

(1997) 10 PAT CK 0014
In the Patna High Court
Case No : Civil Revision No. 350 of 1990

Ram Autar Agarwal

APPELLANT

Vs

The Manager, Reserve Bank of India and Another

RESPONDENT

Date of Decision : 17-10-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 60(1)
Payment of Gratuity Act, 1972 — Section 13
Provident Funds Act, 1925 — Section 2, 3, 4
Provincial Insolvency Act, 1920 — Section 28(2), 28(5), 41, 41(2), 5

Citation : (1997) 2 PLJR 851

Hon'ble Judges : Nagendra Rai, J;G.S. Sharma, J

Bench : Division Bench

Advocate : Ajay Prasad, for the Appellant; T.K. Jha and Chitranjan Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Nagendra Rai, J.—This Civil Revision is directed against the order dated 2.2.1990 passed in Insolvency Case No. 18 of 1974 by the District Judge, Munger, by which, he has recalled the earlier order of attachment of gratuity and provident fund amount of one Dhiraj Kumar Bose (since deceased) payable to his heirs.

2. The factual matrix of the case lies in a narrow compass. Dhiraj Kumar Bose (hereinafter referred to as the debtor) was employed as a teller in the Reserve Bank of India. He had borrowed Rs. 4,000/- from one N.K. Khetan. On 31.3.1974, N.K. Khetan filed a Petitioner for adjudicating aforesaid debtor as insolvent under the provision of the Provincial Insolvency Act, 1920. The District Judge, exercising the power under the Act by order dated 2.4.1974 adjudged him as an insolvent and granted six months' time to apply for discharge u/s 41 of the said Act. The said period was extended from time to time and on 25.9.1979, the debtor applied for conditional discharge u/s 41(2) of the Act. On 29.7.1979 he was granted discharge on the condition that the dues of the creditors would be satisfied by attachment of salary, Provident Fund, gratuity and bonus payable to

him. The said order was sent to Garnishee employer to remit the amount standing to the credit of the debtor for distribution amongst the creditors for satisfying their debts. The said order was not complied with and the debtor died on 20.12.1983.

3. On 9.4.1984, Petitioner-Ram Autar Agarwal filed a petition for being added as a scheduled creditor and the said petition was allowed. On 26.4.1984, one of the creditors filed an application for directing the employer to remit the provident fund, gratuity, arrears of salary and other dues payable to the insolvent to the Court. Before that, on 16.3.1984, a letter was sent by the Reserve Bank of India objecting to the attachment of gratuity, provident fund and salary etc. The Petitioner filed a rejoinder to the aforesaid letter of objection. The aforesaid matter was not disposed of. On 10.6.1987, the District Judge again directed the employer to send the entire due amount of the creditor and scheduled creditor to the Court for distribution amongst them as the entire property of the debtor vested in the Court u/s 28(2) of the Provincial Insolvency Act. Thereafter, the Reserve Bank of India appeared through a Counsel and filed a petition asserting that the gratuity and provident fund were not liable to attachment in view of the provisions of Section 13 of the Payment of Gratuity Act, Section 3 of the Provident Funds Act and Section 60(1)(g) and (k) of the CPC (in short "Code"). The learned District Judge, after hearing the parties, by the impugned order held that the gratuity and provident fund payable to the deceased was not liable to attachment and, accordingly, he recalled the earlier order of attachment.

4. A learned Single Judge of this Court, at the time of admission, by order dated 11.7.1990 referred the matter to a Division Bench and that is how the matter has been placed before us for disposal.

5. Learned Counsel for the Petitioner submitted that as the discharge was granted on the condition that the dues of the creditor shall be satisfied by attachment of the salary, gratuity, provident fund and bonus, which are liable to attachment, the learned District Judge wrongly held the same to be not liable to attachment. He also submitted that once an order for discharge was passed on a condition that the dues of the creditor shall be satisfied by attachment of the salary, gratuity, provident fund and bonus payable to the debtor, the District Judge has no power to recall the order of attachment, which was issued pursuant to the aforesaid conditional order of discharge.

6. Learned Counsel appearing for the Reserve Bank of India, on the other hand, submitted that the gratuity and provident fund are not liable to attachment for satisfaction of the debts under the Provincial Insolvency Act, 1920 (in short "P.I. Act"). In this connection, he referred to the provisions of Section 28(5) of the P.I. Act, Section 60(1)(g) and (k) of the Code, Section 3 of the Provident Funds Act (in short "P.F. Act") and Section 13 of the Payment of Gratuity Act (in short "Gratuity Act").

7. The first question to be determined is as to whether the gratuity and provident

fund of an employee, adjudged as insolvent under the P.I. Act, are liable to attachment for satisfying the dues of the scheduled creditor as well as the creditor? There is no dispute that Dhiraj Kumar Bose was adjudged as an insolvent under the provisions of the P.I. Act. Section 28 of the P.I. Act contains the provisions with regard to effect of an order of adjudication. Sub-section (2) thereof provides that on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver appointed under the P.I. Act, and shall become divisible among the creditors and, thereafter, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose. Sub-section (5) thereof provides that the property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure, 1908 (5 of 1908) or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree.

8. It is an admitted position that the provisions of the P.F. Act, 1925 and Gratuity Act, 1972, are applicable in this case. Section 13 of the Gratuity Act provides immunity to gratuity from attachment in satisfaction of the decree of the Court. According to the said provision, no gratuity payable under this Act shall be liable to attachment in execution of any decree or order of any Civil, Revenue or Criminal Court. Section 3 of the P.F. Act provides that a compulsory deposit in any Government or Railway Provident Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor, and neither the Official Assignee nor any receiver appointed under the P.I. Act, 1920 (5 of 1920), shall be entitled to, or have any claim on, any such compulsory deposit. Compulsory deposit has been defined u/s 2(a) of the P.F. Act, which means a subscription to, or deposit in, a Provident Fund which under the rules of the Fund, is not, until the happening of some specified contingency, repayable on demand and any interest or increment which has accrued under the rules of the fund on any such subscription, deposit or contribution, and also any such subscription, deposit, contribution, interest or increment remaining to the credit of the subscriber or depositor after the happening of any such contingency.

9. Proviso (g) to Section 60(1) of the Code provides that the stipends and gratuities allowed to pensioners of the Government or of a local authority or of any other employer shall not be liable to attachment and sale in execution of a decree. Section 60(1)(k) provides that all compulsory deposits and other sums in or derived from any fund to which P.F. Act, 1925 applies in so far as they are declared by the said Act not to be liable to attachment are immune from attachment or sale.

10. Firstly, I will consider as to whether the amount of provident fund is liable to attachment or not under the provisions of the P.I. Act. From the provisions of Section 28(2) of the said Act, it is clear that after an order of adjudication is passed under the Act, all the property of the insolvent shall vest in the Court or in a receiver, as the case may be. Further, Sub-section (5) thereof provides that the property, which is exempt from attachment and sale in execution of a decree of Court under the provisions of the Code or by any other enactment at the time being in force and shall not be included in the property, which shall vest in the Court or in a receiver after adjudication. Section 3 of the P.F. Act gives protection to the compulsory deposits from attachment. It further provides that a receiver appointed under the P.I. Act shall not be entitled to, or have any claim on, any such compulsory deposit. The word "compulsory deposit" is a very wide term and it includes the deposit by optional subscriber.

11. A bare reading of the provisions contained in Sections 3 and 4 of the P.F. Act, read with Section 60(1)(k) of the Code shows that the attachment of the provident fund amount is prohibited. There is a binding precedent of the apex Court also holding that the provident fund dues are immune from attachment so long as they are not actually paid to the employee, who is entitled to it on retirement or otherwise. In other words, the nature of the dues as a provident fund will alter only after it is paid to the employee. In this connection, reference may be made to the case of Union of India (UOI) Vs. Radha Kissen Agarwalla and Another, . In the said case, an employee of the Eastern Railway was subscriber to the State Railway Provident Fund. He elected to be governed by the Provident fund Sterling Accounts Rules, whereunder the payment of the provident fund credited in his account on retirement was to be made in sterling. He requested the Railway that the provident fund payable to him on retirement might be remitted to him by Bank-draft on the Bank specified in the said letter. The Railway Administration, thereafter, prepared two cheques in favour of the Reserve Bank of India with instruction to the Reserve Bank to convert the amounts covered by the cheques into sterling and to transmit the fund in sterling to the bankers of the employee in England. Radha Kissen Agrawalla obtained a money decree against the Railway employee and he applied for execution of the decree and also obtained an order for attachment of the cheques and under the orders of the Court, the said cheques were encashed. The Union of India claimed immunity from attachment of the cheques in view of the provisions of Section 3 of the P.F. Act. The executing Court overruled the objection on the ground that the moneys attached by the Court lost their character as a provident fund moneys long before they were attached. Considering the said matter, the apex Court held that the Reserve Bank was Agent of the Railway Administration and not the Agent of the subscriber and as such so long as the money remained under the control of the Railway Administration as provident fund, the same was exempt from attachment.

12. The same view was reiterated by the apex Court in the case of Union of India (UOI) Vs. Jyoti Chit Fund and Finance and Others, , wherein it was held that a

bare reading of Section 3 and 4 of the P.F. Act read with Section 2(a) of that Act will convince anyone that the attachment of amounts bearing their description are prohibited. It will be gross violation of the legal mandates involving public interest if in teeth of such injunction, an attachment and sale is ordered by a Court. It was further held that so long as the provident fund amount does not cease to possess the character of provident fund and till it is not paid to the employee on his retirement or otherwise, the nature of the dues is not altered.

13. Learned Counsel appearing for the Petitioner submitted that the Supreme Court in the case of Mukti Lal Agarwala Vs. Trustees of The Provident Fund of The Tin Plate Co. of India Ltd. and Others, , held that money standing to the credit of insolvent in Provident Fund vests in official receiver under the provisions of the P.I. Act.

14. I have gone through the aforesaid judgment. From a perusal of the said judgment, it appears that after going through the relevant Provident Fund Rules, it was found in that case that the membership was voluntary and there was no transfer of the ownership of the fund.

The money of the fund might be invested by the trustees but the subscriber did not divest himself of control over the fund. As such, the said case cannot be said to be an authority that the Provident Fund amount will vest in the official receiver. On the other hand, in view of the aforesaid two judgments of the Supreme Court, it is clear that the provident fund is not liable to attachment so long it remains with the authority and is not paid to the employee and once it is not liable to attachment in execution and sale of a decree, the same shall not be treated as a property of insolvent, which vests u/s 28(2) of the Act.

15. So far as the gratuity is concerned, the word "gratuity" has not been defined under the Gratuity Act. The said word has undergone a metempsychosis over the years. Earlier, the payment of gratuity was treated as a bounty. In other words, it was a gift or boon by the employer to the employee and was payable at his own discretion. Later on, in industrial adjudication, it was considered as a reward for a long and meritorious service rendered by the employee to the employer. Thereafter, it was treated as a retrial benefit.

16. In the case of Tata Iron and Steel Co. Ltd. Vs. Sultan Khan Kabuli and Others, , the question was as to whether the gratuity until it is paid out to the employee, can be treated as a property of the employee-insolvent within the meaning of Section 28(2) of the P.I. Act. In the said case, it appears that the insolvent was governed by the Company Retiring Gratuity Rules. It was held that the gratuity until it is paid out to the employee, cannot be treated as a property of the insolvent within the meaning of Section 28(2) of the P.I. Act. The said view was again reiterated by a learned Single Judge of this Court in the case of Kartar Singh v. Mostt. Durpati and Ors. reported in 1976 B.B.C.J. 169, wherein it was held that the gratuity payable to an employee does not become property of an employee on its mere accrual. Only when it is paid to the employee, it becomes

his property. As such, the insolvent Court cannot attach the gratuity under the provisions of the Act unless it is paid to the insolvent-employee. Section 13 of the Gratuity Act gives total immunity to the gratuity from attachment in execution of a decree or order of a Court.

17. Even if provisions of Section 60(1)(g) of the Code is held to be not applicable in the present case as contended by the learned Counsel for the Petitioner, provisions of Section 13 of the Gratuity Act is clear and it gives total immunity to the gratuity from attachment in execution of a decree or order of a Court. As such, apart from the decisions of this Court as referred to above, even the statutory provision is clear. Thus there is no difficulty in holding that the gratuity shall not be liable to attachment in execution or sale of a decree. Once the gratuity is not liable to attachment under the Gratuity Act, the same cannot be treated as a property of the insolvent having vested after adjudication in the Court or official receiver in view of the specific provisions contained in Section 28(5) of the said Act.

18. Thus, after considering the question from different angles, I am of the view that the learned District Judge has rightly held that as under the provisions of the Gratuity Act, the gratuity is not liable to attachment in execution or sale of a decree, the same cannot be treated as a property and has vested u/s 28(2) of the Act after adjudication of the employee as insolvent. Admittedly, the amount has not been paid to the employee, who died later on. The amount is still in the hands of the employer and as such the same cannot be treated to have vested in terms of Section 28(2) of the Gratuity Act.

19. The next question is as to whether the District Judge was justified in recalling his earlier order of attachment?

20. There is no provision for attachment of the property after adjudication of the person as insolvent. Once an order of adjudication is passed, the property vests in the Court or the receiver as the case may be. The only question, thus, for consideration before the District Judge was as to whether the gratuity and provident fund vested in the Court after adjudication? Earlier order of attachment in substance means that the Court has come to the conclusion that the property has vested in the Court in view of the Section 28 of the Act. The question for consideration is as to whether the Court has power to recall/review its earlier order or not? Section 5 of the P.I. Act provides that unless there is express provision in the Act to the contrary, the procedure followed in exercise of original jurisdiction applies to the proceedings under this Act. Thus, the Insolvency Court possesses the same powers as original civil Court and it can exercise its power to correct the errors committed by it and on relevant ground, I can review or recall its order on an appropriate case being made out by taking recourse to the provisions of the Code. In the present case, the learned District Judge found that the earlier order of attaching the gratuity and provident fund was contrary to law as the order of attachment was made in teeth of the provisions giving immunity to the gratuity and provident fund from attachment and thereafter, recalled the

earlier order, which he was competent to do in view of the aforesaid provisions of the said Acts.

21. In the result, there is no merit in this revision application and it is, accordingly, dismissed.

Gurusharan Sharma, J.

22. I agree.