Privy Council Appeal No. 86 *of* 1931.

Gummidelli Anantapadmanabhaswami - - - - *Appellant*

v.

The Official Receiver of Secunderabad and others - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND FEBRUARY 1933.

Present at the Hearing:

LORD TOMLIN.
LORD THANKERTON.
SIR GEORGE LOWNDES.

[*Delivered by* LORD THANKERTON.]

This is an appeal from a decree of the High Court of Judicature at Madras dated the 2nd October 1930, which set aside a judgment and order dated the 23rd April 1929, made by the same Court in its Original Civil Jurisdiction.

The appellant is in right of a money decree for Rs. 53230-9-0 dated the 15th June 1926, made in the Bombay High Court in favour of the appellant's father against three persons, who may be conveniently referred to as the judgment debtors. At that time the judgment debtors were the plaintiffs in a suit then pending in the Madras High Court for partition of certain joint family property between the plaintiffs' and the defendants' branches of the family. The Madras partition suit had been instituted in 1922, and on the 5th December 1922 a preliminary decree by consent had been made, declaring *inter alia* certain properties and business assets involved in the suit to be the exclusive properties of the plaintiffs' branch and directing certain interim payments of money to be made by the defendants to the plaintiffs. The decree further directed certain arbitrators to take the joint family account and to partition the joint family

property between the two branches of the family in two equal shares. The arbitrators failed to come to any final decision and the matter was referred to the Official Referee of the Court by consent.

On the 20th December 1926, the preliminary decree in the Madras suit was attached in the Madras High Court by the present appellant's father, in execution of the decree in the Bombay suit, the execution proceedings having been transferred from the Bombay High Court to the Madras High Court.

In September 1928, the defendants in the Madras suit applied for a final decree in terms of a compromise entered into between them and the plaintiffs on the 5th August, 1928, and, on the 21st September 1928, the High Court of Madras passed an order for a final decree in the partition suit in terms of the compromise but upon certain conditions, one of which was that the defendants should first pay into Court the amount of money due to the present appellant under the Bombay decree in respect of which the attachment had been made. That order has not been carried out and, in fact, is now under appeal in the Madras High Court.

On the 15th September 1928, an order was made by the District Court at Secunderabad, on a creditors' petition, adjudging as insolvents two of the plaintiffs in the Madras partition suit, who are also the judgment debtors (the third plaintiff having died leaving his widow as his legal representative). The Official Receiver of Secunderabad, who is trustee in the bankruptcy, is a respondent in the present appeal.

On the 4th March 1929, the appellant's father took out a Judge's summons in the High Court of Madras and started the present proceedings against the parties to the Madras partition suit, for leave to execute the decree attached by him. The proceedings were opposed by the defendants in the partition suit and by the Official Receiver of Secunderabad, who was then made a party plaintiff to the partition suit in substitution of the insolvents, the two surviving plaintiffs in that suit, and who is the active respondent in the present appeal.

It is first necessary to consider whether, in the Madras Court, the adjudication order is to be regarded as the order of a foreign Court. Both the Courts below have held that it is to be so regarded and their Lordships agree with that conclusion. It is not suggested that the position of Secunderabad has altered from that stated by the Foreign Office to the Court, and referred to in the judgment, in *Hossain Ali Mirza* v. *Abid Ali Mirza*, (1893) I.L.R. 21 Cal. 177, at p. 179. That reply makes clear that the British Cantonment in Secunderabad still remains part of Hyderabad State and the property of the Nizam. The administration of justice according to British enactments by the District Court established there does not render the orders of that Court anything but the orders of a foreign Court in relation to the Courts of British India.

There remains the question of what effect is to be given by the Madras Courts to the adjudication order of a foreign Court in competition with the prior attachment of a decree in the Madras Court.

The learned Trial Judge held, under the principles laid down in *Galbraith* v. *Grimshaw* [1910], A.C. 508, that the present respondent could only take subject to the present appellant's rights of attachment, and made an order continuing the attachment until the further orders of the Court, and giving the appellant leave to execute the preliminary decree in the partition suit. The Appellate Court set aside that order and dismissed the present appellant's application, in substance on the ground that an attachment under the Civil Procedure Code is purely prohibitory and does not operate to create any title, lien or security in favour of the attaching creditor which, according to British Indian law, could prevail over the Receiver in insolvency, and that it made no difference that the adjudication order was made by a foreign Court.

Their Lordships do not agree with the reasoning or conclusion of the Appellate Court. The question is one of comity between States and not one of the municipal bankruptcy codes of either country. The rule of private international law is clearly laid down in *Galbraith* v. *Grimshaw*, *supra cit.* as regards movable estate, for it is settled that no adjudication order is recognised as having the effect of vesting in the Receiver any immovables in another country.

The reason for the rule is stated in the speech of Lord Dunedin in *Galbraith's* case (at p. 513):—"Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the Court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution; and that I take to be the doctrine at the bottom of the cases of which *Goetze* v. *Aders* (1874, 2 R. 150), is only one example." This means that, after the date of the foreign adjudication order, it will be recognised as effective, but it is equally clear from the opinions expressed in *Galbraith's* case that it will not be allowed to interfere with any process at the instance of a creditor already pending, even though such process is incomplete, provided that at that date the bankrupt's freedom of disposal was so affected by the process that he could not have assigned the subject matter of the process to the Receiver. As Lord Macnaghten says (at p. 512), "The Scottish Court (the foreign Court) can only claim the free assets of the bankrupt. It has no right to interfere with any process of an English Court pending at the time of the Scotch sequestration. It must take the assets of the bankrupt such as they were at that date and with all the liabilities to which they were then subject. The debt

attached by the order nisi was at the date of the sequestration earmarked for the purpose of answering a particular claim—a claim which in due course would have ripened into a right. With this inchoate right the Scottish Court had no power to interfere, nor has it even purported to do so." In an earlier passage Lord Macnaghten had said, "A creditor of the bankrupt having duly obtained an attachment in England before the date of the sequestration cannot, I think, be deprived of the fruits of his diligence."

In the present case, at the date when the foreign adjudication order was made, the appellant was entitled to the benefit of his prior attachment of the decree in the Madras partition suit. The decree was thereby earmarked for the purpose of answering the Bombay money decree, and that inchoate right would have riped into execution and sale ; it is no matter that under section 73 of the Civil Procedure Code the appellant would have to share the proceeds of sale with other decree holders ; it would still be a valuable right. The Scottish case of *Hunter & Co.* v. *Palmer* (1825) 3 Shaw 402, in which an arrestment in Scotland was preferred to a posterior English commission of bankruptcy, is very similar to the present case. Arrestment is only inchoate diligence ; to complete the transfer and make the arrester's right real a decree of furthcoming must be subsequently obtained, which adjudges the fund arrested to the arrester. No decree of furthcoming had been obtained in Hunter's case.

It is irrelevant to consider what effect a British Indian adjudication order would have had on the appellant's prior attachment. The question is what the pending process of attachment would have ripened into, if uninterrupted. Equally, it is irrelevant to point out that a British Indian adjudication order would not be affected by the prohibitory provisions of section 64 of the Code, as it is not a private transfer ; such an order operates *vi statuti*, but the foreign adjudication order does not operate in British India *vi statuti*, but only under the rule of private international law. In *Galbraith's* case, Lord Loreburn states the test as follows :—" In each case the question will be whether the bankrupt could have assigned to the trustee, at the date when the trustee's title accrued, the debt or assets in question situated in England. If any part of that which the bankrupt could have then assigned is situated in England, then the trustee may have it ; but he could not have it unless the bankrupt could himself have assigned it." It is clear in the present case that, by reason of section 64, the bankrupts could not have assigned their right in the decree which had been attached. This test renders it irrelevant to consider whether the attachment created a lien or charge or conferred title, and the cases relating to British Indian bankruptcies relied on by the learned Judges of the Appellate Court have no bearing on the present question. In *Kristnasawmy Mudaliar* v. *Official Assignee of Madras* (1902) I.L.R. 26 Mad. 681, the Court appears to have ignored the opinion expressed by

this Board in *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 Ind. App. 88, which was cited to them, and to have taken a dictum in the judgment of this Board in *Motilal* v. *Karrab-ul-Din* (1897), 24 Ind. App. 170, at p. 175, from its context and used it for a purpose which it did not have in view. In *Frederick Peacock* v. *Maden Gopal* (1902), I.L.R. 29 Cal. 428, the case of *Suraj Bunsi* was not referred to, and the dictum from *Motilal's* case was similarly employed. Their Lordships desire to reserve their opinion as to the soundness of the Madras and Calcutta decisions. The decision of this Board in *Raghunath Das* v. *Sundar Das Khetri*, (1914) 41 Ind. App. 251, was also referred to, but that decision proceeded on an admission by counsel, the point was not argued and the case of *Suraj Bunsi* was not referred to.

Accordingly, Their Lordships are of opinion that the decision of the Trial Judge was right, and they will humbly advise His Majesty that the appeal should be allowed, that the decree of the Appellate Court dated the 2nd October, 1930, should be reversed and that the order of the Trial Judge, dated the 23rd April, 1929, should be restored. The appellant will have the costs of this appeal and his costs in the appeal before the Appellate Court.

In the Privy Council.

GUMMIDELLI ANANTAPADMANABHASWAMI

v.

THE OFFICIAL RECEIVER OF SECUNDERABAD AND OTHERS.

DELIVERED BY LORD THANKERTON.

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