

APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice Cornish.

THE OFFICIAL RECEIVER OF KISTNA (PETITIONER),
APPELLANT,

1934,
September 18.

v.

THE IMPERIAL BANK OF INDIA AT BEZWADA AND
THREE OTHERS (RESPONDENTS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 47—“Representative” —Official Receiver, if and when a.

The question whether an Official Receiver is a “representative” within section 47 of the Code of Civil Procedure depends upon the true character of his proceedings. If his application is to stay an execution sale of property or to release it from an attachment on the footing that the property in question is property of the insolvent which has become vested in him, he is not to be regarded as acting in a representative capacity. Section 47 of the Code has in such a case no application, because the Official Receiver is exercising his right as Receiver to recover property vested in him and is not pursuing a claim as a representative of a party to the suit in which the decree was made.

APPEAL against the order of the Court of the Subordinate Judge of Bezwada, dated 26th April 1932 and made in Execution Application No. 334 of 1932 in Execution Petition No. 120 of 1931 in Original Suit No. 28 of 1931.

P. Satyanarayana Rao for appellant.

O. T. G. Nambiar for first respondent.

Cur. adv. vult.

JUDGMENT.

The JUDGMENT of the Court was delivered by
CORNISH J.—The appellant is the Official Receiver

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* Appeal against Order No. 319 of 1932.

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of Kistna, and as such the Receiver in the insolvency of the second and third respondents to this appeal. The first respondent, the Imperial Bank of India, obtained a money decree against the two other respondents and against the fourth respondent, a son of the third respondent, in respect of his share in the joint family property. This decree was obtained in March 1931.

The second and third respondents were respectively adjudicated insolvents on 12th September 1931 and 11th January 1932.

The Bank had attached the property of the two insolvents and the share of the fourth respondent before judgment. This attachment could not, of course, operate to prevent the vesting of the insolvents' property in the Official Receiver on their later insolvency ; *Raghunath Das v. Sundar Das Khetri*(1).

The Bank subsequently took steps to bring the fourth respondent's share in the property to sale. Objection was made by the Official Receiver in a petition dated 19th April 1932. In this petition he alleged that on 4th March 1932 he had come to know from information given by some of the creditors that the property which the Bank was going to sell was the self-acquired property of the second and third respondents and another man, and, consequently, property in which the fourth respondent had no right or share. The petition prayed that the property should be released from the attachment and that the Bank's sale should be stayed, or, in the alternative, that the sale proceeds should be deposited in Court pending

(1) (1914) I.L.R. 42 Cal. 72 (P.C.).

the determination of the question of who was entitled to them.

The Court dismissed the petition. The Judge seems to have thought that there had been some undue delay in bringing the petition. But the ground of his decision was that no reason had been shown why the Bank should suffer further expense by having the sale postponed. It is from this order that the Official Receiver has appealed.

Mr. Nambiar on behalf of the Bank has taken the point that the Official Receiver's petition is not maintainable as an application under section 47, Civil Procedure Code, inasmuch as the Official Receiver is not a "representative" within that section. He contends that the only footing on which the petition can stand is as a claim or objection under Order XXI, rule 58; and an order made under this last-mentioned rule is undoubtedly not appealable.

The Receiver or assignee in insolvency may be for some purposes the representative of the insolvent. In *Raghunath Das v. Sundar Das Khetri*(1) their Lordships of the Judicial Committee held that the failure of the judgment-creditors to serve a notice under section 248 of the 1882 Code (now represented by Order XXI, rule 22, of the 1908 Code) on the Official Assignee as the legal representative of the insolvent judgment-debtor rendered the sale in execution of the decree inoperative. That was a decision that the Official Assignee was the legal representative of the insolvent for the purpose of proceedings in execution under section 248. There was, however, no definition of "legal representative" in the 1882

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Code. Now, by section 2, clause 11, of the 1908 Code, a "legal representative" is defined as meaning a person who in law represents the estate of a deceased person. By virtue of the new definition, therefore, the Official Assignee or Receiver of an insolvent would not be his legal representative for the purpose of Order XXI, rule 22; though a rule of this High Court requires that a notice under Order XXI, rule 22, shall be given to the Official Assignee or Receiver.

The principle to be derived from the cases [See *Kashi Prasad v. Miller*(1), *C. E. Grey, Official Assignee v. Hazari Lal*(2), *Sardarmal v. Aranvayal Sabhapathy*(3), *The Official Assignee at Madras v. Aiyu Dikshithar*(4) and *Mohitosh Dutta v. Rai Satish Chandra Chundhuri Bahadur*(5)] appears to be that the question whether an Official Assignee or Receiver is a "representative" depends on the true character of his proceedings. If his application is to stay an execution sale of property or to release property from an attachment on the ground that the property in question is property of the insolvent which has become vested in him, the authorities above cited show that he is not to be regarded as acting in a representative capacity. Section 47 has then no application, because the Official Receiver is exercising his right as Receiver to recover property which is vested in him and is not pursuing a claim as a representative of a party to the suit in which the decree was made.

In the present case the Official Receiver's petition is headed as brought under section 47 and

(1) (1885) I.L.R. 7 All. 752.

(2) (1908) I.L.R. 30 All. 486.

(3) (1896) I.L.R. 21 Bom. 205.

(4) (1925) 48 M.L.J. 530.

(5) (1931) 35 C.W.N. 971.

Order XXI, rule 58, of the Civil Procedure Code, and sections 4, 5, and 52 of the Provincial Insolvency Act. But it is necessary to look at the substance of the petition. It is clear from paragraph 4 of the petition that in reality he is making a claim or objection under Order XXI, rule 58. In these circumstances, we must hold that the order made on the petition is not appealable and that this appeal must be dismissed with costs.

Solicitors for first respondent: *Moresby and Thomas.*

A.S.V.

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Before Mr. Justice Varadachariar.

MUTHURAMAN CHETTIAR MINOR BY NEXT FRIEND
A.R.A. RAMAN CHETTY (PLAINTIFF), APPELLANT,

1934,
May 9.

v.

ADAIKAPPA CHETTY AND FIVE OTHERS (DEFENDANTS
1 TO 6), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXII, rr. 4 and 11—Appeal—Legal representatives of deceased defendant impleaded as respondents in—Death of one of, and his legal representative not brought on record—Decree in appeal against respondents—Null and void against legal representative not so brought on record, when not—Dead man—Decision against—Binding nature of, on his legal representative—Death of a party to an action—Jurisdiction of Court to give judgment, whether in his favour or against him, if put an end to by—O. XLIV, r. 4, of the Code—Applicability to case of respondents—Decree against a dead man—Validity of—Question as to—Applicability of rule to case of.

During the pendency of a suit brought for the recovery of a share in certain properties against two defendants, one of

* Second Appeal No. 468 of 1930.