

(1992) 06 MAD CK 0019
In the Madras High Court
Case No : O.S.A. No. 132 of 1992

Canora Bank

APPELLANT

Vs

M/s. Rehoboth Traders, Madras-33 2. R. Franklin 3. I.W.
Roberts 4. Mr. S. Arokianathan 5. Official Assignee High Court
Madras.

RESPONDENT

Date of Decision : 30-06-1992

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 2(e), 2(i), 52, 52(2), 52(2)(c)

Citation : (1992) 06 MAD CK 0019

Hon'ble Judges : Padmini Jesudurai, J;Mishra, J

Bench : Division Bench

Advocate : L. Jayakumar and S.Venugopal, for the Appellant;

Final Decision : Dismissed

Judgement

Mishra, J.—Heard. The first respondent herein has been adjudicated as an insolvent on application by the petitioner/appellant. It seems, however, that when the Official Assignee proceeded to take possession of the properties of the insolvent in accordance with the provisions under the Presidency Towns Insolvency Act 1909, (hereinafter referred to as the Act) one S. Arokianathan, Managing Partner of Jas Washing Machines Marketing Company moved an application, alleging inter alia, that he had been carrying on business as a sole distributor in Madras City for the sale of Washoe Washing Machines. During the course of business he sold 10 numbers of Washoe Washing Machines for the value of Rs. 61,760/- to the first respondent on 10.12.1990. It is stated further that the cheque issued by the first respondent towards payment of the price of the 10 numbers of Washoe Washing Machines was dishonored. The first respondent issued another cheque on 5.2.1991 for a sum of Rs. 30,880/- towards the cost of five numbers of Washoe Washing Machines only. This cheque, however, was honored and encased. These transactions were completed before the first respondent was adjudicated as an insolvent. He has stated further that

five numbers of Washoe Washing Machines thus in possession of the insolvent, besides five which were sold on payment by cheque dated 5.2.1991 for a sum of Rs. 30,880/-, belonged to Jas Washing Machines Marketing Company, and accordingly, a prayer was made for an order to deliver five numbers of Washing Machines to the said Company. After hearing the Managing Partner of Jas Washing Machines Marketing Company namely, S. Arokianathan and the Official Assignee, learned Company single Judge of this Court on 8.7.1991 ordered as follows:-

I have heard the applicant and the Official Assignee. It is stated by the Official Assignee that the insolvent has told him that he has purchased 10 washing machines from the applicant herein and that he has paid money by way of cheque only for the five machines, and the balance payment has to be made for the five machines. Now the I.P. is pending. The present application has been filed by the applicant herein with a request made in the petition. Under these circumstances, there cannot be any dispute over the ownership of the five washing machines. Accordingly, the Official Assignee is directed to deliver 5 numbers of washing machines to the applicant by taking proper acknowledgment from him and after verifying the records. It is stated by the Official Assignee that on 25.6.1991 have directed the Official Assignee to sell the stock-in-trade, furniture and goods found and take possession from the insolvent's premises at Madras including go-down at four branches at Coimbatore, Tiruvannamalai, Tiruchy and Walajapet. The order dated 25.6.1991 is modified only to the above effect and in other respects the order will stand.

After the above order, however, the creditor/appellant filed a petition seeking to review the above order and for stay of delivery of five numbers of Washing Machines to Jas Washing Machines Marketing Company on the plea inter alia that once the first respondent has been adjudicated as an insolvent, it is mandatory on the part of the creditors to make their respective claims before the fifth respondent, the Official Assignee and that the application for the release of five numbers of Washing Machines filed on behalf of M/s Jas Washing Machines Marketing Company should be rejected because the said application was filed without imp leading the petitioner/appellant-Bank (Secured Creditor) and the fourth respondent's application was based on the ground that he was an unpaid seller, that it was not sure whether the washing machines that are tying with the Official Assignee are ones supplied by the fourth respondent (Jas Washing Machines Marketing Company) and stating further that from the very face of the allegations of the fourth respondent herein, in Application No. 307 of 1991 there was a sale before the adjudication proceedings. Learned judge has however, ordered as follows:-

I have made it very clear in my order dated 8.7.1991 that my order, dated 25.6.1991 was modified only to the extent mentioned in the order, dated 8.7.1991, and in the other respects the order will stand.

These two applications are filed by the Canara Bank, Anna Nagar Branch,

Madras, to set aside the order dated 8.7.1991 made in Application No. 307 of 1991 and for the stay of operation of the said order.

I have heard Mr. L. Jayakumar who appears for the applicant/Bank. The claim of the Bank that they are secured creditors is yet to be established. I dismiss these two applications on the question of locus standi.

Before taking delivery of Washing Machines, the party in person S. Arokianathan will produce the sale papers and other records before the Official Assignee to show that the goods have been sold by him to the insolvent.

Had we not ourselves noticed the undisputed facts in this case and caught by the infirmity in the impugned order, we would have accepted the contention on behalf of the appellant that the learned single judge is not correct in dismissing the two applications (one for setting aside the order dated 8.7.1991 and the other for stay of operation of the said order on the ground that the claim of the Bank that they are secured creditors which is yet to be established). Since however, in the instant case in the application to recall the order (sic) the fourth respondent herein had brought to me notice of the Court that there had been a transaction involving 10 numbers of washing machines; but the price of five of them had been paid to him by the insolvent. It is the duty of the Official Assignee to take possession of the properties of the insolvent and to proceed under S. 61 of the Act. The property of the insolvent would pass from Official Assignee to Assignee and would vest in the Official Assignee for the time being during his continuance in office, without any transfer whatever "Property", however, has been defined under S. 2(e) of the Act to include any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit and "transfer of property" has been defined in S. 2(i) of the Act to include a transfer of any interest therein and any charge created thereon. S. 52 of the Act provides for description of insolvent's property divisible amongst creditors which runs as follows:-

(1) the property of the insolvent divisible amongst his creditors, and in this Act referred to as the property of the insolvent, shall not comprise the following particulars, namely

(a) Property held by the insolvent on trust for any other person;

(b) the tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessel, and furniture of himself, his wife and children, to a value inclusive of tools and apparel and other necessities as aforesaid, not exceeding three hundred rupees in the whole.

(2) Subject as aforesaid, the property of the insolvent shall comprise the following particulars, namely:-

(a) all such property as may belong to or be vested in. the insolvent at the commencement of the insolvency or may be acquired by or devolved on him before his discharge;

(b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge; and

(c) all goods being at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof:

Provided that things in action other than debts due or growing due to the insolvent in the course of his trade or business shall not be deemed goods within the meaning of clause (c):

Provided also that the true owner of any goods which have become divisible among the creditors of the insolvent under the provisions of clause (c) may prove for the value of such goods.

2. Learned counsel for the appellant has fairly conceded that in the instant case he may not be able to show that the property in question shall come under clauses (a) or (b) of sub-S. (2) of S. 52 of the Act. He has however, submitted that it is a case clearly coming under clause (c) of S. 52(2) of the Act for the reason inter alia that five washing machines ordered to be delivered to the fourth respondent herein were at the commencement of the insolvency in the possession of the insolvent and his possession of the machines should be presumed to be a possession of goods in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof. He has argued in main that this aspect of the case has not been gone into at all by the learned single judge, and there are materials to show that the price of which machines had not been paid by the insolvent were properties of which the insolvent was a reputed owner. We have given our anxious consideration to this aspect of the matter and in course of examination thus seen some other provisions including Ss. 62 to 67 of the Act.

3. It is one of the well-settled rules of law that a person, who finds that his interest has been affected or jeopardized on account of some order passed in his absence, has got every right to move an application for the review of such an order that has created prejudice. On proof the petitioner/appellant who is a secured creditor shall become entitled to apportion the assets of the insolvent but even before such adjudication if it has got a claim and that claim has already been adjudicated in the court, it can be said to be a person interested in the proceedings. Had this been not the position the court would not have entertained its application to order for sale of some of the properties of the insolvent at its instance. Learned single judge in our opinion, thus, has fallen in error in holding that the petitioner/appellant has got no locus standee to maintain the petition. Assuming however, that the appellant had the locus stand-in to maintain the petition and proceeding to examine, as to what merit its petition possessed when

we look to the contention on its behalf, we find that except possession there is nothing to show that the insolvent was the reputed owner of the five machines that are involved in the present proceeding. It is not difficult to see from the facts aforementioned (sic) that ownership was to transfer with respect to five washing machines only on payment by the first respondent/insolvent of a sum of Rs. 30,880/- on 5.2.1991 by cheque, since the earlier cheque issued for the value of Rs. 61,760/- on 10.12.1990 stood dishonored, the price of five Washoe Washing Machines thus, was not paid in time. The ownership in the five machines thus continued with the seller namely, M/s. Jas Washing Machines Marketing Company. There is also nothing to indicate anywhere that there was any consent and permission of the true owner, i.e., Jas Washing Machines Marketing Company to the Insolvent under which even though the true ownership prevailed with Jas Washing Machines Marketing Company, the insolvent became the reputed owner. In fact, there has not been any order of dispossession of the true owner so as to make the five machines in possession of the insolvent a property of which it was a reputed owner.

4. Learned counsel for the appellant has drawn our attention to a decision of a Division Bench of this Court in *Official Assignee of Madras v. Suresh Elec.Co.* 1977: M.LJ. 36 in which it has been stated as follows:-

As far as Messrs Suresh Electric Company which is the contesting respondent is concerned, it appears that both the machines were pledged with this respondent. The learned Judge, in the course of his order, says that the pledge of the two machineries was admitted. Apart from that admission, two agreements were in evidence, namely, Exhibits R-3 and R-5 both dated 5th December, 1970 which showed that the two machineries were pledged with the respondent for Rs. 27,500/- The Official Assignee would say that in spite of these pledges, since the insolvent continued to be in possession with the consent of the pledge, under the doctrine of reputed ownership on the basis of 52(2)(c), he was entitled to delivery of possession of both the machines. The learned Judge declined to accept his contention and dismissed his application. We are in agreement with the learned Judge. In order to invoke the principle of reputed ownership under S. 52 (2) (c) not only the property must be goods that should be in possession of the insolvent, but they should have been used in his trade and what is even more important is that it should have been so used in the circumstance that the insolvent was the reputed owner of the goods.

In this case, beyond possession of the second machinery with the insolvent, nothing further appears from the record. Mere possession of the machinery with the insolvent will not, in the circumstances of the case, in our opinion, defeat the right of the pledge. We may take it that the insolvent was in possession of the machinery with the consent of the pledge. But there is nothing to show that the machinery was, at the time of adjudication used by the insolvent in his trade. As a matter of fact, the record shows that he had by the time of his adjudication long stopped running his trade or business. Apart from that there was no act or

circumstance touching possession of the machinery with the insolvent that would suggest that the insolvent was reputed to be the owner of the machinery. They were not dealt with in a manner that would be inconsistent with the pledge with the respondent.

The view that we have taken is in complete agreement with the view taken in the case of Official Assignee of Madras Suresh Elec. Co. (*supra*). Though it has been a serious and ingenious attempt on the part of the appellant and attractive argument on the subject by the counsel appearing for the appellant, since on facts we are of the opinion that it is not a case to attract the provisions under S. 52(2)(c) of the Act and further that there is no equity in favor of the appellant at all to deny to the real owner of the property, the right to deal with it, we are not inclined to admit this appeal. The O.S. Appeal is accordingly dismissed in limine.