

## LETTERS PATENT APPEAL.

*Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice,  
and Mr Justice Dunkley.*

V.K.P. CHOKALINGAM AMBALAM AND OTHERS

*v.*

M.M. SUBBAYA PILLAY AND OTHERS.\*

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Nov. 29.

*Insolvency—Court exercising powers of a receiver—Transfer of immovable property by Court as receiver—Sale an administrative act—Registration of sale document—Civil Procedure Code, O. 21—Provincial Insolvency Act, ss 58, 59—Transfer of Property Act, s. 54.*

Where an Insolvency Court exercises the powers of a receiver in insolvency under s. 58 of the Provincial Insolvency Act in a case where no receiver has been appointed, it does not act under O. 21 of the Civil Procedure Code when transferring immovable property belonging to the insolvent to a purchaser. The sale is an administrative act which the receiver would make if one had been appointed and which the Court makes under similar powers by reason of s. 58 of the Insolvency Act. The transaction falls within s. 54 of the Transfer of Property Act and can only be effected by a registered instrument.

*Bank of Chettinad Ltd. v. Ma Ba Lo, I.L.R. 14 Ran. 484; Maung Tha Dun v. Po Ka, I.L.R. 5 Ran. 768, referred to.*

*N. M. Cowasjee* (with him *V. S. Venkatram*) for the appellant.

*Clark* for respondents 1 to 3.

Special Civil Second Appeal No. 308 of 1938 of this Court was heard and decided by

MACKNEY, J.—This appeal arises out of a suit which was commenced so long ago as November 1933. This is the third occasion on which the case has come before the High Court, the last occasion being in June 1937, when the decrees of the lower Courts were set aside and the case remanded to the trial Court for further hearing.

It was only then that the issue with which we now have to deal was raised for the first time.

In Civil Miscellaneous Case No. 83 of 1933 of the District Court of Myaungmya R.M.L.A. Ramanathan Chettyar, the proprietor of the A.R.M.A. Chettyar Firm, was adjudicated

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\* Letters Patent Appeal No. 9 of 1939 arising out of Special Civil 2nd Appeal No. 308 of 1938 of this Court from the judgment of the District Court of Myaungmya in Civil Appeal No. 14 of 1938.

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insolvent. The Court did not appoint a receiver in insolvency for the properties with which we are concerned in the present suit, and consequently the insolvent's property vested in the Court under section 28 (2) of the Provincial Insolvency Act, and became divisible among the creditors. (The Court did apparently appoint a Receiver "ad interim" under section 20 of the Act of properties of the insolvent in the Pegu district. No further orders were ever passed in this matter after the adjudication and the Receiver under instructions of the Court realized the property and remitted the proceeds to the adjudicating Court. It would seem that the property of the insolvency was never vested in this Receiver.) In due course the Court, by virtue of section 58 of the Act, which gave it the rights of a receiver under the Act and the liberty to exercise all the powers conferred on a receiver under the Act, and of section 59 which requires the receiver to realize the properties of the debtor and distribute dividends among the creditors entitled thereto and for that purpose gives him liberty to sell the whole or any part of the property of the insolvent, caused the property now in suit together with many other properties to be sold. The Court adopted the procedure laid down in the Code of Civil Procedure in Order 21 for the sale of immovable property in execution of a decree. The property with which we have to deal is the right and interest of the insolvent A.R.M.A. Firm as mortgagee of certain immovable property under a mortgage deed dated 17th January 1929, executed by Maung Tin and Ma Chit, the 2nd and 3rd respondents in this appeal, on which was due principal Rs. 5,000 and interest. The sale took place on the 22nd August 1932, and was "confirmed" by the Court on the 24th September 1932. The Court issued a "certificate of sale" relating to this and the other properties sold, under Order 21, rule 94, Code of Civil Procedure. The purchaser of the property was V.K.P. Chokalingam Ambalam, the 1st respondent in this appeal.

In the suit out of which this appeal arises V.K.P. Chokalingam Ambalam has sought to enforce against Maung Tin and Ma Chit his alleged right under the mortgage thus apparently transferred to him. The present appellants are the legal representatives of M.S. Subbaya Pillay, deceased, who was originally joined as 3rd defendant in V.K.P. Chokalingam Ambalam's suit on the ground that he was the purchaser of the mortgaged property, having purchased it on the 17th March 1930 at a Court sale in execution of a money decree which he had obtained against Ma Chit.

The suit was resisted on various grounds, the only one of which we need now consider is that the alleged purchase of the rights under the mortgage by the plaintiff-respondent was not valid in law because the provisions of section 54 of the Transfer of Property Act applied but had not been complied with as the sale had not been made by a registered instrument.

The Subdivisional Court held that in selling property vested in it the Insolvency Court followed the rules laid down in Order 21 of the Code of Civil Procedure and had the power to grant a certificate of sale under Order 21, rule 94, and that under section 17 (2) (xii) of the Registration Act such a certificate was exempted from registration. However, the Court dismissed the suit on the ground that the original mortgage deed was a fraudulent and sham one.

On appeal to the District Court the learned District Judge found that what the Insolvency Court purported to sell was not the mortgage interest created by the mortgage bond but the bond itself, which is merely movable; the person holding such a document acquired the right to sue for the recovery of the debt evidenced by the document: Further he found that the mortgage was not a fraudulent one but was valid. Accordingly he set aside the decree of the Subdivisional Court and granted the plaintiff a preliminary decree for sale as in a mortgage suit. It is obvious that the decree was not consistent with the finding of the learned Judge as to what it was the plaintiff had bought; but in any case it is admitted by learned counsel for the respondent that the view taken by the learned Judge is entirely untenable. If the Insolvency Court did not sell the right and interest of the mortgagee under this deed, then the plaintiff-respondent was not entitled to sue under the deed.

[Where the Transfer of Property Act applies the interest of the mortgagee of immovable property can be transferred only by registered deed. *Bank of Chettinad Ltd. v. Ma Ba Lo* (1).]

Against this decree this appeal is laid by the legal representatives of M.S. Subbaya Pillay. The first ground set out in the memorandum of appeal is that the learned District Judge erred in law in holding that when the property of an insolvent vests in the Court under the provisions of the Provincial Insolvency Act, the sale by that Court can be effected by a mere sale certificate or that the sale certificate does not require registration.

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It has to be decided whether the Transfer of Property Act applies to such a transfer of property.

Section 2 (d) reads as follows :

“ Nothing herein contained shall be deemed to affect save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction.”

We are not here concerned with section 57 and Chapter IV of the Act. It is moreover not contended that the transfer to the plaintiff-respondent was by operation of law. It is contended that it was by, or in execution of, an order of the Court.

The Code of Civil Procedure lays down the manner in which decrees shall be executed. Section 36 of the Code directs that the provisions of the Code relating to the execution of decrees shall so far as they are applicable, be deemed to apply to the execution, of orders. “ Order ” means a formal expression of any *decision* of a civil Court which is not a decree. The order of the Insolvency Court directing the sale of the mortgage rights of the insolvent firm in the property of Maung Tin and Ma Chit was not a decision of the Court. Considering that the words “ decree ” and “ order ” are used in section 2 (d) of the Transfer of Property Act in close juxtaposition, it seems certain that the word “ order ” must here be used in the same sense in which it is used in the Code of Civil Procedure.

Their strict significance must be given to the words “ competent jurisdiction ” which qualify the word “ Court.” “ A decree or order of a Court of competent jurisdiction ” means a decree or order of a Court lawfully made in the exercise of its *jurisdiction* : that is to say, there cannot here be any reference to orders of a Court not made in the exercise of its *jurisdiction* as a Court. The orders intended must be the orders of the Court passed in the exercise of its juridical authority.

When under section 59 of the Provincial Insolvency Act the Insolvency Court in which the property of the insolvent has been vested under section 28, exercises the powers of a receiver, it is clearly not exercising its juridical authority as a Court : it is doing something outside the scope of its “ jurisdiction,” using that word in its strict sense.

As was observed by their Lordships of the Privy Council in *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (1) “ the Court is

not a juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it." If the Provincial Insolvency Act vests the property of the insolvent in the Court when no receiver is appointed and gives the Court all the rights of the receiver under the Act and liberty to exercise all the powers conferred on such receiver, these are extraordinary powers. When the Court exercises those powers it does so solely by virtue of special provisions of the Insolvency Act which are not concerned with its "jurisdiction", and not in the exercise of its "jurisdiction" as a Court. The Court is thus enabled to do things which ordinarily a Court, not being a juridical person, cannot do.

We have only to look at the list of powers conferred on a receiver under section 59 of the Act to realize that when the Court exercises such powers it is not acting in exercise of its "jurisdiction." For instance, it may give receipts for money, it may carry on the business of the insolvent, it may mortgage or pledge any part of the property of the insolvent, etc., etc.

Of course, if an Insolvency Court is granted such powers it can only exercise them by one of its officers. No doubt when that officer, for instance, sells property, he does so by order of the Court, but it is not an order of the Court given in exercise of its jurisdiction.

Section 5 (1) of the Provincial Insolvency Act directs that "subject to the provisions of the Act, the Court, in regard to proceedings under the Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction." In *Maung Tha Dun v. Po Ka* (1) this Court, following *Chedatal v. Lachman Prasad* (2), held that the words "proceedings under the Act" mean proceedings in Court. The provisions of Order 21 of the Code of Civil Procedure do not govern a sale by the receiver. It must be so because the procedure to be followed is the procedure followed in the "exercise of original civil jurisdiction." Further, as was pointed out in the Allahabad case cited, the meaning is made abundantly clear when we refer to sub-clause (2) of this section which directs that "subject as aforesaid the High Courts and District Courts, in regard to 'proceedings under this Act in Courts subordinate to them', shall have the same powers and shall follow the same procedure as they respectively have and follow in regard to civil suits." Sub-clause (1) might have been phrased "the Court, in

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(1) (1927) I.L.R. 5 Ran. 768.

(2) (1916) I.L.R. 39 All. 267.

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regard to proceedings in Court under this Act" etc. The words "in Court" were omitted as being obviously redundant.

There are many other cases of the High Courts of India in which it has been held that sales by a receiver in insolvency are not governed by the provisions of Order 21 of the Code of Civil Procedure. It is true that I have not been able to find any case dealing with the procedure to be followed when an Insolvency Court in which the property of the insolvent has been vested exercises the powers of a receiver for sale; but it appears to me equally clear that then too the procedure of the Code of Civil Procedure is nowhere prescribed.

A "certificate of sale" can be granted only by such officers or Courts as have authority to do so. Order 21, rule 94 of the Code of Civil Procedure is the provision which gives a Civil Court power to grant a "certificate of sale" of immovable property specifying the property sold and the name of the person who at the time of the sale is declared to be the purchaser.

The Lower Burma Land and Revenue Act, in sections 47 and 48, gives authority to the revenue officer to make sales of rights in land, and the rules framed under that Act give him power to grant a "certificate of sale." Section 41 (1) (d) and section 44 and the rules framed thereunder, of the Upper Burma Land and Revenue Regulation confer a similar authority on revenue officers in Upper Burma. In virtue of section 17 (2) (xii) of the Registration Act such certificates are exempt from registration.

In this section the words "certificate of sale" must, I think, be limited to such certificates granted under the provisions of law to which I have referred above. The clause reads "Any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer." In section 89 of the Act, sub-clause (2), we find that every Court granting a certificate of sale of immovable property under the Code of Civil Procedure shall send a copy of such certificate to the registering officer, etc., and in sub-clause (4) every Revenue officer granting a certificate of sale to the purchaser of immovable property sold by public auction shall send a copy of the certificate to the registering officer etc. Clearly these are the same "certificates of sale" as are referred to in section 17 (2) (xii), although here the reference is, correctly, to the civil *Court* which grants the certificate of sale and not, as in section 17, to the civil *officer*. Indeed, it is not apparent what the words "civil officer" could mean unless they mean an officer of a civil Court acting for the Court.

It would seem therefore that there are no provisions which would enable an Insolvency Court exercising the powers of a receiver for sale to grant a "certificate of sale."

How then is a transfer of immovable property effected in such cases?

The preamble to the Transfer of Property Act reads :

"Whereas it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties."

Section 54 of the Transfer of Property Act is to be applied in the case of sales of immovable property effected by "act of parties."

Transfers by "act of parties" mean *voluntary* transfers, that is to say, transfers which have not been compelled by any Court in the exercise of its jurisdiction, or have been effected by operation of law. It appears to me that such a transfer as that with which we are dealing is just as much a "voluntary" transfer as it would have been had it been effected by a receiver in insolvency. The fact that it is effected by the Court itself in exercise of the powers of a receiver does not appear to me to alter the nature of the transaction.

The Court is not a "juridical person," but here property is vested in it and it has to exercise the powers of a juridical person, that is to say, the receiver. It is true it can do so only by one of its officers. It appears to me that a transfer so effected is properly regarded as a transfer by act of parties. It is not possible to see how else it could be regarded. If a Court is exceptionally vested with property and permitted to exercise powers of transfer thereof which ordinarily a receiver appointed by it exercises, then, so it appears to me, it or the officer acting for it is in effect a "party" to the transfer and such a transfer is an act of parties.

I am of the opinion therefore that the provisions of section 54 of the Transfer of Property Act apply to such a transfer as that with which we are dealing. They have not been applied, and therefore no valid sale of the rights of the mortgagee in the mortgage in question has been made to the plaintiff-respondent. His suit therefore must fail.

This appeal is allowed and the plaintiff's suit is dismissed with costs in all Courts.

The respondents applied for and obtained leave to appeal further.

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ROBERTS, C.J.—In my opinion, this is a plain case and the order of the learned Judge, who has given the certificate for this Letters Patent Appeal, was right.

The first, second and third respondents in the suit are the legal representatives of the deceased Subbaya Pillai, who claimed to have bought certain property, which was mortgaged by the fourth and fifth respondents, at a Court sale in execution of a money decree against them during the month of March, 1930. And the plaintiff-appellant says that he purchased the right title and interest of an insolvent Chettyar firm as mortgagees at a sale in August, 1932. The first respondent points out that this alleged purchase in 1932 was not valid, there being no registered instrument as required by section 54 of the Transfer of Property Act. It is clear from the case of *The Bank of Chettinad Limited v. Ma Ba Lo and others* (1) that the sale of a mortgagee's right must be by registered deed.

The circumstances of this case are such that no receiver having been appointed the Court had all the rights of, and could exercise all the powers conferred on, a receiver under the Provincial Insolvency Act by virtue of section 58 of that Act, and the Court had no more than the powers conferred on a receiver under that Act. It has been contended by Mr. Cowasjee that, because the property of the insolvent vests in the Court under section 28, the Court is entitled not only to exercise the powers of an ordinary receiver, but, by virtue of section 5 (1) of the Act, to exercise the powers which it could employ judicially in cases where there has been a decree and proceedings in execution.

The sale certificate, to which Mr. Cowasjee has referred, arises out of matters in execution. It is no part of insolvency procedure, and it is quite clear

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(1) (1937) I.L.R. 14 Ran. 494.



from the decision of *Maung Tha Dun and one v. Po Ka and one* (1) that a receiver in insolvency cannot have recourse to Order XXI of the Civil Procedure Code and the machinery to which it refers, since the sale by a receiver is not a proceeding under the Code. In the same way, having regard to the provisions of section 58, the sale by the Court is not a proceeding under the Code. It is one of the administrative actions which a receiver would take, if he had been appointed, and which the Court takes with its powers the same as the powers of a receiver under section 58 of the Act.

In my opinion, it is quite clear that section 54 of the Transfer of Property Act makes a registered deed requisite by whomsoever the sale of a mortgagee's right is undertaken, except when it can clearly be shown that the sale takes place, for example, under Order XXI of the Civil Procedure Code. But the receiver appointed under the Provincial Insolvency Act has powers which are quite distinct from the powers of the Court in execution and which must be carefully distinguished from it.

In my opinion, therefore this appeal fails and must be dismissed with costs.

DUNKLEY, J.—I am of the same opinion. The insolvency Court obtains powers to realize the estate of an insolvent only under section 58, read with section 59, of the Provincial Insolvency Act. Consequently, its powers of realization are the same as the powers which the receiver, if a receiver is appointed, has to realize the estate. Therefore, when once it is conceded—as it has to be conceded—that if this mortgage had been transferred by the receiver it would necessarily have had to be transferred by registered deed, the position is the same when no receiver is appointed and the transfer is made

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by the Court. I know of no authority for the proposition, for which Mr. Cowasjee seems to contend, that whenever a transfer of immovable property is made by a Court the provisions of section 54 of the Transfer of Property Act have no application. The only case in which a Court can sell immovable property and give a title without a writing duly registered is the case of a sale in execution of a decree, and this sale was not a sale of that category.