

(1929) 12 MAD CK 0014
In the Madras High Court

L.V. Narasimha Sastri

APPELLANT

Vs

The Official Assignee of Madras

RESPONDENT

Date of Decision : 18-12-1929

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : (1930) 59 MLJ 321

Hon'ble Judges : Ramesam, J;Cornish, J

Bench : Full Bench

Judgement

Ramesam, J.—This is an appeal against the order of our brother Kumaraswami Sastri, J., in the course of insolvency proceedings relating to

the insolvency of P. Kumaraswami Rao, in I. P. No. 263 of 1923. The facts out of which this appeal arises may be stated. The appellant before us

L. V. Narasimha Sastri got a decree against the insolvent in Order S. No. 282 of 1922 on the file of the District Munsif's Court of Cocanada on a

promissory note said to have been dated 28th January, 1921, and said to have been lost. This decree was sought to be executed against the

insolvent. It was transferred to Madras and in execution of it the insolvent was sought to be arrested on the 20th August, 1923. He at once sought

the protection of the Insolvency Court. In that petition"" he alleged that the promissory note on which this decree was obtained was a fictitious one

and that he was also not properly served with summons from the District Munsif's Court of Cocanada. In the schedule to the petition he showed

this decree debt as the only debt for which he was liable. He was duly declared insolvent and his properties vested in the Official Assignee.

Immediately the appellant sought to prove his debt by producing his decree. The Official Assignee held that the debt was not proved. There was

an appeal by way of notice of motion seeking to set aside the order of the Official Assignee. This was on 28th April, 1925. This petition was adjourned and, on 19th August, 1925, an order was issued for a Commission to examine witnesses. On 4th September two witnesses were examined on Commission (1) Mr. Y. Kameswara Rao, a First Grade Pleader of 28 years' standing of Cocanada, and (2) P. Bhimalingamurthi, a Municipal Councillor of Cocanada, but these were not cross-examined on that occasion. So a further Commission was ordered to issue for the cross-examination of these witnesses and On 24th October, 1925, these two witnesses were cross-examined. Afterwards two other witnesses, P. Subba Rao and the appellant himself were examined before the Official Assignee. P. Subba Rao was the original payee who was said to have endorsed the note to the appellant. The second witness Bhimalingamurthi was an attester and the first witness, the Vakil, says that the note was shown to him, that he issued the registered notice to the insolvent, that afterwards he filed the suit and in the interval the suit note was lost. On 1st February, 1926, the case was sent back to the Official Assignee. On 2nd November, 1928, the petition was ordered by the Assistant Registrar to be posted before the Court as nothing was done by the Official Assignee but it was not so posted. There were further adjournments in December, 1928 and finally on 11th January, 1929, the Official Assignee sent his report to the Original Side. On 21st January, 1929, the matter came up before our learned brother and he ordered the application of April, 1925, to be dismissed. The present appeal is against this order.

2. It appears that the only debt to which this insolvent is liable is this decree debt. If this decree debt is a spurious debt and is held to be no debt then there is no insolvency. A man cannot be insolvent without any debts to pay. But in the present case, because execution was attempted against him by arrest he applied to be declared insolvent and used the Insolvency Jurisdiction for attacking the nature of the debt and for contending that that was a fictitious debt. There is no doubt about the powers of the Official Assignee to investigate into the debts attempted to be proved before him whatever their nature may be and whether founded on a contract, loan or a judgment or a decree. In *Ex parte Revell*, *In re Tollemache* (1884)

13 Q.B. 720. Baggallay, L.J., says :

The rule is clearly stated by Lord Justice James, in *Ex parte Kibble* (1875) L.R 10 Ch. 373 thus: "It is the settled rule of the Court of Bankruptcy,

on which we have always acted, that the Court of Bankruptcy can inquire into the consideration for a judgment debt. There are obviously strong

reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. If a

judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relatives without any

debt being due on them at all; it is, therefore, necessary that the consideration of the judgment should be liable to investigation.

3. Then he proceeds:

I do not wish to lay it down as a rule that the Court should impure into the consideration for a judgment debt when nothing is shewn to justify the

inquiry. I am disposed to think that *prima facie* a judgment ought to be considered as binding. But, if a proper case is made, I think the Court ought

to direct an inquiry into the consideration for a judgment debt.

4. At page 725, Cotton; L.J., says :

In bankruptcy a judgment certainly stands in a different position from that in which it previously stood as against the debtor himself, because the

rights of the other creditors of the bankrupt have supervened. When a person is *sui juris* a judgment against him is a very strong *prima facie*

evidence against him of the existence of a debt; if he disputes it, he must satisfy the Court that there is some reason which requires that the

judgment should be set aside.

5. In *In re Flatau; Ex parte Scotch Whisky Distillers Ltd.* (1888) 22 Q.B. 83 Lord Esher, M.R., says :

When an issue has been determined in any other Court, if evidence is brought before the Court of Bankruptcy of circumstances tending to shew

that there has been fraud, or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to inquire into

the validity of the debt. But that the Court of Bankruptcy is bound in every case as a matter of course to go behind a judgment is a preposterous

proposition.

6. In *In re Saville. Ex parte Saville* (1887) 4 Morrell 277 the same learned Judge observes :

It does not decide that there being a judgment, on the mere suggestion of the debtor that the judgment debt is bad, the Court of Bankruptcy is bound to go behind the judgment and inquire into the validity of the debt. There is a judgment debt. That is a sufficient debt on which to found a bankruptcy. It is true, that if suggestions are made and some plausible evidence given, that the judgment debt does not really exist, the Court may well examine into it ... Nothing was offered against the circumstances except the statement of the debtor, which he had ample opportunity and which it was to his interest to bring forward before.

7. In the present case there seems to be some ground for suggesting that the insolvent was not properly served with summons in the District

Munsif's Court of Cocanada. At any rate it appears that he was not personally served though the service may be declared sufficient in law. When

he was arrested in August, 1923, he had an opportunity to contest before the District Munsif's Court to set aside the ex parte decree. Under

Article 164 of the Limitation Act he has 30 days to get that decree set aside, but not having done so the decree has now become incapable of

being set aside. The debtor himself, therefore, cannot get rid of that decree assuming it is a wrong or an unjust decree. This, of course, does not

prevent the Official Assignee in Insolvency from investigating into the nature of the debt if there are grounds for doing so. The cases I have cited

show that the basis of his jurisdiction and the reason for his investigating into judgment claims is the necessity of protecting other creditors. Where

there are no other creditors the reason for examining into this judgment-debt especially when the debtor himself allowed the opportunity he had to

pass by becomes much less. In *In re Van Lawn. Ex parte Chatterton* (1907) 2 K.B. 23 Cozens-Hardy, M.R., says :

The trustee in bankruptcy can say "You are a person who comes in to prove a debt. It is my duty to see that this bankrupt's assets are distributed

amongst those who are justly, legally and properly creditors of the estate. In order to enable me to do my duty, I ask you to furnish me with such

information as will enable me to do that which I am told to do by Rule 22 in the Second Schedule to the Act, to examine every proof and the

grounds of the debt".

8. Buckley, L.J., says:

The trustee is entitled to say "It is my business to see that those who seek to rank against this estate are persons who are really creditors of that estate".

9. In *In re Campbell. Ex parte Seal* (1911) 2 K.B. 992 a judgment was obtained which was opposed to the terms of the Money-lenders Act.

There was afterwards a further agreement with reference to that judgment. It was held that it is open to the Court to find that the judgment and the

further arrangement are both illegal and as they are opposed to the Money-lenders Act, are unlawful and void and constitute a criminal offence.

That case, therefore, does not help the respondent. In the present case, as already stated, the only purpose for which the judgment is being

attacked is to say that the decree debt was wrongly passed. If the contention of the Official Assignee is upheld then there is no reason for declaring

the insolvent an insolvent and if the insolvency is annulled his protection is lost and the decree can be executed against the insolvent by attachment

and arrest. In the latter case he will resort to insolvency again. Thus, we got into a vicious circle. I do not think this jurisdiction of the Official

Assignee to inquire into debts could be used as a device to escape the execution of a decree where the only debt of the insolvent is the decree and

there are no other debts. It seems to me that the Insolvency Jurisdiction should not be used as a device to evade execution of a decree which has

become final and unimpeachable as in the present case. However, evidence has been adduced by the appellant. His vakil, R.W. 1, says that he

saw the promissory note. It is true that such evidence cannot prove the genuineness of the note. It only shows that the alleged note was shown to

the vakil for the purpose of issuing a notice but that takes the appellant's case to a certain stage. Then we have got the evidence of R.W. 2. He

was the attestor. He was a Municipal Councillor of Coca-nada. Though it does not appear that he is a man of very affluent circumstances nothing

is elicited against him as to why he should join in a conspiracy to support the alleged note or why he should depose against the insolvent. Then

there is the evidence of the appellant which of course is somewhat interested but it must be remembered after all that he is only the endorsee of the

note and not the original lender, the original lender being R.W. 3, P. Subba Rao. The Official Assignee in his report relies on two circumstances:

(1) that the summons was not properly served and, therefore, the insolvent is not bound by the decree. In the first place it is for the Court which

passed the decree to inquire into the question whether the summons was properly served. (2) He relies upon a judgment in Madras Small Cause

Court Suit No. 9738, a suit instituted by the insolvent against an Advocate of this Court, Mr. P.C. Venkataramanayya Pantulu for a sum of Rs.

600 and odd. In that suit it was the case of the insolvent that the Rs. 1,300 admittedly sent by Subba Rao according"" to both the parties was sent

not as a loan but as payment on behalf of Mr. P.C. Venkataramanayya, who owed Rs. 2,500 to the insolvent and that suit was for Rs. 600 settled

by mediators as the sum still due in respect of the balance of Rs. 1,200. The subject-matter of this suit is not this Rs. 1,300 but the remaining Rs.

1,200. The appellant before us was not a party to that suit. The Small Cause Judge decreed the suit for Rs. 600 and odd. Incidentally he made

remarks about the nature of the payment of Rs. 1,300. Surely observations in a judgment relating to a different matter though connected cannot

bind a third party and the judgment itself cannot be evidence against him. The appellant was not a party to that suit and he had no opportunity to

cross-examine the witnesses there. The Official Assignee beyond referring to the judgment of the Small Cause Court and the fact that the summons

was not properly served did not go into the matter or examine evidence. The evidence for the appellant was not contradicted by either evidence on

behalf of the insolvent or the Official Assignee. The respondent now asks for a further opportunity of adducing further evidence. We do not think

there is a case made out for further evidence. The Official Assignee was content to report before the learned Judge on the materials available then,

We do not think this is a case in which the suspicions that have been suggested against the appellant's case ought to be allowed to practically

vacate the decree of the District Munsif's Court of Cocanada, especially when it is the only debt subsisting against the insolvent. We think the debt

must be regarded as proved and we, allow the appeal.

10. The Official Assignee will pay the appellant's and his own costs out of fees of his Office Charges Fund. No costs in the Lower Court for both

sides.

Cornish, J.

11. I am of the same opinion. Although the debtor was probably ignorant of the suit filed by the creditor in the Cocanada Court he certainly

became aware that an ex parte decree had been passed against him when he was arrested in execution of the decree. Instead of taking steps to

have the decree set aside--and his omission is the more remarkable because in a subsequent affidavit he described the decree as a fraudulent

decree--the debtor apparently preferred to take refuge in the insolvency Act and to get himself adjudicated an insolvent. Order 9, Rule 13, Sch. I,

Civil Procedure Code, provides a simple procedure for getting an ex parte decree set aside, and Article 164 of the Limitation Act prescribes the

time within which steps must be taken. By allowing this decree to stand, therefore, the debtor permitted strong prima facie evidence of the validity

of the debt to remain. No doubt the Official Assignee acted within his rights in investigating the circumstances in which this decree was passed. As

observed in *In re Van Laun. Ex parte Chatterton* (1907) 2 K.B. 23 .

The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the

debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him,

can deprive the trustee of this right.

12. It was open to the Official Assignee, therefore, to satisfy by evidence the Insolvency Court that, either on account of fraud or collusion or

miscarriage of justice, the Court should go behind the decree and invalidate the decree-debt. But the only evidence--and I am assuming that it is

evidence by reason of Rule 117 of the Insolvency Rules--before the Insolvency Court was the report of the Official Assignee, and the only ground

given in the report for treating the decree as not binding on the debtor is the Official Assignee's finding that the summons in the suit was not

properly served on the debtor. The only reason given in the report for discrediting the evidence of the creditor and his witnesses in support of his

claim is a bare reference to a quite irrelevant finding (that is to say, irrelevant to this enquiry), by the Judge of the Small Cause Court in a suit

between the debtor and some other person, to which the creditor was not a party and in which he did not give evidence. In my opinion these

materials are not sufficient evidence either of collusion or of fraud or of

miscarriage of justice as would justify the Insolvency Court in invalidating the decree and holding that the debt is not binding upon or proved against the debtor.