

(1960) 02 AHC CK 0025
In the Allahabad High Court
Case No : Civil Revision No. 912 of 1959

Smt. Champa Devi L. Rameshwar Pd.

APPELLANT

Vs

Jairam Das Banu Mal and Others

RESPONDENT

Date of Decision : 22-02-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 59, Order 21 Rule 60, Order 21 Rule 61, Order 38 Rule 5

Citation : AIR 1960 All 615 : (1960) 30 AWR 232

Hon'ble Judges : S.S. Dhavan, J

Bench : Single Bench

Advocate : S.N. Misra, for the Appellant; Ambika Pd. Ganesh Prasad, for the Respondent

Final Decision : Allowed

Judgement

S.S. Dhavan, J.—This is an application u/s 115 C.P.G. against an order of the trial Court rejecting the applicant's claim under Order 38 Rule 8 read with Order 21 Rule 58 C. P. C. that a certain property which was attached before judgment by the court in a pending suit belonged to her and was not liable to attachment, The facts of the case are these. On 15-3-1955 the plaintiff respondents Messrs. Jairam das Banumal filed a suit against Ram Swarup in the Court of the Additional Civil Judge DehraDun for the recovery of Rs. 15,000/-. On 16th. March Ram Swarup sold a house for Rs. 5000/- under a a registered sale deed to Smt. Champa Devi who is the applicant in this revision.

On 19th March the plaintiff firm applied under Order 38 Rule 5 C. P. C. for attachment before judgment, and the house sold to Smt. Champa Devi was specified in the list of properties sought to be attached. On 29th March the court passed an ex parte order of attachment. On 20th May Ram Swarup filed an objection against the attachment in which he denied his liability under the suit. On 5-11-1955 the order of attachment was made absolute. It is common ground that the applicant Smt. Champa Devi was not a party to the attachment

proceedings.

2. Meanwhile on 16-6-1955 the Firm Jairam das Banumal made an application before the Insolvency Court praying that Ram Swarup be adjudged as an insolvent. One of the acts of insolvency alleged against him was the sale of the house to Shrimati Champa Devi. It is common ground that Smt. Champa Devi was not a party to the insolvency proceedings nor was any notice issued to her. On 11-5-1957 the District Judge declared Ram Swarup insolvent and also held that the sale of the house to Smt. Champa Devi was an act of insolvency.

3. On 25-3-1957 Smt. Champa Devi filed her claim in respect of the attached property before the learned Additional Civil Judge. It was supported by an affidavit sworn by her brother-in-law Lala Ugger Sen, who stated that Champa Devi was the legal owner in possession of the property which, consequently, was not liable for attachment in any suit against Ram Swarup.

The plaintiff firm filed no counter-affidavit controverting these allegations but filed an application praying that the official receiver be impleaded as a respondent in the case as the entire property of the insolvent vested in him after the order of adjudication. The parties led evidence before the court, Champa Devi's brother-in-law testifying that she had purchased the house in dispute and Banumal, the partner of the plaintiff firm, deposing that the sale deed was fictitious. Ram Swarup also appeared as a witness.

The learned Judge dismissed Champa Devi's claim for reasons which are best expressed in his own words ".....Once it has been found by the insolvency Court at the time of adjudication that the transfer was an act of insolvency, then the alleged transferee can no longer contend that the transfer was not void on that ground." He relied on a decision of Mukerji, J. in Sheo Raj Bahadur Mathur Vs. Abdul Aziz, in which the learned Judge purported to rely on a decision of the Privy Council in AIR 1943 130 (Privy Council) .

In Sheo Raj Bahadur Mathur Vs. Abdul Aziz, , Mukerji, J. appears to have taken the view that a finding in the order of adjudication by the insolvency Court that a particular transfer of property is an act of insolvency amounts to a decision that the transfer is void, and it is not open to the transferee to re-open this question afterwards and contend that the transfer was not void on that ground.

The learned Judge further held that this principle applies not only where the transfer is declared automatically void by the insolvency Court at the time of adjudication but also where the official receiver applies u/s 53 of the Provincial Insolvency Act for avoidance of a deed of transfer. The learned Judge was of the opinion that the order of adjudication is conclusive, and the remedy of an aggrieved third party is to challenge the order of jurisdiction itself by way of appeal.

In that case a man called Noor Ahmad was declared insolvent and one of the acts of insolvency was held to be a transfer made by him in favour of another man

called Abdul Aziz. The Court held that this transfer was made with the object of defeating and delaying his creditors. Thereupon the property of the insolvent Noor Ahmad vested in the official receiver. Subsequently, the receiver made an application u/s 53 for avoidance of the transfer in favour of Abdul Aziz.

The court held that the sale was not fictitious and rejected the receiver's application. His appeal was dismissed by the District Judge who took the view that the transfer was not automatically avoided by the finding of the court that it amounted to an act of insolvency. In revision Hon^{ble} Mukerji, J. was of the opinion that the Privy Council in AIR 1943 130 (Privy Council) had laid down the principle that it was not open to a transferee from the insolvent, after the transfer had been held by the insolvency Court to be an act of insolvency made with the object of defeating the insolvent's creditors, to contend in any subsequent proceedings u/s 53 that the transfer was not void and should not be set aside.

The learned Judge conceded that the decision of the Privy Council was pronounced in a case under the Presidency Towns Insolvency Act but he extended it to a case under the Provincial Insolvency Act. "because the provisions of the Provincial Insolvency Act are similar to the provisions of the Presidency Towns Insolvency Act." Several decisions of other High Courts, including one of a Full Bench of the Nagpur High Court (AIR 1947 161 (Nagpur)) had been cited before the learned District Judge. But he considered himself bound to follow the opinion of Mukerji, J. reported in Sheo Raj Bahadur Mathur Vs. Abdul Aziz, .

He, therefore, rejected the petitioner's claim under Order 38 Rule 8 even though he conceded that the judgment in the insolvency case which according to him "rendered the sale deed null and void," was passed after the filing of the suit and after the order of attachment. Aggrieved by this decision the petitioner Champa Devi has come to this Court in revision.

4. After hearing learned counsel for the parties I am of the opinion that this application must be allowed, as the learned Judge in rejecting Champa Devi's claim followed a procedure not permitted by law. The powers of a Civil Court to direct the attachment of any property before judgment are derived from, and regulated by O, 38, Rule 5, C. P. C. This rule provides, in effect, that if the Court is satisfied, on proof, that the defendant in the suit is about to commit certain acts (specified in the rule) with the intention of defeating any decree that may be passed against him, it may direct the attachment of his property. It is vital to note that this rule empowers the Court to state "his property" that is, the property belonging to the defendant which he is about to dispose of or about to remove from the local limits of the jurisdiction of the Court. It followed that the Court has no jurisdiction to order attachment of the property which does not belong to the defendant.

5. There is also a provision in Order 38 enabling the Court to investigate the

claim of any person who may allege that the property attached before judgment belongs to him and is not liable to attachment. The investigation has to be made in accordance with the procedure prescribed under Order 21, Rules 58, 59, 60 and 61. The claimant, also called the objector, has to adduce evidence to show that on the date of the attachment he had sonic interest in the property attached or was possessed of it. Rule 60 enjoins, in effect, that Court shall make an order releasing the property from attachment if it is satisfied that, on the date of attachment, the property was not in the possession of the defendant or of any person on his behalf or if it was held by the defendant not in his own right but on behalf of some one else. (I have given a somewhat free paraphrase of the rule which is too lengthy to quote).

6. Thus, the Court has to follow a certain procedure prescribed by law in investigating the claim of any person who objects to any property having been attached and demands its release. It has to consider whether or not the property was in the possession of the defendant or some one on his behalf. If it comes to the conclusion that it was not, it must pass an order releasing the property from attachment.

In the present case the learned Judge, instead of considering on merits the evidence adduced by the claimant Champa Devi in proof of her allegation that on the date of attachment she was the owner in possession of the property attached, concluded that he was bound to treat the sale of the house in her favour as void and a nullity, notwithstanding the fact that the claimant was not a party in the insolvency proceedings."

Having held the sale to be void he refused to consider Champa Devi's claim that the sale in her favour was genuine and for consideration, on the ground that her claim automatically failed. Two vital facts may be noted. First, the order of attachment was passed on 29-3-1955 and made absolute on 5-11-55, but the order declaring Ram Swamp insolvent and the sale of the house an act of insolvency was not passed till 11-5-1957. Secondly, it is common ground between the parties that there has been no order u/s 53 of the Insolvency Act annulling the transfer in favour of Smt. Champa Devi, and the Court below treated the order adjudging the transfer an act of insolvency as equivalent to an order of annulment.

7. As the learned District Judge mainly based his decision on the authority of the principle enunciated by Mukerji, J. in Sheo Raj Bahadur Mathur Vs. Abdul Aziz, , it is necessary to consider that decision. Mukerji J. followed what he considered to be a principle declared by the Privy Council in AIR 1943 130 (Privy Council) . With the utmost respect, however, I do not think that the Privy Council laid down that the mere finding that a sale or transfer is an act of insolvency amounts to an automatic adjudication that it is also void. The law on this point has been authoritatively declared by the Supreme Court in Rm. Nl. Ramaswami Chettiar and Others Vs. The Official Receiver, Ramanathapuram At Madurai and Others, in which the meaning and effect of the Privy Council's observations in AIR 1943

130 (Privy Council) were considered. On page 73 their Lordships Sarkar and S. K. Das, JJ. observed,

"It is therefore abundantly clear that all that the Judicial Committee held in AIR 1943 130 (Privy Council) was that in a case under the Presidency Towns Insolvency Act, when the act of insolvency upon which an order of adjudication is founded is a transfer amounting to a fraudulent preference, the transferee cannot so long as the order of adjudication stands, question that finding, namely, that the transfer was a fraudulent preference, and that, therefore, in an application by the official assignee to have that transfer annulled on the ground that it was a fraudulent preference, the order of adjudication is conclusive proof that the transfer was by way of a fraudulent preference and it was not open to the transferee to lead evidence to prove that the transfer was not a fraudulent preference. In such a case therefore the order of annulment had to be made as a matter of course on proof of the order of adjudication. The Judicial Committee did not hold that in such a case the order of adjudication itself annulled the transfer and no separate order of annulment was required for the purpose. In fact, it is obvious that they thought that a separate order annulling the transfer would be necessary even in such a case for otherwise they would not have stated that "the decision of the High Court avoiding the transfer is plainly right;" nor while setting aside the order annulling the transfer reserved the right of the official assignee, should the occasion arise, to make a further application to have the transfer declared void. The case therefore does not support the proposition for which it has been cited. On the contrary, it clearly proceeds on the basis that even where the order of adjudication is based on an act of insolvency constituted by a transfer of property found to be a fraudulent preference, the transfer stands till it is set aside. In our view, this is the correct position and nothing to the contrary has been brought to our notice."

8. Moreover, the observations of the Privy Council were made in a case under the Presidency Towns Insolvency Act and not under the Provincial Insolvency Act. The learned Judge applied these observations to the latter Act because he thought, to quote his own words, "the provisions of the Provincial Insolvency Act are similar to the provisions of the Presidency Towns Insolvency Act." With deep respect, I must point out that the two Acts are not in pair material. I am fortified in this opinion by the view taken by Sarkar, J. in the Supreme Court case referred to above *Rm. Nl. Ramaswami Chettiar and Others Vs. The Official Receiver, Ramanathapuram At Madurai and Others*, .

His Lordship, after an exhaustive and comparative survey of the Presidency Towns Insolvency Act, the Bankruptcy Act, and the Provincial Insolvency-Act, came to the conclusion that the judgment of the Privy Council, which was based on the Presidency Towns Insolvency Act, "cannot be applied to an Act (Provincial Insolvency Act) which differs in all respects from the relevant provisions of Sections 10 and 11 of the Bankruptcy Act on the basis of which that judgment was given. In Provincial Insolvency Act, neither the order of adjudication is

conclusive evidence that it has been duly made, nor the trustee's title dates back to the act of insolvency on which the adjudication is founded." The learned Judge declared his definite view that "neither the decision in *Ex parte Learoyd* (1878) 10 Ch. D 3 based on the provisions of the Bankruptcy Act, 1869, nor the Privy Council decision in AIR 1943 130 (Privy Council) based upon the provisions of the Presidency Towns Insolvency Act, has any bearing in construing the relevant provisions of the Provincial Insolvency Act." In the preface to the 2nd Edition of Sir Dinshah Fardunji Mulla's *The Law of Insolvency in India* Mr. Justice Bhagwati (as he then was), who edited the book, also expressed the view that the principle underlying the decision by the Privy Council in AIR 1943 130 (Privy Council) was not applicable to the Provincial Insolvency Act.

9. In view of the principle enunciated by the Supreme Court on this point which is the law declared by the Supreme Court on this question and, under Article 141 of the Constitution, binding on all Courts in India, the view taken by Mukerji, J. to the contrary in *Sheo Raj Bahadur Mathur Vs. Abdul Aziz*, cannot be regarded as good law.

10. I must, therefore, hold that in treating the question of the validity of the sale as a close chapter and refusing to consider on merits the evidence produced on behalf of the claimant Champa Devi, he denied her an opportunity to prove that on the date of the attachment she was the owner of the property attached, in violation of the mandatory provisions of Order 38 and Order 21, C. P. C. and followed instead a procedure not authorised by law. His election must, therefore, be set aside.

11. I, therefore, allow this revision with costs and remand the case to the Additional Civil Judge, Dehradun to decide the claim of Champa Devi on merits in accordance with the procedure prescribed under Order 38 Rule 8 read with Order 21 Rules 58 to 61 C. P. C. As the parties have already produced their evidence, no further evidence shall be permitted and the learned Judge will decide the claim on the basis of the evidence already on record.