

(1936) 12 MAD CK 0037
In the Madras High Court

Haji Abdul Kuthus Sahib and Others

APPELLANT

Vs

Inayathulla Sahib and Others

RESPONDENT

Date of Decision : 14-12-1936

Acts Referred:

Citation : AIR 1937 Mad 727

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—This civil miscellaneous second appeal arises out of an order of the learned District Judge of North Arcot confirming an order of the learned District Munsif of Vellore allowing execution of a decree in O.S. No. 86 of 1923 on the file of the said District Munsif's Court. It was a money decree obtained by one Habibulla Sahib against defendants 1 to 4 in the suit on 22nd November 1923. Subsequent to the institution of the suit and before obtaining a decree, an application for attachment before judgment of a house belonging to defendant 1 was made and an attachment thereof obtained on 21st February 1923. The wife of defendant 1, one Maimoona Bi, preferred a claim to the said property on the ground that it was sold to her on 12th February 1923.

2. The plaintiff decree-holder resisted the claim on the ground that it was a fraudulent transaction. The claim was disallowed on 24th July 1923. The said Maimoona Bi filed O.S. No. 670 of 1924 on 25th July 1924 to set aside the order on the claim petition, but the said suit was dismissed for default on 6th July 1925 and the claim order had thus become final. An execution petition was filed on 12th July 1926, to execute the said decree by arrest of defendant 1, but it appears to have been dismissed for non-payment of batta. Subsequent to this, in 1927, an application seems to have been made by defendant 1 to adjudicate him an insolvent, and he was accordingly adjudicated. There was an order of discharge passed in the said insolvency proceeding on 6th February 1928. It transpires that the house which was under attachment was not reduced to possession by the Official Receiver, nor does he appear to have taken any

proceedings in respect thereof. The decree-holder died, and the present application is made by his legal representatives to have the said property attached and sold in realization of the decree debt. There seems to have been a subsequent litigation to which the decree-holder in the said O.S. No. 86 of 1923 was not a party, in and by which it was established that the house belonged to the wife, the said Maimoona Bi, and not to defendant 1 (Judgment in S.A. No. 8 of 1931 dated 14th October 1932, Ex. 3). The said Maimoona Bi died later. Subsequent to her death, defendant 1 as her heir settled his share in favour of one Kalik Sahib on 27th December 1932. After the present execution application was filed, defendants 2 and 3 appear to have conveyed the shares they inherited also in favour of their brother, Kalik Sahib, by two deeds dated 25th August and 24th October 1933, and Kalik Sahib having died, the whole property is now vested in defendant 1. He resists the execution application on two grounds, namely (1)" that it is barred by limitation, and (2) that by reason of the order of discharge this property is not liable to be proceeded against in execution of a decree against him. In regard to the first point, both the Courts have concurrently found against him and this finding is not challenged before me.

3. The remaining question is whether this property is not liable to be proceeded against by virtue of the order of discharge. The learned District Munsif did not deal with this contention on the ground that the order of discharge was not filed before him. The learned District Judge refused to admit the said order in appeal and" therefore did. not deal with the contention. Mr. K. Section Krishnaswamy Iyengar made an application for the admission of the said order in this appeal. This application was opposed by the respondents. Their learned counsel however submitted that if I should permit the order to go in, he should be allowed to raise the question that the order of discharge would not preclude him from attaching and selling the said property by reason of the execution proceedings already had and the order on the claim petition and the dismissal of the suit O.S. No. 670 of 1924 and he should be allowed to file documents relating thereto. In the interests of justice I allowed the documents on either side to be filed. It is contended that u/s 44(2), Provincial Insolvency Act, the decree has become incapable of execution. Section 44(2), Provincial Insolvency Act, provides: "An order of discharge shall release the insolvent from all debts provable under the Act." The effect of such a release as stated by Blackburn, J. in *Thompson v. Cohen* (1872) 7 QB 527 is that the insolvent is discharged from the debt altogether, and the debt is in fact gone, and he further says: "If the debt is gone, the creditor"s right to seize in respect of it should be gone also." The object of the enactment is

to enable a debtor who had given up all his property for the benefit of his creditors, to obtain his discharge, so that he might begin the world again freed from all his obligations and protected from oppression by his creditors: Per Kelly, C.B. in *Jakeman v. Cook* (1879) 4 Ex D 26.

4. But is the debt gone for all purposes? It is stated by Williams on Bankruptcy

Practice, at p. 136:

Though an order of discharge released the bankrupt from certain debts provable in the bankruptcy, its effect is not to destroy the debt as though it had never been.

5. He relies on the decision in *In re Ainsworth; Millington v. Ainsworth* (1922) 1 Ch 22 in support of that position. In that case, the testator, with the intention of producing equality between legatees, directed that a debt due from his son be deducted from the moiety of his residuary estate bequeathed to trustees upon trust for the benefit of the son and his children, and subsequently in the liquidation of his son's affairs, by arrangement, received a dividend on the debt, and thereafter a certificate of discharge was given to the son thereby releasing him from all his indebtedness to the testator. A question arose whether the son was entitled to the legacy without deduction of the debt. Lawrence, J. held the son was not entitled to have the deduction of the debt. This decision seems to indicate that the debt is not destroyed altogether. It may also be noted that it is open to a debtor for a new consideration to enter into a contract to pay the old debt. By the order of discharge therefore, as Mellish, L.J. says, "he is free from all debts... and his future assets belong to him," *Ebbs v. Boulnois* (1875) 10 Ch 479, but the property which he owned at the time of adjudication and vested in the Official Receiver would not revert to him as on an annulment. The question is, did the decree-holder in this case by virtue of the execution proceedings and the order made on the claim petition therein obtain any right to proceed against the property irrespective of this order of discharge? Before the insolvency, he had obtained a valid right to realize his debt from the said property. But the insolvency having supervened, he was prevented from doing so. The effect of the insolvency is, by virtue of Section 51, Provincial Insolvency Act, he cannot have the benefit of the execution against the receiver. But the execution does not become void. It deprives the executing creditor from having the benefit of the execution for his sole benefit. His title does not prevail against the Official Receiver. If the execution is proceeded with the leave of the insolvency Court and the property is sold, the sale proceeds will have to be delivered over to the receiver for distribution among all the creditors of the insolvent. As stated in *In re Ford; Ex parte Official Receiver* (1900) 1 QB 264:

If there has been only a partial execution, a levy and no subsequent completion, the intention of the Act apparently is that the other creditors may step in and insist on having the whole of the debtor's estate rateably divided.

6. If the Official Receiver does not intervene, the question arises whether the creditor can proceed with the execution. If the house had vested in the Official Receiver, the creditor cannot proceed with the execution without notice to him and without the leave of the insolvency Court as the property ceased to be that of the judgment-debtor. As by the order of discharge the property is not vested in the debtor, in my opinion the creditor will have to move the insolvency Court for the necessary directions for sale of the property. But in this case the house on

the date of adjudication was, by virtue of the conveyance in favour of Maimoona Bi, vested in her and the Official Receiver has not reduced the same into his possession. And as between her and the judgment-debtor, the property had been held to be her property. By reason of the order on the claim petition and the dismissal of the suit, the decree-holder in the said Order Section No. 86 of 1923 had however obtained a valid adjudication as against Maimoona Bi, that the said property was liable to be attached for his debt. So far therefore as the decree-holder is concerned, it would not be open to Maimoona Bi to resist the execution. She must be deemed to have taken the property subject to the liability of being proceeded against for the debt.

7. The plaintiff decree-holder is not seeking to attach and sell any property of the judgment-debtor which is in his handsqua his property. If a creditor could otherwise realize his debt, there is nothing in the insolvency law which precludes him from doing so as the debt is not extinguished. Defendant 1 must be deemed to have taken the property after the death of his wife subject to the result of the adjudication already had against her. A decision of Cornish, J. in *Doraiswamy Pillai v. Arumuga Naicker* AIR 1936 Mad 100 has been cited before me. In that case there was an attachment of the property in execution of a decree but subsequent to the execution an alienation was made by a judgment-debtor in favour of a third party. Then there was an adjudication of the judgment-debtor in insolvency and a subsequent order of discharge. The learned Judge observed that though the order of discharge might release the insolvent from the debt, yet it did not prevent an execution creditor from proceeding to sell the property in the hands of the alienee who must be deemed to have taken the property subject to all claims enforceable under the attachment. This decision seems to proceed upon the principle already adverted to by me that the debt is not destroyed altogether by the release. It therefore seems to me that the house is liable to be attached for the decree debt. In the result, the second appeal fails and is dismissed with costs. Leave granted.