(1918) 04 MAD CK 0037

In the Madras High Court

Seena Vana Ramiah Ayyar and Another APPELLANT

Vs

S.R.M.A.G. Gopala Ayyar and Others RESPONDENT

Date of Decision : 16-04-1918

Acts Referred:

Citation : 49 Ind. Cas. 20

Hon'ble Judges : William Ayling, J;Courts Trotter, J

Bench : Division Bench

Judgement

1. The 4th and 5th defendants in this case, who are the appellants, brought a suit, Original Suit No. 305 of 1913 in the District Munsif''s, Court of

Ambasamaram against the 2nd defendant. The 2nd defendant was brought under, the machinery of Order XXXVIII of the Code of Civil

Procedure, because an application was taken against him for his arrest before judgment on the ground that he was absconding from the local limits

of the Court, and there-upon in accordance with the procedure sett out in Order XXXVIII, Rules 1 and 2, he was brought before the Court to

show cause why he should not furnish security far his appearance; and he proceeded under Rule 2 to deposit a sum of money--in this case Rs.

1,200--which was adjudged sufficient to meet the plaintiffs'' claim, that is to say, the claim of the defendants. Nos. 4 and 5 in this suit. The dates

are important. The arrest was on the 15th July 1913, and the payment into Court was on the 21st July following. The 4th and the 8th defendants

obtained a decree for the full amount claimed on the 18th August 1914, and meanwhile on the 29th June 1914, the 2nd defendant had filed his

petition in insolvency. He was not adjudicated on that petition until the 17th February 1915, but by relation back, his insolvency will date from the petition on which he was adjudicated and accordingly the insolvency will date back to June 1914.

2. The question in this case is whether the money paid into Court in accordance with the provisions of Order XXXVIII, Rule 2, belongs to the 4th and 5th defendants as the successful plaintiffs in the suit. If it does not belong to them, rival claims may arise as between the Official Assignee as Receiver of the estate of the 2nd defendant and the plaintiffs in this suit, who are prior decree-holders. But, if the true position be that the money in Court belongs to the 4th and 5th defendants, the question of priority as between other parties to the suit will not arise. There is a good deal of authority on the question, though not any direct decision, as to whether this precise section is to be interpreted as giving a lien to the plaintiff in a suit in the circumstance of money being deposited to secure the defendant from arrest. There are decisions of this and other High Courts in regard to the corresponding sections of the Indian Code and also decisions of the English Courts relating to kindred situations. It is clear that attachment before judgment of property under Order XXXVIII, Rule 5, does not pass any title to the person at whose instance it is attached: but its effect merely is to prevent alienations on the part of the person whose property is attached. It restricts the hands of the owner of the property, but does not make him cease to be the owner nor does it confer any specific lien on the person who seeks the attachment. This has been laid down in numerous oases both in England and in this country, and Lord Hob-house observed in Moti Lal v. Karrabuldin 24 I.A. 170 : 7 Sar. P.C.J. 222 that even attachment in furtherance of execution gives no title. This has been reaffirmed by this Court on a specific reference to Order XXXVIII, Rule 5, which relates to attachment of property before judgment in order to prevent the disposal of the property by the defendant, in Errikulappa Chetty v. Official Assignee, Madras 32 Ind. Cas. 190, a decision of the Chief Justice and Seshagiri Aiyar, J. The learned Judges point out that what one may call a condition of the application on which the money was secured to safeguard the plaintiff''s interest is the abstaining of the defendant from making away with his property and so long as the property is not taken out of the jurisdiction of the Court or alienated and the defendant is ready to produce his property to the Court, then the condition is not broken and as soon as ever the property was produced to the

Court by the defendant on decree being obtained by the plaintiff, the object for which the money was deposited was gone and it could only be

claimed by the person who deposited it. That is tantamount to saying that in contemplation of law it has been his property the whole time, only

subject to certain control and retention by the Court. Similar principles have been applied to money deposited in Court under a garnishee order,

Jitmand Ramanand v. Ramchand Nandram 7 Bom.L.R. 488. That is one class of cases, but you get a totally different class of cases where money

is not deposited in Court in order to secure something being done by the person who deposited it, such as abstaining from going away or removing

his property from the jurisdiction of the Court, but where money is paid to the

3. credit of the suit or earmarked for the suit. The Courts have always held that, when that is done, the money belongs to the plaintiff in the event of

his success and that it cannot pass to the general creditors of the person who pays it in or to any person who claims under him. That distinction has

been very clearly laid down by the English Courts in the case of Pollprd, In re; Pollard, Ex parte (1903) 2 K.B. 41 : 10 Manson 152. In that case

some moneys in a bank belonging to an alleged defaulting executor and trustee were sequestrated by letters of sequestration taken out in the

Chancery Division which, for ordinary practical purposes, may be described as a proceeding in the nature of attachment. The defaulting trustee

was adjudicated a bankrupt and it was held that the sequestrated fund in the hands of the bank did not pass to the plaintiff in an action by the cestui

que trustent who, it was said, had been defrauded, but passed to the Official Receiver as part of the estate of the bankrupt. And Romer, L.J., in his

judgment at page 48, explains why it was so and points out very clearly the distinction between the two classes of oases. He says: ""he (i.e., the

plaintiff) might have obtained a special charge by obtaining some special order having that effect. I think, therefore, that the only question is whether

the payment of the money into Court, under the circumstances of the present case, did give the appellants, who are no doubt in the position of or

editors of the bankrupt, a special right to or charge upon the money So paid in. In my opinion for the reasons which I will shortly state, the order

for payment into Court did not convert the money into the property of the creditors or give them any special charge upon it. The order was to pay the money not to the general credit of the action, but to the special account of the sequestrators. That left the money as part of the debtor''s

property received by the sequestrators as sequestrators. Had the order gone on to say that, after payment of the cost of the sequestrators, the

balance should be paid over to the general credit of the action, the result would have been different; but that was not done."" Similarly, in Bird v.

Barstow (1892) 1 Q.B. 94, a woman got leave to defend an action under Order XIV summary judgment) on terms that she brought into Court

ï¿½500. She paid the ï¿½500 and lost the case. Then she tried to raise a point that she being a married woman, an enquiry would have to be held

to see whether it was money belonging to her separate estate which, in the ordinary course of events, would be the only fund against which the

execution could proceed. The Court of Appeal, consisting of Lord Esher, M. R., Fry, L.J., and Lopes, L.J., refused to go into that enquiry on the

short ground put by Lord Esher that ""the meaning of such an order, in my opinion, is to give security to the plaintiff that, if he succeeds in the action,

he shall obtain the fruits of success."" And, in other oases too, it has universally been held in England that where as a condition of granting leave to

defend the suit, money is paid into Court, that money is the property, subject to proving his claim, of the plaintiff and that it cannot be attached by

the creditors or assignee in bankruptcy of the person who paid it in. And that has been followed in this country in the Madras Courts in two

different sets of cases. In one case it has been decided that where money has been deposited under Order XLI, Rule 5, as a condition of leave to

appeal, it is earmarked to the appeal. In that case, which is reported as Subramania Chettiar v. Bajeswara Sethupathi 43 Ind. Cas. 187: 34 M.L.J

84, im-moveable property, not money, had been given as security by the judgment-debtor as a condition of his appeal and it was held that the

successful decree-holder could realize the decree without bringing a separate suit for the purpose of realizing the security, and of course the

necessary implication is that the property was earmarked to the successful litigant and could be taken possession of by him without further

proceedings of any kind. The learned Judges say at page 874 Page of (1917) M. W. N.: ""The effect of Immovable property being given as

security is something more than attachment, because it makes the property applicable solely in discharge of the judgment debt and not liable to rateable distribution among other judgment-creditors."" Similarly a Bench of this Court in Gopalaiyar v. Thiruvengadam Pillai 38 Ind. Cas. 481 held,

following the English eases, that where money was brought into Court by the defendant as a condition of being allowed to defend under Order

XXXVII of the CPC (summary proceeding in this country on negotiable instruments), the amount paid into Court must be regarded as earmarked

to the action of the plaintiff and, in the event of success, the judgment amount must be regarded as being charged upon it.

4. These are principles which seem to us to be clear and the question is, on which side of the line it is that cases coming under Order XXXVIII,

Rule 2, fall. Order XXXVIII, Rule 1, no doubt says that a defendant when arrested is to be brought before the Court to show cause why he

should not furnish security for his appearance and the argument, as we understand it, is that, that being the nature of the enquiry, the section which

tells us what the Court can do must have regard solely to the matter of furnishing security for his appearance. If that were so, the action would fall

within the principle of the decisions under Order XXXVIII, Rule 5, that the mere furnishing of security or payment of money into Court as"" security

for the appearance of the defendant does not create a lien or earmark it for the purpose of the action, But what happens when the defendant does

appear under a warrant is this, that the Court may make alternative orders: ""The Court shall order him either to deposit-in Court money or other

property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending.

It seems to us that there are two alternative courses open. One is the defendant may give security for his appearance. Such security will be merely

conditional for his appearance in Court and could not be said to be to the credit of the suit or ear marked to the general purposes of the suit. It is a

specific security. The alternative is that he may deposit money or other property sufficient to answer the claim. We think that is not security for his

appearance, but is an alternative by which liberty is given to him to pay into Court sufficient money to meet the suit, and we think that that payment

would be earmarked to the suit and would be subject to the lien of the plaintiff in the event of his success. As was pointed out during the argument,

the words are ""to deposit into Court money...or to furnish security..."", not ""to furnish other security"" which one would expect if the deposit mentioned in the first part of the rule is merely an alternative way of furnishing the security mentioned in the second part, We think that the first

alternative described by the rule is undoubtedly the one pursued in this case, that is, the money was paid into Court to the general credit of the

action, and as such, charged with the lien on the plaintiff obtaining a decree in his favour, and we think that neither the assignee of the bankrupt''s

estate nor the general body of creditors nor any specific creditor has a claim which can prevail over the title of the plaintiff.

5. The result is the appeal is allowed and the suit dismissed with costs throughout. The Official Receiver (out of the estate) and the plaintiffs will pay

the costs.