

In Re: B. Sharma

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Court : Chennai

Decided On : Feb-28-1967

Reported in : (1967)2MLJ487

Appellant : In Re: B. Sharma;The Official Assignee

Respondent : ;m.G. Automobiles

Judgement :

ORDER

K.S. Venkataraman, J.

1. M.G. Automobiles, the respondent in this application, obtained a decree against one Sharma in O.S. No. 14 of 1962 on the file of the Civil Court Bellary, for a sum of Rs. 17,000 and odd, and filed E.P. No. 1731 of 1963 in the City Civil Court, Madras to execute the decree. The execution petition was filed in 1963 itself and sought to attach a sum of one lakh of rupees due to Sharma from Hind Mercantile Corporation. Private Limited under a compromise of October, 1963. An interim prohibitory order was issued on 6th November 1963 Prohibiting Hind Mercantile Corporation Private Limited from paying the amount to Sharma. The order was served on the garnishee, Hind Mercantile Corporation, on 8th November, 1963. The garnishee appeared and pleaded that the amount had been paid to Sharma even on 1st November, 1963. The matter was pending enquiry in the Execution Petition in the City civil Court.

2. At that stage, on 4th July, 1966, Sharma presented I.P. No. 31 of 1966 in this Court for being adjudicated insolvent. The petition was admitted on 5th July, 1966, and he was adjudged insolvent on the same day under Section 9(f) of the Act (The Presidency Towns Insolvency Act (III of 1909)).

3. The Official Assignee has put in this Application No. 281 of 1966 under Section 18 of the Act, for stay of further proceedings in E.P. No. 1731 of 1963. His contention is that the alleged debt due to the insolvent from Hind Mercantile Corporation Private Limited has vested in him (Official Assignee) and that he alone is entitled to recover that debt. This contention is based on Section 53(1) of the Act which says:

Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against Official Assignee, except in respect of assets realized in the course of the execution by sale or otherwise (before the date of the admission of the insolvency petition).

4. The point of the Official Assignee is that, no assets had been realised by M.G. Automobiles in E.P. No. 1731 of 1963 before the date of the admission of the insolvency petition (5th July, 1966), and that consequently, the exception in Section 53(1) cannot be invoked by M.G. Automobiles; and, by virtue of Section 17 of the Act, the debt alleged to be due to the insolvent from the Hind Mercantile Corporation Private Limited has vested in the Official Assignee.

5. This contention has been resisted by M.G. Automobiles on the ground that under the circumstances of the case and on equitable grounds, the M.G. Automobiles would be entitled to the full benefit of the realisation, in E.P. No. 1731 of 1963, and that this is not a case where the discretionary power of stay enacted in Section 18(I) of the Act can be exercised in favour of the Official Assignee. The argument is that M.G. Automobiles should be left free to continue the execution proceeding and realise the full benefits thereof. It is urged that the contention of the garnishee that the amount had been realised by Sharma even on 1st November, 1963 is a patent falsehood because that contention was put forth at a late stage and the account produced by the garnishee in support of the claim was suspicious and not true.

6. Now, the position of law as enacted in Section 17 and Section 51 of the Act is clear. Under Section 17, the property of the insolvent vested in the Official Assignee and, under Section 51, it would date back to the act of insolvency on which an order of adjudication was made; and the act of insolvency was on 4th July, 1966 under Section 9(f). Under Section 53 of the Act, unless the assets had been realised in the course of the execution before 5th July, 1966, the execution creditor cannot have the benefit of the execution. Now on the facts pleaded by M.G. Automobiles themselves, it is clear that no assets have been realised in execution. There has been only an attempt to realise the assets, and that will not amount to realisation. This distinction between 'attempt to realise' and 'realisation' has been brought out in two decisions of this Court, *Sambayya v. Official Receiver, Guntur* (1951) 2 M.L.J. 271, and *The Official Assignee of Madras v. Subramania Mudaliar* (1953) 2 M.L.J. 164, where, on similar facts, it was held that the right of the execution creditor, who had attached certain amounts due to the insolvent from the garnishee, would not prevail against the rights of the Official Assignee, and reliance was placed on the decision of a Full Bench of this Court in *Krishnaswami Mudaliar v. The Official Assignee of Madras* : (1903)13MLJ278 , which was followed by a later Full Bench in *Manickam Chettiar v. Income-tax Officer, Madura South* : (1938)1MLJ351 . Reference was made to the decision of Leach, C.J., and Horwill, J., in *Italia v. Official Assignee, Madras* : AIR1941 Mad183 , for the proposition that a mere attachment would not create a charge and that an attaching creditor is in no better position than any other ordinary creditor.

7. In *Krishnaswami Mudaliar v. Official Assignee of Madras* : (1903)13MLJ278 , a creditor of the insolvent filed a suit against him and obtained an order of attachment before judgment and in due course obtained a decree. What was attached was a sum due to the insolvent from Parry & Co. But before any execution petition was filed to realise the amount which was attached the insolvent was adjudicated under the then Insolvency Act (11 and 12 Vict. C. 21), and the Official Assignee under the provisions of that Act corresponding to Section 17 of the present Act claimed that he was entitled to the debt due to the insolvent from Parry & Co. His claim was upheld. It was held that the effect of an attachment under the Code of Civil Procedure was only to prevent the judgment-debtor

collecting the amount but did not confer any title to the debt in the attaching creditor. The above decision was followed by a Full Bench in *Manikam Chettiar v. Income-tax Officer, Madura South* : (1938)1MLJ351 where it was pointed out that the decision in *Krishnaswamy Mudaliar V. Official Assignee of Madras* : (1903)13MLJ278 , had not been overruled by the Judicial Committee in *Anantapadmanabasami v. Official Receiver, Secunderabad* , It was also followed in *Italia v. Official Assignee, Madras* : AIR1941 Mad183 . In view of the above decisions which are all uniform and in teeth of the plain provisions enacted in the Act, it is not possible to accept the contention of Sri M.V. Ganapati, learned Counsel for M.G. Automobiles, that, because of the peculiar facts of this case, M.G. Automobiles will be entitled to equity to retain any assets which they may realise in E.P. No. 1731 of 1963.

8. It is true that in England a provision was added by Companies Act, 1947, Section 115(2), to Sections 40 and 41 of the Bankruptcy Act, 1914, giving a jurisdiction to the Court to set aside the superior right of the Official Assignee in favour of the execution creditor to such extent and subject to such terms as the Court may think fit. The provision reads thus:

The rights conferred by Sections 40 and 41 of the Bankruptcy Act, 1914, on the Official Receiver or trustee in Bankruptcy in relation to executions against the goods or other property of the debtor and attachments of debts due to the debtor may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court may think fit.

A similar provision was enacted in Section 325(1) of the Companies Act, 1948 by proviso (c) to the following effect:

Provided that-

(c) the rights conferred by this sub-section on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court may think fit.

Acting under the above proviso, the Court granted relief to a creditor as against the Official Liquidator of a company which was ordered to be wound up in *In re Suidair International Airways Ltd. (Application of Vickers Armstrongs Ltd.)* (1951) LR 1 Ch. 165 following an earlier case decided in *In re Grosvenor Metal Co., Ltd.* L.R. (1950) Ch. 63, In that case the execution creditor who levied execution against the company which was later wound up would normally have realised their dues but, at the request of the Company, they had to postpone realisation. It was held that, under the circumstances of the case, the creditors should have the benefit up the proviso to retain the fruits of the execution as against the Official Liquidator of the Company. But there is no provision in Section 53 of our Act (III of 1909) corresponding to the above provisions in England. It is for the Legislature to amend Section 53 on such lines if it thinks fit. The Court has, however, to construe Section 53 as it stands, and in the face of that provision it is not possible for the Court to import any equitable jurisdiction to give priority or relief to a creditor like M.G. Automobiles, though it is true that but for their diligence E.P. No. 1731 of 1963 might have become infructuous and nothing may remain for the benefit of the general body of creditors of the insolvent.

9. However, the decisions and the principles contained in Section 54 of the Act show that M.G. Automobiles can have a first charge for the costs of the execution, and under that head it will be just and equitable for the Court to give them something more than what they would be entitled to on the scheduled scale by way of costs of execution, because it is a matter of common knowledge that the execution creditor would have to incur much more than the scheduled fees for carrying the execution petition successfully, particularly as they have to come all the way from Bellary for prosecuting the execution petition. Under those circumstances, I think it will be quite proper and just to allow them to retain as a first charge a sum of Rs. 2,000 (two thousand) more than what they would be entitled to as costs according to the schedule. I may go further and say that if they succeed in realising any substantial assets, it will be quite fair for the Official Assignee to recognise their prior claim to some small extent by persuading the other general body of creditors to agree to such a course. The sum of Rs. 2,000 which I have mentioned here is without prejudice to any further amount which M.G. Automobiles can get from the Official Assignee later on equitable

considerations with the consent of the general body of creditors.

10. Though in the application the Official Assignee prayed for stay of the execution proceedings yet, during arguments, the Official Assignee conceded that M.G. Automobiles might be allowed to continue the execution petition, subject to the condition that the assets realised should belong to the Official Assignee. Accordingly permission is hereby accorded to M.G. Automobiles to continue E.P. No. 1731 of 1963; but they should consult the Official Assignee at every important stage, and should not compromise their claim against Hind Mercantile Corporation Private Limited, without the knowledge of the Official Assignee. Besides the scheduled costs M.G. Automobiles will be entitled to a sum of Rs. 2,000 (Two thousand) out of the assets realised in execution.

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