulled the adjudication and ordered that the bankrupts' estate in Mauritius and India vest in the plaintiff, who was appointed trustee to carry out the said composition with full powers of realisation. The plaintiff now sued to recover movable and immovable property of the bankrupts in India:

Held, (1) that the above instrument was valid as a composition-deed and did not require to be stamped and registered as a conveyance: and that any surplus that might remain after payment to the creditors did not belong to the plaintiff's firm, but was subject to a trust for the bankrupts;

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(1) I.L.R., 2 All., 635.

* Appeal No. 71 of 1890.

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(2) that the plaintiff was entitled to a decree for the amount expended by him in payment of the creditors, together with such costs as were incurred by him in recovering debts due to the estate and could not be recovered from the debtors, and the costs of certain sales and a mortgage incurred in realisation of the estate;

(3) that plaintiff was entitled to a decree for possession of the immovable property until the sum due is paid to him by the defendants or is satisfied out of the rents and profits of the property.

No order made by the Court at Mauritius can operate to transfer the ownership of immovable property in British India. So held, without deciding that the Court cannot compel the bankrupt when within its jurisdiction to execute in favour of the trustee such a deed as will, in accordance with the formalities of the local law, render the order of the Court effectual.

APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in original suit No. 22 of 1888.

Suit to recover movable and immovable property.

Defendant No. 1 and the firm of which he was a member were adjudicated bankrupts in Mauritius and a receiver was appointed. Subsequently a composition-deed was entered into by the creditors and the adjudication was annulled, and the plaintiff was appointed trustee under the composition with full powers to realise the assets. The property now sought to be recovered formed part of the assets in India: some of it was in the possession of defendant No. 2.

The further facts of the case appear sufficiently for the purposes of this report from the judgment of the High Court. The fourth and ninth issues, which are particularly referred to therein, were framed as follows:—

(4) "What is the value of the properties already entrusted to "plaintiff, and if such value were more than sufficient for the "discharge of the debts undertaken by him, whether plaintiff is "entitled to bring this suit?

(9) "Whether the defendant No. 2 is in possession of Rs. "10,000 outstandings collected and Rs. 4,000 profits recovered as "alleged in the plaint?"

The Subordinate Judge dismissed the suit in part and the plaintiff preferred this second appeal.

Mr. *Gantz* and Mr. *W. Grant* for appellant.

Mr. *Johnstone* and Mr. *R. F. Grant* for respondents.

JUDGMENT.—On the 25th April 1887 the firm of Coo. Vythilingam and Company and Coo. Vythilingam (first defendant) personally were adjudicated bankrupts by the Bankruptcy Court of

Mauritius, and a Mr. Newton was appointed by the Court manager and receiver of the bankrupts' property.

On the 23rd May 1887 Rungasawmy and three others, members of the firm of Coo. Vythilingam and Company, were adjudicated bankrupts, and Mr. Newton was appointed receiver.

On the 22nd July 1887 a meeting of creditors was called by Mr. Newton under the presidency of the Judge in Bankruptcy, and the creditors, by a majority in number and three-fourths in value, passed the following resolutions: (i) that a composition of 50 cents in the rupee be accepted in full satisfaction of the debts in principal and costs due to the creditors of the bankrupts, exclusive of all privileged costs and preferential claims which are to be paid in full, and on condition that the two orders of adjudication of 25th April and 23rd May last be annulled by the Court; (ii) that such composition be paid in eight equal monthly instalments; (iii) that the security of V. Subbarayan and Company (plaintiff's firm) be accepted for the payment of the above composition, and that, in consideration of such security, all the joint and separate estate, effects and property, both real and personal, of the firm of Coo. Vythilingam and Company and of the individual members thereof, situated in Mauritius and in India, be assigned to Subbarayan and Company; and (iv) that N. Subbarayan (plaintiff), the managing member of the firm, be appointed trustee to recover and realise all the estate, effects and property assigned as aforesaid and to carry out the above arrangement.

Mr. Newton, as trustee of the property of the bankrupts, accepted the above composition subject to the approval of the Court.

The same day a deed (exhibit T) was drawn up and executed by Mr. Newton on the one part, Subbarayan and Company on the other part, and the bankrupts on the third part, giving effect to the above resolutions. This deed of composition was approved by the Court, the orders of adjudication of bankruptcy were annulled, and it was ordered that all the estate and property of the bankrupts, both in Mauritius and in India, be vested in N. Subbarayan, who was appointed trustee to carry out the said composition with full power to recover and realise all the said estate and property.

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The plaintiff has instituted the present suit to obtain possession of (i) nunja and punja lands, houses and gardens; (ii) jewels, cattle, vessels, &c.; (iii) Rs. 10,000 outstandings; (iv) value of produce of lands; and (v) debts.

The Subordinate Judge of Kumbakonam gave the plaintiff a decree for the movables and a declaration of title to items 195 and 200, but dismissed his claim in other respects. Plaintiff appeals.

It is first urged on behalf of the appellant that the Subordinate Judge is in error in holding that plaintiff cannot rest his claim on the order of the Bankruptcy Court of Mauritius set forth above. The respondents support the judgment of the Lower Court on the ground that, after annulling the adjudication, the Bankruptcy Court was *functus officio*, and had no jurisdiction to pass any further order vesting the property of the bankrupts in plaintiff, as the consequence of the order was to remit the bankrupts to their former status. We observe that the direction was part of the final order passed by the Court of Bankruptcy in the matter of the Bankruptcy of Coo. Vythilingam and Company and the partners of that firm, and that it was competent to the Court to give directions for the due execution of the composition-deed when annulling the adjudication of bankruptcy. Section 23 (2) of the English Bankruptcy Act of 1883 is as follows:—"If the Court approves "the composition, it may make an order annulling the bankruptcy "and vesting the property of the bankrupt in him or in such "other person as the Court may appoint." We agree, however, with the Subordinate Judge that, for the purpose of deciding this question, the Court of Bankruptcy at Mauritius must be taken to be a foreign Court, and that no order passed by it could operate to transfer the ownership of immovable property in British India The settled rule of law is that such transfer is governed by the *lex loci rei sitæ*, and until a deed of transfer is effected in accordance with such law, the immovable property remains vested in the bankrupt. We are not, however, to be understood as deciding that the Court of Bankruptcy cannot compel the bankrupt when within its jurisdiction to execute in favour of the trustee such a deed as will, in accordance with the formalities of the local law, render the order of the Court effectual.

As regards the plaintiff's claim so far as it rests on the composition-deed (exhibit T, which has been admitted in evidence in

this Court by our order on C.M.P. 399 of 1890), the question raised for our decision is whether it is a composition-deed or a conveyance in the sense in which the word is used by the Subordinate Judge. If it is a conveyance, the document would require registration, and the suit must fail for want of it. We are, however, unable to agree in the opinion of the Subordinate Judge that the document is a conveyance and not a composition-deed. His remark that the bankrupts were not parties to it is clearly inaccurate, for they signed the deed. The creditors were duly represented not only by Mr. Newton, but also by the plaintiff who guaranteed the payment of 50 per cent. which the creditors had agreed to accept in full liquidation of their claims. Mr. Newton was a necessary party to the deed, as it was executed during the pendency of the bankruptcy proceedings, and without his concurrence and the sanction of the Court the property could not have been transferred by the bankrupts. We consider that in order to decide the above question, we should have regard more to the substance of the transaction than to its form. The transaction substantially amounts to a transfer of their property by the debtors for the benefit of their creditors, and the intervention of Mr. Newton does not in our judgment alter the real nature of the transaction. As a composition-deed the document has been duly stamped as provided by section 31 of Act I of 1879, and a composition-deed is by section 17 (*e*) of the Registration Act (Act III of 1877) exempted from registration. We are, therefore, of opinion that exhibit T is valid as a composition-deed.

Another question urged upon us by the respondent's counsel is that the Subordinate Judge should have recorded a finding on the fourth issue, whether the value of the property already entrusted to plaintiff was more than sufficient for the discharge of the debts of the bankrupts. It is contended on the other side that no such finding is necessary, inasmuch as the decision of the Subordinate Judge is supported by that of the Bankruptcy Court in Mauritius, which adopted the principle laid down in *ex parte Wilcocks re Wilcocks*(1). Our attention has been drawn by the other side to the case of *Bolton* v. *Ferro*(2) and *Cooke* v. *Smith*(3), and it is argued that the assignment of the estate to plaintiff was not absolute but conditional, that it was made not for the benefit of

(1) 44 L.J., 12. (2) L.R., 14 Ch. D., 171. (3) L.R., 45 Ch. D., 38.

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plaintiff but as security for the payment of the creditors, and that a resulting trust in favour of the debtors must be implied. The case of *Bolton* v. *Ferro*(1) is not really in point, because that was a case of composition prior to bankruptcy, and the question was whether a creditor who had entered into a contract whereby, in consideration of the present payment of a composition on the rest of his debt, was entitled subsequent to the receipt of the amount of composition to the full benefit of his security. The Court (*Bacon*, V.C.) decided in the negative, and held that the surplus belonged to the estate of the debtor. In the course of his judgment, however, the Vice-Chancellor remarked: "If this had "been a bankruptcy, the trustee would have been entitled to the "full benefit of the pledge." The same learned Judge decided *ex parte Wilcocks re Wilcocks*(2). In that case the debtor, alleging that he had no means of paying his debts, submitted his schedule to his creditors, who accepted a composition of two shillings in the pound. One Davies then took upon himself the burden and liability of paying the composition, and as consideration for that the creditors, who were entitled to the whole of the debtor's property, and the debtor agreed that all the assets of the debtor should be held by him. The Chief Judge held that no resulting trust appeared in the deed, and that it would be inconsistent with the transaction. But this decision was virtually overruled by the decision of the Court of Appeal in *Cooke* v. *Smith*(3), in which it was held that, although a deed, whereby debtors assigned the business and property of the firm to trustees upon trust, contained no ultimate declaration of trust for the assignors in case the property was more than enough for the payment of the debts, still, the object being the payment of debts, the transaction did not amount to a sale, but there was a resulting trust of any surplus in favour of the assignors. The remarks of Fry, L.J., are expressly applicable to this case. Referring to the deed executed in that case he said: "Is it a deed by which a firm and their creditors "agreed upon a certain mode of settling the debts and nothing "more—in which case there would plainly be a resulting trust for "the benefit of the assignors—or is it a deed by which the firm "sold their business to their creditors, or a deed by which they "agreed to give up their business by way of satisfaction and

(1) L.R., 14 Ch. D., 171. (2) 44 L.J., 12. (3) L.R., 45 Ch. D., 38.

"accord to their creditors, in either of which two cases it is of "course plain that the creditors, and they alone, are the owners." What was the object of the deed in this case? It was a deed for the benefit of creditors, and the presumption is that it was intended to pay their debts and nothing more. No doubt, a surplus was not contemplated, but it cannot have been intended that should the debts be paid in full and a surplus remain that should pass to the guarantors. As soon as the debts are paid in full, the intention of the parties is fulfilled and there is a trust for the assignors. In this view we consider it necessary to ask the Subordinate Judge to return a finding on the fourth issue.

With reference to the claim for jewels, there is no reliable evidence in support of the plaintiff's claim, which was rightly disallowed by the Subordinate Judge.

As to the mortgages, only certified copies of the mortgage deeds were put in and there is no evidence on the record to enable us to come to a definite finding as to the validity or otherwise of the mortgage transactions.

With reference to the Rs. 10,000 which the second defendant is said to have recovered as the agent of the first defendant, second defendant admits the collection of Rs. 6,000 and pleads payment to first defendant. There is no evidence to show whether the money was collected after the vesting order, and in the absence of such evidence, we cannot press against the second defendant his omission to produce his accounts.

An account must be taken of the mesne profits of the land which admittedly came into second defendant's possession, and the case must go back to the Subordinate Judge for a finding on the fourth issue and the latter portion of the ninth issue.

Finding is to be returned within four months from the date of the re-opening of the Court and seven days after the posting of the finding in this Court will be allowed for filing objections.

In compliance with the above order, the Subordinate Judge submitted his findings.

This appeal having come on for final hearing, the Court delivered the following

JUDGMENT:—The Subordinate Judge has submitted a finding on the fourth and ninth issues. He finds that the value of the properties realised by the plaintiff in Mauritius, amounting to Rs. 17,274·24, has not sufficed to meet the expenditure on behalf of

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the defendants, and that plaintiff has expended Rs. 12,722·82 out of his own pocket.

The plaintiff has put in a memorandum of objections the Subordinate Judge having struck out of his account the sum of Rs. 24,309·35.

The first item disallowed is Rs. 5,850·21 paid to creditors. The Subordinate Judge appears to have disallowed these items, because they do not appear in the schedule of debts (exhibit III) put in by the defendants, and because the plaintiff has not explained how the debts were incurred. The schedule was not referred to in the composition-deed, and the plaintiff undertook to pay not only the scheduled creditors, but all the creditors of the defendants' firm. Items 9 and 27 are bills made out in the name of the firm and are *primâ facie* evidence of the firm's liability. The defendant, when in the witness-box, did not repudiate these items. Items 29, 30 and 25 are promissory notes and a cheque issued by the defendants. The holders have been paid and have granted their receipt. We do not understand the remark of the Subordinate Judge that the alleged payments are not true. The defendants have never repudiated their signature, nor called in question the payments made by plaintiff. Item No. 1, Rs. 1,027·07, are protest charges. The defendants failed to take up their bills when due and the bank protested them. The plaintiff had to pay the protest charges to the bank, but came to terms with the bank and paid less than was actually due. This accounts for the difference in the figures referred to by the Subordinate Judge in paragraph 27. The sum of Rs. 5,850·21 must, therefore, be allowed.

The Subordinate Judge has disallowed a sum of Rs. 125, Attorney's costs. These costs were incurred in connection with the bill of Subbaraya Chetty and Company, No. 27 above, and the bill having been allowed, the Attorney's costs follow. The Subordinate Judge has disallowed an item of Rs. 30·72, costs incurred by plaintiff in recovering rent due by certain tenants. Plaintiff obtained a decree, but was unable to recover his costs, which were allowed and certified by the Court. He is entitled to be reimbursed.

We think the sum of Rs. 337·02, costs said to have been incurred in resisting a claim for wages made by servants of defendants' firm, was rightly disallowed, as the presumption is that

costs were recovered from the unsuccessful party. The order of the Court as to costs is not on the record.

The plaintiff cannot recover in this suit the costs incurred by him in defending a suit instituted against him in the Courts at Mauritius by the defendants. The decree being in his favour, he is at liberty to take out execution. The item of Rs. 6,251·09 was properly disallowed.

As to the items included under general expenses, the Subordinate Judge is in error in saying that a great many of them were incurred by plaintiff after he launched this suit. All these sums were expended in August, September and November 1887, and appear to be closely connected with defendants' affairs. In paragraph 20 of his finding the Subordinate Judge accepts the plaintiff's statement as to the sales of the "Rabannes." The twelfth item of Rs. 10 are the costs of the auction sales. Exhibit M shows that the Rs. 110 were paid to Mr. Jolliffe, a Notary, for preparing a mortgage deed on the property of defendants at Mauritius. The sum of Rs. 215·31 was wrongly disallowed.

It is not now contended that plaintiff is entitled to more than the Subordinate Judge has allowed as personal expenses.

The result is that plaintiff is shown to have expended from his own pocket Rs. 18,944·06. He is entitled, as the Subordinate Judge has held, to interest on this sum from 1st December 1887 at 6 per cent. till date of realisation. He is entitled to a decree for possession of the immovable property sued for until the sum due to him is paid by the defendants or until the said amount is made good by the rents and profits of the property, and, as he succeeds in this suit, he is entitled to his costs. There will be a decree accordingly in modification of the decree of the Subordinate Judge.