

Viraraghava and ors Vs. Parasurama

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Court : Chennai

Decided On : May-08-1891

Reported in : (1892)ILR15Mad372

Judge : Muttusami Ayyar and ;Handley, JJ.

Appellant : Viraraghava and ors

Respondent : Parasurama

Judgement :

ORDER

1. These appeals and petitions arise out of the insolvency of one Mahomed Marakayar against whom decrees had been passed in several suits in the District Court of Coimbatore.
2. The decree-holder, Parasurama Ayyar, in one of these suits (Original Suit No. 11 of 1886) obtained an order for sale of certain immoveable property of the judgment-debtor. Subsequent to the date of that order, but before sale, Mahomed Marakayar filed his petition in insolvency in the High Court and a vesting order was made.
3. The Official Assignee opposed the sale, but the District Judge overruled his objections and allowed the sale. Before the sale under that order took place, Seshu Ayyar, the original appellant and petitioner in the present appeals and petitions, made a double application to the District Court in each of two suits in

which he had obtained decrees against Mahomed Marakayar (Original Suits Nos. 18 and 29 of 1887).

4. All four applications were filed on the same day. In two of these he applied in the two suits for execution by attachment and sale of the immoveable property of Mahomed Marakayar and in the other two, apparently as an alternative in case the other two applications were refused, he applied in the two suits for a rateable distribution between himself and Parasurama Ayyar of the proceeds of sale of the immoveable property which had been ordered to be sold in Parasurama Ayyar's suit.

5. The District Judge has rejected the applications for execution by attachment and sale of immoveable property of Mahomed Marakayar on the ground that the vesting order ' bars any further proceedings in execution when there has been no order for sale,' and he has also rejected the two applications for a rateable distribution on the ground that the orders on these applications must follow the orders on the applications for execution by attachment and sale of the immoveable property of the judgment-debtor.

6. Appeals Nos. 138 and 139 of 1888 are against the orders rejecting the applications for execution by attachment and sale of the immoveable property of the judgment-debtor. Petitions Nos. 312 and 313 of 1888 are for revision of the orders rejecting the applications for a rateable distribution of the proceeds of sale in Parasurama Ayyar's suit.

7. As to the orders appealed against, we think the District Judge was right in his conclusion, but not precisely upon the grounds upon which he puts it. It is not strictly correct to say that the vesting order bars all further proceedings in execution. The more correct way of putting it is, we think, that the vesting order divests the judgment-debtor of the property, and, therefore, there is no property of his which can be attached and sold. On this ground the applications for execution by attachment and sale of Mahomed Marakayar's immoveable property might rightly have been rejected, and, on this ground, we dismiss the Civil Miscellaneous Appeals Nos. 138 and 139 of 1888.

8. But we are not satisfied that it follows that the simultaneous application, for a rateable distribution of the proceeds of sale of the property ordered to be sold in Parasurama Ayyar's suit must also be rejected. These are distinct applications for execution of the decree in this way. We are informed that the District Court had already decided against the Official Assignee's right to oppose that sale and had ordered the sale to go on. If this is so, it may be that there is no further question in regard to that sale between the Official Assignee and the judgment-creditors, and the vesting order and other proceedings in insolvency have no effect upon the rights (if any) of the judgment-creditors to a rateable distribution of the proceeds of that sale. Before disposing of these revision petitions, we shall request the District Judge to furnish us with a copy of the order (if any) passed upon the Official Assignee's objections to the sale of the property of Mahomed Marakayar in execution of Parasurama Ayyar's decree, and also to report what further proceedings have been taken in reference to that sale.

9. After the return called for in the above order had been made the case came on again for disposal.

10. Bhashyam Ayyangar for Petitioner.

11. The Court made the following order:

12. Petitioner Seshu Ayyar having applied to the Court which realized the assets prior to realization for execution of his decree was entitled to a rateable distribution of the assets.

13. The orders of the District Judge are set aside, and he is directed to give effect to this order by calling on Parasurama Ayyar, plaintiff in Original Suit No. 11 of 1886, who appears to have received the entire sale-proceeds, to refund the amount he has received and on this being done, the District Judge will proceed to make a rateable distribution.

14. Under the circumstances we make no order as to costs of these petitions. Parasurama Ayyar preferred petitions for the review of this order.

15. Weir, J., having left the High Court, the petitions came on for disposal ' before Muttusami Ayyar and handley, JJ.

16. Mr. K. Brown and Ramachandra Ayyar for Petitioner.

17. Bhashyarn Ayyangar for Respondent.

18. These are applications for review of judgment in Civil Revision Petitions Nos. 312 and 313 of 1888. The facts are fully set out in the order of this Court of 9th May 1890. By that order certain information was called for from the District Judge, on receipt of which the final order of this Court was passed, setting aside the orders of the District Judge, which were the subject of these revision petitions, and directing the District Judge to call upon Parasurama Ayyar to refund the amount he had received and upon this being done to proceed to a rateable distribution. Parasurama Ayyar was named in Civil Revision Petitions Nos. 312 and 313 of 1888 as a counter-petitioner, but it appears that owing to some mistake, notice was not served upon him, and the final order was consequently made in his absence. On this ground, a review was admitted, and the case has now been argued on his behalf.

19. The first point raised by his counsel is that as he was no party to the proceedings in the District Court, out of which these petitions arose, no order can be made against him on these petitions. As to this, it is true that he received no notice of Seshu Ayyar's application for a rateable distribution of the proceeds of sale of the property ordered to be sold, because the District Judge dismissed it on the preliminary point that the vesting order shut out Seshu Ayyar from any claim to a rateable distribution, but he must have been fully aware of the proceedings for he was a joint applicant with Seshu Ayyar in one of the petitions. But, however this may be, the High Court in directing the District Judge to order Parasurama Ayyar to refund the amount he had received was merely putting matters in the same state as they were when what was held to be the erroneous order of the District Judge was passed. After that, strictly speaking, notice would have to be given to him to show cause why the amount should not be rateably distributed. He has had full notice now however and his counsel waives any further notice, and the question whether the rateable distribution asked for by the original petitioner

Seshu Ayyar can now be ordered has been fully argued and may now be decided.

20. It is next argued that this is not a case in which this Court can interfere in revision under Section 622 of the Code of Civil Procedure as there was no question of jurisdiction. The order passed on the two applications for rateable distribution out of which the present petitions arose, was that the order must follow that on the application for execution on which it was based. We must look to the latter order, therefore, to ascertain what was the decision of the Court. The general order made on several applications for execution by attachment and sale of the judgment-debtor's property was:--' The vesting order has been received. It clearly bars any further proceeding in execution when there has been no order for sale. This application must, therefore, be rejected.' The District Judge, therefore, declined to entertain the application, and to make the rateable distribution, which he was bound by law to make, because he considered he was precluded from doing so by the proceedings in the insolvency and the vesting order. In so declaring, assuming as we shall show afterwards that he was wrong in his view of the effect of the insolvency proceedings, we think he failed to exercise a jurisdiction vested in him by law, and that this Court has power to interfere under Section 622. In so holding, we consider that we are following the principles laid down as to the construction of that section in the case of *Manisha Eradi v. Siyali Koya* I.L.R. 11 Mad. 220.

21. Then it is contended for Parasurama Ayyar that the Judge was right, and he was precluded by the proceedings in insolvency and the vesting order from proceeding to a rateable distribution of the proceeds of sale of property attached and sold in execution of a decree against the insolvent judgment-debtor. The fallacy, as it appears to us, of this contention, and of the District Judge's view, is that it assumes that because the Official Assignee may come in and apply for stay of proceedings in execution, the insolvency and the vesting order have of themselves the effect of staying such proceedings. In the present case, the Official Assignee did, subsequently to the order now in question, apply to the District Court to stay the sale of the property, to which these orders refer, and his application was refused, and he did not appeal against that order as appears in the present case, though served with notice. There was, therefore, as pointed out in this

Court's order of 9th May 1890, no further question between the Official Assignee and the judgment-creditors as to this property and the pendency of proceedings in insolvency could be no reason for the District Court's refusing to make the rateable distribution ordered by law and allowing one creditor to walk off with the whole proceeds of sale of the attached property.

22. Lastly, it is argued on the authority of *Tiruchittambala Chetti v. Seshayyengar* I.L.R. 4 Mad. 383, that there could be no rateable distribution in the present case, because there was no application for execution on the file of the Court pending and undisposed of.

23. The facts are that Seshu Ayyar presented apparently on the same day two applications for execution in the prescribed tabular form. In one the entry in the last column headed 'mode in which the assistance of the Court is required' asked for attachment of immoveable property of the judgment-debtor; in the other it asked that the applicant might share in the rateable distribution of the proceeds of sale of the property attached by Parasurama Ayyar when it should be sold.

24. By the order of this Court of 5th May 1890, it is ruled that the application for attachment of the immoveable property was rightly dismissed by the District Judge, not on the ground on which he put it that the proceedings in insolvency were a bar to execution, but because the vesting order vested the property of the insolvent judgment-debtor in the Official Assignee, and there was therefore no property of the judgment-debtor to be attached. But this ruling did not affect the application for a rateable distribution which was also an application for execution to which the judgment-debtor was a party, as well as an application for rateable distribution, and, therefore, as this Court holds that the latter application was wrongly dismissed by the District Judge, it must be treated as pending within the meaning of *Tiruchittambala Chetti v. Seshayyengar* I.L.R. 4 Mad. 383, for the purpose of supporting Seshu Ayyar's right to share in a rateable distribution of the proceeds of sale of the property attached and sold in execution of Parasurama Ayyar's decree.

25. We see no reason to doubt the correctness of the orders of this Court of 5th May 1890 and 12th August 1890, and we pass a fresh order accordingly in terms

of the latter order.

26. Petitioner must pay the costs of counter-petitioners of these applications.

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