
(1972) 10 MAD CK 0022

In the Madras High Court

Case No : Letter Patent Appeal No. 59 of 1966

Khadir Bi and Others

APPELLANT

Vs

Mammoodunnissa Begum and Others

RESPONDENT

Date of Decision : 31-10-1972

Acts Referred:

Provincial Insolvency Act, 1920 — Section 28(2), 37, 44, 44(2), 67

Citation : AIR 1973 Mad 346

Hon'ble Judges : K. Veeraswami, C.J;Raghavan, J

Bench : Division Bench

Judgement

Raghavan, J.—This Letters Patent appeal has been filed by defendants 30 to 33 with the leave of Srinivasan, J., in S. A. 231 of 1963. The

suit is for partition, possession and future mesne profits. The suit properties belonged to three brothers, Chandamiyan Sahib (died in 1940), Amir

Sahib (died in 1927) and Shamshuddin Sahib (died in 1943). It is not in dispute that these brothers or their legal representatives were entitled each

to one-third share in the suit properties as on the date of the death of Shamsuddin in 1943. The properties had originally been sold in Court auction

under a mortgage decree, but they had already been purchased in 1925 in the name of Rahima Bi, wife of one of the brothers, Chandamiyan

Sahib. In 1929 Shamshuddin (one of the brothers) executed a mortgage over the properties thereby showing that the purchase in 1925 was on

behalf of the family. In respect of the arrears due to the Municipality the properties were brought to sale, and were purchased by the present first

defendant in 1944, but possession was not taken thereunder. Till the death of Shamsuddin in 1943 the members of the family of the three brothers

admittedly resided in the suit properties. After his death, his widow and children

left for Madras leaving the heirs of Amir Sahib, who are defendants 30 to 33, in occupation of the properties. Defendants 1 to 29, who represent Chandmiyan Sahib, also appeared to have left for Salem.

The result is that the descendants of Amir Sahib viz, defendants 30 to 33, who are the present appellants, continued to be in possession of the properties. The plaintiffs in the suit, who are the legal representatives of Shamsuddin, filed the present suit claiming partition of their one-third share in the properties. Their case is that the properties always belonged to the family and enjoyed in common. Their claim was supported by defendants 1 to 29, who, as already stated, are the representatives of Chandmiyan Sahib. The only contesting persons to the plaintiffs' claim are the legal representatives of Amir Sahib, viz, defendants 30 to 33.

2. The plaintiffs' claim was resisted by defendants 30 to 33 on the ground that they have been continuous and uninterrupted possession and enjoyment of the properties from 1938 onwards, that Shamsuddin had been adjudicated an insolvent in 1935, that his interests in the properties vested in the Official Receiver, Salem, and that notwithstanding the discharge, the properties never reverted or revested in him (Shamsuddin), that the co-tenancy or co-ownership between the brothers had been extinguished by the insolvency of Shamsuddin in 1935, that the title of defendants 30 to 33 had become perfected by their adverse possession, that, the heirs of Chandamian Sahib sold the properties to Govindaswami Pillai and the purchaser failed to obtain possession, that there has been no co-tenancy between the parties, that the present suit has been filed at the instigation of the first defendant and that the plaintiffs are not entitled to their share claimed.

3. The trial Court dismissed the suit holding that the suit properties did not revest in Shamsuddin notwithstanding the grant of absolute discharge, that Shamsuddin lost his title to the suit properties by reason of I. P. 56 of 1935 on the file of the Sub Court, Salem, and that defendants 30 to 33 have perfected their title to the entire suit properties by adverse possession.

4. The plaintiffs filed A. S. 252 of 1961 to the District Judge, Salem. The learned Judge reversed the decision of the trial Court, holding that defendants 30 to 33 have not acquired title to the suit properties by adverse possession, that there were no overt acts which disclosed an intention

on their part to hold the properties adversely to the other co-owners amounting to ouster. On the question of the loss of title of Shamsuddin by reason of the insolvency proceeding, the learned Judge found that the adjudication in 1935, an order of absolute discharge had been granted, notwithstanding the vesting of the properties in the Official Receiver, Salem, Shamsuddin continued to be in possession of the suit properties till his death in 1943 and the fact that Shamsuddin was declared insolvent would not put an end to his rights or enable third parties to acquire rights against him.

5. Defendants 30 to 33 filed S. A. No. 231 of 1963. Srinivasan, J. heard the second appeal and the following two points were urged before him:

(1) Shamsuddin lost his right to the properties by reason of the insolvency proceedings and there could be no surviving right in Shamsuddin which could be succeeded to by the plaintiff as heirs;(2) That the appellants have perfected their title to the suit properties by adverse possession. The

learned Judge considered both the points elaborately and held that in spite of their being no order revesting the properties in the insolvent after he

was granted an absolute discharge on 18-11-1938, still the insolvent did not lose his title to the properties and the plaintiffs as heirs of insolvent

Shamsuddin were entitled to their share. On the second question the learned Judge held that except for the fact of possession by one of the co-

sharers, viz, defendants 30 to 33, there was no evidence of any act which can be regarded as an ouster of the claim of the other co-sharers. In the

result, the second appeal was dismissed. In the above Letters Patent Appeal the same two points have been repeated before us.

6. Before dealing with the legal contentions raised it is necessary to recapitulate the facts. Shamsuddin was adjudicated insolvent on 7-10-1935

and his properties vested in the Official Receiver, Salem. He was granted an absolute discharge on 18-11-1938. But no order of revesting the

properties in the insolvent was made. It is also a fact that the insolvent did not discharge his debts in full, the result being that his properties were

still available to meet the undischarged debts, proved or provable in insolvency. The Official Receiver, Salem, notwithstanding the fact that the

properties were vested in him, did not take any steps to bring the properties to sale to discharge the debts and none of the creditors of the

insolvent moved or attempted to bring the properties for sale in discharge of the debts right from 1938 to the present day. The question, under the circumstances, is whether when the Court has granted an absolute discharge to the insolvent but failed to make any order with regard to the vesting of the properties, the title of the insolvent to the properties is lost thereby. It is no doubt true that the vesting order divests title from the insolvent and places the Official Receiver in the position of an insolvent so far as the properties are concerned and under law the Official Receiver is given the authority to deal with the properties and to dispose them of and utilize the sale proceeds to discharge the debts proved before him in insolvency. When the insolvent pays his creditors in part or in full and settle their claim and the Court grants him an absolute discharge, it is difficult to see what steps the Official Receiver can take in relation to the properties for there are no debts proved before him for the discharge of which he can take appropriate steps under the law.

7. u/s 28(2) of the Provincial Insolvency Act, on the making of an order of adjudication, the whole of the property of the insolvent vests in the Court or in a Receiver and shall become divisible among the creditors. u/s 44(2) of the Act, an order of discharge release the insolvent from all debts provable in solvency subject to the exceptions enumerated in sub-Section(1) and S. 67 provides that the insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest as provided by this Act, and of the expenses of the proceedings taken thereunder. We may notice one other Section in that Act, viz., Section 37 which provides that the properties which vested in the receiver on the adjudication shall revert in the insolvent on an annulment. The supreme court in Raghunath Keshava Kharkar Vs. Ganesh and Others, had an occasion to consider the scheme of the Provincial Insolvent Act and the right of the insolvent to get back any undisposed property as surplus when an absolute order of discharge was made in his favor. The facts of the case in the Supreme Court are as follows: The appellant therein, who was undischarged insolvent, became entitled to certain properties under a Will. He sought to recover possession of the properties and the defense was that even if the properties had come to him as reversioner, at the time the succession opened, the appellant having been an undischarged insolvent,

the properties cannot be claimed by him. There was an order of absolute discharge subsequently, but there was no order vesting the properties in

the ex-solvent despite the order of absolute discharge. The question that came to be considered by the Supreme Court was whether an insolvent

on whom the property had devolved when he was an undischarged insolvent, can maintain an action of recovering the property after his absolute

discharge. The Supreme court had to consider the effect of the order of absolute discharge and the insolvent's title to the undisposed of property.

After referring to the scheme of the Provincial Insolvency Act and particularly the effect of Section 37 and 44 of the Act, the learned Judge

observed as follows at page 239:

It is true that the Act does not contemplate that an insolvent might get an order of discharge and yet retain part of his property free from the liability

to pay debts provable under the Act, in case all debts have not been paid off. But it is here that we have to look to the effect of Section 67 of the

Act. That Section lays down that the insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest as

provided by the Act and of the expenses of the proceedings taken thereunder. Now, often this surplus would be in the form of money. But take a

case where an insolvent has come into property by devolution after he became insolvent and before his discharge; and suppose that the property

which has devolved on him is worth a few lacs while his debts are only a few thousands. In such a case the receiver would not proceed to sell all

the property; he would only sell so much of the property as would satisfy the debts in full and meet the expenses of the proceedings in insolvency;

the rest of the property whether moveable or immovable would not be converted into money. It seems to us that it would not be wrong in such a

case to call such property whether moveable or immovable which remains after payment in full to the creditors with interest and of the expenses of

the proceedings in insolvency as "surplus". To this surplus the insolvent is entitled. In such a case therefore it would be proper to hold that if any

property remains undisposed of in the shape of surplus in the shape of money would..... Though therefore there is no specific

provision in terms of Section 44(2) with respect to property that may remain undisposed of by the receiver or by the Court, like the provision in

Section 37 on an order of annulment, it seems to us that Section 67 by necessary implication provides that answer to a case like the present. All the property which remains undisposed of at the time of discharge must be treated as surplus to which the insolvent is entitled. The insolvent will thus get title to all such property and the vesting in the receiver whether u/s 28(2) or Section 28(4) would come to an end on an order of discharge subject always to the insolvent complying in full with the conditions of Section 68 in case they have not been complied with before his discharge, for he is entitled only to the surplus after the creditors have been paid in full and the expenses of all proceedings in insolvency have been met. Any other view of the effect of discharge would result in this startling position that though the insolvent is freed from his debts u/s 44(2) and is a free man for all purpose the property which was his and which vested in the receiver u/s 28(4) will never come back to him and will always remain vested either in the Court or receiver. We have no doubt that the Act did not contemplate such a situation. We have already indicated the reason why Section 44 does not provide for revesting of property in the insolvent in contrast to the provision therefore in Section 37. Generally speaking it is not expected that there would be any property left to re-vest in the insolvent after the administration in insolvent is over. We have therefore to look to Section 67 which provides that the insolvent is entitled to any surplus remaining after payment in full of his creditors and after meeting the expenses of the proceedings taken under the Act ; and it is that section which gives title to the insolvent in the property which remains undisposed of for any reasons before his discharge subject to the conditions of that Section being fulfilled even after the discharge. Just as the Act does not contemplate that an insolvent would get an order of discharge yet retain part of his property without meeting the debts provable under the Act in full, it is to our mind equally clear that the Act does not contemplate that after an insolvent had been discharged, his undisposed of property, if any, should for ever remain in the possession of the Court or receiver, even though in a particular case the creditors may have been paid in full out of the property disposed of and all the expenses of the proceedings under the Act has been met. In such a case it seems to us that it is Section 67 which must come to the aid of the insolvent and the property which remains undisposed of must be treated as surplus and he gets title to it. Where

however the insolvent has been discharge without the insolvent has been discharged with out fully meeting the conditions of Sec. 67, he would in

our opinion be still entitled to the surplus, even if it be in the shape of undisposed of property, subject to his fulfilling the conditions of Section 67.

Lastly their Lordship observed as follows--

Therefore, on a careful consideration of the scheme of the Act and on a review of the authorities which have been cited at the Bar, we are of

opinion that an insolvent is entitled to get any undisposed of property as surplus when an absolute order of discharge is made in his favor, subject

always to the condition that if any of the debts provable under the Act have not been discharged before the order of discharge, the property would

remain liable to discharge those debts and also meet the expense of all proceedings taken under the Act till they are fully met.

In our opinion, the above decision directly applies to the facts of the present case. Here, the insolvent was in 1935. The properties of the insolvent

vested in the Official. Receiver, Salem, on his adjudication. The absolute discharge was granted to him in 1937. It is no doubt true that full payment

was not made to the creditors. But neither the official Receiver nor any of the creditors took any steps all these years--the present suit having been

filed in 1960--seeking to bring the properties to sale to satisfy the claims of the creditors in full. During all the period, the insolvent and his heirs

after his death have been in possession and enjoyment of the suit properties. Even though there was no order re-vesting the properties in the

insolvent after the absolute discharge order was made. by reason of the long delay and the inaction of the Official Receiver and the creditors we

are of opinion that the properties of the insolvent have re-vested in the heirs of the insolvent. In our opinion, the contention of the learned Counsel

for the appellants that in the absence of any revesting order, the insolvent loses his title to the properties is, therefore. untenable.

8. On the question of adverse possession, it is no doubt true that the appellants have been in possession of the suit properties from 1943 and the

present suit is filed in 1960. The appellants and the other contesting claimants stand in the position of co-owners and except for the fact of

enjoyment of the properties by the appellants, there are no acts establishing ouster of the other co-sharers.

9. Further there are a few circumstances which may be taken into consideration in considering the question of adverse possession. The heirs of

Chandamiyan Sahib purported to sell their shares in the suit properties to one Govindasami Pillai in 1945 (Ex. B-3). It was specifically mentioned

in the sale deed that possession was not given to the purchaser, as other co-owners were in possession. Nearly twelve years thereafter the

purchaser filed O. S. No. 29 of 1967 for possession, impleading the present appellants and the present respondents as parties to the suit. In the

written statement filed by the present appellants, who were defendants 7 to 11, therein, they contended that the properties belonged to the three

brothers and that they continued in possession in spite of the Court auction sale and the subsequent sale to Rahima Bi, that till the death of

Shamsuddin in 1943, the co-sharers were in possession of the properties and that they having been in continuous possession they had acquired an

absolute title. No question of adverse possession arose for consideration in that suit. But ultimately the suit for possession was dismissed and a

money decree passed against the defendants. It may be seen that in the former suit nothing was mentioned by the present appellants as to how their

title came to be perfected and no overt act establishing their hostile title as against the other sharers was put forward.

10. The next circumstance relied upon was that a portion of the suit properties was brought to sale by Salem Municipality in execution of a decree

for arrears of house tax. It was purchased by the first defendant, who was one of the descendants of Chandamian Sahib. At the time of taking

delivery, obstruction was caused by the present appellants, who were factually in possession. From the mere circumstance that the appellants

resisted delivery, it cannot be said that they were setting up a hostile title as against the other sharers. It is unnecessary to refer to any decision on

the point. Srinivasan, J. has referred to the various other circumstances and came to the conclusion agreeing with the finding of the learned District

Judge that the ouster of the co-sharers by the appellants has not been established and we entirely agree with his conclusion.

11. There is, therefore, no substance in any of the contention raised by the learned counsel for the appellants. The Letters Patent Appeal,

therefore, fails and is dismissed with costs of the respondents.

12. Appeal dismissed.