
(1935) 04 BOM CK 0014

In the Bombay High Court

Case No : O.C.J. Appeal No. 49 of 1934 and Suit No. 1392 of 1933

Byramji Bomanji Talati

APPELLANT

Vs

The Official Assignee of Bombay

RESPONDENT

Date of Decision : 02-04-1935

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 73
Presidency Towns Insolvency Act, 1909 — Section 53(2)

Citation : AIR 1936 Bom 130 : (1939) 41 BOMLR 506

Hon'ble Judges : John Beaumont, J;Blackwell, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Beaumont, Kt., C.J.—This is an appeal against a decision of Mr. Justice Rangnekar making an order in favour of the plaintiff. The plaintiff is the Official Assignee of Bombay suing as assignee of the estate and effects of one Cooper, and the defendant is a man named Talati. The question which arises is whether Talati can retain certain moneys he received in execution of a decree against Cooper, as against the Official Assignee. The facts are set out at length in the judgment under appeal, and I need not repeat them in full. Talati obtained against Cooper a decree for Rs. 91,000 on February 18, 1929. It was a consent decree, and a suit to set it aside subsequently failed, so that the decree stands, and it is in connection with the execution of that decree that the question in this suit arises. The property on which, execution is said to have been levied is of this nature. Cooper had an Immovable property at Champagalli, and he entered into a contract to sell half of it to a man named Narandas. A suit for specific performance of that contract was brought by Cooper against Narandas in the year 1923, and this Court made a decree in favour of Cooper. That decree was reversed on appeal, but the judgment of the Court of first instance was restored by the Privy; Council. So that Cooper then had his Champagalli property, but as to half of it he had agreed to sell it to Narandas, who had to pay the purchase money, and the Privy Council had in substance directed the respondents before

them to pay the costs, but the actual order as to costs was to remit the case to this Court in its appellate jurisdiction in order to apportion the costs in accordance with the Privy Council order. Shortly after the date of the Privy Council decree, i.e. on March 31, 1930, Talati applied to execute his money decree of 1929 against Cooper. He asked to execute that decree by attachment of the Champagalli property and by attachment of the moneys payable by Narandas to Cooper under the decree passed by this Court in the suit of 1923 which had been confirmed by the Privy Council. So that the application really only dealt with what was payable to the defendant under the decree of this Court which had been confirmed by the Privy Council, and it cannot, I think, strictly be said to cover all the costs referred to in the Privy Council's order, which would include the costs of the appeal to the High Court in its appellate jurisdiction, and to the Privy Council. On that application an order was made by the Prothonotary which is addressed to Cooper, and says :

Take notice that the decree for money in suit No. 1495 of 1923 (that is the specific performance suit) has been ordered to be attached, and you are hereby directed to pay the Sheriff of Bombay the sum of Rs. 1,90,000 and Rs. 22,456 in order that the same may be applied in satisfaction of the decree in this suit for that amount including costs of execution.

Now those two sums were the purchase money and interest and other moneys payable on completion under the contract for the sale of half of the Champagalli property, and there is not in that order any attachment of the costs payable under the decree of the Privy Council. The attachment merely relates to moneys payable under the contract, and no other order for attachment has been produced. That notice and order combined recites that the decree for money in suit No. 1495 of 1923 has been ordered to be attached, but no order of that nature is produced. On June 17, 1930, an order was made appointing, at the suit of Talati, the Court Receiver in execution with power to take possession of the Champagalli property, and, as I read the order, to carry out the decree of the Privy Council. Under that order the receiver did in fact receive the costs payable to Cooper under the Privy Council decree, and in the year 1932, between April 3 and September 14 the receiver paid the sum in question in this appeal, Rs. 32,000, which was part of the costs so decreed in respect of the Privy Council decree, to Talati. The question on this appeal is whether Talati can retain that sum and it depends on the dates relating to Cooper's insolvency, which I will now state. On October 14, 1931, that is, long before the payments in question, Talati presented a petition to have Cooper adjudicated insolvent, the act of insolvency being failure to remove the attachment on the Champagalli property for twenty-one days. On November 17, 1931, that petition was dismissed by the insolvency Judge, and Talati, on December 15, presented an appeal against that order, and on September 15, 1932, that is, after the payments in question were made, the Court of Appeal allowed the appeal, and restored the petition to the file, but stayed the petition till Cooper's suit against Talati to have the consent decree set aside had been disposed of. It appears that the insolvency Judge in

the first instance thought that an order for adjudication would have the effect of stifling Cooper's suit to have the consent decree of 1929 set aside, and the Court of Appeal took the view that, inasmuch as that suit might fail, the petition ought to be kept on the file, so that an order could be made upon it if the consent decree were finally upheld, which, as I have said, eventually happened. After Cooper's suit had been dismissed, and an appeal had also been dismissed, the petition for insolvency was restored, and on March 27, 1933, Cooper was adjudicated insolvent, and this suit was commenced on September 8, 1933. So that, on the facts, putting it shortly, the question is whether moneys paid by the Court Receiver to the execution creditor between the date when the petition for insolvency was dismissed and the date on which the petition was restored to the file by the Court of Appeal can be retained by the execution creditor. That depends, I think, on Section 53(1) of the Presidency-towns Insolvency Act, which provides :

Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the official assignee, except in respect of assets realized in the course of the execution by sale or otherwise before the date of the order of adjudication and before he had notice of the presentation of any insolvency petition by or against the debtor.

Now it is clear that these moneys were realised before the date of the order of adjudication, but it is also clear that they were not realised before notice of the presentation of an insolvency petition. Talati himself presented the petition, and therefore there can be no question about his having notice of it. It is argued by Mr. Khergamvalla that Section 53(1) cannot apply to an insolvency petition which at the moment of the payment is not on the file. In point of fact the language of the section is wide enough to cover any presentation of an insolvency petition. I have no doubt that the section should be so construed as not to apply to notice of presentation of an insolvency petition which has been disposed of, and on which no adjudication can possibly follow ; but I am clearly of opinion that the language ought not to be restricted so as to exclude notice of the presentation of an insolvency petition on which adjudication may follow. Here the petition had been presented? true it had been at the critical date dismissed?but the order dismissing it was under appeal, as Talati well knew, seeing that it was his own appeal, and as soon as that appeal resulted in the petition being restored, it is plain, to my mind, that the case falls within Section 53(1), and that Talati had notice of the presentation of an insolvency petition to which that section relates, So that the payment is clearly bad under sub-s. (1) as against the Official Assignee, and the only other suggested answer to the plaintiff's case is under Sub-section (2) of Section 53, which provides :

Nothing in this section shall affect the right of a secured creditor in respect of property against which a decree is executed.

It is argued that Talati was a secured creditor, by virtue of the attachment. Now, in the first place I am satisfied that he was not a secured creditor; because these

moneys were paid to him out of moneys received by the receiver in respect of costs payable under the Privy Council decree, and no order has been shown to us under which those costs ever were attached. So that the short answer is that the question of being a secured creditor in respect of those properties does not really arise. But even if there had been an order for attachment of those costs, I think that that would not have constituted the creditor a secured creditor in respect of those costs, because the general rule is clearly established that mere attachment of property does not constitute a charge, and does not constitute the attaching creditor a secured creditor. Mr. Khergamwalla relies strongly on the decision of the Privy Council, *Anantapadmanabhaswami v. Official Receiver of Secunderabad* : 35 Bom. L.R. 747 as showing that the cases which establish that proposition are no longer to be relied upon. The actual decision in the Privy Council case has no bearing on the question as to what cons 37 CWN 553 (Privy Council) titutes a secured creditor. What the Privy Council was dealing with there was the relative priorities of a foreign order of adjudication and an attachment in the country in which the attaching Court was situated, that is to say, an attachment in Madras and a judgment of. insolvency in Secunderabad. That is an entirely different question to the question whether attachment of property constitutes the attaching creditor a secured creditor u/s 53(2). In my opinion, the judgment appealed from was right, and the appeal must be dismissed with costs.

Blackwell, J.

2. As regards the first point, Mr. Khergamvalla asks us to treat Sub-section (1) of Section 53 of the Presidency towns Insolvency Act as containing words which are not present in the section. He asks us to hold that the meaning of the section is that there must be an existing insolvency petition on the file of this Court. The section contains no such words. In my view the true meaning of the section is that if a person has notice of the presentation of a petition which may ultimately result in an adjudication order, then he shall not be entitled to the benefit of any execution against the Official Assignee if in fact that insolvency petition does result in an adjudication order.

3. As regards the second point, viz., whether Talati was a secured creditor, in my opinion there is nothing before us to show that the costs which are the subject-matter of this suit were ever effectively attached by him at all. We have been referred to the application for execution which was made under Order XXI, Rule 11, but no order in regard to the attachment which was asked for of the moneys payable under the decree in suit No. 1495 of 1923 has been produced. There is nothing before us to show that the costs payable under that decree were ever attached at all by Talati. That point alone is, in my opinion, sufficient to dispose of the second point. Even if such an order had been forthcoming, it would not, in my opinion, have assisted the appellant. Attachment by itself, in my view, has not the effect of giving to the attaching creditor a charge upon the property which is attached. It merely is in the nature of an order preventing the person

whose property is attached from dealing with his property. That this is the nature of the order is, in my opinion, plain from Section 73 of the Code of Civil Procedure. As a result of that section any creditors of the debtor who attach the debtor's property up to the time at which the property is actually sold under any attachment are entitled to rateable distribution in the property attached. It is plain from that, that the first creditor who attaches is given no charge upon the debtor's property, neither are any subsequent creditors given a charge. The effect of the order for attachment is simply to stay the hands of the debtor in regard to this property. I agree that the appeal must be dismissed.