
(1945) 07 MAD CK 0022
In the Madras High Court

Jaina Muhammad Sheriff Maracair and Others

APPELLANT

Vs

Official Assignee of Madras and Others

RESPONDENT

Date of Decision : 23-07-1945

Acts Referred:

Citation : AIR 1946 Mad 25

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 tiled by the appellant in A.S. No. 257 of 1943 for various reliefs regarding the properties in suit. Defendant 1 is the Official Assignee of Madras who is acting as an auxiliary of the Official Assignee of Singapore in the insolvency of defendant 2, K. Mohamed Hussain. Mohamed 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 in whom the estate of defendant 2 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 defendant 2, Mohamed Hussain to assist him in the business. Zacharia left Mohamed 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 defendant 2 and afterwards defendant 2 was acting as the sole agent of Macharia Hussain. Zacharia lived ever afterwards in British India and did not go to Singapore. He died in British India on 20th December 1917. Thereafter defendant 2 was left in sole charge without any effective control. The plaintiff Sheriff Maracair is the eldest son of Zacharia. Defendant 3 is his Singapore wife. Defendants 4 and 5 are the sons of Zacharia and brothers of the plaintiff and defendant 6 is

Zacharia's daughter by his Indian wife. Defendant 7 is the wife of defendant 2 and she is impleaded as being in possession of certain properties claimed in suit. We are not in this appeal concerned with defendant 8. Defendant 9 is the Muslim Association of Nagore. It is in possession of item 4 Sch.B. Defendant 10 is the purchaser-of the properties in Schedule C. He died during the pendency of the suit and defendants 12 to 15 have been added as legal representatives. We are not concerned with defendant 11 in this appeal.

3. Plaintiff and defendant 3 were appointed joint administrators of the estate of Zacharia Hussain by the Supreme Court of Singapore under letters of administration evidenced by Ex. P-1a dated 6th August 1926. The two executors filed C.S. No. 96 of 1926 in the Singapore Court for a declaration that defendant 2, Mohamed 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 defendant 2 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 20th June 1929 by which an account of the business in boats and lighters carried on in the name of defendant 2 from 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 Mohamed Hussain the defendant. Certain properties mentioned in para. 7 of Ex. 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 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 Mohamed Hussain defendant 2 on the other. It would appear that defendant 2 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 defendant 2 on 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 defendant 2. Subsequent to this partnership agreement this business was carried on for some years by defendant 2 who was left in sole charge and thereafter the plaintiff was also in management for sometime. In December 1930 defendant 2 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 defendant 7, the other by defendant 9 and the third by defendant 10. Defendant 7 claims the property described in item 3 of Schedule B and the B schedule mortgage right. Defendant 9 claims item 4 of Schedule B and defendant 10 claims C schedule properties. Item 3 of Schedule B was purchased in the name of defendant 7 under Ex. D-14 on 7th January 1927, for Rs. 9000. 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 defendant 7'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 Rupees 9000 for Ex. D-14 and the amount of Rs. 5000 the consideration for the assignment of the mortgage came out of moneys sent by defendant 2 from Singapore. As regards the moneys sent from Singapore the allegation is that they all form part of Zacharia's estate, defendant 2 having had no property of his own. The plaintiff therefore claims that these two properties that were acquired in the name of defendant 7 were really acquisitions made by defendant 2 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 defendant 2's estate which is being administered by the Official Assignee of Singapore whose auxiliary is the present defendant 1 the Official Assignee of Madras. In its capacity as the creditor of defendant 2's estate it is said that Zacharia's estate is entitled to a declaration that acquisitions in the name of defendant 7 were made really for the benefit of defendant 2 the insolvent and that they are therefore available for distribution among the creditors of defendant 2. As regards defendant 9, the alienation in its favour is Ex. D-13 dated 24th November 1930. It is really a gift of the property subject to an earlier mortgage held by defendant 9 from the original owner. Defendant 2 purchased the properties subject to the mortgage in favour of defendant 9 under Ex. D-12 dated 14th August 1926. Defendant 2 assigned whatever interest he had in this property to defendant 9 by Ex. D-13 on 24th November 1930. For this latter document there was no consideration. Defendant 10 is a vendee of the properties in Schedule C for Rs. 57,000 under Ex. D-6 dated 17th May 1930. The case of the plaintiff as regards the properties claimed by defendants 9 and 10 is the same as the case against defendant 2. 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 defendant 2's estate the claim is that as creditor in the insolvency of defendant 2 the plaintiff is entitled to have it declared that the gift in favour of defendant 9 and the sale in favour of defendant

10 are both bad against the creditors of defendant 2.

6. Various defences were raised by the different sets of defendants. Defendant 7'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. Defendant 9's case is that the suit is barred by limitation. Defendant 10 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 defendant 2 and that in either case he is protected against the claim of the plaintiff. The learned District Judge held that the acquisitions in the name of defendant 7 of item 3 in Schedule B and of the mortgage right mentioned in Schedule E were really made with the moneys sent by defendant 2 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 defendant 7. As regards defendant 9 the learned Judge held that the alienation under Ex. D-13 is binding on the plaintiff and that defendant 9 must however pay Rs. 1500 to the plaintiff. Defendant 10 was found to be a bona fide purchaser for value without notice of the claim of Zacharia's estate and the suit against defendant 10 was in consequence dismissed. The suit was also held to be barred by limitation against defendant 10. Appeal No. 257 is filed by the plaintiff against the legal representatives of defendant 10. There is no appeal by the plaintiff regarding the dismissal of the suit for possession against defendant 9 but there is an appeal by defendant 9 regarding the direction made by the lower Court that it should pay Rs. 1500 to the plaintiff. This is Appeal No. 304 of 1943. The last Appeal No. 417 is by defendant 7 and she attacks the decree of the lower Court directing that the plaintiff is entitled to get the items in her possession. 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. (Their Lordships dealt with the facts of the case and continued).

7. 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. It now remains, for us to deal with the various objections raised to the maintainability of the suit.

8. 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 para. 473:

The most important distinction between judgments in rem 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 rem 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 rem 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 person affected is domiciled, within those limits.

Again, we have the following passage in Cheshire on Private International Law, (Edn. 2) p. 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.

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 domicile. 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 Zaeharia 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 defendant 2 as his agent and associated him in his business. The business was looked after by defendant 2 jointly with another for a couple of years and thereafter by defendant 2 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. Certain decisions of the Bombay High Court were relied upon by Mr. Ramaswami 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. 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 defendant 2 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.

9. The suit, however, is laid in the alternative as one on behalf of a creditor of defendant 2. It is not disputed that over Rs. 50,000 is due to the estate of Zaeharia from defendant 2. Zaeharia's estate is, therefore, a creditor of defendant 2. All the heirs-at-law of Zaeharia 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 Zaeharia. Thus viewed the plaintiff would only be one of Zaeharia'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 Zaeharia has been transposed as an appellant in A.S. No. 257 by an order of Happel J. in C.M.P. No. 4600 of 1944 on 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 defendant 3 to be trans, posed as a plaintiff. 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 defendants 7 and 9 without the leave of the. insolvency Court. The argument of Mr. Ramachandra Aiyer who appears for these defendants is that the plaintiff or defendant 3 is only a creditor in the insolvency of defendant 2, that a suit to set aside an alienation made in favour of defendant 9 by the insolvent is one which cannot be maintained without the leave of the insolvency Court. As regards the suit against defendant 7 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, Presidency Towns Insolvency Act, and Section 28, 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.

10. As regards defendant 9, 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, T.P. 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 v. Sellakumara Goundan* AIR 28 1941 Mad. 903. 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, T.P. Act, to set aside an alienation made by the debtor before he is adjudged an insolvent maintainable without the leave of the insolvency Court?

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

11. Turning to the case of defendant 7, 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 defendant 7. 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 plaintiff 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 defendant 3 who is now transposed as the plaintiff will enure for the benefit of the Official Assignee in the bankruptcy of defendant 2 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 defendant 1, the Official Assignee administering the estate of defendant 2. Pursuing the line of reasoning adumbrated 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 defendant 7 to belong to herself. That position has been" accepted by defendant 2 and acquiesced by him; in fact both defendants 2 and 7 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 defendant 2. 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, Provincial Insolvency Act, and Section 17, Presidency Act.

12. The next objection taken is that viewed as a suit by a creditor under the principles laid down u/s 53, T.P. 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 defendant 2 in the Singapore insolvency are represented by the Official Assignee of Singapore and defendant 1, the Official Assignee of Madras, is acting as his auxiliary. Therefore defendant 1 really represents his principal, the Official Assignee of Singapore, and that officer represents all the creditors of defendant 2. P.W. 1 has deposed that there are no creditors of defendant 2 in British India and this is not even controverted. Thus, all the creditors of defendant 2 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, R. 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.

13. The next objection taken is that the suit is barred by limitation. As regards defendant 7 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 12 years before the date of suit. Mr. Ramachandra Aiyer, 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 defendant 7. She being on the spot was in management of the properties. Under these circumstances, there is no reason to suppose that defendant 7 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.

14. As regards the claim of defendant 9 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 defendant 9 at a point of time which is more than six years before the date of suit. In the written statement filed by defendant 9, there is no allegation that the plaintiff knew of the alienation in his favour more than six years before suit.

15. 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 para. 7 thereof was given up and that therefore this suit cannot be laid against the properties in the possession of defendant 7. 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 defendant 7. It is only against defendant 2 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 defendant 2's creditor that we have upheld. Any other creditor, for instance, of defendant 2, would have certainly a right to have it declared that the property in the hands of defendant 7 is available for defendant 2's creditors. It is this right that is now recognized and we see no reason why Clause 9 of Ex. P-3 should stand in the way of this right being recognized.

16. One other answer attempted by Mr. Ramaswami Iyer is that Clause 9 would require registration. It is said that the properties claimed by defendant 7 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. In the result, all the appeals fail. 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. 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.