(1973) 03 MAD CK 0025

In the Madras High Court

Case No : A.A.O. No. 344 of 1971

B.K. Muthukrishna Sakthivel Vanavarayar — APPELLANT

Vs

Somasundaram Mills (P.) Ltd. and Another — RESPONDENT

Date of Decision : 30-03-1973

Acts Referred:

Companies Act, 1956 — Section 391, 391(2), 392, 392(1)

Citation : AIR 1973 Mad 463 : (1976) 46 CompCas 274 : (1973) 86 LW 466 : (1973) 2 MLJ 169

Hon'ble Judges : Maharajan, J

Bench : Single Bench

Judgement

1. This is an appeal against the order of the learned Subordinate Judge Devakottai, holding that the decree-holder is not entitled to execute the

decree obtained by him against the second judgment-debtor. The appellant B. K. Muthukrishna Sakthivel Vanavarayar instituted a suit in O. S.

178 of 1969 on the file of the Sub-Court, Coimbatore, for the recovery of a sum of Rs. 18,650 being the principal and interest due on a fixed

deposit receipt dated 20-11-1967 under which the first defendant Messrs. Somasundaram Mills (P.) Ltd., Coimbatore, received a deposit of Rs.

15,000 belonging to the plaintiff returnable within a period of one year ending with 17-6-1968. The plaint averred that on 20-11-1967. P. S. S.

Somasundaram Chettiar the second defendant, who was the Managing Director of the first defendant company, gave a letter to the plaintiff

guaranteeing payment of the amount covered by the fixed deposit receipt in the event of the first defendant failing to repay the amount due after

maturity of the fixed deposit receipt, and that despite repeated demands both the defendants defaulted to pay, whereupon the suit was filed by the plaintiff on 31-1-1969. Defendants 1 and 2 were represented by counsel and when the matter came up before Court on 3-6-1969 Thiru K. N. V.

Ramani advocate for defendants 1 and 2 made an endorsement on the plaint submitting to a decree and the learned Principal Subordinate Judge,

Coimbatore passed a decree in the following terms-

1. That the defendants do jointly and severally pay to the plaintiff the sum of Rs. 18,650 with subsequent interest on Rs. 15,000 at 6 per cent per

annum from the date of suit till date of payment of decree amount and do also pay to the plaintiff the sum of Rs. 1,717-75 being the cost of this suit

as taxed.

2. That the defendants be and hereby are granted six months time for payment of the decree amount.

The time for payment fixed in the decree expired on 3-1-1970. Sometime in January 1970. Somasundaram Mills (P.) Ltd., filed Company Petn.

No. 31 of 1970 on the Original Side of this Court praying that the compromise arrangement set out in that petition be sanctioned by the Court so

as to be binding on all the unsecured creditors of the company (except statutory creditors). By order dated 15-9-1970 Palaniswamy, J. sanctioned

the scheme of compromise entered into between the creditors of Somasundaram Mills (P.) Ltd., and the other persons interested in the company.

The effect of the compromise was to enable the company to pay its creditors including depositors in stated installments. Under the scheme of

compromise the company was liable to pay the first installment within 3 months from the date on which the High Court sanctioned the scheme, that

is to say, by 15-12-1970. The decree-holder in O. S. 178 of 1969 has not so far received a pisa towards his decree either from Somasundaram

Mills (P.) Ltd., the first defendant or Somasundaram Chettiar, the second defendant. Consequently the decree-holder got the decree transferred

from Coimbatore Sub-Court to Devokottai Sub-Court and filed E. P. 95 of 1970 for attachment and sale of the properties of the second

defendant in execution of the decree obtained by him. This execution petition was filed on 2-12-1970 but was returned by the office for

rectification the decree-holder represented the execution petition on 7-12-1970. On the same day, the first and the second judgment-debtors were

vigilant enough to file E. A. 546 of 1970 whereby they asked the Court to dismiss or terminate the above execution proceeding on the ground that

the scheme framed by the High Court in Company Petn. No. 31 of 1970 was binding on the decree-holder as well and that the decree-holder

could claim payment only in accordance with the provisions of the scheme for installment payments. It was further contended that the terms of the

decree, which the appellant had obtained, stood modified in conformity with the terms of the payment prescribed under the scheme and that the

decree must therefore be read in conjunction with the scheme order and as modified by the scheme order. It was also contended by the judgment-

debtors that the decree-holder had absolutely no right to execute the decree for the entire amount decreed and that the execution petition was,

therefore, liable to be dismissed. This contention found favor with the learned Subordinate Judge who relying upon Section 391(2) of the

Companies Act. 1956 held that even though the decree had been passed jointly and severally against the second judgment-debtor, he was only a

guarantor, and that the decree-holder was not entitled to execute the decree against him in view of the scheme sanctioned by the High Court,

Madras, in Company Petn. No. 31 of 1970. Section 391 of the Companies Act runs as follows-

1. ""Where a compromise or arrangement is proposed-

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them; the Court may, on the application of the company or of any creditor or member of

the company, or in the case of a company which is being wound up of the liquidator, order a meeting of the creditors, or class of creditors or of the

members or class of members, as the case may be to be called held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members or class of members as the case

may be present and voting either in person or, where proxies are allowed by proxy, at the meeting agree to any compromise or arrangement, the

compromise or arrangement shall, if sanctioned by the Court be binding on all the creditors all the creditors of the class, all the members or all the

members of the class, as the case may be and also on the company, or in the case of a company which is being wound up on the liquidator and contributories of the company.

2. In the present case the meeting of the creditors of the company was held at which a majority in number representing three-fourths in value of the

creditors agreed to the scheme of compromise and the Court sanctioned the scheme. The scheme was no doubt framed by the company as well as

by the creditors of the company. The question arises whether the benefits extended to a debtor company u/s 391 of the Companies Act can be

invoked by a co-debtor of the company for the second judgment debtor in this case is only in the situation of a guarantor of the company against

whom a joint and several decree has been granted by a competent Court. There is nothing in the decree which suspends execution against the

second judgment debtor till after the first judgment debtor had paid the whole or part of the decree amount. All that the decree says is that both the

judgment-debtors shall be granted 6 months time for payment. The moment the prescribed time terminated both of them would become liable to

pay the decretal amount, and if they defaulted, execution proceedings could be taken against them in accordance with law. So far as the first

judgment-debtor is concerned, it being a company and it having invoked the jurisdiction of this Court under the Companies Act and entered into a

compromise arrangement with its creditors, which was sanctioned by this Court it can by virtue of Section 391 of the Companies Act interdict

execution by the ordinary Civil Court, because Section 392(1) says that where a High Court makes an order u/s 391 sanctioning a compromise or

arrangement in respect of a company it (a) shall have power to supervise the carrying out of the compromise or arrangement and (b) may, at the

time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or

arrangement as it may consider necessary for the proper working of the compromise or arrangement as u/s 391 of the Companies Act what was

sanctioned by the High Court would be binding on all the creditors including the decree-holder in this case. The decree-holder could not after the

sanction of the Court of the scheme of compromise pursue execution proceedings against the first defendant company in the ordinary Court of law.

But so far as the second judgment debtor is concerned he is certainly not a company entitled to invoke the benefit of Section 391 or Section 392 of the Companies Act. He is independently liable to pay the decretal amount because the decree granted against him is a joint and several decree.

3. It was observed by the Supreme Court in Punjab National Bank Ltd. Vs. Shri Vikram Cotton Mills and Another, , as follows-

We deem it necessary to observe that a binding obligation created under a composition u/s 391 of the Companies Act 1956, between the

company and its creditors does not affect the liability of the surety unless the contract of suretyship otherwise provides. As observed in Halsbury''s

Laws of England, Vol. 6, 3rd Edn. Article 1555 at page 771-"" A Scheme need not expressly reserved the rights of any creditors against sureties

for debts of the company as such rights are unaffected by a scheme.

It was held in Re Garner''s Motors Ltd., 1937 Ch 549 that the scheme when sanctioned by the Court has a statutory operation and the scheme

does not release other persons not parties to the scheme from their obligations.

4. As the second judgment debtor had entered into a contract of guarantee with the plaintiff, and a decree has been obtained by the plaintiff against

him and the company jointly and severally, there is no legal embargo against the decree-holder executing the decree against the second judgment

debtor. The scheme which was sanctioned by the company Court, does not release the second judgment debtor, who is a co-debtor of the

company from his obligation under the decree to pay the decretal amount.

5. Consequently, I reverse the order of the Subordinate Judge and hold that the decree is executable, against the second judgment debtor, who

figured as the second petitioner in E. A. No. 546 of 1970. I direct the Court below to restore E. P. 95 of 1970 to its file and proceed with

execution against the second judgment debtor. I may note that though the judgment debtors have been served, they have not appeared either in

person or by counsel. In the circumstances, the appellant will get half the costs of this appeal.

6. Order accordingly.

