

## ORIGINAL CIVIL.

Before Mr. Justice Leach.

S. P. DAYABHOY &amp; SONS

v.

FATIMA BIBI AND OTHERS.\*

1935  
June 19.

*Insolvency—Claim by solvent partner against his insolvent partners—Decree-holder against the firm—Dividend declared by Official Assignee in favour of solvent partner—Attachment by decree-holder of moneys payable to solvent partner—Payment into Court by Official Assignee—Withdrawal by decree-holder on furnishing security for benefit of solvent partner's heirs—Appellate Court's order postponing claim of solvent partner's estate—Application by Official Assignee for refund—Civil Procedure Code (Act V of 1908), ss. 47, 151.*

The decree-holders against the three partners of a firm obtained a garnishee order against the Official Assignee to pay to the credit of their suits Rs. 20,920. The Official Assignee was about to pay this sum as a dividend to the heirs of one of the partners who had died and whose estate had obtained a decree for a large sum in a suit against the other two partners. The defendant partners were adjudicated insolvent on their own petition after the decree had been passed. The Official Assignee paid the money into Court without protest, and the decree-holders withdrew the amount on furnishing security for its refund in case it was found that they were not entitled to it after the heirs of the deceased partner were brought on the record.

A creditor of the firm applied to the insolvency Court for an order expunging the proof of the solvent partner's heirs and for the refund of the amount. The application was dismissed.

The High Court on appeal held that the claim of the solvent partner's estate must be postponed till after the debts of the outside creditors had been liquidated and remanded the case. The Official Assignee obtained an order from the insolvency Court for a refund of the money, but on the re-submission of the case to the appellate Court it held that the insolvency Court had no jurisdiction to deal with the security furnished in the regular suits.

The Official Assignee now applied in the execution proceedings of the regular suits for a refund. He contended that the Court could make the order under ss. 47 and 151 of the Civil Procedure Code.

*Held*, refusing the application, that as a garnishee the Official Assignee was not a party to the suits, and s. 47 did not apply. Further, the Court had no inherent power to reverse its own order under s. 151. The Official Assignee could have objected to the payment order by way of review or appeal, but he had acquiesced in it and the time for a review or appeal had passed. The security was for the benefit of the heirs of the solvent partner, and not for the benefit of the Official Assignee and he had no right to its benefit.

\* Civil Execution Cases Nos. 527 and 528 of 1932 arising out of Civil Regular Suits Nos. 403 and 479 of 1927 of this Court.

*Doctor* for the decree-holders.

*Kalyanwalla* for the Official Assignee.

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LEACH, J.—This is an application by the Official Assignee for an order requiring the decree-holders to refund a sum of Rs. 20,920-15-0 withdrawn by them from Court and directing that, on the failure of the decree-holders to refund the money, certain security furnished by them should be realized. The money was paid into Court by the Official Assignee under an order of attachment and he contends that inasmuch as it has since been shown that the decree-holders were not entitled to the money, they should be compelled to repay it to him. In order to appreciate the question which the Court is called upon to decide it is necessary to state the facts in detail.

On the 1st May, 1928, in Civil Regular Suit No. 403 of 1927, the decree-holders obtained a decree for Rs. 13,890 and interest and costs against M. S. Mohamed Abubacker, A. Musafar and M. S. Nagoor Pitchay, three brothers who were carrying on business in partnership in Rangoon under the name of M.S.M.N. Mohamed Brothers. On the same day the decree-holders obtained in Civil Regular Suit No. 479 of 1927 another decree against the same defendants. In this case the decree was for a sum of Rs. 7,690 with interest and costs.

On the 6th January 1926 Mohamed Abubacker filed Civil Regular Suit No. 7 of 1926 to enforce an agreement which the brothers had entered into for the winding up of the partnership and the distribution of the assets, for an order directing the taking of accounts and for other reliefs. By an order dated the 18th July 1928 Musafar was made the

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plaintiff in the suit and Mohamed Abubacker was relegated to the position of a defendant. On the 23rd September 1928 Musafar died and his heirs were brought on the record as his legal representatives. On the 7th December 1931 a final decree for Rs. 2,26,451-13-2 with interest and costs was passed in their favour against Mohamed Abubacker and Nagoor Pitchay. On the 4th June 1928 the two defendants were adjudicated insolvent on their own petition and in due course the heirs of Musafar were admitted to be creditors for the amount of their decree. On the 10th January 1933 the Official Assignee declared a dividend and allowed the sum for which Musafar's heirs had proved to rank for this purpose. Their share in the distribution amounted to Rs. 20,920-15-0.

On the 19th December, 1932, the decree-holders applied to execute the decrees obtained by them in Civil Regular Suits No. 403 and No. 479 of 1927 respectively. On the 6th January, 1933, the decree-holders, in anticipation of the dividend about to be declared by the Official Assignee in respect of the estate of Mohamed Abubacker and Nagoor Pitchay, applied to the Court for an order directing the Official Assignee to deposit in Court the amount of the dividend payable to Musafar's heirs, and an order as prayed was passed. On the 11th January 1933 the Official Assignee deposited in Court the Rs. 20,920-15-0 and the next day it was paid out to the decrec-holders on the condition that they furnished security for the refund of the money in case it should be found that they were not entitled to it after the legal representatives of Musafar had been brought on the record. The security bond was duly executed, and on the 16th January the execution proceedings were closed.

On the 17th March, 1933, the A.K.R.M.M.C.T. Chettyar Firm filed a petition in the insolvency case asking that the proof of the claim of the heirs of Musafar should be expunged from the record, and that the decree-holders should be ordered to return to him the sum of Rs. 20,920-15-0 withdrawn by them from Court in the execution proceedings, failing which the security in the possession of the Court should be realized for his benefit. The respondents in this application were the decree-holders, one V.A.L.V. Ramasawmy Chettyar and the heirs of Musafar.

The application was heard by Sen J., who dismissed it. His reasons were that there had been no adjudication of the firm of M.S.M.N. Mohamed Brothers, but only of Mohamed Abubacker and Nagoor Pitchay, two of the partners, and in the special circumstances of the case it could not be said that Musafar's heirs were in the position of a partner competing with the ordinary creditors of a partnership. On appeal \* Page C.J. and Mya Bu J. took a different view. In their opinion Musafar's estate could not be regarded as an outside creditor, and that the proof lodged by the heirs of Musafar ought to be expunged. Before expressing a final opinion, however, they remitted the case to the Judge sitting in insolvency to decide whether the Court could, on the assumption that the appellant was entitled to an order expunging the proof of the debt due to the heirs of Musafar, order the decree-holders to return the amount withdrawn by them from Court. On remand the case came before Braund J., who held that the Court had the power to order the decree-holders to refund the amount withdrawn by them from Court and that on failure

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\* Reported at (1934) I.L.R. 12 Ran. 699—Ed.

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to comply with such order the Court was entitled to realize the security which it held. Thereupon he passed an order to this effect.

On the record being submitted to the appellate Court with the finding of Braund J., the matter again came before Page C.J. and Mya Bu J. The appellate Court, while adhering to the view that Musafar's heirs were not entitled to rank with the ordinary creditors of the partnership and that the Rs. 20,920-15-0 had been paid into Court on a wrong footing, held that there was no jurisdiction in the insolvency Court to order a refund or to direct the realization of the security. The money had been withdrawn in execution proceedings arising out of the regular suits, not in the insolvency proceedings. The order of Braund J. was, therefore, set aside. The result was that the decision of Sen J. allowing the heirs of Musafar to rank equally with the creditors of the partnership was set aside, but an order directing the decree-holders to refund the Rs. 20,920-15-0 was refused on the ground that the insolvency Court had no jurisdiction to deal with the matter.\* The application before me has been filed by the Official Assignee in the execution proceedings, and it is not now a question of jurisdiction but whether the Official Assignee is entitled in law to the order which he seeks.

It is contended on behalf of the Official Assignee that as it has now been decided that Musafar's heirs are not entitled to be paid anything until the claims of the creditors of the partnership have been met in full and that as he acted erroneously when he included them in the dividend declaration, he is entitled to recover the money from the decree-holders. The Official Assignee says that the Court

\* Reported at [1935] I.L.R. 13 Ran. 703.—Ed.

has power under section 47 of the Code of Civil Procedure to make an order directing the decree-holders to refund the money withdrawn by them, from Court or under the inherent powers declared by section 151 of the Code.

It is quite clear that section 47 has no application to the present case. The first sub-section states :

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

The Official Assignee was not a party to the suits out of which the execution proceedings arose, and is not a representative of any party to those suits. He was not even a party in the execution proceedings. He was there merely in the rôle of a garnishee, and without protest obeyed the order served upon him as a garnishee.

The argument that the Court has inherent power to order the decree-holders to refund the Rs. 20,920-15-0 shows a failure to appreciate what the inherent powers of the Court really are. The Court has no inherent power to reverse its own order. It may do so in a proper case on review, but the power there is a power conferred by statute. This is not an application for review of the order directing the payment out of the money to the decree-holders. The time for review has long passed. The Official Assignee had an opportunity of objecting to an order of attachment being passed against him and could, if he had not acquiesced in the order, have lodged an appeal. He advanced no objection to the order. On the contrary at the time he took the

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view that the money was in law payable to Musafer's heirs. He had declared a dividend in their favour. The Court had jurisdiction to order the money to be paid out to Musafer's heirs and that order not having been set aside on review or appeal is final so far as the Official Assignee is concerned.

It has been argued that the Court can in any event direct the security in its hands to be realized for the benefit of the Official Assignee. I do not agree. In the first place it seems to me that if the Court cannot order the money to be refunded to him it cannot order the security to be realized for his benefit. In the second place the security was not given for the benefit of the Official Assignee, but solely for the benefit of the heirs of Musafer. When the money was paid out to the decree-holders, Musafer's heirs were not then on the record and the Court required security in case it should be discovered, when they were brought on the record, that they had been prejudiced by the order. This was pointed out by Page C.J. who observed :

"Further, the security was furnished not for the benefit of the insolvent's estate but for the benefit of the legal representatives of Musafer, who at the time when the Court directed the sum in suit to be paid out to the 1st respondent had not been brought on the record. This is clear from the form both of the order that was passed and of the bond that was executed."

The Court cannot direct security which was furnished for the benefit of Musafer's heirs to be realized for the benefit of the Official Assignee. Musafer's heirs have never objected to the money being paid to the decree-holders and they are the only persons who could have objected. At no time has the Official Assignee had any right to the security and the fact that the security still remains in the hands of the

Court does not improve his position. He is, therefore, not entitled to an order directing the security to be realized.

The application must be dismissed with costs which I assess at five gold mohurs.

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## INCOME-TAX APPLICATION.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Ba U.*

ADAMJEE HAJEE DAWOOD & CO., LTD.

v.

THE COMMISSIONER OF INCOME-TAX,  
BURMA.\*

1935  
July 1.

*Income-tax—Assessee exempt from tax on account of losses—Tax paid at source on dividends—Assessee's application for refund time-barred—Extension of time—Application to High Court to require Commissioner to state a case—Income-tax Act (XI of 1922), ss. 48, 50, 50A, 66 (2) and (3)—No application to High Court on order under s. 48—Specific and adequate remedy of assessee—Specific Relief Act (I of 1877), s. 45.*

For the year of assessment, 1932-33, the Income-tax Officer found that the assessee, a limited company, had suffered a heavy loss and declared the company to be non-assessable to income-tax in respect of that year. The order was made on the 22nd June 1934. On the 12th June 1933 the assessee applied to the Commissioner of Income-tax for a refund of income-tax paid at source on dividends in respect of shares which the assessee held in certain companies. The application had become barred on the 1st April 1933 by virtue of s. 50 of the Income-tax Act. The assessee asked for an extension of time in view of the fact that the assessee's assessment was still pending at the date of the application. The Commissioner rejected the application stating that he had no power to extend the time. The assessee then purported to appeal to the Assistant Commissioner of Income-tax from the order of assessment of the 22nd June 1934 with a view to obtain a refund; but that appeal also was rejected. The assessee then applied to the Court for an order directing the Commissioner of Income-tax to state a case under s. 66 (3) of the Act.

*Held*, that (1) s. 66 (3) of the Act is controlled by s. 66 (2), and under s. 66 (2) an assessee is not entitled to require the Commissioner to state a question of law arising out of an order under s. 48;

\* Civil Misc. Application No. 35 of 1935.