1934 *Present :* **Garvin S.P.J. and Akbar J.**

MURUGIAH *v.* BASTIAN FERNANDO.

166—D. C. (Inty.) Chilaw, 9845.

Insolvency—Action to set aside deed by attorney of assignee—No right to maintain—Alternative relief—Power of Court.

A person holding a general power of attorney from the assignee of an insolvent estate is not entitled to bring an action which an assignee may have brought.

Where the attorney, who instituted the action, was himself a creditor of the estate and the relief claimed was on behalf of the general body of creditors, the Court should have permitted the plaintiff to ask for that relief in the alternative capacity, provided the facts in regard to that capacity had been pleaded.

APPEAL from an order of the District Judge of Chilaw.

H. V. Perera, for plaintiff, appellant.

N. E. Weerasooria (with him *N. Nadarajah*), for defendent, respondent.

February 27, 1934. GARVIN S.P.J.—

The purpose of this action was to recover for the benefit of the creditors of the insolvent estate of Francis Xavier Fernando certain premises valued in the plaint at Rs. 15,000, which were conveyed by the insolvent to the defendant by deed No. 582 of July 28, 1930. The grounds upon which this transaction was impeached are set out in paragraphs 5 and 6 of the plaint. They are as follows:—"5. The execution of the said

deed No. 582 was fraudulent and rendered the said Francis Xavier Fernando an insolvent and the defendant paid no consideration and the creditors of the said insolvent have been deprived of means of recovering their just debts. 6. The plaintiff further states that the execution of the said deed in favour of the defendant is a fraudulent preference". Answer was filed and in due course, the case came up for trial when three issues were framed in the following terms: " (1) Can the plaintiff maintain this action by his attorney? (2) Does deed No. 582, dated July 28, 1930, become a fraudulent preference? (3) Is it therefore liable to be set aside?" It is manifest at once that all the matters which appear to be at issue between the parties have not been raised by proper issues. However, it was agreed that the Court should try the first issue before proceeding with the trial of the rest of the issues. The evidence of one witness was led and this evidence was directed mainly to an explanation of the circumstances under which the proxy in this case happened to be signed by a person who was an attorney substituted by an earlier attorney by virtue of a power of substitution committed to him in the power given to him by the original plaintiff.

Now, issue No. 1, though somewhat widely framed, was evidently framed for the purpose of raising the contention that this being in form an action by an assignee it should fail for the reason that it was in fact brought not by the assignee but by an attorney. At the hearing of the argument, however, counsel for the plaintiff contended evidently in the alternative that inasmuch as the plaintiff was also a creditor he was entitled to maintain the action in that capacity. After hearing argument the learned District Judge held that this was in effect an action by an assignee of this insolvent estate and that it was not competent for an attorney of the individual who happened to be clothed with the office of assignee to bring an action in his name. For these reasons he dismissed the plaintiff's action with costs.

There is authority for the proposition that an assignee appointed under the Insolvent Estates Ordinance, 1853, cannot delegate his duties to an attorney or other agent—see " *In re the Insolvency of Arnolis Appu*[1]. As in that case, so in the one now under consideration, the assignee was a member of the Chetty community and in view of the peculiar customs of this community which have been judicially noticed in other connections, it appears to have been assumed that where the assignee was the proprietor of a Chetty firm, then in his absence everything that he might have done might legally be done by the person whom he had appointed his attorney. The judgment to which I have referred and the law laid down therein is evidently not as familiar to persons as it should be, and there is every indication that in this case it was once again assumed that the holder of a general power of attorney from a Chetty was entitled in his absence to function for him even in the capacity of an assignee of an insolvent estate. We think that the learned District Judge was right in his view that such an attorney could not take upon himself to determine whether an action could or should be instituted on behalf of the creditors and that the power to do so could not be held to be delegated to him by any power of attorney, no matter how widely it may be worded.

[1] *19 N. L. R. 476.*

While it seems to us that the learned District Judge was also right in his view that the action as framed was in form an action by an assignee, there are two circumstances which do not appear to have received sufficient notice, first the averments in paragraph 8 of the plaint that the plaintiff was one of the creditors of the said insolvent estate, secondly, that basing himself upon this averment the proctor for the plaintiff contended that if the action was not maintainable as an action by an assignee it was nevertheless maintainable by the plaintiff in the character of a creditor of the insolvent estate. Now it seems to us that that plea should have been more fully considered and not merely disposed of upon the ground that notwithstanding the averment of the material facts this was in form an action by an assignee. The Court undoubtedly had the power, if it chose to exercise it, to permit issues to be framed so that matters of substance such as this might be properly considered and determined. This it seems to us is a case in which this power should have been exercised. It was not an action brought by the plaintiff purely to recover for himself some personal benefit or advantage or to obtain some relief purely personal to himself. It was relief he sought on behalf of the general body of creditors of the insolvent estate and if there was a technical defect which prevented his obtaining that relief in the capacity of assignee there seems to be no good reason why he should not have been permitted in the alternative to ask for that relief in another capacity, particularly where the facts in regard to that alternative capacity had been pleaded.

We think, therefore, that this case should be remitted to the Court below to enable this matter of substance to be fully considered and determined. We have submitted to counsel a series of issues which appear to us to be necessary for the proper determination of this action and they have assented to those issues being framed, subject to the reservation to the defendant of the right to propose such further issues as may be deemed necessary for the purpose of raising such other defence or defences that may be available to him. We would accordingly direct that the second and third issues framed in this case be deleted and that in addition to the first issue the following issues be framed: (1A) Is the plaintiff a creditor? (2) If so, does this action fail for the reason that it was brought by an attorney? (3) Was deed No. 582 executed in the circumstances pleaded in paragraph 5 of the plaint? (4) Is the execution of the said deed a fraudulent preference? (5) If either of these issues is answered in the affirmative, is the deed liable to be set aside? (6) Can a creditor maintain an action to have this deed set aside (*a*) on the ground that it is in fraud of creditors as alleged in paragraph 5, (*b*) that it is a fraudulent preference as alleged in paragraph 6?

The judgment under appeal will be set aside and the case remitted to the Court below for the purposes already indicated. The respondent is, I think, entitled to the benefit of the order for costs made by the learned District Judge, that is to say, all costs incurred up to date. The costs of this appeal will abide the event.

AKBAR J.—I agree.

Set aside.