

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Madhavan Nair, Mr. Justice Jackson
and Mr. Justice Lakshmana Rao.*

SUBBARAYA GOUNDAN AND ANOTHER (PETITIONER—THIRD
DEFENDANT—JUDGMENT-DEBTOR AND NIL), APPELLANTS,

1933,
May 5.

v.

V. V. R. VIRAPPA CHETTIAR BANK AND THREE OTHERS
(RESPONDENTS—PLAINTIFFS—DECREE-HOLDERS), RESPONDENTS.*

Insolvency—Order dismissing application put in by judgment-debtor under Order XXI, rule 90, of the Code of Civil Procedure—Judgment-debtor becoming insolvent—Right of appeal of insolvent.

A judgment-debtor who has been adjudicated an insolvent has the right to prefer an appeal against an order dismissing an application put in by him under Order XXI, rule 90, of the Code of Civil Procedure in the course of the execution of the decree passed against him.

Kondapalli Tatireddi v. Ramachandra Rao, (1921) 18 L.W. 616, approved. *Palaniandi Chettiar v. Kalyanarama Aiyar*, (1926) 97 I.C. 486, overruled. *Hari Rao v. Official Assignee, Madras*, (1926) I.L.R. 49 Mad. 461 (F.B.), distinguished.

APPEAL against the order of the Court of the Subordinate Judge of Coimbatore, dated 18th October 1929 and made in Execution Application No. 384 of 1929 in Execution Petition No. 491 of 1927 in Original Suit No. 246 of 1926.

This appeal against order coming on for hearing in the first instance the Court (PAKENHAM WALSH J.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The first appellant was a judgment-debtor in a certain suit and his property was sold in accordance with the decree therein and purchased by the decree-holders. He filed an application

* Appeal against Order No. 107 of 1930.

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under Order XXI, Rule 90, Civil Procedure Code, to set aside the sale. The application was dismissed by the Court of first instance but on appeal to the High Court the sale was set aside. The decree-holders then filed a review petition on the ground that when the judgment-debtor filed the appeal to the High Court he had been adjudicated an insolvent on a creditor's petition and was not competent to file the appeal. These facts have been ascertained to be correct and the Official Receiver has now consented to continue the proceedings. The initial question is whether the appeal by the insolvent was competent or not. There is direct conflict of authority in this Court with regard to this matter. The first case is *Kondapalli Tatireddi v. Ramachandra Rao*(1), where SPENGER and RAMESAM JJ. held that the insolvency of a judgment-debtor does not render it incompetent for him to continue the proceedings under Order XXI, rule 72, by way of an appeal. The judgment in this case was delivered on 2nd February 1921. The other case is *Palaniandi Chettiar v. Kalyanarama Aiyar*(2), where PHILLIPS and MADHAVAN NAIR JJ. held that a party to a suit after adjudication as an insolvent cannot be deemed to be a person aggrieved by it and has therefore no right to institute an appeal against the decree in the suit. That related to a matter under Order XXII, rule 8. The decision in *Kondapalli Tatireddi v. Ramachandra Rao*(1) is not referred to in that case, but the learned Judges considered the matter as governed by the Full Bench decision in *Hari Rao v. Official Assignee, Madras*(3). The Full Bench case was a matter arising entirely under the Insolvency Act. The insolvent there wished that a particular piece of property should not be sold at a particular time and wanted to appeal against the order of the Official Receiver to sell it. In this matter the question arose whether he was aggrieved by the order of the Official Receiver. The Full Bench held that he was not a person aggrieved. That case is not a direct authority on the position of an insolvent preferring an appeal against an order in execution of a decree passed against him and one of the main arguments urged in that case was that the insolvent had no right to interfere with the insolvency proceedings and retard them. Here the Official Receiver is interested in continuing the appeal. In

(1) (1921) 13 L.W. 616.

(2) (1926) 97 I.C. 486.

(3) (1926) I.L.R. 49 Mad. 461 (F.B.).

view of the direct conflict of authority between *Kondapalli Tatireddi v. Ramachandra Rao*(1) and *Palaniandi Chettiar v. Kalyanarama Aiyar*(2) I would suggest to the CHIEF JUSTICE to refer the following questions to a Full Bench:—

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(1) Has the judgment-debtor who has been adjudicated an insolvent right to prefer an appeal against an order dismissing an application put in by him under Order XXI, rule 90, in the course of the execution of the decree passed against him? and

(2) if such an appeal is incompetent in its inception can it be continued if the Official Receiver consents to continue it?

K. V. Ramachandra Ayyar for appellants.

C. S. Swaminathan for *T. S. Anantaraman* for respondents.

Cur. adv. vult.

The OPINION of the Court was delivered by MADHAVAN NAIR J.—The questions referred to the Full Bench are :

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(1) Has the judgment-debtor who has been adjudicated an insolvent right to prefer an appeal against an order dismissing an application put in by him under Order XXI, rule 90, Civil Procedure Code, in the course of the execution of the decree passed against him? and (2) if such an appeal is incompetent in its inception can it be continued if the Official Receiver consents to continue it?

This reference has been occasioned on account of the conflict between the decisions in *Kondapalli Tatireddi v. Ramachandra Rao*(1) and *Palaniyandi Chettiar v. Kalyanarama Aiyar*(2). In *Kondapalli Tatireddi v. Ramachandra Rao*(1) it was held that the insolvency of a judgment-debtor does not render it incompetent for him to continue the proceedings under Order XXI, rule 72, by way of an appeal. In *Palaniandi Chettiar v. Kalyanarama Aiyar*(2) it was held that a party to a suit after adjudication as an insolvent cannot

(1) (1921) 13 L.W. 616.

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be deemed to be a person aggrieved by it and has therefore no right to institute an appeal against the decree in the suit.

The facts of the case under reference are as follows :—In execution of the decree in Original Suit No. 246 of 1926 on the file of the Subordinate Judge of Coimbatore properties belonging to the judgment-debtor were sold on 6th March 1929 and purchased by the decree-holders. On 4th April 1929 the judgment-debtor filed an application under Order XXI, rule 90, Civil Procedure Code, to set aside the sale. On 15th October 1929 he was adjudicated an insolvent on an application filed by a creditor on 26th April 1929. On 18th October 1929 the judgment-debtor's application to set aside the sale was dismissed by the Court of first instance, but on appeal filed by him on 16th December 1929 the High Court set aside the sale on 7th October 1931. The decree-holders then filed a review petition on the ground that when the judgment-debtor filed the appeal to the High Court he had been adjudicated an insolvent and was therefore not competent to prefer the appeal. Notice was then issued to the Official Receiver and he has consented to continue the proceedings.

The first question for decision is whether the appeal by the insolvent to the High Court was competent or not. On the facts of the case there is no difficulty in answering this question. The insolvency petition was filed after the properties were sold in Court auction and until the sale is set aside the properties will not vest in the Official Receiver. The Official Receiver has not taken any steps to set aside the sale ; and the assets having been realized before the date of the

admission of the insolvency petition he cannot even claim the benefit of the execution (vide section 51 of the Provincial Insolvency Act). It follows therefore that the judgment-debtor whose interests are affected by the sale can not only file an application under Order XXI, rule 90, but also prefer an appeal against the Subordinate Judge's order. The respondent relies on Order XXII, rule 8, Civil Procedure Code, in support of his contention that

“even when the proceedings had been properly instituted by the insolvent he cannot himself continue them, for if the Official Receiver refuses or neglects to continue those proceedings the Court may make an order dismissing the suit on the defendant's application.”

No doubt this is the view expressed by the learned Judges in *Palaniandi Chettiar v. Kalyanarama Aiyar*(1) but it is not noticed in that judgment that Order XXII, rule 12, Civil Procedure Code, makes rule 8 inapplicable to proceedings in execution of a decree or order. As pointed out in *Kondapalli Tatireddi v. Ramachandra Rao*(2), Order XXII, rule 8, applies to an insolvent-plaintiff and is confined to suits when the events mentioned therein happen. This decision has not been referred to in *Palaniandi Chettiar v. Kalyanarama Aiyar*(1). In the latter case the learned Judges relied on the Full Bench decision in *Hari Rao v. Official Assignee, Madras*(3). But in that case the question arose under the Insolvency Act and the decision therefore cannot be considered, as observed in the order of reference, as a direct authority on the position of an insolvent preferring an appeal against an order in execution

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of a decree passed against him under the Civil Procedure Code. The decision in *Kondapalli Tatireddi v. Ramachandra Rao*(1) has been followed in *Ramchandra v. Shripati*(2). In our opinion the decision in *Kondapalli Tatireddi v. Ramachandra Rao*(1) lays down the correct law. For the reasons given above we would answer the first question referred to the Full Bench in the affirmative. In this view the second question does not arise for decision.

G.R.

(1) (1921) 13 L.W. 616.

(2) A.I.R. 1929 Bom. 202.
