

The Official Receiver Vs. Ariya Boyan S/O. Veera Boyan

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Court : Chennai

Decided On : Sep-14-1993

Reported in : (1995)2MLJ537

Appellant : The Official Receiver

Respondent : Ariya Boyan S/O. Veera Boyan

Judgement :

ORDER

Pratap Singh, J.

1. This civil revision petition is directed against the judgment in C.M.A.No. 177 of 1985 on the file of II Additional District Judge, Salem, confirming the order passed in I.A.No. 123 of 1984 on the file of Subordinate Judge, Namakkal.

2. Short facts are: the respondents filed debtors petition for adjudicating them as insolvents in I.P. No. 17 of 1982 on the file of Sub Judge, Namakkal. The insolvency court allowed the petition and the estate of the insolvents was vested with the Official Receiver. While so, the respondents filed I.A. No. 123 of 1984 under Section 28(5) of the Provincial Insolvency Act, praying for release of the properties from the administration of the Official Receiver. That was resisted by the Official Receiver. After enquiry, the learned Subordinate Judge, had allowed the petition. Aggrieved by the same, the Official Receiver had filed appeal in C.M.A. No. 177 of 1985 and having failed there, has come forward with this civil

revision petition.

3. Mr. Jagadeesan, learned Counsel appearing for the revision petitioner would submit that the (i) second respondent was employed as a scavenger in the Municipality drawing salary of more than Rs. 500 per month and so she cannot be classified as a labourer so as to claim the benefits of Section 60(c) of the Act. (ii) the debtors themselves shown had the house as one of their assets in their petition and while so they cannot now put forward a claim that they are to be released from the administration of Official Receiver; and (iii) in E.P. No. 1012 of 1981 on the file of District Munsif, Namakkal, filed by one of the creditors, the respondents, who are judgment- debtors in the said E.P. proceedings did not raise the plea that this house did not belong to the debtors and did not take steps to raise the attachment and while so, by virtue of the principles of constructive res judicata they cannot raise this plea in this insolvency proceedings, (iv) After vesting of the properties with the Official Receiver, the debtors cannot seek for release of the same and that stage was already over and by not having raised that ground at the time of vesting, they must be deemed to have waived that right and so they cannot raise it now. I have heard Mr. S.P. Subramanian, learned Counsel appearing for the respondents on the above aspects.

4. I have carefully considered the submissions made by rival counsel. I shall consider the submissions made by Mr. Jagadeesan in seriatim.

5. The second respondent is a scavenger employed by the Municipality. There is no evidence to show the salary drawn by her. In the counter-affidavit filed by the Official Receiver in the trial court, he has stated that her salary was Rs. 500 per month. That is seen from the judgment of the lower appellate court in which he had summarised the pleadings of rival sides. But, I would like to make it clear that mere pleading by the Official Receiver that the second respondent was drawing more than Rs. 500 would not amount to proof of the same. The respondents have claimed the benefits of Section 60(c) of C.P.C. and while so, the respondents have countered it by saying that the second respondent was not? drawing more than Rs. 500. The very fact that the respondents claim the benefits of Section 60(c) of C.P.C. would amount to denial of the same. While so, the duty is cast upon the

Official Receiver to prove the fact alleged by him in his counter. But no evidence was let in and this claim that the second respondent was getting a salary of more than Rs. 500 remains unsubstantiated. Since on facts I find that this claim of Official Receiver was not proved, the submission on the basis of this fact which was not proved cannot stand.

6. Mr. Jagadeesan would reply upon Smt. Gita Mitra v. Hemanta Kumar Mitra A.I.R. 1982 Clause 336 in support of this submission that if the salary was more than Rs. 400 or Rs. 500 per month, the person who receives this salary cannot be classified as a labourer within the purview of Clause (h) of Section 60, C.P.C. The court below had relied on the ruling of this Court in Muniswami v. T. Viswanatha Nair : (1957)2MLJ400 and has extracted the relevant portion, which reads as follows:

Section 60, C.P.C. covers only a limited class of wage-earners, viz., labourers who earn their daily bread by personal manual labour or in occupations which require little or no art, skill or previous education.

The avocation of a scavenger would involve personal manual labour and on the ratio of the ruling rendered in Muniswami v. T. Viswanathan Nair : (1957)2MLJ400 , it is to be construed that the second respondent is also a labourer. The first respondent is an agricultural labourer. So, both are entitled to claim the benefits of Section 60(C), C.P.C. In view of the above, I am unable to accept the first submission made by Mr. Jagadeesan.

7. Mr. S.P. Subramanian, rightly pointed out that in a petition filed under the Provincial Insolvency Act, the debtors are expected to come out with the assets belonging to them and in that way the house concerned was also shown as one of the items of properties belonging to the respondents. That would not mean that those properties are not covered by Section 60, C.P.C. In view of the above, I am unable to accept this submission made by Mr. Jagadeesan that since because this house was shown as one of the items belonging to the debtors in the insolvency petition, they cannot now seek release of the same from the possession of the Official Receiver.

8. I shall consider submissions (iii) and (iv) together. According to Mr. P. Jagadeesan, the order passed in R.E.P. No. 1012 of 1981 in O.S. No. 1035 of 1978 on the file of District Munsif, Namakkal for sale of the house for realization of the amount due to one of the creditors operates as constructive res judicata and it is not open to the respondent to contend that the property is not liable to be sold by the Official Receiver. This plea of constructive res judicata was not taken by the Official Receiver/revision petitioner in the trial court. For the first time it was taken before the lower appellate court. The Official Receiver was not a party to R.E.P. No. 1012 of 1981. Mr. P. Jagadeesan, would submit that Official Receiver represents the body of creditors and so though Official Receiver was not a party to R.E.P. No. 1012 of 1981, since he is representing the body of creditors out of whom the creditor concerned in R.E.P. No. 1012 of 1981 is also a creditor, the Official Receiver must be deemed to be a party to R.E.P. No. 1012 of 1981. The Official Receiver would come within the Clause 'under whom they or any of them claim' occurring in Section 11, C.P.C. To make the picture complete, I shall extract Section 11 and Explanations IV and VII which are relevant for our purposes. They read as follows:

11. Res Judicata: No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation I: ...

Explanation II: ...

Explanation III: ...

Explanation IV: Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V: ...

Explanation VI: ...

Explanation VII: The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

9. The Official Receiver represents the entire body of creditors. He does not represent a sole creditor. So far as the other creditors are concerned, they are not parties to R.E.P. No. 1012 of 1981 and they cannot urge that the order passed in R.E.P. No. 1012 of 1981 would operate as constructive res judicata against the respondent. Though the Official Receiver now represents those creditors also, it cannot be said that regarding a particular set of creditors whom he represents the order in R.E.P. No. 1012 of 1981 does not operate as constructive res judicata and regarding one creditor who was a party to R.E.P. No. 1012 of 1981, the order would operate as constructive res judicata between the Official Receiver and the respondent. Such an anomalous position cannot exist. So I am clear that the order passed in R.E.P. No. 1012 of 1981 cannot operate as constructive res judicata as between the Official Receiver and the respondent.

10. Mr. S.P. Subramanian, would submit that the section as it stands provides for res judicata between parties to the suit and by virtue of Explanation VII, the provisions of this section shall apply to a proceeding for execution of a decree and the reference to any suit, easement or former suit shall be construed as references respectively to a proceeding for execution of the decree and this provision limiting the rights of parties cannot be construed in an expansive manner so as to interpret it in such a way as to extend it to a subsequent insolvency proceeding.

11. In *Dhani Ram v. District Official Receiver* A.I.R. 1943 Lah. 19, it was held that the words 'for the time being in force' in Section 60(2) of the Provincial Insolvency Act mean in force when the Receiver is proceeding to sell the property of the insolvent and that it is not necessary that the restrictive or prohibitory law should

have been in force at the time when the vesting order was passed. In that case, the residential house of the insolvent was not exempt from attachment and sale at the time when it became vested with the Official Receiver. But before the Official Receiver proceeded to sell it by virtue of the Punjab Act 12 of 1940, the residential house was exempted from attachment and sale under Section 60(1), C.P.C. and so it was held that the receiver's power to sell it would not subsist any longer.

12. In *Smt. Kissan Piarey v. Smt. Ram Dei* : AIR1965 All248 , the matter came up for consideration in this way: In execution of her decree, the decree holder had attached the house with the allegation that it belonged to the judgment-debtor. A claimant filed petition under O.21, Rule 58, C.P.C. claiming to be the exclusive owner of the house. On dismissal of the claim petition she filed a suit for declaration that she was the owner of the house and it was not liable to attachment. The suit was decreed. The decree holder filed appeals. It was dismissed. In the meanwhile, the judgment-debtor was adjudged insolvent. No attempt was made to implead the Official Receiver in the appeal either in his personal capacity or as the representative of the estate of the insolvent. Neither the fact of the adjudication of insolvent was brought to the notice of the appellate court. After judgment-debtor was adjudged as insolvent, the Official Receiver took possession of the house. The claimant contended that since the decree in his claim suit became final, it was binding on all. It was held that on taking a broader view, it could be held that Section 11 was applicable and the judgment in the suit should act as *res judicata*. In it, it was held that the Official Receiver represents the estate of the debtor/ insolvent and consequently he is a person who claims through the debtor. Creditor has been in the same category as they are laying claim to the estate of the debtor, in other words through him. If the matter is considered too technically, it can be said that a civil Judge not invested with the powers of an Insolvency Judge, is not competent to try matters coming before the Insolvency Judge for decision: but if the question is considered from a broader angle, it can be held that a Civil Judge is competent to try dispute of title etc., which can be raised and or raised before in Insolvency Judge and which he decides to adjudicate upon. On this reasoning, the Allahabad High Court had held that on taking a broader view, it can be held that Section 11, C.P.C. is applicable. With respect, I am unable to agree with this view, in view of what I have mentioned

earlier, in which I have taken a different view.

13. In A.D. Henry v. R. Kannan 1972 T.L.N.J. 300, it was held by this Court that the final decision between the parties in execution proceeding will operate as res judicata in a subsequent suit between the parties. This ruling does not apply to the facts of the instant case.

14. Regarding the submission that at the time of vesting of the properties with the Official Receiver, there was no objection and so the respondents, cannot later claim this property, I am only to say that time for making the objection had come, in this way only after the vesting and there was no lapse or delay on the part of the respondent and hence it cannot be considered and that there was a waiver on the part of the respondent with regard to claim over this house. In this regard Mr. P. Jagadeesan, would rely upon Ganpatrao v. A. V. Zinzarde . In that case, the property vested with the Official Receiver was a house in which the family was carrying on a money lending business. Both the father and son were declared insolvents. Nearly 18 years after the vesting they made a claim. It was held that on the facts of that case, it must be construed there was waiver on the part of the insolvent. The facts of that case are totally different from the facts of the instant case before me. In view of the above, I am unable to accept submissions (iii) and (iv) of Mr. P. Jagadeesan.

15. None of the submissions made by Mr. P. Jagadeesan finds acceptance with me and the inevitable result is that this civil revision petition shall stand dismissed. No costs.