

(1988) 04 MAD CK 0014
In the Madras High Court
Case No : C.R.P. No. 547 of 1988

Periasamy Gounder

APPELLANT

Vs

Periasamy Gounder and Others

RESPONDENT

Date of Decision : 28-04-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Provincial Insolvency Act, 1920 — Section 28, 38, 55

Citation : AIR 1988 Mad 340 : (1988) 1 LW 547

Hon'ble Judges : Ratnam, J

Bench : Single Bench

Advocate : V.K. Muthuswami, for the Appellant; M.S. Krishnan and R. Sekhar, for the Respondent

Judgement

1. This civil revision petition at the instance of the insolvent against the order of the learned Second Additional District Judge, Tiruchirapalli,

challenges the correctness of the dismissal of an application filed by the insolvent under S. 38 of the Provincial Insolvency Act 1920 (hereinafter

referred to as the Act).

2. The petitioner filed an application in I.P. No. 7 of 1982 Sub-Court Karur praying that he may be adjudged paninsolyent, and by an order dt.

14-10-1985, the petitioner was ,adjudged as insolventa rid his properties vested with the Official Receiver for being administered in accordance.

with the provisions of Act. In the course of such administration, ihe Official Receiver brought to sale some immovable properties belonging to the

insolvent and they were also sold. The sales were awaiting confirmation. There are about 13 creditors of the insolvent, who are respondents" I to

13 herein. The 14th respondent is the Official Receiver, Tiruchirapalli. Claiming

that the relatives of the insolvent had arranged for discharging the debts due by the insolvent to the several creditors and stating that payments had also been made to 12 of the creditors with the exception of the 1st respondent, between 10-10-1985 and 13-10-1985, the insolvent filed on 4-10-1985, I.A. 303 of 1985 in I.P. 7 of 1982, under S. 38 of the Act for the consideration of a scheme to pay 50 per cent of the approved debts to the creditors viz, respondents 1 to 13, he requested for further appropriate orders in accordance with the provisions of the Act. This was opposed by the first respondent on the ground that the scheme submitted, if approved, would cause hardship, loss and prejudice to the creditors, apart from making out that the insolvent had secreted substantial amounts. The other creditors viz, respondents 2 to 13 in their counter stated that they had been paid more than 50 per cent of the debts due to them in full quit of their claims. The Official Receiver in his counter referred to the sale of some of the properties of the insolvent vested in him and stated that the proposal of the insolvent will cause hardship and loss to the creditors especially when some of the properties of the insolvent had been sold and the claim of the insolvent that his relatives had taken pity on him and arranged to pay the approved debts would establish that the insolvent had been able to secrete large amounts. It was also the further case of the Official Receiver that the insolvent after failing in his attempts to defraud creditors, had come forward with the application for consideration of the scheme of composition and therefore, it deserved to be rejected.

3. Before the Sub-Court, Karur, the receipts issued by the respondents 2 to 13 were marked as Exs. A. 1 to A. 12 and the insolvent was examined as P.W. 1, while on behalf of the first respondent, Exs. B 1 and B 2 were filed and he gave evidence -as R.W. 1. On a consideration of the oral as well as the documentary evidence the learned Subordinate Judge Karur held that the production of Exs. A. 1 to A. 12, established the discharge of the debts due by the insolvent to respondents 2 to 13 and that the proposal submitted by the insolvent is reasonable and further that the insolvent had also shown the availability of sufficient security to pay 50, per cent of the debts due to the first respondent. On those conclusions, the learned Subordinate Judge allowed the application. Aggrieved by this, the first respondent herein preferred C.M.A. No., 65 of 1986 before the

Second Additional District Judge, Tiruchirapalli. The learned District Judge found that the payments stated to have been made by the insolvent to

the other creditors behind the back of the Official Receiver and "Without informing the Court, showed that some kind of a private arrangement had

been arrived at between the insolvent and the other creditors and such an arrangement would be invalid and therefore, the application filed by the

insolvent for consideration of the scheme for composition deserved rejection.

4. Learned counsel for the petitioner contended that payments made either by or on behalf of the insolvent without reference to the Official

Receiver, could at best be considered to be irregular payments and in the absence of any prohibition in the provisions of the Act that such

payments should not be made, it would not deprive the court of its jurisdiction to consider a scheme of composition submitted by the insolvent

under S. 38 of the Act. On the other hand, learned counsel for the first respondent submitted that the pattern of payments sought to be established

by Exs. A. I to A. 12 disclosed that creditors, other than the first respondent had been paid amounts varying between 60% to 93% of the debts

due to those creditors and that there is therefore no justification for the first respondent to be paid only "50% of the debts due to him as per the

scheme of composition submitted by the insolvents that would cause serious prejudice to him, apart from resulting in widely varying preferential

payments to the creditors, which is the farthest from the object of a scheme of -- composition under S. 38 of the Act. It was further pointed out that

payments made by the insolvent or persons on his behalf behind the back of the Official Receiver are irregular and such irregular payments cannot

form the basis of an application for sanctioning a scheme of composition under S. 38 of the Act. Reliance in this connection was placed upon the

decision in the matter of *In Re: C. Subramanian Chetty and Sons, and Amit Mukherjee Vs. Sm. Bibhabati Dasi and Others*, . Referring to the duty

laid "on courts under S. 38 of the Act, learned counsel further pointed out that the court must exercise its judicial discretion based upon sufficient

reasons after considering all „aspects of the case and ascertaining the facts .and that even if creditors consent to the scheme, the Court is not

relieved of its ,responsibility to approve or reject a scheme based on the exercise of its discretion on a consideration of all aspects. Attention in this

connection was drawn to the decision in *Sevagarn Ch6ttiar v. Kasi* AIR 1931 Mad .344.

5. Thus, the main question that arises for consideration is whether the scheme for composition under S. 38 of the Act submitted by the insolvent

deserved approval or rejection. There is no dispute that the first respondent had obtained the two decrees against this insolvent in O.S. 864 and

1609 of 1973 District Munsif Court, Karur, as could be seen from Exs. B 1 and B 2. The insolvent also owed the first respondent other amounts

under "five promissory notes as well as under a mortgage decree. It is seen from the receipts marked as Exs. A. I to A. 12, that varying amounts

had been paid to the creditors, viz, respondents 2 to 13. The details of the amounts so stated to have been paid by the insolvent to these

creditors have been set out in para 7 of the order of the learned Subordinate Judge, and it is seen therefrom that some of the creditors have been

paid as much as 93%, 80%, 78%, 74% etc; of the amounts due to them, while, the offer of the insolvent so far as the first respondent is

concerned, is only 50% of the amounts due to him under the decrees etc. In considering a scheme of composition the court has to take into

account the proposal by the insolvent, its acceptance by the creditors as per S. 38(2) of the Act and thereafter it should consider approving it after

ascertaining all facts and exercising its discretion in the matter in such a way that the interests of the entire body of creditors are reasonably and

beneficially served. It is in the context of the interest of the general body of creditors that the payments stated to have been made by the insolvent

to the other creditors, has to be considered. Under the scheme of the Act, after the adjudication the insolvent cannot, without reference to the

Official Receiver, agree with the creditors to pay their debts in full, for such a secret preferential agreement with the creditors by the insolvent

would be opposed to the policy of the insolvency law and may even amount to a fraud upon the creditors. On the facts in this case, it is seen that

some kind of a private arrangement had been entered into by the insolvent with respondents 2 to 13 regarding the payment of their debts a few

days prior to the filing of the application by the insolvent under S. 38 of the Act. Even on the footing that the receipts Exs. A. I to A. 12 are

genuine, the payments made either by the insolvent or on his behalf by other persons, to the creditors outside the provisions of the Insolvency Act

without reference to the Official Receiver would be irregular and no insolvent, whose assets have vested in the Official Receiver, and who is ~the only person, who can act in the matter of the discharge of the debts of the insolvent, .can proceed either to deal with his assets or to discharge his debts in any manner he likes. In the matter of In Re: C. Subramanian Chetty and Sons, the question of sanctioning a scheme of composition came to be considered in the light of certain payments stated to have been made to creditors either by the insolvent or on his behalf. Beasley J. pointed out that payments .made by the insolvent or by persons on behalf of the insolvent behind the back of the Official Assignee are entirely irregular, and no insolvent or any body on his behalf has any right whatever to make any payment at all to the creditors, as the insolvent's estate vested in the Official Assignee and the only Person," who can discharge the debts of the insolvent, is the Official Assignee. It was further pointed out that the proper procedure in such cases would be that the money said to have been paid to the creditors should be returned to "the Official Assignee, who shall there after deal with it as provided in the Presidency Towns Insolvency Act and after that is done and a proper discharge is taken from the creditors, the Court should be prepared to consider whethqr the scheme of composition would be sanc tioned or not. Learned counsel for the petitioner attempted to distinguish the principles laid down in the decision referred to above on the ground that in that case, the court was concerned with St. 28 and 29 of the Presidency Towns"Insolvency A ct, and not S. 38 of the Act as in this case. It is true them are minor procedural differences in the matter of considering and sanctioning a scheme of composition under the provisions of the Presidence Towns Insolvency Act, and the Act. Even. so, the basic underlying concept of Bankruptcy Law is to the effect that so long as the adjudication is in force and the Official Assignee or the Official Receiver, as the case may be, has entered upon the administration of the estate of the insolvent,it is only he who can act on behalf of the insolventand not any other person. Therefore, the principle laid down in the matter of In Re: C. Subramanian Chetty and Sons, though rendered under the.comparable provisions of the Preside - ncyTowns Insolvency Act would be equally applicable to this case as well. Apart from this,

under S. 28(3) of the Act, on the making of an order for adjudication the property of the insolvent vests in the Court of the Official

Receiver, and the insolvent is deprived of his tide, debarring him from dealing with his property in any manner, subject to the protection afforded

under S. 55 of the Act, under the conditions mentioned therein.

Sec. 55 protects bona fide transactions entered into before the date of adjudication without notice on the part of the person, with whom such

transaction Js entered into, of the presentation of any Insolvency etition. The payments in this case, cannot by any stretch of imagins4ion be brought

under the scope of

the protective mantle of S. 55 of the Act. That this is so is"clearly laid down by the decision in Amit ukherjee v. Bhibabati Dasi, AIR 1979 all 344.

From the foregoing, it follows that the payments stated to have been made by the insolvent to respondents 2 to 13, would not in any manner bind

the Official "keceiver, who under the provisions of the ,Act is the only person to administerthe estate in the interest of the general body of creditors

of the insolvent in the manner provided under the Act. What is more significant in this case is the insolvent or some one on his behalf, has purported

to make payments to some of the creditors, leaving out the first respondent herein, a few days prior to the filing of the application seeking the

approval of the scheme of composition. This conduct establishes that the insolvent appears to have coninanded funds not disclosed to the Official

R6ceiver and that a secret arrangement had been arrived at between the insolvent and a few of the creditors, though novall. Such an arrangement,

even if true, is plainly opposed to the policy as well as the purpose of the Act, which dermnds absolute good faith on the part of the insolvent. The

method and manner, in which the insolvent had purported to enter into an arrangement with a view to benefit a few of the creditors, behind the

back of the Official Receiver just a few days prior to the filing of the applications under S. 38 of the Act, in and by which those creditors had been

favoured, in that, they had been paid amounts varying between 931/6 and 60% of the amounts payable to them while the proposal with reference

to the first respondent was only for payment of 50% of. the debts payable by the insolvent, shows this utter lack of good faith in the very scheme

proposed by the insolvent. Though learned

:counsel for the petitioner would accept that the payments stated to have been made by the insolvent to the creditors without reference to the

Official Receiver are irregular, having regard to the purpose as well as the policy of the Act, it is no longer avoidable to accept the stand of the petitioner

that there is no prohibition in the Act, regarding such payments and therefore, such payments would be in order. It is indisputable that so

long as the insolvency continues, none other than the Official Receiver can deal with the properties of the insolvent and that is the policy of the Act

intended to realise the property of the insolvent and distribute the same amongst all the creditors to their best advantage. By resorting to payments

of the kind stated to have been made by the insolvent in this case, this main purpose of the Act had been defeated. The argument that making of

such payments does not in any manner affect the jurisdiction of the court to consider a scheme under S. 38 of the Act, has also no substance for,

the application under S. 38 of the Act, has to be dealt with on a consideration of a variety of aspects and not merely looked upon as one of a mere

exercise of jurisdiction. On the facts of this case, it is clearly established that the payments stated to have been made by the insolvent to the other

creditors were irregular and had been done without the knowledge of the Official Receiver and gave one set of creditors an advantage over the

first respondents, in that, those creditors were paid substantially while, the scheme, was only for the payment of 50% of the debt due to the first

respondent. Therefore, the consideration of an application under S. 38 of the Act, cannot be merely viewed as one of exercise or non-exercise of

the jurisdiction vested in the insolvency court. The contention of the learned counsel for the petitioner cannot therefore be accepted.

6. Even looked at from the point of view of the exercise of discretion by the Court, the lower appellate court cannot be stated to have committed

any error. In the consideration of a scheme under S. 38 of the Act, the wish of the creditors by itself is not sufficient for its approval. Under S. 38

of the Act, certain restrictions are placed upon the power of the court to approve a scheme of composition. Even if those conditions are fulfilled,

under S. 38(7) of the Act, the court is empowered either to approve or disapprove the scheme. This signifies that though no scheme could be

approved unless it is consented to by the requisite majority of creditors, even then the court must exercise its judicial discretion founded on

sufficient reasons after considering all aspects of the case before approving the scheme. This is very clearly laid down by the decision in

O.R.M.M.S.P.S.V. Sevugan Chettiar (dead) and Others Vs. M.A.K. Kasi alias Murugappa Chettiar and Others, , Viewmig the scheme

submitted by the insolvent from the aspect -of sound exercise of J-udicial discretion, it is seen that the insolvent had not acted bona fide and under

the scheme, if approved, some creditors will have an advantage over others and that would def cat the very basic principle underlying the

Insolvency Law that any scheme should be beneficial to the general body of creditors and not only to a few among them. As already noticed, the

payments made by the insolvent to other creditors without the knowledge of the Official Receiver clearly establish that despite the adjudication, the

insolvent commanded substantial funds at his disposal and had made preferential irregular payments to some creditors and such payments cannot

be accepted or approved as bona fide attempt on the part of the insolvent to Allay before the Court a scheme of composition conceived in the.

interest of the general body of his creditors. The scheme if approved, would operate to the detriment of the first respondent, who is admittedly one

of the creditors in that, while the other creditors had already been Oreferentially favoured by the insolvent by the purported payments of either the

full or as high as 60% to 93 percent of the amount payable, under the scheme, the amount payable to the first respondent would only be 60 per

cent. There is absolutely no justification whatever for depriving the first respondent, one of the creditors, who is similarly placed as the other

creditors, viz, respondents 2 to 13, the benefit of realising" more amounts from out of the estate of the insolvent in the ordinary course of

administration, asunder the proposed scheme, an amount far less than that alone had been offered to be paid. Considering all the facts and the

circumstances, the lower appellate Court was certainly right in exercising its discretion against sanctioning the scheme proposed by the insolvent.

Consequently, the civil revision petition fails and is dismissed with costs of respondents 1 and 14.

7. Petition dismissed.