

(1930) 08 BOM CK 0005

In the Bombay High Court

Case No : O.C.J. Appeal No. 64 of 1929 and S.C.C. Suit No. 24971 of 1928

Gulamali Sher Mahomed

APPELLANT

Vs

N.H. Moos

RESPONDENT

Date of Decision : 11-08-1930

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 52

Citation : (1930) 32 BOMLR 1315

Hon'ble Judges : J.W.F. Beaumont, C.J.; Baker, J

Bench : Division Bench

Judgement

J.W.F. Beaumont, C.J.—This appeal, which is an appeal from a decision of Mr. Justice Blackwell given in chambers in which he merely followed the previous decision of Mr. Justice Mirza in *Durgaduti v. Bholaram : Vishvambharlal In re* (1926) 29 Bom. L.R. 409, raises the short question whether when a receiver has been appointed in an administration action, but no decree has been made, the receiver ought to be directed to pay a judgment-creditor who has obtained an attachment notice under Order XXI, Rule 52, Civil Procedure Code. The administration action was started in 1927, and the receiver was appointed on February 28, 1927. On January 15, 1929, the applicant obtained a judgment in the Small Causes Court against certain defendants who are the heirs, or are so described, of the deceased Mahomed A. Shivji, in respect of whose estate the administration action is proceeding. The judgment of the Small Causes Court is that the defendants do pay the plaintiff the sum altogether of Rs. 675-10-0, and that they do pay in due course of administration the same to the Registrar of the Court at his office. It was in the first instance argued on behalf of the defendants that the words, "indue course of administration" prevented the applicant being paid in priority to other creditors, but inasmuch as the Small Causes Court is not administering the estate, I fail to see how any effect whatever can be given to those words " in due course of administration." It is the High Court which is administering the estate, and the Small Causes Court is not in a position to direct the High Court as to how it is to administer. The next step was that on July 12

the applicant obtained leave to issue a notice under Order XXI, Rule 52, and the notice was served on August 3, and on August 26 a garnishee notice was served for the purpose of enforcing that order. On September 2, the debtors took out a summons to vacate the notice issued under Order XXI, Rule 52. That summons was dismissed on September 16, and on September 30 the garnishee notice was also dismissed, and it is from that latter order that the present appeal is brought.

2. The first point which arises is whether garnishee proceedings really apply in a case of this sort. The rules of the High Court dealing with garnishee proceedings, which are Rules 325 down to 332, provide in effect that where a third party is liable to pay the judgment-debtor, then the judgment-creditor may attach the debt, I have inquired in the office and I understand that it is not uncommon in cases of this sort to treat the receiver as a person liable to pay, and that therefore moneys in his hands can be attached, Speaking for myself, I have very great doubt whether it can be said that a receiver is liable to pay the judgment-debtor, in this case the representatives of the estate, seeing that it has not yet been shown that the estate is solvent and that no order for payment has been made ; but the point has not been fully argued, and it would be necessary, I think, before arriving at a final conclusion, to consider a good many English cases. It is not necessary in my view to decide this point, because I am quite satisfied that the substantial question whether the receiver ought to be ordered to pay can properly be raised in this administration action. The judgment-creditor is clearly entitled to come to the Court in the administration action, and to ask the Court to direct its own receiver to pay his debt whether or not the moneys in the receiver's hands can be attached. I propose, therefore, to consider the case on its merits.

3. The question is whether in this case the receiver ought to be ordered to pay the judgment-creditor's debt. There seems to be no authority on the point except the case of *Durgadutt v. Bholaram*, which is the case which Mr. Justice Blackwell followed. That is a decision of Mr. Justice Mirza, and it is, I think, directly in point, and holds that the receiver in an administration action ought not to be ordered to pay a judgment-creditor. Mr. Justice Mirza bases his decision on an earlier case, *Bhaiji Bhimji v. Administrator General of Bombay* ILR (1898) 23 Bom. 428, which was a decision of the Court of Appeal. In that case the moneys were in the hands not of a receiver, but of the Administrator General, and as the Administrator General, u/s 7 of Act II of 1874, which was the Act applicable in that case, is not an officer of the Court, I am not satisfied that his position bears any really close analogy to the position of a receiver who is an officer of the Court, and I propose, therefore, to consider the question as one of principle. Where the Court appoints a receiver in an administration action, it does so on the footing that so far as the Court can see on the evidence before it there is reason for thinking that an administration order will have ultimately to be made. If an administration order is made, it is quite clear that all the creditors will have to be paid *pari passu*, and it seems to me that, in general, in the absence of very special circumstances, the Court ought not to direct its receiver to pay one

creditor in preference to others before there has been a decree, and thereby put it out of the Court's power ultimately to make an equal distribution amongst creditors. No doubt circumstances might arise in which the Court would be justified in directing its receiver to pay a judgment-creditor in preference to the other creditors. I think that if there was unreasonable delay in the prosecution of the action and the Court considered that the receiver was being used merely as a means to keep the creditors out of their money, the Court would be justified in directing the receiver to pay, but in the present case the action has not come to trial owing to the state of congestion in the lists, and I am not satisfied at present that there has been any unreasonable delay. I think, therefore, that the Court ought not to direct the receiver in this case to pay the judgment-creditor's debt, and that the appeal should be dismissed. Our order will be without prejudice to the question whether the obtaining of a notice under Order XXI, Rule 52, confers any sort of priority upon the creditor who obtains it. That point can of course only arise if the estate proves to be insolvent and there is not enough to pay all the creditors in full. Our order will also be without prejudice to the right of the judgment-creditor to make a further application for payment if he has evidence that the action is not being prosecuted bona fide. I do not propose that he should be kept indefinitely out of his money by a receiver appointed by the Court. But so far as our present order is concerned, that will merely be that the appeal is dismissed with costs.

Baker, J.

4. I agree. The various cases that have been quoted are all cases of partnership suits or suits in which the Administrator General was concerned, with the exception of the one case on which Mr. Justice Blackwell relied, viz., *Durgadutt v. Bholaram : Vishvambharlal In re* (1926) 29 Bom. L.R. 409. It has been frequently stated during the progress of this appeal that there are no other claims against the estate, but whether that is so or not, in view of the fact that an administration suit is pending, I think it will be better to wait for the disposal of that suit, when any claims against the estate will be paid in due course. I, therefore, agree with the order proposed by the learned Chief Justice.