

In Re: M.A. Shard

In Re: M.A. Shard

SooperKanoon Citation : sooperkanoon.com/861926

Court : Kolkata

Decided On : Jun-25-1901

Reported in : (1901)ILR28Cal574

Judge : Sale, J.

Appellant : In Re: M.A. Shard

Judgement :

Sale, J.

1. This is an application under Section 622 of the Civil Procedure Code, the object of which is to set aside an attachment issued under a decree of the Small Cause Court, dated the 16th day of January 1901. The applicants are Laura Elizabeth Madden, wife of the judgment-debtor, and Millie Augusta Sarah Shard, who was the plaintiff in an interpleader suit instituted in the Small Cause Court, for the purpose of having the attachment under the decree, I have mentioned, removed.

2. The matter came before the learned Chief Judge of the Small Cause Court and he dismissed the interpleader suit, and the result is that the present application is made by the plaintiff in that suit and by Mrs. Madden for revision of that order, under the provisions of Section 622.

3. Upon the statements made in the petition an order was made requiring the Small Cause Court to send the records of the case to this Court and the judgment-

creditors were called on to show cause why the order made by the Chief Judge dismissing the suit No. 6493 of 1901 should not be set aside, and why the attachment issued in execution of the decree made in the first mentioned suit should not be withdrawn, and why the Court should not pass such other order with regard to the suits Nos. 20471 of 1900 and 6493 of 1901 as to it may seem fit.

4. The judgment-creditors have appeared to show cause against this Rule. The petitioners, or rather the petitioner Mrs. Madden appeared in person, and objection was taken to her appearing in this matter on the ground that she had no locus standi. It was pointed out she was neither a party to the original suit in which the Small Cause Court made a decree, nor to the interpleader suit.

5. Mrs. Shard did not appear in person at the hearing though a party to the petition. The circumstances under which Mrs. Madden claimed to appear are these:

6. It appears that she is or was the proprietress of the Adelphi Hotel, and that, prior to her marriage with Lieut. Madden, her present husband, she executed a deed of settlement rendering the hotel a trust property to be dealt with under the terms of the settlement. The trustee originally appointed was a person named Mr. Browne who retired, and Lieutenant Madden, the present husband of Mrs. Madden, was appointed trustee in his place, and Lieutenant Madden was trustee in fact of the trust property at the date of the Small Cause Court decree.

7. It appears that two months after the decree Lieutenant Madden retired from the trust and Mrs. Shard was appointed trustee in his place, and as trustee she filed the interpleader suit with the object of removing the attachment issued under the original decree on the trust properties. Mrs. Madden claimed to be a beneficiary under the trust deed, and it is in that capacity she claimed a right to apply to this Court by petition, in conjunction with Mrs. Shard, to have the attachment set aside and she also claimed, it appears, a right to be heard in the Small Cause Court in the interpleader proceedings, and, as I understand, she was accorded the privilege of being heard. It may be that the plaintiffs are right technically in contending that Mrs. Madden has no locus standi in these proceedings as at present constituted, but that does not remove the necessity for my disposing of the

present application on its merits, inasmuch as one of the petitioners is Mrs. Shard, who has a right to bring the matters stated in her petition before this Court, and to ask for an order thereon.

8. In saying this I do not mean that Mrs. Shard has any better right to make the present application than the judgment-debtor himself would have had, supposing that he had continued to be the trustee.

9. The material circumstances connected with the Small Cause Court suit are these: The plaintiffs are creditors claiming to have supplied goods to the Adelphi Hotel and their claim being unsatisfied they instituted the suit against Lieutenant Madden both in his personal capacity and also as trustee under the deed of settlement executed by Laura Elizabeth Madden, and in their plaint after setting out the execution of the deed of settlement the plaintiffs were forced to state 'that in the ordinary course of business at the request of the manager for the time being of the business (that is the business at the Adelphi Hotel), who was duly authorized by the defendant on that behalf, supplied and delivered to the hotel on various dates between the months of February and July 1898, and in the months of May and June 1900 miscellaneous stores of the aggregate value of Rs. 794-4-9.'

The prices charged by the plaintiffs are fair and reasonable, and the manager for the time being of the said business authorized by the defendant in that behalf agreed that the same should be paid to the plaintiffs, and that in the event of the price of any of the said goods remaining unpaid after the expiry of the month next subsequent to that in which such goods were delivered, interest should be paid thereon to the plaintiff from the said first mentioned date, at the rate of twelve per cent, per annum, which interest calculated as aforesaid comes to Rs. 227-8-3, making in all Rs. 1,022-13, for which demand has been made.

10. The defendant, it is stated, is not in Calcutta and is somewhere in the North-Western Provinces discharging his duties as an officer in the Indian Army.

11. No appearance was entered for him in the suit, and according to the practice under the new Small Cause Court rules, when no appearance is entered by

defendant, the Registrar of that Court entered up a default decree against the defendant. That was on the 16th January 1901. It appears that at the time Mrs. Madden was in Calcutta, and there can be no doubt that she was present before the Registrar of the Small Cause Court at the time the default decree was drawn up. She has stated she did not go to the Small Cause Court at the time the decree was made, but I think she is mistaken in this, and I think the mistake is a natural one as she would not be aware of the practice and, inasmuch as the decree was not made in Court, she might very well have thought that the hearing in Court had taken place previously to her visit to the Registrar's room.

12. This is, I think, a matter of small importance. 14. The decree, as drawn, is a personal decree against Lieutenant Madden.

13. There is no doubt, owing to the interposition of Mrs. Madden, certain terms favourable to the defendant were introduced, and there can be no doubt Mrs. Madden was at the time desirous of paying off the decree by instalments, but so far as I can see Mrs. Madden had neither the power nor the intention to give the plaintiff the right to attach the trust property upon any failure to pay the instalments.

14. The decree is a personal decree against the judgment-debtor, and this clearly so appears for two reasons.

15. In the first place the terms of the decree show that liberty is reserved to the plaintiffs to apply for personal attachment against Lieutenant Madden himself. That being so, it can hardly be reasonably argued that the decree was against him in his capacity as trustee.

16. In the next place no decree could, under the circumstances, have been made against the judgment-debtor other than a personal decree.

17. The mere fact that the suit is described in the cause title as one against the defendant personally, and also in his capacity as trustee would not enable the plaintiff to obtain a decree which could be enforced against the trust property.

18. It is clear upon the authorities to which I will refer later on that, before the plaintiffs could obtain a decree which they could execute against the trust property, they would have to show, first, that the trust property under the terms of the settlement was devoted to the purpose of the business of a hotel, and thus made liable to the debts and liabilities which would ordinarily be incurred in the regular course of business, and in the next place they would have to show that the circumstances were such that the defendant as trustee would be entitled to be indemnified by the trust property to the extent of the claim, and further that the plaintiffs, as creditors of the hotel business, were entitled to stand in the shoes of the trustee in respect of the indemnity and to be recouped out of the trust estate. No such proof has been given in this case; and these considerations are, I think, abundantly sufficient to show that the default decree was a personal decree, and could not be enforced, except against the person or property of the judgment-debtor.

19. The mere fact that a trustee in carrying on the business of a trust had rendered himself personally responsible for the business debts would not of itself give creditors a right to proceed against the trust property.

20. This principle has been clearly laid down by Lord Selborne in the case of *Strickland v. Sumons* (1884) L.R. 26 Ch.D. 245, 247 that learned Judge says: 'There is no principle or authority for saying that, if a trustee makes himself personally liable for goods, the creditor thereby obtains a lien on the trust property. There is not the least authority for such an action as the present,' and he proceeds: 'It is an action for an equitable execution against the trust estate in respect of a judgment against the trustee.'

21. In a subsequent portion of the judgment the learned Judge describes the proper course for creditors to take in proceedings to recover their dues from the trust property, in cases where the trustee had rendered himself personally liable. And similar principles were laid down by Sir George Jessel, late Master of the Rolls, in the case of *In re Johnson Shearman v. Robinson* (1880)L.R.15.ch.D.548. It is only necessary for me to read the head note of that case: 'Where a trader has, by his will, directed his executor or trustee to carry on his trade and to employ a

specific portion of the trust estate for the purpose, the rule is that, though the executor or trustee is personally liable for debts incurred by him in carrying on the trade pursuant to the will, he has the right to resort for his indemnity to the specific assets so directed to be employed, but no further; and, consequently, the creditors of the trade are entitled to stand in the place of the executor and trustee, and to claim the benefit of that right, so as to obtain payment of their debts; but the rule does not apply where the executor or trustee is in default to the specific trust estate devoted to the trade; in such a case, the defaulting executor or trustee not being himself entitled to an indemnity, except upon terms of making good his default, the creditors are in no better position, and are, therefore, not entitled to have their debts paid out of the specific assets, unless the default is made good.'

22. The case, I have last referred to, goes somewhat further than the previous one, for it shows the necessity for creditors to make out a special case before being allowed to go against the trust property.

23. Supposing it were shewn that the trustee was heavily in default and indebted to the trust, in that case the creditors would lose their remedy against the trust property.

24. I do not understand that it is suggested in this case that the judgment debtor is indebted to the trust, or is otherwise in default; but I refer to the case of a trustee being in default for the purpose of shewing the necessity that exists that, before creditors are allowed to proceed against trust property, an opportunity should be afforded to the beneficiaries or others interested of being heard in defence of the trust estate.

25. I need only refer to one other case in which creditors were allowed to claim the benefit of the trustee's right to an indemnity, so as to enable them to obtain payment of their debts out of the trust estate. But this was allowed in a proceeding to which the beneficiaries were parties. That is the case of *Raubould v. Turner* (1900) 1 Ch. 199.

26. For the reasons I have stated, it appears to me that the plaintiffs were not justified under their decree in attaching any property other than the personal

property of the judgment-debtor. The decree did not authorize them to attach the trust property.

27. What appears to have happened is that under the warrant of attachment issued out of the Small Cause Court, property was attached at the instance of the plaintiffs which is admittedly trust property. This is clear from the affidavit of the plaintiffs themselves, which has been used in shewing cause against the rule.

28. If that be so it would seem to me to follow that this attachment of the trust property was an irregularity of procedure, which would justify the interference of this Court under the provisions of Section 622 of the Civil Procedure Code.

29. I have no desire, and I hope no Court of law would show any desire to throw obstacles in the way of creditors obtaining payment of their just claims, at the same time the Court must insist that creditors in executing their decrees shall proceed in a legal and proper manner, and, if it is shown that they are seeking to enforce their decree in a way not warranted by law, it seems to me that this Court is bound to interfere.

30. I do not say that the creditors in this case are not entitled to recover their debts out of the trust properties. All I say is that, in order to do so, they must take the procedure which the law lays down.

31. There is one other circumstances to which I think I ought to allude, inasmuch as the learned Counsel, who appeared for the plaintiffs, thought right to take exception to certain action taken by this Court in reference to the interpleader suit when pending in the Small Cause Court. I should have preferred not to have alluded to the matter, because in making the observations I am about to make, it is impossible to avoid stating matters, which must reflect on the conduct of persons, who are not parties to the present proceedings, and who are not now before the Court, but the course, which has been taken, leaves me no alternative. It appears that the following letter was received by the Registrar of this Court from the Registrar of the Small Cause Court: 'I have the honour to request that you will be good enough to send under Section 137 of the Civil Procedure Code, by a competent clerk, the records in suit No. 126 of 1899--Narendra Nath Dass v. Laura

Elizabeth Madden with execution proceedings, which are required as evidence before the 1st Bench on the 20th instant at 11 A.M. in the case Mrs. M. A. S. Shard v. Ridoy Chunder Nundy and Ors.

32. On receipt of the letter, the record in the case mentioned was examined by the Registrar, and it was discovered that execution had been issued at the instance of the plaintiff attaching the trust property, of which Lieutenant Madden, against whom the decree was passed, was the trustee.

33. On referring to the terms of the decree it was found that the suit as against Mrs. Madden was dismissed, and that the decree strictly personal in its terms was made against Lieutenant Madden, and the decree provided that the right should be reserved to the plaintiffs of proceeding on any indemnity, to which the trustee was entitled, as against the trust estate.

34. Under these circumstances the letter of the Registrar of the Small Cause Court was laid before STANLEY, J., the learned Judge, who made the decree, and who, inasmuch as he had expressly declined to allow the plaintiffs any relief in that suit against the trust estate, was not disposed under the circumstances to comply with the request of the Registrar of the Small Cause Court.

35. My learned colleague directed, however, that the papers should be laid before me, as the Judge who had issued one of the orders of attachment. The record was then carefully examined, both by the Registrar and myself, and it became apparent that the attachment of the trust property had been obtained on statements, which were nothing less than a gross misrepresentation of the facts.

36. With whom the real responsibility rests for these statements I do not know. The tabular statement on which the order of attachment was issued was verified by the plaintiffs themselves, and it shews that the person against whom execution was sought was T. E. Madden, and that the property sought to be attached was goods and chattels, being part of the furniture of the Adelphi Hotel.

37. Nothing was said about this property being, as in fact it was, trust property, and in the ordinary course the property being regarded as the personal effects of

the judgment-debtor, the attachment prayed for was ordered to issue, and the warrant directed to the Sheriff authorized him to attach the property indicated, which is described in the warrant 'as being the property of the judgment-debtor.'

38. This attachment was issued in the month of April.

39. Subsequently further proceedings were taken in execution, and an application for attachment of hotel furniture was made before another learned Judge not now sitting on the Original Side. This was in August, and it appeared that attachment was again obtained on precisely the same statements made in the tabular statement, and the warrant in that case also authorized the Sheriff to attach the property as being the property of the judgment-debtor.

40. On these facts being brought to my notice I took what I thought and what I still think was the only proper course, that is to say, I directed that the records should be sent to the Small Cause Court as requested, but as they were to be used as evidence in the interpleader suit I directed the Registrar to write to the Registrar of the Calcutta Small Cause Court explaining the circumstances under which execution against the trust property had been obtained from this Court under the decree made by my learned colleague.

41. The Registrar's letter was confined merely to an explanation of the circumstances under which the attachment came to be issued. It was impossible to permit the records of this Court from being used in a way which might mislead the Judge, before whom they were produced

42. A draft of that letter has been furnished to me by the Registrar, and it is only necessary for me to read the last paragraph, to shew the object, with which it was written:

43. ' I have been directed to call attention to the irregularity of these proceedings, and to make the above observations, in order that the decree made by Mr. Justice Stanley may not be misunderstood, and lest it should be supposed that the decree was one that could have been executed by the attachment of the trust property.'

44. I say the only object of making that communication at the time of sending the records was to see that these records should not be misconstrued, and that it should not be understood that the Court had deliberately and knowingly under a personal decree against the judgment debtor proceeded to attach what it now appears was trust property.

45. I do not propose to add any words of comment to this simple relation of the facts.

46. Under all these circumstances I think the attachment issued by the Small Cause Court was irregular and improper, and I think it was right and proper that Mrs. Shard, as the present trustee, should bring the facts to the notice both of the Small Cause Court and of this Court.

47. No doubt, if the learned Chief Judge of the Small Cause Court, in dismissing Mrs. Shard's application to have the attachment removed, had found, as a matter of fact, that the property attached was the property of the judgment-debtor, it would not have been open to this Court to interfere, but that is not the finding. The property attached is admittedly trust property, and therefore, under the circumstances I have mentioned, the attachment is irregular.

48. Liberty will be reserved to the plaintiffs to take such steps as they may be advised to proceed against the trust property in the proceedings properly constituted for the purpose.

49. All that I at present hold is that the judgment-creditors cannot, under the decree they have obtained, attach trust property.

50. That being so, I must make the Rule absolute, and set aside the attachment, but without costs.