

(1928) 08 MAD CK 0013
In the Madras High Court

A.V. Balakrishna Menon, late Official Receiver	APPELLANT
Vs	
Kakkat Manakkal Uma alias Pattanadi Andarjanam and Others	RESPONDENT

Date of Decision : 31-08-1928

Acts Referred:

Bankruptcy Act, 1869 — Section 20

Citation : AIR 1929 Mad 105 : (1929) ILR (Mad) 263 : 114 Ind. Cas. 825 : (1928) 28 LW 719 : (1928) 55 MLJ 873

Hon'ble Judges : Wallace, J;Thiruvengkatachariar, J

Bench : Full Bench

Judgement

Wallace, J.—On the 7th December, 1920, a Bench of this Court in A.S. No. 353 of 1919 between the Official Receiver of South Malabar

(Mr. A.V. Balakrishna Menon), the appellant and various respondents, decreed ""that the appellant do pay to respondents 1 to 6 Rs. 452-13-6 for

their costs in opposing this appeal.""The short point for decision in this C.M.A. is whether or not the wording of that decree has to be taken to

imply that the costs can be recovered from Mr. Balakrishna Menon personally. The Lower Court has held that "t does so imply and Mr. Menon

appeals. He contends that such phrasing in the decree against the Official Receiver ex-officio implies that unless the Court directs otherwise he shall

not be personally liable. The respondents contend that where the Court has not said that the costs will come only out of the insolvent's estate in the

hands of the Official Receiver, the Official Receiver is personally liable for the costs.

2. Admittedly, Mr. Balakrishna Menon was no longer holding the office of Official Receiver when the present execution petition in which execution

has issued against him personally was put in. The suit itself was filed in 1917 against the predecessor in office of Mr. Menon. It was by members of

a tarwad to declare that certain property included in the schedule of their insolvent karnavan was not his property but the property of the tarwad.

While the suit was pending, Mr. Menon in 1918 came into charge of the Office of the Official Receiver and continued the defence in the suit. The

suit was eventually decreed with costs against the Official Receiver. He, i.e., Mr. Menon, preferred an appeal to the High Court which was

dismissed also, the decree giving the direction noted above as to costs. Mr. Menon ceased to be Official Receiver in January, 1925. There are no

funds in the insolvent's estate to meet this decree for costs and the decree-holder seeks to execute it against Mr. Menon himself.

3. Now there can be no doubt that the Official Receiver or a trustee in bankruptcy may, like any ordinary litigant, be ordered to pay costs in any

action taken or defended by him. See *John Tweedle & Co., Ltd., In re* (1970) 2 K.B. 697, *Arthur Williams & Co., In re. The Official Receiver,*

ex parte (1913) 2 K.B. 88 and *James Bevis v. C.A. Turner* ILR (1883) B. 484. The question here is what did the Court intend when it baldly said

that he shall pay costs. As the Court has not specifically stated its intention we have to be guided by the general principles of law. The law in

England is thus stated in Halsbury, Bankruptcy and Insolvency, para. 176 under the sub-heading "Official Receiver":

The Official Receiver is not personally liable for costs, when being trustee, he is sued as representing the debtor's estate, or when made a party to

any cause or matter on the application of another party, unless the Court otherwise directs.

4. And again under the sub-heading "Trustees," para. 218:

He, (i.e., a trustee appointed to fill the office of trustee of the property of a bankrupt and not the Official Receiver) is in general personally liable for

all costs incurred in the course of litigation instituted by him or "against him, save where an action is brought against him as representing the estate,

or he is made a party to any cause on the application of any other party thereto, and the Court does not direct that he shall be liable.

5. And again in paragraph 230:

Where a trustee brings or defends an action as a litigant, he is as between

himself and the other parties to the action like any other litigant; that is to say, he must pay any debt, damages, or costs which the other litigants recover against him out of his own pocket, and get reimbursement if entitled to it, out of the bankrupt's property.

6. The first two propositions are founded upon Rule 108(3) of the rules framed under the Bankruptcy Act of 1883, and the last proposition is

quoted from *Ex parte Angerstain* : *In re Angerstein* (1874) 9 Ch. App. 479. Rule 108(3) of the Bankruptcy Rules is now Rule 96(3) under the

present Bankruptcy Act of 1914 which lays down that where an action is brought against an Official Receiver or a trustee in bankruptcy as

representing the estate of a debtor, or where the Official Receiver or trustee is made a party to a cause or matter, on the application of any other

party thereto, he shall not be personally liable for costs unless the Court otherwise directs. Now it has to be borne in mind that the word "Court" in

these Bankruptcy Rules is, by virtue of Rule 3, the Court as defined by the Bankruptcy Act, unless the context or subject-matter otherwise

requires, i.e., a Court having jurisdiction in bankruptcy under the Act; in other words, as we would say in this country, the Insolvency Court. See

observations of Peterson, J., in *Hill v. Cooke Hill* (1916) W.N. 61. There is nothing so far as I can see in the context or subject-matter of Rule 96

or the old Rule 108 to render that definition of "Court" inapplicable to the word "Court" in the rule. It is highly improbable that under a Rule

framed under a special Act the Legislature intended to exempt particular officials or persons from the operation of the ordinary Civil Law. So that

the rule only carries us as far as this, namely, that in actions against an Official Receiver, etc., he shall not be personally liable, unless the Insolvency

Court otherwise directs, i.e., in the insolvency relation, if the phrase may be used, between the Official Receiver and the insolvent's estate, the

Insolvency Court will not direct that the costs come out of the pocket of the Official Receiver and not out of the estate except by a special order. It

is to matters in insolvency that these rules have been applied. See the case reported in *In re W.H. Wilkinson, Ex parte The Official Receiver*

(1884) 1 Morr. Bank. Cas. 65, *In re Glanville, Ex parte The Trustees* (1885) 2 Morr. Bank. Cas. 71, *In re Bryant, Ex parte Gordon* (1889) 6

Morr. Bank. Cas. 262, and *In re Agriculturist Cattle Insurance Co., Ex parte*

Official Manager (1874) 10 Ch. App. 586. But as to any order which the Ordinary Civil Court may pass in the matter of costs in an ordinary action against the Official Receiver, these rules seem to have no application. It follows that in a case like the present in which we are concerned with a decree in an ordinary action, a party mulcted in costs is personally liable for those costs, and the Official Receiver is therefore under the decree in question personally liable for the costs. It is open to him to apply to the Insolvency Court for an order that he may reimburse himself out of the estate. It may even be open to him to reimburse himself out of the estate without an order of the Court, and, as between himself and the estate, he shall not be liable for costs unless the Insolvency Court by a specific order so directs.

7. This view is the effect of the rulings in *Ex parte Angerstein : In re Angerstein* : and *Pitt v. La Fontaine* (1880) L.R. 6 App. Cas. 482. The former was a case in bankruptcy, the latter an ordinary civil action. It is true, as the appellant points out, that both these were cases not of the Official Trustee but of a trustee appointed by the creditors, but that really makes no difference in principle. The bankruptcy rules quoted above place both on the same footing. In fact in *Ex parte Angerstein : In re Angerstein* (1874) 9 Ch. App. 479, Sir G. Mellish, L.J., said : I see no difference between the case of an Official Liquidator and a trustee in bankruptcy." Similarly, in *Pitt v. La Fontaine* (1880) L.R. 6 App. Cas. 482 a plea which rested on Section 20 of the Bankruptcy Act of 1869 was rejected on the ground that that section does not mean that the trustee under that Act cannot be made personally liable for costs in an ordinary action. Mackenzie *In re Hertfordshire (Sheriff of), ex parte* (1899) 2 Q.B. 566 is to the same effect. On the other hand, the case relied on by the appellant, namely, *In re Galey, Ex parte Cundy* (1890) 7 Morr. Bank. Cas. 253 is a case in the Insolvency Court, which makes all the difference. There it was held that an order of the Insolvency Court that the Official Receiver must also pay the costs of this appeal did not mean that he was to pay them personally thus fulfilling the intention of Rule 96 or old Rule 108 that the Official Receiver shall not be liable unless the Court so directs. The appellant also relies on the ruling in *Abdul Rahiman & Co. v. Shaw Wallace & Co.* (1924) 21 L.W. 516. There the learned Judge was only interpreting

his own decree, which is a simple matter compared with the task of this Bench to interpret the decree of another Bench. It was obviously within the discretion of the learned Judge to pass any order he chose as to who should pay costs in the action which went before him and he chose that the Official Assignee should not in that case be personally mulcted, in costs. In *Borneman v. Wilson* (1884) 28 Ch. D. 53, a case of a trustee in Bankruptcy electing to continue an action, Bowen, L.J., laid down on the matter of costs that "he cannot adopt part of the action and leave out the rest" and Fry, L.J., said the same.

8. The English practice therefore is that when the case is in bankruptcy, a simple order for costs will not imply that the Official Receiver must pay them personally, because of Rule 96. But in the case of an ordinary action, a simple order for costs against the Official Receiver has the visual meaning of such an order against any litigant, and the party against whom it is made is personally liable in the first instance, though he may later on apply to the Bankruptcy Court and repay himself out of the estate or by enforcing any indemnity bond he may have against the creditors.

9. In this Presidency, we have not even a rule corresponding to Rule 96. The practice in this High Court and in the Calcutta High Court, even on the Insolvency Side, appears to me to hold the Official Assignee in the first instance personally liable for costs. In *re Suresh Chunder Gooyee and Ors.* 23 C.W.N. 431 and *In re. Abdul Rahiman Sahib & Co.* ILR (1926) M. 308 : 55 M.L.J. 12 I can therefore see no ground for holding that the learned Judges who passed this order intended to depart from the usual practice that an unsuccessful litigant in an ordinary civil action shall be personally liable for costs.

Thiruvengkatachariar, J.

10. I am of the same opinion and I wish to add a few words with reference to some of the contentions which were pressed on us by the appellant's Advocate.

11. I may at the outset observe that a Court which executes a decree has to execute it according to its terms, and if for that purpose it is called upon to construe the decree, it has to do so according to the plain meaning of the words of the decree. When the words to be construed are clear enough, the executing Court cannot attribute some other meaning to it unless it

has to do so in virtue of any enactment or rule having the force of law applicable to the particular case before it. In the present case, the decree sought to be executed is a decree for costs passed by a Bench of this Court against the appellant in an appeal preferred by him against a decree of the District Court of South Malabar. The decree in which the appellant is described as the Official Receiver, South Malabar (Mr. A.V. Balakrishna Menon) directs that the appellant ""do pay to respondents Nos. 1 to 6 Rs. 452-13-6 for their costs in opposing this appeal."" According to its plain meaning the decree is executable against the appellant in any manner in which a decree for money may be executed against any ordinary litigant who is directed to pay costs. But the appellant's Advocate contends that as the appellant filed the appeal in his capacity as Official Receiver it could not have been the intention of the Court to make him personally liable for costs and that the decree should be construed as limited to execution out of the assets of the estate which he represented in that litigation. The learned Advocate has not referred us to any enactment or rule by force of which a decree against an Official Receiver should be so construed, corresponding to the rules framed under the English Bankruptcy rules, but he contends that when an official sues or is sued in an official capacity it must be presumed that the decree does not affect him personally and that otherwise it will be imposing such a heavy responsibility upon Official Receivers that few persons would be willing to accept that office.

12. He further contends that when the Official Receiver files the suit or appeal or defends the same with the leave of the Court obtained u/s 53 of the Provincial Insolvency Act, he must be deemed to have acted bona fide and cannot be held personally liable for any decree which may be passed against him. The remedy of the opposite party in those cases is only against the estate unless the decree itself makes his personal liability clear.

13. No authorities were cited in support of these contentions. On the other hand, the only Indian authorities directly bearing on the question to which we have been referred go against these contentions. See *James Bevis v. C.A. Turner* ILR (1883) B. 484, which purports to follow the view taken by the Privy Council in *Pitt v. La Fontaine* (1880) L.R. 6 App. Cas. 482 and

by the Court of Appel in Ex parte Angerstein : In re Angerstein

(1874) 9 Ch. App. 479, as regards the liability of the Official Trustee in Bankruptcy who corresponds to the Official Receiver appointed under the Provincial Insolvency Act.

14. The case In re Suresh Chunder Gooyee and Ors. (1918) 23 C.W.N. 431 is also directly in point on this very question. There also, as in the

present, the respondent had obtained an order for costs against the Official Assignee of the Calcutta High Court which did not contain any

limitation as to the fund out of which it was payable. The Official Assignee contended that he initiated the proceedings only after obtaining the leave

of the Court and that he also prosecuted it with due diligence and that therefore he could not be held personally liable for costs. In overruling that

contention the learned Judge (Mr. justice Rankin) says as follows:

There can be no possible question in this case as to the Official Assignee being in any sense in default. Assuming that the Official Assignee is not in

any possible way in default, here is a motion which has been "brought by the Official Assignee for the benefit of the creditors and which has been

unsuccessful. The respondent has got certain costs against which he ought to be indemnified : what is the Court to do. The suggestion is that, what

the Court ought to do is to make an order that the assets of the estate, so far as they go, and they only, shall bear the respondent's costs, in my

opinion that will be entirely wrong. The correct proceeding is to make an order that the Official Assignee do pay the respondent's costs. Having

protected himself by obtaining leave from the Court, he has got his right of indemnity, for what it is worth, against the assets of the estate, but if in a

case of this sort assets of the estate are insufficient to give a proper indemnity to the Official Assignee, then the Official Assignee before starting

these proceedings, must approach the creditors or somebody and get a guarantee or an indemnity from the people or whose behalf the motion is to

be brought; but it is quite impossible that a person against whom an unsuccessful motion has been brought by the Official Assignee should be left in

the ordinary course in a position that he has to look to an insufficient fund and take his chance of that being sufficient.

15. I respectfully agree with the observations of the learned Judge. The contrary view will result in serious injustice in most cases to parties whose

rights are unlawfully infringed by the Official Receiver. So far as they are concerned, they are equally damnified whether the person who invaded their rights and dispossessed them of their property as in the present case was an individual acting in his own interest or an Official Receiver acting in the interest of the creditors of the insolvent's estate. It would be contrary to justice and equity if their right to be reimbursed their costs unconditionally should depend not upon whether then-claim was just and well founded but upon whether a wrong-doer is a person who acts on his own behalf, or an official who ex-officio acts on behalf of, or in the interests of, some other individuals whose interests he has to guard, it may be for his own advantage also. The circumstance that the Official Receiver obtained the leave of the Court will only entitle him to claim reimbursement out of the estate or from the creditors in whose interest he was acting in the litigation in which he was unsuccessful. As pointed out by Mr. Justice Rankin, if the estate in his hand is not sufficiently solvent to pay the costs of the opposite party should he prove unsuccessful, he should take the ordinary precaution of getting sufficient security from the creditors before conducting the litigation on their behalf, and if he omits to do so and suffers loss, he has to thank himself for it.

16. As the decree against the Official Receiver in this case stands, he is clearly personally liable. u/s 35 of the CPC "the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid." If the intention of the Court in this case was that the costs of the respondents is to be paid only out of the assets of the insolvent's estate, the decree should have expressly said so. It would be wrong to imply such a limitation as the appellant wants us to do in the absence of any enactment or rule having the force of law which prescribes that such an implication should be made as a rule.

17. As regards the case *Abdul Rahiman & Co. v. Shaw Wallace & Co.* (1924) 21 I.W. 516, the decree against the Official Assignee for costs expressly provided that the same was payable "from and out of the estate of the 1st plaintiff, adjudicated insolvent, in his hands"; the application before the learned Judge was not to execute the decree as it stood but an application by the successful party that the decree as drawn up was not

in conformity with the judgment as to costs which contained no such limitation so as to make it executable against the Official Assignee personally.

The application came on before the same learned Judge who delivered the judgment and he held that he did not intend in his judgment to make the

Official Assignee personally liable and that therefore the decree as drawn up was correct. If the case is to be regarded merely as involving an

interpretation by the learned Judge of his own judgment, there is little more to be said because no general principle is involved in such a question;

but if the observations made by the learned Judge are to be relied upon as the appellant contends as supporting the contention that if the Official

Assignee or Official Receiver acts bona fide in prosecuting or defending an ordinary litigation against a third party, he should not be made

personally liable for costs, its correctness is open to question as it is in conflict not only with the decision of Mr. Justice Rankin on the same point in

In re Suresh Chunder Gooyee and Ors. 23 C.W.N. 431 but also with the decision of their Lordships of the Privy Council in the analogous case of

an order for costs against a trustee in bankruptcy in Pitt v. La Fontaine (1880) L.R. 6 App. Cas. 482.

18. It needs scarcely be added that if the appellant was personally liable for costs decreed against him when he was Official Receiver, he is not

divested of that liability by ceasing to be Official Receiver as contended for the appellant.

19. I concur in the order proposed by my learned brother.

20. We therefore decline to interfere and dismiss this appeal with costs.