(1940) 11 MAD CK 0044

In the Madras High Court

Haji Abdul Kuthus Sahib (deceased) and Others — APPELLANT

Vs

Inayathulla Sahib and Others — RESPONDENT

Date of Decision : 08-11-1940

Acts Referred:

Provincial Insolvency Act, 1920 — Section 44, 44(3)

Citation : AIR 1941 Mad 620 : (1941) 53 LW 494 : (1941) 1 MLJ 565

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—This appeal raises the question of the effect of Section 44 of "the Provincial Insolvency Act. The first appellant was adjudicated an insolvent by the District Munsif of Trivellore on the 26th March, 1927 on a petition which had been presented on the 2nd October, 1926. The appellant apparently had no assets and as so often happens his creditors took no interest in the proceedings after the adjudication order had been obtained. The result was that when he applied for his discharge his application was not opposed and it was granted on the 8th February, 1928. The first appellant was indebted to the estate of one Habibulla Sahib, who is now represented by the respondents in this appeal. Habibulla Sahib had obtained a decree against the first appellant and on the 21st February, 1923, he attached a house as property belonging to the first appellant. As a matter of fact this property was the property of the appellant''s wife, Maimoona Bi Bi. It had belonged to the first appellant, but on the 12th February, 1923 he transferred it to his wife and it was held by this Court in other proceedings that the transfer was lawful. On the 24th July, 1927 Maimoona Bi Bi applied for the removal of the attachment on the ground that the property was hers, but her application was dismissed by the District Munsif of Vellore, who relegated her to a regular suit. She filed a suit, but on the date of the hearing she did not appear and it was dismissed with costs. Therefore, so far as the respondents'' execution proceedings were concerned the house was liable to be seized and sold for the first appellant''s debt and it undoubtedly remained liable until the 8th February, 1928 when the first appellant obtained his discharge. The question which the Court is called upon to consider in this appeal is whether the house remained liable to be seized and sold after that date. The District Munsif held that tile respondents were entitled to have the house sold and his decision was concurred in by the District Judge of North Arcot on appeal. The appellant then appealed to this Court and Venkataramana Rao, J., who heard it, decided that the Courts below had correctly interpreted the law, but he gave a certificate permitting the filing of the present appeal under Clause 15 of the Letters Patent.

2. Section 44 of the Provincial Insolvency Act reads as follows:

(1) An order of discharge shall not release the insolvent from--

(a) any debt due to the Crown;

(b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party;

(c) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party;

(d) any liability under an order for maintenance made u/s 488 of the Code of Criminal Procedure, 1898.

(2) Save as otherwise provided by Sub-section (1), an order of discharge shall release the insolvent from all debts provable under this Act.

(3) An order of discharge shall not release any person who, at the date of the presentation of the petition, was a partner or co-trustee with the insolvent, or was jointly bound or had made any joint contract with him or any person who was surety for him.

3. Therefore unless a debt is of the nature of any of those set out in Sub-section (1) an order of discharge absolves the insolvent from liability to pay all his debts which were provable under the Act, but an order of discharge does not by virtue of Sub-section (3) release third parties who are also liable. The section displays no ambiguity and by reason of it the debt which the first appellant owed to the respondents became unenforceable by them.

4. On the 8th February, 4928 the Court ordered the appellant''s discharge and as was pointed out in Thompson v. Cohen (1872) 7 Q.B, 527 if the debt is gone the creditor''s right to seize in respect of it is also gone. In upholding (he decision of the District Judge, Venkataramana Rao, J., considered that because Maimoona Bi Bi had allowed her suit to be dismissed for default, her property was liable to be sold in execution for the first appellant''s debt, notwithstanding the order of discharge. The learned Judge relied on the decision of Cornish, J., in Doraisami Pillai Vs. Arumuga Naicker, . In that case the appellant had attached before judgment property belonging to the respondent. The respondent nevertheless sold the property to a third person. Subsequently, the respondent was adjudicated an insolvent and the appellant proved his debt. As in the present case there were no assets, and in due course the respondent obtained his

discharge. The appellant then sought to execute his decree against the property which he had attached. It was held that the effect of the sale to the third party, contrary to the provisions of Section 64 of the Code of Civil Procedure, was not to make the transfer absolutely void, and the property could be regarded as an asset of the debtor notwithstanding the transfer. The alienee had taken the property subject to the right of the appellant to sell it in execution. It is not necessary for us to consider whether that case was rightly decided, because the facts are not similar to the facts in the present case. It is not a matter of a transfer of property after attachment. The transfer to Maimoona Bi Bi took place before the decree and long before the insolvency. It was obviously because the property had been transferred to Maimoona Bi Bi that the Official Receiver in this case made no attempt to take possession.

5. The position then is this. The appellant, by reason of the statute had been released from all liability to pay the respondents'' debt, but the respondents wish to enforce payment by the sale of the house belonging to Maimoona Bi Bi. In our opinion they are not entitled to do so, because Maimoona Bi Bi herself was under no personal liability to pay the debt and she did not come within any of the categories mentioned in Sub-section (3) of Section 44 of the Provincial Insolvency Act. It is true that by her conduct she could not have prevented the property from being sold had a sale been held before the discharge, but inasmuch as the debt became unenforceable by reason of the discharge it follows that the right to proceed against Maimoona Bi Bi''s house disappeared at the same time. If the debt were an existing and enforceable debt then the respondents could proceed with the attachment and bring the property to sale, but inasmuch as the debt has gone the respondents are not in a position to take proceedings in execution. Section 44 prevents them.

6. The result is that the appeal will be allowed with costs in this Court and before Venkataramana Rao, J., but each party will pay their own costs in the Court of the District Munsif and in the District Court.