Madras High Court
Salimamma And Anr. vs Valli Husanabba Beari on 3 May, 1911
Equivalent citations: (1911) 21 MLJ 764
JUDGMENT

1. This is an appeal from the order of the District Court of South Canara in the proceedings in the insolvency of one Valli Hussanabba. The insolvent claimed to set off the amount of a decree debt in A.S. No. 169 of 1901 of this Court due to him from a creditor against a debt due by him to the creditor. The District Judge disallowed the set-off on the ground that the decree in A.S. No. 169 of 190r was really obtained by the insolvent as trustee for a wakf, while the debt due to the creditor was owed by him personally. On appeal from his order under Section 353 of the Civil Procedure Code preferred by the insolvent, this Court set it aside in the following terms : - "It is objected for the respondent that Section 247 of the Civil Procedure Code has no application because the parties do not occupy the same character. There is nothing in the decree to shew this. We, therefore, reverse the order of the District Judge and remand the matter for disposal according to law." On remand the Judge was again of opinion that the decree debt in A.S. No. 169 of 1901 was due to the insolvent, not as his own property, but in his character as trustee, and considering himself not precluded from deciding the question afresh by this court's order of remand, disallowed the set off. The present appeal is from the second order of the Judge. Mr. Narayana Rao has raised a preliminary objection to the maintainability of the appeal on the ground that under Section 46 of the Provincial Insolvency Act no appeal lies against an order refusing a set-off except with the leave of the District Court or of the High Court, which has admittedly not been obtained in this case. Mr. Shenai for the appellant contends that as the insolvency proceedings commenced before the present Act came into force the right of appeal must be regulated by Section 353 of the repealed Civil Procedure Code which was in force and the commencement of the proceedings and that this Court decided on the former occasion that an appeal lay1 against the Judge's order under Section 353 of the Civil Procedure Code. We are of opinion that the appellants' contention must be upheld. The point is really concluded by the decision of the Privy Council in The Colonial Sugar Refining Co. Limited v. Irving (1905) A.C. p. 369 where a similar question arose in an appeal from the Supreme Court of Queensland. The Judicial Committee held that a right of appeal is not a mere matter of procedure and must be governed by the law in force at the time when the proceedings in the original court commenced, observing that "to deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure." That decision was followed by this Court in C.M.S. A. 21 of 1910, Kalinga Hebbara v. Narasimha Hebbara (1911) 21 M.L.J. 631, when the question arose as to the maintainability of second appeal against an appellate order passed under the section corresponding to Section 310-A of the repealed Procedure Cods, the application under Section 310-A having been presented while the latter code was in force. The same principle was applied by the Bombay High Court in Nana v. Shahu (1908) I.L.R. 32 B. 337 to the converse case of a right of revision not existing under a repealed statute being given by a new one. It Ls also embodied in Section 6, Clause (c), of the General Clauses Act X of 1897 which enacts that "where this Act or any Act of the Governor-General in Council or regulation made after the commencement of this Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the appeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed." We must, therefore, overrule the preliminary

objection. On the merits we are of opinion that the order of the District Judge cannot be sustained. It is clear to us that this Court in its former order decided that the objection to the applicability of Section 247 of the Civil Procedure Code was not valid. The reason given was that the decree in A.S. No. 169 of 1901 did not show that the insolvent did not hold the same character with respect to the debt due to and by him. Mr. Narayana Rao urges that the judgment in A.S. No. 169 of 1901 does show it and that the judgment was unfortunately not before this Court when the order was passed. That may be the fact, but the order was not set aside by review or otherwise and is binding on the parties. We must, therefore, hold that the insolvent is entitled to the set-off claimed, and set aside the order of the lower court and remand the case for fresh orders being passed according to law. The costs of this appeal will abide the result.