

definition of "street" under section 3, clause (27), includes the drain space on either side of the street. There can be no doubt that though the municipality may not have vested in it the right to the space up to the sky over the drain and street, it must have had such a right at least up to a height of about twelve feet over the level of the street in order that it might properly exercise its powers of repairing, widening and altering cleaning and doing other duties in connection with the street and the drain. The pial is therefore clearly an encroachment, a projection and an obstruction in the street. They have the right accordingly to remove it and this suit for an injunction against their removal of such projection was rightly dismissed by the Lower Appellate Court. I would therefore confirm its decree though not on the grounds on which the Lower Court based its decision. The appellant must pay the costs of the second respondent, the Secretary of State. Second Appeal No. 1334 of 1910 follows.

BASAWES-
WARASWAMI
v.
THE
BELLARY
MUNICIPAL
COUNCIL.

SADASIVA
AYYAR, J.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

K. L. C. T. CHIDAMBARAM CHETTY (PETITIONER). APPELLANT,

v.

V. V. R. NACAPPA CHETTY AND EIGHT OTHERS (COUNTER-
PETITIONERS NOS. 1, 2, 4 TO 10), RESPONDENTS.*

1912.
September 3.

*Provincial Insolvency Act (III of 1907), ss. 15, 18, 19, 20, 22, 46 and 52—
Official Receiver's order dismissing insolvency petition—No appeal direct to
High Court—Practice—No interference in revision where other remedy open.*

No appeal lies under section 46, clause (2) of the Provincial Insolvency Act to the High Court from the order of an Official Receiver dismissing an insolvency petition; but an appeal against orders passed by the Official Receiver lies, under section 22, only to the District Court. The language of section 22 read with section 52, clause (2) shows that such right of appeal is not confined to orders made under sections 18, 19 and 20, but extends to all orders of the Receiver.

* Appeal Against Order No. 206 of 1910.

CHIDAM-
BARAM
v.
NAGAPPA.

Obiter: An Official Receiver invested with the powers mentioned in clause (a) of section 52 (1) has the power to dismiss an insolvency petition under section 15.

The Court will not interfere under section 115, Civil Procedure Code, in a case where other adequate remedy was open.

APPEAL against the order of T. S. RAMASWAMI AYYANGAR, the Official Receiver, Madura, in Insolvency Petition No. 5 of 1910, in Insolvency Petition No. 2 of 1909 on the file of the District Court of Madura.

The appellant filed his petition in insolvency in the District Court, Madura. The District Court transferred the petition for disposal to the Official Receiver, who presumably had been invested with the powers specified in section 56, clause (1) of the Provincial Act. The Official Receiver held an enquiry, and finding that the petitioner had suppressed his accounts and had also entered into colourable transactions with a view to screen property from the creditors, dismissed the insolvency petition.

The petitioner appealed direct to the High Court.

C. S. Venkatachariar for the appellant.

The Official Receiver has no jurisdiction to dismiss the petition. Section 52, clause (a), enables him only to pass orders of adjudication. Section 22 gives a right of appeal only in the case of orders comprised under section 18, 19, or 20. In any case this appeal ought to be treated as revision petition under section 115, Civil Procedure Code.

K. S. Krishnaswami Ayyangar for *T. Narasimha Ayyangar* for the respondent. I take a preliminary objection. There is no right of appeal to the High Court in this case. The appeal has been preferred under section 46, clause (2) of Act III of 1907, which provides for an appeal only against certain orders by the District Court. The order in this case having been passed by the Official Receiver, section 46, clause (2), will not apply. The Official Receiver has been empowered under section 52, and clause (2) thereof makes his orders and acts, orders and acts of the District Court subject to the appeal to the Court, which is the District Court. Section 22 gives to the Court ample powers to correct all wrong orders of the Official Receiver. The appellant not having appealed to the District Court, cannot maintain this appeal in this Court.

JUDGMENT.—A preliminary objection is taken to this appeal. The appeal is preferred under section 46, clause (2) of Act III of 1907. The order appealed against was passed by an Official Receiver appointed under the Provincial Insolvency Act. Section 22 of the Act provides for an appeal to the District Court against the orders of the Receiver. Under section 52 of the Act the High Court has the power to direct that the Official Receiver shall have power to hear insolvency petitions, to examine the debtor and to make orders of adjudication. It is not denied, and we presume it is the fact, that the High Court has directed that the Official Receiver in this case should have that power. It is contended that the power given under this section would not entitle the Official Receiver to dismiss an insolvency petition. Clause (a) of section 52 (1) invests the Official Receiver with the same powers (to hear insolvency petitions, to examine the debtor and to make orders of adjudication) in any matters in respect of which jurisdiction is given to the Court by the Act. The sections relating to the procedure to be followed at the hearing of an insolvency petition by the Court give power to the Court to dismiss the petition (see section 15) in certain cases. Section 16 then provides that, where a petition is not dismissed under section 15, the Court shall make an order of adjudication, unless the debtor is able to propose any composition or scheme which shall be accepted by the creditors and approved by the Court.

There can be no doubt that the Official Receiver should follow the same procedure and his power to adjudicate is only in cases where the petition is not dismissed. There can be no reasonable doubt, we think, that he has the power to dismiss the petition. However this may be, section 22 gives a right of appeal to the District Court against all orders of the Official Receiver. It is contended that the right of appeal is only given against the orders comprised in sections 18, 19 and 20. We are unable to accept this contention. The language of section 22 is quite wide and we think that clause 2 of section 52 also shows that the appellate power given to the Court extends to all orders of the Receiver. As the proper course to be adopted by the appellant before us was to appeal to the District Court and as no provision is made in the Act for appeals to this Court directly against the orders of the Receiver, this appeal must be dismissed.

CHIDAM-
BARAM
v.
NAGAPPA.
—
SUNDARA
AYYAR AND
SADANIVA
AYYAR, JJ.

CHIDAMBARAM
v.
NAGAPPA.
—
SUNDARA
AYYAR AND
SADASIVA
AYYAR, JJ.

We are then asked to treat this appeal as a petition under section 15. Some power of revision is given to the High Court by section 46 of the Insolvency Act in favour of a person aggrieved by an order of the District Court. Assuming that, notwithstanding section 46, we have also powers under section 115 of the Civil Procedure Code in this case, and assuming that the Official Receiver's order can be regarded as an order by a Court subordinate to this Court, we still must decline to interfere, as there was other adequate remedy open to the appellant.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

SYED IBRAHIM SAHIB (SECOND DEFENDANT), APPELLANT,

v.

ARUMUGATHAYEE AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

1912.
August
28 and 29,
and
September 4.

Mortgage—Prior and puisne mortgages—Sale to prior mortgagee after creation of a puisne mortgage—Prior mortgage kept alive to what extent—Prior mortgagee whether entitled to charge interest after date of sale—His claim for necessary repairs and municipal taxes, whether allowable—Practice—Appeal—Transfer of Property Act (IV of 1882), ss. 65, 72 and 101—Madras District Municipalities Act (IV of 1884), sec. 103—Doors and windows not m^eable property.

When, after the creation of a *puisne* mortgage, the mortgagor sells the property to the prior mortgagee with possession, the prior mortgage is kept alive as against a *puisne* incumbrancer in the circumstances mentioned in section 101 of the Transfer of Property Act, but not against the owner, whose equity of redemption has been purchased by the prior incumbrancer.

The prior mortgagee is not entitled to claim interest on his mortgage after the date of his sale, against the *puisne* mortgagee; the effect of the sale is this: that what was enjoyed by the prior mortgagee till sale as compensation for the amount of the usufructuary mortgage he agreed subsequently to enjoy in consideration of the whole price, and he cannot therefore claim any further compensation from the date of sale, for any portion of the price.

Where by the terms of the mortgage deed, the mortgagor personally covenanted to pay the municipal taxes himself, the mortgagee who pays the

* Second Appeal No. 411 of 1911.