one sense, no doubt, the sale is in pursuance of or "in execution of," the order, since such an order has ordinarily in contemplation a realization of assets by sale. But attaching to "execution" the meaning which it bears in relation to judicial proceedings, I conclude that such a sale falls outside the scope of the exception. I agree, therefore, that the appeals must be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Sir C. V. Kumaraswami Sastri, Kt., *Officiating Chief Justice and Mr. Justice Curgenven.*

1926, August 12.

1. DHURVAS T. SUBBAYYAR & BROTHERS, APPELLANTS IN BOTH APPEALS,
2. OFFICIAL RECEIVER, MADURA—SUPPLEMENTAL APPELLANT IN BOTH APPEALS.

v.

T. K. MUNISAMI AYYAR & SONS, RESPONDENTS IN BOTH APPEALS.*

Provincial Insolvency Act (V of 1920), ss. 2, 20, 33, 49, 50—Suit by vendor for damages for breach of contract for purchase of goods—Decree for damages—Appeal by vendee—Vendee adjudicated insolvent subsequent to filing of appeal—Right of Official Receiver to continue appeal—Suit by vendee to recover deposit—Decree dismissing suit—Appeal by vendee—Vendee adjudicated insolvent pending appeal—Right of Official Receiver to continue appeal—Remedy of Official Receiver against decrees for damages against insolvent—Official Receiver entitled to contest such decree by taking proceedings under the Insolvency Act.

Where a decree for damages was passed against a vendee in a suit against him by the vendor for damages for breach of

*Appeals Nos. 220 and 221 of 1921.

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contract, and the vendee appealed against the decree but was adjudicated insolvent during the pendency of the appeal, and the Official Receiver claimed to continue the appeal,

Held, that section 59 of the Provincial Insolvency Act (V of 1920), does not authorize the Official Receiver to appeal, or continue an appeal already preferred by the insolvent prior to his adjudication, against a decree for damages in a suit for breach of contract against the insolvent; the expression "relating to the property of the insolvent" in clause (*d*) of section 59, does not mean "*affecting* the property of the insolvent."

The Official Receiver is not without remedy against decrees for damages passed against the insolvent, because the decree is not binding on him but it is open to him to contest the validity of the decree as a debt, in proper proceedings taken under the provisions of the Provincial Insolvency Act (V of 1920), such as sections 33, 49 and 50 of the Act.

Where, however, an insolvent before his adjudication, had instituted a suit against his vendor for the return of a deposit of money made by him with the latter under a contract for sale of goods, alleging breach of contract by the latter, but the suit was dismissed and the former appealed prior to his adjudication, the Official Receiver is entitled to continue the appeal, because in this case the deposit is the insolvent's property which became vested in the Official Receiver under section 20 of the Provincial Insolvency Act, 1920, and section 59, clause (*d*), expressly authorizes the Official Receiver to institute or continue legal proceedings relating to such property.

APPEALS against the decrees of T. N. LAKSHMANA RAO, Additional Subordinate Judge of Madura, in O.S. No. 27 of 1921, and O.S. No. 58 of 1921, respectively.

The material facts appear from the judgment. These appeals were originally preferred by the vendees. After the filing of the appeals, the appellants were adjudicated insolvents, and the Official Receiver was appointed Receiver of their properties. The appeals were not prosecuted by the insolvents and were dismissed. The Official Receiver applied to have the appeals restored as he had no notice of the appeals and their dismissal. The petition was granted, and on the hearing of the appeals,

the respondent took the objection that the Official Receiver was not entitled to continue the appeals.

A. Krishnaswami Ayyar for respondents.—There is a preliminary objection to the competency of the Official Receiver to continue the appeal. In Appeal No. 220 of 1921, a decree was passed for damages for breach of contract against the insolvent. Section 28 of the Provincial Insolvency Act, 1920, does not transfer a right of action to the receiver in insolvency. In *Chandmull* v. *Ranee Soondery Dossee*(1), it has been held that the Official Assignee cannot be made a party to a decree passed against an insolvent. In *Kondapalli Tatireddy* v. *Ramachandra Rao*(2), it has been held that an *insolvent* can continue the suit or appeal even after insolvency in certain cases. Section 59 (*d*) does not authorize the Official Receiver to appeal or continue the appeal of the insolvent against a decree for damages. Right of action for damages for breach of contract is not property. In English Common Law, a right of action for damages may vest in the Official Assignee. (See Williams on Bankruptcy, 11th edition, page 247.) The Indian Law is at variance with the English Law. Section 28 of the Provincial Insolvency Act, 1920, defines what properties vest in Official Assignee or Receiver. Property attachable under Civil Procedure Code, section 60, vest; mere right to sue is not assignable under section 6 of the Transfer of Property Act. A right to sue for damages does not vest in Official Assignee. In *Abu Mahomed* v. *S. C. Chunder*(3), it has been held that a right to damages for breach of contract, is not assignable and not attachable, and therefore does not vest in the Official Assignee under the Indian Law. The English Law is no guide, for there is express departure as to damages for breach of contract which does not vest in the Official Assignee under the Indian Law, by reason of the operation of section 28 of the Provincial Insolvency Act, 1920, section 60, Civil Procedure Code, and Transfer of Property Act, section 6.

C. V. Ananthakrishna Ayyar for appellant.—Order XXII, rule 8, says that the Official Assignee can continue the suit or appeal on behalf of the insolvent's creditors. Debtor and debt include judgment-debtor and judgment-debt. Official Receiver can come in and continue the suit or appeal under Order XXII, rule 8, Civil Procedure Code. The expression

(1) (1895) I.L.R., 22 Calc., 259 at 265. (2) (1921) 13 L.W., 616.
(3) (1909) I.L.R., 36 Calc., 345.

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"relating to property of the insolvent" in section 59 (*d*) of the Provincial Insolvency Act, 1920, includes decrees against insolvent for damages. "Relating to property" means affecting such property. See *United Telephone Co.* v. *Bassano*(1). The decision in *Chandmuli* v. *Ranee Soondery Dossee*(2), was under the old Insolvency Act, 11 and 12 Vic., Chap. 21. The present Insolvency Act, 1920, goes very much further than the old Acts. See *Easwara Iyer* v. *Govindarajulu Naidu*(3). A suit for damages for breach of contract is not a mere right to sue; see 2 Halsbury, page 137, section 236. The decision in 36 Calc., 345, is under the Transfer of Property Act.

A. Krishnaswami Ayyar in reply.—The construction of "relating to insolvent's property" in section 59, clause (*d*) as meaning "affecting such property" proves too much. If the appellant's construction is right, every suit by or against the insolvent can be continued by the Official Assignee or Receiver. The expression "relating to property" means having immediate reference to property.

Order XXII, rule 8, presupposes a right to maintain a suit by the Official Assignee. The right to institute a suit or continue it must be decided with reference to the Provincial Insolvency Act. The Receiver is not without remedy. The decree for damages is not binding on the Official Assignee. It is a debt. It must be proved as a debt. The Official Assignee can go to the Insolvent Court to re-open the judgment and decree. See sections 2, 33, 49 and 50 of the Provincial Insolvency Act, 1920. Under the English Law also, the decree can be re-opened and is not binding on the Bankruptcy Court. See Williams on Bankruptcy (11th edition), pages 53 and 146.

JUDGMENT.

These appeals arise out of a contract for purchase and delivery of goods entered into by the appellant in each of the cases with the respondent. The contract has been filed as Exhibit D, which, after describing the goods and the place where the goods were to be got from and delivered, in paragraphs 1 and 2, goes on to say that the purchaser shall be bound by the contract,

(1) (1886) 31 Ch. D., 630. (2) (1895) I.L.R., 22 Calc., 259 at 265.
(3) (1916) I.L.R., 39 Mad., 689 at 691.

he (respondent) entered into with his vendors and should take delivery of the goods. As regards the delivery of the goods and the advance, paragraphs 5, 6 and 7 are material; they run as follows:

"On the very day on which the aforesaid two persons (their vendors) inform that the aforesaid bales have arrived here you should pay money and take delivery of the bales. Whenever the aforespecified bales are issued from the mill you should take delivery of the same. We are not liable therefor. As the aforespecified advance money is with us without interest, as the bales are issued, according to the proportion of the advance, you should deduct for the bales at the rate of Rs. 190 and at the rate of Rs. 160 per bale."

Then clause 8 says:

"If the bales are received from the aforesaid two persons and if we have not informed you of the same we are liable for the matters of loss that may result therein. In the matter of your not taking delivery after we informed you of the receipt, you yourself are liable for the loss that may arise therein."

This is signed by the respondent firm and is addressed to the appellant firm. Suit No. 27 of 1921 which led to Appeal No. 220 of 1921 was filed by the present respondent against the appellant for recovery of damages for breach of contract, the allegation being that the appellant has not performed his contract in taking delivery. The particulars are given in the plaint and the claim, after credit is given for the advance, is for Rs. 8,860 as detailed in Schedule A or in the alternative for Rs. 3,460 as detailed in Schedule B with interest and costs. Suit No. 58 of 1921 which refers to Appeal No. 221 of 1921 was filed by the present appellant against the respondent for the recovery of the advance paid with interest. His case is that under this contract he paid advances, that the respondent did not deliver the goods and therefore the contract was broken by the respondent and that the appellant is entitled to recover the advance with interest. He claims

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Rs. 5,289-10-0. The suits were tried together and the Subordinate Judge decreed the plaintiff's claim in O.S. No. 27 of 1921, holding that the breach was on the part of the defendant in that suit and awarded a decree for about Rs. 7,000 odd as damages after giving credit for the advance which was paid. He dismissed Suit No. 58 of 1921, the suit filed by the present appellant against the respondent, on the ground that the breach of contract being on the part of the plaintiff in that suit, he was not entitled to recover the deposit.

These appeals are filed by the appellant against the two decrees. After the filing of the appeals, the appellant became insolvent. He applied for the benefit of the provisions of the Provincial Insolvency Act and an Official Receiver was appointed. When the appeals came on, the appellant who became insolvent did not press the appeal. The Official Receiver not being a party, did not appear and the result was that the appeals were dismissed. The Official Receiver then applied to be made a party to the appeals on the ground that he had no notice of the appeals and their pendency and that there was a good case to represent to the Court against the decrees of the Subordinate Judge. His petition was granted on terms that he gave security and the dismissal was set aside; and he now appears by Mr. Anantakrishna Ayyar to prosecute the appeals.

A preliminary objection was taken by Mr. Krishnaswami Ayyar on the ground that, under the Provincial Insolvency Act, it is not competent to the Official Receiver to prosecute an appeal which relates to a claim for damages only and does not affect any property of the insolvent. He bases his contention on two grounds, first of all, he states that so far as the claim for damages is concerned, section 28 of the Provincial Insolvency Act of 1920 states the effect of an order of

adjudication. Clause 2 states that on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided, and shall become divisible among the creditors and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose. Then follow what properties, for the purposes of the section, shall be included and excluded. As regards exclusion, clause 5 of the section says :

" The property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree. "

We have now therefore to turn to the Civil Procedure Code to see what are exempted from attachment because such exempted property could not vest in the Court or in the Receiver. Section 60 of the Code in treating of property not liable to attachment refers in clause (*e*) to a mere right to sue for damages. We take it, by mere " right to sue " is meant a right which has not ripened into or merged in a decree of Court and which still exists as a cause of action which the insolvent can enforce if he chooses by filing a proper suit. Section 6 (*e*) of the Transfer of Property Act is also relied upon which exempts from transfer a mere right of suit and states that it cannot be transferred. In the case of an unliquidated claim for damages there can be no doubt that it is a mere right of suit and the contention of Mr. Krishnaswami Ayyar is that reading

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these sections together in this case, the right of suits would not vest in the Official Receiver and secondly, that he has no right to come in as a party. If the matter rested here, there may be some force in this contention. But in this case there are two points to be considered. On the date when the appellants became insolvents not only had the respondents exercised their right of filing a suit, but there was also a decree which they obtained against the insolvents and the matter did not rest merely on a chose-in-action which has not ripened into a decree. The case must therefore be judged with reference to section 59 of the Provincial Insolvency Act. That section says:

"Subject to the provisions of this Act, the Receiver shall, with all convenient speed, realize the property of the debtor and distribute dividends among the creditors entitled thereto and for that purpose may sell all or any part of the property of the insolvent; give receipts for any money received by him; and may, by leave of the Court, do all or any of the following things, namely, (*c*) carry on the business of the insolvent so far as may be necessary for the winding up of the same; (*d*) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent."

Then other clauses follow which it is not necessary for us to consider. Turning to this section, what we have to see is what under clause (*d*) is the meaning of the terms "relating to the property of the insolvent." Is it a suit which directly or immediately affects the property of the insolvent or is it a suit or legal proceeding which might ultimately result in a decree which if executed or sought to be enforced would be payable out of the assets of the insolvent and thereby affect the property? The argument of Mr. Krishnaswami Ayyar is that it should be such as directly and immediately affects the property and that we cannot hold "relating to the insolvent's property" to mean "affecting the property," because that construction would result in every

cause of action which the insolvent had being continued or defended by the Official Receiver for the benefit of the insolvent, while the law clearly is that so far as regards merely personal actions the Receiver cannot continue them, but he can continue actions which are not personal, and he referred to some English cases on the point. We do not think there is very much use in referring to English law on the subject, because the Provincial Insolvency Act has codified and crystallized the law which we have to administer on the subject and we have not been referred to any corresponding section in the English Act. We do not think there is any authority for holding that the words "relating to" must be taken to mean "affecting." Mr. Anantakrishna Ayyar himself admits that such a construction, which would give the Official Receiver power to conduct suits of a purely personal nature, which no Court has yet allowed to be done, would be placing an undue stretch on the section. What he argues is that where once a decree is passed or where the cause of action does not relate to personal actions but relates to action founded on contracts and not of a purely personal nature, as the effect of a decree passed would be, if improper, to reduce the assets which are divisible among creditors, or, as the effect of a suit dismissed, if proper, should be to diminish the amount coming into the hands for distribution to the creditors, a wide construction would be placed on section 59 (*d*). It is argued that the Official Receiver has no remedy in such cases unless a liberal construction is put on section 59 (*d*). It seems to us that the Official Receiver has in such cases a remedy. The definition of a debt under the Insolvency Act includes a decree debt because section 2 (*a*) states that "creditor" includes a decree-holder and "debtor" includes a judgment-debtor. Now the section

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as regards proof of debt is section 33 which states that

"When an order of adjudication has been made under this Act, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under this Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof and the Court shall, by order, determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts, and the amount of such debts, respectively, and shall frame a schedule of such persons and debts; provided that, if, in the opinion of the Court, the value of any debt is incapable of being fairly estimated, the Court may make an order to that effect and thereupon the debt shall not be included in the schedule. A copy of every schedule shall be posted in the court-house."

Then there is the provision that

"Any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule, and the Court, after causing notice to be served on the insolvent and the other creditors who have proved their debts, and hearing their objections (if any), shall comply with or reject the application."

Then comes section 49 which describes the mode of proof and it says that

"A debt may be proved under this Act by delivering or sending by post in a registered letter, to the Court an affidavit verifying the debt. The affidavit shall contain or refer to a statement of account showing the particulars of the debt and shall specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers."

Then section 50 says

"Where the Receiver thinks that a debt has been improperly entered in the schedule, the Court may, on the application of the Receiver and after notice to the creditor, and such inquiry (if any) as the Court thinks necessary, expunge such entry or reduce the amount of the debt."

Clause 2 deals with cases where no Receiver is appointed. Thus we find that where a decree is passed without the Receiver being made a party, it is open to him to contest the validity of that decree in proper proceedings under the Insolvency Act. So far as the law in England is concerned, it is clear that the Bankruptcy Court is not bound by the decrees passed against the insolvent but can go into proof of the consideration and the amount which is due and the validity of those decrees. We may refer to Williams on Bankruptcy (13th edition), page 253. It is therefore not a case where the Official Receiver is without a remedy. We are of opinion that section 59 does not authorize the Official Receiver to appeal against a decree which was passed against the insolvent in a suit for damages which the respondent filed against him.

The suit which the insolvent-appellant filed against the respondent for the return of the deposit stands in an entirely different position. His case is that he deposited a certain sum of money with the respondent which was to be appropriated in a certain manner and when certain contingencies happened, that the respondent is not entitled to retain the money as he has not given the goods which was the consideration for the deposit being given and that therefore he is entitled to the return of the deposit. Now, deposit under those circumstances is the insolvent's property. The money is with the respondent, but it is the insolvent's property and he is entitled to get a return of the money in certain contingencies. It cannot be said that because the respondent in that suit might justify the retention on the ground that the insolvent has not fulfilled the conditions which entitle him to its return on a breach of contract, the suit is a suit for damages sounding entirely in damages without any reference to the

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property of the insolvent. None of the sections would apply because, if it is property of the insolvent, and the suit is only for the return of that property, it clearly vests in the Official Receiver under section 20 and he is entitled to get back the money. The defence which the defendant may raise is no criterion in estimating or appreciating the cause of action of the plaintiff. What we have to see is whether that money can be said to be his property and there can be little doubt that the money would be his property unless the defendant can show a right to appropriation and not to return it. We are of opinion therefore that Appeal No. 220 of 1921 fails and is dismissed with costs as the Official Receiver could not prosecute it and that Appeal No. 221 of 1921 is competent and that the Official Receiver can appeal against that decree in so far as it relates to the dismissal of the suit to recover the deposit. In this view the question is material as to whether this deposit which was admittedly received by the respondent in this case is returnable or not; and that question will turn upon who committed the breach of the contract. In all cases of deposits on contracts it is well established that a person in default cannot claim a return of the deposit and in this case, as it is not denied that if the contract was broken damages would be much more than the amount deposited no obligations arise to return the deposit for which credit will be given as in estimating the amount of damages. In fact, in the other suit in which a decree was obtained damages were awarded to the extent of Rs. 7,000 after giving credit to the advance. The findings of the Subordinate Judge are these, that as regards two bales, notice was given as required by the contract and the bales were accepted but as regards one bale, notice was given as required by the contract but the goods were not taken delivery

of and money paid. As regards seven bales although the respondent said that he tendered seven bales orally, the Subordinate Judge was not disposed to accept the evidence and to find that the seven bales were tendered according to the contract. As regards the twenty bales the position is that the respondent gave a notice Exhibit G to the insolvent stating that these bales were ready and he could take delivery on payment acting on the notice which he got in turn from Ramachari who was bound to deliver the goods. The notice went on to state that as the market was falling and as the traders were being put to great loss the Madura Mills who were to deliver the goods were willing to give goods of a more saleable quality in exchange for No. 44 and that it was open to the insolvent-appellant if he chose to accept them in lieu of the goods contracted for under the contract. There is nothing conditional about this notice. There is first of all the statement that the goods were ready for delivery and he could pay and receive them. There is an option given which if he chose he could exercise. It is not disputed that the insolvent-appellant got this notice. Having got it, he did not send any reply. It was his duty under the contract when he got this notice to have immediately paid the money and taken delivery of the goods. If delivery was not to be had at his godown according to the contract and he had to go to his vendor to take delivery, the vendor is not bound to get the goods to his godown in anticipation; immediately on his coming he could send for the goods and the performance would be complete. We find here as regards the one bale the insolvent-appellant has admittedly broken the contract; there is no question about it. In estimating who broke the contract and the effect of this notice, we have to take into consideration not only the fact that the appellant

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did not reply to this notice as a businessman would be bound to but that he did not take the one bale regarding which he broke the contract already. The motive for not taking delivery is the falling market. On these facts we think the respondent was justified in assuming that he would not perform the contract by taking the twenty bales and therefore making his own arrangements as regards these bales. As regards the seven bales the position is this. The Judge finds that there was no tender of the seven bales. Even assuming that that finding is correct, the insolvent-appellant who sues for the return of the deposit has broken the major part of the contract and the point is whether we should in this case apportion the damage as regards the seven bales which the Judge finds were not delivered. The contract is a single one and it is not argued before us that having regard to the state of the market, which it is not denied was a falling one about the time of the performance of this contract, the deposit would if apportioned to twenty-one bales still leave a margin as regards the seven bales. In these circumstances no purpose will be served by entering into an inquiry as to what was attributable to seven bales assuming that these seven bales were not tendered. It is clear from the evidence that so far as damages are concerned, it far exceeds the deposit and the suit will therefore fail as the appellant who claimed deposit committed breach of a very large portion of the contract. The appeal therefore fails and is dismissed with costs. The memorandum of objections is not pressed. Dismissed. No costs.

K.R.