(1980) 12 MAD CK 0051

In the Madras High Court

Case No : Civil Revision Petition No. 1211 etc. of 1980

R. Bangaru Reddiar APPELLANT

Vs

K.P. Thiyagaraja Chettiar and Others RESPONDENT

Date of Decision : 23-12-1980

Acts Referred:

Bankruptcy Act, 1914 — Section 28
Criminal Procedure Code, 1973 (CrPC) — Section 488
Presidency Towns Insolvency Act, 1909 — Section 45, 45(1)(2), 45(1)(4)
Provincial Insolvency Act, 1920 — Section 31, 41, 44, 44(1), 44(2)

Citation : (1981) ILR (Mad) 478

Hon'ble Judges : Ratnam, J

Bench : Single Bench

Advocate : K.N. Balasubramaniam and T. Dhanvakumar, for the Appellant; P.S. Ramachandran, for the Respondent

Final Decision : Allowed

Judgement

Ratnam, J.—The judgment-debtor in Original Suit No. 655 of 1972, Original Suit No. 1653 of 1971, Original Suit No. 1350 of 1972. Original Suit. No. 507 of 1971 and Original Suit No. 664 of 1970, District Munsif''s Court, Tindivanam, viz., one Bangaru Reddiar, is the Petitioner in these civil revision petitions, which are directed against the order passed by the executing Court permitting the decree-holders in the suits referred to above, to execute the decrees, obtained against the Petitioner. The Respondents in these civil revision petitions had obtained decrees against the Petitioner on the basis of promissory notes executed by the Petitioner and also amounts due from the Petitioner on dealings. In Insolvency Petition No. 145 of 1972, Sub-Court, Tiruchi, the Petitioner filed an application for adjudicating himself as an insolvent and on 25th June, 1975, the Petitioner was adjudicated an insolvent. The Respondents herein, who had obtained decrees against the Petitioner, were impleaded as third, fourth, eighth Respondents to Insolvency Petition No. 145 of 1972, Sub-Court, Tiruchi. The four sons of the Petitioner instituted a suit in Original Suit No. 45 of 1972, Sub-Court, Cuddalore, challenging the binding nature of the debts incurred by the Petitioner and prayed for partition and separate possession of their 4/5th share free from the debts incurred by the Petitioner. On 6th August 1976, the Sub Court. Cuddalore. passed a preliminary decree in favour of the sons of the Petitioner holding that there was no prior partition as claimed by them, that the debts were binding on them, that the attachment of the share of the sons in the properties was not liable to be raised and that the sons were entitled to a 4/5th share in the properties in that suit. The Petitioner filed an application in Interlocutory Application No. 241 of 1976 in Insolvency Petition No. 145 of 1972 on 22nd July, 1976 u/s 41 of the Provincial Insolvency Act praying for an order of absolute discharge and on 13th June, 1978, an order of absolute discharge was granted in favour of the Petitioner. To the applications filed for the execution of the decrees obtained by the creditors in Original Suit No. 655 of 1972. Original Suit No. 1653 of 1971 Original Suit No. 1350 of 1972, Original Suit No. 507 of 1971 and Original Suit No. 664 of 1970. District Munsif''s Court, Tindivanam the Petitioner raised an objection that though he had earlier been adjudicated an insolvent, yet, an order for absolute discharge had been granted in his favour on 13th June, 1978 and therefore, the execution petition has to be dismissed as not maintainable. In addition, the sons of the Petitioner filed Execution Application No. 253 of 1978 in Execution Petition No. 77 of 1977 filed by the Respondent in Civil Revision Petition No. 1215 of 1980 to execute the decree obtained by him in Original Suit No. 664 of 1970, District Munsif''s Court, Tindivanam, praying that the attachment of their 4/5th share in the properties is illegal and void and that though the decree in Original Suit No. 45 of 1972, Sub-Court. Cuddalore, had declared the binding nature of the debts incurred by the father on them, yet, since their father had been granted an order of absolute discharge in Interlocutory Application No. 241 of 1976, the decree in Original Suit No. 664 of 1970 could not be any longer be executed against their share of the properties and, therefore, the attachment should be raised. The Petitioner on his part filed Execution Application No. 618 of 1978 in Execution Petition No. 332 of 1978 in Original Suit No. 507 of 1971 filed by the Respondents in Civil Revision Petition No. 1214 of 1980 that in view of the order of absolute discharge granted in favour of the Petitioner, the decree ceased to be executable and the properties cannot be attached and brought to sale for the recovery of the amounts due thereunder. On these grounds, the Petitioner prayed for a declaration that the decree is not executable and for stay of all further proceedings in Execution Petition No. 332 of 1978 till the disposal of Execution Application No. 618 of 1978. That application was resisted by the decree-holder in Original Suit No. 507 of 1971 on the ground that no notice was given to him with reference to the absolute discharge of the Petitioner and that even, if the Petitioner had been granted such an order, the decree-holder in Original Suit No. 507 of 1971 had a right to proceed against the properties and, therefore, the petition filed in Execution Application No. 618 of 1978 should be dismissed. Similar objection were raised by the other decree-holders. The learned District Munsif, Tindivanam, who heard all these applications passed a common order holding that though the

Petitioner had been granted an order of absolute discharge, yet, the properties belonging to him can be brought to sale by the decree-holders and that the sons of the Petitioner will be bound by the theory of pious obligation to discharge the decree debts of their father which were prior to the partition and, therefore, the decree-holders have every right to bring the properties of the Petitioner and his sons to sale for the realisation of the amounts due under the decrees. In this view, in the execution petitions filed by the Respondents in Execution Petition No. 272 of 1978, Execution Petition No. 182 of 1978, Execution Petition No. 183 of 1978, Execution Petition No. 332 of 1978 and Execution Petition No. 77 of 1977, further proceedings for the sale of the properties by filing the sale papers were ordered while the application filed by the sons of the Petitioner in Execution Application No. 253 of 1978 in Execution Petition No. 77 of 1977 in Original Suit No. 664 of 1970 and the petition filed by the Petitioner in Execution Application No. 618 of 1978 in Execution Petition No. 332 of 1978 in Original Suit No. 507 of 1971 were dismissed. It is the correctness of the order passed by the executing court directing the further proceedings in executing that is challenged by the Petitioner in these civil revision petitions.

2. The learned Counsel for the Petitioner first contended that by reason of the order of absolute discharge obtained by the Petitioner in Interlocutory Application No. 241 of 1976 in Interlocutory Petition No. 145 of 1972, the Petitioner is freed from all liabilities and, therefore, the decree obtained against the Petitioner by the Respondents could no longer be put into execution for the realisation of the amounts due thereunder. On the other hand, the learned Counsel for the Respondents/decree-holders contends that the effect of the order of discharge obtained by the Petitioner is to release the insolvent from making the payment, but that the property continues to be Label for the decrees obtained and, therefore, there is no impediment for the recovery of the amounts due to the Respondents under the respective decrees.

3. Before proceeding to consider these contentions, it is necessary to advert to a few facts. That the Petitioner was adjudicated an insolvent in Interlocutory Application No. 145 of 1972, Sub-Court, Tiruchi on 25th June, 1975 and was later granted an order of absolute discharge in Interlocutory Application No. 241 of 1976 in Insolvency Petition No. 145 of 1972 on 13th June 1978 are not in dispute. Equally, all he debts incurred by the Petitioner herein which had later ripened into decrees in the suits referred to already were also before the adjudication of the Petitioner as an insolvent in Insolvency Petition No. 145 of 1972. Indeed, the Respondents in these civil revision petitions, had been shown as creditors and as Respondents 3, 4 and 8 even in the application for adjudication. Undoubtedly, therefore, all these debts incurred by the Petitioner, which had later been sued upon and had ripened into decrees, were debts provable in the course of the insolvency of the Petitioner. It is in this setting that the effect of the order of discharge obtained by the Petitioner has to be considered. The primary purpose of an order of discharge is to free an insolvent from the debts and to enable him to carry on his normal activities free from the

liability to pay his prior debts. Section 44 of the Provincial Insolvency Act which is comparable to Sections 45(1)(2) and (4) of the Presidency Towns Insolvency Act, 1909, and Section 28 of the Bankruptcy Act, 1914, provided for the release of an insolvent from the debts provable under the Act. The scope of the release of an insolvent u/s 28 of the Bankruptcy Act, 1914, on which Section 44 of the Provincial Insolvency Act had been modelled has been stated in Halsbury''s Laws of England, fourth edition, Volume III, paragraph 879 thus;

Release from provable debts Apart from certain excepted debts and liabilities, an order of discharge has the effect of releasing the bankrupt from all debts provable in his bankruptcy, including Crown debts; accordingly a promise to pay a debt barred by an order of discharge without fresh consideration is not enforceable by action. If any proceedings instituted against a bankrupt, who has obtained an order of discharge in respect of any debt from which he is released by the order, he may plead that the cause of action occurred before his discharge.

Paragraph 880 deals with debts and liabilities which are left untouched even by an order of discharge and it is stated therein as follows:

An order of discharge does not release the bankrupt from:

(1) Any debt on a recognisance, or from any debt with which the bankrupt may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence; and he will not be discharged from these excepted debts unless the Treasury certifies in writing its consent to his being so discharged;

(2) Any debt or liability incurred by means of any fraud or fraudulent breach of trust to which the bankrupt was a party, or from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party; or

(3) Any liability under a judgment against the bankrupt in an action for reduction, or under an affiliation order, except to such an extent and under such conditions as the court expressly orders in respect of that liability.

Where the bankrupt has been guilty of a bankruptcy offence, he is not exempted by his discharge from prosecution.

An order of discharge does not release any person, who, at the date of the receiving order, was a partner or co-trustee with the bankrupt, or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him.

Section 44 of the Provincial Insolvency Act, 1920 which is modelled on the lines of the comparable provision of Section 28 of the Bankruptcy Act, 1914 runs thus:

Effect of order of discharge:

(1) An order of discharge shall not release the insolvent from:

(a) any debt due to the Government;

(b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party;

(c) any debt or liability in respect of which he has obtained for bearance by any fraud to which he was a party; or

(d) any liability under an order for maintenance made u/s 488 of the Code of Criminal Procedure, 1898 (V of 1898).

(2) Save as otherwise provided by Sub-section (1), an order of discharge shall release the insolvent from all debts provable under this Act.

(3) An order of discharge shall not release any person, who, at the date of the presentation of the petition, was a partner or co-trustee with the insolvent, or was jointly bound or had made any joint contract with him or any person who was surety for him.

This section provides for at the same time the effect of an order of discharge and also the liabilities from which the insolvent cannot secure a release. The use of the word release in that section in its technical sense would, of course, be not merely to bar the remedy, but to extinguish the debt as well. The debts, in the present case, do not fall within Sections 44(1)(a) to (d) of the Provincial Insolvency Act and therefore, the decree-holders cannot claim that the Petitioner is not discharged from his liability under the decrees. Sub-section (3) of Section 44 will not also attracted to the present case. That leaves only Section 44(2) of the Provincial Insolvency Act which declares that save as provided under Sub-section (1) of Section 44 an order of discharge shall release the insolvent from all debts provable under this Act. Giving effect to the ordinary meaning of the words used in Section 44(2) of the Provincial Insolvency Act, what that section means is that the order of discharge release the debtor from all debts and this is based on the policy of the law that a person should not be allowed to suffer for ever the disadvantages and the indignity of having been adjudicated an insolvent, but should be allowed to resume his normal avocation free from the burden of debts. Having regard to this objection, an order of absolute discharge cannot be construed to be limited to the personal liability of an insolvent, but that his property would for ever continue to be liable. No doubt, the learned Counsel for the Respondent would contend that the effect of Section 44(2) of the Provincial Insolvency Act is to free the insolvent from liability from all debts but does not free his property from such liability. It is not possible to accept this contention for the aforesaid reasons. It has been held by this Court in Haji Abdul Kuthus Sahib (deceased) and Others Vs. Inayathulla Sahib and Others, that if a debt becomes unenforceable by reason of discharge, it follows that the right to proceed against the property disappears at the same time. In that case, the first Appellant was indebted to the estate of one Habibullah Sahib who had obtained a decree against the first Appellant and in execution thereof, attached the house property also as belonging to the first Appellant. The wife of the first Appellant applied for the raising of the attachment on the ground that the property was hers and therefore, it could not be attached as the property of her husband and that application was dismissed relegating her to a suit, which was filed, but was later dismissed for default. The first Appellant had seemed an order for discharge on 8th February, 1928 and the question that arose was whether the house remained liable to be seized and sold after 8th February 1928. The executing Court as well as the appellate court held that the Respondents were entitled to have their house sold and when the matter came up to this Court, Venkataramana Rao J., held that the Courts below had correctly interpreted the law. On further appeal under Clause 15 of the Letters Patent, the Bench considered the scope or Section 44 of the Provincial Insolvency Act. In doing so, the Bench held, after referring to the provisions of Section 44, that that section displays no ambiguity and that by reason of it the debt which the first Appellant owed to the Respondents became unenforceable by them. The Bench pointed out that if the debts were in existence and enforceable, then the Respondents could proceed with the attachment and bring the property to sale, but inasmuch as the debt has gone, the Respondents are not in a position to take proceedings in execution as Section 44 prevented them from doing so. The effect of the order of discharge as declared u/s 44(2) of the Provincial Insolvency Act is to render the debt unenforceable and, therefore, the Respondents could not have, after the discharge of the Petitioners, proceeded to take steps for the realisation of the amounts due under the decree. In other words, though the decree debt as such is not wiped out, yet, it cannot be enforced in execution.

4. The question that next arises, for consideration is whether in spite of the order of discharge, the Respondents/decree-holders are entitled to proceed against the share of the sons of the Petitioner on the ground that the sons are bound to discharge the debts of the Petitioner incurred for purposes which are not illegal or immoral as found in the course of the judgment in Original Suit No. 45 of 1972, Sub-Court, Cuddalore. It is not the case of any of the Respondents/decree-holders that the sons of the Petitioner were made parties to the suits instituted by them against the Petitioner and that the sons of the Petitioner were co-judgment debtors jointly bound to pay the decree, in which case u/s 44(3) of the Provincial Insolvency Act, the discharge of the father would not put an end to the liability of the sons of the Petitioner. The debts in question incurred by the Petitioner were no doubt repartition debts and in view of the adjudication in Original Suit No. 45 of 1972, Sub-Court, Cuddalore, to the effect than he debts incurred by the father were not for illegal or immoral purposes, the liability of the sons to pay those debts would have remained unaffected by a partition. The sons would have been liable so long as the father himself continued to be liable on the basis of the theory of pious obligation. That liability of the sons is not a personal one, but is merely to the interest of the sons in the family properties. Such pious obligation of the sons to pay the debts of the father lasts only so long as the

liability of the father subsists. A son''s liability to discharge the debts of the father has never been understood to be either joint or joint and several, as those terms are ordinarily understood. If, under the theory of pious obligation, the liability of the sons to pay the debts of the father is to be operative and remains in force so long as the liability of the father subsists and such liability is not a joiner joint and several liability as normally understood, then, the liability of the sons would be at an end, when the liability of the father ceases. It is in this connection, the learned Counsel for the Petitioner invited my attention to paragraph 327 at page 410 of Mayne''s treaties on Hindu Law and Usage, eleventh edition, which is to the following effect;

327. The pious obligation of the son lasts only so long as the liability of the father subsists. The son''s liability is neither joint nor joint and several as those terms are ordinarily understood in English law. The son cannot be sued alone during his father''s life time, and where the son is joined with the father in a suit to enforce payment of the father''s debt this is for the purpose of preventing the son from questioning the nature of the debt in execution proceedings against the property. Where the liability of the father is extinguished by the Bankruptcy law of a foreign country or where an insolvent is discharged u/s 45 of the Presidency Towns Insolvency Act, or u/s 44(2) of the Provincial Insolvency Act, the sons does not continue to be liable.

The passage referred to above would, undoubtedly, supports the stand taken by the Petitioner. In Narayanan v. Veerappa ILR [1916] Mad. 581 it was contended that the effect of the discharge of the father from liability under the provisions of the Bankruptcy Act would not affect under the Hindu Law, the liability of the sons to pay the debts of the father and that the creditor is entitled to sue the sons and recover the debt from out of the shares in the joint family property. In repelling this contention, the Bench observed (at page 583) thus;

The question is whether a Hindu son is jointly bound with his father to pay the debts within the meaning of the section. We think not. The liability of a Hindu son to pay the debts of his father not being Illegal or immoral (Avyavaharika) has been developed by judicial decisions from his pious obligation to save the father from sin, as laid down by the Hindu Law Texts. This liability as now developed is certainly not a joint liability, nor a joint and several liability as ordinarily understood in English Law.

Ultimately, the Bench pointed out that only so long as the liability of the father subsists, the pious obligation of the son lasts and on the extinction of the liability of the father, a suit as against the sons alone is bad. In addition, it is also pertinent to point out that in Jagadisan v. Saraswathi ILR [1962] Mad. 120 (F.B.) the Full Bench had to consider the question whether a sale of joint family property held in execution of a decree in a suit instituted against the father alone on a mortgage executed by him, the debt not being Avyavaharika, but was contracted neither for paying off an antecedent debt of the father not for any necessity or benefit of the family and in respect of which the personal remedy against the father had become barred, would be binding on the son''s interest in the mortgaged property. In the course of dealing with this question, the Full bench had to consider the contention whether a Court sale in execution of a mortgage decree could convey the interest of the mortgagor''s sons only where the personal remedy against the latter actually subsists, though it is not necessary that it should have been availed of. In discussing this, the Full Bench at page 127 observed thus;

For example, suppose a Hindu father (in a joint family) is adjudicated an insolvent and he obtains a protection order u/s 31 of Provincial Insolvency Act; that does not prevent the creditor from filing suits against the sons on the basis of the latter''s pious obligation. A credit of the father in execution of a decree against the father alone or against the father and son in respect of a personal debt of the father or may notwithstanding the insolvency of the father attach the sell the sons interest. Vide Arunachalam v. Subratnam ILR [1939] Mad. 218. The position will, however be different, if the father had obtained an order of absolute discharge in his insolvency releasing him from the debt in question; the son in that case would be freed of his liability, because the obligation of the father no longer existed.

These observations of the Full Bench fully support the contention of the learned Counsel for the Petitioner that an order of discharge obtained by the father puts an end to the liability of the sons, who are not co-judgment debtors, but who are sought to be made liable solely on the basis of the theory or pious obligation. Again in Km.Rm. Kumarappa Chettiar Vs. Ramana Gounder and Others, Venkatadri J., held that when once the father has been discharged u/s 44(1) of the Provincial Insolvency Act, Sub-section (3) to Section 44 cannot be made applicable to the sons (members of the Hindu Joint family) when they are sued on the same debt, and, therefore, the order of discharge will put an end to liability of sons in respect of the debts due and payable by the father.

5. As against these decision, the learned Counsel for the Respondents would place strong reliance on the decision in Chadalavada Seetharamayya Vs. Velivolu Kesavayya, . In that case the decree-holders had obtained the decrees against the father and the son and the Bench pointed out that the discharge of the father u/s 41 of the Provincial Insolvency Act will not have the effect of releasing the son also from liability u/s 44(2), but that u/s 44(3), the son would continue to be liable as a person, who jointly liable along with the insolvent father. This decision does not, in any manner, assist the Respondents since in the present case as already pointed out, the Respondents had obtained the decrees only as against the father and the sons are sought to be made liable only on the theory of pious obligation. Under these circumstances the order of the Court below directing further proceedings in execution, after an order of absolute discharge in favour of the Petitioners, cannot be sustained. Consequently, the civil revision petitions are allowed. No costs.