APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Burn.

M. R. VENKATARAMA AIYAR (FIRST DEFENDANT), APPELLANT,

v.

THE SOUTH INDIAN BANK, LIMITED, TINNEVELLY, AND NINE OTHERS (PLAINTIFFS NOS. 1 TO 6, 8 AND 9 AND DEFENDANTS NOS. 2 AND 4), RESPONDENTS.*

1919, September 18 and 19, October 8 and 28.

Civil Procedure Code (Act V of 1908), sec. 73—Rateable distribution—Right of a decree-holder to impeach the decree of another before distribution—Suit for declaration whether maintainable.

One decree-holder cannot dispute the right of another decree-holder against the same judgment-debtor to share in a rateable distribution of the assets, merely on the ground that the latter's decree was not based on a real debt, unless there was collusion between him and the judgment-debtor in obtaining that decree.

Per SADASIVA AYYAR, J.—A decree-holder may file a suit for a declaration that another decree-holder is not entitled to rateable distribution under section 73, Civil Procedure Code, and for an injunction, even before the distribution of the assets by the Court.

APPEAL against the decree of R. GOPALA RAO, the Subordinate Judge of Negapatam, in Original Suit No. 22 of 1913.

Plaintiffs were the creditors of Vynagram Lakshmana Chetti and Nataraja Ayyar. Plaintiffs obtained several decrees against them and a considerable sum was realized in execution, and this sum was held by the Negapatam Sub-Court. The first defendant also obtained a decree *ex parte* in Original Suit No. 26 of 1910 against the same judgment-debtors, and applied for rateable distribution along with plaintiffs. As, at that time, proceedings were pending in the High Court which, if decided against him, would have resulted in the decree being set aside, the Court ordered retention of defendant's share in Court and ordered rateable distribution to the plaintiffs. After the passing of the final orders in favour of first defendant, the plaintiffs filed a suit for a declaration that the first defendant was not entitled to participate in the distribution of assets, under section 73 of the Civil Procedure Code. They alleged that the decree in Original Suit No. 26 of 1910 had been obtained by fraud and collusion, and that the promissory note on which the first defendant's claim was based was entirely unsupported by consideration. The Subordinate Judge dismissed the suit, holding that it was not sustainable without a prayer for consequential

* Appeal No. 336 of 1918.

VENKATA-RAMA AIYAR v. THE SOUTH INDIAN BANK, LIMITED.

relief. On appeal to the High Court, this decision was set aside and permission given to plaintiffs to amend the plaint. On the rehearing before the Sub-Court of Negapatam the contest related firstly, to the question whether there had been fraud or collusion in obtaining the decree in Original Suit No. 26 of 1910 and whether the promissory note was supported by consideration or not; and secondly, to the question whether a suit of this nature was maintainable. The Subordinate Judge found that there was no consideration for the promissory note and that, except in one particular, there had been no extrinsic fraud or collusion. In Original Suit No. 26 of 1910 Lakshmana Chetti was proceeded against through his agent, one Narayana Sastri. The Subordinate Judge was of opinion that the impleading of Narayana Sastri when his agency had terminated by the insolvency of his principal, to the knowledge of the first defendant, was a fraudulent act on the part of first defendant. On the question of law, the Subordinate Judge held that the suit was maintainable and granted the plaintiffs the declaration and injunction prayed for. The first defendant appealed to the High Court.

K. Srinivasa Ayyangar, K. V. Krishnaswami Ayyar, K. S. Jayarama Ayyar and *N. Swaminatha Ayyar* for the appellant.

M. D. Devadoss for first respondent.

T. Ranga Achariyar for second respondent.

K. Bhashyam Ayyangar, N. Kunjithapatham Ayyar and *A. Sambamurti Ayyar* for second and eighth respondents.

D. Chamier instructed by Messrs Brightwell and Moresby, for sixth respondent.

BURN, J.

BURN, J.—[His Lordship stated the facts, and after considering the evidence regarding collusion, extrinsic fraud and consideration for the promissory note, continued as follows] :—

The facts then are that the decree in Original Suit No. 26 of 1910 was not obtained by collusion, that there was no extraneous fraud but that the promissory note on which the decree is based was unsupported by consideration. As far as the parties to the suit are concerned, the judgment is final, and there are no circumstances which would enable them to have it set aside: *Chinnayya* v. *Ramanna*(1), *Kadirvelu Nainar* v. *Kuppuswami Nainar*(2). An order in first defendant's favour for rateable

(1) (1915) I.L.R., 38 Mad., 203. (2) (1918) I.L.R., 41 Mad., 743 (F.B.)

distribution has been passed but no payment has been made to him. It remains to be determined whether it is open to third parties in the position of the plaintiffs to impugn the validity of the decree and whether a suit for a declaration of this kind is maintainable.

The latter point may be considered first.

The question is whether the suit is premature because the share of the first defendant has not been disbursed. Once assets have been disbursed, clause (2) of section 73 of the Civil Procedure Code, 1908, expressly provides for a suit for refund, where the payment has been made to a person not entitled to receive it. The contention for the appellant is that the plaintiffs have no cause of action until payment has been made and that a suit for declaration will not lie. Two decisions of this Court have been relied upon: *Parasurama Pattar* v. *Veeraraghava Pattar*(1) and an unreported case, *Venkatappiah Chetty* v. *James Short*(2). In the former case a decree-holder had been paid the whole sum realized by him in execution of his decree, as the application of another decree-holder for rateable distribution had been dismissed. The latter succeeded in getting the order of dismissal set aside, and the former was directed to pay back into Court the sum he had drawn. He then sued for a declaration that the other claimant was not entitled to rateable distribution but as no assets had come into the latter's hands it was held that the suit was not maintainable. *Hart* v. *Tara Prasanna Mukerji*(3) is referred to. There the Court had ordered under section 295 (section 73 of the Code of Civil Procedure, 1908) that the whole sum realized by the defendant in execution proceedings should be paid to him, in spite of plaintiff's application for rateable distribution. No disbursement was however made. The plaintiff sued for payment out of Court to him of the sum which he claimed as rateably due. The question whether a declaratory suit was maintainable was raised in the arguments. The judgment, however, proceeds on the basis that the suit was brought under the provisions of section 295 and the decision is that it would not lie because assets had not come into the hands of the defendant. There is no

(1) (1897) 7 M.L.J., 277. (2) C.C.C. Appeal No. 31 of 1909 (unreported).
(3) (1885) I.L.R., 11 Calc., 718.

VENKATA-RAMA AIYAR v. THE SOUTH INDIAN BANK, LIMITED.

BURN, J.

suggestion in the judgment that any other remedy was open to the plaintiff.

In *Trailakya Nath Adhya* v. *Pulin Behari Baral*(1), it was held that a suit would lie for a declaration that a decree-holder who was otherwise qualified to get rateable distribution under section 73 was not entitled to receive payment on the ground that his decree had been obtained by collusion and fraud. The decision in *Hart* v. *Tara Prasanna Mukerji*(2) was distinguished on the ground that the prayer was for a refund. The plaintiff had asked in the alternative for recovery from the defendant in the event of payment having been made, but the report indicates that this event had not happened, and he also asked for payment out of the assets held by the Court.

Both the Calcutta cases were considered in *Venkatappiah Chetty* v. *James Short*(3) though the facts on which the declaration was sought are not stated in the judgment. Apparently it was not a case in which the decree was attacked on the ground of collusion. *Parasurama Pattar* v. *Veeraraghava Pattar*(4) was followed and it also was a case in which the right to distribution was not disputed on the ground that the decree was collusive. The case of *Trailakya Nath Adhya* v. *Pulin Behari Baral*(1) is referred to as being in favour of the maintainability of a declaratory suit, and it is remarked that the decision may perhaps be distinguished on the ground that the decree of the rival decree-holder was alleged to be collusive. It was held that a suit for a declaration was not maintainable and it was pointed out that the legislature had provided a special machinery for a limited purpose and a special remedy for determining questions of right which might arise. To hold that such a suit is not maintainable would result in many instances in depriving the plaintiff of his only effective remedy. The Madras cases do not decide that such a suit is not maintainable when the decree is attacked on the ground of collusion. That is the case which was put forward in the plaint. In the absence of proof of collusion the suit in my opinion will fail on another ground and therefore this point need not be dealt with further. The case of the respondents is that as they were not parties in Original

(1) (1904) 3 C.L.J., 385.
(2) (1885) I.L.R., 11 Cal., 718.
(3) C.C.C. Appeal No. 31 of 1909 (unreported).
(4) (1897) 7 M.L.J., 277.

Suit No. 26 of 1910 and as the judgment is only *in personam* they are entitled to have it vacated even on grounds which would not be open to the defendants in the suit. The judgment is said to be only a piece of evidence as to the existence of a debt which it is open to the respondents to rebut and which they have succeeded in rebutting. The Subordinate Judge has held that the fact that Exhibit H was not supported by consideration and that the defendant must have supported his claim by false evidence are sufficient to entitle the plaintiffs who held decrees against the same judgment-debtors to the relief they pray for in this suit. It is contended before us that this view is wrong. It is conceded that cases of collusion or proceedings in bankruptcy stand on a different footing. The argument advanced is that apart from the exceptions just mentioned, the plaintiffs would be entitled to relief in such circumstances only to which the principle illustrated by section 53 of the Transfer of Property Act is applicable. The fact that there has been a fraud by one creditor on the judgment-debtor will not enable other creditors to dispute the validity of the decree where the fraud was not aimed at them and they had no direct interest in the suit.

A number of English cases have been cited but it is unnecessary to deal with them at length, because all the decisions relate to bankruptcy proceedings, and there is really no controversy as to the powers of a Court exercising bankruptcy jurisdiction.

Ex parte Kibble In re Onslow(1), *Ex parte Lenox, In re Lennox* (2), *In re Fraser, Ex parte Central Bank of London*(3), and *In re Hawkins, Ex parte Troup*(4) were referred to.

These cases establish that the mere fact that a debt which is sought to be proved is founded on a judgment does not prevent the trustee in bankruptcy inquiring into the reality of the debt on which the judgment is based. Such an inquiry may be held even before a receiving order has been made and even at the instance of the debtor although the latter would be estopped by the judgment from disputing the existence of the debt in any other forum. In order to justify the rejection of

(1) (1875) 10 Ch., 467.
(2) (1885) 16 Q.B.D., 315.
(3) [1892] 2 Q.B., 633.
(4) [1895] 1 Q.B., 404.

VENKATA-RAMA AIYAR v. THE SOUTH INDIAN BANK, LIMITED.

BURN, J.

the debt by the Court, it is not necessary that there should be proof of collusion or of fraud. It is enough that the transaction should have been unfair and unreasonable. [Vide *In re Hawkins, Ex parte Troup*(1).] It is clear from the judgments that the decisions are based on the peculiar powers of the Court of Bankruptcy. The Court is charged with the administration of the estate for the benefit of the whole body of creditors, and the interference of the Court has far-reaching and permanent effects on their rights. The proceedings in bankruptcy are the acts of the Court, and it is not estopped by any prior conduct on the part of the debtor, by any engagements he may have entered into, or by any decrees which may have been passed against him, from inquiring into the true nature of the transactions so that the assets may be equitably distributed between the bona fide creditors of the bankrupt. These decisions do not touch the question of the rights of third parties to attack decrees on their own account. If the first defendant seeks to prove his debt in the Insolvency Court in order to share in the assets of Lakshmana Chetti held by the Receiver, it may be open to the Court to go behind the judgment in Original Suit No. 26 of 1910 and inquire into the consideration for Exhibit H. There is nothing in the cases cited to support the plaintiffs' contention as to the maintainability of the present suit. In this view, it is hardly necessary to notice the further argument that a Court acting under section 73 of the Code of Civil Procedure is invested with powers similar to those exercisable in insolvency proceedings. I think the correctness of this proposition is doubtful.

In *In Re Sunder Dass*(2) it has no doubt been held that the Court has a right to inquire whether any decree on which rateable distribution is claimed is a sham decree or not. The reason given is one which furnishes a ground for the interference of a Court of Bankruptcy in such matters, namely, that a debtor should not be allowed to defeat the rights of his bona fide creditors by means of claims brought into existence collusively for this very purpose. In *Shankar Sarup* v. *Mejo Mal*(3) the Judicial Committee expressed the following view as to the nature of proceedings under section 295 (73) of the Code

(1) [1895] 1 Q.B., 404. (2) (1885) I.L.R., 11 Calc., 42.
(3) (1901) I.L.R., 23 All., 313 (P.C.).

of Civil Procedure: "The scheme of section 295 is rather to enable the Judge as matter of administration to distribute the price according to what seem at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently re-adjusted by a suit such as the present. Their Lordships approve of the decision on this point in *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghate*(1), and they concur in the further observation made by the learned Judge in that case that the application of the 13th article is also precluded by the fact that the order for distribution was a step in an execution proceeding, and was therefore made in the suit in which the decree was made which was in process of execution. The order for distribution was thus an order in a suit." A Court cannot in execution go behind the decree which it is executing. If the orders passed under section 73 are made in execution of the several decrees which happen to be before the Court, it is difficult to see how the Court has authority to question the validity of any of them. The action of a Court under section 73 is materially different from that of a Court in Insolvency proceedings. The estate is not vested in the Court. The remedies open to the creditors in future are not curtailed. The Court merely gives effect to a rule of procedure enacted for the purposes set out in the judgment of STRACHEY, C.J., in *Bithal Das* v. *Nand Kishore*(2). The decisions cited for the respondents do not help the determination of the point in issue. They however rely upon general principles as establishing their title to the relief now sought. They contend that the judgment in Original Suit No. 26 of 1910 is not one binding against all the world, that the existence of the debt sued upon is not *res judicata* as far as they are concerned and that the position they hold as judgment-creditors of the defendants in the suit entitles them to question the validity of the transaction. The judgment is not one *in rem*, the facts found are not *res judicata*, and the plaintiffs have now an interest in disputing the first defendant's right to receive payment. The answer furnished on behalf of the appellant is that there are exceptions to the rule that judgments *in personam* bind only parties and privies and that the present case

(1) (1894) I.L.R., 15 Bom., 438. (2) (1901) I.L.R., 23 All., 106, at p. 110.

VENKATA-RAMA AIYAR v. THE SOUTH INDIAN BANK, LIMITED.

BURN, J.

falls within those exceptions. The existence of exceptions is recognized and acted upon in *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar*(1). In that judgment a long passage is quoted with approval from an American Case, *Candee* v. *Lord*(2) as giving a clear instance of such an exception. The passage in question contains the whole of the argument for the appellant. The proposition enunciated is this. An owner may dispose of or burden his property as he pleases, provided he does not thereby cause injury to others. He may, for instance, contract a debt and this is a matter which concerns solely himself and the particular creditor, provided the act is not done in bad faith and to the prejudice of other creditors. When bad faith has been shown, the transaction can be avoided. When the proviso has been complied with, strangers cannot intervene. They are not entitled to question the way in which a man has dealt with his own, merely because he has been improvident in incurring liabilities or careless in defending his rights. As regards judgments the conclusion is thus stated (page 486): "It follows from the principle suggested that a judgment obtained without fraud or collusion and which concludes the debtor, whether rendered upon default, confession, or after contestation is, upon all questions affecting the title to his property, conclusive evidence against creditors to establish, first, the relation of creditor and debtor between the parties to the record; and second, the amount of the indebtedness." No Indian or English decisions covering the same ground have been cited before us. Black on Judgments, Volume I, section 294, Bigelow on Estoppel, page 167, and Bigelow on Fraud, page 91, indicate that the view taken in *Candee* v. *Lord*(2) is one generally accepted by American authorities.

An act of a debtor, or a judgment passed against him may subsequently become highly detrimental to the interests of other creditors, but this will not entitle them to interfere if all was done in good faith at the time the events took place. (Vide Bigelow on Fraud *loc. cit.*)

An illustration of the application of these principles is to be found in *Suppa Bhattar* v. *Suppu Sokkaya Bhattar*(3). X had

(1) (1910) I.L.R., 33 Mad., 483. (2) 51 A.M., Dec., 294; 2 N.Y., 269.
(3) (1915) 29 M.L.J., 558

been the sole owner of certain property. Y claimed it under an alienation by X. Y's claim was upheld in a judgment passed in litigation to which all persons having an existing interest in disputing the claim were parties. Subsequently Z, who had not been a party to the previous suit, acquired such an interest and tried to question Y's rights on grounds similar to those which had failed before. It was held that he was not entitled so to do.

I think the principle of the decision to be, that the persons who had the exclusive right to settle the question had done so without any fraud on Z and he could not object to what had taken place.

The passages relied upon in the books referred to above lay stress on the fact that a fraud practiced on the debtor is not in itself any ground for interference by third parties. The defendant holds a decree which finally determines that the relation of creditor and debtor exists between him and his judgment-debtors and which is also conclusive as to the amount of the debt as between the parties. Fraud there has been, but not of a nature to enable the debtors to reopen the matter. The plaintiffs are now seeking to have the debtors' lost cause retried because the result is injurious to themselves. They have failed to establish collusion or fraud against themselves. In these circumstances I think the principle of the decision above referred to applies, and the plaintiffs are not entitled to attack the decree by showing that it is not based on a real debt.

I am therefore of opinion that the appeal must be allowed and the suit dismissed. I agree with the order as to costs proposed by my learned brother.

SADASIVA AYYAR, J.—The first defendant is the appellant. The plaintiffs and the defendants Nos. 2 and 3 (who have common interests with the plaintiffs) are the respondents. The material facts and pleadings have been mentioned in detail in the judgment just now pronounced by my learned brother, and I shall not repeat them.

I substantially agree with his conclusions throughout, and have not much to say in my own words.

The decree attacked in the plaint, namely, the decree in Original Suit No. 26 of 1910, was obtained by the first defendant against Nataraja Aiyar *ex parte*, and the assets held by the

VENKATA-RAMA AIYAR v. THE SOUTH INDIAN BANK, LIMITED.

SADASIVA AYYAR, J.

Court were realised in execution against his properties alone as the other judgment-debtor's (Lakshmana Chetti's) properties had vested in the Official Receiver on his insolvency. That decree is dated 16th April 1910.

The plaintiffs in the present suit state in paragraph 7 of the plaint:

"Nataraja Aiyar neglected to appear and the pleader engaged by him did not also appear on the date of hearing, and by reason of the gross and culpable neglect of the said Nataraja Aiyar and by the defendant getting untrue and false returns,"

(the first defendant in this suit, who was impleaded at first as the only defendant, being the plaintiff and decree-holder in the other suit)

"and by the said defendant falsely swearing that the debt was due, the decree has been obtained. The same is fraudulent, null and void and collusive and is devoid of legal effect as against the plaintiffs. The subsequent proceedings initiated by Nataraja Aiyar to set aside the *ex parte* decree were fraudulently and collusively conducted by him. He fraudulently abstained from letting in all the evidence which could have been availed of by him. But in any case the said decree is not binding on the plaintiffs."

Two of the eminent leaders of the bar of this Court, Messrs. T. R. Ramachandra Ayyar and K. Srinivasa Ayyangar appeared for the contesting parties (namely, Nataraja Aiyar and the present first defendant, respectively) in the proceedings conducted to set aside the *ex parte* decree and they have been examined as defence witnesses Nos. 2 and 1 in this case. As the learned Subordinate Judge remarks in paragraph 43 of his judgment,

"After reading their evidence it is not possible to find that there can be any collusion between Nataraja Aiyar and the first defendant in the conduct of those proceedings."

(See also *Venkatarama Aiyar* v. *Nataraja Aiyar*(1) which contains the report of those hotly contested proceedings between Nataraja Aiyar and the first defendant, and in which Nataraja Aiyar was unsuccessful.)

That a judgment though obtained on perjured evidence is conclusive between the parties has been now settled by the Full Bench decision in *Kadirvelu Nainar* v. *Kuppuswami Nainar*(2).

---

(1) (1913) 24 M.L.J., 235. (2) (1918) I.L.R., 41 Mad., 748 (F.B.).

It is clear from the principle of the decisions in *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar*(1) and in *Ramamurti Dhora* v. *The Secretary of State for India in Council*(2), which principle was substantially approved in *Suppa Bhattar* v. *Suppu Sokkaya Bhattar*(3), that when the relationship of decree-holder and judgment-debtor was finally established between the present first defendant and Nataraja Aiyar by the decree in Original Suit No. 26 of 1910, the extent and reality of Nataraja Aiyar's indebtedness under that decree cannot be questioned by third persons (though they are also creditors of Nataraja Aiyar), so long as that decree remains effective. As regards proceedings in insolvency and bankruptcy and proceedings taken in winding up registered companies, special powers are given to Courts and Receivers, not to set aside judgments and decrees, but as is said in some English cases, "to get round judgments", "to go behind judgments", so that the creditors who have got just debts alone may share in the distribution of assets and not the creditors whose debts are unjust, though they may be decree creditors. Those decisions are, in my opinion, not applicable to the question of rateable distribution in execution proceedings under the Civil Procedure Code. Most Insolvency and Bankruptcy Acts, for instance, contain special provisions which direct that domestic servants and clerks, etc., should be paid in full, the arrears of wages due to them for particular periods of time, in preference to other creditors and contain similar special provisions based on special considerations, but these considerations cannot be taken into account under the Civil Procedure Code.

I am therefore clear that the plaintiffs who are decree-holders (just like the first defendant) against Nataraja Aiyar cannot attack the first defendant's decree as not creating a valid debt against Nataraja Aiyar, and therefore as not being a decree capable of execution against Nataraja Aiyar's assets, if Nataraja Aiyar himself is precluded from setting aside that decree, and if there was no collusion between the first defendant and Nataraja Aiyar in the obtaining of the decree by the first defendant [Of course if there was such collusion, it was open to the

(1) (1910) I.L.R., 33 Mad., 483.

(2) (1913) I.L.R., 36 Mad., 141. (3) (1915) 29 M.L.J., 558.

VENKATA-RAMA AIYAR v. THE SOUTH INDIAN BANK, LIMITED.

SADASIVA AYYAR, J.

plaintiffs to attack it. See *Suryanarayana Jagapati Raju* v. *Gopala Surya Rao*(1).]

In the above view, it is unnecessary to consider the question whether the plaintiffs have a right to sue for a declaration and injunction, and whether their only course was to have waited till the money was paid in the course of rateable distribution to the first defendant and then to bring their suit or suits for recovery of that money under the provisions of section 73, Civil Procedure Code. I might however for the sake of completeness express my considered view that they are not so precluded. It may happen that the remedy under section 73, Civil Procedure Code, may become, in certain cases, quite illusory ; for example, where the creditor to whom it was wrongly paid is a pauper, or has no tangible property, or absconds. The right of a man to recover the debt out of his debtor's assets is a substantial right. Where that right is in danger, I do not see why he should be confined to a particular remedy given by a particular statute and why he should not resort to another remedy given by another statute (such as the Specific Relief Act) to protect his rights effectively. If there are observations in certain cases which hold that a suit for declaration and injunction (where the plaintiff is entitled to sue under section 73 after the wrong distribution takes place) is premature, I respectfully dissent from those observations. The actual decision in *Parasurama Pattar* v. *Veeraraghava Pattar*(2) can be supported on the ground that the consequential relief of injunction was not asked for. Exhibit I merely follows *Parasurama Pattar* v. *Veeraraghava Pattar*(2) and the actual decision may be supported on the same ground.

In the result, though with great reluctance, I agree with my learned brother in holding that the lower Court's decision must be reversed, and the suit dismissed, but as the first defendant obtained a dishonest decree and raised the false defence that the promissory note on which he obtained that decree in Original Suit No. 26 of 1910 was supported by consideration, I would direct the parties to bear their respective costs in both Courts.

K.R.

(1) (1912) 23 M.L.J., 699. (2) (1897) 7 M.L.J., 277.