
(1973) 10 MAD CK 0012
In the Madras High Court
Case No : A.A.O. No. 307 of 1971

V.A. Narayana Raja

APPELLANT

Vs

O. RM. M. SV. M. Meyyappa Chettiar and Others

RESPONDENT

Date of Decision : 19-10-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 105, Order 21 Rule 90, Order 43 Rule 1

Citation : AIR 1975 Mad 37

Hon'ble Judges : Natarajan, J

Bench : Single Bench

Advocate : M. Srinivasan, for the Appellant; N.C. Raghavachari, S. Narayana Iyengar, for K.S. Sundararama Iyer and N.S. Varadachari, for the Respondent

Final Decision : Allowed

Judgement

Natarajan, J.—The petitioner in E. A. 716 of 1969, in E.A. 157 of 1969, in E. P. No. 119 of 1967, in O. S. No. 166 of 1965 on the file of

the court of the Subordinate Judge, Madurai, is the appellant. This appeal has come to be filed in the following circumstances.

2. The first respondent in the said petition filed the suit O. S. No. 166 of 1965 against the appellant for recovery of amounts due to him on a

mortgage and obtained a preliminary decree and a final decree in his favour. The fourth respondent, who was the second defendant in the suit, was

a subsequent encumbrancer and on payment of necessary court-fees by him, he was also given a decree for the amount due to him. Consequent,

on the death of the first respondent, the second and the third respondents, got themselves implead-ed as legal representatives of the first

respondent, and brought the mortgaged items for sale in court auction. Certain items of properties, which were the hypothecs, were brought to sale

in court auction and the sale was held on 22-1-1968 and continued on 23-1-1968.

3. The appellant filed a petition before the learned Subordinate Judge, praying for an adjournment of the sale on 22-1-1968 on the ground that

wide publicity has got to be given for the court auction sale. Since, the appellant had been adjudicated insolvent prior to the hypotheca being

brought to sale, the Official Receiver, in whom the properties of the appellant had vested, also filed an application before the learned Subordinate

Judge for adjournment of the sale on 22-1-1968. The learned Subordinate Judge did not deem it necessary to stop the sale on 22-1-1968, in

compliance with the request of the appellant and the Official Receiver, but instead directed the sale to continue on the next day also i.e. 23-1-

1968.

4. On 22-1-1968, the 7th respondent, who is said to be a nephew of the 2nd respondent purchased item I of the property for Rs. 40,000. On the

second day i. e., 23-1-1968, the 6th respondent said to be a partner of the 4th respondent purchased item 2 for Rs. 73,500.

5. It was, therefore, the appellant filed the petition E. A- No. 157 of 1969 under Order 21, Rule 90, Civil P. C. praying that the sales of items 1

and 2 of the properties held on 22-1-1968 and 23-1-1968 be set aside. The contention of the appellant in the said petition was that due and

proper publicity had not been given for the sale, but that the respondents misled some of the intending competitors by representing to them that no

sale would take place, that they scared away some of the other competitors by false representations, that it was on account of such malpractices

the properties had been sold for low prices, that item 1 was easily worth Rs. 80,000 that item 2 was likewise worth Rs. 1,50,000, that the

respondents had acted fraudulently in order to knock off the properties for low prices and that therefore, the sale of items 1 and 2 of the hypotheca

should be set aside. The Official Receiver also filed an affidavit in support of the contentions of the appellant and prayed for the sale of items 1 and

2 of the hypotheca being set aside.

6. This petition E. A. 157 of 1969 was posted for hearing on 28-7-1969. On that date, the counsel for the appellant moved for an adjournment on

the ground that the appellant, who had proceeded to Madras, had taken ill at

Madras, that the appellant had sent a medical certificate dated 25-7-1969 from Madras, that the appellant had also sent a telegram on 27-7-1969 and that, therefore, the enquiry of the petition may be adjourned to some other date. The learned Subordinate Judge refused to grant adjournment and thereupon the appellant's counsel reported no instructions. Consequently, the learned Subordinate Judge dismissed the application E A. No. 157 of 1969 for default.

7. Coming to know about the dismissal of the petition, the appellant filed E. A. 716 of 1969 under Order 21, Rule 105, Civil P. C., praying that E.

A. 157 of 1969 which had been dismissed for default, may be restored. Notice was ordered to the respondents in E. A. 716 of 1969 for hearing

on 12-9-1969. Accordingly, the appellant took notice to the respondents on 12-9-1969. The appellant's counsel was present in court, but the

appellant himself was not present in court on 12-9-1969. In those circumstances, the learned Subordinate Judge passed the following order-

Petitioner absent. Opposed by the respondents. Petition dismissed.

It is to canvass the correctness of this order the appellant has preferred the present appeal.

8. Before Mr. M. Srinivasan the learned counsel for the appellant, could advance arguments on the appeal on merits, Mr. N. C. Raghavachari, the

learned counsel for respondents 1 and 2 in the appeal (legal representatives of the deceased O. RM. SV.. M. Meyyappa Chettiar) and Mr. S.

Narayana Jyengar, learned counsel for the 5th respondent, raised two preliminary objections about the maintainability of the appeal. It was firstly,

contended by them that inasmuch as the appellant had been adjudicated insolvent and his properties had vested with the Official Receiver, it was

not open to the appellant to have filed E. A. 157 of 1969 under Order 21, Rule 90, Civil P. C. The second objection that was raised was that as

against the dismissal of E. A. 716 of 1969 for default no remedy by way of appeal was available to the appellant. In support of the first objection

raised by the counsel for the respondents, reliance was placed on two decisions of this court. In Subbaraya Chettiar (dead) and Another Vs.

Papathi Ammal alias Lakshmi Ammal and Others, it has been held by this court that an undischarged insolvent had no right to sue for the recovery

of property, which was vested in the Official Receiver and that the Official

Receiver was the only person competent to sue for enforcing the right to property possessed by an insolvent. In *Sogmal Chatrabanjee v. Tharachand Chatrabanjee*, 1948 2 MLJ 105, it was held by this court that where a coparcener, during the pendency of a suit to set aside a family partition and to re-partition the property, became an insolvent and the Official Receiver had been added as a supplementary plaintiff and the suit resulted in a dismissal, it was only the Official Receiver, who had a right of appeal and that when the Official Receiver refused to file an appeal, it was not open to the insolvent to file an appeal against the dismissal of the suit. In my opinion, both these authorities have no application to the facts on hand. In both the cases, the dispute was either regarding the insolvent's right to sue for or to be in management of his property. When the properties had admittedly vested in the Official Receiver on account of the insolvency proceedings, it was only the Official Receiver, who was entitled to institute a suit or appeal in respect of matters relating to the management of the insolvent's property. On the other hand, what we are now concerned is with the right of an insolvent to have a sale of his properties set aside on the ground of material irregularity or fraud in the sale of his properties in court auction. The two categories of cases are entirely different in their scope and objective.

Though the insolvent does not have a present right of management over his properties till he is discharged from his insolvency or till the insolvency is annulled, it can never be denied that the insolvent is entitled to any surplus proceeds of properties left unsold after the claims of his debtors are satisfied. As such an insolvent certainly has a right to agitate before the executing court that his properties had not been sold for a just and proper price, even though he does not have a right in praesenti over his properties and his right to claim the surplus proceeds is a latent right, which can be enforced only after all the claims of the debtors are satisfied.

9. It is now well settled that the words "whose interests are affected by the sale occurring in Order 21, Rule 90, Civil P. C. have a wide connotation and significance and that the application of those words cannot be restricted to persons, who have a direct and immediate right in the property sold in court auction. This court has repeatedly held that judgment-debtors, who have been adjudged insolvents are also persons, whose

interests are affected by a sale of their properties in court auction. A Full Bench of this court has observed in *Chalavadi Narasimham and Another*

Vs. Chalvadi Ramayya and Another, that the settled law of this court so far as this aspect of the matter is concerned is as follows-

Judgment debtors who had been adjudged insolvents have been recognised by this court as having a right to apply to set aside execution sales of

properties which once belonged to them, though vested in the Official Receiver on their adjudication. They have been treated as persons whose

interests are affected by the court sales and allowed to apply under Order XXI, Rule 90, Civil P. C. to set aside such sales and to appeal from

adverse orders passed on their applications; see *A. Swaminatha Odayar Vs. Kalyanarama Aiyangar and Another*, *Subbaraya Goundan and*

Another Vs. V.V.R. Virappa Chettiar Bank and its partners being Valliappa Chettiar and Others, and *Manthiri Goundan Vs. Arunachalam*

Goundan and Another, ."" In *C.S. Ponnusami Mudaliar Vs. Subbaraya Mudaliar and Others*, , a Bench of this court following the earlier decisions

has held that a judgment debtor, who was adjudicated an insolvent was a person interested in the property sold within the ordinary meaning of that

expression in Order 21, Rule 90, Civil P. C. that an application by him to set aside the sale was maintainable and that the amendment of Order 21,

Rule 22 in Madras requiring notice to issue to the Official Receiver instead of to the insolvent cannot affect the question whether the insolvent was

a person interested within the meaning of Order 21, Rule 90, Civil P. C. The learned counsel for the respondents sought to distinguish the facts in

the Full Bench decision in *Subbaraya Goundan and Another Vs. V.V.R. Virappa Chettiar Bank and its partners being Valliappa Chettiar and*

Others, on the ground that in that case the judgment debtor was adjudicated insolvent subsequent to the court auction sale whereas in the instant

case the appellant was adjudicated an insolvent even before the hypotheca was sold in court auction. In my opinion, this distinction cannot have

any significance. Though the decision in *Subbaraya Goundan and Another Vs. V.V.R. Virappa Chettiar Bank and its partners being Valliappa*

Chettiar and Others, proceeds on the footing that since the insolvency petition was filed after the properties were sold in court auction, the

properties will not vest in the Official Receiver till the sale was set aside and that the Official Receiver cannot even claim the benefit of the execution

inasmuch as the assets had been realised before the date of the admission of the insolvency petition, the Full Bench has categorically stated that the

insolvency of a judgment-debtor did not per se render it incompetent for him to continue a petition filed by turn earlier under Order 21, Rule 90,

Civil P. C. It is worthwhile mentioning here that none of the other decisions referred to above had made any difference regarding the right of an

insolvent to file an application under Order 21, Rule 90, Civil P. C. irrespective of the fact whether his adjudication was prior to or subsequent to

the sale of the property.

10. I may only refer to a few other authorities which point out that the words "whose interests are affected by the sale" have a wide connotation

and significance. A purchaser of one item of the mortgaged property can apply under Order 21, Rule 90, Civil P. C., to have the sale of the other

items of the mortgaged property set aside, at he is a person "whose interests are affected by the sale". (Vide Narayana v. Pappayi AIR 1927 Mad

783). A person, who has obtained an attachment before judgment, though not a secured creditor in the ordinary sense, is a person, who has some

interests in the property, and is, therefore, within Order 21, Rule 90, and can apply under it. (Vide Rajaram v. Bhavanisankar AIR 1939 Mad 193

and Ayyappa Naicker Vs. Kasiperumal Nayakar and Others, . An interim receiver appointed u/s 20 of the Provincial Insolvency Act whether

appointed subsequent to or before in an execution sale can be clothed by the insolvency court with authority to take proceedings under Order 21,

Rule 90, Civil P. C. to set aside the sale. T.S. Sailappan Vs. Subbiah Pillai and Others, . A rival decree-holder, who had purchased some items of

the property of the judgment-debtor, and which items were also attached by another decree-holder in execution is a person whose interests are

affected by the sale, and as such entitled to file an application under Order 21, Rule 90, Civil P. C. A.P. Ismail Rowther Vs. Mynoon Bivi and

Others, .

11. In view of the preponderance of the judicial decisions in this behalf, it is not open to the respondents to contend that by reason of the

insolvency of the appellant, he is not entitled to file an application under Order 21, Rule 90, Civil P. C. and that, therefore, he is not entitled to file

the application E. A. 716 of 1969 for the restoration of the application E. A. 157

of 1969, which was dismissed for default.

12. With regard to the second objection of the learned counsel for the respondents, the argument was that no date be fixed for hearing in respect

of an application under Order 21, Rule 105, Civil P. C, that it is only under Order 21, Rule 104, Civil P. C. that date should be fixed in respect of

applications under any of the rules foregoing Rule 104, that as such the appellant had no right to be absent from court on 12-9-1969 that therefore,

the appellant is not entitled to question the dismissal of E. A. 716 of 1969 for default and that consequently, the appeal preferred against the

dismissal of that petition is not maintainable.

13. In my view, this contention is also an unsustainable one. It is no doubt true that Sub-clause (1) of Rule 104 of Order 21, Civil P. C. makes

provision for a court before which an application under any of the rules foregoing Rule 104 has been filed, to fix a date for the hearing of the

application and that no such provision is made in respect of an application under Rule 105 of Order 21, Civil P. C. That cannot, however, be

taken to mean that in respect of an application under Order 21, Rule 105, Civil P. C., it was incumbent upon the applicant to be personally present

on each and every day to which the application stood posted and that his non-appearance in court on any day in which the petition was called

should necessarily result in the dismissal of his application and that an aggrieved applicant cannot canvass the correctness of that order in appeal.

Order 43, Rule 1 (jj), Civil P. C. is to the following effect-

1. An appeal shall lie from the following orders under the provisions of Section 104: namely-

(jj) an order rejecting an application made under Sub-rule (1) of Rule 105 of Order XXI provided an order on the main application referred to in

Sub-rule (1) of Rule 104 of that order is appealable.

A reading of this provision clearly shows that what is required for an appeal being preferred against a rejection of an application under Sub-rule (1)

of Rule 105 of Order 21, Civil P. C., is that the main application referred to in Sub-rule (1) of Rule 104 of Order 21, Civil P. C., is an appealable

order. Undoubtedly an order of dismissal of an application under Order 21, Rule 90, Civil P. C., is an appealable one order under Order 43, Rule

1 (j). Therefore, the appellant is certainly entitled to file an appeal as against the

dismissal of E. A. 716 of 1969, which was filed under Order 21, Rule 105, Civil P. C. No-where it is stated in Order 43, Rule 1 (jj) that where an application under Rule 105 had been dismissed for default, it was not open to the aggrieved party to file an appeal. In such circumstances, the second objection raised by the learned counsel for the respondents is also clearly untenable.

14. Coming now to the merits of the case of the appellant, it is contended by Mr. Srinivasan, learned counsel for the appellant, that the appellant's absence from court on 12-9-1969 was not wanton that the appellant was laid up with an ailment at Madras, that in proof of such ailment the appellant had sent a medical certificate and that further more the applicant's counsel was present in court on that date and sought for an adjournment of the hearing and that it was only after the request for adjournment was refused that the counsel reported no instructions. Mr. Srinivasan, also placed reliance upon the fact that the application stood posted to 12-9-1969 only for service of notice on the respondents and not for final hearing or disposal. His argument, therefore, was that on 12-9-1969 the learned Subordinate Judge should have only called upon the respondents to file their counter and ought not to have dismissed E. A. 716 of 1969 merely on the basis of the oral objections raised by the respondents and the absence of the appellant. Yet another argument of Mr. Srinivasan was that when the appellant had not been specifically directed by the court to be present on 12-9-1969 the presence of the appellant's counsel in court must be deemed to be the presence of the appellant himself and that, therefore, the learned Subordinate Judge was not justified in holding that the appellant was absent from court. In support of this last contention of his Mr. Snnivasan placed reliance upon the following decisions-- Viswanatha Asari v. Sami Asari AIR 1924 Mad 43, where it was held that when at the lime of hearing of the suit, the plaintiff was not absent, but was represented by a pleader, who asked for an adjournment, which was refused, the suit should not have been dismissed for default under Order 17, Rule 2, Civil P. C. but on the other hand a judgment must have been written and the case disposed of under Order 17, Rule 3, Civil P. C. In Chellam Ayyar Vs. G. Subramania Ayyar, it has been held that in ordinary circumstances if a party is represented by a pleader,

that was an appearance for the purpose of Order 9, Rule 17, Civil

P. C. There is considerable force in the argument of Mr. Srinivasan, that there was no specific direction by court for the appellant to be present in

court on 12-9-1969, and that as such the appellant's failure to be present in court on that date ought not to have been construed by the court as

fatal to the maintainability of his application under Order 21, Rule 105, Civil P. C. Inasmuch as the application had been posted on 12-9-1969,

only for service of notice of the application to the respondents, it is quite likely that the appellant was misled into thinking that his presence in court

was not absolutely necessary; moreover it is seen that the appellant had sent a medical certificate and also a telegram to his counsel explaining the

reason for his inability to be present in court on 12-9-1969 and had specifically requested his counsel to move the court for an adjournment. In

such circumstances, the dismissal of the application E. A. 716 of 1969 for default is clearly not in accordance with law. Therefore, the order of the

learned Subordinate Judge is set aside and the appeal is allowed. The learned Subordinate Judge will dispose of E. A. 716 of 1969 on merits after

calling for the objections of the respondents to the application filed by the appellant under Order 21, Rule 105, Civil P. C. None of the

observations made herein need be taken into consideration by the court in disposing of E. A. 716 of 1969 on merits. There will be no order as to

costs.