

**(1920) 07 MAD CK 0024**  
**In the Madras High Court**

S.N. Sen, Official Assignee of Rangoon by his Agent, Official Receiver, Ramnad Mr. O. De Glanville APPELLANT

Vs

Chidambaram Chetty and Another RESPONDENT

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**Date of Decision :** 21-07-1920

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 8(1)

**Citation :** 61 Ind. Cas. 300 : (1920) 12 LW 551

**Hon'ble Judges :** John Wallis, C.J.; Sadasiva Aiyar, J

**Bench :** Division Bench

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**Judgement**

John Wallis, C.J.—This is an appeal from an order of the Temporary Subordinate Judge of Sivaganga dismissing, under Order XXI, Rule 8, the suit of the plaintiffs who had become insolvents. Before the date of the petition the Official Assignee of Rangoon, where an order of adjudication had been made against the plaintiffs, had been brought on the record as third plaintiff to enable him to continue the suit. It was contended for the defendant that he was not entitled to represent the insolvents or carry on the suit, because, before the date of the adjudication in Rangoon, there had been an adjudication in Madras under which the insolvents estate had vested in the Official Assignee of Madras who was the proper person to continue the suit. The learned Subordinate Judge accepted this contention and his decision on this point is in accordance with the subsequent decision of this Court in Official Assignee of Madras v. Official Assignee of Rangoon 49 Ind. Cas. 210 where the question was expressly raised as between the two Official Assignees. It did not, however, follow that the suit should necessarily be dismissed because the Official Assignee of Rangoon was not entitled to represent the insolvents estate and had been wrongly added as third plaintiff. Order XXII, Rule 8(1), in its present form, Bays the suit is not to abate unless the Assignee, which must mean the real Assignee, at the time the Official Assignee of Madras, declines to continue the suit or to give security if so ordered. Order XXII, Rule 8(2), then says the suit may be dismissed if the Assignee neglects or refuses to continue the suit or to give security within the time ordered. There is no evidence

that the Official Assignee of Madras knew of the pendency of the suit, and if he did not, he can sorely be said to have neglected or refused to continue it. The fact adverted to by the Subordinate Judge, that the Official Assignee of Rangoon might, if so minded, have given notice of the suit to the Official Assignee of Madras is irrelevant, as it is not suggested that any such notice was given. Now, it has been held in Ibrahim v. Abdur Rahiman 12 B.H.C.R. 257 that the defendant was not entitled to set up that the suit had abated without giving notice to the Official Assignee. In these circumstances, the order dismissing the suit was clearly wrong.

2. It was then argued that the third plaintiff, the Official Assignee of Rangoon, was not entitled to prefer this appeal as the order dismissing the suit was right so far as he was concerned. At the date of the order he did not represent the estate of the insolvents, but it subsequently devolved upon him by reason of the order of this Court annulling the prior insolvency in this Court. See Office I Assignee of Madras v. Official Assignee of Rangoon 49 Ind. Cas. 210 and he is at the present time the proper person. I do not think it necessary to consider this Act objection because I think that, in dismissing this suit under Order XXII, Rule 8(2), without notice to the Official Assignee of Madras who then represented the insolvents estate, the Subordinate Judge acted with material irregularity in the exercise of his jurisdiction and prejudicially to the general body of the insolvents creditors. I think it is our duty to in. derriere and set aside the order of dismissal and direct the Subordinate Judge to restore the case to his file and dispose of it according to law. Costs hitherto to abide.

Sadasiva Aiyar, J.

3. The Official Assignee of Rangoon, S.N. Sen, who came in as the third plaintiff in substitution of the original plaintiffs, filed this appeal (Appeal Suit No. 323 of 1918). During the pendency of this appeal, his successor, Mr. O. De Glanville, has been substituted as the appellant,

4. The suit was brought by the two insolvents against the first defendant, their agent, for an account. The plaintiffs were declared insolvents, first on the original side of this Court on the 23rd April 1917. Then they were declared insolvents by the Rangoon Chief Court on the 10th May 1917. The Rangoon Official Receiver brought himself on the record of this suit on the 3rd October 1917. The Madras Official Assignee never applied to be, and never has been, brought on the record. The Subordinate Judge of Sivaganga dismissed the suit on the 8th April 1918 on the ground that the properties of the insolvents vested and continued to be vested in the Official Assignee of Madras where the order of adjudication was first made on the 23rd April and the Official Receiver of Rangoon had, therefore, no right to continue the suit. It is against this order of the 8th April 1918 that the present appeal has been brought. The material grounds in the appeal memorandum are grounds Nos. 4. 6 and 7 which are as follows:

4. That in view of the provisions of Order I, Rule 10 and Order XXII, Rule 8, CPC

even assuming that the appellant is not a proper party, the lower Court ought to have at all events directed the amendment of the plaint by the addition of the proper party.

4. That even if there was any doubt as to who was the proper representative the Court ought to have made both the Assignees as parties and ought not to have dismissed the suit.

6. That as long as the Rangoon order of adjudication has not been annulled, the appellant was entitled to represent the insolvents estate, and the lower Court failed to notice the provisions of Section 17 of the Provincial Insolvency Act.

5. I do not think there is anything in the 7th ground of appeal.

6. The provisions of Section 17 of the Provincial Insolvency Act referred to in that ground are as follows: If in any case in which an order of adjudication has been made it shall be proved to the Court by which such order was made that insolvency proceeding are pending in another Court against the same debtor, and that the property of the debtor can be more conveniently distributed by such other Court, the Court may rescind the order of adjudication and stay all proceedings or dismiss the petition on such terms (if any) as the court thinks fit," If under this Section 17 the order of adjudication passed by this Court in April 1917 had been rescinded by it before the Subordinate Judge's order of 8th April 1918 now under appeal, the Subordinate Judge's order will clearly be erroneous as the Rangoon adjudication order of the 17th May 1917 would be the only adjudication legally remaining in force and the Rangoon Official Receiver would have become the person in whom the insolvents rights had become vested. A petition seems to have been presented to this Court on its original side in April 1917 (Original Petition No. 88 of 1917) to cancel this Court's order of adjudication and the petition was dismissed by Mr. Justice Baker on 2nd April 1918 six days before the Subordinate Judge passed the order of dismissal in the present suit. Hence this Court's order of adjudication remained in force when the Subordinate Judge dismissed the suit. I am, therefore of opinion that the Subordinate Judge's opinion that the appellant had no locus standi to continue the suit is correct, The order of adjudication by this Court vested all rights and properties of the insolvents within the Madras Presidency in the Official Assignee of Madras and that could not again vest in the Rangoon Official Assignee, fact since held by this Court in Official Assignee of Madras v. Official Assignee of Rangoon 49 Ind. Cas. 210 . See also Aranoayal Sabhupathy K Moodaliar, In re 21 B. 297 and William Watson, In the matter of 31 C. 761. There is thus nothing in the 7th ground of the appeal memo,

7. Coming to the grounds Nos. 4 and 6, I shall first consider the provision of Order XXII, Rule 8. That Order says (1) "The insolvency of a plaintiff shall not cause the suit to abate unless the Official Assignee or Receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct," and

that (2) "where the Assignee or Receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit...and the Court may make an order dismissing the suit, ego.," This rule modifies the provision relating to this matter found in Section 370 of the old CPC or, at least, makes dear the intention of Section 370 of the old Code. That section did not expressly state that "the insolvency of a plaintiff shall not cause the suit to abate;" and, hence there was a doubt whether, in such a case, an order of abatement should or could be made. The present rule clearly provides that the proper order is not an order of abatement but an order of dismissal of the suit. (As regards the death of a plaintiff, the old Section 366 provided for the Court passing an order that the suit shall abate, but the corresponding Order XXII, Rule 3, of the new Code provides that the suit shall abate in certain circumstances, without any formal order that the suit shall abate being necessary).

7. Reading Order XXII, Rule 8, Clauses (1) and (2) together, Clause (1) using the expression "the Assignee or Receiver declines to continue the suit or to give security" and the Clause (2) using the expression "Assignee or Receiver neglects or refuses to continue the suit and to give security", and seeing that the Official Assignee or Receiver is a public servant appointed in pursuance of a public policy of a very beneficial nature, I think that a Court ought not to come to the conclusion that the Assignee or Receiver has declined or refused to continue the suit or even has neglected to continue the suit or to give security, etc., unless he has been given notice either by the defendant or by the Court of its own accord to appear and state whether he is willing to continue the suit and to give the security, or at Act unless it appears that he has had notice of the pendency of the suit in that Court and has taken no steps for a long time. See Ibrahim v. Abdur Rnhiman 12 B.H.C.R. 257 Having, again, regard to the very wide provisions of Order 1, Rule 10, as regards the power of the Court to strike out, add and substitute parties, I think that the Code contemplates that the Court has a duty in such case to call upon the defendant to give notice to the Official Assignee or Receiver, as to what the latter intended to do and has got the right to do of its own accord, and even a duty of its own motion to do so in appropriate circumstances. As no such course has been followed in the present suit, I think that the dismissal of the suit on the ground that the Official Assignee of Madras had neglected or refused to continue the suit or to give security cannot be supported. It appears from Official Assignee of Madras v. Official Assignee of Rangoon 49 Ind. Cas. 210 that the Madras adjudication has been cancelled and that the Bangoon Receiver who has preferred this appeal represents at present the insolvents estate. Apart from mere technicalities, I think that we are entitled to accept this appeal as filed on the date when he became entitled to represent the insolvents and to Act upon his willingness to continue the suit as clearly expressed by his conduct throughout.

8. I, therefore, agree to the order proposed by my Lord.