

(1950) 02 KL CK 0001
In the High Court Of Kerala
Case No : S. No. 648 of 1123

Mahammathu Abubaker and Another

APPELLANT

Vs

Ouseph Chekku

RESPONDENT

Date of Decision : 28-02-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 13(2)
Insolvency Act, 1090 — Section 33

Citation : AIR 1950 Ker 97

Hon'ble Judges : K.T. Koshi, J;Gangadhara Menon, J

Bench : Division Bench

Advocate : K.P. Abraham, for the Appellant; T.K. Sankara Menon, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal is by the Plaintiffs. They were Plaintiffs in an administration suit, O.s. No. 75 of 1104 on the file of the Parur District court. When that Court passed the preliminary decree in that suit the Plaintiffs were appointed receivers for the properties of the deceased debtor with authority to collect the outstanding through Court or otherwise. The debtor was the foreman of a chitty which had acquired even during his life time. The present suit was to enforce payment of the money due under a hypothecation bond executed by the Defendant, who was a subscriber for a half ticket. The Defendant admitted default of payment of the subscriptions, but contended that the amounts due by him were set off against amounts due by the foreman to certain non-prized subscribers, whose rights he had obtained and that he had obtained a decree for the balance due to him in O. S. No. 71 of 1104 on the file of the Parur District Court. To that suit the legal heirs of the deceased foreman as also several non-prized subscribers including the present Plaintiffs were made Defendants. The learned District Munsiff of Parur who disposed of the suit found that the defence raised was a valid one and accordingly non-suited the Plaintiffs. Hence this appeal.

2. Exhibit 1 is a copy of the decree in O. S. No. 71 of 1104 and Ex. II is the decree of the High Court confirming the decree passed by the District Court. Exhibit III is a Copy of the District court judgment in that case. These three documents indubitably show that the decree passed in that suit in favour of the present Respondent was after setting off the amounts due by him to the foreman of the chitty in respect of the hypothecation bond now put in suit. That fact is not disputed either. The contention raised on behalf of the Appellants is that as the decree was passed during the pendency of O. S. No. 75 of 1104, to administer the estate of the deceased foreman the set off effected by the plaintiff in O. S. No. 71 of 1104, was not valid and that it cannot bind the estate of the deceased foreman. It was urged that the set off was made when the debtor's estate was involved circumstances and that that gave the non-prized subscribers a charge in their favour over the entire chitty assets and that the result of giving effect to the set off would be to give some non-prized subscribers or rather their representative-in-interest, the present Respondent, an undue preference over other non-prized subscribers, There is no allegation, much less proof, that when the suit O. S. No. 71 of 1104 was filed the deceased foreman's estate was not solvent. Though the Plaintiffs were parties to that suit the plaintiff in the present suit proceeds as if nothing had happened to the hypothecation bond sued upon. Even when the Defendant set out in his written statement that in O. S. No. 71 of 1104, the amounts due under the bond now sued upon were set off the Plaintiffs did not file any replication or otherwise show that there was any infirmity attached to that set off Even if these defects in the pleadings be ignored, it is difficult to sustain the contention raised before us or to hold that the lower Court's decree dismissing the suit is wrong.

3. The Respondent effected the set off now pleaded by him even before O. S. No. 75 of 1104, was instituted. The plaintiff in O. S. No. 71 of 1104, claimed only the balance after such set off. It was not disputed that when O. S. No. 71 of 1104 was instituted the legal heirs of the deceased foreman were competent to give a valid discharge with respect to the claim under the hypothecation bond now sued upon. Had the Respondent paid the amount to them no Court could have compelled him to pay the same over again a second time. The preliminary decree in the administration suit was passed only on 19-6-1108 while the decree in O. S. No. 71 of 1104 was passed on 14-3-1106. The legal heirs of the deceased foreman must be deemed to have realised the amount due under the bond on the date when the plaintiff in O. S. No. 71 of 1104 was filed four years before the preliminary decree in the administration suit was passed. Order 20, Rule 13(2), CPC (CPC) so far as it is relevant for our present purpose, provides that when it appears in an administration suit that the estate of the deceased is insolvent, the rules that are in force for the time being with respect to the estates of persons adjudged or declared insolvent shall apply as regards the respective rights of secured and unsecured creditors and the debts and liabilities provable. Under the insolvency law in force in Travancore in 1104 (Section 33, Insolvency Act of 1090) payments made to or realizations made by creditors before adjudication

were protected. See 16T.L.J. 166 (F.B.). Another Full Bench decision reported in the same volume (16 T.L. J. 152) decided that the words "date of the order of adjudication" in Section 33 cannot be construed to mean the date of the presentation of the petition of insolvency to which the order of adjudication relates back by virtue of Section 16 Clause (6) and that those words meant nothing more or less than the date on which the order of adjudication is made. When that law is applied to administration suits, the date of adjudication is equivalent to the date of the preliminary decree. See 32 T.L.J. 525. In that case the District Judge held that creditors when they prove their claims in an administration suit have to give credit to the amounts they realized before the passing of the preliminary decree and that such amounts should be deducted from the dividend due to them in the administration suit. The High Court reversed the District Judge's decision and held that the amounts realised prior to the preliminary decree are not to be taken into account in adjusting the rights of the parties. The present is an a fortiori case in that the realization was made even before the administration suit was instituted. There is therefore no merit in this appeal. We confirm the lower Court's decision and dismiss the appeal with costs.