Before Mr. Justice Sulaiman and Mr. Justice Boys.

KANIZ FATIMA (PLAINTIFF) *v.* NARAIN SINGH AND ANOTHER (DEFENDANTS).* 1926 *July* 6.

Act No. V of 1920 (Provincial Insolvency Act), sections 4 and 53—Insolvency—Transfer set aside in proceedings under section 53—Ostensible transferees not objecting in spite of notice—Suit for declaration of title barred.

In a proceeding held by an insolvency court under section 53 of the Provincial Insolvency Act, 1920, the court decided that certain transfers of their property made by the insolvents, the validity of which was questioned by the receiver, were voidable as against him. The ostensible transferees had notice of this proceeding, but did not appear, so that the decision, so far as they were concerned, was *ex parte*.

Held, that section 4 of the Act barred a suit by the transferees for a declaration of their title to the property in question. *Maharana Kunwar* v. *E. V. David* (1), and *Pita Ram* v. *Jujhar Singh* (2), referred to.

THIS and a similar appeal preferred by the other transferee were appeals arising out of certain insolvency proceedings which commenced on the 28th of January, 1922, against two brothers, Ehsan Husain and Abdul Majid. About a year before the insolvency proceedings commenced, the two brothers had executed sale-deeds of the property now in question in favour of their respective wives. It appeared that there was some application on the part of the receiver that these properties should be treated as properties of the insolvents. Thereupon the District Judge took proceedings under section 53 of the Provincial Insolvency Act, 1920. Notices were served on the ladies, and they failed to appear. The District Judge, on the 12th of May, 1922, passed an order by which he found the transfers voidable against the receiver and

*First Appeal No. 267 of 1923, from a decree of Banwari Lal, Subordinate Judge of Bijnor at Moradabad, dated the 27th of February, 1923.

(1) (1923) I.L.R., 46 All., 16. (2) (1917) I.L.R., 39 All., 627.

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annulled them. Subsequently, the ladies filed an application to have these *ex parte* orders set aside. The Judge, on the 30th of October, 1922, held that the service of summonses on the ladies was sufficient and, they having failed to appear, declined to restore the proceedings. He further remarked that though the ladies were *pardanashin* ladies, both their husbands had been present in court on the day of the hearing. Subsequently, on the 25th of January, 1923, the two ladies instituted the suits, out of which these appeals arose, asking for a declaration of their respective ownership of the properties in question. The Subordinate Judge held in both cases that they were bound by the provisions of section 4, clause (2), of the Provincial Insolvency Act and that by the order in the insolvency proceedings the claim of the ladies in each case was *res judicata*. He, therefore, dismissed both suits. The plaintiffs appealed.

Munshi *Sarkar Bahadur Johari*, for the appellant.

Pandit *Mohan Lal Sandal*, for the respondents.

The judgement of Boys, J., after setting forth the facts as above, thus continued :—

The point that we really have to decide is whether strangers to the insolvency proceedings, as these two ladies are, come within the phrase " claimants against the debtor and the debtor's estate " in sub-section (2) of section 4. If they do come within those terms then there can be no doubt that the Judge's order in the insolvency proceedings was final against them. The first consideration that occurs is that if strangers to the insolvency proceedings do not come within the phrase " claimants," it is difficult to understand what class of persons it was intended to cover. So far as I understand the matter, there are only three classes of persons who can possibly be interested in the result of insolvency

proceedings. There are, first, the debtor; secondly, his creditors; thirdly, strangers, whose property is in danger of being mistaken for property of the debtor in the proceedings and sold or distributed to creditors. The first is clearly excluded. It is not possible to conceive a case in which a debtor could be a claimant against his own estate. The second class, creditors, are especially provided for in many other sections of the Act, more particularly under section 28 where, after the adjudication order is passed, a schedule of creditors has to be prepared and provision is made for hearing evidence in regard thereto. There remains, therefore, only the third class to come within the scope of the "claimants", namely, strangers whose property is in danger.

Further, even if the word "claimant" includes "creditors," a point which I have not to decide in the present matter, the language is clearly wide enough to include a "stranger" claimant who has become a party to the proceedings.

The next question for consideration is how can a stranger to the insolvency proceedings come before the court. There are several sections which give the court power to take action in regard to property, by which action the interest of a stranger may be in danger. There is section 21 by which property may be attached, and in the course of that attachment a mistake might be made. There is section 28 which vests in the receiver property which is in the ostensible ownership and control of the debtor, and there is section 53 by which the court is given power to annul transfers, with certain exceptions, which have been made by the debtor within two years of the adjudication.

When property is attached in which a stranger claims an interest, it may be that the stranger will prefer to make no objection before the insolvency court but to file a separate suit. In that event it may well be

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that the proceedings before the insolvency court will have no effect upon the right of the stranger. That, however, is not the case before us. Nor are we concerned with the effect of any order in regard to property under section 28(*iii*). The case before us is one where the court is proceeding to inquire into the validity of transfers under the provisions of section 53 with a view to the possible annulment thereof. In pursuance of proceedings under those sections a notice was issued to the present appellants to show cause why the transfers should not be annulled. Power to arrive at a decision on the question of the ownership of those properties is given by section 4 of the Act. To ascertain what procedure is to be followed we have to refer to section 5 of the Act. That section lays down :

"Subject to the provisions of this Act, the court, in regard to proceedings under the Act, shall have the same power and *shall follow the same procedure* as it has and follows in the exercise of original civil jurisdiction."

It is clear, therefore, that there is ample opportunity to a stranger to protect his own interests as fully as if the matter were to be decided in an ordinary suit. There is, therefore, *primâ facie* no prejudice to the stranger if he prosecutes his resistance in the interest of his property with due attention in the insolvency court and there is, therefore, *primâ facie* no reason why the decision so arrived at should not bind the stranger. Further, sub-section (2) of section 4 appears to be conclusive in this regard. It declares that a decision so arrived at shall be final "subject to the provisions of this Act," i.e., subject to the rights of appeal given by the Act. It is, therefore, manifest that the plaintiffs having neglected the opportunity fully given to them in the insolvency court, had no right of separate suit in the ordinary civil court to set aside the order passed by the insolvency court, and there is, therefore, no force in this ground of appeal.

The only case to which our attention has been drawn, in which this question came up for consideration is that of *Maharana Kunwar* v. *E. V. David* (1). In that case my brother Mr. Justice SULAIMAN held that section 4 was applicable to the case of a stranger to the insolvency proceedings and remarked :

"If a question of title has been actually raised by a stranger to the insolvency and decided by the insolvency court, the decision is final and the question cannot be re-opened in a separate regular suit."

Mr. Justice LINDSAY, who was a party to the decision in that case, remarked :

"I am not prepared to take the view that a decision under sub-section (2) of section 4 would be binding upon a stranger like the plaintiff in the present case, who, in my opinion, is not making any claim against the debtor or the debtor's estate. What the plaintiff in the present suit is saying is that the property about which the dispute exists does not belong to the debtor's estate and never did belong to it, and so I cannot see how it can be said that she in the present proceedings is claiming against the debtor or his estate. That question, however, does not arise for decision and these observations are consequently *obiter*."

It is true that the views expressed were in that case to this extent certainly *obiter*, in that the plaintiff in that case had not taken any part in the proceedings before the insolvency court. The plaintiff's property had been attached, but the plaintiff had allowed the matter to remain there and had taken no objection before the insolvency court. It is, therefore, true that she could not be regarded as having been in the insolvency court a claimant against the debtor's estate. But I take it that the remarks of Mr. Justice SULAIMAN only meant this that if the plaintiff has, as a matter of fact, resisted or been called upon to resist

(1) (1923) I.L.R., 46 All., 16.

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the proceedings in the insolvency court, the plaintiff would have had to be regarded as "a claimant against the debtor's estate." With that view I have already expressed my agreement.

If then the plaintiffs had no right of suit at all their appeals must fail and it is not necessary for us to enter into the question whether a notice under section 80 of the Code of Civil Procedure to the receiver was, or was not, necessary.

I would dismiss both appeals with costs.

SULAIMAN, J. :—I agree. The court below has dismissed the suit on two grounds, first, that the receiver appointed by the insolvency court was a public officer and two months' notice under section 80 of the Code of Civil Procedure was necessary, and, secondly, that the claim is barred in view of the provisions of section 4 of the Provincial Insolvency Act, 1920.

A public officer is defined in section 2, sub-section (17). I am not prepared to say off-hand that a receiver appointed by an insolvency court, in the case of a particular insolvent, as distinct from an official receiver, is an officer of a Court of Justice within the meaning of sub-clause (*d*) of that sub-section. The case of *Anna Laticia De Silva* v. *Gobind Balvant Parashare* (1) has been relied upon, which case has been referred to in a judgement of this Court in the case of *Murari Lal* v. *E. V. David* (2). I prefer to reserve my opinion on this point.

It is, however, clear that the present suit is barred by section 4 of the Provincial Insolvency Act. The receiver applied to the insolvency court for adjudicating certain transfers to be fraudulent and to cancel the same. The application was under section 53 of the Act. Notice was issued to the plaintiff, and

(1) (1920) I.L.R., 44 Bom., 895. (2) (1924) I.L.R., 47 All., 291.

though there was due service she did not appear and the case was heard *ex parte* and decided against her on the merits. She applied to have the *ex parte* order set aside but failed. The adjudication of the insolvency court is, in my opinion, final. The fact that the proceedings were *ex parte* can make no difference. Section 4, sub-section (1) of the Provincial Insolvency Act gave full power to the court to decide all questions of title or priority or of any nature whatsoever, whether involving matters of law or fact, which may arise in the case or which the court may deem it expedient or necessary to decide. The court did in fact decide the question of fact. The present plaintiff must be deemed to be a claimant against the debtor or his estate inasmuch as she was putting forward a claim to a part of the property which was claimed by the receiver as belonging to the insolvent. Section 4, sub-clause (2) is wide enough to cover such a case. The decision *inter partes* must be deemed to be final and binding. I adhere to the view expressed by me in the case of *Maharana Kunwar* v. *E. V. David* (1), even though it might not have been necessary to decide that point in that case. Unless disputes between the receiver and strangers, as distinct from creditors, can come within the scope of section 4, it is difficult to see how questions of title can be decided by the insolvency court at all. In my opinion the enactment gives effect to the view which prevailed in this Court even under the old Provincial Insolvency Act; vide *Pita Ram* v. *Jujhar Singh* (2).

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BY THE COURT.—Both the appeals are dismissed with costs.

Appeal dismissed.

(1) (1923) I.L.R., 46 All., 16. (2) (1917) I.L.R., 39 All., 627.