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principles laid down in Chapter VIII of the Transfer of Property Act and will not be entitled to all the privileges of an indorsee under the Negotiable Instruments Act. Section 137 must be deemed to exclude these principles in the case of negotiable instruments only to the extent that they are dealt with and are sought to be enforced as such instruments. I have elsewhere dealt with *Nachiappa Chetty v. Dakshinamurthy Servai*(1) and reserve my opinion on the point dealt with therein.

MOCKETT J.—I agree with my Lord the Chief Justice.

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APPELLATE CIVIL—FULL BENCH.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar and Mr. Justice Pandrang Row.*

1937,
December 1.

DEVULAPALLI SOBHANADRI SASTRULU (SECOND
APPELLANT IN APPEAL NO. 201 OF 1936), PETITIONER,

v.

DORBALA NAGAYYA SASTRY AND SEVENTEEN OTHERS
(RESPONDENTS IN APPEAL NO. 201 OF 1936), RESPONDENTS.*

*Insolvency—Undischarged insolvent—After-acquired property—
Suit or proceedings in respect of—Insolvent's right to
institute or conduct—Intervention of Official Receiver—
What amounts to—Effect of.*

K, the petitioner's mother, instituted a suit to recover possession of properties which she claimed constituted the estate

(1) 1915 M.W.N. 217.

* Civil Miscellaneous Petition No. 4869 of 1937.

of her deceased father. Her mother had predeceased her father and she was the only issue of the marriage. She averred that her father had separated from his brothers and on this footing claimed the estate as the sole heir. The lower Court dismissed the suit and K filed an appeal. During the pendency of the appeal she died. The petitioner was then an insolvent. The Official Receiver applied to the Court for an order directing that he should be brought on the record in the place of K, but he withdrew the application as he had not been placed in funds to meet the costs. The petitioner himself thereafter filed an application seeking to be allowed to continue the appeal because the Official Receiver had refused to become the appellant.

Held by the Full Bench : (i) The application by the Official Receiver for an order to make him the appellant in the place of the petitioner's mother constituted an intervention; he having intervened, and being unable to withdraw, the Official Receiver alone could maintain the appeal. The petitioner, therefore, could not be permitted to continue the appeal.

Quaere : Whether the rule in *Herbert v. Sayer* (1) is applicable to morassil insolvencies in India. In any view it must be read in the light of the rule which has been added to it by *Hill v. Settle*(2).

(ii) The petitioner's right in the property in suit is based on the claim that he is the actual reversioner of the last male owner. Therefore, he desires to continue the appeal in his own right, not through his mother. His rights in the property, whatever they are, have devolved on the Official Receiver and the law does not permit him to maintain the appeal.

Per Varadachariar J.—The question, whether the same principles as are laid down in this case will be applicable even to cases where a "legal representative" in the strict sense is applying to continue an appeal or a suit preferred or instituted by his predecessor in title, left open.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant leave to the petitioner

(1) (1844) 5 Q.B. 965; 114 E.R. 1512.

(2) [1917] 1 Ch. 319.

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therein to continue Appeal No. 201 of 1936 preferred to the High Court against the decree of the Court of the Subordinate Judge of Guntur in Original Suit No. 7 of 1934 as the legal representative of Devulapalli Kanchamma, the deceased appellant in the said appeal, and also grant leave, if necessary, to the petitioner therein to continue the said appeal.

P. V. Vallabhacharlu for petitioner.—The petitioner who is an undischarged insolvent can continue the appeal, as the subject-matter of the appeal relates to after-acquired property. *Ramanatha Iyer v. Nagendra Iyer*(1), the decision of a Bench of this Court, is a case under section 28, clause 4, under the present Provincial Insolvency Act and is directly in point. That case follows an earlier decision in *Sriramulu Naidu v. Andalammal*(2), which applies the principle in *Herbert v. Sayer*(3) and distinguishes *Cohen v. Mitchell*(4). This is no doubt a case under section 7 of 11 and 12 Vict. c. 21, but the right to institute or to continue proceedings, there being no question of contract or transfer, is not affected by the Privy Council decision in *Kala Chand Banerjee v. Jagannath Marwari* (5); [vide *RANKIN J.* in *Dasarathy Sinha v. Mahamulya Ash* (6)]. The case of *Kala Chand Banerjee v. Jagannath Marwari* (5) is distinguishable as it is a case of a decree obtained against the insolvent without impleading the Official Receiver as a party and it was held that such a decree was a nullity as against the Official Receiver. The question is not whether the principle in *Cohen v. Mitchell*(4) is applicable to cases under the Provincial Insolvency Act, after the Privy Council decision in *Kala Chand Banerjee v. Jagannath Marwari*(5) which is negatived in *Girikant Shrivastav v. Vadilal Vrijlal*(7), *Ma Phaw and others v. Maung Bu Thaw*(8), *Abdul Rahman v. Nihal Chand* (9) and *Lingayya v. Venkatapathy*(10). The question is the application of the limited principle in *Herbert v. Sayer*(3).

(1) (1923) 45 M.L.J. 827.

(3) (1844) 5 Q.B. 265; 114 E.R. 1512.

(5) (1927) I.L.R. 54 Cal. 595 (P.C.).

(7) (1935) I.L.R. 60 Bom. 141.

(9) (1935) I.L.R. 58 All. 132 (F.B.).

(2) (1906) I.L.R. 30 Mad. 145.

(4) (1890) 25 Q.B.D. 262.

(6) (1920) I.L.R. 47 Cal. 961, 970.

(8) (1926) I.L.R. 4 Ran. 125.

(10) (1935) 42 L.W. 33.

B. Somayya and *M. S. Ramachandra Rao* for respondents 1 to 4.—The Indian decisions relied on by the petitioner are all cases decided under the old Insolvency Act (11 and 12 Vict., c. 21) which applied only to the Presidency-towns. The principle underlying the English decisions [viz., *Fowler v. Down* (1), *Herbert v. Sayer* (2) and *Cohen v. Mitchell* (3)] is that there is a kind of “special property” in the insolvent in regard to after-acquired property. In other words the right to maintain an action is dependent upon the right to the property. The present Provincial Insolvency Act, section 28 (4), clearly says that after-acquired property shall “forthwith vest” in the Receiver. The words “forthwith vest”, on which I lay emphasis, indicate that the English decisions cannot have any application to cases arising under the Provincial Insolvency Act. [*Kala Chand Banerjee v. Jagannath Marwari* (4), *Ma Phaw and others v. Maung Ba Thaw* (5), *Girikant Shival v. Vadilal Vrijlal* (6), *Abdul Rahman v. Nihal Chand* (7) and *Lingayya v. Venkatapathy* (8) were referred to]. As regards property at the date of adjudication the insolvent cannot maintain an action because the property did not vest in him; *Subbaraya Chettiar v. Papatthi Ammal* (9). In this case the Official Receiver actually intervened. Intervention need not be continuous or effective. Once there is intervention the insolvent loses his right of action even though the Official Receiver refuses to take further action; *Hill v. Settle* (10).

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P. V. Vallabhaacharlu in reply.—There is no intervention by the Official Receiver in this case. So the insolvent should be allowed to continue the appeal.

ORDER.

LEACH C.J.—The petitioner’s mother, Devulapalli Kanchamma, instituted Original Suit No. 7 of 1934 in the Court of the Subordinate Judge of Guntur to recover possession of properties which she claimed constituted the estate of her deceased father, Dorbala Narasimha Sastri. Her mother

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(1) (1797) 1 Bos. & Pul. 44; 126 E.R. 769.

(2) (1844) 5 Q.B. 965; 114 E.R. 1512. (3) (1890) 25 Q.B.D. 262.

(4) (1927) I.L.R. 54 Cal. 595 (P.C.). (5) (1926) I.L.R. 4 Ran. 125.

(6) (1935) I.L.R. 60 Bom. 141. (7) (1935) I.L.R. 58 All. 132 (F.B.).

(8) (1935) 42 L.W. 33. (9) (1917) 7 L.W. 516.

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had predeceased her father and she was the only issue of the marriage. She averred that her father had separated from his brothers and on this footing claimed the estate as the sole heir. The lower Court dismissed the suit and Kanchamma then appealed to this Court. During the pendency of the appeal she died and the petitioner applied to be allowed to continue the appeal. This petition is now before us and is opposed.

The petitioner is an insolvent and was an insolvent when he filed the petition. He seeks to be allowed to continue the appeal because the Official Receiver has refused to become the appellant. The Official Receiver did apply to this Court on 12th July for an order directing that he should be brought on the record in the place of Kanchamma, but on 12th October he withdrew the application as he had not been placed in funds to meet the costs.

The petitioner has relied on the rule in *Herbert v. Sayer*(1) which allows a bankrupt to maintain a suit to recover after-acquired property in the hands of a stranger unless the trustee has intervened. This rule has frequently been applied in India, but the respondents say that as the result of the decision of their Lordships of the Privy Council in *Kala Chand Banerjee v. Jagannath Marwari*(2) it can no longer be applied. It is, however, not necessary to decide this question, because even if the decision in *Kala Chand Banerjee v. Jagannath Marwari*(2) has not the effect which the respondents maintain it has, *Herbert v. Sayer*(1) must now be read in the light of

(1) (1844) 5 Q.B. 965; 114 E.R. 1512. (2) (1927) I.L.R. 54 Cal. 595 (P.C.).

Hill v. Settle(1) and when this is done it is clear that the present petition does not lie.

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In *Hill v. Settle*(1) it was decided that when once a trustee in bankruptcy has intervened in regard to after-acquired property of an undischarged bankrupt that property vests in the trustee and he cannot by withdrawing his intervention divest himself of the property and re-vest it in the bankrupt. In that case a person had entered into an agreement with the bankrupt under which he had to make payments to the bankrupt and the trustee in bankruptcy gave notice requiring these payments to be made to him. For reasons which it is not necessary to go into the trustee withdrew the notice. It was contended that as the result of the withdrawal, the original position was restored. The Court of Appeal, consisting of LORD COZENS-HARDY M.R., WARRINGTON L.J. and LAWRENCE J., held that this was not so. Once the trustee in bankruptcy had intervened the property vested in him and remained with him in spite of the withdrawal of the notice. The property being in the trustee, nothing remained in the bankrupt.

If the rule in *Herbert v. Sayer*(2) applied here, we must also apply the rule which has been added to it by *Hill v. Settle*(1). There can be no doubt that the application by the Official Receiver to this Court for an order making him the appellant in the place of the petitioner's mother did constitute an intervention. It was a far greater act of intervention than that in *Hill v. Settle*(1). The Official Receiver having intervened

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and being unable to withdraw he alone could maintain the appeal.

It has been suggested that the petitioner does not ask to have his name brought on the record as the owner of the property, but merely as the legal representative of his mother. But this is not the case. His right in the property in suit is based on the claim that he is the actual reversioner of the last male owner, his grandfather. Therefore he desires to continue the appeal in his own right, not through his mother. His rights in the property, whatever they are, have devolved on the Official Receiver and the law does not permit him to maintain the appeal.

The application must therefore be dismissed with costs.

VARADA-
CHARIAR J.

VARADACHARIAR J.—I agree that the insolvent is not entitled to continue this appeal ; but I wish to make one reservation to avoid a possible misapprehension. I have felt some difficulty in this case on account of the fact that the petitioner is certainly within the definition of the expression “legal representative” given in the Code of Civil Procedure though in strict law he does not claim *under* his mother. As pointed out by my Lord, the petitioner’s claim is substantially for his own benefit and not for the benefit of his mother’s estate. I wish to guard myself against being understood as deciding that the same principles as are laid down in this case will be applicable even to cases where a “legal representative” in the strict sense is applying to continue an appeal or a suit preferred or instituted by his predecessor in title. In such a case, the considerations applicable to a suit instituted by the insolvent himself will not

apply in their entirety because, so far as that particular litigation is concerned, the legal representative will only be taken to assert or safeguard the title of the original party. The decision in that case of a question like the present will depend upon the scope of the words in Order XXII, rule 8, of the Code of Civil Procedure, namely, whether the proceeding which the legal representative who has been adjudged insolvent wishes to continue can be regarded as a proceeding which the Assignee or Receiver in the insolvency of the legal representative might maintain for the benefit of his creditors. I do not read the judgment in *Kala Chand Banerjee v. Jagannath Marwari*(1) as concluding this question.

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PANDRANG ROW J.—I agree with my Lord the Chief Justice and I have only to add that whether the rule in *Herbert v. Sayer*(2) applies to mofussil insolvencies is not being decided by us, and that our decision rests mainly, if not entirely, on the decision in *Hill v. Settle*(3) by the Court of Appeal in England.

PANDRANG
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(1) (1927) I.L.R. 54 Cal. 595 (P.C.). (2) (1844) 5 Q.B. 965; 114 E.R. 1512.

(3) [1917] 1 Ch. 319.