
(1941) 12 PAT CK 0017
In the Patna High Court

Maharajadhiraj Sir Kameshwar Singh Bahadur

APPELLANT

Vs

Kuleshwar Singh and Others

RESPONDENT

Date of Decision : 17-12-1941

Acts Referred:

Companies Act, 1956 — Section 232, 277N
Provincial Insolvency Act, 1920 — Section 47

Citation : AIR 1942 Patna 508

Hon'ble Judges : Shearer, J;Chatterji, J

Bench : Full Bench

Judgement

Chatterji, J.—These seven appeals arise out of seven analogous execution cases started by the same decree-holder, the Maharaja of Darbhanga, against the same judgment-debtors, Babn Kuleshwar Singh and others, in the Court of the Subordinate Judge at Bhagalpur. The decrees under execution in all these cases are money decrees, and the total claim amounts to about Rs. 1,17,000. The earliest of these execution cases is No. 224 of 1937 which was filed on 9th September 1937. A sum of Rupees. 1,25,000 was in deposit in the Benares Bank at Bhagalpur in the name of Kuleshwar Singh's deceased wife Mt. Debeshwari Bahuasin. The decree-holder prayed for attachment of this money on the allegation that it actually belonged to Kuleshwar Singh who had deposited it in the name of his wife. The prayer for attachment was allowed and the attachment was effected on 15th September 1937. The Benares Bank put forward the objection that the money did not belong to the judgment-debtor. The Subordinate Judge allowed this objection and withdrew the attachment on 22nd February 1938. The matter came up to this Court which by its order dated 18th November 1938 restored the attachment and directed that garnishee proceeding under Order 21, Rule 63C, Civil P.C., be started.

2. Mt. Debeshwari Bahuasin had died on 17th April 1937 leaving a will in favour of her daughters-in-law Biseshwari and Tarkeshwari. These two ladies filed on 11th January 1938 a claim under Order 21, Rule 58, Civil P.C., alleging that the attached money belonged to their mother-in-law Mt. Debeshwari Bahuasin and

on her death they became entitled to the money by virtue of the will executed by her. They had already applied for probate of the will in the Court of the District Judge of Darbhanga. The claim case, however, was eventually dismissed for default on 28th January 1939. On 30th January 1939 the decree-holder filed an application for issue of notice on the Benares Bank under Order 21, Rule 63A, Civil P.C., calling upon the bank to show why the amount in deposit should not be paid into Court. Notice was issued accordingly, on receipt of which the bank wrote a letter dated 10th February 1939 to the Court saying that the amount in deposit was insufficient to cover the full amount under attachment. Later, on 9th March 1939, the bank applied for and obtained one month's time to make inquiries and ascertain the names of the legal representatives of the deceased depositor Mt. Debeshwari Bahuasin so that they might be impleaded under Order 21, Rule 63C, Civil P.C., and an order passed in their presence. On 1st May 1939 the bank filed an application in the Allahabad High Court for grant of moratorium u/s 277N, Companies Act, and on or about 4th May payment was suspended. On 5th May 1939, the decree, holder made an application praying for issue of notice on the bank to deposit the attached amount in Court forthwith. The Court accordingly issued a notice on the bank on 9th May 1939. The bank on receipt of this notice filed a petition on 24th May 1939 stating that an application had been filed in the Allahabad High Court for grant of moratorium u/s 277N, Companies Act, and payment had been suspended, and, therefore, the bank could not be compelled to deposit the attached amount in Court at that stage.

3. On 1st August 1939 one Bata Krishna Das applied to the Allahabad High Court for winding up the bank. On 17th August 1939, the bank's application for grant of moratorium was rejected. On 31st August 1939 the executing Court at the instance of the decree-holder wrote to the manager of the bank requesting him to deposit the attached amount in Court. On receipt of this letter the bank filed a petition on 25th September 1939 stating that as the matter of winding up was pending before the Allahabad High Court, the bank could not give preference to any one of its creditors, and praying that the letter be withdrawn. On 26th September 1939 the Court passed the following order:

Heard both sides. The prayer for moratorium has been rejected. The bank should have thus no objection to bring the money within the custody of the Court. It was attached long ago. Now it is said that the proceedings for winding up are pending. This might be but this is no ground for withholding the money. I give one chance. Let the bank deposit the attached money in Court by 16th November 1939.

4. On 18th November 1939, the bank asked for time to obtain stay order from the Allahabad High Court. Time was allowed till 1st December 1939. On the latter date the execution cases were stayed pending further orders of the Allahabad High Court. On 15th January 1940, the decree holder filed a petition stating that the stay order had been vacated by the Allahabad High Court and praying that the bank be directed to deposit the attached amount in Court. A

letter was written accordingly to the bank. On 12th February 1940 the Allahabad High Court passed an order for winding up and appointed a liquidator. On 28th February 1940, the bank intimated this fact to the executing Court. The decree-holder then on 26th April 1940 obtained leave from the Allahabad High Court to proceed against the Official Liquidator. On 21st May 1940 the decree-holder filed a petition in the executing Court for adding the Official Liquidator of the bank as a party. This was allowed. On 28th May 1940 the Court issued notice on the Official Liquidator to deposit the attached amount in Court. On 12th July 1940 the liquidator stated that he was unable to deposit the amount and that all the depositors would have to be paid rateably after realisation of the assets. On 24th July 1940 the decree-holder made an application with the following prayer:

It is therefore prayed that your honour would be graciously pleased to order the said garnishee to comply with the terms of the notice already served on him and on such order execution may be issued against him (the said garnishee) as though such order were a decree against him, as contemplated under the provisions of Order 21, Rule 63B, Civil P.C.

5. Notice of this application being served on the liquidator, he filed a petition on 19th August 1940 in which he raised the following objections:

(a) The attachment effected prior to the date of winding up order cannot give him any preferential claim over the other unsecured creditors and the decree-holder is only entitled to share pro rata in the dividend, if and when declared.

(b) That no order having yet been passed on the application of these petitioners for enquiry and decision under Order 21, Rule 63C and the petitioner's objections not having been disposed of according to law, the notice for deposit of money is premature and cannot operate as decree.

(c) That the decree-holder has already filed a claim, sometime after the leave of the High Court was granted under provision of the Indian Companies act and the rules framed thereunder and has submitted to the jurisdiction of Official Liquidator and company Court, and the decree-holder cannot now be allowed to proceed with execution oases, his remedy now is only to proceed according to the provisions of the Indian Company law and rules framed thereunder.

(d) That the notice dated 30th May 1940 was not in order as no orders could be passed for depositing the amount in deposit without going through entire procedure laid down in Order 21, Rules 63A to H.

6. The learned Subordinate Judge, by his order dated 23rd September 1940, disallowed the second and fourth of these objections of the bank, but gave effect to the other two. He held that the decree holder, as an attaching creditor, had no preferential claim and must "take pro rata and await winding up proceedings." He also held that the decree-holder could not proceed in execution against the liquidator without the leave of the Allahabad High Court. Being dissatisfied with this order, the decree-holder has filed these appeals.

7. Sir Manmatha Nath Mukherji on behalf of the appellant contends, in the first place, that the attachment having been effected and order having been passed on the bank to deposit the money in Court long before the winding up order was passed, the Official Liquidator took the assets of the bank subject to the attachment. He relies on the decision in *Amrita Lal Kundu v. Anukul Chandra Das* AIR 1916 Cal. 918. In that case certain moveable property of a company with limited liability was attached in execution of a decree, and before it was sold the company went into voluntary liquidation, The liquidator sought to stay the sale and release the attachment. This was refused. The property was then sold and the sale proceeds brought into Court. It was held that the distribution of the proceeds in Court must be governed by the provisions of the Code of Civil Procedure, and that the attachment and sale could not be set aside at the instance of the liquidator. Reliance is also placed on *Kayasth Trading and Banking Corporation v. Satnarain Singh* A.I.R. 1921 All. 149. That was a case in which long before the proceedings for winding up a company were started, certain immovable property belonging to the company was attached in execution of a decree and the property was ultimately sold after the winding up order was passed. The Official Liquidator applied to have the sale set aside u/s 232, Companies Act, on the ground that the sale of the property was putting into force of an execution without the leave of the Court. It was held that for the purpose of that section the execution was put into force on the date the property was attached, and as that date was long anterior to the date of the application for winding up, the sale was not invalid.

8. These decisions have no application to the facts of the present case. Here no property of the bank has been attached or sold nor any sale proceeds brought into Court. Here the attachment was made under Order 21, Rule 46, Civil P.C. What was attached was not the property of the bank, but the money that was due by the bank to the judgment-debtor. The effect of the attachment was to prohibit the bank from making payment to the judgment-debtor. It did not confer on the decree-holder any higher right than the judgment-debtor himself had as against the bank. The decree-holder stood in the shoes of the judgment-debtor. The judgment-debtor as a creditor of the bank could claim no preference over its other creditors. It is true that the Court on the application of the decree-holder repeatedly passed orders on the bank to deposit the attached money in Court, and the bank also at one stage in a manner expressed its willingness to do so. But the Court merely by reason of the attachment could not compel the bank to deposit the money. Order 21, Rule 46(3), Civil P.C., provides:

A debtor prohibited under Clause (i) of Sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the sum.

9. The debtor is thus given the option to pay the amount into Court. There is nothing in Order 21, Rule 46 which authorises the Court to pass an order by which the judgment-debtor's debtor can be compelled to deposit the amount of

his debt in Court. If the debtor does not pay the amount of the debt into Court in accordance with Order 21, Rule 46(3), the decree-holder may adopt the procedure laid down in Order 21, Rules 63A and 63B. Under Rule 63A, "The Court on the application of the decree-holder may order a notice to issue calling upon the garnishee to appear before the Court and show cause why he should not pay into Court the debt due from him to the judgment-debtor." Rule 63B(1) provides:

If the garnishee does not pay into Court the amount of the debt due from him to the judgment debtor, and if he does not appear in answer to the notice issued under Rule 63A, or does not dispute his liability to pay such debt to the judgment-debtor, then the Court may order the garnishee to comply with the terms of such notice and on such order execution may issue against the garnishee as though such order were a decree against him.

10. No order under Rule 63B(1) appears to have been passed against the bank. The decree-holder for the first time made an application for an order under this rule on 24th July 1940, that is, after the bank had gone into liquidation. It is thus clear that before the bank went into liquidation there was no valid order by which it could be compelled to deposit the attached money in Court. Sir Manmatha Nath Mukherji, on the authority of the decision of this Court in *Ram Sunder Rai Vs. Ram Dheyan Ram*, contends that when the executing Court passed an order on the bank to deposit the attached money in Court, the money became the decree-holder's money and the bank held it merely as trustee on his behalf. In the said case the decree holder had attached before judgment certain amount in the hands of the District Board of Arrah which was payable to the debtor. After obtaining the decree the decree-holder took out execution, and on his application a precept was issued by the executing Court directing the District Board to pay over the attached money to the decree-holder. In the meantime the judgment-debtor had filed an application for insolvency, and just after the issue of precept by the executing Court he made an application to the insolvency Court, praying for an injunction directing the District Board to stop payment. The decree-holder opposed this application, but the insolvency Court, disallowing his objection, issued an injunction as prayed for. Against this order the decree-holder preferred an appeal to this Court. This Court allowed the appeal, holding that u/s 47, Provincial Insolvency Act (3 of 1907), read either with Order 39, Rule 1 or Section 151, Civil P.C., the insolvency Court had no power to issue the injunction. In this view, their Lordships said, it was unnecessary to discuss the meaning of the phrase "assets realised" in Section 34, Provincial Insolvency Act, but they observed that if it were necessary to do, they thought in that case the assets were realised. Then they proceeded as follows:

There was no order of the civil Court upon the District Board to send the money to the Court and, therefore, the authorities which hold that where money has been ordered to be deposited as assets it cannot be considered to have been realised till it reaches the Court do not apply. In this case the District Board were

directed on 2nd June to pay the money to the decree-holder and from that time the money became the decree-holder's money and the District Board mere trustees on behalf of the decree holder. The assets, so far as the judgment-debtor was concerned, became assets realised by the decree-holder in the possession of the District Board on behalf of the decree-holder.

11. It thus appears that this observation was a mere obiter and the distinction was also recognised that if there had been an order of the civil Court upon the District Board to Bend the money to the Court, the money could not be regarded as "assets realised" till it reached the Court. This case therefore is really no authority for the contention advanced. It is not disputed that an attachment by itself gives no preferential right. The orders which were passed from time to time by the executing Court calling upon the bank to deposit the attached money in Court did not and could not improve the decree-holder's position in any way. His position still is that of an unsecured creditor. The bank having gone into liquidation, he should, if he wishes to pursue his remedy against the bank, proceed according to the provisions of the Companies Act. His rights will be controlled by Section 229, Companies Act. In other words, he must take pro rata and await winding up proceedings.

12. The next contention of Sir Manmatha Nath Mukherji is that the learned Subordinate Judge erred in holding that the leave of the Allahabad High Court to proceed in execution against the Official Liquidator is necessary. Section 171, Companies Act, runs as follows:

When a winding up order has been made or a provisional liquidator has been appointed no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

13. It is argued that the leave of the Allahabad High Court was already obtained on 26th April 1940. The leave was granted in these terms: "Leave to the applicant to "proceed with" several proceedings referred to in the written affidavit against the Official Liquidator." After obtaining this leave the decree-holder on 21st May 1940 impleaded the Official Liquidator in the execution oases. Mr. Section K. Mitter on behalf of the Official Liquidator suggests that the leave was granted only for the purpose of the garnishee proceedings and it did not authorise the decree-holder to proceed in execution against the bank. This appears to be correct. Neither the application for leave nor the affidavit by which it was supported has been produced. If the leave had been intended to authorise execution against the bank, the Court would have imposed such terms as would be considered necessary for the protection of the bank. The leave was granted merely to "proceed with" the pending execution oases. The bank was merely in the position of a garnishee. Until the requisite garnishee order was obtained, there could be no execution against the bank. To obtain a garnishee order is one thing; to levy execution against the garnishee is quite another. The leave granted may entitle the decree-holder to obtain a garnishee order, but it is not by its

terms sufficient to authorise execution against the bank. The learned Subordinate Judge's decision in this respect, therefore, cannot be said to be wrong. Lastly it is contended by Sir Manmatha Nath Mukharji that but "for the trickery played by the bank the decree-holder would have realised his money long ago and that the bank cannot be allowed to gain any advantage by means of such triokery. He relies on the decisions in *Armborduct Manufacturing Company, Limited v. General Incandescent Co.* 2 K.B. 143 and *Anglo-Baltic & Mediterranean Bank v. Barber & Co.* (1924) 2 K.B. 410. In the first case the facts were these:

The plaintiffs obtained judgment against the defendant company on 24th February 1911, and their solicitor applied on 25th February to the company's solicitor to obtain and send to him the company's cheque in payment of the judgment debt. The plaintiffs' solicitor was led to believe by the solicitor and by a director of the company that a cheque would be sent in a few days, and in consequence he delayed issuing execution, but he was not told, and did not know that on 25th February a notice had been sent out convening a meeting of the company for 6th March for the purpose of passing a resolution for the voluntary liquidation of the company on the ground that the company was unable to pay its debts. The meeting was held on 6th March and the resolution for voluntary liquidation was passed. On the same day the judgment debt not having been paid, the plaintiffs issued execution.

14. Upon these facts it was held that "the postponement of execution had been caused by a trick on the part of the defendant company, and that the plaintiff, therefore, ought not to be prevented from proceeding with their execution." In the second case the facts were:

The manager of a company fraudulently and without authority accepted bills of exchange in the company's name, and upon those bills the company was sued to judgment by the holders. After the " commencement of the action the company went into voluntary liquidation. The company subsequently recovered judgment in an action against a third party for damages for having wrongfully facilitated the commission of the above fraud, and for having thereby rendered the company liable on the bills. The judgment creditors in the first action then sought to attach under a garnishee order the money so payable to the company by the third party.

On an application by the company to stay the garnishee proceedings it was held that where a judgment is recovered against a company which is in voluntary liquidation the invariable practice of the Court is to stay execution of the judgment unless there are very exceptional reasons for exercising its discretion otherwise, and the fact that the only right of the company to recover the money claimed from the garnishees was based upon the company's liability to the judgment creditors was not such an exceptional circumstance as to take the case out of the general rule,

15. In both these cases there was a question of fraud. In the present case it is impossible to hold that the bank played any fraud with the decree-holder. The attached money did not stand in the account of the bank in the name of the judgment-debtor and further at the time of the attachment the depositor Mt. Debeshwari Bahuasin was dead. The bank was, therefore, justified in putting forward an objection which was accepted by the trial Court. As a matter of fact the daughters-in-law of the deceased depositor filed a claim case under Order 21, Rule 58, Civil P.C., which remained pending till 28th January 1939. The bank by its petition dated 9th March 1939 pointed out the necessity of passing an order after impleading the legal representatives of the deceased depositor under Order 21 Rule 630, Civil P.C. In the meantime apparently some complications arose in the affairs of the bank on account of which proceedings were started in the Allahabad, High Court for its winding up. Ultimately the Court passed an order for winding up. It is not a case of voluntary liquidation. In these circumstances it is difficult to see how the bank can be charged with fraud. Moreover, it is to be remembered that the bank is not the judgment-debtor. All the contentions raised by the appellant fail. I would accordingly dismiss the appeals with costs: one set of hearing fee.

Shearer, J.

I agree.