Original Suit No. 39 of 1924, who was the execution-petitioner before the Subordinate Judge. That appears to me an obviously impossible contention. The answer of the decree-holder in Original Suit No. 39 of 1924 was that Mr. Muttuswami Ayyar's client was merely a benamidar for the judgment-debtor in Original Suit No. 39 of 1924, which would be an effective answer, if true. It is quite impossible for Mr. Muttuswami Ayyar to maintain that his client had the right to come in with a petition under section 47 of the Code but that his opponent had no right to urge his answer and to claim that his answer should be heard under that section.

I agree with the order proposed by my learned brother in regard to the disposal of the appeals and as to costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

K. G. ETHIRAJULU CHETTIAR (RESPONDENT), APPELLANT,

v.

THE OFFICIAL RECEIVER, EAST TANJORE, NEGAPATAM (PETITIONER), RESPONDENT.*

1932, October 3.

Provincial Insolvency Act (V of 1920), sec. 52—Property "in the possession of the Court" within the meaning of—Immovable property—Decree creating charge on—Sale of property in execution of—Stay of—Interim receiver's right to apply for—Property in such a case not property "in the possession of the Court"—Application under sec. 52 by interim receiver impleaded as party to a suit in execution—Order on—Appeal from—Right of.

Immovable property which a judgment-creditor seeks to bring to sale on the ground that his decree creates a charge on

* Appeal against Order No. 226 of 1932.

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it is not property in the possession of the Court within the meaning of section 52 of the Provincial Insolvency Act. An interim receiver is not, therefore, entitled to apply under that section to have the sale stopped.

No appeal lies from an order on an application made under section 52 of the Provincial Insolvency Act by an interim receiver impleaded as a party to a suit in execution. Such an order neither comes within section 47 of the Code of Civil Procedure nor falls within the definition of "decree" in the Code.

APPEAL against the order of the Court of the Subordinate Judge of Mayavaram, dated 24th March 1932 and made in Execution Application No. 158 of 1932 in Execution Petition No. 114 of 1931 (in Civil Suit No. 164 of 1931, on the file of the High Court, Madras) in its Ordinary Original Civil Jurisdiction.

T. R. Venkatarama Sastri and *K. P. Mahadeva Ayyar* for appellant.

C. A. Seshagiri Sastri and *K. S. Desikan* for respondent.

JUDGMENT.

VENKATASUBBA RAO J.

VENKATASUBBA RAO J.—The lower Court has held that the decree is invalid for want of registration under section 17 of the Registration Act, and Mr. Venkatarama Sastri contends that this view is wrong. It is unnecessary to consider this point on account of the opinion we have formed on another question that has been raised.

A few facts bearing on that question may be stated. The appellant filed a suit (Civil Suit No. 164 of 1931) in the High Court on its original side for the recovery of a certain sum of money. That suit was compromised by the defendant agreeing to pay a certain specified amount, which was declared to constitute a charge on some immovable property. It was also stipulated

that in default of payment of the sum the property itself should be sold. In pursuance of this compromise a decree was passed, which, after stating that the immovable property set forth in the schedule thereto should be security for the payment of the amount mentioned, went on to provide that in default of payment the plaintiff was to be at liberty to bring the property to sale in execution of the decree itself. This decree was passed in April 1931, and in June the plaintiff (appellant) got it transferred to the lower Court for execution as the property charged by the decree was situated within the jurisdiction of that Court. In July 1931 a petition was filed for adjudicating the defendant an insolvent, and the respondent was appointed interim receiver in the insolvency. In September 1931 the appellant filed an execution petition in the lower Court applying for the sale of the property, which was charged by the decree. He also applied that the interim receiver should be impleaded as the second defendant in the suit. The latter did not oppose the application and was accordingly impleaded as a party. The proclamation of sale was in due course settled, and the sale was finally fixed for the 21st March 1932. In the meantime on the 12th March the interim receiver applied to the executing Court under section 52 of the Provincial Insolvency Act that the sale should be stopped and that other suitable relief should be granted.

Mr. Venkatarama Sastri on these facts contends that section 52 is inapplicable. The gist of the interim receiver's application is that the decree of the High Court was ineffectual, not having been registered, and that it did not therefore have the effect of making the plaintiff a secured creditor. The section provides as to what should be done, where a decree being under

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execution, the executing Court is informed that a petition to declare the judgment-debtor as insolvent has been admitted. The executing Court, the section says, shall direct the property of the debtor, against which execution has issued, if in the possession of the Court, to be delivered to the receiver. Mr. Venkatarama Sastri's contention is that the property in question was not in the possession of the Court and that the section therefore is inapplicable. The words "if in the possession of the Court" have given rise to some difficulty. If what is attached is movable property, there can be no doubt that it is the property in the possession of the Court. As immovable property under the procedure obtaining in India is not attached by seizure, some doubts were expressed whether such property can be said to be property in the possession of the Court. In *Sivasami Odayar* v. *Subramania Aiyar*(1) a Bench of this Court, after referring to *Mahasukh* v. *Valibhai*(2) and *Haranchandra Chakravarti* v. *Jay Chand*(3), reluctantly came to the conclusion that immovable property under attachment must be held to come within the terms of the section. But at any rate there is no warrant for holding that property, which is not even attached, is in the possession of the Court. By no fiction of law can it be held that the property which a judgment-creditor is seeking to bring to sale on the ground that the decree creates a charge upon it is property in the possession of the Court. Section 52 does not therefore apply, and the lower Court should not have allowed the interim receiver's application.

A preliminary objection has been taken that the appeal is incompetent. The interim receiver, as I have pointed out, was impleaded as a party to the suit in

(1) (1931) I.L.R. 55 Mad. 316. (2) (1927) 30 Bom. L.R. 455.
(3) (1929) I.L.R. 57 Calc. 122.

execution. But his application cannot be treated as falling within section 47 of the Code of Civil Procedure. In making the application he cannot be deemed to have represented the judgment-debtor; for the right he put forward was a paramount one, being that of the general body of creditors. Mr. Venkatarama Sastri in the circumstances did not seriously contend that this should be treated as an appeal filed from an order made under section 47, Civil Procedure Code. The interim receiver, by reason of a statutory right conferred upon him by section 52 of the Provincial Insolvency Act, made the application in question to the lower Court, and against an order made in such a proceeding no appeal is provided. Such an order neither comes under section 47 nor falls within the definition of "decree" in the Code. To give effect to Mr. Venkatarama Sastri's contention, we must be prepared to convert the appeal into a civil revision petition. The question then is, can we in the exercise of our discretion treat this appeal as a civil revision petition? We are prepared to so treat it, as the lower Court has infringed the plain provisions of section 52 and had no jurisdiction to make the order in question.

The order of the lower Court is accordingly set aside but in the circumstances we direct the appellant to pay the respondent's costs of this appeal.

REILLY J.—I agree.

A.S.V.