
(1953) 03 MAD CK 0014
In the Madras High Court
Case No : A.A.O. No. 554 of 1950

Ramnad District Central Co-operative Bank	APPELLANT
Vs	
Official Receiver of Ramnad Dt. Ramnad at Madura	RESPONDENT

Date of Decision : 25-03-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Provincial Insolvency Act, 1920 — Section 28(6), 4, 5, 53

Citation : AIR 1954 Mad 12 : (1954) ILR (Mad) 360 : (1953) 2 MLJ 359

Hon'ble Judges : Govinda Menon, J; Basheer Ahmed Sayeed, J

Bench : Division Bench

Advocate : M. Chockalingam, for the Appellant; G.N. Chary, for the Respondent

Final Decision : Dismissed

Judgement

Govinda Menon, J.—In this appeal a point of significance on which there is divergence in the views expressed in judicial pronouncements

has to be considered, and as the matter relates to the jurisdiction of courts we shall discuss it with some fulness of detail.

2. The appellant before us is the Ramnad District Central Co-operative Bank and the respondent is the Official Receiver of Ramnad district. The

contest is between an official on the one side and a quasi-Government department on the other. One Syed Mohamed Rowther was adjudged an

insolvent in I. P. No. 1 of 1947 on the file of the District Court of Ramnad and all his estates became vested in the Official Receiver of Ramnad.

The insolvent was the president of a certain Co-operative Society as well as a director of the Ramnad District Central Co-operative Bank. The

Co-operative Society was a debtor to the Co-operative. Bank in a large sum of money and the insolvent executed a security bond to the bank for

that sum. The bank later on applied to the Deputy Registrar of Co-operative Societies to an award, A. R. C. No. 87/1947-48 for a sum of Rs.

83000 and odd against the insolvent, to be recovered by the sale of the properties hypothecated by him under the security bond and after getting

that award the bank filed E. P. No. 95 of 1947-48 before the same Deputy Registrar for execution of the award and realisation of the amounts

due by sale of the mortgaged property and that application is now pending. The Official Receiver in whom the equity of redemption has vested

filed I. A. No. 47 of 1949 to annul the security bond u/s 53 of the Provincial Insolvency Act on the ground that it is a voluntary transfer and as

such not valid and binding so far as the Official Receiver was concerned. Pending that application, the Official Receiver has also filed I. A. No. 48

of 1949 for a temporary injunction restraining the bank from proceeding with the execution of the award before the Deputy Registrar. The learned

District Judge of Ramnad issued the injunction prayed for and against that order the present appeal has been filed.

3. Mr. M. Chockalingam for the appellant contests the jurisdiction of the insolvency Court to issue an Injunction restraining the proceedings taken

by a secured creditor in due furtherance of his rights and states that in view of Section 28, Sub-section (6) of the Provincial Insolvency Act, the

secured creditor has an unfettered right of exercising his rights for the realisation of the amount due to him. Section 28, Sub-section (6) reads as

follows: ""Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as

he would have been entitled to realise or deal with it if this section had not been passed"". On the very wide terms of this section, the argument is

put forward that if a secured creditor has taken steps to realise the money due under his security or otherwise dealt with it, then it is in no way

affected by the insolvency of the debtor and that the secured creditor could proceed as if Section 28 had not been in force. In other words an

insolvency court can issue no process against a secured creditor curtailing his unrestricted right of enforcement of a security. In such circumstances

where the bank has taken steps to realise the security, the order of injunction issued by the insolvency court is "ultra vires" and without jurisdiction.

We have therefore to see how far this argument is well founded.

4. Great reliance is placed upon a judgment of this court in the -- The Official Receiver of Coimbatore Vs. Palaniswami Chetti alias Ponnuswami

Chettiar and Another, , where it is held that an insolvency court has no jurisdiction to stay a mortgage suit pending in another court u/s 10, Civil P.

C., in a case where the insolvency court is seized of an application u/s 53, Provincial Insolvency Act to set aside a mortgage as void against the

creditors which mortgage is itself the subject of adjudication in another civil court. There are observations in the judgment of Devadoss J. which

are sufficiently wide to justify an argument that an insolvency court cannot even prevent a secured creditor from enforcing his remedies under the

mortgage or other security in the ordinary civil courts. If we examine the facts and arguments in that case closely, it is clear that what was argued

there was that a civil court is deprived of its jurisdiction to proceed with a suit for the enforcement of security by a secured creditor of the insolvent

on account of the pendency of an application before the insolvency court u/s 53 or the Provincial Insolvency Act. The reason alleged was that if the

insolvency court declares the mortgage void and not binding on the estate of the insolvent, then the property could vest in the Official Receiver to

be disposed of in favour of the general body of creditors, and such being the case the mortgagee secured creditor would not be in a position to

bring the property to sale on the strength of his mortgage as soon as the transaction is declared void. But it is one thing to say that a civil court is

not deprived of its jurisdiction by reason of the pendency of an application u/s 53 of the Insolvency Act and another to say that if the insolvency

court considers it better it can stay the hands of the person who invokes the jurisdiction of the civil court to realise the monies due under his

security. At page 758 Devadoss J. observes as follows: ""No Court has power to sell the property of an insolvent if it is vested in the Official

Receiver excepting the Official Receiver himself

But till such a declaration is made by the Insolvency Court u/s 53, the transaction is good and the mortgagee could proceed with the suit or with

the execution of his decree against the insolvent's property. The Official Receiver's right to proceed u/s 53 is not taken away either by the

institution of a suit by the mortgagee or the passing of a decree in his favour or even by his realising the amount due to him by the sale of the

property; for the Official Receiver could apply to the insolvency court for a declaration that the transaction is void, and if he succeeds the property of the insolvent would vest in him before sale in execution of the mortgage decree.

5. At page 1057 Wallace J. speaks in the following strain:

There is no reason, therefore, why the mortgagee's suit should be stayed because proceedings u/s 53 are filed or pending. The result of such

proceedings would affect only the execution of the decree in the mortgage suit, since the mortgagee cannot be permitted to sell the property for

himself if there is an adverse order u/s 53. The real conflict in the two proceedings does not materialise until the question arises; who is to sell the

property? Then the decision in the proceedings u/s 53 will bind the mortgagee by force of Section 4 of the Provincial Insolvency Act and the sale

will be by the Official Receiver and the proceeds must be primarily held at the disposal of the Official Receiver. As the Official Receiver is already

a party "ex hypothesi" to the mortgage suit, there will be no trouble about that. It would be the duty of the court executing the mortgage decree to

give effect u/s 4 of the Provincial Insolvency Act to the decision in the insolvency enquiry. The principle that the interest of the particular creditor

must give way to that of the general body of creditors is thus not in danger.

In our opinion the decision in -- The Official Receiver of Coimbatore Vs. Palaniswami Chetti alias Ponnuswami Chettiar and Another, ", cannot be

said to prevent a court from taking into consideration various relevant factors which would show that it is open to the insolvency court to see that

the interest of the general body of creditors fare not jeopardised by a secured creditor prosecuting his remedy in other proceedings. Some of the

considerations are the following: (1) Whereas the mortgagee secured creditor has no interest in getting any amount more than what is due to him by

the sale of the property, the Official Receiver should very much be on the alert in getting the maximum price by the sale of the properties on behalf

of the general body of creditors; (2) where the Official Receiver is to sell the property, he need not conclude the sale until a bid which according to

him would be an adequate price, whereas in court sales the sale has to be concluded even though the price fetched was not sufficient; and (3) that

if the properties are sold in auction in execution of a decree, complications might

arise in the form of a purchaser coming on the scene. The really crucial point is how best to safeguard the interest of the general body of creditors who will have no say in the proceedings by the secured creditor in the ordinary civil court. We may remark here that so far as the proceedings in question are concerned, there is no difference between an execution of a mortgage decree by a civil court for the realisation of the mortgage money and the proceedings u/s 57 A of the Madras Co-operative Societies Act for the realisation of the amounts due under an award.

6. How far the learned Judges who decided -- *The Official Receiver of Coimbatore Vs. Palaniswami Chetti alias Ponnuswami Chettiar* and

Another, ", are correct in laying down that even if there are sufficient and valid grounds for staying the proceedings in a civil court or the execution

of a mortgage decree by a civil court, still the insolvency court has no jurisdiction to prevent by means of an injunction actions which might turn out

to be detrimental to the interests of the general body of creditors may now be considered.

7. The observations contained in the standard works on Bankruptcy Law as well as the decisions of English Courts are not uniform on this subject.

In Halsbury's Laws of England, Hailsham's Edn. Vol. II, at page 91, paragraph 106, the learned author expresses the following opinion:

The right of a secured creditor to realise or otherwise deal with his security is unaffected by the presentation of a Bankruptcy petition or the

making of a receiving order. Thus the court has no jurisdiction to restrain a mortgagee of the bankrupt's property from selling the property; nor will

it restrain a mortgagee from proceeding with an action to enforce his security.

In support of these observations "*Re Evelyn; Ex parte General Public Works and Assets Co. Ltd.*", (1894) 2 Q. B. 302 (B), and other cases are

cited. Section 28(6) of the Provincial Insolvency Act which we have quoted above is practically in the same form as Section 7(2) of the English

Bankruptcy Act, 1914 and 1926. The language of Section 7(2) of the English Bankruptcy Act is as follows:

But this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would

have been entitled to realise or deal with it if this section had not been passed.

8. With regard to the power of restraining secured creditors, the Law in England

is stated at page 85 of Williams on Bankruptcy:

The court will not ordinarily restrain a mortgagee or other secured creditor in the exercise of his legal remedies. But a mortgagee whose title there

is substantial ground for impeaching may be restrained by the court, not under the powers of this section but in the exercise of its powers as a

Court of equity in any case where an injunction is necessary for the preservation of the property. In practice, receivers showing sufficient prima

facie grounds for impeaching the title of mortgagees have obtained such injunctions until the appointment of a trustee.

9. The power of the insolvency court to decide questions arising in insolvency is contained in Sections 4 and 5 of the Provincial Insolvency Act

which are very wide in their scope and import. The corresponding provision in the English Act is contained in Section 105 and in the commentary

to that section at page 470 of Williams on Bankruptcy there are observations which are helpful for the present discussion.

Although, as has been seen, a secured creditor would not be restrained from enforcing his security in courts other than the court of bankruptcy,

unsecured creditors, and indeed, secured creditors, have always been restrained from bringing action for their debts against the bankrupt, and this

is the necessary consequence of the provisions of Section 7(1), that after receiving order no creditor shall have any remedy except by proof against

the property or person of the debtor, saying the power to realise or deal with securities. The injunction, however, is discretionary

10. It is seen from these observations that there is a discretion vested in the court in the matter granting injunctions and not that there is an absolute

prohibition against the grant of injunction. Though in "Ex parte Bayly, In re Hart", (1880) 15 Ch. D. 223 (C), the court refused to grant the

injunction, still observations in the judgment of Cotton L. J. at pages 226 and 227 do not negative the power inherent in the court to issue the

injunction in suitable cases. At page 227 we have the following statement by the learned Judge:

Under such circumstances if the court saw that there was a reasonable case to be tried at the hearing, it would interfere and keep the property "in

medio" until at the hearing the rights of the parties could be decided.

11. It is therefore clear that it cannot be said as an abstract proposition of law

that the insolvency court in England never had that power. In India also there are judicial pronouncements as well as views of text books writers which do show the existence of such a power. Paragraph 74, at page 56 of the Law of Insolvency by D. P. Mulla is to the following effect:

Injunction. Though the court will not restrain a mortgagee or other secured creditor in the exercise of his legal remedies u/s 18 (sic.) of the Act, it may, it seems, restrain him under Order 39 Rule 1 C. P. C., 1908, if there are substantial grounds for impeaching its title.

12. The question was discussed in -- "Ally Mohamed v. M. M. Bham", AIR 1928 Rang 241 (D), by Heald and Maung Ba JJ. who, without referring to any of the English decisions, were of opinion that u/s 5 of the Provincial Insolvency Act the insolvency court, since it has some powers as a civil court, could, under justifiable circumstances, grant an injunction preventing a creditor from selling the insolvent's property which right is disputed by the other creditors in the insolvency court. We do not find any reference made to -- The Official Receiver of Coimbatore Vs. Palaniswami Chetti alias Ponnuswami Chettiar and Another, ", at all in the above quoted case. Nor have the learned Judges followed any observations of the English courts.

13. That Section 4 of the Provincial Insolvency Act empowers a court to direct a secured creditor to prove his claim and to issue against him an injunction restraining him from selling the secured property is clear from -- Monmatha Nath Ghose Vs. Mt. Luchmi Debi and Others, . The learned Judges rely upon the very wide powers conferred upon the insolvency court by Section 4, Provincial insolvency Act. But it has to be remembered that the creditor in that case had not yet resorted to the ordinary forum of the civil court for the recovery of his money. The proper way of looking at the question is this: When the equity of redemption in the secured property has vested in the Official Receiver then no proceedings undertaken by a court without the Official Receiver being made a party would bind him and such being the case in the proceedings before the Deputy Registrar in the present case the Official Receiver ought to have been impleaded and he not having been impleaded it is open to the Official Receiver to see that the rights of the secured creditors are safeguarded by means of an injunction. See the observations of the Privy Council in -- AIR 1927 108

(Privy Council) . Dealing with Sub-section (5) of Section 16, Provincial Insolvency Act, 1907, which is equivalent to Section 28(6) of the present

Act, their Lordships of the Judicial Committee observe as follows:

The learned Judges of the High Court interpret this clause as inferring that the secured creditor is entitled to deal with the security as though there

had been no vesting in the court or the receiver. Their Lordships are clearly of opinion that this construction of the clause cannot be supported.

That the rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent

is of course, plain, but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of

redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it, and he and not the insolvent, has the

sole interest in the subject matter of the suit. To him, therefore, must be given the opportunity of redeeming the property. The contrary view would

encourage collusive arrangements between the secured creditor and the insolvent and might involve the sacrifice of valuable equities of redemption

which ought to be made available for the benefit of the unsecured creditors of the insolvent with whose Interests the receiver is charged.

As against these decisions supporting the view that under Ss. 4 and 5 of the Act, the insolvency court has very wide powers, learned counsel for

the appellant has invited our attention to a few cases, the first of them being -- (Nune) Narasimham Vs. (Donepudi) Subramaniam and Others, .

Apart from referring to -- The Official Receiver of Coimbatore Vs. Palaniswami Chetti alias Ponnuswami Chettiar and Another, ", there is no

observation in that case which could help the appellant. Similarly in the -- The Official Assignee of Bombay Vs. Obla Kuna Muna Sundarachari

and Others, , the learned Judges have relied upon certain observations in -- The Official Receiver of Coimbatore Vs. Palaniswami Chetti alias

Ponnuswami Chettiar and Another, ". Even here we do not find any dicta, much less any clear decision on the present point in dispute supporting

the contention of the appellant. But learned counsel placed some reliance on a decision of the Rangoon High Court in -- "M. K. M. Chettyar firm

v. Maung Thaung", AIR 1935 Rang 92 (I), where; Page C. J. discussing the various cases held that a secured creditor of an insolvent is entitled,

notwithstanding the vesting of the property in the Official Receiver, u/s 28(2), Provincial Insolvency Act, to realise his security by filing a suit or

otherwise in accordance with law, without obtaining the leave of the court in that behalf. Granting that the secured creditor has such a right, there is

nothing in the judgment to show that the insolvency Court cannot restrain the secured creditor from proceeding with the suit or other proceeding by

means of a proper injunction.

The question is whether the circumstances are such as would justify the issue of an injunction. If the secured creditor has instituted legal

proceedings in respect of Immovable property situated, in a foreign country belonging to the mortgagor, then even though the mortgagor company

is in the course of winding up in England, English Courts, will not restrain by an injunction the secured creditor from prosecuting such proceedings

especially when the party seeking to restrain can appear before the foreign Tribunal and assert his rights. See the observations in -- "Moor v.

Anglo Italian Bank", (1879) 10 Ch. D. 681 (J). Mr. Chokkalingam relies upon the observations of Jessel M. R. in this case. The learned Master of

the Rolls, at page 690 bases his decision mainly upon the nature of International law and the rights of the English Courts to interfere in the

proceedings before the foreign tribunal and he gives the following reasoning:

Prima facie this court cannot interfere to restrain that proceeding. The court of the country must be assumed to know more about the law of its

own country than the court of a foreign country and the risk of miscarriage in this court if it undertook to administer Italian law would be much

greater than in the courts of Italy, who are, of course, more familiar with their own law, and as all parties can appear in that court and have their

rights finally settled, it appears to me it would be in the highest degree inconvenient for this court to interfere at all, more specially when, to use an

English phrase, the Italian Courts first had seisin of the matter, and have had seisin of it for some 2 or 3 years now past.

14. We are unable to see how the appellant can get any help at all from these observations. In our opinion, the observations in -- "A. I. R. 1925

Mad 1051 (A)," are too widely stated and the principle is correctly stated in paragraph 74 of Mulah's Law of Insolvency. In these circumstances

we have no doubt that the Insolvency Court is empowered to issue the injunction

in proper cases.

15. How far the learned Judge was justified in issuing the injunction has not been seriously disputed before us. On the facts it is clear that all the

Immovable properties belonging to the insolvent have been the subject of the security bond & were being brought to sale before the Deputy

Registrar and it was expedient in the interest of the- general body of creditors to get an adjudication from the insolvency Court as to how far the

mortgage was binding. If in the meanwhile the properties are sold by the Deputy Registrar and purchased by third parties innumerable

complications are likely to arise impeding the realisation of the- just dues of the various creditors. We are therefore of opinion that the learned

District Judge acted rightly in issuing the Injunction restraining the Co-operative Bank from proceeding with the sale of the properties. The civil

miscellaneous appeal is therefore dismissed, in the circumstances with out costs. The Official Receiver will have his costs out of the estate.