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that there was a submission to the jurisdiction of the foreign Court and that the learned District Judge was wrong in refusing execution. This appeal must, therefore, be allowed with costs here and in the District Court and execution allowed to proceed.

KING J.—I agree.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

MUTHAN CHETTIAR AND ANOTHER (PETITIONERS),
 PETITIONERS,

1936,
 March 25.

v.

VENKITUSWAMI NAICKEN (RESPONDENT-
 DECREE-HOLDER), RESPONDENT.*

*Provincial Insolvency Act (V of 1920), ss. 51 (3) and 52—
 Executing Court—Interim receiver's application to—Duty
 of executing Court, in case of—Defiance of provisions of
 sec. 52 by it—Sale a nullity, if, in case of—Purchaser
 in good faith at sale—Good title, if acquired by—Effect of
 sec. 51 (3).*

On an application made to it by the interim receiver the executing Court is, under section 52 of the Provincial Insolvency Act, bound to direct the property of the debtor in the custody of the Court to be delivered to the receiver and to stay the execution sale.

The executing Court's defiance of section 52 has not, however, the effect of making the sale in execution a nullity. Section 51 (3) provides that "a person who in good faith purchases the property of a debtor under a sale in execution shall

* Appeal Against Order No. 37 of 1935 converted into Civil Revision Petition No. 380 of 1936, and Appeal Against Order No. 201 of 1935.

in all cases acquire a good title to it against the receiver". The sub-section means that, although by reason of the sale being held after the admission of the petition, the decree-holder gets no right to the proceeds, the purchaser in good faith nevertheless acquires a good title to the property against the receiver.

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Sivasami Odayar v. Subramania Aiyar, (1931) I.L.R. 55 Mad. 316, dissented from on this point.

Din Dayal v. Gur Saran Lal, (1920) I.L.R. 42 All. 336, referred to.

A purchase made on the faith of a Court's order sanctioning a sale would negative any inference of bad faith which knowledge of the debtor's insolvency standing alone might possibly justify.

Anantharama Iyer v. Kuttimalu Kovilamma, (1916) 30 M.L.J. 611, dissented from.

Malkarjun v. Narhari, (1900) L.R. 27 I.A. 216; I.L.R. 25 Bom. 337, referred to.

Raghunath Das v. Sundar Das Khetri, (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72 explained and distinguished.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Trichinopoly, dated 26th September 1934 and made in Execution Application No. 668 of 1934 in Execution Petition No. 44 of 1934 in Original Suit No. 120 of 1932.

APPEAL against the order of [the Court of the Subordinate Judge of Trichinopoly, dated 7th March 1935 and made in Execution Application No. 769 of 1934 in Original Suit No. 120 of 1932.

M. S. Vaidyanatha Ayyar and *K. Soundararajan* for petitioners.

K. Bhashyam Ayyangar, *T. R. Srinivasan* and *R. Desikan* for respondent.

Cur. adv. vult.

JUDGMENT.

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VENKATASUBBA RAO J.—These appeals raise a question of some importance as to the scope and effect of sections 51 and 52 of the Provincial Insolvency Act. The facts may be briefly stated. The decree in question was obtained on 7th March 1933 and the property was attached in due course. Subsequently on 11th August 1934 the judgment-debtors presented a petition for being adjudicated insolvents. An interim receiver was appointed and on 3rd September 1934 he was directed to take possession of the insolvents' property. In the meantime the executing Court had directed the attached property to be sold. The date fixed for sale was 26th September 1934. On that date the interim receiver and one of the insolvent judgment-debtors presented to the executing Court an application under section 52, which, though strictly not in conformity with that section, we are prepared to treat as falling within it. On 26th September 1934 the learned Subordinate Judge (Mr. Krishna Nambiyar) made an order refusing to stop the sale but directing that the sale proceeds should be paid to the Official Receiver. A sale was accordingly held and a third party, i.e., a stranger to the suit, purchased the property. On 25th October 1934 the same two persons (the Receiver and the insolvent judgment-debtor) applied to the executing Court that the sale should be set aside. The application purports to be under section 151 and Order XXI, rule 90, Civil Procedure Code. That was heard by Mr. R. Rangaswami Ayyangar who, holding that his predecessor had acted in violation of section 52, set aside the sale, declaring it to be

null and void. In the view he took, he considered it unnecessary to go into the question of material irregularity under Order XXI, rule 90.

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There are various sections in the Provincial Insolvency Act which affect or control the legal remedies of a creditor against the property or person of the debtor. An insolvency proceeding, it is hardly necessary to observe, commences with the presentation of a petition (section 7). The second stage is reached when the petition is admitted, although from its presentation to its admission it is but a short step (section 18). After the admission a date is fixed for the hearing of the petition, section 19 (1), and the Court may on such hearing either dismiss the petition or make an order of adjudication, which marks the third stage (section 27).

When the Court makes an order admitting the petition, an interim receiver may be appointed, in whom, however, the property does not vest but whose powers are those conferred on a receiver under the Civil Procedure Code (section 20). But when an order of adjudication is made, the insolvent's property immediately vests in the Court or in a receiver (section 28). The Court may appoint a receiver either at the time of the order of adjudication or at any time afterwards (section 56). If there is an interval between the order of adjudication and the appointment of a receiver, the property first vests in the Court and, when a receiver is appointed, it thereupon vests in him (section 56).

As regards the effect of the orders made in insolvency on the creditor's remedies, there are two distinct sets of sections : first, sections 28 and

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29 dealing with the effect of the order of adjudication and, secondly, sections 51 and 52 dealing with the effect of an order admitting the petition. The distinction between these two sets of provisions it is essential to bear in mind. The effect of section 28 is, when an order of adjudication has been made, to take away the right of a creditor to proceed against the insolvent's property or to commence any suit or other legal proceeding against him except with the leave of the Court and subject to such terms as it may impose. Section 29 relates to pending suits or other proceedings and provides that the Court shall, on proof that an order of adjudication has been made, either stay the proceedings or allow them to continue on such terms as it may impose. Now, turning to the second group, under section 52, the point of time material is not the date of the order of adjudication but the date of the admission of the insolvency petition. The executing Court, it provides, shall, if two conditions are satisfied, direct the insolvent's property, if in its possession, to be delivered to the receiver. Those conditions are: (i) execution has issued against the property but, before its sale, notice is given to the Court that an insolvency petition has been admitted and (ii) an application is made to the executing Court for delivery of the property to the receiver. The point of difference to note is, that, whereas under section 29, on mere proof that an order of adjudication has been made, the executing Court's power is checked, under section 52 no such result automatically follows from the mere fact that notice of the admission of an insolvency petition has been given to the Court ;

for, in the latter case, coupled with that fact, there must be an application to the Court for delivery. That the Legislature intended this difference there can be no doubt, for the order of adjudication is sometimes a long way off from the admission of the insolvency petition. I am not prepared to agree with Mulla who, after referring to the two conditions mentioned above, observes in his valuable work :

“ It does not, however, follow that, if no such application is made, the Court executing the decree can sell the property even if it had such notice as is mentioned above.”

(Mulla's Law of Insolvency, 1930 Edn., page 425, paragraph 604).

The learned author's interpretation is opposed to the plain wording of the section which says that the Court shall “on application” direct the property to be delivered. Then comes section 51 which, unlike sections 28, 29 and 52, deals not with procedure but with substantive rights. It enacts that an execution creditor is not entitled to the benefit of the execution against the receiver unless the assets are realised before the admission of the petition. The material date under this provision of law, it must be observed, is the date not of the insolvent's adjudication, but of the admission of the insolvency petition. I may in passing remark that, under the Provincial Insolvency Act of 1907 which the Act in question has replaced, under both the sections corresponding to the present sections 51 and 52, the point of time material was the date of the order of adjudication and not, as under the present Act, the date of the admission of the insolvency petition (sections 34 and 35 of Act III of 1907).

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I have attempted this analysis of the relevant sections of the Act as it will, I believe, lead to a correct understanding of the points now raised. In the first place, does section 52 exclude an interim receiver on the ground that the insolvent's property does not vest in him? The question has been answered in the affirmative in *Subramania Aiyar v. The Official Receiver, Tanjore*(1), but that view has been dissented from in *Sivasami Odayar v. Subramania Aiyar*(2). As already observed, departing from section 35 of the old Act, the Legislature has substituted, for the date of the order of adjudication, the date of the admission of the petition, which clearly points to the fact that the vesting of the property in the receiver on adjudication can no longer be treated as a necessary condition precedent. *Sivasami Odayar v. Subramania Aiyar*(2), in my opinion, therefore, gives effect to the correct principle, and, with respect, I am unable to agree with the observation of Mulla who seems to think that the word "receiver" in section 52 can only refer to a person appointed after adjudication. The learned author observes :

"The present section provides for an order directing the property to be delivered to the receiver after the admission of an insolvency petition. It is difficult to conceive how such an order can ever be made for no receiver can be appointed until adjudication" (page 426, paragraph 605).

It seems to me, with respect, that this construction does not give full effect to the words of the altered section.

I have therefore no hesitation in holding that on the interim receiver's application the sale

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

(2) (1931) I.L.R. 55 Mad. 316.

ought to have been stayed and the property delivered to him and that the order of 26th September 1934 is wrong. The result is that Civil Miscellaneous Appeal No. 37 of 1935, which is directed against that order, must be allowed, but we make no order as to costs.

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But that does not bring this matter to an end. As already stated, the property has been sold in pursuance of what we now hold to be a wrong order and has been purchased by a third party. The question is, did the sale, held as it was in contravention of the peremptory terms of section 52, convey or not title to the third party purchaser? It is contended for the Official Receiver, on the strength of *Sivasami Odayar v. Subramania Aiyar*(1), already cited, that the sale held in such circumstances is null and void and the purchaser gets no title under it. But the observation in that sense, which no doubt occurs in the judgment, is an *obiter dictum*. The sale had been held to be valid at a previous stage of the same case by the Bench that decided *Subramania Aiyar v. The Official Receiver, Tanjore*(2). The learned Judges therefore could not have been, and were not in fact, asked to set aside that sale, though in their opinion the decision of the former Bench was wrong. The observation therefore to the effect that the sale is absolutely void is, as I have said, *obiter*. The question has really to be decided with reference to section 51, which has not been referred to in that judgment. That section, after saying that an execution creditor is not entitled to the benefit of the execution unless the assets are realised by sale or otherwise before the

(1) (1931) I.L.R. 55 Mad. 316.

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admission of the petition, goes on to say in sub-section 3 :

“ A person who *in good faith* purchases the property of a debtor under a sale in execution shall *in all cases* acquire a good title to it against the receiver.”

The sale here contemplated must necessarily be that held after the admission of the petition, for, if it be a sale held previous to that, the execution creditor would become entitled even to the sale proceeds and the property would pass to the purchaser, independent of the question of good faith. Sub-section 3 therefore means that, although by reason of the sale being held after the admission of the petition, the decree-holder gets no right to the proceeds, the purchaser in good faith nevertheless acquires a good title to the property. As a matter of construction (although this point does not now arise) it would follow that, even in regard to a sale held after the date of adjudication, a *bona fide* purchaser would under this sub-section be protected. This is the view taken, and in my opinion rightly, in *Ramanatha v. Vijayaraghavalu*(1).

The further question then remains, was the purchase made in *good faith*? It has been contended for the Official Receiver that no purchaser having knowledge of the debtor's insolvency can ever be treated as acting in good faith within the meaning of this section. For this position the learned Counsel relies upon *Anantharama Iyer v. Kuttimalu Kovilamma*(2), but I must most respectfully dissent from it. I think it is unnecessary to enquire whether or not the purchaser here had notice of the debtor's insolvency ; for,

(1) A.I.R. 1927 Mad. 983. (2) (1916) 30 M.L.J. 611.

granting that he had notice, could it be said that there was want of good faith on his part when he purchased the property at a sale sanctioned by the Court? Let us look at the facts. The executing Court, though the fact of the insolvency was brought to its notice, refused to stay the sale, presumably on the ground that section 52 was not applicable, that being the view of even a Bench of this Court although it was subsequently dissented from. Why should the purchaser be expected to doubt the correctness of the Court's order? A purchase made on the faith of a Court's order would negative any inference of bad faith which knowledge of the debtor's insolvency standing alone might possibly justify. *Raghunath Das v. Sundar Das Khetri*(1), on which the learned Counsel relies, does not militate against this view. There, after the attachment of the judgment-debtor's property had been effected, he was adjudged an insolvent under the Indian Insolvency Act, 1848, and his estate vested in the Official Assignee. The property was then sold in execution, no notice under Order XXI, rule 22, Civil Procedure Code, having been served on the Official Assignee. It was held by the Privy Council that the sale was null and void. In the Indian Insolvency Act there was no provision corresponding to that contained in section 51 (3) and, that being so, I have no hesitation in holding that the Privy Council ruling does not apply. Section 51 (3) is modelled, as is pointed out by Mulla (see page 167, paragraph 253), upon section 46 (3) of the Bankruptcy Act, 1883 [now Bankruptcy Act, 1914, section 40 (3)]. True, after the property passes to

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(1) (1914) L.R. 41 I.A. 251 ; I.L.R. 42 Cal. 72.

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and vests in the judgment-debtor's representative, it would be wrong to allow the sale to proceed without obtaining an order binding upon him under Order XXI, rule 22, and a sale so held would be a nullity. But the special provision in the Insolvency Act enacted for the protection of *bona fide* purchasers must have the effect of over-riding the general provision contained in the Code of Civil Procedure ; for Order XXI, rule 22, is not confined to a receiver in insolvency in whom the property vests, but extends to every kind of legal representative. Therefore the decision of the Judicial Committee is inapplicable.

Lastly, it is necessary, however, to point out that what the section demands is good faith ; the existence of it or the want of it may be proved in diverse ways. Because it has been held that knowledge on the purchaser's part of the debtor's insolvency does not, in the circumstances, amount to absence of good faith, it does not necessarily follow that all enquiry into the question whether the purchaser acted in good faith or not is to be excluded. Any collusion or fraud may vitiate the sale. Further, another important point must be borne in mind, that section 51 (3) is of wider range than Order XXI, rule 90, Civil Procedure Code. For one thing, it is unnecessary to prove substantial injury under the former section.

That being so, the lower Court must be directed to dispose of the petition to set aside the sale (Execution Application No. 769 of 1934) in the light of these remarks.

In the result, the lower Court's order is reversed, Civil Miscellaneous Appeal No. 201 of 1935 is allowed with costs and the petition to set aside

the sale is remanded for being disposed of as aforesaid.

In conclusion, I wish to point out that a preliminary objection was taken that Civil Miscellaneous Appeal No. 37 of 1935 was incompetent. We intimated that we did not propose to decide that matter as we were prepared, if necessary, to allow the appeal to be converted into a revision petition.

CORNISH J.—I agree. The difficulty presented by section 52 to the construction of section 51 is due to the circumstance that the former section, as a result of the amendment made by the present Act, is out of place where it stands. It does not belong to the chapter of the Act relating to the “effect of insolvency on antecedent transactions”. It relates to the stage prior to adjudication, where the insolvency petition has been admitted. It therefore belongs more properly to the provisions of the Act dealing with that particular stage when, upon the admission of the petition, an interim receiver is appointed to take charge of the debtor’s property. The interim receiver is simply the officer of the Court appointed for this purpose and he stands in the same position as a receiver appointed under Order XL of the Civil Procedure Code. Section 52 enables him to get possession of the property of the debtor which is subject to attachment; and it is clear from the language of the section, as well as from authority, that when application is made to it the executing Court is bound to direct the property of the debtor in the custody of the Court to be delivered to the receiver. It follows as a necessary implication that the Court is likewise bound to stay the execution

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sale ; otherwise the peremptory provision of the section will be defeated. I do not think, however, that the executing Court's defiance of section 52 has the effect of making the sale in execution a nullity. It seems to me that the opinion given in *Sivasami Odayar v. Subramania Aiyar*(1), that an auction purchaser can get no title under such a sale against the Official Receiver, who subsequently comes upon the scene after adjudication, goes too far. Section 52 does not say that a sale held in contravention of its provisions shall be void or voidable. So that there is nothing in the section which qualifies the very emphatic language of section 51 (3).

Section 51 contemplates an execution sale of a debtor's property after the admission of his insolvency petition. The only result so far as the executing creditor is concerned is that if the sale takes place after admission of the petition the sale proceeds go to the receiver for the benefit of the creditors generally. But the sale confers title on the purchaser in good faith. Sub-section 1 of section 51 is concerned with the assets of the debtor realised by execution sale, and it provides that no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition. But sub-section 3 is concerned with the purchaser at an execution sale and says that a person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver. I think that the plain

(1) (1931) I.L.R. 55 Mad. 316.

meaning of this is that in every case of execution sale of a debtor's property, whether before or after admission of the insolvency petition, the *bona fide* purchaser acquires a title to the property which holds good against the Official Receiver. In other words, the right which the Official Receiver gets by relation back from the order of adjudication, to have vested in him all the property which the debtor had at the date of the insolvency petition, will not prevail against the purchaser in good faith at an execution sale prior to the adjudication. This was the rule under section 34 of Act III of 1907 [*Din Dayal v. Gur Saran Lal*(1)] and I think it is equally the rule upon the construction of section 51 (3) of the present Provincial Insolvency Act. There is this reason for the rule in favour of the *bona fide* purchaser that, as observed by their Lordships of the Judicial Committee in *Malkarjun v. Narhari*(2), strangers to a suit are justified in believing that the Court has done that which it ought to do, and no purchaser at a Court sale would be safe if he was bound to inquire into the accuracy of the Court's conduct of its own business. I agree with the order proposed by my brother.

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(1) (1920) I.L.R. 42 All. 336.

(2) (1900) L.R. 27 I.A. 216; LL.R. 25 Bom. 337.