

## APPELLATE CIVIL.

*Before Mr. Justice Devadoss and Mr. Justice Waller.*

CHITTAMMAL AND ANOTHER (2ND AND 3RD RESPONDENTS),  
APPELLANTS,

v.

1. PONNUSWAMI NAICKER  
2. A. SUBRAMANIA AYYAR,  
OFFICIAL RECEIVER OF TINNEVELLY } PETITIONERS),  
RESPONDENTS.\*

*Provincial Insolvency Act (V of 1920), ss. 4 and 56—Application under sec. 56 (3) to remove a person from possession of property—Person in possession setting up title—Delivery of possession, whether can be directed under sec. 56 (3)—Application under sec. 4—Question of title—Effect of order under sec. 56 (3) and sec. 4, difference between—Nature of applications under the section—Parties to application.*

Acting under section 56 of the Provincial Insolvency Act (V of 1920), the Court cannot direct any person to deliver up any property in his possession to the Official Receiver, unless the insolvent is entitled, on the date of the application under the section, to the immediate possession of the property; if a title, however flimsy, is set up by the person in possession, the Court cannot act under section 56.

But it is open to the Court, on a proper application being made under section 4 of the Act, to try the issue whether the insolvent is entitled to the property or not.

APPEAL against the order of J. K. LANCASHIRE, the District Judge of Tinnevelly, in Insolvency Application No. 265 of 1923, in Insolvency Petition No. 17 of 1923.

The first petitioner in the lower Court, a lessee of the properties in question from the second petitioner, the Official Receiver of Tinnevelly, filed a petition under section 56 (3) of the Provincial Insolvency Act in the District Court to remove the respondents 2 and 3 therein, from the properties in their possession on the ground

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that the properties belonged to the insolvent adjudicated in I.P. No. 17 of 1921. The persons in possession claimed to be in possession of the properties ever since 1897 under a family arrangement; and they contended that their names as well as the name of the insolvent were included in a joint patta, that the second respondent was the widow of the insolvent's paternal uncle, that the third was her daughter, that they had been paying the Government revenue ever since, that they were given the lands in absolute right and that their possession could not be disturbed. They adduced evidence to prove their case. The learned District Judge held that there was no valid absolute gift, but that they were probably entitled only to maintenance; that the properties were vested in the insolvent, and directed, under section 56 (3), that the Official Receiver be placed in possession of the properties, removing the second and third respondents from their possession. The latter preferred this appeal.

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*K. Bhashyam Ayyangar* and *S. Rajagopalachariar* for appellants.

*K. R. Rangaswami Ayyangar* and *R. Krishnaswami* for respondents.

### JUDGMENT.

DEVADOSS, J.—This appeal is against the order of the District Judge of Tinnevely directing the appellants to hand over possession of the property in their possession to the Official Receiver and his lessee. The first respondent herein is the lessee of the property from the second respondent who is the Official Receiver of Tinnevely. The appellants were in occupation of the property in dispute from the year 1897. The respondents applied to the District Judge for an order under section 56 of the Provincial Insolvency Act directing

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the appellants to hand over possession of the property in dispute to the respondents on the ground that the property was the property of the insolvent. The learned Judge has passed an order under section 56 (3) in favour of the respondents. The question for consideration is whether such an order can be passed against persons who claim adversely to the insolvent. Section 56, clause (3), second paragraph is in these terms :—

“ Provided that nothing in this section shall be deemed to authorize the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove.”

An application under section 56 is made for the purpose of realization of the property of the insolvent. If a person is in possession of the property on behalf of the insolvent, or claims under the insolvent, possession of such property may be taken under the orders of the Court by the Official Receiver. But where the person in possession claims adversely to the insolvent, or where he is able to show that the insolvent is not entitled to present possession, the Court has no power to proceed under section 56, for the second paragraph of clause (3) specifically says that

“ nothing in this section shall be deemed to authorize the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove.”

The corresponding provision in the Presidency Towns Insolvency Act is section 58; and clause (2) of that section puts the matter beyond doubt. It is as follows :—

“ The Official Assignee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent, be in the same position as if he were a receiver of the property appointed under the Code of Civil Procedure, 1908,

and the Court may, on his application, enforce such acquisition or retention accordingly.”

The position of the Official Assignee is therefore the same as that of a receiver appointed under the Code of Civil Procedure. Order XI, rule 1 (2), is as follows :—

“ Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.”

The power of the Court under the Provincial Insolvency Act, section 56, is not any higher than the power of the High Court under the Presidency Towns Insolvency Act, section 58. The Court therefore cannot, acting under section 56, direct any person to deliver up property in his possession to the Official Receiver unless the insolvent is entitled on the date of such application to the possession of such property. If a title, however flimsy, is set up by the person in possession, the Court should not act under section 56. It is open to the Court on a proper application being made under section 4 of the Provincial Insolvency Act to try the issue whether the insolvent is entitled to the property or not. But in order to enable the Court to do that a proper application ought to be made under section 4 of the Provincial Insolvency Act, and the other side should be asked to plead thereto.

In this case it is suggested for the respondents that, though the application was made under section 56, it must be deemed that the enquiry was held under section 4 and the order was made under that section. But it is clear from the sixth paragraph of the District Judge's order that he passed the order only under section 56 (3) and we cannot import into it something which is not there. If the application was one under section 4 the first respondent should not have been made a party. Nobody other than the Official Receiver can move under

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section 4 unless the Official Receiver is unwilling to act and the Court authorizes a creditor or any other person interested in preserving the insolvent's estate to act under that section in the name of the Official Receiver.

It is again urged that the question of the title of the appellant has been gone into and has been found against, and therefore it is unnecessary that there should be a fresh proceeding under section 4. When an order is passed under section 56 (3) it does not determine the rights of the parties and though the Judge may incidentally determine the question, yet it cannot be said that the question is finally determined. It would not be right to allow a loose procedure to obtain in insolvency proceedings. The law of insolvency is not properly understood in the mufassal and it would not be right on the part of the Court to adopt a loose procedure for the purpose of realizing the estate of the insolvent. Such a procedure would lead inevitably to hardship and to an unsettled state of the law.

In regard to the merits it is unnecessary to say much. The appellants were in possession of the property from 1897. They claim to have been in possession of the property by virtue of an arrangement in the family. It is urged by Mr. Bhashyam Ayyangar that no registered document is necessary for a family arrangement. If the appellant could show that there was a proper arrangement, they would be entitled to retain possession of the property against the insolvent and against the Official Receiver.

On behalf of the respondents it is urged that the first appellant is dead and therefore the second appellant, daughter of the first appellant, has no right to be in possession of the property. This question again will have to be gone into fully, and in the absence of an investigation into the title of the second appellant it

would not be right to deprive her of the possession of the property and drive her to a suit. If the order is to be construed as an order under section 4 a suit would be barred; if it is construed as an order under section 56 (3) the order is illegal inasmuch as the insolvent is not entitled to present possession of the property.

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In a recent case, *Official Receiver of South Arcot v. Perumal Pillai*(1), it was decided by SPENCER, J., and myself that the power given by section 4 of the Provincial Insolvency Act, is subject to the provisions of the Act one of which is the proviso to section 56 (3) which is in the way of the Court removing any person from the possession of property whom the insolvent has no present right to remove.

The appeal is allowed and the order of the lower Court is set aside with costs throughout.

WALLER, J.—I agree that, where there is a dispute as to the insolvent's title, section 56 cannot be invoked. For, in order that that section may be resorted to, the insolvent must have an immediate right to remove from possession. Proceedings therefore should have been taken under section 4.

WALLER, J.

K.R.

(1) (1923) 18 L.W., 884.