

(1981) 12 MAD CK 0063
In the Madras High Court

V. Natarajan and Another

APPELLANT

Vs

N. Salai Muthu and Another

RESPONDENT

Date of Decision : 21-12-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Companies Act, 1948 — Section 320
Companies Act, 1956 — Section 531(A)

Citation : (1984) ILR (Mad) 276 : (1984) 97 LW 49 : (1984) 2 MLJ 17

Hon'ble Judges : S. Swamikkannu, J; S. Swamikannu, J

Bench : Division Bench

Judgement

S. Swamikkannu, J.—This is an interesting Civil Revision Petition in which a principle of "Doctrine of Notice" has been the subject matter of argument advanced by both the sides. The Uma Investment Company incorporated under the provisions of the Indian Companies Act was in existence and the same became defunct and therefore an Official Liquidator had been appointed in this case. The main question that arises for consideration in this Civil Revision Petition, is whether it is the Director of the defunct company who has to be given the notice of the rights and claims of that company as original decree-holder as per the provision of O.21, r. 6 of the C.P.C., or the Official Liquidator who had taken the reigns of administration on 22nd April, 1976 on the petition filed for winding up the company, namely, C.P. No. 441 of 1976. The preliminary decree had been passed in the suit on 9th April, 1974. The said preliminary decree had been assigned by Uma Investments Private Limited, namely the company which is undergoing liquidation, in favour of the respondents in this revision petition. Now, a question has arisen as to whether these respondents who are ready and willing to pay the amount that is due and payable to the decree-holder have to pay after giving notice to the Official Liquidator as per Section 531(A) of the Companies Act (1 of 1956) which is equivalent to Sections 320 and 321 of the Indian Companies Act of 1948. After Viswanatha Sastri Committee's Report had been accepted by the Central Government, Act 1 of 1956 came into the Statute

Book of Bharat and the old Section 321 of the old Companies Act had been remodelled and put in a refined way so as to suit the Company Law of the country by way of provisions u/s 531(A) of the Companies Act (1 of 1956). In the instant case, on 23rd June, 1976, I.A. No. 645 of 1976 was filed by Uma Investments Private Limited for final decree. The order of winding up had emanated from the competent Court on 23rd July, 1976 in C.P. No. 441 of 1976. On 9th August, 1976 the final decree was passed. On 19th August, 1976, the present execution petition was filed in which the order under revision was pronounced with respect to the notice that has to be given with respect to the assignment of the decree.

2. E.P. No. 277 of 1976 was filed in Q.S. No. 687 of 1973. On 18th August, 1978, a petition had been filed in this Execution Petition for recognising the assignment of decree and sale of the movables attached before judgement under O. 21, r. 11 of the C.P.C. the said E.P. No. 277 of 1976, dated 18th August, 1978 was disposed of by an order of the learned II Additional Subordinate Judge, Coimbatore, on 15th day of April, 1980 holding as follows:

I therefore think that Sub-section (1) of Section 26 is qualified by Sub-section (2) of Section 26. Moreover, I am inclined to think that even if any transfer is effected without any sanction of the Chit Registrar, the transfer cannot be void. Therefore, I dismiss the contention of the learned Counsel for the respondents that the assignment is hit by Section 26(1) of the Madras Act XXIV of 1961.

The assignment was recognised. As against the above order, the respondents (V. Natarajan and V. Thangavel) in E.P. No. 277 of 1976 have come forward with this civil revision petition inter alia contending that notice ought to have been served on the Official Liquidator because it is he who comes into the picture after the winding up proceedings had been taken up by the Court, and he had been given directions by the Court to submit report to the Court regarding the financial condition of the company so wound up. On the other hand, the learned Counsel for the respondents in this revision petition contends that the lower Court is correct in having held that the notice to the Uma Investments Private Limited is quite sufficient because the assignment of decree was only on 22nd August, 1974 which is about 2 years prior to the appointment of the Official Liquidator in C.P. No. 441 of 1976. The petition, namely I.A. 645 of 1976 was filed by Uma Investments Private Limited on 23rd June, 1976 for final decree. It was within a month from thereof or exactly on the very same date in the subsequent month C.P. No. 441 of 1976 was ordered for winding up the said company. On 9th August, 1976, the final decree was passed.

3. It would have been better if the fact of winding up of the company had been brought to the notice of the Court even when the final decree was passed on 9th August, 1976 in O.S. No. 689 of 1973. It is common ground that such an impleading of the Official Liquidator for the winding up of the company in C.P. No. 441 of 1976 does not seem to have been represented to the Court which passed the final decree in O.S. No. 687 of 1973 on 9th August, 1976 as mentioned

above.

4. It is brought to the notice of this Court that C.R.P. No. 2608 of 1977 was filed before this Court u/s 115 of the C.P.C, to revise the order made in E.P. No. 277 of 1976 in O.S. No. 687 of 1973 by the learned II Additional Subordinate Judge, Coimbatore, and while disposing of the same, this Court has observed as follows:

The reason given by the Executing Court, that, because the assignment came to be effected in favour of the Revision Petitioner on 22nd August, 1974, and after that assignment, steps were taken by the decree-holder, Uma Investments Private Limited to have the final decree passed, and that it is not open to the assignee to rely upon the assignment, cannot be held to be correct. Nor does it affect the locus standi of the original decree-holder to have the final decree passed. Therefore, the Civil Revision Petition is hereby allowed and the Execution Petition is remitted back to the II Additional Subordinate Judge, Coimbatore, for disposal on merits. No Costs.

5. Referring to the above decision, the learned Counsel for the respondents herein submits that notice need not be given to the Official Liquidator who was appointed in C.P. No. 441 of 1976 though the said C.P. No. 441 of 1976 had been filed with reference to the very same Uma Investments Private Limited which had assigned the decree in O.S. No. 687 of 1973 in favour of the petitioners in E.P. No. 277 of 1976, the order on which is now before this Court as the subject-matter of this revision. This Court is unable to uphold the contention so raised on behalf of the respondents herein. Because, when once the order for winding up has been made in C.P. No. 441 of 1976 with respect to Uma Investments Private Limited which had assigned the decree in O.S. No. 687 of 1973 in favour of the petitioners in E.P. No. 277 of 1976, it is well established position of law that from the date of the order of the winding up the activities of the company registered under the Indian Companies Act (1 of 1956) are subject to the supervision of the Official Liquidator who has got complete control over the financial aspects as well as the procedural aspects relating to the various transactions which the company had indulged in during the relevant period affecting its activities which became questionable in the interest of the share-holders of the company. Therefore, it is needless to say that when once the assignment had been made by the Company under winding up proceedings, the said transaction also comes within the purview of the supervisory and the scrutinisation power of the Official Liquidator who is actually entitled to notice u/s 531(A) of the Indian Companies Act. Merely on the ground that the decree had been passed two years prior to the appointment of the Official Liquidator in C.P. No. 441 of 1976, it cannot be said that it stands in the way of the assignees of the benefits of the decree giving notice to the Official Liquidator who is actually entitled to have the complete know of things relating to the transaction of the company prior to the ordering of winding up as well as the subsequent matters relating to the financial aspects of the company. Of course, it may be said, unless there is provision under the procedural law of the land which provides that such a notice should be given to

the Official Liquidator, the Court cannot compel a notice being given to the Official Liquidator. It is not a case of any provision actually existing as it is that a notice has to be given to the Official Liquidator so as to enable the Court to order notice to the 1st defendant. It is common knowledge that when once a public limited company had become a subject-matter of liquidation and that a competent officer has been appointed by the Court as Official Liquidator, it is that person who has to be given notice of each and every proceeding that is taking place with respect to that company even subsequent to the assignment. It is not as if the execution petition was filed prior to the appointment of the Official Liquidator. E.P. No. 277 of 1976 was filed on 19th August, 1976. The Official Liquidator had been appointed even as early as 22nd April, 1976 in C.P. No. 441 of 1976. Under these circumstances, this Court considers that notice must necessarily be given to the Official Liquidator with respect to the transaction of assignment which had led to the institution of E.P. No. 277 of 1976. It is not as if the assignment of decree must stand a scrutiny of the judicial forum and this is possible by giving a notice to the Official Liquidator who will take necessary steps to see that the said assignment of the decree is cancelled if it is not in conformity with law and that it had been made with ulterior motive though it had taken place about two years prior to the appointment of the Official Liquidator in the instant case. In these circumstances, this Court does not find substance in what has been contended on behalf of the petitioners in this case.

6. In fairness, this Court considers it necessary to incorporate the decisions that had been cited on behalf of the revision petitioners as well as the decisions cited by the learned Counsel for the respondents though they are not germane to the point at issue, but they do contain certain observations which are really enlightening the Court to a proper conclusion in the present civil revision petition.

7. The meaning of "Notice" as given in Stroud's Judicial Dictionary of Words and Phrases (Third Edition) Volume 3 is as follows:

(1) "Notice", is a direct and definite statement of a thing as distinguished from supplying materials from which the existence of such thing may be inferred.

(4) But notice that the subject-matter of an assignment is the subject-matter of an action, amounts to notice to the assignee of the existence of the solicitor's right to a lien on property "Recovered or Preserved" within Section 28, Solicitors Act, 1860.

* * *

(5) So, notice of an act of bankruptcy means knowledge of it, or wilfully abstaining from acquiring such knowledge.

(18) Notice of Assignment of a Chose in action to be given to the prayer, in order to complete the assignee's title, and the priorities of incumbrancers are determined according to the dates of service of the notices.

* * *

(20) Notice of claim includes notice to a defendant by including him in a counter claim.

8. In *Sarifa Khatun Vs. Asimannessa Bibi and Others*, , it has been held as follows:

Property in a decree passed to the transferee under a deed of assignment when the parties to the deed of assignment intend such property to pass. It does not depend on the Court's recognition of the transfer. Order 21, Rule 16 neither expressly nor by implication provides that assignment of a decree does not take effect until recognised by the Court. It is true that while Order 21, Rule 16 enables a transferee to apply for execution of the decree the first proviso to Order 21, Rule 16 enjoins that notice of such application shall be given to the transferor and the judgment-debtor and that the decree shall not be executed until the Court has heard their objections, if any, to its execution. It is one thing to say that the decree may not be executed by the transferee until the objections of the transferor and the judgment-debtor are heard. It is an altogether different thing to say that the assignment is of no consequence until the objections are heard decree-holder and transferee is effected by the deed of assignment. If the judgment-debtor has notice of the transfer, he cannot be permitted to defeat the rights of the transferee by entering into an adjustment with the transferor. If the judgment-debtor has no notice of the transfer and enters into an adjustment with the transferor before the transferee serves him with notice under Order 21, Rule 16, the judgment-debtor is protected.

9. In *Braj Lal v. Atkinson* AIR 1920 Pat. 146, it has been held as follows:

A judgment-debtor who fails in an execution proceeding to object to the execution on the ground that notice of transfer of the decree has not been properly served on the transferor, cannot raise the objection in a subsequent proceeding.

10. In *Sarifa Khatun v. Asimannessa Bibi* AIR 1938 Cal. 734 it has been observed as follows:

The service of notice under Order 21 Rule 16 is an essential pre-requisite to the assumption of jurisdiction by the Court in a proceeding to execute the decree, if the application for execution purports to have been made by one who is not the original decree-holder but describes himself as an assignees of the decree-holder. The absence of necessary notice on the assignor is not a mere irregularity but it vitiates the whole execution proceeding and the sale. As the Court lacks jurisdiction to pass the order for execution, the fact that the auction-purchaser is a stranger cannot make any difference.

11. In *K.V. Subrahmanyam v. Premier Bank of India* (1967) 1 A.W.R. 127, it has been held as follows:

Under Order 21, Rule 16 the executing Court has to execute the decree as it stands. It is only the decree-holder or the person whose name appears on the

face of the decree that can execute it and the executing Court cannot record any other person as being entitled to execute the decree. The principle of O. 21, r. 16 is that no one can execute the decree except the decree-holder or the person to whom the decree has been assigned in writing or by operation of law. In the instant case it is the name of the Bank that is shown as the decree-holder. Nowhere is there the mention of the Corporation. Since the name of the Corporation does not appear as the decree-holder, the executing Court cannot allow the Corporation to execute the decree. It is only the original decree-holder whose name appears on the face of the decree that can execute the decree. O. 21, r. 16 is for the benefit of the transferee. It is for the transferee to bring to the notice of the Court the fact of the transfer and execute the decree and unless he is so brought, the original decree-holder is entitled to execute the decree.

12. In *Bansidhar Shankarlal Vs. Mohd. Ibrahim and Another*, , it has been held as follows:

There is nothing in the Companies Act, 1913, which makes the leave u/s 171 a condition precedent to the institution of proceeding in execution of decree against a company ordered to be wound up. Failure to obtain leave before institution of the proceeding does not entail dismissal of the proceeding. The suit or proceeding without leave of the Court may be regarded as ineffective until leave is obtained, but once leave is obtained the proceeding will be deemed to be instituted on the date of granting leave.

13. In *K. Vadivelu and Others Vs. The Official Liquidator, Madras*, , it has been held as follows:

Commencement of the proceedings does not depend upon the issue of process so as to attract the bar of lis. The words "commence" and "institution"-appear to be synonymous. In *Ponnusami Chettiar Vs. Kaliaperumal Naicker*, , it was held that a suit commences with the presentation of the plaint. The same view was taken by a Bench of the Lahore High Court in *Peoples Bank of Northern India, Ltd., Lahore v. Fateh Chand & Co.*, and another AIR 1936 Lah. 401. The word "Commenced" occurring in Section 446 of the Companies Act has to be understood in the light of the expression "Shall be proceeded with" occurring in the same section. The expression "shall be proceeded with" is intended to cover the case of those suits or other legal proceedings which were pending at the time of the liquidation proceedings.

* * *

But as regards new suit or proceeding to be instituted, the Legislature has used the word "commenced" and it has enacted that such commencement shall not be made until the leave of the Court is granted. To hold that "commencement" would take place only after the issue of process would mean that if a plaint is presented, it could be taken on file and kept till the issue of process. To hold that such presentation and taking on file is not barred u/s 446 would virtually render the provision nugatory.

14. u/s 457 of the Companies Act (1 of 1956) it is provided that the Official Liquidator has the following powers with the sanction of the Court:

- (1) to bring and defend actions, prosecutions or other legal proceedings, civil or criminal, in the name and on behalf of the Company;
- (2) to carry-out the business of the company so far as may be necessary for the beneficial winding up of the company;
- (3) to sell and transfer the property of the company by public auction or a private contract;
- (4) to raise money on the security of the assets of the company; and
- (5) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

15. The Liquidator has further powers which need not be sanctioned by the Court. They are:

- (a) to execute and seal, documents and deeds on behalf of the company;
- (b) to prove, rank and claim in the insolvency of any contributory for any balance against his estate and to receive dividends in respect thereof;
- (c) to draw, accept, make and endorse any bills of exchange, hundies or promissory notes with the same effect as if drawn, etc., by the company in the course of its business,
- (d) to take out in his own name letters of administration to any deceased contributory,
- (e) to appoint an agent to do any business which he is unable to do himself; and
- (f) to inspect the records and returns of the company on the file of the Registrar without any fee.

The leading decision on the subject is *Jaswantraai Manilal Akhaney Vs. The State of Bombay*, . In English Law, we have the decision reported in *Re Wrek Recovery and Salvage Company* 15 Ch. D. 353 which deals with the liquidator's power to carry on the business of the company so far as may be necessary for the beneficial winding up of the company. Therefore, when the winding up has been ordered by a competent Court, and the several assignments of rights made by the defunct company are now questioned, it is needless to observe that the Official Liquidator of the Company concerned has to be given notice.

16. As already stated the point for consideration in the instant revision petition is, whether notice has to be given to the Official Liquidator as per the provision of Section 561(A) and in accordance with the provisions of O. 21 R. 16 of the C.P.C. In construing the entire decision in this case, this Court considers that it is just and equitable that notice has to be given to the Official Liquidator under the

circumstances of the case, and therefore, it orders notice.

17. The result is, this Civil Revision Petition is allowed and the entire matter is remitted back to the lower Court by setting aside the order under revision for being considered a fresh by the executing Court in the light of the observations made by this Court and in accordance with law. Both the sides should be given opportunity to adduce evidence, if any, both oral and documentary. Under these circumstances, the Civil Revision Petition is allowed. Under the circumstances, there is no order as to costs.