

(1932) 05 MAD CK 0011
In the Madras High Court

Valliammal and Others

APPELLANT

Vs

The Official Assignee of Madras

RESPONDENT

Date of Decision : 11-05-1932

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 103

Citation : AIR 1933 Mad 74 : (1933) ILR (Mad) 273 : (1932) 36 LW 703 :
(1932) 63 MLJ 810

Hon'ble Judges : Horace Owen Compton Beasley, J;Cronish, J

Bench : Full Bench

Judgement

Horace Owen Compton Beasley, Kt., C.J.—This is an appeal from an order of Stone, J., made in the Insolvency Court on the application of the Official Assignee that the appellants should be ordered to produce certain account books or be committed for contempt of Court. On the 29th February, 1932, Stone, J., passed the following order : "Books to be delivered within two weeks." Against that order this appeal has been presented. It raises some interesting and important questions.

2. The proceeding in which the order under appeal was made was the administration by the Insolvency Court of the estate of one Gurunatha Mudaliar who died on the 5th June, 1930. His estate was insolvent but he had not before his death been adjudicated an insolvent. One of his creditors presented a petition to the Insolvency Court for the administration of the deceased debtor's estate u/s 103 of the Presidency Towns Insolvency Act and an order for the administration of that estate in insolvency was made after notice of the petition had been served upon the deceased's widow, the 1st appellant, who appeared by Mr. Varadaraja Mudaliar on the hearing of the petition but did not oppose it. The deceased debtor during his life-time carried on a timber business but he did not live at his place of business but lived at No. 52, Vellala Street, Purasa-walkam, Madras, with his wife. He had a brother Ranganatha Mudaliar, who is the 2nd appellant. Immediately after the order for the administration of the estate in

insolvency the Official Assignee took possession of a superstructure belonging to the deceased and some timber and some old pieces of furniture, and although the house and the business premises of the deceased were searched and an inventory was taken of all articles and documents, no account books and other documents or papers relating to the timber business were discovered, except some bill books for timber sold, and certain title deeds which the Official Assignee alleges to have been in the possession either of the 1st appellant or the 2nd appellant were not found. At this time there was in Madras Murugesu Mudaliar, the 3rd appellant, alleged to be a relation of the deceased debtor or the 1st appellant, who was assisting the 1st appellant in the administration of the estate and took some action with regard to the leasing of some properties. The Official Assignee's case is that the appellants have taken possession of the account books and other documents relating to the timber business carried on by the deceased and also the title deeds to some of the properties. The Official Assignee made a number of efforts to get the appellants before him for the purpose of examining them u/s 36 of the Presidency Towns Insolvency Act in order to ascertain whether they had the property in the shape of account books, documents and title deeds, etc., of the deceased debtor in their possession and eventually all the appellants were examined and all of them denied having in their possession those documents. Faced with these denials and being unable to get the documents the Official Assignee presented the application to the Court upon which the order appealed from was made. Affidavits in answer to the Official Assignee's application were filed by all the three appellants contradicting the Official Assignee's case. No evidence was taken by the learned Trial Judge although we are informed by Mr. V.C. Gopalaratnam appearing on behalf of the Official Assignee that he had his witnesses in Court. The learned Trial Judge upon the report of the Official Assignee on the one side and the affidavits of the respondents on the other side passed the order that the books were to be delivered within two weeks. As learned Counsel before us were unable to agree as to what happened in the Trial Court we have consulted Stone, J., who states that he made his order very quickly without considering any evidence other than the documentary evidence before him intending on the next occasion, namely at the end of the period prescribed in his order, to inquire into the question of the possession of the account books. We also ascertained from him that Mr. Narasimha Aiyar who was then appearing for the 1st appellant did not state that he wished to argue any question as to the jurisdiction of the Court to entertain the application although we accept Mr. Narasimha Aiyar's statement that he intended to take the point and had the necessary authorities to support his argument ready in Court and it was only the rapidity with which the order was made by our learned brother that prevented him taking this legal objection. It is conceded however that he informed our learned brother that the order made by him amounted really to a finding that either his client or the other appellants, or all of them acting together, were in possession of this property. Notwithstanding that, the order was passed.

3. The points taken here in appeal are : (1) that the Court had no jurisdiction to entertain a claim u/s 7 of the Act; (2) that even if it had, as the appellants had been examined u/s 36 and had denied possession of the books etc., the Official Assignee's remedy was by suit and not u/s 7; (3) that if the application was not one u/s 7 there is no other section in the Insolvency Act which entitles the Official Assignee to present it; and (4) that there was no evidence before Stone, J., upon which he could make the order that he did as the report of the Official Assignee cannot be evidence upon such an application and that therefore the denials of possession of the books by the appellants stood uncontradicted whereas the allegations made by the Official Assignee in his report remained unproved.

4. With regard to the first point the contention is that as this is an administration of the estate of a person dying insolvent u/s 108 the only provisions of the Act, except of course Part X in which Section 108 is, that apply are those contained in Part III. It is necessary to refer to Section 109. Section 109(1) reads as follows:

(1) Upon tin 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, and (2) 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.

5. It is argued that as Section 7 is in Part I of the Act its provisions do not apply to these administrations. In support of this argument reference was made to *Sornammal Vs. The Official Assignee*, . It was. there held that Section 7 is not applicable to proceedings to administer a deceased debtor's estate initiated u/s 108. Sir Arnold White, C.J., held that the decision in *In re Hewitt* (1885) L.R. 15 Q.B.D. 159 governed the question. The facts in *In re Hewitt* (1885) L.R. 15 Q.B.D. 159 were that the deceased debtor's estate was being administered by the Bankruptcy Court u/s 125 of the Bankruptcy Act, 1883, the section corresponding to Section 108 of the Presidency Towns Insolvency Act. The Official Receiver applied to the County Court having jurisdiction in the matter of the administration for an order for the examination on oath before the Court of the widow and executrix of the deceased and the deceased's son upon the ground that they were capable of giving information respecting the deceased's property. It was ordered by the County Court that these persons should attend before the Court for examination on oath u/s 27 of the Bankruptcy Act, the section corresponding to Section 36 of the Presidency Towns Insolvency Act. This order they did not obey and an order for their committal for contempt was obtained. They appealed. Under the Bankruptcy Act of 1883 there is a provision similar to Section 109(2) of the Presidency Towns Insolvency Act applying the provisions of Part III of the Bankruptcy Act to such administrations. That is

Section 125(5) to (8). Section 27 is not in Part III of the Bankruptcy Act of 1883 and it was held on appeal there was no power in cases of such administrations to apply the provisions of Section 27. Wills, J., who together with Cave, J., decided this matter at page 167 states thus:

Now, 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 rule 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.

6. This case has been referred to repeatedly in English decisions and in the course of the arguments in reported English cases and as an authority upon this point has never been questioned. Indeed it is probable that it was in consequence of this decision that in the Bankruptcy Act of 1914 an alteration was made in the law and the power to examine persons in such administrations was given to the Bankruptcy Court. No such alteration has been made to the Presidency Towns Insolvency Act. In *re Hewitt* (1885) L.R. 15 Q.B.D. 159 therefore strongly supports the appellants' contention that no sections of the Act which are not included in Part III have any application to administrations of estates u/s 108 unless there are very strong reasons for applying other sections. In *re Hewitt* (1885) L.R. 15 Q.B.D. 159 was considered by a Full Bench of the Rangoon High Court in *D.J. Kolapore v. The Port Commissioners, Rangoon* ILR (1926) 4 Rang. 157. There the question to be considered was whether the provisions of Section 7 of the Act could be applied in the case of an administration u/s 108 and it was held by Rutledge, C.J. and Maung Ba, J., Heald, J., dissenting, that Section 7 is not a provision of the Act which, either expressly or by necessary implication, can be applied in such cases. Heald, J., took the view that the words "case of insolvency" in Section 7 of the Act are sufficiently wide to cover a case of administration in insolvency. Great reliance was placed by the majority of the Full Bench upon *Hewitt's* case and it is very difficult to understand why Heald, J., did not consider that *Hewitt's* case (1885) L.R. 15 Q.B.D. 159 strongly supported the view expressed by the other two learned Judges. At page 167 he says:

The position is therefore that there is one English ruling, namely, *Hewitt's* case (1885) L.R. 15 Q.B.D. 159, which suggests that the fact that a section which is sought to be applied to cases of administration in bankruptcy or insolvency falls outside Part III of the Act, precludes its application to such cases

and

With the greatest respect I find myself unable to apply that suggestion to the Indian Act.

7. I am quite unable to follow Heald, J.'s inability to apply *Hewitt's* case to the Indian Act which is almost word for word the English Bankruptcy Act. As I have

already stated, Hewitt's case has, since its decision, been treated with the greatest respect both in the arguments at the Bar and in the judgments found in many English reported cases. In *In the matter of the Estate of P.A. Mohamed Ganny* ILR (1927) 5 Rang. 375 Chari, J., held that Sections 36, 55 and 56 of the Presidency Towns Insolvency Act are not applicable to administrations u/s 108 of the Act, Section 36 because of the authority of Hewitt's case (1885) L.R. 15 Q.B.D. 159 and the other two sections because of *Ex parte Official Receiver, In re Gould* (1887) L.R. 19 Q.B.D. 92. In the later case it was held that Section 47 of the Bankruptcy Act, 1883, corresponding to Section 55 of our Act, 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 u/s 125 of the Act. The ratio decidendi of this case was that Section 125 of the Bankruptcy Act, 1883, corresponding to Section 108 of the Indian Act, is confined to the administration of the estate of a deceased debtor and does not include the administration of the property of other persons. The property having been voluntarily transferred by settlement ceased to be the property of the deceased debtor and hence it was not the property, the subject-matter of Section 125. Hewitt's case (1885) L.R. 15 Q.B.D. 159 therefore, defines the provisions of the English Bankruptcy Act applying to administrations u/s 125 of that Act to those in Part III of the Act. In *re Goulds* (1887) L.R. 19 Q.B.D. 92 goes further and decides that even some sections included in Part III of the Act have no application to such administrations because the Court has power to deal only with the property of the deceased debtor and not that of other persons. In my view, the decision in *D.J. Kolapore v. The Port Commissioners, Rangoon* ILR (1926) 4 R 157 is correct. It appears to me that it was not intended by the use of the words "in any case of insolvency" in Section 7 of the Presidency Towns Insolvency Act to include the exercise of the powers of the Insolvency Court in cases of administration in insolvency such as this. The deceased debtor was not an adjudicated insolvent and, in my view, Section 7 was only intended to apply to cases where there had been an adjudication in insolvency. In my view, the Official Assignee had no power to examine the appellants u/s 36 of the Act and no power to take proceedings u/s 7. Even if he had possessed the latter power, he could not, without the consent of the appellants, have proceeded with the application having examined them u/s 36 and the possession of the documents, etc., having been denied by them. This right is clearly negatived by a Full Bench of this Court, of which I was a member, in *The Official Assignee of Madras v. Narasimha Mudaliar* ILR (1929) 52 Mad. 717 : 57 M.L.J. 145, where it is pointed out that in such cases the Official Assignee's only remedy is to proceed by way of suit. This disposes of points 1 and 2.

8. I shall now proceed to deal with the third point taken by the appellants, namely, that if Section 7 is inapplicable, there is no other section in the Insolvency Act which entitles the Official Assignee to proceed with this application. It is argued that Section 58 of the Act does not give the Official Assignee this power because Section 58(2) says:

The Official Assignee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent, be in the same position as if he were a receiver of the property appointed under the Code of Civil ILR (1929) 52 Mad. 717 : 57 M.L.J. 145. Procedure, 1908, and the Court may on his application enforce such acquisition or retention accordingly.

9. This it is argued by the appellants limits the power of the Official Assignee to that possessed by a Receiver appointed under the CPC and that a Receiver thus appointed has no power to deal with persons who are not parties to the suit in which he has been appointed Receiver. Hence it is argued that, as a Receiver can only get the property of the estate which is in the hands of strangers to the suit by filing a suit against them, the Official Assignee is in no better position and his remedy is by way of a suit and not by such an application as this. In support of this argument the notes to Order 50, Rule 16 of the Rules of the Supreme Court were referred to (page 899 of the Annual Practice, 1932). There it is stated:

As against a stranger to the action who is in actual possession the appointment of the Receiver is of no effect.

10. In *re Crowther, Ex parte Ellis* ILR (1929) 52 Mad. 717 : 57 M.L.J. 145 was also referred to. There it was held that a County Court Judge, sitting in bankruptcy, has no jurisdiction unless by consent, to order payment to the Official Receiver of money received under a garnishee order attaching a debt due to the estate of a deceased debtor which is being administered u/s 125 of the Bankruptcy Act of 1883. The County Court Judge made the order and the persons who had attached the debt appealed and Cave, J., in allowing the appeal, said:

Section 125 of the Bankruptcy Act, 1883, has given power to the Court of Bankruptcy to administer the estate of a debtor who has died insolvent. Unless there is some provision to the contrary the Court in acting under this section must follow the practice of the Chancery Division of the High Court of Justice with regard to the administration of the estates of deceased persons. In the High Court an application for an order such as that now appealed against would not be entertained without the consent of the person against whom the order was asked for.

11. I do not, however, think that this case goes as far as Mr. Duraiswami Aiyar for the appellants argues it does. When the facts of the case are examined it will be seen that what was decided that the Bankruptcy Court had no power to do was to entertain an application for the delivery up to the Official Receiver of money which the appellant not only claimed a right to possess but had got an order from the Court showing that he had made out a prima facie case for such a claim. That this is so will be seen from the argument of Mr. Herbert Reed who appeared for the appellant in that case. His first point was that the section under which the County Court Judge acted was not contained in Part III of the Act and therefore following *In re Hewitt* (1885) L.R. 15 Q.B.D. 159 the Court had no

jurisdiction to act under that section. His second point was that the order affected not only the estate of the deceased debtor but also the property of another person, namely, the appellant, and in support of that argument he relied upon *In re Gould* (1887) L.R. 19 Q.B.D. 92. This case, in my view, does not say that where a third person is in possession or is alleged to be in possession of property admittedly belonging to a deceased debtor such an application as this cannot be made although it must be conceded that the notes to Order 50, Rule 16 of the Rules of the Supreme Court certainly do support Mr. Duraiswami Aiyar's argument. Although the Official Assignee is to have the same powers as a Receiver appointed under the Civil Procedure Code, Section 58(1) says:

The Official Assignee shall, as soon as may be, take possession of the deeds, books and documents of the insolvent and all other parts of his property capable of manual delivery

and Sub-section (2) provides that on his application the Court will enforce his acquisition of that property or its retention. In my opinion, the words of the section are sufficiently wide to cover an application made to the Court for delivery up of possession of the documents of a deceased debtor, admittedly his property, the only question being whether or not the respondent to the application is possessed of them. Section 59 entitles the Court to issue a search warrant and under it houses belonging to a person not the insolvent may be searched and the property of the insolvent discovered there seized. I cannot accede to the appellants' contention that where the Official Assignee has a well-founded belief that property of an insolvent or a deceased debtor lies in the house of a third person, obtains a search warrant from the Court, searches the house and is unable to discover that property because it is cleverly concealed by the occupier of the house, the Official Assignee is driven to file a suit against him instead of applying to the Court for directions or for such an order as was made in this case. Mr. Narasimha Aiyar for the 1st appellant argues that the Official Assignee's remedy must be by way of suit because non-compliance with the order such as was made in this case exposes his client to the risk of being committed for contempt whereas if a suit is filed against her and a decree is obtained she runs no such risk. The answer to that contention is that under Order 21, Rule 31 of the CPC such a decree could be executed by the detention in a civil prison of his client, the judgment-debtor, and or by the attachment of her property. Holding the view that the Official Assignee was entitled to make this application u/s 58 of the Act because the appellants are persons alleged to be in possession of property admittedly belonging to the deceased debtor, it is not necessary for me to consider the question as to whether or not he was entitled to do so because the appellants are to be regarded as parties to the suit. It was argued alternatively by Mr. Gopalaratnam for the Official Assignee that the appellants would be proper parties to an administration suit and therefore the Receiver would be entitled to make this application. The 1st appellant is the next-of-kin of the deceased and a next-of-kin is certainly a proper party to an administration suit. As regards the other appellants and indeed as regards the

1st appellant, the allegations are that they have intermeddled in the estate and if those allegations are true - it is not for us to enquire into them; that is a matter for the learned Trial Judge - then obviously they would be proper parties to the suit; but in my view it is unnecessary to go into this question.

12. There remains the fourth point argued by the appellants, namely, that there was no evidence before the learned Judge upon which he could make his order. With this contention I entirely agree. Before such an order as this could be made, the Official Assignee had to make out a prima facie case that the appellants had in their possession the property he sought to get delivery of. What was the sworn evidence put forward by the Official Assignee in support of his claim? Sworn evidence there was none, either oral or by affidavit. The whole case of the Official Assignee was set out in his report. Most of what is contained therein is derived from persons who did not give evidence. On the side of the appellants were the affidavits contradicting the Official Assignee's allegations. The question which arises here is, is the report of the Official Assignee in such a proceeding as this, prima facie evidence in support of his application? It was argued on behalf of the Official Assignee that Rule 117 of the Presidency Towns Insolvency Act makes the Official Assignee's report prima facie evidence of the matter reported upon. That rule is as follows:

Except where otherwise provided by the Act or these rules, evidence to be given by the Official Assignee may be given by his report to the Court and need not be upon affidavit; and such report shall be prima facie evidence of the matter reported upon.

13. The Act does not provide anywhere that the evidence on such an application as this to be given by the Official Assignee is not to be by his report nor must be upon affidavit. That rule is sufficiently wide even to enable the Official Assignee who has a money claim against strangers in an insolvency and against debtors to an insolvent's estate and in many other cases to rest his case upon his report only. This rule offends against two of the most important rules of evidence, namely, that testimony shall be on oath or by affirmation and that hearsay evidence shall be excluded. Under the English Bankruptcy Act the report of the Official Assignee is only receivable in evidence in the cases provided for in the Act and the rules, such as cases of composition or applications for discharge or where the conduct of the insolvent is in question, i.e., failure to attend for examination, file his schedule or assist the Official Assignee and Rule 190 of the Bombay Rules under the Act provides for the cases in which the Official Assignee's report is receivable by itself as evidence. If Rule 117 is intended to allow the Official Assignee's report to be prima facie evidence in such a case as this, then I have no hesitation whatever in saying that the rule is ultra vires. In my opinion, the Official Assignee's report was not evidence at all. The learned Trial Judge therefore had no evidence before him upon which he could make the order. With all respect to the learned Trial Judge, I think he should have decided the question of possession first before making the order and after taking

evidence. Indeed the only inference arising from his order is that he had decided that question and not left it for decision, as he intended to do, on the next occasion.

14. There is one other matter to be dealt with and that is the respondent's argument that, if the appellants' contention is right, namely, that the only sections of the Act applicable to such an administration are those contained in Part III, the appellants have no right of appeal because Section 8 is the section giving the right of appeal and that is not contained in Part III. Adopting the view of Wills, J., in *In re Hewitf* (1885) L.R. 15 Q.B.D. 159, unless there are strong reasons to the contrary, the words of Section 109 of our Act must mean that all the other parts of the Act except Part III shall not be applicable. But there are the strongest reasons to the contrary. No right of appeal is given by any of the other sections of the Act and it seems to me to be an amazing contention that, whereas in the case of an insolvent there is a right of appeal and the Court may review, rescind or vary any order made under its insolvency jurisdiction, where you have a deceased debtor no such right exists. Amongst other things, Part III deals with the proof of debts and when in an insolvency a creditor whose proof of debts has been rejected is entitled to appeal, why should the creditor whose proof is rejected merely because his debtor is dead be deprived of such a right? I am supported in the view I take about this matter by Rutledge, C. J., in *D.J. Kolapore v. The Port Commissioners, Rangoon* ILR (1926) 4 Rang 157, who says that he would be prepared to hold that by necessary implication Section 8(1) of the Act applies to orders of the Insolvency Judge arising in administration of the estates of deceased debtors. In my view, that contention fails.

15. In the result, the appeal must be allowed and the case remanded to the Insolvency Court where this application will be reheard in the light of the opinion expressed by this Court with regard to the evidence. With regard to costs, as a great deal of the appellants' argument was directed to the third point raised and it has been decided in favour of the respondent, I think the proper order will be to direct the costs of the appeal to abide the re-hearing of the Official Assignee's application.

Cronish, J.

I am of the same opinion and for the same reasons.