
(1953) 04 MAD CK 0046

In the Madras High Court

Case No : Petn. No. 134 of 1952 and Application No. 229 of 1953

Official Assignee of Madras

APPELLANT

Vs

A.P. Subramania Mudaliar and Others

RESPONDENT

Date of Decision : 06-04-1953

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 53

Citation : (1953) 2 MLJ 272

Hon'ble Judges : Panchapakesa Ayyar, J

Bench : Single Bench

Advocate : M.A. Rajagopalan, for the Appellant; V. Radhakrishnaiyya and M.K. Harihara Ayyar, for the Respondent

Final Decision : Allowed

Judgement

Panchapakesa Ayyar, J

1. This is a petition by the Official Assignee, Madras, for orders declaring that respondents 2 and 3 have no manner of right to the amount Rs. 3,132-0-0. deposited in C. S. No. 132 of 1952, on the file of this Court, and that the applicant alone is entitled to the same, and for an order permitting the applicant to draw out the said amount of Rs. 3,132-0-0.

2. The facts were briefly these. The Official Assignee is in charge of the properties of the insolvent, and the insolvency petition was admitted on 12-12-1952. Respondent 3 filed O. S. No. 6G2 of 1952 against the insolvent and obtained attachment before judgment of a house of the insolvent (who had not become an insolvent by then) subject to a mortgage. He got a decree in that suit, for Rs. 9,265/- or so, on 23-7-1952, and the interim attachment was made absolute on 23-7-1952. At the instance of the mortgagee of the house, the auctioneers, Murray & Co., sold the house. After discharging the mortgagee's dues, a balance of Rs. 3,132-0-0 remained. Respondent 2 filed C. S. No. 139 of 1952 on the file of this Court against the insolvent for dissolution of partnership

and accounts, and took out a direction against the auctioneers and the mortgagee for depositing the balance of Rs. 3,132-0-0 into Court. On 23-2-1953, the said amount was directed by this Court to be deposited in Court to the credit of C. S. No. 139 of 1952, to be disposed of, later on, by paying out to the correct party entitled to receive it.

On 8-11-1952, respondent 3 filed E. P. No. 2388 of 1952, in O. S. No. 632 of 1952, in the City Civil Court, Madras, praying for the issue of an order for depositing the excess proceeds, of the sale held by the mortgagee through the auctioneers on 23-10-1952, or, in other words, for bringing the excess of Rs. 3,132-0-0 into the City Civil Court, for respondent 3 to take the money out by way of execution and part satisfaction of his decree in O. S. No. 662 of 1952. The City Civil Court Judge passed an order on 10-11-1952: "Interim Pro. Order and notice 29-11-1952". But, as a matter of fact, it is admitted that the amount was not taken to the City Civil Court or put to the credit Of O. S. No. 662 of 1952 and the E. P. therein before 12-12-1952, the date when the insolvency application was admitted. The amount still remains in this Court.

3. The question, under these circumstances, is whether the rights of the O.A. to the amount of Rs. 3,132-0-0 should prevail over the rights of respondents 2 and 3 u/s 53, Presidency Towns Insolvency Act, as it stands amended now by Act 3 of 1950.

4. Respondent 2 does not contest the application by the O. A. Respondent 3 appears by counsel and contests. I have heard the arguments of the learned O. A. and the learned counsel for respondent 3, and I have no hesitation whatever that the O. A.'s application should be allowed and he permitted to draw out the said amount of Rs. 3132-0-0, and respondent 3, the attaching creditor, left to his remedies, like other ordinary creditors, of proving his debt and applying for a dividend before the O. A.

5. Mr. Harihara Iyer, for respondent 3, urged that, as respondent 3 had not only got an interim order of attachment but also an absolute order of attachment and an interim prohibitory Order and notice, before the admission of the insolvency petition on 12-12-1952, respondent 3's claim should prevail over the O. A.'s, and respondent 3 should be allowed to have the sum of Rs. 3132-0-0 sent to the City Civil Court to the credit Of O. S. No. 662 of 1952, & the E. P. therein, so that it may be drawn out by him in part satisfaction of his decree.

6. The learned O. A. relied on a Pull Bench, ruling of this Court in -- "Kristnaswamy Mudaliar v. Official Assignee, Madras", 26 Mad 673 (A). There it was held that the effect of an attachment under the CPC is only to prevent alienation and that it does not confer title but only gives the judgment-creditor certain rights in execution, and that an attachment win not operate when those rights are not exercised before the presentation of a petition in insolvency so as to create in favour of the Judgment-creditor a title which prevail against that of the Official Assignee under the vesting order in insolvency, made after the order

of attachment.

Though the Privy Council seems to have remarked in --- "Anantapadmanabhaswami v. Official Receiver, Secunderabad", AIR 1933 PC 131 (3), that the above Full Bench decision required reconsideration, they actually refused to go into the question of its correctness or otherwise in that case, as it was unnecessary for them to do so. A Full Bench of this Court in -- Kandaswami Chettiar Vs. A.R.M. Annamalai Chettiar, , re-affirmed the correctness of the previous Full Bench decision and said that an attaching creditor was not in the position of a secured creditor and the fact of his attachment would not prevail against the O. A.'s rights in insolvency, as the assets had not been realised in the course of the execution by sale or otherwise. Nor can Mr. Harihara Iyer's reliance on the interim prohibitory order passed by the City Civil Judge, on 10-11-1952, before the admission of the insolvency petition, be of any avail to him, as even that would not amount to "realisation of the assets", but only to "an attempt to realise the assets".

In -- Mepatti Sambayya Vs. The Official Receiver, Guntur and Others, , Raghava Rao J. has held that the mere order, on an execution petition, to send for the money of the judgment-debtor would not be tantamount to an order "realising the assets" within the meaning of Section 51, Provincial Insolvency Act (the wording of Section 53, Presidency Towns Insolvency Act is the very same now), and that, therefore, when a petition to adjudicate the judgment-debtor is filed a few days after such an order, and the money is not "in fact" received by the Court before the date of the petition, the prior order sending for the money cannot have the effect of bringing into operation the exception referred to in that sub-section, and will not avail against the O. R. (here the O. A.) in insolvency. That decision covers the point in question, and I fully agree with the principle therein. It has been held by a Bench of this Court in -- D.D. Italia and Another Vs. The Official Assignee of Madras and Others, , that a mere attachment creates no charge, and that an attaching creditor is in no better position than any other ordinary creditor. That is, of course, the correct position in law so far as this State is concerned.

7. This petition is, therefore, allowed, but, in the peculiar circumstances, and as it is a very hard case, without costs.