
(1971) 12 MAD CK 0008
In the Madras High Court
Case No : Second Appeal No. 697 of 1969

B. Srinivasan

APPELLANT

Vs

AL. V.R. ST. Veerappa Chettiar and Others

RESPONDENT

Date of Decision : 23-12-1971

Acts Referred:

Provincial Insolvency Act, 1920 — Section 78

Citation : AIR 1973 Mad 165 : (1972) 85 LW 503

Hon'ble Judges : V. Ramaswami, J

Bench : Single Bench

Judgement

1. The facts necessary for the disposal of this second appeal are these: The first defendant Ramaswami Iyer, executed four promissory notes in

favor of the plaintiff for a total sum of Rs. 5,500/-. He also created an equitable mortgage over certain properties by deposit of title deeds in

respect of the amount due under the promissory notes. On 10-2-1951 he filed a petition (I. P. 7 of 1951) to get himself adjudicated an insolvent.

He was adjudicated an insolvent on 8-8-1951. In the insolvency proceedings the plaintiff-first respondent herein was the fifth respondent. The debt

payable to the plaintiff under the equitable mortgage and the promissory notes was proved in the insolvency on the admission of the first defendant.

The adjudication has not been annulled so far.

2. The present suit was filed by the first respondent-plaintiff for the recovery of the amount due under the promissory notes and for enforcement of

the equitable mortgage executed by the first defendant. The second defendant is the grandson of the first defendant through a deceased son. The

third defendant is the mother of the second defendant. Pending the suit the first defendant died. The plaintiff filed I. A. No. 695 of 1964 for

amendment of the plaint in which the plaintiff had given up the right under the equitable mortgage and prayed only for a simple money decree

against the defendants. The two main contentions raised in the suit by defendants 2 and 3 were that the suit was barred by limitation and that in any case the suit was bad for want of leave of the Insolvency court.

3. The trial court held that the suit was in time. So far as the plea of non-maintainability of the suit for want of leave of the Insolvency Court, is

concerned, it held that the suit was not maintainable against the first defendant but it was maintainable against defendants 2 and 3. On appeal by

defendants 2 and 3 the lower appellate court confirmed the decree of the trial court. Hence the present second appeal by the second defendant.

4. The learned counsel for the appellant raised three contentions-the first was that the suit was barred by limitation on the ground that the last of the

endorsement of acknowledgment of the debt was on 13-9-1950, whereas the suit was filed in 1965. But the case of the plaintiff is that in view of

the insolvency proceedings filed by the first defendant on 10-2-1951, the suit is not barred by limitation, in particular he relied on Section 78 of the

Provincial Insolvency Act. This contention of the plaintiff is well-founded. In *Achiah v. Papiiah*, 1944 2 MLJ 158 in an identical case, Somayya, J.,

held that the provision in Section 78 that ""the period between the date of adjudication and the date of annulment should be excluded"" means that

during that interval the cause of action was not barred. The provision is not that in the happening of a later event a new ratio is created. But the

provision is one for providing for the exclusion of the period between the two events. As already stated, on the date when the suit was filed and, in

fact, it appears that even today, the adjudication has not been annulled. As such, the suit is neither premature nor barred by limitation.

5. The next contention of the learned counsel for the appellant was that the suit as against the second defendant was not maintainable without the

leave of the insolvency court. This contention is also covered by a decision of this court in *Pommalai Goundan and Another Vs. Settia Goundan*, ,

in which it was held that no sanction is necessary for maintaining a suit against a son of an insolvent in cases where the debt is binding on the son. It

is not in dispute that in the present case the debt incurred by the first defendant was binding on the second defendant. Therefore, there is no

substance in this contention of the appellant.

6. The last contention was that since the suit was dismissed as against the first defendant no decree could be passed against the second defendant.

As already noticed, the debt due under the promissory notes was proved in the insolvency proceedings and therefore it was a subsisting debt on

the day when the suit was filed and even subsequently thereafter. The liability of the first defendant is not wiped out by the dismissal of the suit

against him on the ground that leave of the insolvency court has not been obtained for filing a suit against him. Since the liability of the second

defendant would depend on the subsistence of the debt, the suit as against the second defendant could be decreed.

7. No other point has been raised in this second appeal. Consequently, the second appeal fails and it is dismissed with costs. No leave.

8. Appeal dismissed.