

(1921) 10 MAD CK 0012
In the Madras High Court

The Official Receiver of Coimbatore District and Another
Vs

APPELLANT

D.D. Kanga

RESPONDENT

Date of Decision : 19-10-1921

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 17, 20

Citation : AIR 1922 Mad 51 : (1922) ILR (Mad) 167 : (1921) 14 LW 655 :
(1922) 42 MLJ 53

Hon'ble Judges : Spencer, J;Ramesam, J;Ramasam, J

Bench : Full Bench

Judgement

Spencer, J.—It is evident from paragraphs 15 and 16 of the affidavit that accompanied both C.M.P. No. 2723 of 1919, the 2nd appellant's

petition for stay of the sale of the insolvent's property, and C.M.P. No. 2724 of 1919, the petition for a direction to be given to the Official

Receiver, Coimbatore, to file a suit against the Respondent in this appeal for damages on account of his action in allowing the promissory note for

Rs. 10,000, to become time barred, that the purpose of the latter petition, was to get a suit filed within October 27th, 1919, after which date a suit

upon that cause of action would have been out of time.

2. C.M.A. 272 of 1919 , wherein the order of the District Judge of Coimbatore directing the Official Receiver not to file a suit was appealed

against, was not placed before Odgers, J, for disposal, nor did that learned Judge purport to deal with the District Judge's order, 1 consider

therefore that Bakewell J. who dealt with an application for stay of proceedings in the suit, pending the disposal of C.M.A. No. 272 of 1919, and

Phillips J, who tried the suit, were right in regarding Odgers J's order as a provisional subject to the result of the C.M.A.

3. The learned Judges (Oldfield and Seshagiri Iyer, JJ.) who heard the C M A observed that the order of Odgers, J. was in force and that they

could not interfere with it in the proceedings before them. They next went on to say that in these circumstances it would be useless to dispose of

the appeal and to dismiss it. Apparently they failed to notice that Odgers, J. could not and did not set aside the District Judge's order refusing

leave to sue, an order that was passed by him as a court exercising jurisdiction under the Provincial Insolvency Act (Vide the expression ""by leave

of the Court"" in Section 20 of Act III of 1907, the enactment then in force, and the definition of ""Court"" in Section 2(1)(g). They also seem to have

overlooked the fact that the result of the Bench dismissing the appeal would be to leave the District Judge's order prohibiting the Official Receiver

from suing in full force and effect. I have no doubt that their intention was to give full effect to Odgers, J's order and that this result might have been

attained by allowing the appeal instead of dismissing it.

4. But no attempt has been made by the parties to get the order on the C.M.A. reviewed by the Bench that passed it, and so we are bound to give

it the legal effect that it has, instead of being guided by what we may think the learned Judges intended to do.

5. On the second point, which is that no leave was necessary for the institution of this suit, I am unable to follow the opinion of the Learned Judge

of the Court who tried this suit, in treating the words ""as hereinafter provided"" in Section 16(2)(a) of Act III of 1907, as qualifying the words ""vest

. I think that they qualify the word ""receiver"" that immediately precedes them, seeing that the following Sections 18 and 19, provide for two kinds

of receivers, one appointed by the Court for the particular insolvency and others appointed by the Local Government for certain local areas. In the

absence of a receiver of either of these classes, the insolvent's property, upon an order of adjudication being made, vests in the Court.

6. Section 17 of the Presidency Towns Insolvency Act (Act III of 1909) which deals with the vesting of the insolvent's property in the Official

Assignee, does not contain the words ""as herein after provided """. They were not needed, because no doubt could arise as to the Officer

designated by the words ""Official Assignee"", an expression defined in Section 2(c) of that Act; whereas there is no definition in the Provincial

Insolvency Act of the word ""receiver"" till we come to Section 18.

7. I think that the obtaining of leave is a matter between the receiver and the Court whose officer he is, and that it is not a valid defence to the suit

which a defendant can raise to say that leave of the Insolvency Court has not been obtained. I would follow the English law as laid down in *Lee v.*

Sangster (1857) 2. C.B.N.S. 1 which although decided in 1857 appears from *In re Branson* (1914) 2 K.B. 701 to be still good law. As between

the Court and the Official Receiver there was no reason for withholding leave, as the assets of the insolvent's estate were not risked by the suit.

The Official Receiver is not the sole plaintiff in the present suit, and it was made a condition precedent to the granting of leave by *Odgers, J.* that

the co-plaintiff who is the insolvent himself, should find security for Rs. 1,500, for the defendant's costs in the suit.

8. As appellants succeed on this point, the appeal must be allowed and the suit is directed to be restored to file and disposed of according to law.

The 2nd appellant will get his costs of this appeal. Costs of the suit will be provided in the final decree.

Ramesam J.

9. The suit out of which this appeal arises was filed by two plaintiffs. The 2nd plaintiff is an insolvent and the 1st plaintiff is the Official Receiver (of

the Coimbatore District) in whom the properties of the insolvent were vested u/s 16(2)(a) of the Provincial Insolvency Act III of 1907. It was

dismissed by our brother *Phillips J.* on the ground that it was not maintainable without leave of the Court and no leave had been obtained. The

plaintiffs appeal.

10. The first point argued is that the Judgment (dated 12th April 1920) of *Oldfield and Seshagiri Iyer, JJ* in C.M.A. No. 272 of 1919 (on appeal

against the order of the District Judge of Coimbatore refusing to grant leave to the Official Receiver to file this suit) is, or what amounts to the same

thing should be construed as, an order granting leave. In that judgment, their Lordships construe a previous order by *Odgers J* (dated 24th

October 1919) not as an interlocutory order intended to operate till the disposal of the appeal but as a permanent order which would remain in

force after the disposal of the appeal. This construction of the order Of *Odgers, J.* is binding on the parties and on us, even if we are inclined to

take a different view of it. But this is not enough for the appellants. It was necessary that the order of the District Judge should have been modified by the High Court in appeal. The learned Vakil for the appellants contends that the order of their Lordships should be construed as an order adopting the order of Odgers, J. If it were possible I would adopt such a construction; but I confess that the language of their Lordships "it would be useless to dispose of the appeal and it is dismissed . . ." presents considerable difficulties in my way. If it were necessary for us to dispose of the case on this point, I would adjourn the appeal to enable the appellants to apply for a review of the order of Oldfield and Seshagiri Iyer, JJ. But I do not further deal with this point, as I am clear the appeal must be allowed on the 2nd ground, Viz., that the leave of the court is not necessary for the maintainability of the suit.

11. Section 20(d) of the Act authorises the Receiver to institute a suit with "leave of the Court". The consequences of the want of leave are not stated. Similar provisions in other Acts have been construed as not being fatal to the maintainability of the suit, if leave is not obtained (vide *Cochrane v. Owen* 2 Hyde 150, on 11 Viet Ch. XXI Section 29 the Insolvency Act, formerly in force in the Presidency towns; *Lee v. Sangster* 140 E.R. 310, on 12 and 13 Vict C VI Section 153 and *In re Branson* (1914) 2 K.B. 701. The reason given in these cases is that "leave" is a matter between the Court and Official Receiver and the want of leave cannot be relied on by the defendants in a suit. The Official Receiver prosecutes the suit at his own risk in the matter of costs and cannot charge them on the Insolvent's estate if he loses. It is said that these cases do not govern the matter before us as the vesting under Act III of 1907 is qualified, as Section 16(2)(a) provides that the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided". It is contended that the effect of the words "as hereinafter provided" is to make the vesting subject to the provisions of Section 20 which provides for leave of the Court and that, if leave of Court is not obtained, there is no vesting; whereas, in the other enactments, the vesting was "absolute." But as my learned brother pointed out in the course of the arguments, the term "receiver" does not occur in the prior sections of the Act not even in Section 2 containing definitions and occurs for the first time in Section 16

without any explanation. The provisions for the appointment of Receivers and Official Receivers are contained in Section 18 and Section 19 and these words ""as hereinafter provided"" (following the word " receiver") are intended to draw the attention of the reader to these sections and, in my opinion, have nothing to do with Section 20. In the Presidency Towns Insolvency Act III of 1909, Section 2(c) defines Official Assignee, Section 17 directs that the property of the insolvent shall vest in the Official Assignee and Section 68 provides for suits by the Official Assignee with leave of Courts, The absence of the words ""as hereinafter provided"" in Section 17 is due to the fact the the ""Official Assignee"" has been defined in Section 2(c) unlike "receiver" in Act III of 1907. In my opinion the words ""as hereinafter provided ""qualify"" receiver " and not the verb ""shall vest""; and there is no distinction in principle between the policy of all these enactments. The language of Section 153 Of 12 and 13 Vict-C 106 is stronger as it uses the words " with the leave of the Court first obtained, upon application to such Court, but not otherwise."" I do not see any reason why the cases above cited should not apply to the Act of 1907. The appeal is therefore allowed, the decree of Phillips, J. is reversed and the case remanded, to the Original Side for disposal according to law, The 2nd appellant will have the Costs of the appeal. The costs of the first Court will abide result.