

(1963) 09 KL CK 0009
In the High Court Of Kerala
Case No : S.A. No. 1008 of 1959

Lukka Varghese

APPELLANT

Vs

Devasia Varkey

RESPONDENT

Date of Decision : 24-09-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 46B
Companies Act, 1956 — Section 446

Citation : AIR 1965 Ker 47

Hon'ble Judges : S. Velu Pillai, J

Bench : Single Bench

Advocate : Joseph Vithayathil, George Vadakkal, M.A. Joseph and Varghese Kalliath, for the Appellant; C.J. Anthony, for the Respondent

Final Decision : Allowed

Judgement

S. Velu Pillai, J.—In execution of a decree, the appellant judgment-creditor, attached a debt due to the judgment-debtor, a bank, from the respondent. On the motion of the appellant, notice under Order XXI, Rule 46-A was served on the respondent on the 10th February, 1955. The respondent entered appearance, and at his instance the case was adjourned to the 4th March, 1955; on that day, the respondent's prayer for a period of six months being allowed to him to deposit the amount of the debt, was disallowed. On the 1st April 1955, the Court passed an order under Order XXI, Rule 46-B and directed warrant to issue to the respondent. Upon this, the respondent made an application on the 6th October, 1955, for exemption from personal execution. While this was pending, the bank was ordered to be wound upon the 7th November, 1956, upon a petition presented on the 17th September, 1956. The respondent then applied for stay of proceedings purporting to be u/s 446 of the Companies Act, 1956. The two courts have allowed the application.

2. Section 446 Sub-section (1) has enacted : "When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no

suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with against the company, except by leave of the Court and subject to such terms as the Court may impose."

The question for decision is whether, when the final order under Order XXI, Rule 46-B was passed before the winding up proceedings commenced, the execution of that order can be considered to be a proceeding against the company so as to be within the ban imposed by Section 446. Order XXI, Rule 46-A of the Travancore-Cochin Civil Procedure Code, which was in force at the material time, provided for an order nisi by the issue of notice to the garnishee calling upon him to pay the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree or to appear and show cause why he should not do so. Order XXI, Rule 46-B provided for the order nisi being made absolute. It is useful to quote this Rule:

"Where the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution, or does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order being made, execution may issue as though such order were a decree against him."

The concluding part of the Rule is what is important. The final order is to be deemed to be a decree against the garnishee and necessarily in favour of the judgment-creditor; if so, it is logical to hold that the further proceedings are in execution of that decree and against the garnishee. But for this special procedure, the time-honoured method of proceeding against the attached debt by sale, and of realisation thereof by suit, would have to be resorted to. Such a proceeding by way of suit is against the garnishee; this is avoided by the short-cut invented by Order XXI, Rule 46-B. I see great force in the contention of the learned counsel for the appellant, that the proceedings which are now stayed by the court below, were not proceedings against the bank but were against the respondent. It seems to me to be of no relevance, that this proceeding had a nexus with the decree against the judgment-debtor and later with the attachment.

3. In English Law, where the garnishee does not appear and contest his liability, the order nisi may be made absolute, and execution may be levied against him. The effect of an order absolute is stated thus, in 16 Halsbury's Laws of England, third edition page 90, paragraph 136 :

"Upon the order being made absolute, the garnishee becomes liable to pay to the judgment creditor the amount due from him to the judgment-debtor, or as much as may be sufficient to pay the judgment debt and the costs of the garnishee proceedings.

Payment may be enforced by execution, or, where execution cannot be issued,

by an action on the order His (the judgment creditor's) right to the debt is further qualified by the fact that he takes it subject to all rights and equities attaching to it in the hands of the garnishee. If money has been ordered to be paid into Court, the judgment creditor is entitled to take it out.

.....Hence an order absolute will prevent the judgment debtor after its date from issuing execution of serving a bankruptcy notice in respect of the debt, if he has already obtained judgment upon it."

As to the service of the order nisi, it is stated thus at page 86, paragraph 128, of the same volume:

"The service of the order binds the debts specified in the hands of the garnishee, if they are debts capable of being attached at the date The judgment creditor does not thereby become a creditor of the garnishee in respect of such debts; but he at once acquires a right over them, entitling him to prevent the garnishee from paying his creditor. though he cannot, until the order is made absolute, insist on payment to himself."

From this it would follow, that upon the passing of the order absolute, the judgment creditor is entitled to "insist on payment to himself" by the garnishee. This supports the view I have indicated above.

4. The Subordinate Judge has relied upon *Anglo Baltic and Mediterranean Bank v. Barber and Company* (1924 (2) KB 410). In this case the judgment-creditor obtained a decree against a company after it had gone into voluntary liquidation: afterwards the company recovered judgment against a third party upon which the judgment creditor sought to attach the judgment-debt in garnishee proceedings. The effect of Section 186 of the Companies Act, 1908, was stated to be, that the assets of the company became divisible among the creditors *pari passu*. At page 417 Scrutton L.J. said:

"It is now the almost invariable practice when a company is in voluntary liquidation to stay proceedings in an action against it, because the result of allowing a judgment creditor to proceed to execution might be that, instead of the assets being divided among the creditors *pari passu*, the judgment-creditor, by enforcing his judgment, would obtain an advantage over the other creditors".

That garnishee proceedings are only a form of execution of the judgment was no doubt recognised and cannot be disputed, but the point of distinction in the case before the Lord Justice is, that the winding up of the company commenced, even before judgment was recovered against it and therefore the effect of an order absolute against the garnishee corresponding to an order under Order XXI, Rule 46-B, did not fall to be considered.

5. In *re, Stanhone Silkatone Collieries Company* (1879) (XI) Ch. 160 Jessel M. R., while recognising that an "attachment or garnishee order is a mode of enforcing by execution the payment of debt in the original action," said that

"the order that the debt be attached and that the garnishee, that is, the debtor of the original judgment-debtor, shall appear to show cause why he should not pay the debt, does not operate to give the plaintiff in the original action any security until it (the order nisi) is served. It is quite plain that the garnishee before service may pay his own creditor, that is, the original judgment-debtor and then the judgment-creditor would have no remedy under the order, but would have to issue execution against the judgment-debtor upon the original unsatisfied judgment. It is, in fact, an imperfect execution,.....".

According to James L.J, in the same case, execution against debts is indistinguishable on principle from execution against goods and chattels:

"the creditor is made his own sheriff, and he is allowed to make his own execution just as a landlord puts in a distress himself for rent.....

The writ of execution against goods does not prevail unless it has been actually executed. So the order of attachment, or the writ of attachment--they are the same thing in my opinion--does not prevail until it has been executed by being served upon the debtor. That being so, it appears to me it is an imperfect execution, which is defeated by the fact of the intervening bankruptcy or what is in this case equivalent to bankruptcy, namely, the winding up."

It would therefore seem that on service of the order nisi and on its being made absolute before the winding up, the result is different. In *re Roundwood Colliery Company, Leo v. Roundwood Colliery Company*, (1897 (1) Ch 373), what Stirling J. has said as follows seems apposite, to mark the distinction between an order absolute and an order nisi.

"The result, as I understand it, is this: that a creditor who has issued execution, or a landlord who has levied a distress, before the commencement of the winding-up will be allowed to proceed to sale unless there is established the existence of special reasons rendering it inequitable that he should be permitted to do so. On the other hand, the case of *In re Lancashire Cotton Spinning Co.*, (35 Ch. D. 656), shows that a creditor who does not issue execution or a landlord who does not levy a distress until after the commencement of the winding-up will not be allowed to proceed unless there are special reasons which render such a course inequitable."

In my judgment the case before me appears to fall within the former and not the latter class.

6. I therefore come to the conclusion, that the order nisi having been served on the respondent and having been made final and absolute, on the terms of Order XXI, Rule 46-B, the appellant is entitled to execute that order as a decree against the respondent, regardless of the fact, that the right of the appellant had sprung from the judgment recovered against the bank. A proceeding to execute the final order against the respondent cannot be construed to be a proceeding against the bank and is not within the prohibition of section 446 of the Companies Act,

7. I am not clear that the respondent had a locus standi to apply u/s 446; the charitable construction is, that he intervened not for his own sake, not to enable him to postpone payment, but to remind the Court of its duty to stay proceedings u/s 446 where the liquidator has not done his duty. However, it is unnecessary to pursue this.

8. The result is, that the order of the Sub-ordinate Judge confirming that of the execution Court is set aside and the appellant is allowed to proceed against the respondent according to law. The second appeal is allowed with costs throughout.