

(1967) 11 MAD CK 0004

In the Madras High Court

Case No : Original Side App. No. 43 of 1966 and C.M.P. No's. 12111 and 13495 of 1967

Sivasankara Mehta

APPELLANT

Vs

Bagwandas Arjunlal Bankers and Others

RESPONDENT

Date of Decision : 28-11-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 11

Citation : AIR 1969 Mad 112 : (1969) ILR (Mad) 57 : (1968) 81 LW 334

Hon'ble Judges : Sadasivam, J; Ramakrishnan, J

Bench : Division Bench

Advocate : Sivaramakrishniah, for the Appellant;

Final Decision : Dismissed

Judgement

Ramakrishnan, J.—This appeal filed under the Letters Patent is directed against the order of Ramamurti, J., in I. P. No. 42 of 1965, a

petition filed by a creditor to adjudge one Sivasankara Mehta, the appellant, an insolvent. The ground relied on by the petitioning creditor is a brief

one. He alleged that the debtor's properties were attached in execution of a decree passed by the City Civil Court, Madras for payment of money,

that the attachment remained subsisting for a period of more than 21 days, and that consequently this amounted to an act of insolvency, as denned

in Section 9(e) of the Presidency-Towns Insolvency Act. That section is in the following terms-

A debtor commits an act of insolvency in each of the following cases:-- (e) if any of his property has been sold or attached for a period of not less

than 21 days in execution of the decree of any Court for the payment of money." u/s 12(c) such a petition has to be filed by the creditor within

three months from the act of insolvency relied upon. It was alleged by the appellant in answer to the petition that the act of insolvency had occurred

long prior to the period of three months before the presentation of the petition and that, therefore, the petition was barred by time. The learned

Judge held that the petition was not so barred, bearing in mind the relevant dates in the case, and adjudged the appellant insolvent as prayed for by

the order dated 26-4-1966. The debtor appeals.

2. Certain dates are important for the purpose of appreciating the points in controversy. The petitioning creditor attached before judgment the

moveable properties of the appellant in a suit filed by him in O. S. No. 2783 of 1964 on the file of the City Civil Court, Madras. The suit was

decreed for a sum of Rs. 4550/- on 20-11-1964 and the attachment before judgment was made absolute on the same date. On 19-3-1965, the

petitioning creditor, the decree-holder in the above suit, filed an execution petition in the City Civil Court, Madras, praying for the sale of the

moveables of the appellant, which were the subject-matter of the attachment mentioned earlier. The execution petition was ordered on 31-3-1965

and thereafter it was adjourned for filing sale papers. The present insolvency petition was filed on 7-7-1965. The learned Judge was of the opinion

that the act of insolvency within the meaning of Section 9(e) of the Act was completed when 21 days elapsed from 19-3-1965, the date of the

filing of the execution petition and that, therefore, the insolvency petition filed on 7-7-1965 was within three months thereafter and therefore was in

time. Alternatively it was contended by the learned Counsel for the petitioning-creditor before the learned Judge, that time should be reckoned for

the purpose of limitation from 31-3-1965 when notice of the execution petition for the purpose of proceeding with the sale of moveables was

served on the Registrar of the City Civil Court, Madras and from that point of view the petition was in time. But the learned Judge did not consider

this alternative aspect, and gave the opinion that even if the date of the filing of the execution petition on 19-3-1965 is taken into account,

calculating 21 days thereafter, the insolvency petition must be considered to be well within time.

3. In this appeal, learned Counsel for the appellant, Mr. Sivaramakrishniah, contended that on the principle laid down by several decisions of

Courts in India, the act of insolvency enunciated in Section 9(e) of the Act is not a continuing one and that the moment 21 days elapse from the

date of the attachment of the property of an insolvent in execution of a decree for money, the act of insolvency becomes complete. Thereafter the

three months period of time has to be counted for the purpose of limitation u/s 12(b). The authorities relied on in this connection are in *Re,*

Beeston, 1899-1 QB 626, which was followed in *Mt. Anupama Debi Vs. Gurudas Chatterji*, and several other decisions. Of these decisions

Mulla in his *Law of Insolvency in India*, 2nd Edn. at page 124 observed-

The fact that the attachment continues for more than 21 days is not a continuing act of insolvency. Nor is there a repetition of the act of insolvency

at the expiration of every 21 days thereafter. Once these days have elapsed, the act of insolvency is complete. A petition therefore must be

presented within three months of the completion of the first 21 days, though the attachment may continue for more than 21 days"". This principle has

become well established in this country and has to be adopted in this case also.

4. The next and in fact the principal argument relied upon by the learned Counsel for the appellant is this. Order XXXVIII Rule 11, CPC reads

thus:

Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall

not be necessary upon an application for execution of the such decree to apply for a re-attachment of the property"". The effect of this order is to

lay down that when there is an attachment before judgment, and subsequently a decree is passed making the attachment absolute and if thereafter

an execution petition is filed for executing the decree, the anterior attachment can be relied upon for the purpose of realising the amount of the

decree by sale of the property without a fresh attachment. According to the learned Counsel for the appellant, in such cases where the fact of

attachment of a debtor's property in execution of a decree is relied upon as an act of insolvency u/s 9(e) of the Presidency-Towns Insolvency Act,

the terminus a quo for the purpose of calculating the three months period of limitation must be counted from the expiry of 21 days from the date of

the decree which makes the attachment absolute. According to the learned Counsel, even though in fact an execution petition is filed long

subsequent to the decree, Order XXXVIII Rule 11 CPC must be viewed as a deeming provision having the effect of dating the execution petition

retrospectively to the date of the decree itself when the attachment is made absolute. We are unable to agree with this contention. The purpose of a

deeming provision in a statute is to create by a legal fiction something which was not there before. But in cases where Order XXXVIII Rule 11

CPC applies and an attachment had already existed before the execution petition is filed, that order merely declares a right in the decree-holder to

proceed with the execution on the basis of the preexisting attachment without the need to obtain a fresh attachment. No question of deeming

provision arises in such cases.

5. Further, if we are to concede the proposition put forward by the learned Counsel for the appellant, it will amount in many cases to casting an

oppressive burden on debtors. The proposition amounts to saying that the moment the property is attached before judgment and the attachment

before judgment is made absolute on the passing of the decree in the judgment, the attachment for the purpose of Section 9(e) of the Presidency

Towns Insolvency Act will commence from the date of the decree irrespective of whether the decree-holder elects to execute the decree by filing

an execution petition or whether he is prepared to give some accommodation to the judgment-debtor to satisfy the decree. In other words, on the

expiry of 21 days from the date of decree, an act of insolvency becomes complete and the judgment-debtor will have to face the consequence of

an insolvency petition which it may be open to any creditor to file within three months and 21 days after the passing of the decree. Such an

intention cannot be inferred either from the language of Order XXXVIII Rule 11, C. P. C. or Section 9(e) of the Presidency Towns Insolvency

Act.

6. In the present case, it appears to us, that it is by reliance on the fact that such an extreme proposition will enable the appellant to urge a plea of

limitation that his argument appears to have been put forward. But on the other hand, if we are to concede the above proposition the hardship that

will be caused to debtors will in many cases be oppressive and unconscionable. It could not be the intention of the statute to impose such an

onerous consequence, on the mere passing of a decree along with an attachment

of the judgment-debtor's property made before judgment which becomes absolute on the passing of the decree.

7. Several decisions cited in this connection do not support the above extreme view taken by the learned Counsel for the appellant. In fact, the learned Counsel was fair enough to concede that the proposition which he has put forward above is without authority of any decision, and he wants us to lay down the law in the manner suggested by him for the first time in this case. On the other hand, if we read carefully the decisions cited at the Bar, there is practically a consensus of view to hold that the terminus a quo for computing the three months period of limitation u/s 12(b) of the Act is the actual date of the filing of the execution petition followed by 21 days thereafter, and that this will be the case when the filing of an execution petition follows an attachment before judgment and Order XXXVIII Rule 11 is applied thereafter.

8. In *Konchadu Dalayya Vs. Malla Sundara Narayana and Others*, Varadachariar, J., speaking for the Bench observed:

As a question of principle, if an attachment before judgment can be treated as an attachment for purposes of execution at all, it is difficult to see what necessity there is for an order of Court. The more reasonable view seems to us to be to hold that, from the time the decree-holder applies for execution, he elects to avail himself of the attachment before judgment and from that moment the attachment available for purposes of execution".

In *Ramanandhan Chettiar Vs. Veerappa Chettiar and Others*, , a Bench of this Court held that before the attachment before judgment can become

an attachment in execution of the decree, there must be some unmistakable declaration of the decree-holder's intention to execute the decree, that

in ordinary cases such an election or declaration of intention would be made by presenting an execution application, but it does not seem that in

every case without exception it should be done in this manner and in no other and that if the intention to execute can be inferred from other

circumstances, it is sufficient. The decision in *Konchadu Dalayya Vs. Malla Sundara Narayana and Others*, was followed by a recent Full Bench of

this Court in *R.M. Subramaniam Vs. N. Sundaram Iyer*, where the Full Bench observed:

..... an attachment before judgment automatically becomes an attachment in

execution of the decree, when the decree-holder applies for an order of the Court directing the sale of the property attached and that the subsistence of such an attachment for more than 21 days after the application for sale has been made by the decree-holder can be relied upon as an act of insolvency u/s 9(e) of the Presidency-Towns Insolvency Act".

Referring to the effect of Order XXXVIII Rule 11 C. P. C., in a Full Bench decision of this Court reported in Arunachalam Chetty and Another

Vs. Periasami Servai and Others, Wallis, C. J., who delivered the opinion of the Full Bench, at page 910 of the report (ILR Mad) = (at p. 167 of

AIR) observed-

Order XXXVIII Rule 11 does not, in my opinion, enable us to say that property attached before judgment becomes property attached in

execution of a decree upon the mere passing of a decree for the plaintiff, either within the meaning of Article 11 of the Limitation Act or of Order

XXI Rule 57 as execution may never be applied for, but merely enables the decree-holder to apply for execution by sale of the attached

property without a fresh attachment." Though that decision dealt with Article 11 of the Limitation Act, as well as Order XXI Rule 57 C. P. C., in

the context of Order XXXVIII Rule 11 C. P. C. the above observations will be equally valid when we have to construe what is meant by the

terms "attachment in execution of a decree" for the purpose of Section 9(e) of the Presidency Towns Insolvency Act.

9. There is an observation of one of the learned Judges who constituted the above Full Bench, Spencer, J., at page 911 of the report (ILR Mad)=

(at p. 167 of AIR)-

If, on the other hand, a decree is passed and an attempt is made to execute it, what was an attachment before judgment becomes in effect an

attachment in execution of a decree, because Order XXXVIII Rule 11 declares that no re-attachment is necessary. As attachment is the first step

in the execution of all decrees against property, just as sale or delivery of property is the last step, the effect of this provision is that execution is

made to, date back to the first attachment which was before judgment.

We cannot construe this observation of Spencer, J., which appears to have been nothing more than a passing observation, to imply that for the

purpose of Section 9(e) of the Presidency Towns Insolvency Act, on the filing of

an application for execution of a decree where there has been an attachment before judgment, a retrospective effect is given for the purpose of antedating the terminus a quo for the purpose of computing limitation u/s 12(b) of the Act to the date of the judgment when the attachment was made absolute. In fact, in a later Full Bench decision in *Meyyappa Chettiar Vs. Chidambaram Chettiar*, which followed the decision in *Arunachalam Chetty and Another Vs. Periasami Servai and Others*, , Ramesam, J., at page 508 of the report (ILR Mad)= (at pp. 502-503 of AIR) made the comment that in the earlier Full Bench decision *Spencer, J.*, ""may be regarded as going further than the others"", when he agreed with the other Judges to the extent that at least after the order for sale, the attachment before judgment becomes one in execution. In a decision of a Bench of this Court reported in *R. Chidambaram Mudaliar and Another Vs. K.V. Ranganatham and Another*, the question arose u/s 9(e) of the Presidency Towns Insolvency Act. In that case, the petitioning creditor filed a suit against the appellants and obtained an attachment before judgment, which was confirmed when he obtained a decree on 27-7-1941. On 11-9-1941, the decree-holder applied for the sale of the property which was already under attachment. The insolvency petition was filed for adjudicating the appellants on 17-10-1941, relying on Section 9(e) of the Presidency Towns Insolvency Act. The learned Judges observed that when an execution application is made, the attachment automatically becomes an attachment in execution of the decree and no other construction is open. They followed the earlier decision cited above including the judgment of *Varadachariar, J.*, in *Konchadu Dalayya Vs. Malla Sundara Narayana and Others*, . No doubt, the occasion did not arise in that case for examining fully when the terminus a quo for purpose of Section 12(b) commenced; nor was a contention like the one urged by the learned Counsel for the appellant herein placed before the Court; the only dispute was whether an attachment effected before judgment can be deemed to be an attachment in execution of the decree on the filing of a subsequent execution petition. But the observation of the learned Judges that on the making of an execution petition the attachment before judgment automatically becomes an attachment in execution of the decree shows that the Bench was having in mind the principle that the act of insolvency for

the purpose of Section 9(e) of the Act would be committed only if the execution petition is filed and 21 days run thereafter. In fact, Mullah in his

law of Insolvency, in India, 2nd Edn. to which we have made reference already, has referred to this judgment at page 124 of his book for holding

That an attachment before judgment can be relied upon as an act of insolvency where the decree-holder elects to avail himself of the attachment

and applies for execution inasmuch as from the moment of such application the attachment becomes available for the purpose of execution there

being no necessity for a fresh order of attachment by the Court".

10. In view of the above considerations, we are of the opinion that there is no merit in the appeal, which is dismissed with costs of the petitioning

creditor.