1934

U PO SEIN v. E. M. BODI.

PAGE, C.J.

Scarf v. *Jardine* (1); *Morel Bros. & Co., Ltd.* v. *Earl of Westmorland* (2); and *Moore* v. *Flanagan* (3). The respondent, having elected to take a decree for the amount claimed against Lim Kar Gim, the fourth defendant, in my opinion was precluded thereafter from obtaining a decree against U Po Sein.

The result is that the appeal is allowed, the decree of the trial Court is set aside as against the appellant U Po Sein, and as against him the suit is dismissed. The appellant is entitled to his costs of and incidental to the suit. Each party will pay his own costs of the appeal.

MYA BU, J.—I agree.

APPELLATE CIVIL.

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

U PO SEIN AND ANOTHER

v.

E. M. BODI.*

1934

Dec. 6.

Alternative claim against defendants—Plaintiff's election to take decree against one defendant—Claim on appeal for a decree against the other defendant.

Where the plaintiff in a suit claims relief against two defendants not jointly but in the alternative, and elects to take a decree against one of them, he cannot claim on appeal that a decree ought to be passed against the other defendant.

Chettyar Firm of S.A.A. v. *Chettyar Firm of A.R.P.R.M.P.*, Civil First Appeal No. 148 of 1932, H.C. Ran.; *Morel Bros. & Co., Ltd.* v. *Earl of Westmorland*, (1904) A.C. 11—*referred to.*

K. C. Bose (with him *Dadachanji*) for the respondent raised a preliminary objection. The claim against the defendants was not joint but in the alternative.

(1) (1882) 7 A.C. 345. (2) (1904) A.C. 11.

(3) (1920) 1 K.B 917.

* Civil First Appeal No. 42 of 1934 from the judgment of this Court on the Original Side in Civil Regular No. 59 of 1933.

1934

U PO SEIN v. E. M. BODI.

The plaintiffs elected to take a decree against the second defendant; he cannot now ask for a decree against the first defendant also. *Morel Bros. & Co., Ltd.* v. *Earl of Westmorland* (1); *Chettyar Firm of S.A.A.* v. *Chettyar Firm of A.R.P.R.M.P.* (2).

Thein Maung (with him *Tha Kin*) for the appellants.

PAGE, C.J.—This appeal must be dismissed.

The suit was brought by the appellants against E. M. Bodi and K. R. Sanghari for compensation for the use and occupation of certain premises belonging to the appellants in 183-187, Phayre Street. It appears that the business of the Vienna Cafe, which was carried on in those premises, was sold in September 1932 by order of the Court, and the purchaser was K. R. Sanghari.

The case for the plaintiffs was that Sanghari was a man called Ratilal, a clerk of the first defendant Bodi; that the premises were really purchased by Bodi *benami* in the name of Sanghari, and that Bodi was carrying on the Vienna Cafe on the premises in suit. In the alternative if the plaintiffs failed to prove that the real purchaser of the premises was the defendant Bodi, they claimed a decree against the defendant Sanghari.

At the trial Cunliffe J. held that Sanghari was not the same person as Ratilal, and that Bodi did not purchase the premises *benami* in the name of Sanghari. In these circumstances the learned trial Judge dismissed the suit as against the first defendant Bodi, but passed a decree against the second defendant Sanghari for compensation for use and occupation of the premises at the rate of Rs. 1,500 a month and interest, at 6 per cent. He also awarded costs at a special rate against the defendant Sanghari.

(1) (1904) A.C. 11. (2) Civil First Ap. No. 148 of 1932, H.C. Ran.

1934

U PO SEIN v. E. M. BODI.

PAGE, C.J.

At the trial the learned advocate for the appellants, so far from withdrawing their alternative claim in the suit against Sanghari, presented an argument to the learned Judge as to what was a fair sum at which compensation for use and occupation of the premises should be assessed as against the defendant Sanghari, and further applied to the Court that special costs should be awarded to the plaintiffs as against Sanghari. In those circumstances it cannot, I think, be disputed that the plaintiffs elected to take a decree against Sanghari.

The present appeal has now been brought against the decree of the trial Court in so far as the suit was thereby dismissed as against the first defendant Bodi. If the appeal were to succeed and a decree was passed against the defendant Bodi the result would be that a decree would have been passed against both Bodi and Sanghari upon the footing that each of them was in occupation of the premises, although the plaintiffs had pleaded that one or in the alternative the other was liable for use and occupation thereof. I am of opinion that as the plaintiffs have elected to take a decree against Sanghari they are now precluded from obtaining a decree also against the respondent Bodi. It was neither pleaded nor contended that the defendants were jointly liable in the suit. The appeal is concluded against the appellants by the decision of the House of Lords in *Morel Bros. & Co., Ltd.* v. *Earl of Westmorland* (1); see also the case of *The Chettyar Firm of S.A.A.* v. *The Chettyar Firm of A.R.P.R.M.P.* (2).

The result is that the appeal is dismissed. As the appeal has been dismissed upon this preliminary ground, and not after consideration of the merits

(1) (1904) A C. 11. (2) Civil First Ap. No. 148 of 1932, H.C. Ran.

1934

U PO SEIN v. E. M. BODI.

PAGE, C.J.

of the case we award the respondent half his costs of the appeal.

MYA BU, J.—I agree.

INSOLVENCY JURISDICTION.

Before Mr. Justice Braund.

1934

Dec. 14.

IN THE MATTER OF M.V.R. VELUSWAMY THEVAR AND OTHERS.*

Insolvency—"Ordinary Residence" of debtor—Confinement in jail—Transfer of "the whole solvency" of the debtor—Transfer in pursuance of an alleged antecedent agreement—Burden of proof—Petitioning creditor's duty to adduce evidence of debtor's resources—Presidency-Towns Insolvency Act (III of 1909), ss. 9 (b), 11 (b).

A person confined in the Rangoon Central Jail for upwards of twelve months immediately prior to the petition for his adjudication as an insolvent must be deemed to reside in Rangoon within the meaning of s. 11 (*b*) of the Presidency-Towns Insolvency Act.

A transfer by a debtor of the whole or substantially the whole of his property in consideration of a past debt is an act of bankruptcy as well under Indian law as under English law.

Smith v. *Cannan*, 2 E. & B. 35; *Woodhouse* v. *Murray*, L.R. 2 Q.B. 634—*followed.*

A transfer, however, made in pursuance of an antecedent *bonâ fide* agreement come to at the time of making the loan that security should be given for the loan may be valid. But the onus of proving such agreement and its *bonâ fides* in all respects lies on the person who sets it up and it is the Court's duty to scrutinize such an agreement with extreme care.

There must be no suspicion of a collusive bargain or understanding that the transfer should be delayed till insolvency has intervened and the creditor must have taken sufficient steps to obtain the security or assignment agreed to be given him before insolvency has intervened.

Ex parte Burton, 13 Ch.D. 102; *Ex parte Fisher*, 7 Ch. Ap. 636; *Ex parte Hunxwell*, 23 Ch D. 626; *Ex parte Kilner*, 13 Ch.D. 245; *Mercer* v. *Peterson*, L.R. 2 Ex. 304—*referred to.*

In alleging a transfer by a debtor of his whole solvency the adjudicating creditor should, wherever possible, be prepared to show the debtor's actual resources. Every advantage ought to be taken of the various processes of discovery before trial or evidence adduced. He cannot ask the Court to make an assumption by merely presenting the transfer unsupported by any evidence. The debtor likewise must adduce evidence of his resources if he desires the transfer to be upheld upon the ground that it left him solvent.

* Insolvency Cases Nos. 172 and 209 of 1933.