APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

A.K.R.M.M.C.T. CHETTIAR FIRM

v.

S. P. DAYABHOY & SONS AND OTHERS.*

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Apl. 26.

Insolvency—Claim by a solvent partner against his insolvent partners—Decree-holder against all the partners—Attachment by decree-holder of moneys payable to solvent partner—Payment by Official Assignee into Court—Withdrawal by decree-holder on security—Postponement of solvent partner's claim—Moneys paid into Court not a dividend—Insolvency Court's order for refund illegal.

In a suit for the dissolution of partnership, *M*, a partner of the firm, obtained a decree against his two co-partners for a large sum. The two co-partners were subsequently adjudicated insolvent, and the Official Assignee paid one-third of the partnership assets realized by him to *M*'s representatives, *M* in the meanwhile having died, in pursuance of an arrangement with *M*. In respect of the balance due under the decree the representatives of *M* tendered a proof in the insolvency which was admitted by the Official Assignee. All the assets realized by the Official Assignee were partnership assets.

The 1st respondent who had two money decrees against all the partners obtained a prohibitory order from the Court against the Official Assignee who was about to pay Rs. 20,920 to *M*'s representatives in respect of their claim in insolvency. Pursuant to the order of the executing Court the Official Assignee paid the money into that Court and the 1st respondent withdrew the amount on furnishing security. On appeal this Court was of opinion that *M*'s claim must be postponed until the outside creditors of the partnership were satisfied. The proceedings were returned to the insolvency Court for the consideration of the question whether the 1st respondent should refund the sum of Rs. 20,920 which he had withdrawn under his execution proceedings. The insolvency Judge ordered that if the 1st respondent did not return the amount resort should be had to the security furnished by him.

Held, that (1) the claim of *M*'s estate must be postponed until after the debts of the outside creditors had been liquidated, and consequently that the order requiring the Official Assignee to pay Rs. 20,920 into Court upon the footing that it was a dividend payable to *M*'s estate ought not to have been made;

(2) the insolvency Court was not competent to pass any order requiring the 1st respondent to refund the amount, and it had no jurisdiction to deal

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* Civil Misc. Appeal No. 85 of 1930 from the order of this Court on riginal Side in Insolvency Case No. 110 of 1928.

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with the security furnished in the regular suit. Although the Official Assignee paid the money into Court in respect of a dividend that was due from the insolvent estate to *M*, yet the 1st respondent did not receive it as a creditor in the insolvency, but as a judgment creditor in liquidation of the decree that he had obtained against *M* and his co-partners in the regular suit.

Kalyanwalla for the appellants. A creditor who obtains payment of his debt wrongfully from his debtor can be ordered to refund it on the insolvency of the debtor.

Musafer, who was a partner in the insolvent firm in question, had no right to the sum of Rs. 19,920-15-0, his claim being postponed to those of the outside creditors. In the circumstances the payment of the said sum by the Official Assignee to the respondent was not justified, and the respondent should be ordered to refund the money. On his failure to refund the money it is competent for the insolvency Court to order that the security given by the respondent on the sum being paid out to him should be utilized for recouping the amount.

Doctor for the 1st respondent. The amount in question was paid to the respondent by the Official Assignee as representing the estate of the judgment-debtor in satisfaction of a decree that the respondent had against Musafar. The insolvency Court has no jurisdiction to order the respondent to refund the money obtained in an executing Court. Even in insolvency no creditor has a right to disturb distributions already made. See s. 72 of Presidency Towns Insolvency Act. The appellant could have the proof of Musafer's claim expunged, but even that would not assist the respondent, because dividends already paid would not be affected. *Ex parte Harper* (1); *In re Searle, Hoare & Co.* (2).

(1) 21 Ch.D 537. (2) (1924) 2 Ch. 325.

PAGE, C.J.—In this case it is common ground that the assets in the hands of the Official Assignee for distribution to the creditors are assets belonging to the firm of which Musafer and the insolvents were partners.

Mr. Doctor, on behalf of the 1st respondent, does not now contend that the debt due to Musafer's representatives for which they have proved in the insolvency can be paid *pari passu* with the debt of what I may call the outside creditors of the firm. At the last hearing of the appeal we expressed the opinion that payment of the debt for which Musafer's representatives tendered a proof must be postponed until after the debts of the outside creditors have been liquidated.* It is not now disputed that the view that we then took is correct, and an order in that sense will be passed. It follows, therefore, that the payment of the dividend of Rs. 20,920-15-0, which the Official Assignee deposited in Court in the regular suit upon the footing that it was a dividend payable to Musafer's estate, ought not to have been made. But that does not dispose of the matter, because as between the appellant and the present respondent it is still necessary to decide whether the learned Judge in insolvency ought to have directed either that this sum, which was paid out to the 1st respondent under the order of the Court in satisfaction of the decree that he had obtained against Musafer and the two insolvents, should be refunded to the Official Assignee or that the security furnished by the 1st respondent upon this sum being paid out to him ought to be utilized as a mode of refunding to the insolvent estate the dividend which in the event it has been held ought not to have been paid to Musafer's representatives. The learned Judge

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

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in insolvency has ordered that the 1st respondent must return and deposit in Court the said sum or that "resort ought to be had to the security in the hands of the Court for the recovery of the said sum." With all respect to Braund J., in my opinion, the order that he passed cannot be sustained.

Quoad the proceedings as the result of which the 1st respondent has received payment of this sum in execution of his decree in the regular suit the respondent was in the same position, so far as the insolvency Court was concerned, as he would have been if he had not been a creditor in the insolvency; because this sum was claimed by him and paid to him not as a creditor in the insolvency but as a judgment-creditor of Musafer. For the purpose in hand it matters not whether the proof tendered by Musafer's estate ought or ought not to be expunged or whether the proceedings for attachment of the dividend were in accordance with law, because it is common ground that the sum in question was and purported to be paid into Court in the regular suit by the Official Assignee as being a sum due from the insolvent estate to Musafer. Musafer's representatives have never raised any objection to this sum being utilized for the purpose of liquidating their debt to the respondent, and the Official Assignee, so far from having asserted at any time that the sum in dispute was not a dividend payable and paid in respect of a debt due from the insolvent estate to Musafer, has up till the present time acted upon the assumption that by depositing this sum in Court to the credit of the judgment-debtor in the regular suit he was in substance and in fact paying a dividend that was due from the insolvent estate to Musafer. The 1st respondent did not receive payment of this money in any sense as a creditor in the insolvency. He received it as a judgment-creditor

in liquidation of the decree that he had obtained against Musafer *inter alios* in the regular suit. No steps have been taken in the regular suit to establish that the order directing the payment out of this sum to him ought not to have been made, the present application being made in the insolvency proceedings and not in the regular suit. In my opinion the insolvency Court would have had no jurisdiction to order the 1st respondent to repay a sum of money which the Court had directed should be paid out to him in the regular suit.

It is contended, however, and the learned Judge in insolvency held, that the insolvency Court was competent to order that the security deposited in the execution proceedings in the regular suit on the sum in question being paid out to the respondent should be utilized for the purpose of recouping to the insolvent estate the amount of the dividend which in the event it has been held was improperly paid to Musafer. But, in my opinion, the insolvency Court had no jurisdiction to pass any order in connection with the property deposited as security in the regular suit. Further, the security was furnished not for the benefit of the insolvent 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. In my opinion this application, as was held by Sen J., is entirely misconceived, and was rightly dismissed by him.

The only contesting respondent throughout these proceedings has been the 1st respondent. As between the appellant and the 1st respondent it is obvious that the main issue was whether the 1st respondent

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ought to be ordered to refund the sum in suit or whether the security which he has furnished on receiving payment of it ought to be utilized to recoup the Official Assignee. For the reasons that I have given it is immaterial as between the 1st respondent and the appellant whether the proof by Musafer's representatives ought or ought not to be expunged, because even if it was ordered that the proof ought to be expunged dividends already paid would not be affected [*Ex parte Harper* (1)]. Upon this issue the appellant has failed in both Courts to obtain the relief which he sought as against the 1st respondent. The other respondents do not appear to have taken an active part in the proceedings.

The result is that the appeal is allowed *pro tanto*, and an order will be passed that payment of the debt under the proof tendered by Musafer's representatives is postponed until after payment of the debts of the outside creditors have been made in full. In other respects the appeal is dismissed. The 1st respondent is entitled to his costs both of the appeal and of the hearing after remand, and we assess the advocate's fee of and incidental to the appeal and the remand order at 15 gold mohurs.

MYA BYU, J.—I agree.

(1) 21 C.D. 537.