APPELLATE CIVIL.

Before Mr. Justice Otter and Mr Justice Bagulcy.

1930

Aug. 6

MOHAMED ADJIM NACODA AND OTHERS

v.

E. M. CHETTYAR FIRM. *

Insolvency of judgment-debtor—Declaratory suit by attaching creditor under O. 21, r.63, Civil Procedure Code (Act V of 1908).—Leave of Insolvency Court to sue—Provincial Insolvency Act (V of 1920), s. 28 (2).

An attaching creditor cannot file a suit under O. 21, rule 63 of the Code of Civil Procedure against a claimant for a declaration that the property attached belongs to his judgment-debtor who has in the meantime been adjudicated an insolvent, without first obtaining leave of the Insolvency Court. Such leave is a condition precedent to the commencement of the suit.

Raman Chetty v. *Ma Hme*, 10 B.L.T. 116 ; *Trimback* v. *Sheoram*, 65 I.C. 941 ; *Vasudeva* v. *Lakshmunarayana*, I.L.R. 42 Mad. 684—*referred to*,

Nune Narasimham v. *Donepudi*, 98 I.C 446—*dissented from.*

Anklesaria for the appellants.

Darwood with *Shunmugam* for the respondents.

OTTER, J.—In execution of a decree, the respondent Chettyar firm attached certain property said to belong to a man called A. M. Nacoda.

On the 24th of January and the 30th of January 1929, respectively, two applications were filed, asking for removal of the attachment (namely, Civil Miscellaneous Nos. 21A and 28A of 1929 of the District Court of Amherst).

On the 13th of February 1929, the respondent firm applied for the adjudication in insolvency of the said A. M. Nacoda ; and on the 18th of March of that year, an *ad interim* receiver was appointed.

On the 24th of April 1929, the said Nacoda was adjudicated insolvent, and on that date the *interim* receiver was appointed receiver.

* Civil First Appeals Nos. 227 and 228 of 1929 from the judgments of the District Court of Amherst in Civil Regular Nos. 30 and 31 of 1929.

1930

MOHAMED ADJIM NACODA v. V.E.M. CHETTYAR FIRM.

OTTER, J.

Meanwhile, on the 22nd of March, an application had been made on behalf of the *interim* receiver in both the removal of attachment cases, that he should be made a party to those proceedings. The present appellants objected, but the *interim* receiver was brought on the record in both cases, apparently on the 28th of March 1929.

It is material to point out that on behalf of the present appellants, it was objected, *inter alia*, that the correct procedure was to close the execution case and for the receiver appointed in the insolvency proceedings to take charge of the properties belonging to the insolvent. It would appear, therefore, that proper notice that an insolvency petition had been admitted was given to the Court (which was the same Court as that in which the insolvency proceedings were going on), and also, that an application was made to that Court that the attached property should be delivered to the receiver under the provisions of section 52 of the Provincial Insolvency Act.

The Court however seems to have thought that such notice and application should have been at the instance of the receiver; and for this reason, and also because the receiver did not seem to be anxious that the sale should be stayed, an order was passed, merely granting the application for the receiver to be made a party.

It is true that the receiver then was an *interim* receiver only (appointed under section 20 of the Act), and that the receiver proper (if he may be so called) was not appointed until the 24th of April, when the order of adjudication was passed.

It seems to me however that in the circumstances the proper course whould have been to stay the execution proceedings until the adjudication was

made and a receiver of the insolvent's property was appointed.

If this course had been taken, the receiver appointed upon adjudication could and, as I think, should, have taken the steps provided by section 52 of the Act, to have the property transferred to him.

No such steps were taken, and in the result, the attachments were removed.

The respondent in the present appeals then filed Regular Suits (Nos. 30 and 31 of 1929 of the District Court, Amherst) for declarations that the attached property was the property of their judgment-debtor, A. M. Nacoda.

The defendants were the respective applicants in the two attachment proceedings and they are the appellants in these appeals.

The insolvency proceedings were meanwhile adjourned from time to time pending the result of the proceedings in this Court.

No leave of the Court to commence the suits under appeal was obtained under section 28 (2) of the Provincial Insolvency Act, and in the result the respondent firm was held to have had an interest in the attached property in both cases. It was adjudged that these interests were liable to be sold in execution of these decrees.

On appeal to this Court, two main points, in the nature of preliminary points, were argued on behalf of the appellants, the remaining issues being left open for later argument and decision, if necessary.

The first of these preliminary points was that, as leave of the Court was a condition precedent to the commencement of the suits under appeal, the failure to obtain such leave is fatal to the respondent's case.

In other words, it was argued that the suits were not maintainable.

1930

MOHAMED ADJIM NACODA v. V.E.M. CHETTYAR FIRM.

OTTER, J.

Section 28(2) of the Provincial Insolvency Act is as follows :—

"On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt proveable under this Act shall 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 proceeding, except with the leave of the Court on such terms as the Court may impose."

Now, there can be no doubt that these suits were filed by the respondent firm in its capacity as a creditor of the insolvent, and that the purpose of the suits was in order to obtain satisfaction of decrees, if obtained.

In my view, the words of the provision above-quoted must cover such suits as these. Moreover, there is authority to this effect : see the cases of *Trimback* v. *Sheoram and another* (1) ; *Raman Chetty* v. *Ma Hme* (2) ; *Vasudeva Kamath and two* v. *Lakshminarayana Rao and four* (3).

In the first of these the facts were that the applicants obtained a decree against a man called Sheoram on the 19th of April 1917, and on the 30th of May of that year, in execution of that decree they attached a certain property. Objections were raised to the attachment and were allowed. In the meantime, on the 16th of June 1917, Sheoram applied to be made an insolvent, and on the 10th of November he was so adjudicated. A suit filed by the applicants for a declaration that the property was liable to be sold in execution was dismissed. On appeal it was held that under section 16 of the Provincial

(1) (1922) 65 I.C. 941. (2) (1917) 10 B.L.T. 116. (3) (1919) I.L.R. 42 Mad. 684.

Insolvency Act of 1908 (corresponding to section 28 of the present Act) a Court, making an order of adjudication, is vested with the whole property of the insolvent, and no creditor to whom the insolvent is indebted in respect of any debt proveable under the Insolvency Act has any remedy against the property of the insolvent in respect of the debt, nor can he commence any suit or other legal proceeding, except with the leave of the Court on such terms as the Court may impose.

A similar view was held in the two other cases I have mentioned; and in the last of these, Wellis, C.J., said at page 686 of the report :—

"A suit by a judgment-creditor such as I have mentioned without the leave of the Court would, I think, be in contravention of this section, and would enable the judgment-creditor to obtain satisfaction of his decree out of the property declared in a suit to be the property of the insolvent."

On behalf of the respondent firm, however, the case of *Phul Kumari* v. *Ghanshyam Misra* (1) was referred to. It was said that this case decided that in a suit under Order 21, rule 63, Civil Procedure Code, which seeks merely a declaration that the property belonged to the judgment-debtor, leave of the Court was not necessary.

An examination of the authority however shows that it is not an authority for this proposition at all, but merely turned upon a question of Court-fees.

It was also argued on behalf of the respondent that Order 21, rule 63, of the Civil Procedure Code, gives a statutory right to institute such suits as those under appeal, and that he cannot be deprived of such right.

I cannot agree. The Code of Civil Procedure cannot of itself establish a right which does not

(1) (1908) I.L.R. 35 Cal. 202.

1930

MOHAMED ADJIM NACODA v. V.E.M. CHETTYAR FIRM.

OTTER, J.

exist under the ordinary law: it is a code of procedure only, and not of substantive law, and as I am of opinion that under the terms of the Provincial Insolvency Act (an Act enacting substantive law), the respondent is barred from filing such suits as those under review without the leave of the Court, the Code of Civil Procedure cannot assist him.

One further case may be mentioned *Nune Narasimham* v. *Donepudi Subramanian and others* (1). In this case it was held that leave of the Court to file a suit in such a case was necessary, but it was also said that the absence of such leave, where no objection was taken, would not render a decree passed in such a suit a nullity.

In view of the terms of section 28 (2) of the Provincial Insolvency Act, however, I cannot, with respect, subscribe to a view held on this point by the single Judge who decided that case.

In my view, for these reasons, the first of the preliminary points raised on behalf of the appellants must succeed, and therefore it is unnecessary to set out or discuss the further points raised.

The appeals must therefore both be allowed, the decrees of the lower Court set aside, and the suits dismissed.

I observe, however, that the point taken before us was not raised in either case in the lower Court, and therefore, I think each party should bear their own costs in both Courts.

BAGULEY, J.—I agree with the order proposed to be passed by my learned brother in these appeals. I concur with the whole of the judgment save on one point and that is with regard to whether Order

(1) (1927) 98 I.C. 446

XXI, rule 63, can be regarded as giving a statutory right of suit. It seems to me that although the Civil Procedure Code is a code of procedure it does in this instance give a definite right to bring a suit, with a period of limitation of its own as shown by Article 11 of Schedule 1 of the Limitation Act. This, however, does not affect the result of the appeals, for there can be no question but that what one statute may give a later statute may take away or limit. The Provincial Insovency Act being of a later date than the Civil Procedure Code, it must in this respect be regarded as limiting, so far as creditors of insolvents are concerned, a statutory right that they may have obtained under Order XXI, rule 63.

ORIGINAL SIDE.

Before Mr. Justice Cunliffe.

A. SWAMI IYAH NADAR
v.
THE COMMISSIONERS FOR THE PORT OF RANGOON.*

1930

Dec. 4.

Letters Patent, Clause 10—High Court's jurisdiction— "Suit for land or other immoveable property", meaning of— Substantial question relating to right and title in land—Plaint framed in tort—Indian Sale of Goods Act (III of 1930), s. 2 (7)—General Clauses Act (X of 1897), s. 3 (25).

The term "suits for land or other immoveable property" in clause 10 of the Letters Patent means suits in which, having regard to the issues raised in the pleadings, the decree or order will affect directly the proprietary or possessory title to land or other immoveable property.

Where the real dispute between the parties is as to title to immoveable property outside the jurisdiction of the High Court the fact that the plaint is framed in tort will not give that Court jurisdiction to entertain the suit.

---

* Civil Regular Suit No. 361 of 1930.