

## APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice  
Madhavan Nayar.

1926  
January 26.

CHOWDAPPA GOUNDER (A CREDITOR OF THE INSOLVENT,  
FOR HIMSELF AND ON BEHALF OF ALL THE CREDITORS),  
APPELLANT,

vs.

KATHAPERUMAL PILLAI AND 2 OTHERS (RESPONDENTS  
1 AND 2, AND PETITIONER—OFFICIAL RECEIVER),  
RESPONDENTS.\*

*Provincial Insolvency Act (V of 1920), ss. 75 (2), 53 and 54—  
Appeal—Application to District Court by Official Receiver  
to set aside an alienation by insolvent—Dismissal—Right  
of a creditor to appeal against the order—Creditor, not  
actually party to the original application—Official Receiver,  
not moved to appeal—Person aggrieved by the order,  
meaning of—Practice—Amendment of appeal petition.*

Under section 75 (2) of the Provincial Insolvency Act (V of 1920), a creditor of an insolvent can appeal against an order of a District Court dismissing an application of the Official Receiver to set aside, under sections 53 and 54 of the Act, an alienation by the insolvent, even though the creditor was not an actual party to the application and had not previously moved the Official Receiver to file an appeal and the latter had not refused to do so; but the creditor must prefer the appeal on behalf of all the creditors.

*Ananthanarayana Ayyar v. Sankaranarayana Ayyar, (1924) I.L.R., 47 Mad., 673, distinguished; Shikri Prasad v. Aziz Ali, (1922) I.L.R., 44 All., 71, followed.*

APPEAL against the order of J. J. COTTON, District Judge of Coimbatore, in Insolvency Application No. 558 of 1922 in Insolvency Petition No. 47 of 1922.

The material facts appear from the judgment of MADHAVAN NAYAR, J. The District Judge dismissed the

\* Civil Miscellaneous Appeal No. 364 of 1923.

application of the Official Receiver to set aside the alienation of the insolvent. One of the creditors appealed against the order. The creditor was not actually a party to the original application and did not move the Official Receiver to appeal.

*T. R. Ramachandra Ayyar*, for respondent took a preliminary objection that the creditor cannot appeal.

*L. A. Govindaraghava Ayyar* for appellant.—A creditor can appeal as he is a person aggrieved by the order under section 75 of the Provincial Insolvency Act (V of 1920), though there is an Official Receiver. The creditor need not be a party individually to the original application by the Official Receiver; nor need the Official Receiver have been moved by the creditor to appeal, before he (creditor) can himself appeal.

Reference was made to the following cases :—

*Shikri Prosad v. Aziz Ali* (1), *Niadar v. Ramji Lal* (2), *Anantanarayana Ayyar v. Sankaranarayana Ayyar* (3), and other cases referred to in the judgment.

*T. R. Ramachandra Ayyar* for respondent.—The view of the Madras High Court is that a creditor can appeal only (1) if he was a party to the order appealed against, and (2) if the Official Receiver refuses to appeal on request by the creditor. In 47 Mad., 763, the creditor was a party. If the Official Receiver refuses to do his duty, then only a creditor has a grievance under section 75 (2) of the Act.

### JUDGMENT.

WALLACE, J.—The first question in this appeal is whether an appeal lies. The Official Receiver of Coimbatore in proceedings in insolvency applied to the lower Court under section 53 of the Provincial Insolvency Act to declare void against him an assignment or sub-lease in favour of the second respondent before it. The lower Court dismissed the petition. The appellant before us is not the Official Receiver but one of the

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(1) (1922) I.L.R., 41 All., 71.

(2) (1925) 23 All., L.J., 503.

(3) (1924) I.L.R., 47 Mad., 673.

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creditors; and a preliminary objection is taken that such an appeal by a single creditor is not competent. It does not appear that the appellant before appealing moved the Official Receiver to appeal. For the purposes of this argument I assume that the Official Receiver was not moved to appeal.

The appellant relies very strongly on the general wording of section 75, sub-clauses (1) and (2), which undoubtedly lays down that any creditor aggrieved by the decision of the District Court may appeal to the High Court in a matter of this kind. The short question then is, is the appellant a creditor aggrieved by this order and does the fact that he did not first move the Official Receiver to appeal make him any the less an aggrieved creditor?

Now, the general scheme of the Act is that in insolvency proceedings creditors cannot act individually and independently but are represented by the Official Receiver who alone may ordinarily take action. Clearly however the Official Receiver can act for the whole body of the creditors only when the interests of the whole body are homogeneous; if the interests of individual creditors conflict, then the Official Receiver cannot represent the interest of the creditor who is standing on his individual right as opposed to those of the general body, so far as that right is concerned. Such a case would occur, for example, when the Official Receiver or some creditor wishes to have the debt of another creditor struck out as fictitious, or when one creditor wishes to be ranked as a secured creditor, or when an alienation in favour of one creditor is sought to be declared void under section 53 or 54 of the Act. In such cases it seems to me clear that no one but the individual creditor can represent his individual interest, as distinguished from the interest he possesses homogeneous

with those of the general body of creditors. The general principle thus would seem to be that where the insolvency proceeding under consideration concerns only an individual creditor and his interests, he alone can agitate the matter both in the Original Court and in the Appeal Court.

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Reference may be made in this connexion to the reported ruling in *Khushhali Ram v. Bholar Mal*(1). In such cases however there would ordinarily be an order by the Receiver as representing the general body of creditors, and *a fortiori*, the homogeneous interest of all individual creditors including the creditor opposed to him in the matter of that creditor's individual claims, unfavourable to the individual creditor's individual claims and the latter would apply first of all to the Court under section 63 for redress. [See *Thiruvengkatachariar v. Thangayiammal*(2)]. But where the proceeding concerns the general interests of the general body of creditors, then individual creditors are not in the first instance permitted ordinarily to act individually, but must be represented by and must act through the Official Receiver. What then is the principle to be invoked if the Official Receiver being moved on behalf of the general body of creditors, refuses to act? The proper principle, as I conceive, has been laid down by CAVE, J., in *Ex parte Kearsley. In re Genese*(3). It is quoted *in extenso* in *Ananthanarayana Ayyar v. Sankaranarayana Ayyar*(4).

That principle would, *prima facie*, apply equally to proceedings in the Original Insolvency Court and to proceedings in appeal from it. But, having regard to the generally adopted interpretation of the phrase "any person aggrieved" set out in the well-known case of

(1) (1915) I.L.R., 37 All., 252.

(2) (1916) I.L.R., 39 Mad., 479.

(3) (1888) 17 Q.B.D., 1.

(4) (1924) I.L.R., 47 Mad., 678 at 682.

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*In re Sidebotham*(1) and adopted therefrom in various decisions in this country [see *Ananthanarayana Ayyar v. Sankaranayana Ayyar*(2) and *Kumarappa Chettiar v. Murugappa Chettiar*(3)] it must be admitted that section 75 does give an individual creditor a wider right, viz., a right to appeal in any case in which his interests are adversely affected whether it is his individual interests or his interests as one of the general body of creditors which are so affected, so that it is open to the individual creditor to appeal in a case where his interests are homogeneous with, and not opposed to those of the whole body of creditors, even though he has not first moved the Official Receiver to appeal and had a refusal.

At the same time it is essential that the general principle that the individual creditor cannot without leave or order of the Court represent the whole body of the creditors, must not be lost sight of, and in cases where he does so it must be made clear that the appeal is on behalf of the general body of creditors. Following therefore the analogy of a suit by an individual creditor under section 53 of the Transfer of Property Act [*cf. Pokker v. Kunhammad*(4) and *Ishwar Timappa v. Devar Venkappa*(5)], I would direct that before this petition of appeal be entertained and heard, the petition be amended so as to make it clear that the appellant is appealing on behalf of the general body of creditors, so that any order he may obtain will enure on their behalf and be worked out, if necessary, by the Official Receiver.

The general principles on which such insolvency proceedings ought to be conducted would then be these. In original proceedings in the Insolvency Court, in which an individual creditor's individual interests are concerned and are opposed to the interests of the other

(1) (1880) 14 Ch. D., 458.

(2) (1924) I.L.R., 47 Mad., 673.

(3) (1916) 36 I.C., 771.

(4) (1919) I.L.R., 42 Mad., 143.

(5) (1903) I.L.R., 37 Bom., 146.

creditors so that the Official Receiver cannot represent the individual creditor's individual claims, a motion may be made by the individual creditor and an appeal may be made by him also ; but when in the original proceedings the individual creditor's interests are homogeneous with those of the rest so that the Official Receiver can represent all, the proper person to move is the Official Receiver and the individual creditor cannot move unless there is a decision of the Official Receiver against him under which he can come up under section 68. But in the matter of appeals an individual creditor can always appeal whether or not the Official Receiver does ; but if in the matter of appeal his interests are homogeneous with those of the rest of the creditors, then in such a case he must make his petition a representative petition on behalf of all the creditors.

I do not think that the fact that the appellant was not in his individual capacity a party to the original petition precludes him from appealing. This individual creditor was in matters in which his interests are homogeneous with those of the general body of creditors sufficiently represented in the Original Court by the Official Receiver who was a party to the original proceedings.

Various decisions have been quoted at the bar. I shall refer only to a few of them. *Iyappa Nainar v. Manicka Asari*(1) is no authority against a right of appeal in this case. There the creditors' interests were not affected in any way and it was held therefore that he had no right of appeal at all. *Appireddi v. Appireddi*(2) is not a case of an appeal, and section 75 did not come under consideration. Ordinarily, as I have said, where the interests of all creditors are involved, the individual creditor cannot move in the Original Court

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(1) (1917) I.L.R., 40 Mad., 680.

(2) (1922) I.L.R., 45 Mad., 189.

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unless and until the Official Receiver has refused to move. The same rule is laid down in 47 Mad., 673 and *Hemraj Champa Lall v. Ramkishen Ram*(1). The respondent relied strongly on 47 Mad., 673. That, however, was a case in which the Court did not deny the right of a creditor to come up on appeal, but only held that he had been premature and should have applied himself to the Original Court in place of the Official Receiver who refused to act under sections 53 and 54 of the Act to have the alienation set aside, and it was laid down generally that the principle must be safeguarded, that a creditor should ordinarily act on behalf of the whole body of creditors, and if necessary for that purpose should apply for and obtain permission to use the Official Receiver's name. The same principle was safeguarded in another way in *Jaganatha Ayyangar v. Narayana Ayyangar*(2) by the Court directing that the proceedings after remand ordered on appeal by an individual creditor should be conducted by the Official Receiver. The respondent relies on the wording in the 47 Madras case with reference to the right of appeal under section 75 :

“ We see no reason why we should not . . . hold that a creditor can appeal when he is a party to the decision appealed against, ”

and it is sought to deduce the inference that he cannot appeal when he is not a party to the decision appealed from. As to this, I think, as I have said, that, as his interests in that case are homogeneous with those of the general body of creditors he need not have been represented in the original proceedings in his individual capacity; it is sufficient that he was represented by the Official Receiver. In *The East India Cigarette*

(1) (1917) 2 P.L.J., 101.

(2) (1919) 52 I.O., 761.

*Manufacturing Co., Ltd. v. Ananda Mohan Basak*(1), an individual creditor whose individual interests were at stake was allowed to appeal and make the Official Receiver a party in order to have on record the general body of creditors. The previous view in the Allahabad High Court set out in *Jhabba Lal v. Shib Charan Das*(2), that the provisions of Act III of 1907 did not allow an individual creditor to appeal has been altered in deference to the wording of the present section 75. See *Shikri Prasad v. Aziz Ali*(3) and *Niadar v. Ramji Lal*(4).

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I would therefore allow the appeal to be argued provided the appellant amends his appeal petition to make it clear that his appeal is presented by him as representative of the general body of creditors, and then he may be heard on the merits.

MADHAVAN NAYAR, J.—The facts of this case are very simple. One Kathaperumal Pillai was adjudicated as an insolvent. He had assigned a lease in his favour to the second respondent. The Official Receiver at the instance of the present appellant, one of the creditors, filed an application before the District Judge to set aside this alienation under sections 53 and 54 of the Provincial Insolvency Act, V of 1920. The appellant himself was not an actual party to the proceedings. The District Judge declined to set aside the alienation. The present appeal is against this order of the District Judge. The appellant, before filing the appeal, did not move the Official Receiver to file an appeal, but he has made him the third respondent before us.

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Mr. Ramachandra Ayyar on behalf of the second respondent, the alienee, takes the preliminary objection that the appellant, inasmuch as he did not request the

(1) (1919) 24 C.W.N., 401.

(2) (1916) I.L.R., 39 All., 152.

(3) (1922) I.L.R., 44 All., 71.

(4) (1925) 23 A.L.J., 503.



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Official Receiver to file an appeal beforehand, is not himself entitled to file it. The appeal has been preferred under section 75, sub-section (2) of the Provincial Insolvency Act. Section 46 of Act III of 1907 gave a right of appeal to any person aggrieved by an order made in the exercise of insolvency jurisdiction. The Madras High Court in *Thirumenkata Chariar v. Thanagayammal* (1) held that an individual creditor was a person aggrieved and was entitled to appeal. In that view, as pointed out in *Niadar v. Ramji Lal* (2) the terms of section 46 have been altered in the new Act in section 75, sub-section (1) to

“The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction \* \* .”

Sub-section (2) of section 75 provides that

“Any such person aggrieved by any such decision or order of a District Court as is specified in Schedule I, come to or made otherwise than in appeal from an order made by a Subordinate Court, may appeal to the High Court.”

There can be no doubt that the decision of the District Judge is clearly adverse to the interests of the appellant; for it reduces the amount of property out of which he will be entitled to claim a dividend. It is conceded by Mr. Ramachandra Ayyar that the language of the section is certainly wide enough to include, within its terms—

“Any such person aggrieved by any such decision or order of a District Court,”

a creditor like the present appellant who was not an actual party to the original proceedings or who has not asked the Official Receiver to file an appeal. But he argues that, according to the decisions of this Court, an appeal by a creditor under this section is to be deemed

(1) (1916) I.L.R., 39 Mad., 479.

(2) (1925) 23 A.L.J., 503.

incompetent if he is not an actual party to the proceedings, or if he has not moved the Official Receiver to file the appeal beforehand.

In my opinion, the position contended for is not warranted by the decisions of this Court. In *Kumarappa Chettiyar v. Murugappa Chettiyar*(1), when an objection was raised as regards the maintainability of an appeal filed by a contesting creditor in insolvency proceedings under section 36 of the old Act, III of 1907, KRISHNAN, J., after a consideration of the English authorities as to who is a person aggrieved stated as one of his conclusions that a person is "aggrieved by an order where he is party to an order, or, even if he is not, he is bound by the order and the order affects his interests, i.e., his person or his property, injuriously." If so, the appellant, though not a party, as "an aggrieved person," is certainly entitled to prefer the appeal. OLDFIELD, J., while agreeing with the conclusion of KRISHNAN, J., made the following observations:—

"The Official Receiver, from the moment at which the insolvent's estate vests in him, represents the body of creditors and ought to protect their interests. If in the exercise of his discretion he thinks it unnecessary to appear to do so, but finds that a particular creditor thinks an appearance necessary, the proper practice is for him to obtain an indemnity from such creditor and to carry on the contest, recovering his costs from him in case of failure."

These remarks, in my opinion, do not lay down that an aggrieved creditor can prefer an appeal only in cases where the Official Receiver has refused to do so; they only indicate the usual practice and are meant to point out that the order passed in insolvency cases after the vesting of the estate in the Official Receiver will enure only to the advantage of the whole body of creditors.

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This decision was followed by OLDFIELD and SESHAGIRI  
AYYAR, JJ., in 52 Ind. Cas., 761, with this remark :

“ This, however, we may observe, will not entitle appellant  
(a creditor) to the conduct of the petition in the lower Court,  
when it is dealt with there in pursuance of this order.”

In *Ananthanarayana Ayyar v. Sankaranarayana Ayyar*  
(1) the case most relied on by Mr. Ramachandra Ayyar,  
it was held that a creditor could move the Court to set  
aside a voluntary transfer or to avoid a fraudulent  
preference and that he could file an appeal against  
the order of the lower Court. In the course of their  
judgment the learned Judges observed :

“ If the Official Receiver refuses to move the Court under  
section 53 or 54 even though a creditor offers to indemnify him  
against costs in the event of an adverse order against him, such  
creditor can apply to the Court to permit him to use the Official  
Receiver's name, or make him a party to the proceedings and  
may move for an order under section 53 or 54 ; and if the order  
is against him, if the Official Receiver refuses to appeal notwith-  
standing the offer of indemnity against costs, the creditor can  
appeal against the order and may make the Official Receiver a  
party to the appeal.”

These remarks, while laying down a very salutary  
rule of practice, do not, in my opinion, support the  
contention that an aggrieved creditor cannot prefer an  
appeal under section 75 (2) without first obtaining a  
refusal from the Official Receiver. The observation in  
the judgment

“ We see no reason why we should not \* \* \* hold  
that a creditor can appeal when he is a party to the decision  
appealed from,”

does not necessarily lead to the conclusion that an  
aggrieved creditor can prefer an appeal only if he  
actually figures in his own person as a party to the  
original proceeding. In the present case, the appellant

was sufficiently represented by the Official Receiver in the lower Court as his interests did not conflict with those of the other creditors and, in this sense, he may be deemed to have been a party to the original proceeding. It is true that in all the rulings of the Madras High Court that we have examined the creditor was an actual party to the proceedings and that in some of them there are remarks that a creditor, before he moves the Court, should apply to the Official Receiver to take the necessary proceedings; but it seems to me that none of the decisions goes the length of holding that a creditor can prefer an appeal against an adverse order passed by the District Judge only if he is an actual party to the proceeding or only if the Official Receiver on being moved refuses to appeal. To import this limitation would be to cut down the general right conferred upon an aggrieved creditor by section 75 (2).

The contention that has been advanced on behalf of the appellant is supported by the decision in *Shikri Prasad v. Aziz Ali*(1). In that case the original application was by the insolvent complaining under the old Act against an act of the Official Receiver and from the order passed by the District Judge a creditor preferred an appeal. In reply to the objection that no appeal lay, the learned Judges observed that section 75 (2) of Act V of 1920 gives a right of appeal to any creditor against the decision of a District Court of the nature specified in Schedule 1 of the Act. In *Niadar v. Ramji Lal*(2) the crops in suit were attached by a Receiver in insolvency at the instance of the appellant who was a creditor of the estate. The District Judge held that the crops were sold to the respondent and belonged to him and directed their release from attachment. The creditor preferred an appeal to the High

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(2) (1925) 23 A.L.J., 503.

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Court under section 75(2). As regards the preliminary objection taken that no appeal lay, the learned Judges pointed out that the decision being adverse to the interests of the creditor, he was a person aggrieved and had, therefore, a right of appeal under section 75 of the Act. It is not clear from the report whether the creditor was actually a party to the original proceedings.

In my opinion, the preliminary objection in this case should be overruled. The right conferred by section 75 (2) is not to be fettered by considerations such as whether he was an actual party to the proceedings, or whether before he filed his appeal he moved the Official Receiver to appeal. It is the policy of the insolvency law to administer an insolvent's estate in the interests of all the creditors. Any order that may be passed in favour of the appellant-creditor will enure only to the benefit of the entire body of creditors represented by the Official Receiver and not merely for his own benefit. Since the Official Receiver is a party to this appeal, there can be no difficulty, in the event of the creditor's success, in passing an order in favour of the Official Receiver, so that the advantages resulting from it may enure for the benefit of all the creditors. The same result may be achieved, as suggested by my learned brother, by directing that, before this petition of appeal be entertained and heard, the petition be amended so as to make it clear that the appellant is appealing on behalf of the general body of creditors, so that any order he may obtain will enure on their behalf and be worked out, by the Official Receiver.

For these reasons, I would overrule the preliminary objection and proceed with the case. I agree with the order proposed by my learned brother.

This appeal and the Memorandum of Objections put in by the second respondent coming on for further

hearing this day after the amendment of the appeal petition in compliance with the order of Court contained in the above judgment, dated 7th January 1926, the Court delivered the following

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### JUDGMENT.

The appeal petition has been amended and is now in proper form. The District Judge cannot decline to go into the matter of the nominal or fraudulent nature of the alienation. The "Separate suit" he speaks of is not between the present parties and will not settle the matter at issue between them. We set aside his order and direct that the petition be re-heard and decided in the insolvency proceedings. Appellant will get his costs here up-to-date.

The Memorandum of Objections is dismissed.

K.R.

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### APPELLATE CIVIL.

*Before Mr. Justice Phillips and Mr. Justice  
Madhavan Nayar.*

VENKATASAMI NAIDU (FIFTH DEFENDANT), APPELLANT,

v.

VENKATASUBBA NAIDU AND OTHERS (PLAINTIFF  
AND DEFENDANTS 1 TO 4), RESPONDENTS.\*

1926,  
January 27.

*Limitation Act (IX of 1908), art. 182 (4)—Date of amendment, meaning of—Order directing amendment, whether a judgment—Amended decree, whether should bear same date as order to amend.*

The words "date of amendment" in article 182 (4) of the Limitation Act (IX of 1908) mean the date of the Court's order

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\* Appeal against Order No. 150 of 1924.