alteration of the law not in a construction of the existing Act which would do violence to the most elementary rules of construction.

BHAVATHI DOSS BAVAJI v. SARANGARAJA IYENGAR.

It follows that the preliminary objection is upheld, and the appeals are dismissed with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice Bhashyam Ayyangar.

THE OFFICIAL RECEIVER OF SECUNDERABAD, APPELLANT,

1930, October 2.

v.

GUMIDELLI LAKSHMINARAYANA (DEAD) AND SIX OTHERS, RESPONDENTS.*

Courts—British Indian and Foreign—Courts of Foreign countries, British Colonies, etc.—Position of, quoad *British Indian Courts—Extra-territorial jurisdiction—Foreign Court—Meaning outside Code of Civil Procedure—Vesting order in insolvency by Foreign Court—Operation on insolvent's property within British India—Whether will prevail against previous attachment of property effected by Court in British India—Foreign and domestic receivers.*

In the contemplation of the general law of British India, there are only two kinds of Courts—British Indian Courts and Foreign Courts—and whatever is not a British Indian Court is a Foreign Court; so that, *quoad* the Courts of British India, the Courts, for example, of foreign countries, British Colonies, and assigned tracts like Secunderabad stand upon an

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* Original Side Appeal No. 55 of 1929.

OFFICIAL RECEIVER OF SECUNDERABAD v. LAKSHMINARAYANA.

equal footing as Foreign Courts, subject, of course, to the test of recognition as competent Courts.

The theory upon which extra-territorial jurisdiction is based is one of authority delegated for this purpose by the ruler of the territory over which it is exercised. But although, in the case of India, the authority so delegated, and the jurisdiction so exercised, is derived through His Majesty from the Governor-General in Council, and although the law may be identical with the law in force in British India, and may be administered by British officers, the Court so erected is a Foreign or extra-territorial Court.

Though under the Code of Civil Procedure, and for its purposes, a "Foreign Court" means "a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council," outside the Code this distinction does not appear to be drawn, and there is no reason to hold that for the purpose, for example, of insolvency jurisdiction it should be imported, nor even if imported, that it would affect whatever conclusions are to be drawn as to the effect of judgments passed by such extra-territorial Courts upon the proceedings of Courts in British India.

In general, a vesting order in insolvency made by a Foreign Court operates upon the property of the insolvent within British India, and will prevail against a prior attachment by creditors of the insolvent's property effected by a Court in British India; and in this matter there is no ground for distinguishing between the rights of a foreign and of a domestic receiver in insolvency.

ON APPEAL from the judgment of KUMARASWAMI SASTRI J., dated 23rd April 1929, and made in the exercise of the Ordinary Original Civil Jurisdiction in Application No. 802 of 1929 in Civil Suit No. 420 of 1922 on the file of the High Court, Madras, Original Side, and Civil Suit No. 510 of 1926 on the file of the High Court, Bombay, Original Side.

S. Varadachari for appellant.

S. Duraiswami Ayyar (*A. K. Ramachandra Ayyar* with him) for respondents.

JUDGMENT.

CURGENVEN J.—The question of law which this appeal raises is whether a vesting order made by the District Court of Secunderabad prevails against a prior attachment of a decree effected by a Court in British India. In 1922 a preliminary decree for partition was passed in Civil Suit No. 420 of 1922 on the file of this Court. In 1926 a creditor of the plaintiff in that suit, who had obtained a decree in Bombay, attached this preliminary decree. In 1928 the plaintiff was adjudicated an insolvent by the District Court of Secunderabad under the provisions of the Provincial Insolvency Act (V of 1920) which is in force in that area and an order was passed vesting his property in the Official Receiver of Secunderabad.

The legal argument divides into two stages:—

(1) What is the status of the District Court of Secunderabad and (2) what is the effect within British India of a vesting order passed by that Court. The former question presents little difficulty. Although administered by the Governor-General in Council, Secunderabad is part of the Nizam's Dominions, and lies outside British India. Jurisdiction over this area, as over a number of similar areas, is derived from the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), the preamble to which recites that the sovereign "by treaty, capitulation, grant, usage, sufferance, and other lawful means" has jurisdiction within divers foreign countries. Section 1 runs as follows:—

> "It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory."

OFFICIAL RECEIVER OF SECUNDERABAD v. LAKSHMINARAYANA.

CURGENVEN J.

By the Indian (Foreign Jurisdiction) Order in Council of 11th June 1902, powers under the Act were delegated to the Governor-General of India in Council for the purposes of constituting Courts and determining the law and procedure within areas extra-territorial to British India; and by a Notification of 1913 the specific Act with which we are concerned, the Provincial Insolvency Act (III of 1907), was declared applicable to Secunderabad. Section 3 of the Foreign Jurisdiction Act provides that

> "every act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country."

This is the principle upon which the Judicial Committee decided *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*(1), where the question arose as to what law, the English or the Muhammadan, the Consular Court in Zanzibar should administer. Their Lordships say:

> ". . . throughout the matter Zanzibar remains foreign territory, and the Queen and her officers are acting as Zanzibar authorities by virtue of the power which she has acquired, and which is within its limits a Sovereign power. It results that a Judge acting within these limits is a Zanzibar Judge, and is bound to take judicial notice of the Zanzibar law, whatever it may be, applicable to the case before him."

The theory upon which extra-territorial jurisdiction is based is one of authority delegated for this purpose by the ruler of the territory over which it is exercised—in the present instance the Nizam. But although, in the case of India, the authority so delegated, and the jurisdiction so exercised, is derived through His Majesty from the Governor-General in Council, and although the law may be identical with

(1) [1901] A.C. 373.

the law in force in British India and may be administered by British Officers, the Court so elected is a Foreign or extra-territorial Court. In the contemplation of the general law of British India, it seems that there are only two kinds of Courts—British Indian Courts and Foreign Courts—and that whatever is not a British Indian Court is a Foreign Court; so that *quoad* the Courts of British India, the Courts for example of foreign countries, British Colonies and assigned tracts like Secunderabad stand upon an equal footing as Foreign Courts, subject, of course, to the test of recognition as competent Courts. It is true, as Mr. Varadachariar points out, that the Code of Civil Procedure does distinguish another class of Court. Under that Act, and for its purposes, a "Foreign Court" means "a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council," so that by virtue of the concluding words a Court such as we are dealing with is not a "Foreign Court" within the definition. Special provisions affecting such Courts are to be found in sections 10, 43 and 45 of the Code dealing with *lis pendens* and the reciprocal execution of decrees. But outside the Code this distinction does not appear to be drawn, and there is no reason to hold that for the purpose, for example, of insolvency jurisdiction it should be imported, nor even if imported, that it would affect whatever conclusions are to be drawn as to the effect of judgments passed by such extra-territorial Courts upon the proceedings of Courts in British India.

The statutory provision which declares that the judgment *in rem* of a competent Court is conclusive proof that any legal character which it confers accrued

OFFICIAL RECEIVER OF SECUNDERABAD v. LAKSHMINARAYANA.

CURGENVEN J.

as from the date of that judgment is section 41 of the Evidence Act; and this applies, it is not disputed, to the foreign judgments of a competent Court no less than to domestic judgments. The English Law draws a distinction between the assignment of a bankrupt's immovable property to the trustee in bankruptcy and the assignment of movables, an assignment by a foreign Court of the former kind not operating, and of the latter kind operating, upon property situate in England (Dicey's Conflict of Laws, 4th Edition, Rules 123 and 124). An exception is made in favour of assignments of immovables under the Irish, Scotch and Indian Acts. [*Loc. cit.* Rule 122.] We are not concerned here with the assignment of immovables, and it seems clear that, in general, a vesting order made by a competent foreign Court operates upon property of the insolvent within British India, creating a title in the Official Receiver so invested. This title so operates with effect from the date of the order, the case *Galbraith* v. *Grimshaw*(1) being sufficient authority in dispute of the proposition that a foreign Receiver may take advantage of any "relating back" provision which his own Act may contain.

Accepting then that the insolvent's property in the decree in Original Suit No. 420 of 1922 vested in the Official Receiver of Secunderabad upon his adjudication on 15th October 1928, the second issue arises, whether such vesting will prevail against the respondent's earlier attachment of that decree. We have heard a good deal of argument upon this point based upon English decisions as to the effect of what in England corresponds most closely to the attachment of a debt in this country, a garnishee order *nisi*. It appears to me that

(1) [1910] A.C. 508.

the two proceedings differ in one critical particular which vitiates the analogy it is sought to draw. Under rule 1 of Order XLV of the Rules of the Supreme Court, a garnishee may, upon the application of a person who has obtained a judgment against his debtor, be called upon to "show cause why he should not pay to the person who has obtained such judgment" so much of the debt as may be sufficient to satisfy the judgment; and rule 2 declares that service of such an order upon the garnishee "shall bind such debts in his hands." The legal consequences of an order *nisi* have been considered in several cases cited before us, especially with reference to a competing claim in bankruptcy. In *Ex parte Joselyne. In re Watt*(1) JAMES L.J. said:

> "The moment the order of attachment was served upon the garnishee the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditors. The garnishee could then only pay his debt to the judgment creditor of his original debtor. The property in the debt was transferred, and there was a complete and perfect security the moment the order of attachment was served."

The other two learned Judges of the Court of Appeal, COTTON and THESIGER L. JJ. expressed the view that by virtue of the order the judgment-creditor became a secured creditor, and that may be a way of putting the position preferable to saying that the property in the debt was transferred. This latter proposition has in fact been dissented from in later cases, for instance in *Chatterton* v. *Watney*(2). The question of these competing claims again arose in *Galbraith* v. *Grimshaw and Baxter*(3), where the debtor had been adjudicated bankrupt in Scotland, and the trustee laid claim to a debt in respect of which a garnishee order *nisi* had been passed in England. I have already referred in another connexion to this case, which went up to the House of

(1) (1878) 8 Ch.D. 327. (2) (1881) 17 Ch. D. 259.
(3) [1910] 1.K.B. 339.

OFFICIAL RECEIVER OF SECUNDERABAD v. LAKSHMINARAYANA.

CORNISH J.

Lords as *Galbraith* v. *Grimshaw*(1). In the Court of Appeal, FARWELL L.J. observes of the garnishee order *nisi*, no doubt having in mind the language of JAMES L.J. cited above:

"It does not, it is true, operate as a transfer of the property in the debt, but it is an equitable charge on it, and the garnishee cannot pay the debt to anyone but the garnishor without incurring the risk of having to pay it over again to the creditor."

In this view BUCKLEY and KENNEDY L.JJ. concurred. In the House of Lords, LORD LOREBURN L.C., after dealing with the question of relating back, proposed as a test whether the bankrupt could have assigned to the trustee, at the date when the trustee's title accrued, the debt which had already been made the subject of a garnishee order *nisi*. However appropriate such a test may be in England, it is certain that the rights of a Receiver under either of the Indian Insolvency Acts are not necessarily delimitated by it. LORD MACNAGHTEN, by saying that the Scottish Court can only claim the free assets of the bankrupt, had, I think, in view the principle of an equitable charge arising out of the order, and I do not read any of the observations in this case as amounting to a pronouncement that, irrespective of this principle, the Scottish Court, merely because it was a Foreign Court, could not interfere with the claim under the attachment.

Mr. Doraiswami Ayyar has sought to draw some conclusions from two cases in which the respective claimants were the trustee in a foreign bankruptcy—French in the one case and Scottish in the other—and a receiver appointed in execution; *Levasseur* v. *Mason & Barry*(2) and *Singer & Co.* v. *Fry*(3). The decisions turn upon the incidents attaching to such a receivership and

(1) [1910] A.C. 508.
(2) [1891] 2 Q.B. 73.
(3) [1915] 84 L.J. (K.B.) 2025.

do not, I think, afford much help in deciding upon the rights of an attaching creditor under Indian Law. It will be clear from LORD ESHER'S judgment in the former case that a receivership shares this feature with a garnishee order *nisi*—that it is directed to the satisfaction of the claim of the judgment creditor who secured the appointment of the receiver, and of his claim alone.

It is precisely in this respect that an order of attachment of a debt under the Code of Civil Procedure differs. The difference will be apparent upon a comparison of the form for a garnishee order *nisi* (Form No. 39, Appendix K, Rules of the Supreme Court) and the Form for attaching a debt (Form No. 17, Appendix E, Code of Civil Procedure). In the one the attachment is expressly made with a view to satisfying the judgment debt, and that debt only. The other does no more than prohibit and restrain the garnishee from paying, and his debtor from receiving, the debt until further orders. It is of purely negative effect, designed only to preserve the *status quo*, and cannot operate to create any lien or security in favour of the garnishor. So far as a domestic insolvency is concerned, the priority of an Official Assignee's claim over that of an attaching creditor was pronounced upon by a Bench of three Judges of this Court in *Krishnasawmy Mudaliar* v. *Official Assignee of Madras*(1). The effect of an attachment, it was observed, following a dictum of the Privy Council in *Moti Lal* v. *Karrabuldin*(2), was to prevent alienation; it does not confer title. In that case, too, an attempt was made to support the claim of the attaching creditor by reference to English cases dealing with a garnishee order *nisi* but, though recognizing that such

(1) (1903) I.L.R. 26 Mad. 673. (2) (1897) I.L.R. 25 Calc. 179 (P.C.).

OFFICIAL RECEIVER OF SECUNDERABAD v. LAKSHMINARAYANA.

CURGENVEN J.

cases might have their use by way of analogy, the learned Judges considered that the question had to be decided upon the terms of the Code of Civil Procedure and of the Insolvency Act in force in this country. In Calcutta a contrary view was at first taken in *Miller* v. *Lukhimani Debi*(1). The judgment is only of interest here because it proceeded upon the principle that the Official Assignee stood in the shoes of the insolvent, and could not occupy a better position. This is very much the *ratio decidendi* adopted by LORD LOREBURN in *Galbraith* v. *Grimshaw*(2). This Calcutta case was overruled by a Full Bench in *Frederick Peacock* v. *Madan Gopal and others*(3), similar arguments to those adopted in the Madras case being accepted. Reference may also be made to the Privy Council judgment in *Raghunath Das* v. *Sundar Das Khetri*(4).

I can find no ground for distinguishing in this matter between the rights of a foreign and of a domestic receiver in insolvency. In each the debtor's property vests subject to any prior equities such as a charge or lien, and no such equities are created by an attachment. Under section 64 of the Code of Civil Procedure, any private transfer or delivery of the property attached is void as against all claims enforceable under the attachment. A vesting order passed by a Foreign Court is, I should suppose, a transfer by operation of law, though not of British Indian Law; at any rate, it is not a private transfer, and therefore it has not to give way to an attachment.

The result will be that the appeal is allowed. The order of the learned Judge continuing the attachment and giving leave to the attaching creditor (now dead and represented by seventh respondent) to execute the

(1) (1901) I.L.R. 28 Calc. 419.
(2) [1910] A.C. 508.
(3) (1902) I.L.R. 29 Calc. 428 (F.B.).
(4) (1914) I.L.R. 42 Calc. 72 (P.C.).

preliminary decree is set aside and the application dismissed. The contesting (seventh) respondent will pay the appellant's taxed costs here and in the trial Court. The remainder of that Court's order as to costs will stand.

BHASHYAM AYYANGAR J.—I concur and have nothing to add on the first question on which my learned brother has held in concurrence with the learned trial Judge that the Secunderabad Court is a Foreign Court for the purposes of this case. I only wish to say a few words on the second question, namely, what is the effect in British India of a vesting order made by the said Court? The jurisdiction or competency of that Court to pass the order of adjudication is not challenged, and it is conceded that, under the order passed by that Court vesting the insolvent's estate in the Official Receiver of that Court, all the movable property of the insolvent situate (even) in British India became vested in that officer. The only point is whether the judgment creditors of the insolvent who had attached the decree in question before the said vesting order was passed are entitled to any lien over it, or "equity" as the learned trial Judge calls it, as against the said officer. On this point the learned trial Judge has observed: "I do not think that such adjudication will put an end to all execution proceedings in British India against the person adjudicated there. So far as British India is concerned, the Official Assignee takes the properties subject to all the equities. I may in this connection refer to *Ex parte Holthausen. In re Scheibler*(1) and *Galbraith* v. *Grimshaw*(2). It is stated that there is some difference as regards the effect of attachments in British India and English Courts, but I do not think that makes much difference, the principle on which the cases are decided

(1) (1874) 9 Ch. App. 722.

(2) [1910] A.C. 508.

OFFICIAL RECEIVER OF SECUNDERABAD v. LAKSHMINARAYANA.

BHASHYAM AYYANGAR J.

being that the trustees in bankruptcy or Official Receiver in a Foreign Court cannot take advantage of the provisions of law applicable to Courts in British India as regards the antedating." Speaking with the greatest respect, I am unable to agree with this decision. It is thoroughly settled that an attachment under the Code of Civil Procedure does not confer any title or create any charge and that it merely prevents and avoids a private alienation but does not invalidate the alienation by operation of law, such as is effected by a vesting order passed on the adjudication of the judgment debtor; see *Kristnasawmy Mudaliar* v. *Official Assignee of Madras*(1) and *Raghunath Das* v. *Sundar Das Khetri*(2). If the present were a case of an adjudication and a vesting order made by a British Indian Court, there can be no question that the attaching creditors cannot claim any charge or priority over the Receiver in insolvency. Why should it make any difference on this point because the adjudication and the vesting order were passed by a foreign Court? No Indian authority has been referred to which recognizes any such difference. The learned trial Judge bases his decision on the analogy of similar proceedings in England, but an attachment in this country and what corresponds to it in England have different significance and effect as pointed out in the judgment of my learned brother. Indeed the learned trial Judge himself concedes some difference between the two. He however states that it does not affect the point, the ground given by him being that the provisions of law applicable to Courts in British India as regards the antedating are not available to the Official Receiver in a Foreign Court. Now, the doctrine or law of antedating is had recourse to only for invalidating a prior title which would

(1) (1908) I.L.R. 26 Mad. 673. (2) (1914) I.L.R. 42 Calc. 72 (P.C.).

otherwise be valid. That doctrine may be relevant, with reference to an English attachment, which creates a charge, but is not relevant with reference to an attachment under the Code of Civil Procedure which, unless followed up by proper subsequent proceedings, does not in any way affect the existing title. In the present case the Official Receiver, Secunderabad, has no need to and does not invoke the help of the said doctrine at all. I think for these reasons that the conclusion of the learned trial Judge cannot be sustained and that the Official Receiver of Secunderabad has a prior claim over the attaching creditors. I agree with the order pronounced by my learned brother.

B.C.S.

APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice Bhashyam Ayyangar.

1930, September 12.

A. N. RAMACHANDRA AYYAR AND SEVEN OTHERS (RESPONDENTS), APPELLANTS,

v.

THE OFFICIAL ASSIGNEE OF MADRAS AND TEN OTHERS (APPLICANT AND RESPONDENTS), RESPONDENTS.*

Presidency Towns Insolvency Act (III of 1909), sec. 7—Insolvent father—Suit by sons for partition of joint family properties—Pending—Application by Official Assignee for declaration that debts of insolvent father binding on sons to extent of their shares in joint family property—Jurisdiction of Insolvency Court acting under sec. 7—Power to direct sale—General rule of limitation for enforcement of sons' liability.

A Court acting under section 7 of the Presidency Towns Insolvency Act (III of 1909) has jurisdiction on the application of the Official Assignee to grant a declaration that the debts of

* Original Side Appeal No. 111 of 1928.