(1920) 10 MAD CK 0015

In the Madras High Court

Kochu Mahomed Asan Tharagan and Another — APPELLANT

Vs

Sankaralinga Mudaliar and Others — RESPONDENT

Date of Decision : 14-10-1920

Acts Referred:
Provincial Insolvency Act, 1920 — Section 16, 35

Citation : AIR 1921 Mad 204 : (1921) 14 LW 505 : (1921) 40 MLJ 219

Hon'ble Judges : Seshagiri Aiyar, J;Oldfield, J

Bench : Full Bench

Judgement

Oldfield, J.—These are appeals by certain creditors and. by the Official Receiver of Tinnevelly District against orders passed by the lower

court in insolvency. It is conceded that the insolvents'' estate has throughout the proceedings been fully represented by the Official Receiver.

Appeal against Order No. 127 of 1919 by the creditors must therefore be dismissed at once, but in view of our conclusion on the merits of the

dispute without an order as to costs.

2. The lower court''s order against the Official Receiver in Appeal Against Order No. 128 of 1919 was passed firstly on the short ground that

Sections 16, 34 and 35 of the Provincial Insolvency Act (III of 1907) specified in the heading of the petition are not ""petitioning sections"" the

meaning being apparently that the proper remedy was not by petition under that Act, but by suit or otherwise under the direct provisions of the

Code of Civil Procedure; and the appeal is resisted here firstly on that account.

3. The facts are that on 23rd September 1914 1st to 3rd respondents obtained a compromise decree, Ex. I, in the Court of the District Munsiff of

Ambasamudram against four persons, who were adjudicated insolvents in the lower court on 23rd March 1917. On 28th June 1918 certain

properties of the insolvents were sold in execution of this decree by the District Munsif and purchased by the 4th respondent, after one of the

insolvents and the Official Receiver had in circumstances not yet investigated taken objection to the sale proceedings. In the present proceedings

the Official Receiver has moved the lower court, as the court dealing with insolvency, to set aside the sale or in the alternative to direct a refund by

1st to 3rd respondents of their realization in execution. It is not clear whether delivery to 4th respondent has taken place. But there is a further

prayer for such other relief as the circumstances may demand, which would cover, if necessary, an order for the return of the property. On these

facts the contentions, as advanced in paragraph 16 of 1st respondent''s counter-petition and in argument before us, a,re that only the court, which

held the sale, can set it aside; that the insolvency court has no right to interfere with the proceedings in execution elsewhere; and that the Official

Receiver should, as the lower court held, proceed by suit or otherwise under the Code.

4. The general question thus raised is whether the Court dealing with an insolvency under the Provincial Insolvency Act has either an exclusive

jurisdiction or one concurrent with that of ordinary courts to deal for the purpose of the administration of the insolvent''s estate with claims against

persons holding it adversely to him, whether they have arisen from purchase at court sale or otherwise. Before dealing with the provisions of the

Act, I observe that such an exclusive jurisdiction is well recognised elsewhere in insolvency systems which are of longer standing than the Provincial

Act and which are usually referred to in its construction. Reference may be made on this point to the decisions collected u/s 105 of the English

Bankruptcy Act,1914 at p. 375 William''s Bankruptcy Practice, 11th Edition and to Section 7 of Presidency Insolvency Act (III of 1909) of which

the material portion was reproduced from the English act in force at its date; and it is significant that, although there is no reason for presuming any

intention to change the law, the Legislature has included a similar provision, as Section 4 in the Provincial Act, V of 1920, which is now in force.

The mention above of concurrent jurisdiction is based solely on Naginlal v. Official Assignee ILR (1911) Bem. 473 a case under the Presidency

Act, which does, not appear to have been followed in any other High Court, which makes no reference to Section 8(2)(o) as affording a remedy in

the insolvency-Court and deals with Section 7 with very little regard to English authority. The decision in these circumstances is of doubtful

authority and in any case, as it merely recognizes only a concurrent jurisdiction, it in no degree assists respondents.

5. To turn to the Provincial Act, it is material first that, as appears from its preamble, its comprehensive character and the repeal by it of the existing

insolvency law, Sections 341 and 344 to 360 A of the Code in force at its date, it is a special law and its provisions are, except as specially

provided, u/s 4 of the CPC (Act V of 1908) in force at the date of these proceedings unaffected by anything therein. Of the provisions in the Act

relating to property held actually or colourable against the insolvent, Sections 36 and 37 merely prescribe a rule of evidence applicable to two

classes of alienations, those completed within particular periods before the adjudication, not like the sale now in question, after it; and it is material

only that they assume and do not confer the power of cancellation, which they imply, but which must be looked for in another place. ''There are

next Sections 34(1) and 35, the only provisions relating to execution proceedings, the former to assests realized before the insolvency began and

still remaining in the executing Court, the latter to cases, in which an adjudication has taken place after the issue of execution and property is under

some description of attachment. To the application of Section 35 (1) to what happened in the present case it will be necessary to return although it

may at once be pointed out that in Kashinath v. Kanhaiya Lal Sharma I.L.R., (1915) All. 452 proceedings for the recovery of the property

subsequently to the sale eventually held were taken by the Receiver in the insolvency Court without objection to its jurisdiction. The material point

at present however is that these are the only two provisions in the Act for the intervention of a court other than the insolvency court in the

administration of the insolvent''s estate; that they deal with the only cases, which have been suggested, in which conflict between the insolvency

court and another would be inevitable in spite of the former''s exclusive jurisdiction; and that the intervention authorized by them consists in no

adjudication on, the interests in conflict, but is limited to delivery of the assests or the property under the executing court''s control to the receiver.

These sections, the only ones in which an executing court is referred to, therefore impose no limitation on the provisions of Sections 16 and 18(1)

and (3), which read together confer power on the insolvency court to reduce the insolvent''s property, which has vested in the receiver under the

former, to his possession. Two observations may be made, that Section 16 vests in the Court and therefore Section 18(1) in the receiver

appointed by'' it all the property with exceptions not at present material and that Section 18(3) is subject to the proviso restricting the Court''s

power to removal from property of persons, whom the insolvent has a present right to remove.

6. These observations are material in connection with the suggestion involved in respondent''s argument that special considerations apply to titles

acquired by third parties at court sales and to the first set of authorities relied on by them. It is not necessary for the present purpose to deal with

cases, in which a court sale is attacked by the Receiver as collusive or fraudulent, since here he makes no such allegation, but contends only that

the sale of property vested in him before its date is a nullity. It has been pointed out that the only provisions of the Act relating to court sales do not

deal with the method available to the receiver for avoiding them and there is no provision, which places titles acquired at them on any special

footing. When therefore, Section 16, on which the vesting in the receiver u/s 18(1) follows, is exhaustive, there is no ground on which property

alleged to have been transferred after adjudication by court sale, can be treated differently from property transferred at that stage in any other way.

7. The authorities relied on are in fact concerned rather with the application of the proviso to Section 18(3) than with any attempt to distinguish the

remedies open to the receiver with reference to the origin of title he desires to displace. In Nilambhoy Chowdhry v. Dhurga Charan (1918) 22

G.W.N. 704 the Court no doubt held that Section 18(3) was not intended to authorize the removal of any person whom the insolvent could not

himself remove without legal proceedings and in Maddipati. Peramma v. Gandiapu Krishnayya (1918) 8 L W 136 Bakewell, J. said that it was not

intended to confer jurisdiction over a person against whom the insolvent had merely a right enforceable by suit, this view being explained in the

former case as authorising removal of a benamidar, when the veil was transparent and the insolvent was insubstantial beneficial possession. These

Judgments however do not account for a power being conferred on the court, which would, if they are correct, be useless, if it were not coercive;

or for the present well-established exercise of such a power in cases, to which the mere rules of evidence in Sections 36 and 37 are applied. In the

second case cited Krishnan, J. held that the Court had power under the Section to deal with adverse claims by third parties; and that it is not

inconsistent with the Jagrup Sahu v. Ramanand Sahu ILR (1917) All. 633 and is supported fully by Bansidhar v. Karagjit ILR (1914) All 65 in

which the question arose directly. The restriction in the proviso of the court''s right to disturb possession will receive full effect, if it is read with

reference, not to the method by which the in solvent can regain possession, of which it says nothing, but to a qualification of his right to possession,

such as an outstanding lease or life estate would involve; and I would respectfully follow the opinion of Krishnan, J. and the Allahabad cases cited

on the point.

8. Next it is material that Section 18(3) empowers the court to reduce property to the possession only of the Receiver. The existence of the power

is accordingly in no way inconsistent with the cases relied oh by respondents, in which other persons in some of them claiming under him, have

proceeded by suit or have been held to be entitled to proceed only in that manner. The effect of the first class of cases, for example Raghunath Das

v. Sundar Das Khetri I.L.R.(1914) Cal. 72 is in any case only negative. In the second class it is significant that the power of the insolvency Court

relied on and regarded as inapplicable was not that conferred by Section 18(3) at all, but the general power exercised by it in its ordinary civil

jurisdiction as extended to proceedings in insolvency by Section 47(1); and such extension was held unauthorized, because the section allows it

only in proceedings under the Act and not in proceedings for which the Code, and not the Act, affords the only warrant. That was statedly the

ground of decision in Muddipoti Peramma v. Gandiapu Krishnayya (1918) 8 L.W.135 already refer-red to. See also Bhashyam Reddi v. Soma

Sundaram Chetty (1916) 3 L.W. 230 and Cheda Lal v. Lachman Prasad ILR (1916) All. 237 . In Narasimhaya v. Veeraraghavulu ILR

(1917)Mad. 440 one statement made in connection with Section 47 is relied on by respondents. ""It would be going too far to say that a Judge in insolvency in the moffussil has power by a summary proceeding to decide questions of title to property claimed by third persons."" But this does not

support their argument, since the proceeding consisted only in an attempt to utilize the obstruction procedure under the Code in a dispute between

a third party and the receiver''s transferee, which the Act in no way permitted. Only one case has been cited by respondents, to which the receiver

was a party and in which Section 18(3) could legitimately have been relied on, Anantarama Iyer v. Kovilamma (1916) 3 L.W. 504 . In it no doubt

the proceedings were taken under Order XXI, Rule 90 and regarded as u/s 47 of the Code of Civil Procedure. But the case was dealt with in

revision; it is not clear whether the insolvency and executing courts were distinct; and no objection to the jurisdiction of the latter or to the

procedure applied was considered, Sections 34 and 35 of the Provincial Insolvency Act being in fact referred to. The decision therefore does not

assist respondents or affect the conclusion that, when the receiver is the claimant and the property claimed has vested in him, his claim should be

made u/s 18(3) in the insolvency court.

9. The Lower Court therefore erred in refusing to enquire into the receiver''s petition. The other point decided in its judgment was that Ex. I, the

compromise decree under execution was not simply for money, but secured the amount due on particular properties. In terms, Ex. I only provides

that the insolvents shall pay an amount agreed on by a specified date and that in case of their default it shall be recoverable by sale of properties

attached before judgment, the attachment before judgment to continue in force until payment is made. The Lower Court''s decision purports to be

based only on Ex. I and that document contains none of the characteristics of a decree for a charge and adds nothing to the rights of 1st to 3rd

respondents as holders of a money decree, in execution of which an attachment has been made. The decision under appeal however was based

mainly on the conclusion against the procedure adopted by appellant. In setting that decision aside we therefore direct a rehearing in respect of the

character of the decree under execution with reference to any considerations other than those referred to, which may be relied on.

10. At the rehearing the lower Court will also consider any argument based on the application made by one of the insolvents to the executing

Court, in which appellant participated. As the facts are not in evidence, it is not clear whether his participation was by way of an application u/s 35

of the Provincial Insolvency Act or otherwise. In any event the effect of appellant''s acquiescence in the adverse order actually passed by the

Subordinate Judge on appeal from the order of the executing Court must be considered with reference to Section 34(3) and the good faith of the

4th Respondent''s purchase.

11. The appeal is allowed and the petition remanded for readmission and rehearing in the light of the foregoing and costs to date in the lower court

and here will be costs in the case and will be provided for in the order to be passed.

Seshagiri Aiyar, J.

12. I agree. The respondents obtained a money decree against the insolvents and some others on the 23rd October, 1914. On the 31st January,

1917 an application for adjudication was made. Notice was given on the 19th February 1917 to the respondents and the order of adjudication

was made on the 23rd March 1917. In June, the respondents applied for sale of the insolvents'' property. An application to stop the sale was, then

made. Apparently, the Official Receiver was not a party to the application although he seems to have supported the insolvents'' application by a

written statement. It also appears that an application to make the Receiver a party was rejected in April 1918. On the 6th July, 1917, the District

Munsif stopped the sale. On appeal the Subordinate Judge reversed that order. There can be no doubt that this order was wrong and it is to this

wrong view of the Subordinate Judge that all the subsequent complications are attributable. The sale was made on the 28th June 1918. An

application to set aside the sale was made by some of the scheduled creditors. Apparently it was not granted. The present application was made

on the 23rd September 1918 to the District Court to annul the sale. It may be that when the case goes back the petition will have to be amended

by asking for possession of the property as well. The District Judge has held that the Official Receiver bad no locus stands to impeach the sale by

means of a petition to the Insolvency Court. Hence this appeal.

13. I shall state my conclusions very shortly. u/s 16 of the Provincial Insolvency Act, the property vests in the Official Receiver as soon as an order

for adjudication is made. Any dealing with that property by any Court without notice to him will be ultra vires. Anantarama Aiyar v. Kovilamma

(1916) 3.L.W. 504 and Devaraju Aiyangar v. Tirumalasami Naidu (1915) 32 I.C. 489 support this view. If the sale held behind the back of the

Official Receiver is a nullity the further question is what is the remedy he is entitled to Mr. S. Ramaswami Aiyar contended that he must bring a suit

in the ordinary Courts to have his rights established. He mainly relied upon the absence of a provision in the Provincial Insolvency Act like Section

7 of the Indian Insolvency Act and the corresponding provisions in the English. Bankruptcy Act. I do not think this contention is well-found. There

was a conflict of decisions in the various High Courts as to whether even without a provision similar to Section 7 of the Indian Insolvency Act, the

Provincial Insolvency Court has no jurisdiction to direct delivery of property to the Receiver when it is moved by means of a petition. Section 4 of

the present Act has been so altered as to confer such a power. The amendment should not be regarded as if for the first time a new power has

been conferred. I am of opinion that Section 4 declares what has been the law all through. Apart from this, I think that Sections 16 and 18 read

together do invest the Insolvency Court with jurisdiction to direct that property in the hands of a third party be delivered over to the insolvent. Mr.

S. Ramaswami Aiyar relied upon the analogy of Order XL of the CPC relating to Receivers. I am prepared to accept the analogy but I do not

think that any of the cases quoted by him hold that where a sale is a nullity the Receiver is not entitled to move the court for possession being given

to him of the property. Reliance was placed upon the express provision in Section 37 of the Act for annulling sales made in anticipation of

insolvency. It was necessary to give such an express power to set aside a conveyance which prima facie vests the property in a third party; but

where the property. vests in the Official Receiver, the legislature apparently did not consider it necessary that a special provision should be made

that his rights should be dealt with in,a particular manner. The real question is whether the language of Section 18(3) is not comprehensive enough

to confer jurisdiction upon a Court of Insolvency to direct that possession be given to the Receiver. It clearly enacts that the court may remove the

person in whose possession or custody any such property is, from the possession or custody thereof. This implies that the property so removed can be put in possession of the Receiver. The learned Vakil for the respondent relied upon the proviso which lays down that the insolvent himself

must have a present right in order that the Official Receiver may exercise the right. The mere fact that there has been a court sale is not a ground

for holding that the insolvent has no present right to the property. The proviso refers to cases where owing to the act of the insolvent, the property

is substantially on a lease for a particular period or is under a usufructuary mortgage or the like. If I am right in the view that the court sale

conferred no right in the property to the purchaser when it was made behind the back of the Official Receiver, it follows that the insolvent as well

as his representative, the Official Receiver has a present right to the possession of the property. The decision in Nilmoni Chowdhry v. Dhurga

Charan (1918) 22 C.W.N. 704 dealt with the case of a benamidar. It was held by the learned Judges that an apparent title in a third party cannot

be summarily dealt with in the Insolvency Court. That decision does not affect the present case. I therefore do not discuss it further. On the other

hand the decisions quoted by Mr. K. V. Seshayyangar, namely, Raghunath Das v. Sundar Das Khetri ILR (1914) Cal. 72 Anup Kumar v. Kesho

Das ILR (1917) All 547 and Madhu Sudan Pal v. Parbati Sundari Dasya (1916) 35 I.C. 643 support his contention.

14. I therefore agree in holding that the order of the District Judge in C.M.P. No. 566 of 1918 must be reversed. The question as to whether the

Receiver is estopped and other defences that may be open to the respondents will have to be considered at the trial. I agree with the order as to

costs.