
(1927) 02 MAD CK 0052
In the Madras High Court

T. K. Kaliaperumal Naicker and Others	APPELLANT
Vs	
O. S. Ramchandra Ayyar and Others	RESPONDENT

Date of Decision : 01-02-1927

Acts Referred:

Citation : AIR 1927 Mad 693

Hon'ble Judges : Ramesam, J

Bench : Division Bench

Judgement

Ramesam, J.—The facts of this Second Appeal may be stated as follows: The 1st defendant, Somu Asari, executed a deed of mortgage,

Ex. A, on 27th October 1907, in favour of one Govinda Asari, for Rs. 100, payable in two years with interest at 12 per cent per annum and a

higher interest in default. Govinda Asari, the mortgagee, died on 19th August 1914 leaving two sons, Amirthalinga Asari and Chinnasami Asari. In

a partition between the sons the suit debt fell to the share of Amirthalinga Asari. He was declared an insolvent and his property vested in the

Official Receiver of Tanjore who files this suit for recovery of money due on the mortgage deed. The suit was filed on 26th October 1921. The suit

was originally filed against four defendants, and we may ignore the fourth defendant for the present. The second defendant purchased the property

from 1st defendant. The 3rd defendant again purchased the property in execution of a decree against the 2nd defendant. The 3rd defendant filed

an application for being declared an insolvent on 16th November 1920. u/s 20 of the Provincial Insolvency Act, the Official Receiver was

appointed interim Receiver on 17th January 1921. On 20th December 1921, an adjudication order was passed. On 25th April 1922 the plaintiff

applied that the Official Receiver of Tanjore in the capacity of the Receiver of the estate of the 3rd defendant, should be made a defendant and he was accordingly made the 5th defendant.

2. The only point raised in the lower appellate Court and argued before me is whether the suit is barred by limitation by reason of the 5th defendant

being impleaded in the suit on 25th April 1922, which was more than 12 years from the date when the cause of action arose. Mr. Watrap S.

Subrahmania Ayyar, who appears for the appellant, relies on Section 28 (7) which says that an order of adjudication shall relate back and take

effect from the date of the presentation of the petition on which it is made. He contends that the effect of the order of adjudication, and the vesting

order which followed, is that it must be taken that the adjudication and the vesting were made on 16th November 1920, the date of the

application; and if the suit was filed after that date, without the Official Receiver as a party, it was defective, and as the defect was cured by

bringing him as a party on 25th April 1922, the suit is barred u/s 22 of the Limitation Act.

3. Order 22 of the Civil P. C. deals with the devolution of interest by the operation of law and not by act of parties. Though there is one rule

dealing with the position of a plaintiff becoming an insolvent there is no rule dealing with a defendant becoming an insolvent. If there is no provision

of law then the case of the defendant becoming an insolvent is strictly like any other case of devolution. The Official Receiver in insolvency may be

regarded as a continuation of the original defendant. If the suit was filed prior to the order of adjudication, the only possible person who can be

made defendant is the party himself, and all that can be done is that if he is declared an insolvent afterwards to bring as a party the Official Receiver

on whom the interest has devolved, if one so chooses. But now, Act 5 of 1920, Section 29, provides for the case of a defendant who has been

adjudicated an insolvent. Section 29 says:

Any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made against him

under this Act, either stay the proceeding: or allow it to continue on such terms as such Court may impose.

4. If the Court allowed the suit, imposing, some further terms it can proceed only

on those terms being complied with. If the Court insisted on the Official Receiver being brought in as a defendant the Official Receiver will have to be brought in. But he will have to be brought in, not because he is an essential party to the suit in the sense that his absence is fatal to the suit, and if he is impleaded at a later date the suit will be regarded as filed on that date, but because of the provisions of Section 29 of the new Act. The suit was rightly filed on 26th October 1921, and there is a devolution of interest on the Receiver who is merely a continuation of the original defendant. Section 28 (7) must be read in conjunction with Sections 28 (2) and 29. Section 28 (2) says that, if suits or legal proceedings are taken after the order of adjudication, they shall not be commenced except with the leave of the Court on such terms as the Court may impose. But we are not concerned here with a suit filed after the order of adjudication.

5. The present suit was filed before the order of adjudication, and as it was then filed it was properly filed, and not defective. The appellant contends that the plaintiff had not obtained the leave of the Court for the filing of that suit. Mr. Subrahmania Ayyar refers me to a number of cases u/s 28 (7). Most of these cases had to do with the effect of dealings by the insolvent in the interval between the application and adjudication. For instance, in *Sheonath Singh v. Munshi Ram* [1920] 42 All. 433 it was held that alienations by the insolvent are not valid against the Official Receiver. The effect of Section 28 (7) was correctly described there. The actual sections referred to there are the corresponding sections of the old Act:

No vesting takes place until an order of adjudication is made. It is the making of the order of adjudication which vests the property, and only upon such an order being made can any vesting take place at all. But once the order is made the effect created by it is by a legal fiction taken to relate back to the presentation of the petition or in other words the commencement of the insolvency.

6. For all purposes of the insolvency Act this fiction has to be used and it is a very useful fiction; but outside those purposes it has no place. The filing of a suit prior to the adjudication may be regarded outside the purpose of the Insolvency Act with reference to the provisions of Section 28

(2). The decision in *Subramania Aiyar v. Ramakrishna Aiyar* A. I. R. 1922 Mad.

335 relates to a case where a suit was filed after adjudication.

There the learned Judges referred to the order dating back to the petition. All the other cases referred to by Mr. Subrahmania Ayyar are not cases

relating to insolvency but generally cases on the effect of a party being brought in at a later stage of the suit when the suit was defective without the

presence of the party earlier. I do not think that those cases have anything to do with the matter before me. To hold otherwise would be to lay

down a rule of law which would be impossible for one to comply with.

7. The second point raised by Mr. Subrahmania Ayyar is that the Receiver ought to have been made a party at least on 20th December 1921. But

once it is held that the suit was rightly filed on 26th October 1921, and the bringing in of the Official Receiver is merely a matter of compliance with

such orders as the Court may pass u/s 29 of the Insolvency Act, the fact that he might have been brought in December 1921 and not in April 1922

makes no difference. There is no rule of limitation governing the application to bring the Official Receiver as a party. Directions of Court u/s 29 are

the only matter that can govern the procedure in regard to the bringing in of the Official, Receiver as a party.

8. The third contention of Mr. Subrahmania Ayyar is that as the interim order was passed on 17th January 1921 the properties vested in the

Official Receiver on that date, and as the suit was filed nine months after that date the Official Receiver could have been made a party. But the

order of the appointment of the interim Receiver has not got the same effect as the vesting order or the order of adjudication. The effect of the

appointment of an interim Receiver is that he will have such of the powers conferrable on a Receiver appointed under the CPC 1908 as the Court

may direct. Ex. VI, which is the order appointing the Official Receiver as the interim Receiver shows that he was appointed as interim Receiver

only for the purpose of realisation of the assets of the insolvent, to collect the rents and debts due to the insolvent and for similar other purposes.

But the properties themselves do not vest in the Official Receiver by reason of such an interim order. Therefore the contention of Mr. Subrahmania

Ayyar fails.

9. The result is the decision of the lower appellate Court is right and the Second Appeal is dismissed with costs.