PRIVY COUNCIL.

GUMMIDELLI ANANTAPADMANABHASWAMI,
APPELLANT,

J.C.*
1933,
February 2

v.

OFFICIAL RECEIVER OF SECUNDERABAD AND OTHERS, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Attachment—Foreign Insolvency—Effect on property in British India—Secunderabad Court—International Law—Code of Civil Procedure (Act V of 1908), sec. 64.

Upon a foreign Court adjudicating a person an insolvent the only property in British India which vests in the Receiver by virtue of private international law is such movable property as the insolvent was free to assign to the Receiver at the date of the adjudication.

The District Court at Secunderabad adjudicated persons insolvents under the Provincial Insolvency Act, 1907. Jurisdiction is exercised at Secunderabad, and the above Act was there applied by orders made by the Governor-General in Council by authority of the Foreign Jurisdiction Act, 1890, and the Indian (Foreign Jurisdiction) Order, 1902. The insolvents were holders of a decree of the Madras High Court, which, before the adjudication, had been attached by that Court in execution proceedings. By section 64 of the Code of Civil Procedure, 1908, any private transfer of the attached decree was made void against claims under the attachment.

Held, that the District Court at Secunderabad was a foreign Court; accordingly, the adjudication operated in British India only under private international law and, having regard to section 64 of the Code, did not affect the rights of the attaching creditor.

Galbraith v. *Grimshaw*, [1910] A.C. 508, applied.

It was unnecessary to consider whether an attachment creates a lien or charge, or confers title: On that question

* Present: Lord TOMLIN, Lord THANKERTON and Sir GEORGE LOWNDES.

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Kristnasawmy Mudaliar v. *Official Assignee of Madras*, (1903) I.L.R. 26 Mad. 673, and *Frederick Peacock* v. *Madan Gopal*, (1902) I.L.R. 29 Calc. 428, commented upon.

Judgment of the High Court, *Official Receiver of Secunderabad* v. *Lakshminarayana*, (1930) I.L.R. 54 Mad. 727, reversed.

APPEAL (No. 86 of 1931) from a decree of the High Court in its appellate jurisdiction (October 2, 1930) reversing an order of the Court in its original jurisdiction (April 23, 1929).

The question for determination in the appeal was whether, under an adjudication in insolvency by the District Court at Secunderabad on September 15, 1928, there vested in the respondent, as Receiver, the benefit of a decree obtained by the insolvents in the Madras High Court freed from an attachment previously made by that High Court upon the application of the appellant's father, Lakshminarayana, since deceased and represented by the appellant.

The facts are stated in the judgment of the Judicial Committee.

Secunderabad was fixed as a place for a British Cantonment in pursuance of article 4 of a treaty between the Nizam and the East India Company. Civil jurisdiction is exercised in the Administerial Areas of the Hyderabad State, which include the Cantonment of Secunderabad, under an order of the Governor-General in Council made on December 21, 1925, under the Indian (Foreign Jurisdiction) Order in Council, 1902; the Order of 1925 superseded earlier Orders. In 1913 an Order similarly made applied the Provincial Insolvency Act (III of 1907) to the Cantonment of Secunderabad; the amending Act, V of 1920, was not so applied until 1929.

The appellate Court (CURGENVEN and BHASHYAM AYYANGAR JJ.), while agreeing with the view of the trial Judge, KUMARASWAMY SASTRI J., that the District

Court at Secunderabad was a foreign Court in relation to the Courts of British India, reversed his decision as to the effect of the adjudication. By separate judgments the learned Judges held that the claim of the Receiver in the insolvency had priority over the claim under the attachment. The appeal is reported as *Official Receiver of Secunderabad* v. *Lakshminarayana*(1).

Upjohn K.C. and *Hyam* for appellant.—It was rightly held by the Courts in Madras that the District Court at Secunderabad was a foreign Court in relation to Courts in British India. The adjudication therefore affected no immovable property in British India, nor any movable property there which the insolvents could not assign to the Receiver, although that inability was due to legal process which was incomplete: *Galbraith* v. *Grimshaw*(2); Dicey's Conflict of Laws, 5th edition, rules 123, 124. Upon the true construction of the Code of Civil Procedure the attachment operated as a charge or lien on the decree; it made the decree realizable by sale: Code of Civil Procedure, 1908, sections 60, 64, 73; Order XXI, rule 53(4) and (6); and Appendix E, Forms 22, 23. The judgments to the contrary in *Kristnasawmy Mudaliar* v. *Official Assignee of Madras*(3) and *Frederick Peacock* v. *Madan Gopal*(4) conflicted with the judgment of the Board in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(5) and that of the Calcutta Full Bench in *Anand Chandra Pal* v. *Panchilal Sarma*(6). The judgment in *Moti Lal* v. *Karrab-uldin*(7) was misunderstood and did not decide the question. The statement in *Raghunath Das* v. *Sundar Das Khetri*(8) was in terms based upon a concession by Counsel. All the decisions relied on against the appellant upon this point were as to the effect of an adjudication in British India under the Indian Insolvent Act, 1848, upon a previous attachment, and that is a different question to that now arising. But, whether or not the attachment created a charge, its effect, under section 64 of the Code, was to preclude the insolvent from assigning it to the Receiver; consequently upon the principle of international law

(1) (1930) I.L.R. 54 Mad 727.
(2) [1910] A.C. 508.
(3) (1903) I.L.R. 26 Mad. 673.
(4) (1902) I.L.R. 29 Calc. 428 (F.B.).
(5) (1879) I.L.R. 5 Calc. 148, 174; L.R. 6 I.A. 88, 109.
(6) (1870) 5 Ben. L.R. 691 (F.B.).
(7) (1897) I.L.R. 25 Calc. 179; L.R. 24 I.A. 170.
(8) (1914) I.L.R. 42 Calc. 72; L.R. 41 I.A. 251.

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already mentioned, the decree did not vest in the Receiver, or vested subject to the attachment. It is not material that, had the adjudication been in British India, section 34 of the Provincial Insolvency Act, 1907, would have prevented the attachment, without a sale, being available against the Official Assignee.

Narasimham for first respondent.—Although Secunderabad is foreign territory the District Court was not a foreign Court. It was established and administered by the Government of India, appeals from Secunderabad lie to the Privy Council, and in making the adjudication the Court was applying legislation of British India. Effect should be given to the whole of the Act of 1907; under section 34, the attachment not being followed by a sale, the decree vested in the first respondent as Receiver. In any case the authorities already referred to do not show that the attachment in itself operated so as to affect the title of the respondent under the adjudication. [Reference was made also to the Code of Civil Procedure, section 73; Provincial Insolvency Act, 1907, section 16, sub-sections 2 and 5.] The judgment of the Board in *Mohammad Afzal Khan* v. *Abdul Rahman*(1) assumed that the attachment there in question did not operate as a charge. In *Moti Lal's case*(2) it was stated in terms that "an attachment only prevents alienation, it does not confer title."

Upjohn K.C. replied.

The JUDGMENT of their Lordships was delivered by

LORD THANKERTON.

Lord THANKERTON.—This is an appeal from a decree of the High Court of Judicature at Madras, dated the 2nd October 1930, which set aside a judgment and order dated the 23rd April 1929, made by the same Court in its Original Civil Jurisdiction.

The appellant is in right of a money decree for Rs. 53,230-9-0, dated the 15th June 1926, made in the Bombay High Court in favour of the appellant's father against three persons, who may be conveniently referred to as the judgment-debtors. At that time the judgment-debtors were the plaintiffs in a suit then pending in the

(1) (1932) I.L.R. 13 Lah. 702; L.R. 59 I.A. 405.
(2) (1897) I.L.R. 25 Calc. 179, 185; L.R. 24 I.A. 170, 175.

Madras High Court for partition of certain joint family property between the plaintiffs' and the defendants' branches of the family. The Madras partition suit had been instituted in 1922, and on the 5th December 1922 a preliminary decree by consent had been made, declaring *inter alia* certain properties and business assets involved in the suit to be the exclusive properties of the plaintiffs' branch and directing certain interim payments of money to be made by the defendants to the plaintiffs. The decree further directed certain arbitrators to take the joint family account and to partition the joint family property between the two branches of the family in two equal shares. The arbitrators failed to come to any final decision and the matter was referred to the Official Referee of the Court by consent.

On the 20th December 1926, the preliminary decree in the Madras suit was attached in the Madras High Court by the present appellant's father, in execution of the decree in the Bombay suit, the execution proceedings having been transferred from the Bombay High Court to the Madras High Court.

In September 1928, the defendants in the Madras suit applied for a final decree in terms of a compromise entered into between them and the plaintiffs on the 5th August 1928, and, on the 21st September 1928, the High Court of Madras passed an order for a final decree in the partition suit in terms of the compromise but upon certain conditions, one of which was that the defendants should first pay into Court the amount of money due to the present appellant under the Bombay decree in respect of which the attachment had been made. That order has not been carried out and, in fact, is now under appeal in the Madras High Court.

On the 15th September 1928, an order was made by the District Court at Secunderabad, on a creditors'

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petition, adjudging as insolvents two of the plaintiffs in the Madras partition suit, who are also the judgment-debtors (the third plaintiff having died leaving his widow as his legal representative). The Official Receiver of Secunderabad, who is trustee in the bankruptcy, is a respondent in the present appeal.

On the 4th March 1929, the appellant's father took out a Judge's summons in the High Court of Madras and started the present proceedings against the parties to the Madras partition suit, for leave to execute the decree attached by him. The proceedings were opposed by the defendants in the partition suit and by the Official Receiver of Secunderabad, who was then made a party plaintiff to the partition suit in substitution of the insolvents, the two surviving plaintiffs in that suit, and who is the active respondent in the present appeal.

It is first necessary to consider whether, in the Madras Court, the adjudication order is to be regarded as the order of a foreign Court. Both the Courts below have held that it is to be so regarded and their Lordships agree with that conclusion. It is not suggested that the position of Secunderabad has altered from that stated by the Foreign Office to the Court, and referred to in the judgment in *Hossain Ali Mirza* v. *Abid Ali Mirza*(1). That reply makes clear that the British Cantonment in Secunderabad still remains part of Hyderabad State and the property of the Nizam. The administration of justice according to British enactments by the District Court established there does not render the orders of that Court anything but the orders of a foreign Court in relation to the Courts of British India.

There remains the question of what effect is to be given by the Madras Courts to the adjudication order

(1) (1893) I.L.R. 21 Calc. 177, 179.

of a foreign Court in competition with the prior attachment of a decree in the Madras Court.

The learned trial Judge held, under the principles laid down in *Galbraith* v. *Grimshaw*(1), that the present respondent could only take subject to the present appellant's rights of attachment, and made an order continuing the attachment until the further orders of the Court, and giving the appellant leave to execute the preliminary decree in the partition suit. The appellate Court set aside that order and dismissed the present appellant's application, in substance on the ground that an attachment under the Code of Civil Procedure is purely prohibitory and does not operate to create any title, lien or security in favour of the attaching creditor which, according to British Indian law, could prevail over the Receiver in insolvency, and that it made no difference that the adjudication order was made by a foreign Court.

Their Lordships do not agree with the reasoning or conclusion of the appellate Court. The question is one of comity between States and not one of the municipal bankruptcy codes of either country. The rule of private international law is clearly laid down in *Galbraith* v. *Grimshaw*(1) as regards movable estate, for it is settled that no adjudication order is recognized as having the effect of vesting in the receiver any immovables in another country.

The reason for the rule is stated in the speech of Lord DUNEDIN in *Galbraith's case*(1) at page 513 :

> " Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the Court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution ; and that I take to be the doctrine at the bottom of the cases of which *Goetze* v. *Aders*(2) is only one example."

(1) [1910] A.C. 508. (2) (1874) 2 R. 150.

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This means that, after the date of the foreign adjudication order, it will be recognized as effective, but it is equally clear from the opinions expressed in *Galbraith's case*(1) that it will not be allowed to interfere with any process, at the instance of a creditor, already pending, even though such process is incomplete, provided that at that date the bankrupt's freedom of disposal was so affected by the process that he could not have assigned the subject-matter of the process to the Receiver. As Lord MACNAGHTEN says in *Galbraith's case*(1) at page 512:

> "The Scottish Court (the foreign Court) can only claim the free assets of the bankrupt. It has no right to interfere with any process of an English Court pending at the time of the Scotch sequestration. It must take the assets of the bankrupt such as they were at that date and with all the liabilities to which they were then subject. The debt attached by the order *nisi* was at the date of the sequestration earmarked for the purpose of answering a particular claim—a claim which in due course would have ripened into a right. With this inchoate right the Scottish Court had no power to interfere, nor has it even purported to do so."

In an earlier passage Lord MACNAGHTEN had said:

> "A creditor of the bankrupt having duly obtained an attachment in England before the date of the sequestration cannot, I think, be deprived of the fruits of his diligence."

In the present case, at the date when the foreign adjudication order was made, the appellant was entitled to the benefit of his prior attachment of the decree in the Madras partition suit. The decree was thereby earmarked for the purpose of answering the Bombay money decree, and that inchoate right would have ripened into execution and sale; it is no matter that under section 73 of the Code of Civil Procedure the appellant would have to share the proceeds of sale with other decree-holders; it would still be a valuable right.

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

The Scottish case of *Hunter & Co.* v. *Palmer*(1), in which an arrestment in Scotland was preferred to a posterior English commission of bankruptcy, is very similar to the present case. Arrestment is only inchoate diligence; to complete the transfer and make the arrester's right real a decree of furthcoming* must be subsequently obtained, which adjudges the fund arrested to the arrester. No decree of furthcoming had been obtained in *Hunter's case*(1).

It is irrelevant to consider what effect a British Indian adjudication order would have had on the appellant's prior attachment. The question is what the pending process of attachment would have ripened into, if uninterrupted. Equally, it is irrelevant to point out that a British Indian adjudication order would not be affected by the prohibitory provisions of section 64 of the Code, as it is not a private transfer; such an order operates *vi statuti*, but the foreign adjudication order does not operate in British India *vi statuti*, but only under the rule of private international law. In *Galbraith's case*(2), Lord LOREBURN states the test as follows :—

> "In each case the question will be whether the bankrupt could have assigned to the trustee, at the date when the trustee's title accrued, the debt or assets in question situated in England. If any part of that which the bankrupt could have then assigned is situated in England, then the trustee may have it; but he could not have it unless the bankrupt could himself have assigned it."

It is clear in the present case that, by reason of section 64, the bankrupts could not have assigned their right in the decree which had been attached.

This test renders it irrelevant to consider whether the attachment created a lien or charge or conferred

(1) (1825) 3 Shaw 402. (2) [1910] A.C. 508.

* See Encyclopædia of the Laws of Scotland, s. v. "Arrestment", paragraph 1356.

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title, and the cases relating to British Indian bankruptcies relied on by the learned Judges of the appellate Court have no bearing on the present question. In *Kristnasawmy Mudaliar* v. *Official Assignee of Madras*(1) the Court appears to have ignored the opinion expressed by this Board in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(2) which was cited to them, and to have taken a dictum in the judgment of this Board in *Motilal* v. *Karrab-ul-Din*(3) from its context and used it for a purpose which it did not have in view. In *Frederick Peacock* v. *Madan Gopal*(4) the case of *Suraj Bunsi*(2) was not referred to, and the dictum from *Motilal's case*(3) was similarly employed. Their Lordships desire to reserve their opinion as to the soundness of the Madras and Calcutta decisions. The decision of this Board in *Raghunath Das* v. *Sundar Das Khetri*(5) was also referred to, but that decision proceeded on an admission by Counsel, the point was not argued and the case of *Suraj Bunsi*(2) was not referred to.

Accordingly, their Lordships are of opinion that the decision of the trial Judge was right, and they will humbly advise His Majesty that the appeal should be allowed, that the decree of the appellate Court, dated the 2nd October 1930, should be reversed and that the order of the trial Judge, dated the 23rd April 1929, should be restored. The appellant will have the costs of this appeal and his costs in the appeal before the appellate Court.

Solicitors for appellant: *Barrow, Rogers* and *Nevill.*

Solicitor for first respondent: *Harold Shephard.*

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(1) (1903) I.L.R. 26 Mad. 673.
(2) (1879) I.L.R. 5 Calc. 148, 174; L.R. 6 I.A. 88, 109.
(3) (1897) I.L.R. 25 Calc. 179, 185; L.R. 24 I.A. 170, 175.
(4) (1902) I.L.R. 29 Calc. 428 (F.B.).
(5) (1914) I.L.R. 42 Calc. 72; L.R. 41 I.A. 251.