

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Cornish.

1925,
March 27.

MULUKUTLA ATCHUTA RAMAYYAGARU (FIRST
RESPONDENT), APPELLANT,

v.

THE OFFICIAL RECEIVER, EAST GODAVARI
AT RAJAHMUNDRY (PETITIONER), RESPONDENT.*

*Provincial Insolvency Act (V of 1920), sec 28 (7) and (2)—
Relation back—Doctrine of—Applicability—Suit for speci-
fic performance of agreement to execute a mortgage for a
debt—Filing of, after filing of petition to adjudicate
defendant debtor an insolvent—Decree by consent in suit
passed before adjudication of debtor and before appoint-
ment of Official Receiver as Receiver of insolvent's property
—Decree binding on Official Receiver, if—"Transaction"
within sec. 55 of Act—Filing of suit and obtaining of
decree, if.*

A to whom B owed some money and in whose favour B had executed an agreement undertaking to execute a mortgage as security for his debt sued B for specific performance of the agreement. B filed a written statement but subsequently withdrew his defence whereupon the suit was decreed. Before the institution of A's suit an insolvency petition had been presented against B and A's debt was included in the schedule of debts filed by the insolvent, but the decree in A's suit was passed before B was adjudicated an insolvent and before the Official Receiver was appointed Receiver of the insolvent's property.

Held that the decree in A's suit was not binding upon the Official Receiver.

The filing of the suit and the obtaining of the decree by A even though by consent of the judgment-debtor was not a "transaction" which was protected by section 55 of the Provincial Insolvency Act. Under section 28 (7) of

* Appeal Against Order No. 374 of 1933.

that Act, the order of adjudication related back to and took effect from the date of the presentation of the insolvency petition. It was from that date that the vesting of the estate in the Official Receiver commenced and that the rule in section 28 (2) restraining a creditor's right of suit in respect of a debt came into force. A's suit being one in respect of a debt was therefore incompetent under the provisions of section 28 (2), leave of the Court to commence the suit not having been first obtained.

Kaliaperumal Naicker v. Ramachandra Aiyar, (1927) 53 M.L.J. 142, considered.

In re O'Shea's Settlement. Courage v. O'Shea, [1895] 1 Ch. 325, and *Wild v. Southwood*, [1897] 1 Q.B. 317, referred to.

APPEAL against the order of the District Court of East Godavari at Rajahmundry, dated 5th April 1933 and made in Interlocutory Application No. 153 of 1932 in Insolvency Petition No. 9 of 1931.

Ch. Raghava Rao for appellant.

R. N. Aingar as *amicus curiae*.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—This is an appeal from an order of the learned District Judge of East Godavari declaring void as against the Official Receiver a decree obtained by the appellant here, the first respondent in the lower Court, against the second respondent in the lower Court, an insolvent. A petition to adjudicate the second respondent in the lower Court and his son was presented on 3rd February 1931. The second respondent owed moneys on promissory notes to one Mulukutla Atchutaramayya, afterwards the twenty second creditor in the list of creditors filed by the insolvent and the appellant here. He threatened the second respondent with a suit and the second respondent

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executed an agreement in favour of the appellant here on 19th March 1930 undertaking not to alienate his immovable property till his debt was discharged and undertaking to execute a mortgage bond in his favour for the amount due whenever demanded by him. On the strength of this agreement the appellant filed a suit against the second respondent on 4th February 1931, i.e., the day after the presentation of the insolvency petition, in the District Munsif's Court of Rajahmundry praying for a decree for specific performance of the before-mentioned agreement. The second respondent appeared by pleader on 31st July 1931 and filed his written statement on 7th August 1931 but withdrew his defence on 8th September 1931 upon which date the suit was decreed. On 8th October 1931 the second respondent was adjudicated an insolvent but not his son; and on the same date the Official Receiver of East Godavari was appointed Receiver of the insolvent's property; and on 13th February 1932 he filed the application which resulted in the order which is under appeal. The position is that the creditor, the appellant here, obtained his decree before the date of the adjudication of the insolvent but after the date of the presentation of the insolvency petition. The suit was also filed after that date. The question here is whether this decree is binding upon the Official Receiver who contended in the lower Court that section 28 (7) of the Provincial Insolvency Act, which makes the adjudication order take effect as from the date on which the insolvency petition was presented, renders legal proceedings taken after that date against a debtor of no effect against the

Official Receiver, because, by reason of sub-section 2, on the-making of an order of adjudication the whole of the property of the insolvent vests in the Court and thereafter no creditor to whom the insolvent is indebted can, 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 proceedings except with the leave of the Court. The appellant relies on *Kabiaperumal Naicker v. Ramachandra Aiyar*(1), a decision of RAMESAM J. There, the owner of the equity of redemption in certain properties presented a petition to be adjudicated an insolvent on 16th November 1920. A suit was filed on the mortgage on 26th October 1921 impleading this person as the defendant. On 20th December 1921 the order of adjudication was passed. On 25th April 1922 the plaintiff applied to implead the Official Receiver also as a defendant. It was held that there was no necessity to obtain the leave of the Court for the institution of the suit as the suit was filed before the date of the order of adjudication and that the filing of a suit prior to the adjudication must be regarded as being outside the purpose of the Insolvency Act with reference to the provisions of section 28 (2) of the Act. On page 145, RAMESAM J. says :

“ The appellant contends that the plaintiff had not obtained the leave of Court for the filing of that suit. Mr. Subramania Iyer refers me to a number of cases under section 28 (7). Most of these cases had to do with the effect of dealings by the insolvent in the interval between the application and adjudication. For instance, in *Sheonath Singh v. Munshi Ram*(2) it was held that alienations by the insolvent are not valid against

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(1) (1927) 53 M.L.J. 142.

(2) (1920) I.L.R. 42 All. 433.

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the Official Receiver. The effect of section 28 (7) was correctly described there. The actual sections referred to there are the corresponding sections of the old Act. 'No vesting takes place until an order of adjudication is made. It is the making of the order of adjudication which vests the property and only upon such an order being made can any vesting take place at all. But once the order is made the effect created by it is, by a legal fiction, taken to relate back to the presentation of the petition or, in other words, the commencement of the insolvency.' For all purposes of the Insolvency Act this fiction has to be used and it is a very useful fiction; but outside those purposes it has no place. The filing of a suit prior to the adjudication may be regarded as being outside the purpose of the Insolvency Act with reference to the provisions of section 28 (2)."

The Allahabad case referred to, viz., *Sheonath Singh v. Munshi Ram*(1), is a decision of a Bench of that High Court consisting of PIGGOT and WALSH JJ. It was there held that when once an order of adjudication has been made the insolvency commences by the legal fiction of relation back on the date of the presentation of the petition and that therefore the insolvent cannot make a valid alienation of his property between the dates of the presentation of the petition and the order of adjudication. What the debtor did in that case was to execute a sale deed of his immovable property after the presentation of an insolvency petition against him. On page 435, in discussing *Sankaranarayana Aiyar v. Alagiri Aiyar*(2), a decision of this High Court, they say :

"We are not satisfied that there is really all the difference between the provisions of the English law and the Provincial Insolvency Act, which appears to have troubled the Madras High Court, but it does not matter, as the view which we take is the view which was always taken from the earliest days in the administration of Bankruptcy law for reasons inherent in

(1) (1920) I.L.B. 42 All. 433.

(2) (1918) 49 I.C. 283.

the policy of the Bankruptcy law, some of which are contained in the judgment of the Madras High Court. The commercial community cannot be too often reminded of the risks which everybody runs in dealing with a man who is in low water and who may have committed an act of insolvency. Section 38 of the Provincial Insolvency Act, which is another section taken from the English Legislature, protects anybody who before the date of the order of adjudication deals with the insolvent for valuable consideration but that protection has always been held to be unavailable to a transferee where the circumstances show that the transfer which he has taken is in itself an offence against the Bankruptcy law, that is to say, a man cannot claim the protection of a *bona fide* transfer for value, where he is himself engaged in an act which is an act of insolvency."

Another case relied upon by the appellant is *Subramania Aiyar v. The Official Receiver, Tanjore*(1), a decision of SPENCER and MADHAVAN NAIR JJ. In that case, an execution sale was held on 30th September 1920. Seven days previously the first judgment-debtor, who was the father of the other judgment-debtors, presented an insolvency petition. An interim Receiver was appointed and he wrote and asked the Subordinate Judge to stop the sale. It was nevertheless held and confirmed by the Subordinate Judge on 27th November 1920. An adjudication order in insolvency was made on 15th December 1920 which was finally confirmed by the High Court. It was held that when the Official Receiver wrote to the Subordinate Judge asking him to stop the sale he was acting only in the capacity of an interim Receiver, and, as he was not, therefore, in possession of the debtor's properties, the Subordinate Judge was not therefore bound to stop the sale; that until the Receiver is actually in possession a creditor is not barred from proceeding to

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(1) (1925) 50 M.L.J. 665.

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execution ; and that under section 28 of the Provincial Insolvency Act vesting only takes place upon adjudication and under section 29 it is not till then that a Court in which proceedings are pending against a debtor is bound to stay them. The effect of sub-section 7 of section 28 was not there considered. Mr. R. N. Aingar as *amicus curiae*, to whom we are very much indebted for his very able argument, has stressed the fact that the transaction in question was to give a remedy to the creditor against the insolvent's property. This he contends is contrary to the provisions of section 28 (2) of the Act which vests the property of the insolvent in the Court on the making of an order of adjudication and no creditor to whom the insolvent is indebted in respect of any debt provable under the Act is permitted during the pendency of the insolvency proceedings to have any remedy against the property of the insolvent and that, as under sub-section 7 the order of adjudication relates back to and takes effect from the date of the presentation of the petition, the insolvency is deemed to commence on the latter date and that from that date the insolvency proceedings are pending. He contends, therefore, that the Official Receiver becomes the owner of the property not merely from the date when the order of adjudication is made but from the commencement of the insolvency. The result is that a debtor cannot himself after the date of the presentation of the insolvency petition which results in his subsequent adjudication enter into any transaction which will bind the Official Receiver, and a person dealing with him from that date may find himself in a precarious position unless the

transaction comes within section 55 of the Act which protects *bona fide* transactions. Under that section the only transactions which are protected are payments by the insolvent to any of his creditors, any payment or delivery to the insolvent, transfers by the insolvent for valuable consideration or contracts or dealings by or with the insolvent for valuable consideration, provided that such transactions take place before the date of the order of adjudication and that the persons with whom such transactions take place have not at the time notice of the presentation of any insolvency petition by or against the debtor. Upon the question of whether the appellant had notice of the presentation of the insolvency petition, the learned District Judge in his judgment says that he had no notice of that petition. I am bound to say that the facts of this case give rise to a very strong inference that the appellant did know of the presentation of the insolvency petition. The agreement upon which he sued is dated 19th March 1930 and it is significant that the appellant took no steps whatever to enforce that agreement by suit for nearly eleven months after the date of the agreement and only filed his suit the day after the presentation of the insolvency petition in the District Court of East Gōdāvāri at Rajahmundry, in the District Munsif's Court of Rajahmundry. It is difficult to avoid the conclusion that the suit was filed in consequence of the filing of the insolvency petition on the previous day. However, in my view, the question of notice is immaterial as this is not one of those transactions which is protected by section 55. In an English case, namely, *In re O'Shea's Settlement*.

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Courage v. O'Shea(1), it was held that a charging order under section 14 of the Judgments Act, 1838, upon stock or shares or money in Court belonging to a judgment-debtor is not a "transaction" protected by section 49 of the Bankruptcy Act, 1883. Section 49 protected any contract, dealing or transaction by or with the bankrupt for valuable consideration provided that the person with whom the contract, dealing or transaction was made or entered into had not, at the time of the contract, dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time. That section is very similar to section 55 of the Provincial Insolvency Act. LINDLEY L.J. on page 331 says :

" 'Contract, dealing or transaction' with the bankrupt means something done by him. The words do not point to a proceeding in which the bankrupt is merely passive."

It is difficult to see how the filing of a suit and the obtaining of a decree even though by consent of the judgment-debtor can be held to be a contract, dealing or transaction done by the judgment-debtor.

This case was followed in *Wild v. Southwood*(2). There, a charging order under section 23 of the Partnership Act, 1890, upon a judgment-debtor's interest in a partnership, being a proceeding *in invitum*, was held not to be a "transaction" protected by section 49 of the Bankruptcy Act. The plaintiff in that suit, who had on 20th April 1896 obtained judgment against the defendant for £147-8-6 and costs, obtained an order on the 27th April in the action under section 23 of

(1) [1895] 1 Ch. 325.

(2) [1897] 1 Q.B. 317.

the Partnership Act, 1890, charging the judgment-debt and costs on the defendant's share and interest in a business he was carrying on in co-partnership with two other persons. On the 23rd May he took out a summons to enforce his charging order by a sale of the defendant's interest in the partnership property. At that time the defendant, although the plaintiff was unaware of it, had committed an act of bankruptcy on the previous 17th April. On the 1st June a bankruptcy petition was presented against the defendant grounded on the act of bankruptcy he had committed on the 17th April, and on the 15th June a receiving order was made on the petition which was followed by an adjudication. Following *In re O'Shea's Settlement. Courage v. O'Shea*(1), VAUGHAN WILLIAMS J. held that the obtaining of the charging order was not a transaction within the meaning of section 49 of the Bankruptcy Act. He then deals with the law of relation back and says :

“ This law of relation back, which makes the title of the trustee vest as from a date antecedent to the transaction or event which took place without any petition in bankruptcy having occurred or a receiving order having been made, operates no doubt very hardly in many cases, and therefore various Acts of Parliament have contained protective sections to relieve those persons who would be injured by the stringency of that law. Apart from those protective sections, it is plain that this execution cannot hold good against the trustee in bankruptcy whose title relates back to a period anterior to it.”

In my view, Mr. R. N. Aingar's contention must be upheld. This was not a transaction which is protected by section 55 of the Provincial Insolvency Act and, unless it comes within the

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protection of that section, by reason of the doctrine of relation back the property of the insolvent must be deemed to have vested in the Official Receiver on the date of the presentation of the insolvency petition which was antecedent to the date of the filing of the suit and the subsequent decree. For these reasons, I am unable to agree with the opinion expressed by RAMESAM J. in *Kaliaperumal Naicker v. Ramachandra Aiyar*(1) that the filing of a suit against a debtor prior to the adjudication although after the presentation of an insolvency petition is to be regarded as being outside the purpose of the Insolvency Act with reference to the provisions of section 28 (2). The result is that this appeal must be dismissed.

CORNISH J.

CORNISH J.—I agree. In my opinion the decree which the creditor obtained in his suit against the debtor for specific performance was not a “transaction” covered by section 55 of the Provincial Insolvency Act. The construction put upon the word in the corresponding section 49 of the English Bankruptcy Act is that it means a transaction in which the insolvent does something, and not a proceeding in which the insolvent is merely passive. Thus, a charging order upon property belonging to the judgment-debtor in Court, and a garnishee order attaching a debt due to the insolvent have been held not to be a transaction within the protection of the section: see *Williams on Bankruptcy*, 14th edition, page 331. There is no reason why the word “transaction” as it occurs in section 55 of the Provincial Insolvency Act should bear a different meaning.

The act done by the debtor in this case is that he withdrew his defence to his creditor's suit and submitted to a decree. It was a purely passive act, and judged by the above-mentioned criterion would not be a transaction within the contemplation and protection of section 55.

Now, if the creditor had commenced his suit against the debtor prior to the filing of the insolvency petition, the suit could have been continued notwithstanding the insolvency, subject to the possibility of the suit being stayed or its continuance being made subject to terms by the Court under section 29 of the Act. But it has so happened that the suit was instituted on the day after that on which the insolvency petition was filed. The effect of the relation back of the adjudication made upon that petition is that the adjudication commenced from the time when the petition was filed. It is from that time that the vesting of the estate in the Official Receiver is made to commence, and that the rule in section 28 (2) restraining a creditor's right of suit in respect of a debt comes into force. The consequence is that the suit in the present case must be deemed to have been commenced after the adjudication; and the suit being one in respect of a debt, namely, to enforce performance of an agreement by the debtor to execute a mortgage to the creditor as security for his debt, the suit was incompetent under the provisions of section 28 (2), leave of Court to commence the suit not having been first obtained. The decree made in the suit would therefore not be binding upon the Official Receiver as representing the insolvent, nor could it be effectual against the insolvent, for after

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adjudication his power to transfer his property by mortgage or otherwise was gone.

With regard to what is said by RAMESAM J. in *Kaliaperumal Naicker v. Ramachandra Aiyar*(1), if he intended to lay down the proposition that the relation back of an adjudication order to the time when the insolvency petition is filed did not affect a suit instituted in the interval between petition and adjudication by a creditor in respect of a debt, I must respectfully dissent from it. But I question whether this was what the learned Judge intended to convey. I think his observations should be understood as referring to the particular suit before him. It was a suit upon a mortgage. The right of a secured creditor, such as a mortgagee, to realise his security independently of the Insolvency Court is expressly reserved to him by section 28 (6) of the Act, and this right includes the power of realising the security by suit: *Lang v. Heptullabhai Ismailji*(2). A suit instituted by a mortgagee to enforce his claim under the mortgage would, therefore, be outside the Insolvency Act, and section 28 (2) would have no application to it. But in the present case the creditor who filed the suit was not a secured creditor, though he doubtless hoped to become one as the result of his suit.

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(1) (1927) 53 M.L.J. 142.

(2) (1913) I.L.R. 38 Bom. 359.