Present: Lyall Grant J. and Maartensz A.J.

SEENA SOONA VANA & CO. *v.* ASSIGNEE OF INSOLVENT CASE OF SEGU MOHAMADU.

126—D. C. (Inty.) Colombo, 30,964.

Insolvency—Seizure of money in Court—Adjudication of judgment-debtor as insolvent—Attachment of money—Payment to judgment-creditor—Ordinance No. 7 of 1853, ss. 56 and 111.

Where money, lying in Court to the credit of a person, is seized in execution of a decree against him in another action, such seizure will not be effective against an assignee in insolvency of the judgment-debtor until the money is drawn by the attaching creditor.

APPEAL from an order of the District Judge of Colombo. The facts appear from the judgment.

Thiagalingam (with *Rajapakse*), for appellant.

Weerasooria, for respondent.

October 18, 1929. MAARTENSZ A.J.—

The plaintiff in this action sued the defendant for the recovery of a sum of Rs. 1,039.41 and obtained judgment on February 18, 1929.

On a writ issued the same day the Fiscal forwarded a written notice under section 229 of the Civil Procedure Code to the District Judge of Colombo to withhold from paying the judgment-debtor a sum sufficient to satisfy the amount of the writ out of the money lying to the credit of case No. 30,395 of the District Court of Colombo.

The judgment-debtor was adjudicated an insolvent on the same date.

The plaintiff, having obtained a return to his writ on the day it issued, moved the Court in this case to transfer a sum of Rs. 1,123.11 from case No. 30,395 to the credit of this case. This motion should properly have been made in case No. 30,395. But in view of the conclusion I have come to it is immaterial in which case the motion was made, nor is it material whether the seizure was effected before or after the judgment-debtor was adjudicated insolvent.

The motion was opposed by the assignee, and the plaintiff appeals from the order of the District Judge disallowing his application.

The contention in appeal shortly stated was that neither section 56 nor section 111 of the Insolvency Ordinance applied to the seizure as the money could not be sold in execution and that the money, therefore, became immediately on seizure the property of the plaintiff.

I am unable to accept this contention. Section 70 of the Insolvency Ordinance, 1853, enacts that: " When any person shall have been adjudged an insolvent, all his personal estate and effects,

present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate, and all debts due or to be due to him wheresoever the same may be found or known, and the property, right, and interest in such debts, shall become absolutely vested in the assignee for the time being, for the benefit of the creditors of the insolvent, by virtue of their appointment."

Section 56 enacts that: " . . . . and all executions and attachments against the lands of any insolvent *bona fide* executed by seizure, and all executions and attachments against the goods and effects of any insolvent *bona fide* executed and levied by seizure and sale before the date of the filing of such petition, shall be deemed to be valid notwithstanding any prior act of insolvency by such insolvent committed, provided the person so dealing with or paying to or being paid by such insolvent, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such payment, conveyance, contract, dealing, or transaction, or at the time of such execution or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of insolvency by him committed."

Section 111 enacts that: " No creditor having security for his debt, or having made any attachment of the goods and effects of the insolvent, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution served and levied by seizure and sale upon or any mortgage of or lien upon any part of the property of such insolvent before the date of the filing of a petition for sequestration of his estate." It is clear from these provisions that a mere seizure of goods and effects does not deprive an assignee of the rights created by section 70. The seizure must be followed up by a further step, that step is a sale.

In the absence of any enactment that the seizure of a debt due to the insolvent entitles the execution-creditor to the amount seized I would hold that section 70 of the Ordinance applies to the debt and that it therefore vests in the assignee for the benefit of the creditors.

Appellant's Counsel's argument that as the money seized could not be sold the attachment was completed by seizure of the debt was the very argument pressed upon the Court and adopted by Bacon C.J. in case of *Ex parte Pillers in re Curtoys*.[1] The facts are as follows: On August 14 Curtoys committed an act of bankruptcy. On August 30 Targart recovered judgment against Curtoys for £167. 11*s*. 8*d*. and on September 1 obtained a garnishee order *nisi* against King attaching all debts due to Curtoys in King's hand. It was served on King on September 2 and made absolute on September 15.

[1] *(1881) 17 Ch. Div. 653.*

Pillers filed a bankruptcy petition against Curtoys on September 3 and he was adjudicated a bankrupt on September 25. Pillers was appointed trustee and moved for a declaration that the garnishee order was void and of no effect against him.

The Act in force was the Bankruptcy Act of 1869.

Sections 94 and 95 of the Act correspond to and are very similar to section 111 of our Ordinance. The relevant sub-section is sub-section (3) of section 95—it provides that notwithstanding any prior act of bankruptcy " Any execution or attachment against the goode of any bankrupt executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being executed by seizure and sale, notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication."

Bacon C.J. said: " In the very words, then, of the 3rd sub-section of the 95th section, I find in this case that there was an attachment against the goods of the man who has become bankrupt. I have not heard it doubted or questioned that it was an execution in good faith by seizure. The property is incapable in its nature of being dealt with by sale. There may be executions and attachments which cannot be effected by sale; this is one of them, and it took place before the date of the order of adjudication. The statute, therefore, seems to me completely to cover the case," and dismissed the application.

In appeal the application was allowed. Lush L.J. said in the course of his judgment " The words ' goods ' may well include debts, and I think we ought to take it as including debts. If it does not include debts, they are not within sub-section (3) at all. But, if the words do apply to debts, then I think the fallacy of the respondent's argument consists in treating the debt attached as having been the debt of the bankrupt at the time when the garnishee order was served. By virtue of the adjudication of the 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 trustees. 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 show what was the meaning of the Legislature clearly enough to enable us to apply the principle, and if for want of appropriate 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 haeret in litera haeret in cortice.*' I am of opinion that 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."

Statutory force was given to this decision in subsequent Bankruptcy Acts. It is part of sub-section (2) of section 40 of the Bankruptcy Act, 1914,[1] which provides that an attachment of a debt is completed by receipt of the debt.

In view of the history of the clause I cannot accede to the argument that because there is no corresponding clause in our Ordinance we must hold that the attachment of a debt is completed by seizure.

The case of *Carolis Appuhamy et al. v. Ramanathan Chetty* [2] is not an authority applicable to this case. In that case the property seized was a decree held by insolvent judgment-debtor, and in my opinion the decision turned on the provisions of secton 254 of the Civil Procedure Code, which provides that " When the property seized is a decree of Court the judgment-creditor at whose instance the seizure is made shall be deemed the assignee thereof under assignment as of the date of the seizure, made by the person against whom he is executing the writ of execution, so far as that person's interest extends, and he may realize the decree in the manner hereinafter provided for the execution of a decree by an assignee thereof."

The effect of this section is to substitute the seizing judgment-creditor for the holder of the decree on seizure of the decree and the attachment is therefore completed by seizure.

I respectfully agree with the reasoning of Lush L.J., and for the same reasons hold that the seizure of the debt did not give the

[1] *4 & 5 Geo, V. c. 59*

[2] *5 C. L. R. 206.*

plaintiff the protection accorded by section 111 to an execution and attachment of the goods and effects of an insolvent *bona fide* executed and levied by seizure and sale.

I accordingly dismiss the appeal with costs.

Lyall Grant J.—

I have had the advantage of reading the judgment of my brother Maartensz, with which I agree.

Appeal dismissed.