
(1914) 04 MAD CK 0040
In the Madras High Court

Sornammall

APPELLANT

Vs

The Official Assignee of Madras

RESPONDENT

Date of Decision : 02-04-1914

Acts Referred:

Citation : 24 Ind. Cas. 239

Hon'ble Judges : Charles Arnold White, C.J;Oldfield, J

Bench : Division Bench

Judgement

Charles Arnold White, C.J.—In this case the South Indian Export Company--I will refer to them hereafter as the Company--applied to the Court for an order u/s 108 of the Insolvency Act that the estate of one Muruga Pillai deceased should be administered in insolvency. The application states that the deceased at the time of his death was indebted to the Company in the sum of about Rs. 50,000. It also states that by three agreements the deceased had hypothecated skins and other things and also deposited with the Company the title-deeds of certain properties to Secure the re-payment of the amount due to the Company, but that the Company were informed that the value of the security held by them did not exceed Rs. 30,000 and they claimed to be unsecured creditors for the balance. An order was made on this application. The order was u/s 109. Section 109, Sub-section(1), provides : " Upon an order being made for the administration of a deceased debtor's estate u/s 108, the property of the debtor shall vest in the Official Assignee of the Court, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act." Sub-section (2) provides : "With the modification hereinafter mentioned, all the provisions of Part III, relating to the administration of the property of an insolvent, shall, so far as the same are applicable, apply to, the case of such administration order in like manner as to an order of adjudication under this Act." Shortly after the making of this order, a notice of motion was taken out by the Official Assignee". It was served on two parties. One of them is the widow of the deceased : the other is said to be the brother of the widow. We are not concerned to-day with the transaction in which the brother of the widow is said to have taken part. We

are only concerned with the widow. The notice of motion is dated the 4th December 1912, and it asks for an order as against the widow declaring that certain properties were purchased by the deceased benami in her name and were in reality the property of the deceased and as such were vested in the Official Assignee. The notice of motion was made returnable on the 9th December 1912. There is appended to the notice of motion this note : This notice of motion was taken out by the Official Assignee and will be based on his report and oral testimony of witnesses." I do not propose to say anything with regard to the question as to how far the report of the Official Assignee is evidence. We have discussed this question in another case. It may, however, be pointed out that the notice of motion is returnable on the 9th December and the report is dated the 14th. If the motion had come on for hearing on the day on which it was returnable, it is difficult to see how the widow could have had an opportunity of meeting the report. However, we are told that, as a matter of fact, the notice of motion did not come on for hearing until February.

2. Mr. Chamier, who appeared in support of the learned Judge's order, contended before us that the application was made on behalf of, and in the interests of, the general body of creditors. The general body of creditors are, no doubt, interested in seeing that the Company's security is upheld, because if the security is upheld, the amount which the Company would be entitled to prove against the estate would be so much the less and the balance available to the general body of creditors, if there are any assets at all, would be so much the more. That is the only interest, so far as I can see, which the general body of creditors had in the success of the application made by the Official Assignee. On the other hand it is obvious that the Company had a very substantial interest in the order, which the Official Assignee asked for, being made, because their security was in jeopardy and the order made by the learned Judge was in effect an order that their security was good. The actual finding of the Judge in regard to this matter was : I am of opinion that the evidence establishes that Sornammall (that is the widow) held the property benami for the insolvent." Therefore one cannot help thinking--we have no information one way or the other--that this application, at any rate in the first instance, was not conceived as being, as Mr. Chamier suggests it was, in the interest of the creditors, but was made for the purpose of establishing by an order of the Court in insolvency that the security which the company hold over the property of the deceased was a good security on which they could realize.

3. The state of things, as I understand it, when the notice of motion was launched was this : the Company held a mortgage over the property which constituted them, as they contended, secured creditors. The house property referred to in the notice of motion is included in the mortgage and the mortgage was executed by the deceased and by his widow. The title-deeds stand in the name of the widow. In that state of things I confess I do not understand why the Company did not proceed under Section. 12 of the Act and, if they were not willing to relinquish their security, give an estimate of the value of their security

and prove for the balance, and having done so, proceed to realize their security. The widow being a party to the mortgage, the fact that the title-deeds stood in her name would not have been, as I understand the case, an obstacle in the way of the Company when they sought to realize the security. If the Company had sought to realize their security, it would, no doubt, have been open to the widow to set up a case that her signature to the mortgage was obtained by fraud : but until she was able to substantiate that, the Company were in the position of ordinary secured creditors and were entitled to realize their security. However, that course was not taken. When the motion came on for hearing, Mr. Grant, who appeared for the widow, did not argue the case on the merits : but he said there was no jurisdiction to make this order. So far as the notice of motion goes, it does not appear under what section of the Act the jurisdiction of the Court was invoked. But I do not think it is contended that, as a matter of fact, the Court was asked to make the order under any other section than Section 36. The learned Judge in his judgment refers to that section. He says that "under Section 36 the Official Assignee can apply to the Court in a summary manner for an order that the property may be delivered to him." Then the learned Judge goes on to refer to Section 7.

4. As regards Section 36 our view of that section, as we have had occasion before to observe, is that it is a discovery section. It enables the Official Assignee to get an order which will help him in discovering the existence of property which belongs to the insolvent, or which will enable him to acquire information on which, on adopting the appropriate procedure, he may be in a position to ask the Court for an order that property, which prima facie belongs to somebody else, forms part of the estate of the insolvent. In my view the section does not authorize the Court to make an order determining any question of title as between the insolvent and a third party where a third party sets up a title which the Official Assignee desires to call in question. Other sections of the Act provide for the procedure whereby these questions of title are to be determined. We have specific sections, such as the voluntary settlement section and the fraudulent preference section, and in addition there is the general power of the Court to set aside a transaction, if a proper application is made in that behalf, on the ground that it is fraudulent, or against the policy of the Insolvency Act. That being my view of the construction of the section--and I think that is the construction which has been placed upon the corresponding English section, namely, Section 27 of the English Act of 1883--the learned Judge, in my opinion, had no power to make the order u/s 36.

5. Then Mr. Shenai has contended on behalf of the Official Assignee that the learned Judge had jurisdiction, to make the order u/s 7. Now Section 7 is taken word for word from Section 102 of the English Act. As regards Section 7 it seems to me that three questions arise. First, does Section 7 apply to administration proceedings at all ? Secondly, if it does, the general question, is there power to deal with a question arising between the Official Assignee and a stranger, where the Official Assignee sets up no larger right than the insolvent had, on motion in

the insolvency ? Thirdly, if Section 7 applies, the specific question, was there jurisdiction to make this particular order in view of the circumstances in which it was made?

6. Now as regards the first question, does Section 7 apply to administration proceedings at all ? The provisions of Section 125 of the English Act are reproduced in Sections 108 and 109 of the Indian Act. Sub-sections (1) and (2) of Section 109 of the Indian Act correspond to Sub-sections (5) and (6) of Section 125 of the English Act. In the case of *In re Hewitt : Ex parte Hannah and Walter Hewitt* 15 Q.B.D. 159 : 54 L.J.Q.B. 402 : 53 L.T. 156 : 2 Morrell 184. the question arose as to whether the provisions of Section 27 of the English Act of 1883, which corresponds to Section 36 of our Act, applied to the administration of the estate of a person dying insolvent and it was held that they did not. The ratio decidendi of that case was that as Section 27 was not one of the provisions of Part III of the English Act, that particular section " was not applicable in the administration of the estate of a deceased insolvent. Mr. Justice Cave puts it thus : This question depends primarily on the language of Section 125. The 6th sub-section of that section" [that is Sub-section (2) of Section 109 of our Act] " applies with the modifications after-mentioned all the provisions of Part III of the Act relating to the administration of the property of a bankrupt so far as the same are applicable. There is, therefore,, an express enactment that the provisions of Part III with " certain modifications shall apply to the administration in bankruptcy of the estate of a person dying insolvent. The terms of, Sub-section 5" [that is Sub-section (1) of our Section 109] "cannot, as it seems to me, be relied upon as extending, the provisions of Sub-section 6." Mr. Justice Wills says : "By Sub-section 6 of Section 125, the Legislature has specifically pointed out certain sections of the Bankruptcy Act which are to be applied to the administration of the estates of persons dying insolvent. According to the ordinary rules of interpretation, unless there are strong reasons to the contrary, when they provide that the provisions of Part III shall be applicable, they must be considered to mean that other parts of the Act shall not be applicable." The learned Judge also observes : There is no reason afforded by the use of the language referred to why any other provisions than those of Part III should be applicable to the administration of estates u/s 125." If we apply the ratio decidendi of that decision to the question before us, there can only be one answer to the question. There is another authority which throws light on the question and that is *Ex parte Official Receiver : In re Gould* (2). There it was held that Section 47 of the Bankruptcy Act of 1883, which avoids certain voluntary settlements executed by a bankrupt, does not apply to the administration of the estate of a deceased insolvent by the Court of Bankruptcy. According to the English decisions, the fact that the provision which is sought to be applied to administration proceedings does not form part of Part III is conclusive on the question as to whether that provision is applicable. On the other hand the fact that it does form part of Part III is not conclusive. The judgment of Fry, L.J., is instructive, because he traces the history of the jurisdiction. There he makes this

observation : "It is argued that the use of the words administration according to the law of bankruptcy," in Sub-section 1, shew that the estate of the deceased debtor" is to include the property of third persons. In my judgment those words apply only to the mode of administration, and not to the subject-matter which, is to be administered. In my opinion, if it had been intended to arm the Court with the power of administering the property of third persons as part of the estate of a deceased insolvent-debtor--a power which had never been possessed by the Court of Chancery--the Legislature would have expressed their intention in clear and unambiguous language." Again, What is an 19 Q.B. D. 92 : 56 L.J.Q. B. 333 : 56 L.T. 806 :(SIC) administration order ? It is an order for the administration of the deceased debtor's estate," and of nothing else. So many, therefore, of the provisions of Part III as are applicable to such an administration are imported into Section 125, and no others." I do not think there is any case (at any rate our attention has not been called to any case), in which it has" been held that on a motion in proceedings for the administration of the estate of a deceased insolvent, the Court has power to hold that property which prima facie belongs to somebody, else forms part of the estate of the insolvent. For the purposes of the case before us today, I do not think it necessary for us to express any final opinion in this matter. But I find it difficult to suggest any grounds for holding that the decision in *In Re Hewitt*, 15 Q.B.D. 159 : 54 L.J.Q.B. 402 : 53 L.T. 156 : 2 Morrell 184. does not govern the question.

7. Assuming for the purposes of this judgment that Section 7 applies to administration proceedings there is the further question, the general question, is there power to deal with this class of cases on notice of motion ? That, of course, depends upon the construction of Section 7, which is taken word for word from Section 102 of the English Act. No doubt, the words are very wide. Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case", that is to say, in any case of insolvency coming within the cognizance of the Court.

8. The effect of Section 102 of the English Act has been the subject of a great many decisions which I do not propose to discuss now. But the effect of the decisions is thus stated by Vaughan Williams, L.J., in his book on Bankruptcy, 9th Edition, page 342. He points out various considerations and then goes on : All" (that is all these considerations) "seem to point to an intention by the Legislature that the High Court in bankruptcy should now exercise that jurisdiction between the trustee and strangers which the cases under the old Act (SIC) then constituted, could not, or ought not, to exercise." Applying that summary of the law I should have been disposed to hold, although I do not think it necessary to give a final decision on the question, that the question which was raised in this notice of motion was a question which could be determined as

between the Official Assignee and the stranger on a notice of motion, and that it was not necessary that the Official Assignee should bring a suit for the purpose of having the question determined.

9. That brings me to the last question, the specific question : in view of the fact that the learned Judge purported to make the order u/s 36, can we say that he had jurisdiction to make the order? The learned Judge says : "Under section 36 the Official Assignee can apply to the Court in a summary manner for an order that the property may be delivered to him." He refers to Section 7 as giving him power to decide all questions arising in a case of insolvency. I understand that the learned Judge decided the question of title and ordered delivery of possession in exercise of the powers which he considered he possessed u/s 36. As I have already said, in my opinion the jurisdiction given by Section 36 does not include a power to determine questions of title as between the Official Assignee and a stranger to the insolvency, where prima facie and until the contrary is proved (and this is the footing on which this case was argued) the title is in the stranger.

10. I think we must hold that this order was made without jurisdiction. The order in so far as it relates to the properties described as items 1 and 2 in the schedule attached to the notice of motion is set aside with costs here and before Mr. Justice Bakewell, the costs to be taxed on the original side scale. The costs of Mr. Grant's client and of the Official Assignee may be paid out of the estate.

Oldfield, J.

I agree.