ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

JITMAND RAMANAND AND ANOTHER (PLAINTIFFS) *v.* RAMCHAND NANDRAM AND OTHERS (DEFENDANTS).* 1905. *March* 18.

Insolvent Debtors Act (11 *and* 12 *Vict., c.* 21), *sec.* 7—*Attachment under Garnishee Order—Debt in hands of Sheriff—Rights of Official Assignee as against attaching creditor.*

N, on an attachment under a garnishee order, handed over Rs. 1,200, a sum largely exceeding the amount due by him to the judgment-debtor, together with Rs. 83-9-0, the costs of the execution, to the Sheriff.

On the following day, the judgment-debtor filed his petition in the Insolvent Court.

Upon the Official Assignee claiming Rs. 399-12-9, that portion of the sum in the hands of the Sheriff, which was admittedly owing to the attaching creditor,

Held, the title of the Official Assignee must prevail. The payment to the Sheriff could not be treated as equivalent to a payment to the creditor. It was really tantamount to a payment into Court. The fact, that a larger sum was paid to the Sheriff, than was actually owing, showed that such payment was made for the purpose of getting rid of the attachment, and not in satisfaction of the debt. The property in the hands of the Sheriff must still be considered, as belonging to the insolvent, and therefore, as being vested in the Official Assignee.

Frederick Peacock v. *Madan Gopal*(1) and *Kristnasawmy Mudaliar* v. *Official Assignee of Madras*(2) followed; *Ex parte Pillers. In re Curtoys*(3) referred to.

SUMMONS in chambers.

The facts of the case are fully set out in the judgment of Mr. Justice Tyabji.

Lowndes for the plaintiff, applicant.

Macleod, Official Assignee, in person.

TYABJI, J.:—In this case a question has arisen between the execution-creditor and the Official Assignee as regards priority in respect of a debt which was attached and the amount of which is now in the hands of the Sheriff.

* Suit No. 279 of 1899.

(1) (1902) 29 Cal. 428. (2) (1903) 26 Mad. 673.

(3) (1881) 17 Ch. D. 653.

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The facts are that the plaintiff obtained a decree against all the three defendants on the 1st of August 1899. There were moneys due to the 2nd defendant from Narsingdas Jamnadas and a warrant for attachment of the debt was issued on the 25th of January 1905. A prohibitory order was served on the garnishee Narsingdas on the 27th January 1905. No cause having been shown, a notice to pay was issued and was made absolute against Narsingdas on the 27th of February 1905 under Rules 348, 349 and 352 of the High Court Rules. Execution was then issued against Narsingdas on the 28th February 1905 as if he had been a judgment-debtor himself and the warrant of attachment was executed on the 1st March 1905, when Narsingdas paid to the Sheriff a sum of Rs. 1,200 and a sum of Rs. 83-0-9 for costs of the execution. It appears, however, now on the examination of the books of the garnishee that only Rs. 399-12-9 was really due from the garnishee to the 2nd defendant. On the next day, that is on the 2nd March 1905, the 2nd defendant filed his petition in the Insolvent Court, and by a vesting order made on that day under section 7 of the Insolvent Act, the whole estate of the Insolvent became vested in the Official Assignee.

The Official Assignee now claims the amount of Rs. 399-12-9 which is admittedly due by the garnishee Narsingdas to the 2nd defendant, and the question is, whether the Official Assignee's claim should prevail over the claim of the execution-creditor, namely, the plaintiff Jitmal.

Now I think I must take it to be settled law that attachment of any property does not *per se* create any interest in the attaching creditor, but merely gives him the right to take further proceedings which might enable him to recover the amount of his judgment claim. This is now clear from the Full Bench case of *Frederick Peacock* v. *Madan Gopal*[1] and others, reported in I. L. R. 29 Cal., p. 428, where the head-note is:—"A judgment-creditor has no priority over the Official Assignee in respect of property attached by him previous to the vesting order." And this case follows the case of *Soobul Chunder Law* v. *Russick Lall Mitter*[2] and overrules the case of *Miller* v. *Lukhimani Debi*[3] where a contrary doctrine had been laid down.

(1) (1902) 29 Cal. 428. (2) (1888) 15 Cal. 202.
(3) (1901) 28 Cal. 419.

Now the case of *Ex parte Pillers. In re Curtoys*(1) decides that a garnishee order, attaching a debt due to a bankrupt, is not a "dealing" with the bankrupt within section 94, sub-section 3, of the Bankruptcy Act, 1869: and it holds that such an order is not within the protection of section 95, sub-section 3, unless the garnishor has obtained actual payment of the attached debt from the garnishee before the order of adjudication. And at page 666 Lord Justice Lush says:—"By virtue of the adjudication of bankruptcy and the relation back of the trustee's title, all the property which the bankrupt had at the time when he committed the act of bankruptcy is vested in the trustee and becomes divisible among the creditors. The debt had, therefore, ceased to be due to the bankrupt and had become due to the trustee. Then this clause was inserted for the protection of a creditor who, after the commission of an act of bankruptcy of which he had no notice, a secret act of bankruptcy, had pursued his remedy, but it protects him only upon certain conditions. Goods seized under a *fi. fa.*, goods in the ordinary popular sense of the word, must not only have been seized, but sold, before the adjudication. The intention was that so long as the execution remained only a security for the debt, it was not to be protected. Something more must have been done; there must have been an actual conversion of the security into money. And I think we must find some equivalent for that in the case of an attachment under a garnishee order. What is the equivalent? The security must have been realized before there can be any protection. How can the garnishor realize the debt which he has attached? The debt cannot be sold, and he can only realize it by obtaining payment of it from the garnishee, either voluntarily or by means of an execution on his goods. Till that has been done I think there is no protection. It is true the words 'executed by seizure and sale' have no application to the case. But I think they do shew what was the meaning of the Legislature clearly enough to enable us to apply the principle, and if for want of apt words in the section we were to say it does not apply to a garnishee order, we should be incurring the censure which is implied in the maxim *qui hæret in literâ hæret in cortice*. I am of opinion that

(1) (1881) 17 Ch. D. 653.

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the only equivalent for an actual sale of goods which will satisfy the words of the Act in the case of a garnishee order is an actual receipt of the attached debt by the garnishor. Till that has been done the attachment is only a security, and it is not protected by section 95."

And in the case of *Kristnasawmy Mudaliar* v. *Official Assignee of Madras*[1] it is laid down in the head-note:—

"The effect of an attachment under the Code of Civil Procedure is to prevent alienation. It does not confer title. An order of attachment under section 268 only operates so as to give the judgment-creditor certain rights in execution. It does not operate when those rights are not exercised before the presentation of a petition in insolvency, so as to create in favour of the judgment-creditor a title which prevails against that of the Official Assignee, under the vesting order in insolvency made after the order of attachment.

"The plaintiff in a suit obtained an order for attachment before judgment of a sum of money belonging to the defendant. In due course a decree was obtained, and subsequently to the decree the judgment-debtor was declared an insolvent. The Official Assignee then preferred a claim to the money under attachment, contending that the attachment was of no effect as against him, and asking that it might be set aside:

"*Held*, that the Official Assignee was entitled to the order asked for."

And at page 678 the learned Judges say:—

"The order does not purport to deal with any question of title as between the debtor and the party in whose hands the debt alleged to be due to the debtor is attached, or as between the debtor and any party in whom his estate may afterwards become vested by operation of law. In other words, attachment prevents alienation, it does not confer title. * * * * * It is for the attaching creditor to show that, under the provisions of the Code of Civil Procedure, the order of attachment operates so as to prevent this right from vesting. In our judgment the making of an order of attachment in favour of a judgment-creditor obtained under section 268 of the Code of Civil Proce-

(1) (1903) 26 Mad. 673.

dure only operates so as to give the judgment-creditor certain rights in execution. It does not operate, when these rights are not exercised before the presentation of a petition in insolvency, so as to create in favour of the judgment-creditor a title which prevails against that of the Official Assignee under a vesting order in insolvency made after the order of attachment. As regards the authorities, the precise point does not appear to have been decided by this Court."

Then they refer to the various cases and wind up by saying:—

"The amendments of the law of procedure in this country, as well as of the law of bankruptcy in England, have been based upon the principle that, so far as possible, the creditors should be treated *pari passu*, and that nothing short of actual realization of the debt due should give rights of priority.

"If, under the provisions of the present Code, an attaching creditor does not obtain a charge or lien on the attached property, no question, as it seems to us, of the property vesting subject to any equity in favour of the attaching creditor really arises."

Applying the principles laid down in the cases to which I have referred, I am of opinion that here the title of the Official Assignee must prevail over that of the execution-creditor because although the money has been paid to the Sheriff it cannot be treated as equivalent to the actual payment to the creditor himself. I consider that what has taken place is really tantamount to paying the money into Court. No order has yet been obtained for payment of the money over to the creditor himself. Moreover, it must be remembered that Rs. 1,200 was paid by the garnishee to the Sheriff when only Rs. 399-12-9 was really due. That shows that the money was merely paid under protest for the purpose of getting rid of the attachment and not in satisfaction of the amount due from him.

Therefore, I consider that the amount now in the hands of the Sheriff merely represents the property that might have been otherwise attached, and it must still be considered as belonging to the insolvent, and, therefore, being vested in the Official Assignee.

I must, therefore, rule that the title of the Official Assignee prevails over that of the attaching creditor and must order the money to be paid to him.

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Rs. 399-12-9 will be paid to the Official Assignee, and Rs. 83-0-9, which have been ascertained as the costs of execution, will be paid to the solicitor of the attaching creditor, less the amount of poundage due to the Sheriff, and the balance of the money in the hands of the Sheriff will be returned to the garnishee.

If there are any costs of the Official Assignee, the solicitor of the attaching creditor will pay them.

Attorneys for the Applicant—*Messrs. Bhaishankar, Kanga and Girdharlal.*

W. L. W.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1905. *March 27.*

LAKSHMIBAI KOM ANANT (ORIGINAL DEFENDANT), APPELLANT, *v.* VISHNU VASUDEV BELE (ORIGINAL PLAINTIFF), RESPONDENT.*

Adoption by a widowed daughter-in-law under the direction of the father-in-law after his death—Divesting of the estate of daughters—Adoption invalid.

A Hindu testator died leaving him surviving two daughters and a widowed daughter-in-law. In his will he made the following provision:—"I wanted to dispose of the above-mentioned property myself. But as I am ill, it is not possible for me to do so. Therefore the Panch should give a boy in adoption to my daughter-in-law and (thus) keep (the doors of) my house open."

After the death of the father-in-law, the widowed daughter-in-law adopted a boy under the said provision. The adopted boy having subsequently brought a suit for a declaration of his title as the grandson of the testator, the validity of the adoption was impeached by one of the daughters of the testator, whose interest became divested by the adoption,

Held that the adoption was invalid.

From the fact that a husband's authority to his widow to adopt may be operative after his death, it does not follow that a father-in-law's assent survives beyond his life-time so as to enable his son's widow to divest an estate that had already devolved by inheritance on heirs who did not derive title through the son.

SECOND APPEAL from the decision of J. J. Heaton, District Judge of Násik, confirming the decree of P. J. Taleyarkhan, Subordinate Judge.

* Second Appeal No. 521 of 1904.