(1945) 07 MAD CK 0014

In the Madras High Court

Jaina Muhammad Sheriff Maracair alias Jackiria Muhammad Sheriff Maracair (deceased) and Others	APPELLANT
Vs	
The Official Assignee of Madras and Others	RESPONDENT

Date of Decision : 23-07-1945

Acts Referred:
Presidency Towns Insolvency Act, 1909 — Section 17

Citation : (1946) ILR (Mad) 486 : (1945) 58 LW 462 : (1945) 2 MLJ 318

Hon'ble Judges : Somayya, J

Bench : Division Bench

Judgement

Somayya, J.—These three appeals arise out of O.S. No. 1 of 1941 on the file of the District Court of East Tanjore. The suit was filed by the

appellant in A.S. No. 257 of 1943 for various reliefs regarding the properties in suit. The first defendant is the Official Assignee of Madras who is

acting as an auxiliary of the Official Assignee of Singapore in the insolvency of the second defendant K. Muhammad Hussain. Muhammad Hussain

was adjudged a bankrupt by the Singapore Court by an order passed in January, 1931. At the instance of the Official Assignee of Singapore m

whom the estate of the second defendant vested, the Official Assignee of Madras has been acting in aid of and as the auxiliary of the Singapore

Official Assignee. This is by an order of the High Court of Madras passed in its insolvency jurisdiction.

2. One Zacharia Hussain of Velanganni in the Tanjore district started a business in Singapore in boats, lighters, etc., in 1884, and built up a

lucrative business. He took his wife''s brother the second defendant, Muhammad Hussain to assist him in the business. Zacharia left Muhammad

Hussain in charge of the business and returned to India in 1909 having appointed him as his agent. It would appear that from 1909 to 1911 another

person was associated as joint agent with the second defendant and afterwards the second defendant was acting as the sole agent of Zacharia

Hussain. Zacharia lived ever afterwards in British India and did not go to Singapore. He died in British India on the 20th December, 1917.

Thereafter the second defendant was left in sole charge without any effective control. The plaintiff Sheriff Maracair is the eldest son of Zacharia.

The third defendant is his Singapore wife. Fourth and fifth defendants are the sons of Zacharia and brothers of the plaintiff and the sixth defendant

is Zacharia''s daughter by his Indian wife. The seventh defendant is the wife of the second defendant and she is impleaded as being in possession of

certain properties claimed in suit. We are not in this appeal concerned with the eighth defendant. The ninth defendant is the Muslim Association of

Nagore. It is in possession of the fourth item in Schedule B. The tenth defendant is the purchaser of the properties in C schedule. He died during

the pendency of the suit and defendants 12 to 15 have been added as legal representatives. We are not concerned with the eleventh defendant in

this appeal.

3. Plaintiff and the third defendant were appointed joint administrators of the estate of Zacharia Hussain by the Supreme Court of Singapore under

Letters of Administration evidenced by Ex. P-1-a dated 6th August, 1926. The two executors filed C.S. No. 96 of 1926 in the Singapore Court

for a declaration that the second defendant Muhammad Hussain was a trustee for the estate of Zacharia and was bound to render accounts as

such. The suit was decreed by the Singapore Court and Ex. P-2 is the judgment. The decretal portion of the judgment directed the second

defendant to render an account of his management on the footing that he was an agent and trustee bound to account. An appeal was filed against

that judgment and during the pendency of the appeal the parties came to a settlement evidenced by Ex. P-3 dated the 20th June, 1929, by which

an account of the business in boats and lighters carried on in the name of the second defendant from the 1st January, 1925, should be taken and

settled by the person named in it and that the net assets should be divided in equal shares between the estate of the deceased Zacharia and

Muhammad Hussain the defendant. Certain properties mentioned in paragraph 7 of P-3 were also to be divided between the two parties and

Clause 9 which is important says this:

Neither party to have any claim against the other for any properties either in Singapore or in India save as herein mentioned.

4. Nothing seems to have been done in pursuance of this and the parties entered into a partnership agreement evidenced by Ex. P-4 on the 23rd

November, 1928. Instead of having an account taken of the business as directed by Ex. P-3 the parties agreed that the business should be run in

partnership with the administrators of the estate of Zacharia on the one side and Muhammad Hussain the second defendant on the other. It would

appear that the second defendant had transferred his business in lighters and boats to his Singapore wife and the assets of that business and the

other properties in Singapore were brought into the partnership as partnership assets. There are other conditions which will be referred to when

necessary.

5. Even before Ex. P-3 the plaintiff herein was adjudicated an insolvent at the instance of the second defendant on the 4th February, 1927. The

debt on the basis of which this adjudication was made was under Exs. P-3 and P-4 to be given up by the second defendant. Subsequent to this

partnership agreement this business was carried on for some years by the second defendant who was left in sole charge and thereafter the plaintiff

was also in management for sometime. In December, 1930, the second defendant applied to be adjudged bankrupt and on that petition of his the

adjudication order was made in January 1931. The present suit was filed for various reliefs regarding some properties which the plaintiff alleges are

held in trust for Zacharia''s estate which he represents. We are in this appeal Concerned with three sets of properties--one claimed by the seventh

defendant, the other by the ninth defendant and the third by the tenth defendant. The seventh defendant claims the property described in item 3 of

schedule B and the E schedule mortgage right. The ninth defendant claims item 4 of schedule B and the tenth defendant claims G schedule

properties. Item 3 of schedule B was purchased in the name of the seventh defendant under Ex. D-14 on the 7th January, 1927, for Rs. 9,000.

She took also an assignment of a mortgage which is mentioned as the E schedule property. No date is given to this assignment but as the lower

Court says it was admitted that it was early in 1926. The mortgage was one executed by the seventh defendant''s father in favour of a third party.

We have no further information either as regards the document itself or the assignment. Neither the originals nor authenticated copies of the

documents have been filed in this case. The plaintiff alleges that the consideration of Rs. 9,000 for Ex. D-14 and the amount of Rs. 5,000 the

consideration for the assignment of the mortgage came out of moneys sent by the second defendant from Singapore. As regards the moneys sent

from Singapore the allegation is that they all form part of Zacharia''s estate, the second defendant having had no property of his own. The plaintiff

therefore claims that these two properties that were acquired in the name of the seventh defendant were really acquisitions made by the second

defendant with the aid of moneys belonging to Zacharia''s estate and that therefore Zacharia''s estate is entitled to a declaration that it is the

beneficial owner of these two properties. In the alternative it is said that Zacharia''s estate is a creditor entitled to a large sum of over Rs. 50,000

from the second defendant''s estate which is being administered by the Official Assignee of Singapore whose auxiliary is the present first defendant

the Official Assignee of Madras. In its capacity as the creditor of the second defendant''s estate it is said that Zacharia''s estate is entitled to a

declaration that acquisitions in the name of the seventh defendant were made really for the benefit of the second defendant the insolvent and that

they are therefore available for distribution among the creditors of the second defendant. As regards the ninth defendant the alienation in its favour

is Ex. D-13 dated the 24th November, 1930. It is really a gift of the property subject to an earlier mortgage held by the ninth defendant from the

original owner. The second defendant purchased the properties subject to the mortgage in favour of the ninth defendant under Ex. D-12, dated the

14th August, 19.26. The second defendant assigned whatever interest he had in this property to the ninth defendant by Ex. D-13 on the 24th

November, 1930. For this latter document there was no consideration. The tenth defendant i,\ a vendee of the properties in schedule G for Rs.

57,0000 under Ex. D-6, dated the 17th May, 1930. The case of the plaintiff as regards the properties claimed by the ninth and tenth defendants is

the same as the case against the second defendant. The acquisitions themselves it is said were made with the moneys that really belonged to

Zacharia''s estate and that therefore the estate is entitled to a declaration that it is the beneficial owner. In the alternative, if they are to be regarded

as the second deiendant''s estate the claim is that as creditor in the insolvency of the second deiendant the plaintiff is entitled to have it declared that

the gift in favour of the ninth defendant and the sale in favour of the tenth defendant are both bad against the creditors of the second defendant.

6. Various defences were raised by the different sets of defendants. The seventh defendant''s defence is that she herself found the money required

for the purchase of item 3 of schedule B and that she has been in adverse possession of the property ever since the date of her purchase in 1927.

As regards the assignment of the mortgage, she says that she found the money for it. The ninth defendant''s case is that the suit is barred by

limitation. The tenth defendant says that he is a bona fide purchaser for value without notice of any claim on the part of Zacharia''s estate or of the

embarrassing position of the second defendant and that in either case he is protected against the claim of the plaintiff.

7. The learned District Judge held that the acquisitions in the name of the seventh defendant of the third item in schedule B and of the mortgage

right mentioned in schedule E were really made with the moneys sent by the second defendant from Singapore and that those moneys came out of

Zacharia''s estate. The lower Court held that there was no question of adverse possession by the wife against the husband and that the suit was not

barred by limitation. He therefore gave a decree against the ""properties in the hands of the seventh defendant. As regards the ninth defendant the

learned Judge held that the alienation under Ex. D-13 is binding on the plaintiff and that the ninth defendant must however pay Rs. 1,500 to the

plaintiff. The tenth defendant was found to be a bona fide purchaser for value without notice of the claim of Zacharia''s estate and the suit against

the tenth defendant was in consequence dismissed. The suit was also held to be barred by limitation against the tenth defendant. Appeal No. 257 is

filed by the plaintiff against the legal representatives of the tenth defendant. There is no appeal by the plaintiff regarding the dismissal of the suit for

possession against the ninth defendant but there is an appeal by the ninth defendant regarding the direction made by the lower Court that it should

pay Rs. 1,500 to the plaintiff. This is Appeal No. 304 of 1943. The last Appeal No. 417 is by the seventh defendant and she attacks the decree of the lower Court directing that the plaintiff is entitled to get the items in her possession.

8. A number of questions relating to the maintainability of the suit at the instance of the plaintiff have been raised and we shall deal with them after

deciding the questions of fact.

9. (Their Lordships dealt with the facts of the case and continued).

10. Thus on the merits of the case we have no reason to disturb the findings of the learned Judge as regards the properties claimed by the various

defendants.

11. It now remains for us to deal with the various objections raised to the maintainability of the suit. The first point urged is that the plaintiff has filed

this suit mainly as a joint administrator of the estate of Zacharia, that he was appointed as such administrator by the Supreme Court of Singapore

and that an administrator appointed by a foreign Court is not entitled to sue in British Indian Courts for recovery of Immovable property. As

regards the law on this subject, there is no difficulty. In 13 Halsbury''s Laws of England we have the following passage in paragraph 473:

The most important distinction between judgments in rent and judgments inter partes is that whereas the latter are only binding as between the

parties thereto and those who are privy to them, the judgment in rent of a Court of competent jurisdiction is, as regards persons domiciled and

property situated within the jurisdiction of the Court pronouncing the judgment, conclusive against all the world in whatever it settles as to the status

of the persons or property, or as to the right or title to the latter, and as to whatever disposition it makes of the property itself, or of the proceeds

of its sale. In other words, all persons, whether party to the proceedings or not, are estopped from averring that the status of persons or things, the

right or title to property, is other than the Court has by such a judgment declared or made it to be. But a judgment in rent can have no effect as

such beyond the limits of the state within which the Court delivering the judgment exercises jurisdiction, unless the thing affected is situate, or the

persons affected is domiciled, within those limits.

12. Again, we have the following passage in Cheshire on Private International Law (2nd edition), page 508:

The rule is absolute that the status of an administrator appointed by a foreign

Court is not recognised in England. His title relates only to property

that lies within the jurisdiction of the country whence he derives his authority, and therefore he has no right to take or to recover property in

England without a grant from the English Court.

13. It is alleged by Mr. Ramaswami Iyer, learned Counsel for the plaintiff-appellant, that the deceased Zacharia acquired the Singapore domicile

and that that would enable his client to file the suit. He points out that Zacharia went to Singapore in 1884, married a Singapore wife, started a

business and settled down there. The inference that the learned advocate asks us to draw is that the deceased had the intention of permanently

settling down at Singapore and that he abandoned the domicile of origin, viz., the Indian domicile. If really Zacharia had settled down at Singapore

and had abandoned his domicile of origin and had intended to stay permanently at Singapore the result contended for may follow. But there is no

evidence regarding the circumstances under which Zacharia went and started business at Singapore. There is no allegation in the plaint that

Zacharia settled down at Singapore permanently without any idea of returning to India and that he therefore acquired the foreign docimile. Further

there is no evidence from which we can say that he abandoned the Indian domicile. True it is that he returned to India finally in 1909 but there is no

evidence that from 1884 Zacharia lived continuously in Singapore. It is in evidence that by his Indian wife he had a number of children. It is not

even suggested that the Indian wife was taken to Singapore. It is therefore clear that the deceased Zacharia must have been visiting India a number

of times. He returned finally to India in 1909 and though he was alive for eight years thereafter, he never went to Singapore. He took the second

defendant as his agent and associated him in his business. The business was looked after by the second defendant jointly with another for a couple

of years and thereafter by the second defendant himself, supervision being exercised by the late Zacharia from India. We are not in these

circumstances prepared to say that Zacharia had acquired a Singapore domicile.

14. Certain decisions of the Bombay High Court were relied upon by Mr. Rama-swami Iyer for the plaintiff but these are not suits for recovery of

Immovable property. We have not been referred to any authority where the right of a foreign administrator to recover Immovable property has been recognised.

15. Another objection taken to the maintainability of the suit by the plaintiff is that he is an undischarged bankrupt. We have already referred to the

fact that at the instance of the second defendant he was adjudged bankrupt by the Singapore Court as early as 1927. It has not been shown that

he has since been discharged. But this will not affect his right to file the suit as the administrator of the estate of his father which right does not vest

in the assignee in his bankruptcy. But as we have already said in his capacity as the administrator of his father''s estate, the suit does not appear to

lie.

16. The suit however is laid in the alternative as one on behalf of a creditor of the second defendant. It is not disputed that over Rs. 50,000 is due

to the estate of Zacharia from the second defendant. Zacharia''s estate is therefore a creditor of the second defendant. All the heirs-at-law of

Zacharia are made parties to the suit. It is not said that there are any other heirs in addition to the plaintiff and defendants 3 to 6. The suit can

therefore be regarded as one filed on behalf of the heirs of the deceased Zacharia.

17. Thus viewed the plaintiff would only be one of Zacharia''s heirs suing in his personal capacity. It would then be certainly open to the objection

that whatever right he had to a share in the sum of Rs. 50,000 just mentioned would vest in the Official Assignee in his bankruptcy and a suit by

him if it stood alone would have been incompetent. But the suit is professedly laid on behalf of the plaintiff and defendants 3 to 6. In this Court the

widow of the deceased Zacharia has been transposed as an appellant in A.S. No. 257 by an order of Happell, J., in C.M.P. No. 4600 of 1944 on

the 13th November, 1944. There is therefore no objection to the maintainability of the suit. We would have been prepared, if the matter had not

been set right by the order just mentioned, to allow the third defendant to be transposed as a plaintiff.

18. The next objection taken is that a creditor of an insolvent is not entitled to file a suit against persons situated in the position of the seventh and

ninth defendants without the leave of the Insolvency Court. The argument of Mr. Ramachandra Iyer; who appears for these defendants is that the

plaintiff or the third defendant is only a creditor in the insolvency of the second defendant, that a suit to set aside an alienation made in favour of the

ninth defendant by the insolvent is one which cannot be maintained without the leave of the Insolvency Court. As regards the suit against the

seventh defendant it is said that the plaintiff''s claim is that it is the property of the insolvent and that this was also within the prohibition contained in

the rule that certain suits can be filed by the creditors only with leave of the Insolvency Court. The rule is laid down in Section 17 of the Presidency

Towns Insolvency Act, and Section 28 of the Provincial Insolvency Act. It is conceded that the law is the same even in Singapore. On the making

of the order of adjudication all the properties of the insolvent vest in the Official Receiver or the Official Assignee and thereafter no creditor to

whom the insolvent is indebted in respect of any debt provable under the bankruptcy law shall, during the pendency of the insolvency proceedings,

have any remedy against the property of the insolvent except with the leave of the Court and on such terms as the Court may impose.

19. As regards the ninth defendant the claim against him is that the alienation made by the insolvent in his favour in November, 1930, is void against

the Official Assignee and against the creditors of the insolvent. Thus the property was not the property of the insolvent at the time the insolvency

petition was filed. The title had validly passed from the insolvent to the alienee. It was only subject to being avoided by the Official Assignee in the

bankruptcy proceedings or by the creditors u/s 53 of the Transfer of Property Act. Therefore the suit is not against the property of the insolvent

but is one really against a third party and against the property in the hands of the third party and the object of the suit is to secure the property for

the benefit of the general body of creditors. When the suit succeeds the property will be taken possession of by the Official Assignee and he will

administer the estate for the benefit of the creditors. In such a case leave of the insolvency Court is not necessary. This has been settled by a Full

Bench of this Court in Chidambaram Chettiar (died) and Others Vs. Sellakumara Goundan and Others, . The matter was referred to a Full Bench

as there was some slight difference of opinion on this question and the Full Bench has answered the question in favour of the maintainability of such

a suit. The point referred for the decision of the Full Bench is stated at page 6 of the report thus:

Is a suit by a creditor u/s 53 of the Transfer of Property Act, to set aside an alienation made by the debtor before he is adjudged an insolvent

maintainable without the leave of the Insolvency Court?

20. Having regard to the Considerations set out above the learned Judges held that the suit does not require the leave of the Insolvency Court.

21. Turning to the case of the seventh defendant, it is no doubt true that the claim of the plaintiff is that the property in her hands is the property of

the insolvent taken in the name of the seventh defendant. This case is not directly covered by the Full Bench decision referred to. But we have to

see nevertheless whether this is a suit against the property of the insolvent in respect of the debt. This is certainly not a suit against the property of

the insolvent and the plaint does not ask any relief against the property of the insolvent. Further the creditor does not directly seek a relief against

this property for his own benefit. The decree when granted to the plaintiff or to the third defendant who is now transposed as the plaintiff will enure

for the benefit of the Official Assignee in the bankruptcy of the second defendant and will have to be administered by him. In fact the decree of the

lower Court is that the plaintiff''s interest in this decree do vest in the first defendant, the Official Assignee administering the estate of the second

defendant. Pursuing the line of reasoning adumberated in the judgment of the Full Bench, it is only those suits that seek relief against the property of

the insolvent and which were admittedly the insolvent''s property at the date of the insolvency petition that would require leave of the Insolvency

Court. The property is claimed by the seventh defendant to belong to herself. That position has been accepted by second defendant and

acquiesced by him; in fact both second and seventh defendants being husband and wife sail together. This is therefore a case in which steps have to

be taken before the estate can be said to vest in the Official Assignee in the bankruptcy of the second defendant. There is, therefore, apparently no

reason why a suit for a declaration that the property standing in the name of a third party is really that of the insolvent and not that of a third party

should not lie at the instance of a creditor. This does not come within the rule laid down within Section 28 of the Provincial Insolvency Act and

Section 17 of the Presidency Act.

22. The next objection taken is that viewed as a suit by a creditor under the

principles laid down u/s 53 of the Transfer of Property Act leave under Order 1, Rule 8 has not been obtained. It is argued that the suit must be on behalf of all the creditors, but we find that the suit is really on behalf of all the creditors. All the creditors of the second defendant in the Singapore insolvency are represented by the Official Assignee of Singapore and the first defendant, the Official Assignee of Madras, is acting as his auxiliary. Therefore, the first defendant really represents his principal, the Official Assignee of Singapore and that officer represents all the creditors of the second defendant. P.W. 1 has deposed that there are no creditors of the second defendant in British India and this is not even controverted. Thus all the creditors of the second defendant are parties to this suit. The conditions laid down in Section 53 that the suit should be on behalf of all the creditors apply only to a case where all the other creditors are not made parties to the suit. In such a case, the suit must be a representative action, and the necessary leave of the Court under Order 1, Rule 8 must be obtained. The absence of leave under Order 1, Rule 8 upon which much stress has been laid is really beside the point, because Order 1, Rule 8 only applies where some persons out of a large body of persons entitled to file a suit desire to conduct proceedings on behalf of themselves and on behalf of the absentee parties; but when all the persons jointly interested are made parties, Order 1, Rule 8 does not apply, and there is no need to apply for the leave of the Court under that rule. That objection also fails.

23. The next objection taken is that the suit is barred by limitation. As regards the seventh defendant this objection does not seem to us to have any force. So far as she is concerned, there is no proof that she claimed any interest adverse to that of her husband more than twelve years before the date of suit. Mr. Ramachandra Iyer, her learned advocate, referred to certain maintenance proceedings of 1933. But taking it from that time the possession of the wife was adverse, that commenced only in the year 1933 and the suit was filed in 1940. The husband was always living in Singapore. He was sending moneys to India and the properties were purchased in the name of his wife, the seventh defendant. She being on the spot was in management of the properties. Under these circumstances, there is no reason to suppose that the seventh defendant was holding the

property otherwise than on behalf of her husband, the real owner. There is no question of adverse possession, at any rate until 1933 when alone

we have some disputes between the husband and the wife.

24. As regards the claim of the ninth defendant that the suit is likewise barred, the first answer is that no decree has been given for possession.

Further, the argument that the suit is barred under Article 120, viewing it as one for possession is again devoid of substance. Under Article 120,

there is a period of six years from the time when the cause of action accrues. The cause of action will accrue admittedly either on the date when the

plaintiff came to know of the alienation or even later at the time when he chose to avoid the alienation. It is unnecessary to decide which of these

two views is correct, but taking it that the earlier point of time when the plaintiff came to know is the starting point of limitation, we have nothing in

this case that the plaintiff knew of the alienation in favour of the ninth defendant at a point of time which is more than six years before the date of

suit. In the written statement filed by the ninth defendant, there is no allegation that the plaintiff knew of the alienation in his favour more than six

years before suit.

25. Lastly it is argued that under Ex. P-3 all the right which the estate of Zacharia had against the properties in India other than those covered by

paragraph 7 thereof was given up and that therefore this suit cannot be laid against the properties in the possession of the seventh defendant. A

number of answers were given by Mr. Ramaswami Iyer for the plaintiff, but we are content to put the position thus: Paragraph 9 of Ex. P-3 says

that neither party was to have any claim against the other over any of the properties either in Singapore or in India save as therein mentioned.

Clause 9 does not give up the right of the estate of Zacharia against the seventh defendant. It is only against the second defendant who was a party

to the document and who therefore comes under the expression "" against the other "" that Clause 9 of Ex. P-3 would at all operate. We therefore

think it unnecessary to deal with the other contentions of Mr. Ramaswami Iyer, one of which is that the compromise must be viewed as a whole,

that the consideration for Clause 9 is really the provisions contained in the other paragraphs of the document and that when the provisions laid

down in all the other paragraphs were admittedly given up and substituted for the arrangement contained in Ex. P-4, the provision made in Clause

9 must also be taken to have been superseded. Further, the claim that we have upheld is not the claim of Zacharia''s estate to the properties

themselves, but it is the claim of the second defendant''s creditor that we have upheld. Any other creditor, for instance, of the second defendant,

would have certainly a right to have it declared that the property in the hands of the seventh defendant is available for the second defendant''s

creditors. It is this right that is now recognised and we see no reason why Clause 9 of Ex. P-3 should stand in the way of this right being,

recognised.

26. One other answer attempted by Mr. Ramaswami Iyer is that Clause 9 would require registration. It is said that the properties claimed by the

seventh defendant are Immovable properties worth over Rs. 100 and that a release or relinquishment of the rights of Zacharia''s estate over this

property can be made only by a registered instrument. It is urged on the other side that having been embodied in a compromise decree, no

registration was required before 1930 when decrees were also brought under the category of compulsorily registrable documents by the amending

Act of 1929. But it is unnecessary to go into this question either.

27. In the result, all the appeals fail.

28. Appeal No. 257 is dismissed with costs of respondents 8 and 9. Appeal No. 304 is dismissed. Appeal No. 417 is dismissed with costs of

respondents 5 to 7.

29. Appeal No. 417 has been filed in forma pauperis. There will be a direction that the appellant do pay the Court-fee payable to Government on

the memorandum. of appeal.

